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**TROUT UNLIMITED  
LAND & WATER CONSERVATION HANDBOOK VOL. III**

**PART II: COMPENDIUM OF STATE AUTHORITIES REGARDING  
REAL PROPERTY INTERESTS IN APPROPRIATIVE WATER RIGHTS**

**&**

**LAND TRUST ALLIANCE  
2013 LAND TRUST RALLY  
SEMINAR ON WATER RIGHTS IN  
WESTERN CONSERVATION EASEMENTS:  
2013 CALIFORNIA SUPPLEMENT**



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## **INTRODUCTION**

By partnering with land trusts and other conservation organizations, Trout Unlimited can better help protect and restore critical coldwater habitat on private lands from development or incompatible farming, ranching and forestry practices.

This specialized legal reference at the interface of real property, federal tax, and western water law, it is intended to catalyze Western regional conservation professionals' understanding and transactional use of federal tax deductions associated with water right donations. This reference is educational in purpose and is not a substitute for tax advice or an attorney's opinion based on a given set of transactional facts.

This Land and Water Conservation Handbook Vol. III is organized in three parts and builds upon:

1. TU Land Conservation Handbook Vol. I: A Guide for TU Chapters: Working with Land Trusts;
2. TU Land Conservation Handbook Vol. II: A Guide for Land Trusts: Working with Trout Unlimited;
3. TU Land and Water Conservation Handbook Vol. III
  - a. Part I: Federal Tax Deductions;
  - b. **Part II: Compendium of State Authorities Regarding Real Property Interests in Appropriative Water Rights.**

Each Part is separated for ease of reference and relevance for western water conservation professionals who might acquire all or part of an appropriative, riparian, or groundwater right. Issues related to state defined real property water right transactions and federal tax deductions are distinct from state level administration of instream transfers pursuant to each Western state's recognized water and other legal authorities.

This 2013 TU Land and Water Conservation Handbook legal reference is also intended to complement other organizations' concurrent and ongoing leadership and scholarship with regard to land and water conservation, and will evolve accordingly to minimize and avoid redundancy. In particular:

- Supplement to Peter Nichols' Land Trust Alliance's annual Land Trust Rally *Seminar on Water Rights in Western Conservation Easements* and the foundational *Water Rights Handbook (for Colorado Conservation Professionals)*. The 2013 LTA Supplement updates and builds upon two prior LTA Seminar on Water Rights in Western Conservation Easements supplements provided by California attorneys Stuart Somach (2009) and Ellen Fred (2012). See **Appendices A and B**.
- Complement the LTA's 2013 *Land Trust and Water Sourcebook: Strategies and Resources for Addressing Water in Western Land Conservation*.

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“In what may be called the mountain states (Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming) the law of prior appropriation was adopted as the sole basis of rights to the use of water, but in states on the West Coast (Washington, Oregon and California) and on the Great Plains boundary between the humid and arid areas (the Dakotas, Nebraska, Kansas, Oklahoma and Texas) both bodies of law have been recognized.” (Frank J. Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 Tex. L. Rev. 24 (1954)). *California Oregon Power* validated dual system states . . . and riparian rights must be integrated into prior appropriative rights. Kansas, Oregon, South Dakota, Texas, and Washington have achieved integration by converting used riparian rights to appropriative rights. All riparian rights put to actual use by a certain date are vested. These rights are thus appropriative rights because they have a priority against subsequent appropriators. (A. Dan Tarlock, *L. of Water Rights and Resources* § 5:11).

The legal authorities from each of the following states are organized by these four propositions:

1. An Appropriative Water Right is a Real Property Right
2. An Appropriative Water Right is Severable and Transferrable
3. An Appropriative Water Right Entails Beneficial Use
4. An Appropriative Water Right is not Appurtenant to Land

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**NORTHERN ROCKIES**

**1. Colorado**

**A. An Appropriative Water Right is a Real Property Right**

- *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882). Riparian rights are not recognized in this pure appropriations state.
- Colo. Rev. Stat. Ann. § 37-92-103(12). “Water right” means a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same.
- *Farmers Highline Canal v. Golden*, 272 P.2d 629, 631 (Colo. 1954). “There is absolutely no question that a decreed water right is valuable property.”
- *Shirola v. Turkey Canon Ranch, LLC*, 937 P.2d 739, 747-48 (Colo. 1997). Water rights are usufructuary rights and are considered separate and distinct real property interests.
- *Pub. Serv. Co. of Colorado v. Meadow Island Ditch Co. No. 2*, 132 P.3d 333, 340 (Colo. 2006). Priority, location of diversion at the source of supply, and amount of water for application to beneficial uses are the essential elements of the appropriative water right.
- *Pub. Serv. Co. of Colorado v. Meadow Island Ditch Co. No. 2*, 132 P.3d 333, 340 (Colo. 2006). A decreed water right is valuable property, not a mere revocable privilege. As a valuable property right, it may be used, its use changed, and its point of diversion relocated. Citing: *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo.

575, 579, 272 P.2d 629, 631 (1954); *Weibert v. Rothe Bros., Inc.*, 200 Colo. 310, 316, 618 P.2d 1367, 1371 (1980).

- *Farmers Reservoir & Irrigation Co. v. City of Golden*, 44 P.3d 241, 245 (Colo.2002); (citing *Williams v. Midway Prop. Owners Ass'n*, 938 P.2d 515, 523 (Colo.1997)). “The right to change the use of a vested water right is an important stick in the bundle of rights constituting a Colorado water right.”
- *West End Irrigation Co. v. Garvey*, 184 P.2d 476, 479 (Colo. 1947); *see also Brighton Ditch Co. v. City of Englewood*, 237 P.2d 116, 120 (Colo. 1951). "The right to divert water is an interest in real estate."
- *WRWC, LLC v. City of Arvada*, 107 P.3d 1002, 1005 (Colo. Ct. App. 2004). In Colorado, water rights are separate from interests in land. *See Bd. of County Comm'rs v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 707 (Colo.2002). Neither surface water, nor ground water, nor the use rights thereto, nor the water-bearing capacity of natural formations belong to a landowner as a stick in the property rights bundle. The property rights of landowners do not include the right to control the use of water in the ground. Rather, the water belongs to the public, and the right to use it must be acquired from the state. *Park County Sportsmen's Ranch, supra*, 45 P.3d at 707–09 (citing *State v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294 (Colo.1983)).

#### **B. An Appropriative Water Right is Severable and Transferrable**

- COLO. REV. STAT. § 38-30-102 (2)(Water rights conveyed as real estate . . .). “In the conveyance of water rights in all cases, except where the ownership of stock in ditch companies or other companies constitutes the ownership of a water right, the same formalities shall be observed and complied with as in the conveyance of real estate.” *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982); *Strickler v. Colo. Springs*, 26 P. 313, 316 (Colo. 1891).
- *Lower Latham Ditch Co. v. Bijou Irr. Co.*, 93 P. 483, 484 (Colo. 1907). Water rights can be conveyed and transferred like real estate, independent from the land where they were used historically.
- COLO. REV. STAT. 38-30-102; *see also Child v. Whitman*, 42 P. 601 (Colo. App. 1896). Colorado requires water rights to be transferred with the same formalities as real estate.
- *High Plains A&M, LLC v. Se. Colo. Water Co.*, 120 P.3d 710 (Colo. 2005) (citing *Strickler*, 26 P. at 316). "Water rights, as property, may be sold and transferred to another type and place of use, so long as the rights of others are not injuriously affected."
- *Pub. Serv. Co. of Colorado v. Meadow Island Ditch Co. No. 2*, 132 P.3d 333, 340 (Colo. 2006). The right to change the use of a vested water right is an important stick in the bundle of rights constituting a Colorado water right.
- *In re Smith*, 924 P.2d 155, 158-59 (Colo. 1996). A transfer of land is presumed to include a transfer of the right to extract underlying nontributary ground water unless such right is explicitly excepted from the conveyance instrument.
- *Humphrey v. Sw. Dev. Co.*, 734 P.2d 637, 640 (Colo. 1987). “A validly adjudicated water right gives its holder a special type of property right” and water rights may be

bought and sold, like other kinds of real property, “without regard to the real property over which the water flows

