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## Creative Programs and Projects to Increase Water Supply Mitigation and Mitigation Banking: Strategies for Meeting New Supply Needs in Oregon's Deschutes Basin

Martha O. Pagel

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**Creative Programs and Projects to Increase Water Supply Mitigation and Mitigation Banking: Strategies for Meeting New Supply Needs in Oregon's Deschutes Basin**

# CREATIVE PROGRAMS AND PROJECTS TO INCREASE WATER SUPPLY MITIGATION AND MITIGATION BANKING: STRATEGIES FOR MEETING NEW SUPPLY NEEDS IN OREGON’S DESCHUTES BASIN

MARTHA O. PAGEL<sup>†</sup>

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## I. INTRODUCTION

Oregon’s Deschutes River Basin provides an example of what is likely to become one of the most contentious and problematic water management issues in the West: the scientific and public policy questions presented by the hydrologic connection between surface water and ground water. In the Deschutes River Basin, geologists have mapped an extensive ground water aquifer, capable of supplying the domestic, irrigation, municipal, industrial, and other water needs of a growing population for years to come. However, this vast water supply will be inaccessible to new development unless, and until, Oregon’s Water Resources Department (“WRD”) finds a way to reconcile existing laws designed to protect surface water with the need to make reasonable use of an ample ground water supply.

For nearly three years, the WRD worked with a local advisory

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<sup>†</sup> Martha O. Pagel is a shareholder with the firm Schwabe, Williamson, & Wyatt P.C in Salem, Oregon. She concentrates her practice on natural resources and water law. She was previously the Director of the Oregon Water Resources Department. Ms. Pagel would like to thank Michael D. Furlong, an associate at Schwabe, Williamson & Wyatt, for his invaluable assistance in preparing this article.

group, the Deschutes Basin Ground Water Supply Work Group (“Work Group”), in an attempt to meet that challenge. Recognizing the need to seek a workable balance between development and environmental interests within the framework of strict surface water protection laws, the WRD used the collaborative Work Group process to identify key issues and seek consensus-based policy recommendations.

Growing impatient with the Work Group’s inability to reach full consensus on all issues, in February 2001, the WRD issued a Ground Water Mitigation Strategy (“Mitigation Strategy”) for the Deschutes Basin.<sup>1</sup> The WRD based the Mitigation Strategy Report on the general principles agreed to in the consensus process, and included its own policy recommendations for unresolved issues. In September 2001, following a public comment period on the Mitigation Strategy, the WRD issued proposed rules for the program.<sup>2</sup> On September 13, 2002, the Oregon Water Resource Commission adopted final rules.<sup>3</sup> Despite the rocky path toward development of a mitigation program, the Mitigation Strategy and new rules include important new concepts for the water rights process in Oregon: mitigation credits and mitigation banking. Such an approach presents the option of identifying and addressing the potential impacts of ground water development on surface water sources.

This article, based on a report originally delivered at the Nineteenth Annual Water Law Conference of the American Bar Association in February 2001, provides a summary of the legal and policy issues confronted during the Work Group and rule development processes. An abbreviated version of this article first appeared in *Western Water Law and Policy Review*, October 2001.<sup>4</sup>

## II. BACKGROUND

### A. OVERVIEW OF OREGON LAW

Under Oregon law, both surface water and ground water are public resources.<sup>5</sup> Most uses of water require the WRD to issue a water right permit.<sup>6</sup> In deciding whether to approve applications for new ground water rights, the WRD must first determine that the proposed

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1. See Oregon Water Res. Dep’t, Ground Water Mitigation Strategy for the Deschutes (Feb. 9, 2001) (on file with the Oregon Water Res. Dep’t) [hereinafter Public Review Draft].

2. See Oregon Water Res. Dep’t, Public Hearing Draft, Deschutes Basin Mitigation Rules (Sept. 7, 2001) (on file with the Oregon Water Res. Dep’t).

3. See Oregon Water Res. Dept, Final Deschutes Basin Mitigation Rules (Sept. 13, 2002) (on file with the Oregon Water Res. Dep’t) [hereinafter Final Proposed Rules].

4. Portions of this article originally appeared in the Oct. 2001 Issue of *W. WATER LAW & POL’Y REP.*, copyright © 2001, 2003, Argent Communications Group. Reprinted with permission. Further reprints require written consent: Argent Communications Group, P.O. Box 1425, Foresthill, CA; e-mail: reporters@argentco.com.

