

The Eugene Millrace

*Key Findings in Response to UO Campus Operations Planning Department Request
(expanded data of findings follows)*

Court Established Millrace Water Right and Spatial Constraint

Twice in 1916, Millrace taxlot owners and the City of Eugene brought suits against industry to prevent widening of the Millrace for water-generated power purposes. The Supreme Court of Oregon affirmed Millrace industry water rights and established a 50' maximum Millrace width easement for this water right.

Patterson v. Chambers' Power Co., 81 Or. 328, Supreme Court of Oregon, 1916

City of Eugene v. Chambers' Power Co., 81 Or. 352, Supreme Court of Oregon, 1916

Court Established Millrace is Manmade and Can Be Filled In

A 1951 Oregon Circuit Court decision affirmed that “the Millrace is an artificial, dug and constructed power ditch... .. <and> evidence fail to show that it was a natural watercourse in any sense of the term,” and, as such, could be piped and filled, provided property owners not interfere with City of Eugene utility water rights of flow.

Stewart v. Koke and Chapman, Case #38123, Oregon Circuit Court, 1951

UO-City Millrace Management Agreement and Millrace Abandonment

In 1957, City transfers Millrace water rights to UO, and enters into the first of two Millrace maintenance agreements within which was posed the option to abandon the Millrace. Specifically, in these agreements it stated, “The Millrace is used as a storm sewer... and if the Millrace is abandoned, additional storm sewers will need to be constructed and the channel through the City will need to be filled. There is a question as to the legal position of the City regarding the filling of the Millrace since the City does not own the right-of-way. It is understood that the land is granted to the operator of the Millrace for Millrace use only.” The operator of the Millrace is the water rights owner, which is UO.

Water Rights and Usage - in Need of Filing

The University of Oregon owns two water rights: Certificate 29374 (13.2 cfs) for industrial and utility use, and Certificate 29375 (36.8 cfs) for recreational use. Both rights are currently in Non Canceled status. However, current UO reporting lapses for both certificates may pose jeopardy to its water rights.

State Engineer. *Certificate of Water Right, 29374*. Lane County, OR: State of Oregon, 1957.

State Engineer. *Certificate of Water Right, 29375*. Lane County, OR: State of Oregon, 1957.

Zoning and the Goal 5 Water Resources Conservation Plan

Recent Millrace zoning designations (Water Resources Conservation Overlay, Adopted Goal 5 Designations Map, and Special Area Zone/Riverfront Park) contradicts:

- the established Oregon Supreme Court water rights easement use
- the Oregon Circuit Court decision that the Millrace is not a natural water course
- UOs legal water right uses (and identified maintenance options).

It appears, at best, the Millrace may be argued to be a constructed wetland. A constructed wetland is defined as a facility that exhibits wetland characteristics but was constructed for the express purpose to perform a utility need (this definition examples utility need to mean a stormwater retention pond, etc., and not resulting from activities of power and/or recreational use). Regardless, as a constructed wetland the Millrace is not subject to the jurisdictional requirements of federal and state wetland law.

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Additional Information

Court Established Water Rights and Millrace Spatial Constraints (cont.)

Patterson v. Chambers' Power Co.

81 Or. 328, Supreme Court of Oregon, 1916

In 1916, 20 residents of the City of Eugene brought forth suit against the Chambers' Power Company and Frank L. Chambers to prevent the widening of the Millrace for utility purposes. The plaintiffs owned property in "an attractive residential portion of Eugene" and the widening of the Millrace was "cutting away and destroying the plaintiff's property"¹. The defendants claimed it was their right to widen the Millrace due to their deed which allowed for expansion in order to power their mills, based on the amount of expansion.

City of Eugene v. Chambers' Power Co.

81 Or. 352, Supreme Court of Oregon, 1916

Shortly after the decision in Patterson v. Chambers' Power Co., the City of Eugene also brought forth suit against Chambers' Power Co. "to prevent the defendants from widening their ditch passing through the city", referring to the agreement to widen the Millrace up to 50 feet. No changes to the original case were made. "Every question involved in this case is fully considered in the case of Ida Patterson et al. v. Chambers' Power Co. et al. [...] this case will take the same course"². The right to widen the Millrace to 50 feet was therefore maintained.

