



Basic Utah Water Law

By J. Craig Smith

INTRODUCTION

There is, perhaps, no area of American law which evokes the lore of the West more than water law. The scarcity of water in the West has been dramatized in dozens of books and movies from *Shane* to *Chinatown* to *The Milagro Beanfield War*. The body of law that developed in the irrigated river basins and mining camps to allocate this scarce and valuable resource is unique to the arid states of the West, and has long been shrouded in mystique. As an installment of a new "How To" series in the *Utah Bar Journal*, this article will discuss basic Utah water law. The goal of this article is to acquaint the reader with the major principles of water law.

Water law is, in essence, a form of property law and thus is best understood in that context.¹ It seeks to allocate a finite and unique resource. There are two standard measures of water that are used interchangeably.² The first is acre feet. This is a measure of *volume* which has its origins in irrigation. An acre foot is the amount of water necessary to cover one acre of land with one foot of water. This equals 325,851 gallons. The second standard measure is cubic feet per second (CFS). This is a measure of *flow*. A CFS or "second foot" is the number of cubic feet of water that passes a certain point

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each second. One CFS for an entire year yields 235,905,363 gallons or 723.97 acre feet.

APPROPRIATION DOCTRINE

The basis of Utah water law is the appropriation doctrine which first evolved in Colorado. This doctrine prescribes that all water not already appropriated, i.e., not being used, is available for use by any person for a "beneficial" purpose.³ The appropriator does not "own" water, but rather holds the right to perpetually use the water appropriated.⁴ Courts have long recognized this right of use, once it is perfected, as a property right.⁵ This property right may be conveyed separately by deed, or transferred by shares of stock, or if appurtenant to land, with the land.

Beneficial uses are generally considered to be those uses that promote economic activities. In recent years this concept has expanded, in limited circumstances, to

include instream flow to enhance fishery, natural stream habitat and recreation.⁶ Once appropriated, the right to use water exists only so long as the beneficial use continues. A term which must be understood in connection with beneficial use is the "duty" of water. This is the concept that only so much water may be beneficially used for any authorized purpose. For example, the "duty" of irrigation water is, depending on location, around 3 acre-feet per year. Only this much water may be beneficially used for irrigation of an acre of land.

If there is a failure to use water for five years, the right is forfeited.⁷ Water rights may also be abandoned, and, prior to 1939, water could be adversely possessed by seven years of adverse use of the water.⁸ A large and important exception to the state water law principles discussed in this article are water rights held by or reserved for the federal government. Federal water rights are not subject to many aspects of state law. They cannot be forfeited or lost through non-use and may exist without any record or documentation.⁹

A critical aspect to understanding the appropriation doctrine is recognizing its slavish adherence to priority. The principle of priority fully protects beneficial users in order of seniority of their use.

Whoever has the first or prior water right is entitled to receive their entire allocation of water prior to any junior appropriator receiving any water. Need or relative importance of various uses is not a consideration. Obviously, this becomes of particular significance during times of drought when a junior water right holder may not receive any water. During the recent drought, river commissioners on various drainages ordered that holders of water rights with lower priority dates refrain from taking any water. As the drought worsened, the prohibition date moved back into early pioneer times, leaving more and more water users without any water at all.

PRACTICE BEFORE THE STATE ENGINEER

The ultimate goal of the appropriation doctrine is to put all water to beneficial use. Unappropriated water is available at no cost to anyone who can use it beneficially. To accomplish this goal and to administer water rights, an extensive legal and administrative system has been put into place by the State. Title 73 of the Utah Code is the Water and Irrigation volume. Since water is the property of the public, water rights in Utah are administered by the state, subject to federal sovereignty. The administrative body established by Utah statute to regulate water for the State is the State Engineer's office, also known as the Division of Water Rights.¹⁰ The State Engineer, Robert L. Morgan, is the director of the Division of Water Rights in the Department of Natural Resources.¹¹

Since 1903, when statutory administrative procedures to appropriate water were first established, the exclusive method of obtaining a new surface water right, (and since 1935 an underground water right) is through filing an application with — and ultimately obtaining a certificate from the State Engineer.¹² Prior to 1903, the method for obtaining the right to use water was by putting the water to beneficial use. These water rights are known as diligence claims and require beneficial use prior to 1903. In order to memorialize a diligence claim, which is also known as a water user claim, a written claim must be filed with the State Engineer.¹³