5. OR. REV. STAT. §§ 537.110, 537.525 (1999).

6. *Id.* §§ 537.130(1), 537.615(1).

new use will “ensure the preservation of the public welfare, safety and health . . . .”<sup>7</sup> A key element of the public interest-based review is the determination that water is available for the new use, and that the new use will not injure existing senior water rights.<sup>8</sup>

Since the mid-1970s, Oregon law has also required special protection for rivers and streams designated as state “Scenic Waterways.”<sup>9</sup> The State Scenic Waterway Act (“Act”), first approved by voters through Oregon’s initiative process,<sup>10</sup> prohibits the issuance of new ground water rights within or above designated scenic waterways, unless minimum surface flow requirements are met.<sup>11</sup> Oregon designated portions of the Deschutes River as a Scenic Waterway under this Act.<sup>12</sup>

Until the early 1990s, implementation of the Act was relatively straightforward and, for the most part, applied only to new applications for the use of surface water.<sup>13</sup> With a growing understanding of the hydraulic connection between ground water and surface water and a growing database of information about ground water supplies in the Deschutes Basin (“Basin”), came new questions about interpretation and implementation of the Act.

As a result of clarifying amendments in 1995, the Act now includes detailed requirements for evaluating the potential impacts of new ground water uses within and above Scenic Waterway reaches.<sup>14</sup> Where the WRD determines that the proposed use would result in reduced surface flows, it must deny an application unless the surface flow impacts can be fully mitigated.<sup>15</sup> Where sufficient hydro-geologic information is not available to make an informed determination as to the potential impacts of the proposed ground water use on surface flows, the WRD may approve the application if it meets other review criteria.<sup>16</sup> However, the WRD must condition the new water right allowing for future curtailment of the ground water use if and when data are available and it demonstrates an adverse impact on the Scenic Waterway.<sup>17</sup>

Since 1995, all new ground water rights, issued within the Deschutes Basin, have included such a condition.<sup>18</sup> In early 1998, it became clear that judgment day was approaching.<sup>19</sup>

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7. *Id.* § 537.621(2).

8. *Id.*

9. *Id.* §§ 390.805 through .925.

10. *Id.* §§ 250.135 through .355.

11. OR. REV. STAT. § 390.835(9)(a) (1999).

12. *Id.* § 390.826(5).

13. *See* OR. REV. STAT. § 390.835 (1993).

14. OR. REV. STAT. § 390.835(9) (1999).

15. *Id.* § 390.835(9)(d).

16. *Id.* § 390.835(9)(g).

17. *Id.*

18. *Id.*

19. *See generally* Oregon Water Res. Dep’t, The Deschutes Basin Ground Water Work Group, *Overview*, at <http://www.wrd.state.or.us/programs/deschutes/>

## B. OVERVIEW OF SCIENTIFIC/TECHNICAL ISSUE

For nearly ten years, state and federal geologists have been working together on a comprehensive study of the Deschutes Basin ground water resources. The U.S. Geological Survey led the Deschutes Basin Ground Water Study ("Study"),<sup>20</sup> with cost sharing and cooperation by the state and local government agencies, as well as the Confederated Tribes of the Warm Springs Indian Reservation. Preliminary results, available as early as 1998, indicated a clear hydraulic connection between most ground water uses and the designated Scenic Waterway reaches of the Deschutes River.<sup>21</sup> In essence, the Study described the Basin as a large bathtub, with several key areas of discharge to the Deschutes River.<sup>22</sup> Because ground water in the Basin would naturally flow toward these points of discharge, and because pumping of ground water for new beneficial uses would interrupt this natural discharge, the WRD has determined the triggering conditions for the Scenic Waterway regulation will be met.<sup>23</sup>

With the Study's completion in 2001,<sup>24</sup> WRD now has the requisite evidence, based on the Study's data and modeling, to not only deny new water right applications, but also to require regulation and curtailment of existing ground water rights issued since 1995.<sup>25</sup>

## C. WORK GROUP PROCESS

When the Study's apparent impacts became clear, WRD officials initiated an informal process to provide background information to, and seek input from, other affected state agencies, local governments, environmental groups, water users, the Warm Springs Indian Tribes, and interested citizens.<sup>26</sup> After initial town hall-type meetings in 1998, the WRD convened a Work Group to develop a long-term strategy for reconciling water supply needs with the environmental needs in the

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overview.shtml (last visited Sept. 20, 2002) [hereinafter *Overview*].

