OREGON'S WATER LAWS AND IRRIGABLE LANDS

(Prepared for The Christmas Capital Journal by John H. Lewis, State Engineer.)

In the great arid West, land without water sufficient for irrigation purposes is of little value, except in a few valleys on the western slope of the Cascade mountains. The owner of the water practically owns the land for miles on either side of the spring or river. The increasing use of streams in developing water power, and the necessity of pure water for domestic supply for cities and towns, greatly adds to the value of flowing streams.

The land originially belonged to the federal government, which gave it out to actual settlers, under a well understood administrative system. The stream so valuable in the west, were considered of but little importance in the east when the government's land policy was originated. The water also belonged to the government and could have been administered and given out to settlers in as orderly a manner as the public lands. After the value of water was demonstrated by the early pioneers in California, the federal government, by an act of 1866, recognized the right of citizens to appropriate the water of streams to beneficial uses in accordance with the customs, laws and decisions of the courts in the various states.

For many years the states in the arid west failed to realize the great responsibility thus imposed upon them by the government in providing some orderly method of establishing and protecting rights to the use of water. The streams were left to be grabbed by unscrupulous and far-sighted persons, without regard to the public welfare. Soon water, a necessity of life and the basis for the substantial growth of these states, became the subject of speculation and monopoly. The state's development was retarded. Conflicting rights were established and the courts blocked with litigation intended to straighten out the tangle. The same ditch right would be before the court almost constantly, for a decree would no more be rendered than new conditions would arise, new diversions be made, and a new decree would be necessary. The slowness of the courts in many cases compelled resorting to force to secure the necessary water to save a valuable crop or orchard. Many men have been killed throughout the arid states in their personal efforts to protect their water supply. The stream, perhaps, would be a hundred or more miles long, flowing through different counties. Conditions soon became so complicated that many of the early settlers found it impossible to protect, of their own effort or through the courts, their water supply, abandoning their places, which returned to the original desert condition.

Wyoming was the first state to assume the responsibility of providing a system of acquiring titles to its public water, and protecting these rights, when established, as carefully as other property rights are protected. If the usual water supply is disturbed, the irrigator is not compelled to tear out his neighbor's dam, but simply tell his troubles to a water policeman, or a water master, as he is called. This state official, with authority to regulate diversions from natural channel, rides up the stream and closes the headgates, where water is taken without right. Water cannot be appropriated at will without regard to the public welfare. A system of grant or license is employed, which is as simple as the acquirement of title to a mining claim from the United States. An application is first made to the state officials for permit to appropriate water for a specific use. If not in conflict with vested rights or the public welfare, the right is granted and definite record kept of the transaction. When proof is furnished in a required time that the water has been applied to a beneficial use, and examination made by the state authorities, the right becomes vested and the record completed. This right then becomes appurtenant to the land, is protected by the state, and is thereafter not subject to litigation in the courts, except as to regularity of procedure under the laws of the state. The rights acquired prior to the adoption of the Wyoming law have nearly all been determined once for all, and recorded, taking up one stream at a time.

The amount of water necessary to supply vested rights along any stream can therefore be readily ascertained from the public records. If the total amount of water in the stream is known, the amount of unappropriated water is also known. The method of acquiring definite title to this water is clearly set out in the law and capital does not hesitate to invest in works for the utilization of this surplus water. Wyoming is nearly all above four thousand feet in elevation and has but few natural advantages, yet its agricultural development compares favorably with that of California, with its great natural advantages, but where the entire burden of protecting water rights is placed upon the owner, and where no encouragement is given the investor.

The office of state engineer is peculiar to the arid west. In those states having an administrative system for its public waters, the state engineer is the head of said system, and in his office can be found a complete record of all rights to the use of water. Through water masters, one on each stream where necessary, this officer has control of the diversions from streams.

State Engineer in Oregon.

In Oregon, the office of state engineer was crated in 1905. A complete code of water law, following closely that of Idaho, and much similar to laws which have since been adopted in North Dakota, South Dakota and Oklahoma, was presented to the legislature for enactment. This law was defeated, with the exception of a few provisions. The creation of the office of state engineer was strongly urged by the state land board, to assist in handling details in connection with the reclamation of lands by the state under the provisions of the Carey act. The state engineer has at present no supervision or control over the appropriation or distribution of water. An appropriation of five thousand dollas per annum is provided for the making of hydrographic and topographic surveys, under his supervision, contingent, however, upon the appropriation by the Federal Government of an equal amount to be expended within the state for similar purposes. During the past three summers, over 2,400 square miles of the state's area have been mapped, showing all elevations by roads, streams, buildings, etc. Daily discharge records of the flow of many of the important streams of the state have been kept and the results of all surveys and measurements of the state's water supply published in the first biennial report of his office.