### **C. An Appropriative Water Right Entails Beneficial Use.**

- COLO. CONST. art. XVI, § 5. (Water of streams public property). All heretofore unappropriated surface waters of the State are public property and subject to appropriation.
- COLO. CONST. art. XVI, § 6. The right to use shall never be denied.
- COLO. CONST. art. XVI, § 6; COLO. REV. STAT. § 37-92-103(3)(a) (2010); § 37-92-103(7) (2010) (Definitions - "Diversion"); CRS § 37-92-103(4) (2010) (Definitions - "Beneficial use"); *Colo. River Water Conservation Dist. v. Rocky Mountain Power Co.*, 406 P.2d 798, 800 (Colo. 1965). The three elements of a Colorado appropriation are: (1) intent to apply water to a beneficial use, (2) diversion of water from a natural water course, and (3) application of the water to beneficial use without waste within reasonable time.
- *Mun. Subdistrict, N. Colorado Water Conservancy Dist. v. Rifle Ski Corp.*, 726 P.2d 635, 636 (Colo. 1986). A conditional water decree requires an intent to appropriate and an overt, physical act constituting the first step toward diversion and application to a beneficial use. See also: *Rocky Mountain Power Co. v. White River Electric Association*, 151 Colo. 45, 376 P.2d 158 (1962). See also *Fort Lyon Canal Co. v. Amity Mutual Irrigation Co.*, 688 P.2d 1110 (Colo.1984) (applying § 37-92-305(9)(b), 15 C.R.S. (1985 Supp.), added by the General Assembly in 1979).

### **D. An Appropriative Water Right is not Appurtenant to Land**

- *Kinoshita v. N. Denver Bank*, 181 Colo. 183, 188, 508 P.2d 1264, 1267 (1973). “We follow the rule announced as follows *Hastings and Heyden Realty Co. v. Gest* . . . It is recognized in this state that water may or may not be appurtenant to land. The provisions of the deed control, and if the deed be silent on the subject, then the intention of the parties is to be determined from all the circumstances of the case, including the fact as to the use of the water and whether it is necessary and essential to the beneficial use and enjoyment of the land.”
- *Strickler v. City of Colorado Springs*, 16 Colo. 61, 72, 26 P. 313, 317 (1891). The rights of water were not appurtenant to the particular parcel of land granted, but that the owner might use the water at any place, or in any manner, so long as the rights of others were not thereby impaired.
- *Brighton Ditch Co. v. City of Englewood*, 124 Colo. 366, 372, 237 P.2d 116, 120 (1951). A water right is not a fixed appurtenance; that the right to change its place of use and the point of diversion is an inherent property right, not conferred by our remedial statute, but pre-existing as an incident of ownership.

## **2. Wyoming**

### **A. An Appropriative Water Right is a Real Property Right**

- Wyo. Const., Article VIII, § 1. “The water of all natural streams, springs, lakes or other collections of still water within the boundaries of the state are hereby declared to be the property of the state.”

- *Frank v. Hicks*, 35 P. 475, 483, 1894; (citing *Strickler v. City of Colorado Springs*, 26 Pac. 313). “By such appropriation the appropriator acquires, not an absolute ownership in the water itself, but a right to its use which is considered as property, and may be sold and conveyed as such.”
- *Frank v. Hicks*, 35 P. 475, 484, 1894. "Water rights are obtained by appropriation and use for a beneficial purpose from the public waters of the United States or this state, under statutes authorizing such appropriation. By such appropriation the appropriator acquires, non at an absolute ownership in the water itself, but a right to its use which is considered as property, and may be sold and conveyed as such."

#### **B. An Appropriative Water Right is Severable and Transferrable**

- Wyo. Stat. Ann. § 41-3-104. (Procedure to change use or place of use). Water right owner who wants to change the nature or place of use of a water right, must file a petition.
- Wyo. Stat. Ann. § 41-3-110. (Right to acquire temporary water rights for highway or railroad roadbed construction or repair; application; restrictions; fee).
- *Frank v. Hicks*, 35 P. 475, 484, 1894; "It is true that by all the authorities the water right is separable from the land to which it is appurtenant, and may be sold separate from the land, and the place of diversion and place of use may be changed. . . . only when these acts are not injurious to others."
- *King v. White*, 499 P.2d 585, 588 (Wyo. 1972) A water right is a ‘property right of high order,’ with ‘none of the characteristics of personal property,’ and it is real property. 2 Kinney, *Irrigation and Water Rights*, s 769, pp. 1328-1329 (2d Ed.), and numerous cases cited therein
- *Bentley v. Dir. of Office of State Lands & Investments*, 2007 WY 94, 160 P.3d 1109, 1123 (Wyo. 2007). As a general rule, a water right beneficially used upon land becomes appurtenant to the land. *Condict v. Ryan*, 79 Wyo. 211, 228–29, 333 P.2d 684, 689 (1958); *Sturgeon v. Brooks*, 73 Wyo. 436, 455–56, 281 P.2d 675, 682 (1955); *Frank v. Hicks*, 4 Wyo. 502, 530–31, 35 P. 475, 484 (1894). And, when the land is conveyed, the water right passes with it.
- *Frank v. Hicks*, 4 Wyo. 502, 35 P. 475, 480 (1894). An irrigation right and the ditch making such right available, becomes attached to the land irrigated and passes by conveyance.

#### **C. An Appropriative Water Right Entails Beneficial Use**

- Wyo. Const. art. VIII, § 3. “Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.”
- Wyo. Stat. Ann. § 41-3-101. (Nature of water rights and beneficial use)Beneficial use shall be the basis, the measure and limit of the right to use water at all times, not exceeding the statutory limit except as provided by W.S. 41-4-317.
- Wyo. Stat. Ann. § 41-4-317. (Determination of priorities to streams; limitations on amount of water to be allotted; disposition of excess water generally). “Each appropriation shall be determined in its priority and amount, by the time by which it shall have been made, and the amount of water which shall have been supplied for beneficial



purposes; provided, that such appropriator shall at no time be entitled to the use of more water than he can make a beneficial application of on lands. . . . Water rights for the direct use of the natural unstored flow of any stream cannot be detached from the lands, place or purpose for which they are acquired, except as provided in W.S. 41-3-102 and 41-3-103, pertaining to a change to preferred use, and except as provided in W.S. 41-4-514.”

#### **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

- *Rennard v. Vollmar*, 977 P.2d 1277, 1280 (Wyo. 1999). Appropriator has implied right to use ditch because water right are appurtenant to the land upon which the water is used, and the conduit for the water becomes attached to the land and therefore becomes part and parcel of the realty.
- *Frank v. Hicks*, 4 Wyo. 502, 35 P. 475, 484 (1894). “in the states of the arid region, that a water right becomes appurtenant to the land upon which the water is used, and the ditch, water pipe, or other conduit for the water becomes attached to the land, either as appurtenant or incident to the land, and necessary to its beneficial enjoyment, and therefore becomes part and parcel of the realty.”