20. RODNEY R. CALDWELL, U.S. GEOLOGICAL SURVEY WATER-RESOURCES INVESTIGATIONS REPORT 97-4233, CHEMICAL STUDY OF REGIONAL GROUND-WATER FLOW AND GROUND-WATER/SURFACE-WATER INTERACTION IN THE UPPER DESCHUTES BASIN, OREGON (1998).

21. *See id.* at 22-30.

22. *Id.* at 3-5.

23. *See* Public Hearing Draft, *supra* note 2, § 690-505-0600; *see also* Final Proposed Rules, *supra* note 3, § 690-505-0600.

24. MARSHALL W. GANNETT ET AL., U.S. GEOLOGICAL SURVEY, GROUND-WATER HYDROLOGY OF THE UPPER DESCHUTES BASIN, OREGON, WATER RESOURCES INVESTIGATIONS REPORT NO. 00-4162 (2001).

25. Oregon Water Res. Dep't, Final Deschutes Basin Mitigation Rules (to be codified at OR. ADMIN. R. §§ 690-505-0600(3)-(4)), *available at* [http://www.wrd.state.or.us/publication/notices/new\\_oars/Deschutes\\_Program-Mitigation.htm](http://www.wrd.state.or.us/publication/notices/new_oars/Deschutes_Program-Mitigation.htm) (last visited Oct. 2, 2002) (on file with the Oregon Water Res. Dep't) [hereinafter *Final Rules*].

26. *See Overview*, *supra* note 19; Oregon Water Res. Dep't, The Deschutes Ground Water Work Group, *Participants*, at <http://www.wrd.state.or.us/programs/deschutes/participants.html> (last visited Sept. 24, 2002).

Basin.<sup>27</sup> A Steering Committee, comprised of approximately twenty members representing different affected interests, was chosen to provide leadership and guidance for the Work Group.<sup>28</sup> The Work Group hired a neutral facilitator to assist with meeting management.<sup>29</sup>

The Steering Committee adopted goals and operating principles to effectuate the process.<sup>30</sup> A key provision was that the Committee would attempt to make decisions by consensus.<sup>31</sup> An Administrative Committee comprised of the WRD Director, an environmental representative, and a community at-large representative met regularly with the facilitator to monitor progress and plan agendas.<sup>32</sup> Financial contributions came from both public and private resources.<sup>33</sup>

The Steering Committee met regularly, roughly on a monthly basis, for nearly three years. By the end of 2000, the Work Group had made substantial progress, but had not reached full agreement on all aspects of the proposed recommendations for WRD. Despite this lack of agreement, the WRD issued its own Mitigation Strategy in February 2001<sup>34</sup> followed by initial Draft Rules in September 2001.<sup>35</sup> The proposed rules embodied key points on which the Steering Committee had reached consensus, along with the WRD's own recommendations on issues still in dispute.

Widespread criticism of the initial rule proposal was predictable, based on the Steering Committee's failure to reach a consensus on major points. The WRD received more than 100 written comments. A revised draft of the rules, offered for public comment in the spring of 2002, generated similar controversy. Although the rulemaking process was far from a consensus-generating model, the effort has been instructive in identifying major policy and practical issues related to the determination of hydraulic connection between surface and ground water. The Work Group did reach agreement on general principles and developed a framework for mitigation that may prove to be a useful model.

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27. See *Overview*, *supra* note 19.

28. Oregon Water Res. Dep't, The Deschutes Ground Water Work Group, *Steering Committee*, at <http://www.wrd.state.or.us/programs/deschutes/committee.html> (last visited Sept. 24, 2002).

29. See Memorandum of Understanding for Deschutes Basin Water Management Planning Process §§ 7.1.1, 9.1-9.5, available at [http://www.wrd.state.or.us/publication/notices/deschutes-announce/99\\_0428mou.html](http://www.wrd.state.or.us/publication/notices/deschutes-announce/99_0428mou.html) (last visited Sept. 24, 2002) (on file with the Oregon Water Res. Dep't) [hereinafter Memorandum of Understanding].

30. *Id.* §§ 1.1 through 1.3, 2.1 through 2.9.

31. *Id.* § 10.1.6.