As the land surface does not change in elevation, the topographic maps, when once made, will serve for all time. The maps assist greatly in the development of the state, as they are made with great care. Railroad lines can be projected upon them and profiles drawn in the office with sufficient accuracy to enable a preliminary estimate of cost to be made. Owing to the fluctuation of streams, no water power or irrigation works will be constructed unless a record of stream flow, extending over a period of three to five years, is available. If the amount of vested rights to the use of water from a stream can be determined, the amount available for the proposed works can then be readily ascertained. Without the collection of such information at public expense, this class of development would proceed slowly and under a great handicap.

The state engineer acts as adviser to the state land board in engineering matters relating to the reclamation of lands by the state under the provisions of the Carey act. Under this act, the government will donate arid lands to the state to the extent of one million acres, provided the state will reclaim and dispose of the same in small tracts to actual settlers. The details of reclamation are turned over by the state to construction companies, who build the system and settle the land under a contract with the state land board.

First Reclamation Projects.

During the first nine months of this year, the state land broad has entered into contract with construction companies for the reclamation of 203,834 acres of land, at a cost to future settlers for water rights, of $4,286,804, payable to the construction companies. These contracts cover every detail of construction and disposal of land to settlers, and include detailed plans and specifications. A total of 400,222 acres is before the board in various stages for consideration. This is equal to the total area of land at present under irrigation in this state. The area contracted for during this year is equal to one-half the state's present irrigable area, and greater than the area now being reclaimed by the government in Oregon. With a family of five upon each 60 acres, it will mean that these companies must bring into the state within the near future 17,000 people. This is not a small task, and if accomplished, will mean much to Oregon. If these settlers, through the state's action, are induced to purchase water rights and on making settlement find that the water supply is insufficient or none at all, the state will be greatly damaged, for without sufficient water the settlers can not live upon the land.

For six years the state land board has called the attention of the legislature to certain defects in the state law accepting the Carey act and requesting their correction. The governor, in his message to the last legislature, called special attention to these difficulties. The board made specific recommendations in their report, preparing a bill embodying the changes desired. The attorney general and the state engineer, in their respective reports, made similar recommendations, and with all, the great importance of this matter to the development of the state, it would be supposed that much time would be devoted by the legislature to the remedying of defects in the law. The bill recommended by the board was passed by the senate, but indefinitely postponed in the house, without consideration. If we look for a reason for this action, we find upon the floor of the house the secretaries of two companies which were attempting to reclaim lands under contract with the state where the plans were not feasible; also, constantly present in the lobby throughout the session, was the president of one of these companies. The extension of state supervision over projects that are not feasible would naturally not be of financial benefit to the companies.

It will doubtless surprise many to know that no money has been appropriated by the state to facilitate this great colonization scheme, and to guard the interests of the intending settler. The land is donated to the state, which, in turn, gives it to the settler without charge, provided the settler purchases a water right from the construction company authorized to reclaim it. As a general rule, that which costs nothing is worth nothing, but notwithstanding, it is expected that the acceptance of the Carey Act will prove of great benefit to the state.

Columbia Southern Project.

The state land board entered into contract with the Three Sisters Irrigation Co. to reclaim 27,000 acres of land by building a canal from Tumalo creek in Crook county. This company changed hands several times and is now known as the "Columbia Southern Irrigating Company." Under this project, water rights were sold for about 18,000 acres, where the low water flow of the creek will not irrigate 8000 acres, and upon adjudication in the courts about half of the low water flow of the stream will doubtless be found to have been appropriated before the state began its project. The state law provides that "the right to the use of water for the irrigation of lands reclaimed under the provisions of this act shall become and perpetually remain appurtenant thereto." Under present laws, it is impossible to ascertain who owns or has a right to the use of water from any stream. The state and its officers are in the dark as much as other investors. When this matter reaches the courts, which is the only tribunal to decide as to the merits of the various claims to water, it will doubtless be found that the state cannot make somebody's else water right appurtenant to its land any more than a private corporation can, notwithstanding the above section of law. Even if all the water in the stream could be used on the state project, it is physically impossible, without storage, to reclaim more than half the land already sold. The state recently brought suit against this company to cancel its contract, as it would not agree to build the necessary reservoirs to impound the winter stream flow necessary to furnishing an adequate water supply. No plans have as yet been determined upon for straightening out this tangle. Some of the first lands sold were through advertising literature of the company, showing the project was backed by the state of Oregon and that residence was not required. The latter statement being a misrepresentation. The prospective settlers who have purchased water rights under this project are scattered through many states, some of whom are living on the land. Others have visited the project, expecting to reside, but found those settlers on the ground consuming nearly all the watter supply. Many have paid in full and are demanding deeds from the state.