Court Established Millrace is Manmade and Can Be Filled In (cont.)

Stewart v. Koke and Chapman

Case #38123, Oregon Circuit Court, 1951

In 1949, Joseph Koke and Thomas Chapman extended the pipe portion of the Millrace and filled their section to build a gas station and parking lot. Anena Stewart sued Koke and Chapman in 1951 to prevent them from further filling and to dig out the portion they had filled. The result of this case “was the dismissal of the plaintiff’s complaint, based on the fact that she did not own the channel, or have any riparian rights, because the channel had been man-made”³.

The case found that “the Millrace is an artificial, dug and constructed power ditch, having its origin in the development of power upon the 23 acre tract, and is in no sense a natural water course”⁴. Additionally, there was “considerable testimony confirming that there were originally certain sloughs, swamps and low lands along parts of the course through which it now flows. However, the evidence, including the early history, the maps, etc., fail to show that it was a natural watercourse in any sense of the term”. It was noted that “it was constructed and dug by Hilyard Shaw, his employees and associates, for the purpose of diverting waters from the Willamette River”, and “there is no doubt that they took advantage of the natural terrain and used the low places to advantage to avoid excessive digging, but it does not prove, nor necessarily indicate, that they followed any natural water course”⁴.

“University students had gathered recreational easements from most of the millrace property owners, and had entered them into the case”³. The judge determined that “civic beatification and sentimental reasons make a strong argument for keeping this ancient Millrace open” for recreational use, but these reasons “do not take precedence over the law of the case”⁴. The judge indicated that the remaining Millrace “southerly from the defendants” – the portion downstream of the Chambers’ Power Co. – would probably remain “properly unimpaired” for recreational use⁴.

In 1946, Eugene voters had bought the Millrace, however, the sale was disputed. The Stewart v. Koke and Chapman case also decided “the city’s purchase only gave it an easement to move water in the channel for generation of power”²⁶. As the Circuit Court put it, “the City of Eugene has succeeded by mense conveyances and is now the owner of the water power and the right of way over Shaw’s land”⁴. This case also decided that “property owners retained right to put culverts in the Millrace and fill it in”²⁶. However, “the City of Eugene still has the right to utilize the water power on the 23 acre tract if they wish. They would normally be entitled to the maximum flow as set by the Supreme Court in 81 Oregon 328” – the Patterson v. Chambers’ Power Co. case – “but by their own act and acquiescence with the Highway

Commission, they have limited the flow to a three foot conduit, so they cannot complain so long as the defendants” – the property owners – “do not limit the flow to a lower degree than the City itself has already done”⁴.

UO-City Millrace Management Agreement and Millrace Abandonment (cont.)

The Millrace Agreement

Department of Public Works, City of Eugene. Contract 68-0041, 1968.

In 1954, “a committee consisting of citizens of Eugene, city officials, and officials and students of the University of Oregon was forced to discuss the problems attendant upon the abandonment or restoration of the Millrace”. The committee recommended certain improvements based on engineer’s reports developed by the City Engineer’s office and CH2M Engineers.

The abandonment findings were of particular interest. “The Millrace is used as a storm sewer for a portion of the City of Eugene and if the Millrace is abandoned, additional storm sewers will need to be constructed and the channel through the City will need to be filled. There is a question as to the legal position of the City regarding the filling of the Millrace since the City does not own the right-of-way. It is understood that the land is granted to the operator of the Millrace for Millrace use only. Whether private individuals fill the Millrace or the City fills the Millrace, the filling represents a cost”²².

The purposes of the Agreement were to “restore to the extent economically feasible the recreational use and scenic appeal of the Millrace”, “to maintain the functional use of the Millrace as an integrated part of the storm sewer system of the City of Eugene”, and “to provide cooling water for the University’s heating and power plant and a possible water supply for irrigation”²².

