



Western Water Rights

Western Water Law, Transactions and Instream Transfers

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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

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

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



WWE Resources- Photographs – General and Scenic – Rivers and Creeks

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

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

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

Amount of Water Right
Rate of Flow

- Cubic Feet per second
 - cfs
- Gallons per minute
 - gpm
- Million gallons per day
 - mgd



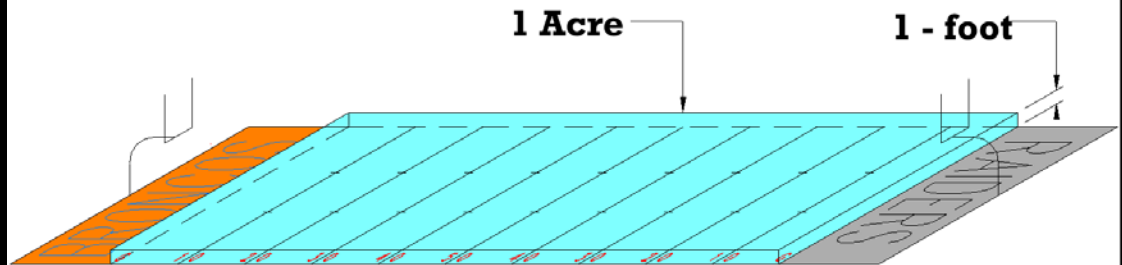
The Center for Environmental Law & Policy

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)

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)



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Type of use

Fire protection



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Photos

Type of use

Supplemental



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- 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

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

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

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?

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

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

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

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

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

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 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



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