Western Water Rights

Western Water Law, Transactions and Instream Transfers

Peter D. Nichols, Esq.
pdn@bhgrlaw.com / 303-402-1600
Western Water Law

Characteristics of Western Water Rights

• Water is a public resource held in trust by the state
• A water right is a usufructuary right, i.e., right of use
• A water right is an appropriative right
• A water right is a separate real property right
Western Water Law

Appropriation of Water

• Intent to apply water to a beneficial use
  – Overt act(s) that demonstrate intent, a substantial step, and notice to other appropriators

• An actual diversion of water from a natural source

• The application of the water to a beneficial use within a reasonable time

• Anti-speculation doctrine

• Can-and-will doctrine
Western Water Law

Elements of Appropriative Water Rights

- Established by adjudication (court decree) or by state permit:
  - Priority
  - Source
  - Amount
  - Type of use
- Place of use may be specified or implied
- Beneficial use limitation is implied
- May be lost by non-use
Elements of an Appropriative Water Right

Priority

- "First in time, first in right"
- Appropriation date
  - Date of "first step"
    - Intent and overt acts sufficient to put third parties on notice of proposed use
  - Relation Back Doctrine
    - Holds priority date to allow time to develop infrastructure and use
- Administration date (most important)
  - Date of adjudication (court decree)
  - Date of permit
- Note: Conditional water right holds priority date pending completion of appropriation
- Note: Virtually every river basin in the West is over appropriated
  - More claims for water than physically available for use except in extremely wet years
  - Most basins were fully appropriated under average hydrology by 1900
Elements of an Appropriative Water Right

Source

- **Surface water**
  - Direct flow (stream or river)
  - Storage (lake or reservoir)
- **Groundwater**
  - Tributary to surface stream
  - Non-tributary to surface streams
  - Limited interaction with surface streams
- **Point of diversion**
  - Usually PLSS description
Elements of an Appropriative Water Right

**Amount**

- **Rate of diversion**
  - *Surface water*
    - Cubic feet per second (cfs)
    - Miners inches
  - *Groundwater*
    - Gallons per minute (gpm)
    - "Duty of water"

- **Temporal limits**
  - Example: irrigation season

- **Volumetric limits**
  - Implied or explicit in decree or permit
  - Examples: irrigated acreage, acre-feet
Rate of Flow

- Cubic Feet per second
  - cfs
- Gallons per minute
  - gpm
- Million gallons per day
  - mgd
Amount of Water Right

Volume

Acre Foot = approximate annual supply for 1 to 2 households in western US

Water Units

Depiction of One Acre Foot (AF)

1 AF = 325,850 gallons
1 cubic foot per second (cfs) for 1 day = 1.98 AF
1 cfs = 449 gallons per minute (gpm)
Elements of an Appropriative Water Right

Type of use (purpose of appropriation)

• Specified in decree or permit

• Examples:
  – Mining and manufacturing
  – Domestic and municipal
  – Irrigation
  – Environmental
  – Virtually anything deemed "beneficial"

• Normally cannot reuse - return flow "belongs to the stream"
Type of use

Domestic and Municipal

https://www.usgs.gov/media/images/glass-drinking-water-municipal-water-use
Type of use

Irrigation
Type of use
Industrial

WWE Resources – Photographs – Historic Jobs
Type of use

Commercial

https://wise.er.usgs.gov/wateruse/home
Type of use

Power (non-consumptive)
Type of use

Fire protection
• Most federal projects provide supplemental water to owners of water rights
Type of use

Instream Recreation and Environmental

Photo from WWE Resources - Photograph – Photos by WWE employees - Ken's Photos – Historical Photos
Western Water Law

Types of Water Rights

• Examples (use):
  – Direct flow
  – Storage
  – Groundwater
  – Augmentation
  – Exchange
  – Recharge

• Absolute water rights
  – Perfected by use

• Conditional water rights
  – Priority protected by relation back doctrine
Place of use

• May be specified in decree or permit, or implied by circumstances at time of issuance of decree or permit, e.g., land owned by appropriator of irrigation water
Non-appropriative rights

**Contract water**

- Private water companies
- Irrigation districts
- Conservation/conservancy districts
- Bureau of Reclamation
- U.S. Army Corps of Engineers

- Note: Organizations may be the "bare owner" of the water rights, but they do not beneficially use the water rights directly, which contract owners use