32. See Minutes, Deschutes Ground Water Steering Committee Meeting (June 29, 1999), at [http://www.wrd.state.or.us/publication/notices/deschutes-sum/97\\_0629.html](http://www.wrd.state.or.us/publication/notices/deschutes-sum/97_0629.html) (last visited Sept. 24, 2002).

33. See Minutes, Deschutes Ground Water Steering Committee Meeting (Aug. 17, 1999), at [http://www.wrd.state.or.us/publication/notices/deschutes-sum/96\\_0817summary.html](http://www.wrd.state.or.us/publication/notices/deschutes-sum/96_0817summary.html) (last visited Sept. 24, 2002).

34. See Public Review Draft, *supra* note 1.

35. See Public Hearing Draft, *supra* note 2.

### III. MITIGATION STRATEGY

#### A. MITIGATION GOALS

The Steering Committee agreed upon the following goals reflected in the Mitigation Strategy:

- i. To ensure compliance with state laws relating to Scenic Waterway protection, water availability, and protection of senior water rights;
- ii. To Restore and enhance instream flows;
- iii. To achieve long-term sustainability; and
- iv. To accommodate projected water demand in the Basin in a manner that does not compromise other goals.<sup>36</sup>

#### B. KEY MITIGATION REQUIREMENTS AND CONCEPTS

The Mitigation Strategy included eleven specific standards for evaluating mitigation proposals.<sup>37</sup> The primary concept the standards embody is that mitigation must be “wet.”<sup>38</sup> That is, a mitigation project must directly replace the projected impact of a ground water use by adding protected flow to the river.<sup>39</sup> Potential mitigation actions may include: (1) retirement of existing ground water rights in trade for new uses; (2) transfer of existing surface water rights to instream flow; and (3) conservation to reduce consumptive use under existing rights.<sup>40</sup> Development of new surface water storage and aquifer recharge projects may also be possible mitigation options, but will be subject to additional environmental scrutiny.<sup>41</sup>

Under the mitigation strategy, ground water impacts are calculated based on projected consumptive use levels.<sup>42</sup> Mitigation is required to replace the maximum amount of consumptive use authorized by the new water right.<sup>43</sup> Where water development will occur over a period of time, the WRD may allow phase-in mitigation measures to correspond to the level of actual development. However, the WRD will require full implementation of the appropriate level of mitigation measures before water use may begin.<sup>44</sup>

The application process requires mitigation plans for new ground water rights.<sup>45</sup> Upon approval, the WRD will incorporate the

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36. See Public Review Draft, *supra* note 1.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. See OR. REV. STAT. § 537.135 (2001); Final Rules, *supra* note 25, §§ 690-350-0110 through -0130.

42. See Public Review Draft, *supra* note 1.

43. *Id.*

44. *Id.*

45. *Id.*



mitigation plan into the Final Order<sup>46</sup> approving the new use. The mitigation plan provisions will be conditions on the water right permit.<sup>47</sup> Failure to comply with the mitigation conditions will constitute a violation of the permit, subject to enforcement action.<sup>48</sup>

### C. MITIGATION CREDITS AND MITIGATION BANKING

Mitigation credits and mitigation banking concepts are the innovative components of the mitigation strategy<sup>49</sup> agreed to by the Work Group and ultimately adopted by the Oregon Legislative Assembly.<sup>50</sup> Under this procedure, any person may endorse and execute a mitigation project not associated with a particular application for new ground water use.<sup>51</sup> The review process and standards will be the same as those required for mitigation plans submitted as part of a water right application. However, once approved, the mitigation credit will stand alone and will not be "attached" as part of any particular water right.<sup>52</sup> The holder of the mitigation credit may then freely assign the credit to any other party for use within the same watershed.<sup>53</sup>

The Work Group encouraged the concept of a mitigation bank to facilitate cooperative efforts and larger projects than would result from a series of individual mitigation plans. The Deschutes Resources Conservancy, a non-profit organization formed to promote watershed restoration in the Basin, is a likely candidate to administer a mitigation bank. Although the WRD would be involved in the process of reviewing and approving actions for mitigation credits, it would play no role in the development of a private market for the credits, or in managing the mitigation bank.<sup>54</sup> Similarly, transactions involving mitigation credits would not require further WRD approval, so long as the credit was attached to a new ground water use within the same watershed.<sup>55</sup>

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46. See OR. REV. STAT. § 183.310(5)(b).