### **3. Montana**

#### **A. An Appropriative Water Right is a Real Property Right**

- Mont. Code Ann. § 85-2-401 (2010). As a pure prior appropriation state, Montana also operates under the shorthand “first in time, first in right.”
- Mont. Code Ann. § 70-1-106(3) (2010). Real property consists of that which is incidental or appurtenant to land.
- *Cook v. Hudson*, 110 Mont. 263, 103 P.2d 137, 145 (1940). A water right is property. Citing: *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 62 P.2d 206 (1936); *Murray v. Tingley*, 20 Mont. 260, 50 P. 723.
- *In re Adjudication of the Existing Rights to the Use of All the Water*, 2002 MT 216, 311 Mont. 327, 332, 55 P.3d 396, 399. The common law elements of a valid appropriation are intent, notice, diversion and application to beneficial use.
- *Harrer v. N. Pac. Ry. Co.*, 147 Mont. 130, 410 P.2d 713 (1966). One who has appropriated water in Montana acquires a distinct property right, which is a species of property in and of itself, and considered a property of the "highest order."
- *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 62 P.2d 206, 210 (1936). We accordingly hold that a water right in gross may be the subject of transfer.
- *Dep't of State Lands v. Pettibone*, 216 Mont. 361, 373, 702 P.2d 948, 955 (1985). An appurtenant water right is an interest in the land. If surrendered, the State must receive fair market value.
- *Wills Cattle Co. v. Shaw*, 2007 MT 191, 338 Mont. 351, 359, 167 P.3d 397, 403. Water right and ditch right, are separate and distinct property rights which may be conveyed separately. If a water right passes as an appurtenance, the means of conveyance of the water also passes.

#### **B. An Appropriative Water Right is Severable and Transferrable**

- Mont. Code Ann. § 85-2-403 The right to use water shall pass with a conveyance of the land or transfer by operation of law, unless specifically exempted therefrom. All transfers of interests in appropriation rights shall be without loss of priority.
- Mont. Code. Ann. §§ 85-2-403, § 70-1-520. The transfer of a thing transfers also all its incidents unless expressly excepted, but the transfer of an incident to a thing does not transfer the thing itself.
- Mont. Code Ann. § 85-2-424. The transfer, severing, or dividing of water rights must be done in writing as a deed.
- *Dep't of State Lands v. Pettibone*, 216 Mont. 361, 372, 702 P.2d 948, 955 (1985). When title to irrigated property is passed, the water rights pass as an appurtenance unless specifically excepted.
- *Axtell v. M.S. Consulting*, 1998 MT 64, 288 Mont. 150, 159, 955 P.2d 1362, 1368 Once a water right was acquired, it could be transferred. Generally, a water right is appurtenant to the land where it is used, and, as such, passes with the conveyance of the land ... even though the grant does not specifically mention the water right. Citing *Maclay v. Missoula Irrigation Dist.* (1931), 90 Mont. 344, 353, 3 P.2d 286, 290.
- *Brennan v. Jones*, 101 Mont. 550, 55 P.2d 697, 702 (1936). A water right is property which may be disposed of apart from the land on which it has been used.
- Mont. Code Ann. § 85-2-320. Describes permit system USDA follows to change appropriative water right to instream flow right.

### **C. An Appropriative Water Right Entails Beneficial Use**

- Mont. Const. art. IX, § 3(3); (1); Mont. Code Ann. § 85-2-101 (2010) (Declaration of policy and purpose). The waters within Montana are the property of the state for use by the people subject to appropriation for beneficial uses.
- *In re Adjudication of the Existing Rights to the Use of All the Water*, 2002 MT 216, 311 Mont. 327, 336, 55 P.3d 396, 401. Beneficial use is the only essential element of a valid appropriation.
- *In re Adjudication of the Existing Rights to the Use of All the Water*, 2002 MT 216, 311 Mont. 327, 344, 55 P.3d 396, 406. The doctrine of prior appropriation does not require a physical diversion of water where no diversion is necessary to put the water to a beneficial use.

### **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

- *Department of State Lands v. Pettibone*, 216 Mont. 361, 373, 702 P.2d 948, 955 (Mont. 1985); *Yellowstone Co. v. Assoc. Mtg. Investors*, 88 Mont. 73, 82, 290 P. 255 (1930) (spring waters appurtenant to land). An appurtenant water right is an interest in the land subject to fair market valuation.
- *Wills Cattle Co. v. Shaw*, 2007 MT 191, 338 Mont. 351, 360, 167 P.3d 397, 403. The conveyance of a tract of irrigated land with its appurtenances also conveys the ditch and the water right, necessary to the cultivation, use and enjoyment of the land, just as fully as though the grantor had described it in express terms in the deed itself.

#### **4. Idaho**

##### **A. An Appropriative Water Right is a Real Property Right**

- Idaho Const. art. XV, § 3. “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes.”
- Idaho Code Sec. 55-101. “Real property or real estate consists of: (1). Lands, possessory rights to land, ditch and water rights, and mining claims, both lode and placer. (2). That which is affixed to land. (3). That which is appurtenant to land.”
- *Nielson v. Parker*, 19 Idaho 727, 732-733, 115 P. 488 (Idaho 1911). “It has never been the intention, so far as we are advised, of the legislature to cut off the right an appropriator and user of water may acquire by the actual diversion of the water and its application to a beneficial use. This constitutes actual notice to every intending appropriator of the water of such a stream. It is like a man being actually in possession of realty; indeed, a water right is realty in this state.”
- *Twin Falls Canal Co. v. Shippen*, 46 Idaho 787, 271 P. 578, 579 (1928). “A water right is real property and may be sold and transferred separately from the land upon which it has been used, the same as any other real property.”
- *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 150 P. 336, 340 (1915) “Under the law and the decisions of this court, a water right is a distinct property right from the land on which it is used.”
- *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011), reh'g denied (June 6, 2011) “In Idaho, water rights are real property.” *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983).
- *Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Idaho 793, 51 P. 990, 992 (1898). ”A ditch may be conveyed, reserving the water right, or the water right may be conveyed, reserving the ditch. Citing *Clifford v. Larrien* (Ariz.) 11 Pac. 397. Ditches and water rights are real estate, under the provisions of section 2825, Rev. St.”

##### **B. An Appropriative Water Right is Severable and Transferrable**

- Idaho Const. art. XV, § 1. “The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.”
- *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 150 P. 336, 340 (1915) “Under the provisions of section 1629, Rev. Codes, the Legislature has declared that the water rights to all lands acquired under the provisions of the chapter in which said section is found shall attach and become appurtenant to the land as soon as the title passes from the United States to the state. That statute could not and did not make the water right an inseparable appurtenant to the land any more than it could make a building situated upon land, or timber growing on land an inseparable appurtenant to the land. The owner of the realty on which he has placed buildings and has trees growing may sell the building

without selling the land, and also may sell the growing timber without selling the land, and the purchaser may remove them from the land.”

- *Olson v. Idaho Dept. of Water Res.*, 105 Idaho 98, 100-01, 666 P.2d 188, 190-91 (1983). Under Idaho law, real property must be transferred by a written instrument. I.C. § 9–503; I.C. § 9–505. An oral contract for water rights falls within the statute of frauds and is unenforceable in the absence of a writing.
- *Hall v. Blackman*, 8 Idaho 272, 68 P. 19, 24 (1902). ”One settling on the public domain may acquire a right to the use of water for the irrigation of the land taken by him, and he may sell such right, independent of the land, or, in case of his death, such right may descend to his heirs.”
- *Pflueger v. Hopple*, 66 Idaho 152, 155, 156 P.2d 316, 317 (1945). “The water right in controversy is real property. Prescriptive title to a water right such as here involved may be acquired by adverse use for more than the statutory period.”
- *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 488, 244 P.2d 151, 157 (1951). “Irrigation ditches and water rights are real property and thus can only be conveyed and transferred as other real property. Title to real estate may be transferred by contract or deed of the owners, adverse possession, or condemnation, or by operation of law.”