The Millrace Agreement details how the University of Oregon became responsible for much of the Millrace’s functions due to funding, maintenance, and power trade agreements²². The University’s water rights were awarded in 1957, the same year as the original Millrace Agreement, and were directly related to actions the University agreed to perform. The City likely agreed to transfer the rights to the University because the City had the power to do so at the time. The Millrace Agreement states “nothing herein shall be construed as a grant of water

rights by the City to the University except insofar as such a grant shall be within the power of the City”²².

Water Rights and Usage - in Need of Filing (cont.)

Water Rights and Water Usage

The University of Oregon owns two water rights, both for the rights to use the waters of the Willamette River^{5, 6}. Certificate 29374 is “for the purpose of condenser cooling in University heating plant”, the use of which “shall not exceed 13.2 cubic feet per second”⁵, and Certificate 29375 is “for the purpose of recreational, including swimming, boating and scenic enhancement”, the use of which “shall not exceed 36.8 cubic feet per second”⁶. Both rights are currently listed as NC, a Non Canceled status⁷. This differs from the ideal “active” status⁸.

Proper usage to maintain the rights is a concern. The Oregon Water Laws explain that “a water right remains valid as long as it is not cancelled and beneficial use of the water is continued without a lapse of five or more consecutive years”²⁸. Additionally, in the water usage reports, “zeroes indicate that a report was received, stating that no water was used during those months”⁷. Further, “if a year is not listed, no report of water use was received for that year”⁷.

For Certificate 29374 – condenser cooling in the University heating plant – 0.00 acre-feet was used from 2012-2014. No reports were received for 2010 or 2011⁷. There is a concern of losing this right if a period of five years of non-use occurs. Upgrades to the University heating plant may mean that the water is no longer being used for utility purposes. According to Randy Collins, operations supervisor at the Central Power Station, the Department of Environmental Quality asked the university to stop using the Millrace water, based on “thermal pollution” into the Millrace caused by utility use⁹. The upgrades to the plant include “a new 12,000 ton chilled water plant”¹⁰. Determination should be made if the Millrace can be used for any utility purpose, to decide the necessity of continuation of this water right. Past unfiled reports for 1994-2000 and 2010-2011 should be filed, and attention should be paid to ensure that a period of non-use of five or more years does not occur⁷.

For Certificate 29375 – recreational use – no reports were received from 1994-1999, in 2002, or from 2010-2011⁷. Again, to avoid potential loss of this right, past reports need to be filed. At this time, there is no concern over non-use, because usage of at least 0.01 acre-feet has been reported for all filed reports since 1992⁷. However, current water resource, wetland, and riparian zoning affects the ability to use and maintain this right.

According to the Oregon Water Laws, “any governmental entity that holds a water right shall submit an annual water use report to the Water Resources Department”¹¹. This is a concern because “the Director may order regulation or termination of deliveries of water to and use of water by any water right holder who fails [...] to submit a report”, however, “Notice of intended regulation shall be served on the person by certified mail, return receipt requested,” so the University should already be aware of the missed reports¹². If these water rights are still needed or desired, the past water use reports should be filed to avoid their potential loss.

Zoning and the Goal 5 Water Resources Conservation Plan (cont.)

Zoning and the Goal 5 Water Resources Conservation Plan

Despite the 1951 Circuit Court decision that the Millrace is “in no sense a natural water course”⁴, and the 1916 Supreme Court determination that the deed rights to widen the Millrace for industrial use superseded the importance of beautification and land value of residential lots², the Millrace is zoned WR, in the Water Resources Conservation Overlay^{13, 14}. The purpose of this zone is “to provide conservation of significant riparian areas, wetlands and other water-related wildlife habitat areas included on the city’s adopted Goal 5 inventory”¹⁴. The Millrace is also included in the Special Area Zone S-RP, known as Riverfront Park^{13, 14}.