47. See Public Review Draft, *supra* note 1.

48. See OR. REV. STAT. § 537.720; Public Review Draft, *supra* note 1.

49. See Public Review Draft, *supra* note 1.

50. Act of June 28, 2001, § 2, 2001 Or. Laws 659 (enabling the Water Resources Commission to establish rules related to water banking within the Deschutes River Basin).

51. See Public Review Draft, *supra* note 1.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

## IV. MAJOR POLICY ISSUES AND POINTS OF CONTROVERSY

### A. QUALITATIVE VERSUS QUANTITATIVE MITIGATION

Early in the process, the Work Group engaged in extensive debate over the definition of “mitigation.”<sup>56</sup> Specifically, environmental groups argued for strict bucket-for-bucket replacement with wet water as the only allowable type of mitigation. While other water users sought more flexibility, including the opportunity to implement upland-based watershed restoration measures, such as riparian improvements or water quality improvements.<sup>57</sup>

Although the Work Group had some interest in promoting this type of qualitative watershed restoration measures, it reached consensus that, initially, mitigation must consist of “wet” water.<sup>58</sup> The final rules define “mitigation water” as water that is “legally protected for instream use . . . .”<sup>59</sup> In the future, the Work Group will encourage development of a long-term watershed restoration plan for the Basin.<sup>60</sup> If and when such a plan is developed, the Work Group indicated a willingness to review the issue of mitigation, and allow for consideration of qualitative measures.<sup>61</sup>

### B. CANAL LINING AND PIPING

The Work Group also faced another difficult issue: whether to include canal lining and piping projects as allowable forms of mitigation. Most major existing irrigation diversion in the Basin occurs through such systems.<sup>62</sup> The Bureau of Reclamation estimated up to forty six percent of annual irrigation diversions into canals are lost to recharge leakage.<sup>63</sup> “In 1994, 356,600 acre-feet . . . of water leaked through canal bottoms to become ground water recharge.”<sup>64</sup> The Work Group recognized that canal lining and piping measures to reduce ditch losses and conveyance requirements offered the greatest potential for restoring summer flows in critical reaches of the Deschutes River, which have long suffered from low flows due to

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56. See Minutes, Deschutes Ground Water Steering Committee Meeting (Oct. 19, 1999), at [http://www.wrd.state.or.us/publication/notices/deschutes-sum/90\\_101999.summary.html](http://www.wrd.state.or.us/publication/notices/deschutes-sum/90_101999.summary.html) (last visited Sept. 24, 2002).

57. See *id.*; Report from Deschutes Groundwater Work Group No. 7 to Deschutes Steering Committee, Water Quality/Habitat Improvement (Jan. 18, 2000), at [http://www.wrd.state.or.us/publication/notices/deschutes-workgroups/7\\_water\\_quality/96\\_11800.report.html](http://www.wrd.state.or.us/publication/notices/deschutes-workgroups/7_water_quality/96_11800.report.html) (last visited Oct. 1, 2002).

58. See Public Review Draft, *supra* note 1.

59. See Final Rules, *supra* note 25, § 690-505-0605(13).

60. See Memorandum of Understanding, *supra* note 29.

61. See Public Review Draft, *supra* note 1.

62. See GANNETT ET AL., *supra* note 24, at 23.

63. *Id.* at 26.

64. *Id.*

senior irrigation diversions.<sup>65</sup>

Oregon law expressly encourages conservation and efficiency.<sup>66</sup> The state's Conserved Water Program<sup>67</sup> creates an incentive for existing water rights holders by allowing a portion of the water saved through conservation to be retained and used for additional irrigation or other purposes. At least twenty five percent of the saved water must be dedicated to instream flow.<sup>68</sup> If public grant funds pay for more than twenty five percent of the project, then a corresponding portion of the saved water must be used for instream purposes.<sup>69</sup> The remainder of the saved water is available to the water right holder.<sup>70</sup>

The Work Group addressed whether such conservation measures should qualify as mitigation for the specific purposes of offsetting the impacts of new ground water uses.<sup>71</sup> Environmental representatives argued that such projects, though useful for restoring summer flows in critical areas, would be "robbing Peter to pay Paul" in the context of ground water mitigation.<sup>72</sup> They noted current stream flow data include ground water discharges fed by leaking canals.<sup>73</sup> Although conservation measures would result in clear flow benefits during the summer months, the projects are expected to cause a slight reduction in surface flows, due to reduced recharge, during the winter months.<sup>74</sup> As a result, environmental groups argued the conservation projects should not qualify as mitigation.<sup>75</sup> The argument faced considerable resistance from others in the group who concluded the potential surface flow benefits would far outweigh the impacts on ground water recharge.<sup>76</sup>

As a policy matter, the WRD acknowledged a strong legislative mandate, by virtue of the state's conservation policy and conserved water statutes, to encourage efficiency improvements, notwithstanding the potential reduction in recharge.<sup>77</sup> However, the Final Rules do not

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65. See Public Review Draft, *supra* note 1.