#### **C. An Appropriative Water Right Entails Beneficial Use (without waste)**

- *Anderson v. Cummings*, 81 Idaho 327, 335, 340 P.2d 1111, 1115 (1959). Appellants' decreed water right constitutes real property; such right is appurtenant to appellants' lands to which the water represented thereby has been beneficially applied.
- *In re Robinson*, 61 Idaho 462, 103 P.2d 693, 696 (1940). “The lode star of utility of irrigation water is application to a beneficial use without waste, i. e., using no more than is necessary according to the standards and practices of good husbandry for the particular crop sought to be grown”

#### **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

- Idaho Code Ann. § 42-101. “The right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied.”
- *Paddock v. Clark*, 22 Idaho 498, 126 P. 1053, 1053 (1912). ”Under the Constitution and statutes of this state, a water right is “real property,” and is an appurtenance to the land irrigated by the use of such water.” Water right acquired by deed of conveyance becomes appurtenant when put to beneficial use.
- *Joyce Livestock Co. v. United States*, 144 Idaho 1, 14, 156 P.3d 502, 515 (2007). Unless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention “appurtenances.”

- *Silverstein v. Carlson*, 118 Idaho 456, 460, 797 P.2d 856, 860 (1990). Citing *Russell v. Irish*, 20 Idaho 194, 118 P. 502 (1911) “A division of a tract of land to which water is appurtenant, without segregating or reserving the water right, works a division of such water right in proportion as the land is divided.”

## **5. Utah**

### **A. An Appropriative Water Right is a Real Property Right**

- *Whitmore v. Salt Lake City*, 89 Utah 387, 57 P.2d 726, 731 (1936). “In this Territory the doctrine of riparian rights has never been recognized.” A statute of the Territorial legislature abrogating rights of the riparian, is valid.
- *In re Green River Drainage Area*, 147 F. Supp. 127, 139 (D. Utah 1956). Water rights in Utah are treated as, and are deemed to be, real estate. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894; 73-1-10, Ibid.
- *Cortella v. Salt Lake City*, 93 Utah 236, 72 P.2d 630, 635 (1937). “A water right is treated as an incorporeal hereditament as distinguished from the corpus of the water, and is real property.” 2 Kinney on Irrigation and Water Rights, pp. 1328-1333;
- *Elliot v. Whitmore* 10 Utah 238, 37 P. 459. “An injunction requiring a defendant in possession to give plaintiff part of the water of a stream is in effect a judgment for the delivery of the possession of real property.”
- *In re Bear River Drainage Area*, 271 P.2d 846, 848 (Utah 1954). An action to determine the legal control of water rights are the same as in an action to determine title to real estate. And a suit to quiet title to water rights is in the nature of an action to quiet title to real estate.

### **B. An Appropriative Water Right is Severable and Transferrable**

- Utah Code Ann. § 73-1-10 (1)(a) A water right shall be transferred by deed in substantially the same manner as is real estate.
- Utah Code Ann. § 73-1-11. “(1) A water right appurtenant to land shall pass to the grantee of the land unless the grantor: 1) specifically reserves the water right or any part of the water right in the land conveyance document; 2) conveys a part of the water right in the land conveyance document; or 3) conveys the water right in a separate conveyance document prior to or contemporaneously with the execution of the land conveyance document.”
- *Snake Creek Mining & Tunnel Co. v. Midway Irr. Co.*, 1923, 43 S.Ct. 215, 260 U.S. 596, 67 L.Ed. 423. “Citing Utah Const. art. XVII, § 1 Under Laws Utah 1880, c. 20, § 6, recognizing the right to appropriate water from any natural source of supply, which right was confirmed by Const. Utah, art. 17, § 1, and was assented to by Congress, so far as the public lands were concerned, by Act July 26, 1866, c. 262, § 9, 43 U.S.C.A. § 661, Act July 9, 1870, c. 235, § 17, 43 U.S.C.A. § 661, and Act March 3, 1877, c. 107, 43 U.S.C.A. § 321, the common-law rule that the owner of land has the right to all percolating waters therein not flowing in any defined channel is not recognized, and appropriators of the waters of a stream for irrigation purposes are entitled to percolating waters discharged from a mining tunnel located after the appropriation, where those

waters would otherwise eventually reach the stream and form an important source of its supply.”

- *Roberts v. Roberts*, 584 P.2d 378, 379 (Utah 1978). In Utah, a deed which conveys land to a grantee also conveys the right to use appurtenant water, unless expressly reserved.

### **C. An Appropriative Water Right Entails Beneficial Use**

- Utah Code Ann. § 73-1-3.” Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.”
- *Whitmore v. Salt Lake City*, 89 Utah 387, 57 P.2d 726, 731 (1936). “The use of water for beneficial purposes, is hereby declared to be a public use.” R.S. Utah 1933, 100-1-1, 100-1-3, 100-1-5.

### **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

- *Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, 5 P.3d 1206, 1220 Generally, water rights are appurtenant to land on which the water is beneficially used. *See* Utah Code Ann. §§ 73-1-10 to -11 (1989). They are “transferred by deed in substantially the same manner as real estate,” and pass automatically to a grantee of the land unless expressly reserved.

## **PACIFIC COAST**

### **6. Washington**

#### **A. An Appropriative Water Right is a Real Property Right**

- Wash. Rev. Code Ann. § 90.03.010 (Appropriation of water rights - Existing rights preserved). In Washington, all waters belong to the public with the right of use limited to appropriations for beneficial use subject to priority.
- *State v. Superior Court of Grant County* (1912) 70 Wash. 442, 447-48, 126 P. 945. Citing Wash. Const. art. XVII, § 1. Riparian owner on navigable lake has no superior right to waters of lake for irrigation superior to right of appropriation possessed by owners of land not bordering on lake.
- *Ickes v. Fox*, 300 U.S. 82, 95-96, 57 S. Ct. 412, 417, 81 L. Ed. 525 (1937). “[In] the state of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.”
- *Foster v. Sunnyside Valley Irr. Dist.*, 102 Wash. 2d 395, 400, 687 P.2d 841, 844 (1984). Under Washington law, a water right is considered real property which is appurtenant to and passes with a conveyance of the land which receives its beneficial use.

#### **B. An Appropriative Water Right is Severable and Transferrable**

- Wash. Rev. Code Ann. § 90.03.380 (2010). (Right to water attaches to land - Transfer or change in point of diversion - Transfer of rights from one district to another - Priority of water rights applications - Exemption for small irrigation impoundments). The use of water is an appurtenant property right, which can be transferred without loss of priority, so long as the change can be made without detriment or injury to existing rights.
- *Avery v. Johnson*, 59 Wash. 332, 334, 109 P. 1028, 1029 (1910). A mere squatter can claim no right either as an appropriator or a riparian proprietor.

### **C. An Appropriative Water Right Entails Beneficial Use.**

- *United States v. Ahtanum Irr. Dist.*, 330 F.2d 897, 904 (9th Cir. 1964). To perfect an appropriation under the rules applicable in most western states, including the State of Washington, the user must apply the water to a beneficial use with intent to appropriate.
- Wash. Rev. Code Ann. § 90.03.005. (State water policy--Cooperation with other agencies--Reduction of wasteful practices). State policy to promote the use of the public waters for maximum net benefits from diversionary uses and protection of instream and natural values and rights.
- *Matter of Deadman Creek Drainage Basin in Spokane County*, 103 Wash. 2d 686, 687, 694 P.2d 1071, 1072 (1985). The 1917 water code established prior appropriation as the dominant water law in Washington. After 1917, new water rights may be acquired only through compliance with the permit system and existing water rights not put to beneficial use are relinquished.
- Wash. Rev. Code Ann. § 90.14.180. (Relinquishment of right for abandonment or failure to beneficially use without sufficient cause--Future rights acquired through appropriation.) An appropriator who fails to beneficially use all or any part of water right for a period of five years without sufficient cause, shall relinquish the portion thereof to the state.