Water Rights.

Two questions must be answered before a capitalist will invest his money in works for the utilization of water: (1) is there sufficient unappropriated water in the source of supply, and (2) how can the right to such water be acquired? At the present time the amount of water carried in a few of our important streams can be demonstrated with some certainty from records extending over a number of years, but how much of this water has already been appropriated to beneficial use and become a vested right cannot be answered from any public records. The county records show claims to the public waters under our present law which, if added together, would invariably amount to many times the available supply. Therefore, all these claims cannot be vested rights. At present no method is provided for definitely acquiring undisputed title to water in Oregon. The investor must build his works and take chances of defending his rights in the courts. If he uses the water for ten years without being seriously disturbed, he can acquire a prescriptive right, but must still resort to the court in case of an excessive new diversion at a point higher up on the stream. The state, like all prospective investors, including the reclamation service, must consider these questions before commencing construction.

Occasionally the state engineer's office receives inquiries from prospective purchasers of present constructed works, inquiring as to the amount of water such ditches are entitled to appropriate. Since no reliable record of vested rights to the use of water is provided by law, such questions cannot be answered, and the sale is made at a reduced price, if at all.

The state land board, as well as the engineer's office, receive numerous letters from prospective settlers, asking for definite information concerning water rights being sold by construction companies operating under the Carey act. Even in these cases, the state officers have no definite title, such as a patent from the government for land, upon which to base a reply. Rather than block development, they, like any ordinary investor, must leave something for the courts to decide, and take reasonable chances on the water supply being sufficient.

It is generally admitted that the unappropriated water of the non-navigable streams of the state, belong to the public, (the United States), and can be appropriated for beneficial use under the laws of the state. Oregon is much in need of legislation providing, through a system of grant or license, a reliable public record of all water rights initiated under public supervision after its passage, and some method whereby the present vested rights, as determined through litigation, can be recorded under such system. Based upon the system of permits issued by the state, the investment of capital in works for the utilization of water would be greatly encouraged, and the sale of lands and water rights to prospective settlers made much easier. With a reliable record of new rights as initiated, a state administrative system for the orderly and equitable distribution of water can be gradually put into effect as the prior vested rights come before the courts for adjudication.

The passage of a new law will not throw the entire state into litigation over water rights. It will prevent litigation over all rights established after its adoption, except as to the regularity of procedure under the law in initiating such rights. When water rights indicated prior to the passage of a new law become so entangled that litigation is necessary, one general adjudication for all old rights will settle such rights forever, and the cost of such litigation to each user will doubtless not be much in excess of the cost of many abstracts of title to land. Without such a law, litigation will go on indefinitely.

Litigation has been in progress on the Walla Walla river, in Umatilla county, for about 30 years, and as a result, instead of water rights being settled, as one would naturally suppose, the entire valley is now before the courts, represented by 25 lawyers, endeavoring to straighten out the tangle. With new diversions and new conditions, such as the storage of water in the mountains and the use of the natural streams channels in conveying such water past the many points of division in the stream and the diversion points of those having decreed rights, even this decree, which some assume will settle matters for all time will have to be revised. The longer the enactment of a complete water law is delayed, the more expensive will the determination of the early rights become, yet the enactment of such a law is inevitable. Capital invested in present constructed works must and will eventually seek protection by the state through an administrative water law which will protect all vested rights, and the system be capable of expanding to meet all new conditions which may arise.

There is no lack of precedent in this matter and Oregon should not fail to place upon her statute books the very best laws that can be devised, based upon centuries of experience of other states and countries.

The 1905 act provides that the state engineer shall recommend such legislation as is deemed advisable. As the question of titles to water is one of the greatest importance to the future welfare of the state, the need of legislation on this subject has been briefly presented. Without a realization of the great need of water legislation on the part of the public, recommendations by state officials will have but little weight with the legislature and a few interested corporations or individuals who see in present lax laws chance for speculation in water, or the formation of a great monopoly of this necessity of life, can defeat the will of the people.

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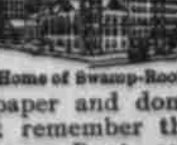

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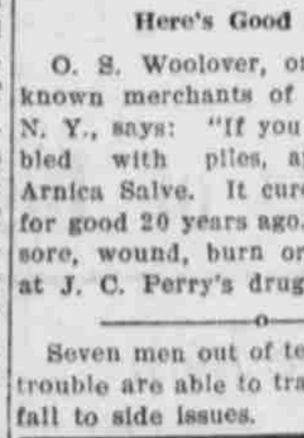

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