Though the Riverfront Park zone partially includes the Willamette River¹³, the Millrace is specifically highlighted as WR-4, “Riverfront Park/Millrace Wetland”, in the Wetland Sites Table¹⁶. Much of the surrounding area is listed as E40, “Riverfront Park”, in the Riparian Corridor Sites Table¹⁷. Both are separate entities from the Willamette River in the Adopted Goal 5 Designations Map¹⁸. This designation may be inaccurate based on the Criteria for Determining the Significance of Riparian Corridor and Wildlife Habitat Resources Sites Within the Eugene Urban Growth Boundary (hereafter “Criteria”) to be included in the Goal 5 Water Resources Conservation Plan¹⁹. The qualifying Criteria depend heavily on the Willamette River’s inclusion in the Special Area Zone of Riverfront Park¹³, and the Millrace’s inclusion in this zoning should be evaluated separately from the Willamette River.

As part of the Criteria, the Millrace must fulfill certain qualifications. In the Goal 5 Water Resources Conservation Plan, the Millrace is listed as partially mapped on the State/National Wetland Inventory, containing fish according to the Oregon Department of Forestry or the Oregon Department of Fish and Wildlife, containing natural vegetation in an area larger than one acre, being an undeveloped area contiguous with a water feature, and being

partially mapped on the Federal Emergency Management Agency floodway and 100-year floodplain¹⁹.

Indeed, part of the Millrace is mapped on the National Wetlands Inventory Map created by the U.S. Fish and Wildlife Service²⁰. It is listed as a PUBHx – a freshwater pond with permanent surface flooding, excavated by man (us fish and wildlife)²¹. However, the permanent surface flooding is artificial – according to the Millrace Agreement, “the University will have the full responsibility for filling the Millrace with water [...] to maintain the channel within its banks”²². Additionally, some water from the Willamette and stormwater from campus and several nearby streets travels directly into the Millrace²³.

According to the Criteria, Riverfront Park contains fish-bearing streams. The Willamette River is of course mapped as a fish-bearing stream on the Oregon Department of Forestry Stream Size and Data Map, however, the Millrace has an “unknown” fish presence on the same map²⁴. With obstructions such as pipes and grating preventing large fish from entering the Millrace from the Willamette River, the Millrace should not be considered a fish-bearing stream.

Riverfront Park is also listed as being partially included in the Federal Emergency Management Agency floodway and 100-year floodplain. However, no part of the Millrace falls in these flood areas²⁵.

This zoning affects the usage of this area. Because of the zoning, the area cannot be filled, graded, or excavated, and the “natural drainageway” cannot be channelized or straightened¹⁴. This contradicts the prior Supreme Court decision allowing widening up to 50 feet for utility purposes, despite any effect this may have on beautification efforts¹. Under this zoning, even storage of building materials and machinery requires prior approval¹⁴.

The water rights owned by the University for industrial and recreational purposes are not in a cancelled status, meaning that the effects of this zoning directly contradict the University’s water rights. The Water Resources Overlay Zone information in the Eugene Code uses language such as “limiting impact” and “protect the resource” to describe the area, showing that, under this zoning, the Millrace should be treated with extreme care and not used for recreation, “including swimming, boating and scenic enhancement”, as the water right allows.

Analyzing the Eugene Millrace as its own entity, treating it as a constructed wetland would be more appropriate. A constructed wetland is “a facility that exhibits wetland characteristics but was constructed for the express purpose to perform a utility need, such as a sedimentation pond”¹⁴. Designating it as a constructed wetland would mean that it would then be “not eligible for mitigation credit or subject to the jurisdictional requirements of federal and state wetland law”¹⁴.

It has been said that currently there is “a plan to let Mother Nature take its course” on the Millrace due to its new status as a “natural wetlands”⁹. However, allowing the Millrace to fulfill a purpose, such as additions to allow filtration of stormwater before its entrance to the Willamette River, could better preserve the wildlife and environment of both the Millrace and the Willamette River, and would prevent the consequences of abandonment as detailed in the Millrace Agreement.

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