### **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

- *Richland Irr. Dist. v. United States*, 222 F.2d 112, 114 (9th Cir. 1955). “Under the law of the state of Washington the grant or acquisition of a full fee interest carries with it appurtenances to the land. The express mention of either the particular appurtenances involved or appurtenances generally is unnecessary. They pass by implication with a full fee interest.”

## **7. Oregon**

### **A. An Appropriative Water Right is a Real Property Right**

- Or. Rev. Stat. Ann. § 537.110. (Public ownership of waters). “All water within the state from all sources of water supply belongs to the public.”
- Or. Rev. Stat. Ann. § 537.120. (Right of appropriation; vested rights protected). All waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act.

- Or. Rev. Stat. Ann. § 537.130 (2010) (Permit to appropriate water required). Persons may not use, store, or divert any waters without a state permit authorizing appropriation.
- Or. Rev. Stat. Ann. § 540.510 (2010) (Appurtenancy of water to premises; restrictions on change of use, place of use or point of diversion; application for transfer of primary and supplemental water rights; right to use conserved water). An appropriative right is appurtenant to the premises upon which it is used and the right of use is considered real property.
- *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 55 S. Ct. 725, 729, 79 L. Ed. 1356 (1935). "A patent issued thereafter for lands in a desert land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common-law right to the water flowing through or bordering upon the lands conveyed."
- *Fort Vannoy Irr. Dist. v. Water Res. Comm'n*, 345 Or. 56, 79, 188 P.3d 277, 292 (2008). All water within Oregon from all sources belongs to the public for appropriation. "The elements of an appropriation of water are: '(a) Quantity of water appropriated; (b) time, period, or season when the right to the use exists; (c) the place upon the stream at which the right of diversion attaches; (d) the nature of the use or the purpose to which the right of use applies, such as irrigation, domestic use, culinary use, commercial use, or otherwise; (e) the place where the right of use may be applied; [and] (f) the priority date of appropriation or right as related to other rights and priorities.' "
- *Dry Gulch Ditch Co. v. Hutton*, 133 P.2d 601 (Or. 1943). A water right becomes a private property right upon establishing control.

#### **B. An Appropriative Water Right is a Property Right that is Severable and Transferrable**

- Or. Rev. Stat. Ann. § 540.510(2) (2010) (Appurtenancy of water to premises; restrictions on change of use, place of use or point of diversion; application for transfer of primary and supplemental water rights; right to use conserved water). When land is sold, appurtenant water rights attach with the conveyance, unless specifically excluded. Even if such rights are excluded, they remain appurtenant to the land until a water rights transfer is approved.
- Or. Rev. Stat. Ann. § 540.510(2) (2010) (Appurtenancy of water to premises; restrictions on change of use, place of use or point of diversion; application for transfer of primary and supplemental water rights; right to use conserved water). Instream transfers are expressly exempt from and can otherwise sever the appurtenance requirement.
- *Fort Vannoy Irr. Dist. v. Water Res. Comm'n*, 345 Or. 56, 92, 188 P.3d 277, 298 (2008). "[A]n appropriation may be made by one person for the future use of another; and for the future use upon lands which the appropriator does not then own, or which he does not contemplate owning and which he never does own."

#### **C. An Appropriative Water Right Entails Beneficial Use**

- Or. Rev. Stat. Ann. § 540.610 (2010) (Beneficial use as measure of water right; forfeiture for nonuse; confirmation of rights of municipalities). "Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state."



- Or. Rev. Stat. Ann. § 536.310(1) (2010) (Purposes and policies to be considered in formulating state water resources program). Waters belong to the people of the state for beneficial use without waste.

#### **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

### **8. California**

#### **A. An Appropriative Water Right is a Real Property Right**

- Cal. Water Code § 102. (State ownership of water; right to use); “All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.”
- Cal. Water Code § 1201. (2010) (Public water of state; appropriation). “All water within California is the property of the people of the State, but the right to the *use* of water may be acquired by appropriation in the manner provided by law.”
- *Locke v. Yorba Irrigation Co.*, 217 P.2d 425 (Cal. 1950). While there is no private property right in the corpus of water, the right of use is recognized as real property.
- *State v. Superior Court of Riverside County*, 96 Cal. Rptr.2d 276, 281 (Cal. App. 2000). The right of use, though not an interest in the corpus of the water itself, is “unquestionably a species of real property.”
- *Yellen v. Hickel*, 335 F. Supp. 200, 205 (S.D. Cal. 1971) *supplemented*, 352 F. Supp. 1300 (S.D. Cal. 1972) *vacated sub nom. United States v. Imperial Irrigation Dist.*, 559 F.2d 509 (9th Cir. 1977) *modified*, 595 F.2d 524 (9th Cir. 1979) and *on reh'g sub nom. United States v. Imperial Irr. Dist.*, 595 F.2d 525 (9th Cir. 1979) and *judgment rev'd in part, vacated in part sub nom. Bryant v. Yellen*, 447 U.S. 352, 100 S. Ct. 2232, 65 L. Ed. 2d 184 (1980). In the West water and land are separate and ownership of land does not automatically give right to water use. This is reflected in the homestead laws where water rights are reserved from patents.
- *San Bernardino v. Riverside*, 198 P. 784, 787 (Cal. 1921); *San Francisco v. Alameda County*, 54 P.2d 462, 464 (Cal. 1936). Water rights are considered rights in real property.
- *Wright v. Best*, 121 P.2d 702, 711 (Cal. 1942); *Thayer v. California Development Co.*, 128 P. 21 (Cal. 1912); *Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 53 (Colo. 1999). An appropriative right is an interest in real property.

#### **B. An Appropriative Water Right is Severable and Transferrable**

- *McDonald v. Bear River & Auburn Water & Mining Co.*, 13 Cal. 220, 232-33 (1859). “The ownership of water, as a substantive and valuable property right, distinct sometimes, from the land through which it flows...may be transferred like other property.”

#### **C. An Appropriative Water Right Entails Beneficial or Valuable Use**

- *Fullerton v. State Water Res. Control Bd*, 90 Cal. App. 3d 590, 598, 153 Cal. Rptr. 518, 524 (Ct. App. 1979). Three elements of appropriation must coexist: “The intent to take,

accompanied by some open, physical demonstration of the intent, and for some valuable use.”

#### **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

- *Nicoll v. Rudnick*, 160 Cal. App. 4th 550, 557-58, 72 Cal. Rptr. 3d 879, 884 (2008). Once such water rights are acquired, they become appurtenant to land.
- *Fullerton v. State Water Res. Control Bd*, 90 Cal. App. 3d 590, 598, 153 Cal. Rptr. 518, 523 (Ct. App. 1979). “The concept of an appropriative water right is a real property interest incidental and appurtenant to land.”
- *Nicoll v. Rudnick*, 160 Cal. App. 4th 550, 561-62, 72 Cal. Rptr. 3d 879, 888 (2008). “All appurtenant water rights are presumed to run with the land unless reserved in the deed.”