- Note: shares in a mutual ditch and reservoir company are NOT contract rights, but rather indicia of pro-rata ownership of underlying water rights
Non-appropriative rights

Exempt water rights

• Exempt domestic wells
• Stock ponds
• “Free river” conditions
  – Diversions allowed when more water available than necessary to satisfy decreed/permitted water rights, e.g., during snowmelt
Water Rights

Administration of decrees and permits

• State Engineer
  – Typically appointed by governor
  – Field employees responsible for day-to-day administration of water rights

• Diversion of water in priority
  – "Calls" by senior water rights when they are not receiving their full rights lead state officials to shut down junior water rights
    • Common in dry years, mid to late summer/fall

• Monitor legal point of diversion, type and place of use for conformance with decree or permit

• Prevent waste
Acquiring Western Water Rights

**Due Diligence**

- What water right?
- Who owns the water right?
- What was the actual historical use of the water under the water right?
- Is there water physically available for use?
- Is any water legally available for use?
Due Diligence

What water rights?

- Adjudications/decrees
- Permits
- State Engineer's tabulation
  - Usually by structure name, e.g., X ditch
  - Often by point of diversion (PLSS)
- State administrative officials, e.g., water commissioner
- Owner/seller
- Organization, e.g., ditch company
Due Diligence

Who owns an appropriative water right?

• Water rights are real property
  – Usually required to be transferred by same formalities as land, i.e., recorded deed
    – Typically quit claim deed or special warranty deed, rarely general warranty deed
    – May be transferred via general appurtenance clause with real estate if grantor's intent
      » Extrinsic evidence may be necessary
  – Notice of transfer of ownership of permit usually required by state

• Challenges
  – Water rights typically excluded from title policies
  – Gaps in title/unrecorded transfers
  – Permits not transferred with change in ownership
  – Deeds often not available on line; require on-site search of county records

• Title opinion from water attorney?
  – Expensive
  – Usually only limited title opinion possible
Due Diligence

Who owns a contract water right?

- Typically represented by contract or certificate
- District or company has record of ownership
- Challenges
  - Private company may not allow non-owner to examine books
    - May answer question about what their books show
  - Owners may fail to transfer shares on district or company books
    - Very common
    - Lengthy legal process to reissue
  - Contracts or certificates may be lost
    - Statutory +/- organizational replacement procedures
      » Open to abuse
Due Diligence

What was the actual historical use?

• Water rights are limited to actual historical use for decreed/permitted purposes
  – Type of use
  – Place of use
• Water engineer will typically evaluate over a representative period encompassing dry, average and wet years
  – Diversion records typically available
• Challenges
  – Records of actual use, e.g., irrigated acreage, often not available
    • May be developed from aerial photos or other historical evidence
  – Informal administrative approval of change in type or place of use probably not recognized by courts in determining historical use
Due Diligence

Is the water physically available for use?

• Water engineer's hydrological evaluation
  – Priority of water right relative to other more senior rights
  – Historical diversion and use pursuant to decree or permit
  – Hydrological scenarios, dry, average and wet years
  – Operability of structures
    • Diversion structures, e.g., headgates, flumes, measuring devices, ditch integrity
    • Wells, e.g., pumps, meters, water quality
    • Reservoirs, e.g., dam integrity, outlet structure, measuring devices
  – Beware "paper rights" with no record of diversions or use
Due Diligence

Is the water legally available for use?

• Water engineer or water attorney evaluation of decree/permit
  – Abandonment/forfeiture
    • "Use it or lose it"
      – Water right can be lost through lack of use
        » Usually requires intent to abandon
        » Presumption of intent to abandon after 5 to 10 years without use for decreed/permitted purpose
  – Historical consumptive use
Changing Water Rights

Changing Type and Place of Use for Instream Flow

• Water rights are real property
  – Separate real property interest from land on which used
    • NOT appurtenant to land
  – May be transferred separately from land
    • May not be true for specific contract rights which may be appurtenant

• May be changed to a new type +/- place of use
  – Change limited to historical consumptive use (HCU)
  – No Injury Rule
Changing Water Rights

Changing Type and Place of Use for Instream Flows

• Water rights are real property
  – Separate real property interest from land on which used
    • NOT appurtenant to land
  – May be transferred separately from land
    • May not be true for specific contract rights which may be appurtenant

• May be changed to a new type +/- place of use
  – Change limited to historical consumptive use (HCU)
  – No Injury Rule