66. See OR. REV. STAT. §§ 537.460 (2),(3) (2001).

67. *Id.* §§ 537.455 through .500.

68. *Id.* § 537.463(3).

69. *Id.*

70. *Id.*

71. See Minutes, Deschutes Water Management Steering Committee Meeting (March 21, 2000), at [http://www.wrd.state.or.us/publication/notices/deschutes-sum/84\\_032100summary.html](http://www.wrd.state.or.us/publication/notices/deschutes-sum/84_032100summary.html) (last visited Sept. 30, 2002).

72. *Id.*

73. *Id.*

74. See Minutes, Deschutes Water Management Steering Committee Meeting (Aug. 29, 2000), at [http://www.wrd.state.or.us/publication/notices/deschutes-sum/74\\_082900.summary.html](http://www.wrd.state.or.us/publication/notices/deschutes-sum/74_082900.summary.html) (last visited Sept. 30, 2002).

75. See Minutes, Deschutes Water Management Steering Committee Meeting (Sept. 26, 2000), at [http://www.wrd.state.or.us/publication/notices/deschutes-sum/73\\_092600.summary.html](http://www.wrd.state.or.us/publication/notices/deschutes-sum/73_092600.summary.html) (last visited Sept. 30, 2002) [hereinafter Steering Committee Sept. 26].

76. *Id.*

77. See Minutes, Deschutes Water Management Steering Committee Meeting (Nov. 27, 2000), at [http://www.wrd.state.or.us/publication/notices/deschutes-sum/72\\_112700.summary.html](http://www.wrd.state.or.us/publication/notices/deschutes-sum/72_112700.summary.html) (last visited Sept. 30, 2002).

offer clear policy guidance on this issue. The rules include conservation projects as a possible form of mitigation, but offer no further guidance toward resolution of the legal, factual, and policy issues raised during the Work Group debates.<sup>78</sup> Under this approach, no credit would be given for the portion of saved water dedicated to instream flow by operation of the statutes (twenty-five percent or more depending on the level of public grant funds). However, any portion of the remaining amount of saved water could be converted to an instream water right and receive full, bucket-for-bucket credit as mitigation.

### C. ENFORCEMENT

Early on, the Work Group members agreed that mitigation plans should be incorporated into the water rights as permit conditions.<sup>79</sup> Failure to implement a mitigation plan would be a violation of the permit, and subject to enforcement action.<sup>80</sup> The Work Group debated considerably over whether the specific remedy, or enforcement action, should be curtailment of water use.<sup>81</sup>

Under the Final Rules, failure to comply with mitigation requirements “shall result in the Department regulating the associated ground water right . . . and proposing to cancel the associated permit.”<sup>82</sup> However, the WRD retains discretion to determine the appropriate method and level of enforcement, ranging from requests for voluntary compliance to permit cancellation, including the option to restrict water use.<sup>83</sup>

## V. WHAT CAN BE LEARNED?

As more information is obtained about the hydraulic connection between ground water and surface water, the job of effective water resource management and distribution will become more difficult.

Mitigation may offer a means of offsetting potential impacts, while still allowing appropriate development to occur. Mitigation banking can offer a useful tool by simplifying the process for individual compliance with mitigation requirements and providing a mechanism for water users to collectively fund major conservation efforts.

As new management strategies are employed, however, community concern and skepticism may be high; appropriate strategies for community involvement in the problem-solving process will be needed.

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78. See Final Rules, *supra* note 25, § 690-505-0610(3).

79. See Public Review Draft, *supra* note 1.

80. *Id.*

81. See Steering Committee Sept. 26, *supra* note 75.

82. See Final Rules, *supra* note 25, § 690-505-0620(3).

83. See OR. REV. STAT. § 537.720 (2001).