### **SOUTH WEST**

#### **9. Arizona**

##### **A. An Appropriative Water Right is a Real Property Right**

- Ariz. Const. art. XVII, § 1. The common law doctrine of riparian water rights shall not obtain or be of any force or effect in the state.
- *Clough v. Wing* (1888) 2 Ariz. 371, 17 P. 453. Rights of owners of lands on the border of streams are subject to a prior appropriation of water.
- *In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. 230, 235, 830 P.2d 442, 447 (1992). “In general, water rights are property rights.”
- *Arizona Public Service Co. v. Long*, 160 Ariz 429, 438 773 P.2d 988, 997 (1989). Because the Arizona Constitution has abolished the riparian doctrine, “...neither stream nor groundwater is private property free from regulation.”
- *Neal v. Hunt*, 112 Ariz. 307, 311-12, 541 P.2d 559, 562-63 (1975). The right to percolating groundwater is a hereditament.
- A.R.S. § 1-215(30) (Supp 1997); *Norwest Bank Ariz. v. Maricopa County Super. Ct.*, 263 Ariz. Adv. Rep. 21, 23 (Feb. 19, 1998). In Arizona, hereditaments are real property interests.
- *Chino Valley II*, 131 Ariz. at 82, 638 P.2d at 1328 There are no real property rights to groundwater “prior to its capture and withdrawal.”
- A.R.S. § 45-411 to 45-421; A.R.S. § 45-431 to 45-440 Groundwater is managed differently inside and outside of Active Management Areas and Irrigation Non-expansion Areas.
- *Davis v. Agua Sierra Res., LLC*, 220 Ariz. 108, 113-114, 203 P.3d 506, 511-512 (Ariz. 2009). Outside of AMAs landowners “do not have a real property interest in the future use of groundwater” prior to its capture and application to a reasonable use.
- *Id.* at 112, 510. Landowners have the opportunity to pump underlying groundwater, best described “as an unvested expectancy insofar as it concerns the potential future use of groundwater that has never been captured or applied.”

##### **B. An Appropriative Water Right is Severable and Transferrable**

- Ariz. Rev. Stat. Ann. § 45-176. A water right may be severed from appurtenant land or place of use without losing priority to the water right established and transferred to an Indian Tribe or the United States with the consent and approval of the owner
- A.R.S. § 45-172. Surface water rights can be severed and transferred separate from appurtenant lands.
- A.R.S. § 45-172. Existing water rights can be severed and transferred instream “to the state or its political subdivision for use for recreation and wildlife purposes, including fish,” without losing priority.
- A.R.S. § § 45-464; 45-474 (Type II Grandfathered Groundwater Rights) Inside AMAs, a landowner can only use groundwater pursuant to grandfathered rights. Certain grandfathered groundwater rights can be transferred separate from land on which they were established.
- *Neal v. Hunt*, 112 Ariz. 307, 541 P.2d 559 (1975); *Paloma v. Jenkins*, 194 Ariz. 133, 978 P.2d 110 (App. 1998). Water rights, especially groundwater rights, must be conveyed by deed.

#### **C. An Appropriative Water Right Entails Beneficial Use.**

- A.R.S. § 45-141(A) “The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriate and beneficial use . . .”
- *Arizona Public Service Co. v. Long*, 160 Ariz 429, 436 773 P.2d 988, 995 (1989). “One does not own water in Arizona. One only has the right to put it to a beneficial use.”
- *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 82, 638 P.2d 1324, 1328 (1981). Groundwater rights are usufructuary rights

#### **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

- *Gillespie Land & Irrigation Co. v. Buckeye Irrigation Co.*, 75 Ariz. 377, 384 (Ariz. 1953). Surface water rights are usufructory rights that are appurtenant to property on which it they are established and used.

### **10. Nevada**

#### **A. An Appropriative Water Right is a Real Property Right**

- Nev. Rev. Stat. § 533.025. Water in Nevada belongs to the public.
- *Reno Smelting, Milling and Reduction Works v. Stevenson*, 20 Nev. 262, 21 P. 317 (1889). Nevada is a prior appropriation state and does not recognize riparian rights.
- *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 140 P. 720, 724 (1914). “The right of a direct appropriator to use the waters of a public stream and to apply the same to beneficial use has been termed an “incorporeal hereditament,” and it has been said that a consumer under a ditch, constructed and maintained for the sole purpose of distribution and sale, possesses a like property.”
- *Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535, 537 (1949). “[T]he owner of a water right does not acquire a property in the water as such, at least while flowing

naturally, but a right gained to use water beneficially which will be regarded and protected as real property.”

- *Carson City v. Estate of Lompa*, 88 Nev. 541, 501 P.2d 662 (1972). “When a right to use water has become fixed either by actual diversion and application to beneficial use or by appropriation as authorized by the state water law, it is a right which is regarded and protected as real property.”
- *Dermody v. City of Reno*, 113 Nev. 207, 212, 931 P.2d 1354, 1358 (1997). Nevada law is clear that appurtenant water rights are a separate stick in the bundle of rights attendant to real property.
- Nev. Rev. Stat. § 533.060(2)-(4). Surface water rights cannot be lost through forfeiture but can be deemed abandoned if certain statutory elements are met.
- Nev. Rev. Stat. § 533.060(5). A prescriptive right to use water cannot be acquired through adverse possession.
- Nev. Rev. Stat. Ann. § 37.010. (Public uses for which eminent domain may be exercised). Includes reservoirs, water rights, canals, aqueducts, flumes ditches or pipes.

#### **B. An Appropriative Water Right is Severable and Transferrable**

- Nev. Rev. Stat. § 533.040(2). (Water used for beneficial purposes to remain appurtenant to place of use; exceptions). “If at any time it is impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from the place of use and be simultaneously transferred and become appurtenant to another place of use, in the manner provided in this chapter, without losing priority of right.”
- *Zolezzi v. Jackson*, 72 Nev. 150, 297 P.2d 1081. Water rights are sold with property unless specifically excluded.
- *Margrave v. Dermody Props., Inc.*, 110 Nev. 824, 827-28, 878 P.2d 291, 293-94 (1994). A water right conveys with the land to which it is appurtenant unless expressly reserved.
- *Dermody v. City of Reno*, 113 Nev. 207, 212, 931 P.2d 1354, 1358 (1997). “In an advisory opinion, the Nevada attorney general found that when a condemnor acquires fee simple title to property, appurtenances, including water rights, pass with condemnation unless the appurtenant water rights are specifically reserved. Nev.Op.Atty.Gen. No. 92-9 (10-6-92).”

#### **C. An Appropriative Water Right Entails Beneficial Use**

- 1903 Stats. Nev., Ch. 4, p. 24, § 1. “All natural water courses and natural lakes, and the waters thereof which are not held in private ownership, belong to the public, and are subject to appropriation for a beneficial use, and the right to the use of water so appropriated for irrigation shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.”
- Nev. Rev. Stat. § 533.035. To perfect a water right, an appropriator must put the water to beneficial use.
- *Desert Irrigation, Ltd. v. State of Nevada*, 113 Nev. 1049, 1059, 944 P.2d 835 (1997). A property interest in water is therefore a Usufructory right to use and enjoy the water.

- *State v. Morros*, 104 Nev. 709, 715, 766 P.2d 263, 267 (1988). “Nevada water law (Nev. Rev. Stat. §§ 533.023, 533.030) recognizes and permits water appropriation *in situ*, without a diversion, for public recreation purposes.”

#### **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

- Nev. Rev. Stat. §§ 533.040(1). Water rights are appurtenant to benefitted land. (2) The right may be severed from the land and given to another-then it becomes appurtenant to the place of use.
- Nev. Rev. Stat. Ann. § 111.167. Unless otherwise provided, appurtenant water rights convey with land.
- *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 140 P. 720, 724 (1914). “The water and the land to which it is applied become so interrelated and dependent on each other in order to constitute a valid appropriation that the former becomes by reason of necessity appurtenant to the latter.”
- *Margrave v. Dermody Props., Inc.*, 110 Nev. 824, 827-28, 878 P.2d 291, 293-94 (1994). A water right conveys with the land to which it is appurtenant unless expressly reserved.
- *Dermody v. City of Reno*, 113 Nev. 207, 213, 931 P.2d 1354, 1358 (1997). “Since appurtenant water rights are considered a separate property interest, we find that the word “interests” encompasses appurtenant water rights.”
- *Dermody v. City of Reno*, 113 Nev. 207, 213, 931 P.2d 1354, 1358 (1997). Where the appurtenant water rights were not expressly reserved in the condemnation instrument, the title to the real property (the water rights) transferred to the City in fee simple absolute.

### **11. New Mexico**

#### **A. An Appropriative Water Right is a Real Property Right**

- N.M. Stat. Ann. § 72-1-2 (Water rights; appurtenant to land; priorities)
- N.M. Stat. Ann. § 72-5-22 (Transfer of water rights). For a water appropriation to be valid, “the transfer of title of land . . . shall carry with it all rights to the use of the water appurtenant thereto for irrigation purposes, unless previously alienated in the manner provided by law.”
- N.M. Const. art. XVI, § 2. “The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.”
- N.M. Const. art. XVI, § 3. “Beneficial use shall be the basis, the measure and the limit of the right to the use of water.”
- *Clodfelter v. Reynolds*, 68 N.M. 61, 66, 358 P.2d 626, 629 (1961). “In 1907, New Mexico adopted a comprehensive statute on the law of waters. Ch. 49, N.M.S.L.1907, §§ 151-101 to 151-178, N.M.S.A.1929. The statute codifies the Colorado doctrine, prescribes the procedure for effecting appropriations through applications for permits . . . and the application of the water to beneficial use.”
- *Murphy v. Kerr*, 296 F. 536, 540 (D.N.M. 1923) *aff’d*, 5 F.2d 908 (8th Cir. 1925). “The doctrine of prior appropriation with application to beneficial use has definitely and wholly superseded the common-law doctrine of riparian rights in many of the

jurisdictions in which irrigation is necessary to the growth of crops, and among them is New Mexico.”

- *Murphy v. Kerr*, 296 F. 536, 542 (D.N.M. 1923) *aff'd*, 5 F.2d 908 (8th Cir. 1925) “The rule is settled in this state that to constitute a valid appropriation of water there must be (1) an intent to apply it to some beneficial use, existing at the time or contemplated in the future; (2) a diversion thereof from a natural stream; and (3) an application of it within a reasonable time to some useful industry.”
- *New Mexico Products Co. v. New Mexico Power Co.*, 42 N.M. 311, 77 P.2d 634, 641 (1937). A water right is property and in fact it is held to be real property by most authorities. “It is generally conceded by all of the authorities that a water right, or an interest in water, is real property, and it is so treated under all the rules of law appertaining to such property.” 2 Kinney on Irrigation and Water Rights (2d Ed.) p. 1328.
- *State ex rel. Reynolds v. Miranda*, 83 N.M. 443, 445, 493 P.2d 409, 411 (1972). We hold that man-made diversion, together with intent to apply water to beneficial use and actual application of the water to beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes.
- *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, 143 N.M. 142, 148, 173 P.3d 749, 755. “The legislature has decreed, as an exception to the general rule, that water rights are appurtenant to irrigated land, and follow a conveyance of that land unless specified differently.
- *Walker v. United States*, 2007-NMSC-038, 142 N.M. 45, 51, 162 P.3d 882, 888. Under prior appropriation, “the right to use water is considered a property right which is separate and distinct from ownership of the land.”
- *Lindsey v. McClure*, 136 F.2d 65, 70 (10th Cir. 1943). A water right is a property right and inherent therein is the right to change the place of diversion, storage, or use of the water if the rights of other water users will not be injured thereby.
- *Walker v. United States*, 2007-NMSC-038, 142 N.M. 45, 56, 162 P.3d 882, 893. Because water rights are real property interests, the rules of real property apply, including the requirement of the statute of frauds that all such conveyances be in writing

#### **B. An Appropriative Water Right is Severable and Transferrable**

- N.M. Stat. Ann. § 72-5-22. Any permit or license to appropriate water may be assigned.
- N.M. Stat. Ann. § 72-5-23 All water used in this state for irrigation purposes, shall be considered appurtenant to the land upon which it is used, and the right to use it upon the land shall never be severed from the land without the consent of the owner of the land, but, by and with the consent of the owner of the land.
- *Turner v. Bassett*, 2005-NMSC-009, 137 N.M. 381, 386, 111 P.3d 701, 706. Water right is automatically severed upon issuance of transfer permit, and the severance is not dependent upon the application of beneficial use.
- *Montgomery v. N.M. State Eng'r*, 2005-NMCA-071, 137 N.M. 659, 664-65, 114 P.3d 339, 344-45. New depletions of surface water at a new site did not constitute a new appropriation of surface water because surface water and groundwater were hydrologically connected.

**C. An Appropriative Water Right Entails Beneficial Use.**

- N.M. Stat. Ann. § 72-1-1. “All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use.”
- *Walker v. United States*, 2007-NMSC-038, 142 N.M. 45, 55, 162 P.3d 882, 892, 896. Type of beneficial use can change. No interminable right to continue that same beneficial use. Right of forage is not within the scope of a water right or right-of-way for enjoyment of a water right.

**D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

- N.M. Stat. Ann. § 72-1-2. Beneficial use is the basis, the measure and the limit of the right to the use of water, and all waters appropriated for irrigation purposes, unless excepted by contract, shall be appurtenant as long as beneficially used or until severed from the land.
- *Murphy v. Kerr*, 296 F. 536, 541 (D.N.M. 1923) *aff'd*, 5 F.2d 908 (8th Cir. 1925). The usufructuary right or water right is appurtenant to the land upon which it is applied to beneficial use. Citing *Snow v. Abalos*, 18 N.M. 681, 695, 140 Pac. 1044. It is entirely distinct from the property right in the diversion dam, canals, ditches, and reservoirs, by which the water is diverted, stored, and carried to the land for beneficial use thereon. The water right is an incorporeal hereditament in the flow and use of the stream as a natural resource. *Wiel on Water Rights, Western States*, vol. 1, Sec. 280.
- *Clodfelter v. Reynolds*, 68 N.M. 61, 65, 358 P.2d 626, 629 (1961). Citing Section 75-5-23, N.M.S.A: An appropriator of water may, change the place of diversion, storage, or use as long as there is no detriment to other users.

**GREAT PLAINS**

**12. North Dakota**

**A. An Appropriative Water Right is a Real Property Right**

- N.D. Cent. Code Ann. § 61-04-26. “A water permit may be recorded as any other instrument affecting the title to real property without acknowledgment or further proof. A copy of any order declaring any water right, or portion thereof, forfeited, canceled, or abandoned shall be filed by the state engineer in the office of the recorder in the county or counties where the affected land is located, and it shall be recorded as any other instrument affecting the title to real property.”
- N.D. Cent. Code Ann. § 61-01-03. “In all cases of claims to the use of water initiated prior to March 1, 1905, the right shall relate back to the initiation of the claim, upon the diligent prosecution to completion of the necessary surveys and construction for the application of the water to a beneficial use. All claims to the use of water initiated after March 1, 1905, shall relate back to the date of receipt of an application therefor in the office of the state engineer, subject to compliance with the applicable provisions of law, and the rules and regulations established thereunder.”

**B. An Appropriative Water Right is Severable and Transferrable**

- N.D. Cent. Code Ann. § 61-04-15. “Any conditional or perfected water permit may be assigned only upon approval by the state engineer. Any conditional or perfected water permit may also be transferred, with the approval of the state engineer, to any parcel of land owned or leased by the holder of such water permit. Upon reasonable proof that such assignment or transfer can be made without detriment to existing rights, the state engineer shall cause the water permit involved to be assigned or simultaneously severed and transferred from such land without losing priority of any right previously established.”

**C. An Appropriative Water Right Entails Beneficial Use**

- N.D. Cent. Code Ann. § 61-01-01. “All waters within the limits of the state from the following sources of water supply belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use must be acquired pursuant to chapter 61-04.”
- N.D. Cent. Code Ann. § 61-04-01.2 “A right to appropriate water can be acquired for beneficial use only as provided in this chapter. Beneficial use shall be the basis, the measure, and the limit of the right to the use of water.”

**D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

- N.D. Cent. Code Ann. § 61-03-19. “Upon the adjudication of the rights to the use of the waters of a stream system, . . . a decree (filed with the state engineer), in every case, shall declare as to the water right adjudged to each party, the priority, amount, purpose, and place of use, and, as to water used for irrigation, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.”

**13. South Dakota**

**A. An Appropriative Water Right is a Real Property Right**

- *Knight v. Grimes*, 1964, 80 S.D. 517, 127 N.W.2d 708. The 1955 statutes restricting rights to appropriation of water are valid. SDC 1960 Supp. 61.0101 et seq., 61.0401 et seq.; U.S.C.A.Const. Amends. 5, 14; Const. art. 6, §§ 2, 13; Desert Land Act, § 1, 43 U.S.C.A. § 321.

**B. An Appropriative Water Right is Severable and Transferrable**

- S.D. Codified Laws § 46-5-34.1. Irrigation rights may be transferred apart from the land to which they are appurtenant if they are transferred for domestic use or use within a water distribution system.
- S.D. Codified Laws § 46-5-33. A transfer of title to land shall carry with it all rights to the use of water appurtenant to the land for irrigation purposes.

**C. An Appropriative Water Right Entails Beneficial Use**

- S.D. Codified Laws § 46-5-4. Appropriative rights to water granted since March 7, 1907, are in full force and effect.



- S.D. Codified Laws § 46-5-5. Subject to vested rights and prior appropriations, all waters flowing in definite streams of the state may be appropriated only as provided in chapters 46-1 to 46-10, inclusive. A water right does not constitute absolute ownership of the water, but shall remain subject to the principle of beneficial use. No appropriation in excess of the reasonable needs of the appropriators may be allowed.
- *Platt v. Rapid City*, 67 S.D. 245, 291 N.W. 600, 602 (1940). “We hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became public juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.”

#### **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

#### **14. Nebraska**

##### **A. An Appropriative Water Right is a Real Property Right**

- Neb. Const. art. XV, § 4 The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want.
- *In re Birdwood Irr. Dist. Water Div. No. 1-A*, 1951, 154 Neb. 52, 46 N.W.2d 884. An adjudicated appropriation of waters of stream for irrigation purposes is a vested property right which is subject only to the law in existence at time the right was acquired.

##### **B. An Appropriative Water Right is Severable and Transferrable**

##### **C. An Appropriative Water Right Entails Beneficial Use (without waste)**

- Neb. Const. art. XV, § 5 The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section.
- Neb. Const. art. XV, § 6 The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user.
- Neb. Rev. Stat. § 46-204 The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purposes, but when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming it for any other purpose,

and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.

#### **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

### **15. Kansas**

#### **A. An Appropriative Water Right is a Real Property Right**

- Kan. Stat. Ann. § 82a-701(f) “Appropriation right” is a right, acquired under the provisions of article 7 of chapter 82a of the Kansas Statutes Annotated and amendments thereto, to divert from a definite water supply a specific quantity of water at a specific rate of diversion, provided such water is available in excess of the requirements of all vested rights that relate to such supply and all appropriation rights of earlier date that relate to such supply, and to apply such water to a specific beneficial use or uses in preference to all appropriations right of later date.
- Kan. Stat. Ann. § 82a-701(g). “Water right” means any vested right or appropriation right under which a person may lawfully divert and use water. It is a real property right appurtenant to and severable from the land on or in connection with which the water is used and such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other disposal, or by inheritance.

#### **B. An Appropriative Water Right is Severable and Transferrable**

- *State ex rel. Peterson v. Kansas State Bd. of Agric.*, 158 Kan. 603, 149 P.2d 604, 608 (1944). “Underground waters are part of the real property in which they are situated. The owner of land may convey or grant the underground water, or the right to take it from the land, by an appropriate instrument in writing to the same extent that he might convey or grant any other portion of the real property; or a party, having the right of eminent domain, may appropriate underground water to his use by condemnation proceedings.”

#### **C. An Appropriative Water Right Entails Beneficial Use (without waste)**

- 2012 Kansas Laws Ch. 6 (H.B. 2451), 2012 Kansas Laws Ch. 6 (H.B. 2451). 82a–718. (a) All appropriations of water must be for some beneficial purpose.
- *State ex rel. Peterson v. Kansas State Bd. of Agric.*, 158 Kan. 603, 149 P.2d 604, 608-09 (1944). “An owner of land owns its surface and underground water by the same title as he owns the land itself, and the clay, gravel, coal or oil within it, even though these items of property differ in component parts. The land itself, or any of its parts, is a public resource in the sense that it may be taken for a public use, or the state may prohibit its waste or its use in a manner detrimental to others.”
- *Williams v. City of Wichita*, 190 Kan. 317, 339, 374 P.2d 578, 595 (1962). “The right of the plaintiff to ground water underlying his land is to the usufruct of the water and not { "pageset": "Sa4 to the water itself. . . . The ownership of land does not carry with it any ownership of vested rights to underlying ground water not actually diverted and applied to beneficial use.”

## **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

### **16. Oklahoma**

#### **A. An Appropriative Water Right is a Real Property Right**

- Okla. Stat. Ann. tit. 82, § 105.2 Beneficial use shall be the basis, the measure and the limit of the right to the use of water; provided, that water taken for domestic use shall not be subject to the provisions of this act,<sup>1</sup> except as provided in Section 105.5 of this title.

#### **B. An Appropriative Water Right is Severable and Transferrable**

#### **C. An Appropriative Water Right Entails Beneficial Use (without waste)**

- Okla. Stat. Ann. tit. 82, § 105.2 irrigation water rights are appurtenant in Oklahoma but they may be severed if it becomes impracticable to beneficially or economically use the water for irrigation.

## **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**

### **17. Texas**

#### **A. An Appropriative Water Right is a Real Property Right**

- Tex. Water Code Ann. § 11.001. (Vested Rights Not Affected). “This code does not recognize any riparian right in the owner of any land the title to which passed out of the State of Texas after July 1, 1895.”
- *Motl v. Boyd* (Sup. 1926) 116 Tex. 82, 286 S.W. 458. Under water appropriation acts of 1889 and 1895 (Acts 1889, c. 88; Acts 1895, c. 21), impliedly approved by constitutional amendment of 1904 (Const. art. 3, § 52), general irrigation act of 1905 (Acts 1905, c. 122), general water right laws of 1913 and 1917 (Acts 1913, c. 171; Acts 1917, c. 88), and this section, rights of riparian owner attach only to ordinary flow or underflow of streams, and not to storm or flood waters. This case uses Tex. Const. art. XVI, § 59.

#### **B. An Appropriative Water Right is Severable and Transferrable**

#### **C. An Appropriative Water Right Entails Beneficial Use (without waste)**

- Tex. Water Code Ann. § 11.023. (a) To the extent that state water has not been set aside by the commission under Section 11.1471(a)(2) to meet downstream instream flow needs or freshwater inflow needs, state water may be appropriated, stored, or diverted for: (1) domestic and municipal uses, including water for sustaining human life and the life of domestic animals; (2) agricultural uses and industrial uses, meaning processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric; (3) mining and recovery of minerals; (4) hydroelectric power; (5) navigation; (6) recreation and pleasure; (7) public parks; and (8) game preserves. (b) State water also may be appropriated, stored, or diverted for any other beneficial use.

## **D. An Appropriative Water Right Becomes Appurtenant to Place of Use**