In addition to appropriation,¹⁴ the State Engineer is also responsible for general

adjudications where the rights in an entire drainage are determined by Court Decree,¹⁵ distribution of water,¹⁶ dam safety,¹⁷ and regulating water well drillers,¹⁸ stream alterations¹⁹ and geothermal power.²⁰ In many drainages which are fully appropriated, or in other words, where all of the available water has been put to beneficial use, a major function of the State Engineer is to preside over applications for changes in use or points of diversion of water. A catalyst for such applications is often urbanization, where irrigation water is sought to be changed to domestic or municipal use. In addition, the State Engineer maintains public records of water rights, applications, deeds and assignments.²¹ Working under the State Engineer are subordinate engineers over appropriations, distribution and adjudications, dam safety, and finally, special investigations.

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The State Engineer has divided Utah into seven regions with regional engineers overseeing each region. Regional offices are located in Logan, Vernal, Price, Richfield and Cedar City. The engineer for each region is known as the Area Engineer. All other offices, including two regional offices, are located in the State Engineer's main office in the Department of Natural Resources Building at 1636 West North Temple, Suite 220, Salt Lake City, Utah 84116. The telephone number is (801) 538-7240.

Practice before the State Engineer is best described as an informal administrative practice. Applications to appropriate water, change the use of or point of diversion of water, extend the period of time to resume use of water, exchange water, and segregate water, among others, are all initiated by completing and filing pre-printed forms, along with a filing fee. Assistance in completing the forms is readily available from the staff of the State Engineer. Certain applications, including applications to appropriate

water, change the nature or place of use of water, and extensions of time to resume use are advertised by publication and “any interested person” has the right to protest the approval sought in the Application. If a protest is made, a hearing is generally held on the Application and protestants are given an opportunity to be heard.

The State Engineer has designated that all adjudicative proceedings be informal under the Utah Administrative Procedures Act.²² Special regulations govern informal proceedings before the State Engineer. These regulations are found at R655-6 of the Utah Administrative Code. At State Engineer hearings, evidence will often be given in the form of a proffer. Hearsay is admissible. Any aggrieved party may, within thirty days,²³ appeal the decision of the State Engineer to the District Court in the County where the water is located. The review by the District Court of an informal hearing is de novo.²⁴

However, approval of an application is not the final step. For example, an application to appropriate is merely a hunting license for water. Once an application to appropriate water is approved, the applicant must build the diversion works and actually divert the water and put it to the approved beneficial use. A Proof of Appropriation verifying that the water right has been diverted must be filed with the State Engineer within five years of the approval of the application, or an extension may be sought upon a showing of diligent progress.²⁵ Only a licensed engineer may submit the proof of appropriation. And, only after a proof of appropriation is filed, examined and accepted by the State Engineer will a certificate of appropriation be issued by the State Engineer. This is the final step in obtaining and perfecting a water right.

TRANSFER OF WATER RIGHTS

So long as there is not a change in the nature of use, point of diversion, period of use, or place of use, transfer of ownership of water rights does not require approval of the State Engineer's office. However, because of the various ways water rights may be held, transfers must be accomplished in certain specified ways. For example, water may be appurtenant to and transferred with the land, transferred separately by deed, or transferred via shares of stock.

The first step in any transfer of water rights, as in land, is determining the status of the title. However, unlike land, it is not possible to obtain either title reports or title insurance for water from a title insurance company. Title insurance companies, perhaps sensing the title complexities and pitfalls inherent to water rights, steer a wide berth. Thus, determining title and issuing any opinions as to title of water rights fall squarely on the shoulders of lawyers. The source of "insurance" is the professional errors and omissions coverage of the lawyer.

There are several sources to check in researching the status of title or rights to water. First is the County Recorder's office. In many cases water is connected to the land where it is used typically for irrigation. This water is considered appurtenant water, and its title is automatically transferred with the land unless specifically excluded.²⁶ Title to appurtenant water is determined, in part, in the same fashion as title to land. Research of land title, so long as the water has not been lost through non-use or severed from the land, will reveal the title of appurtenant water. Each link in the chain of title should be examined to verify that the water or some portion of it has not been severed from the land. Loss of the water through forfeiture or abandonment will obviously not be of record, but must be ascertained by other means.

The County Recorder also has a file of conveyances of water without land. While practices vary from county to county, they are typically found in a "water" or "miscellaneous" index. This index should be checked whether or not the water is believed to be appurtenant to land. An otherwise unknown severance of water rights which were formerly appurtenant to land may be discovered by checking this index.

A second and even more important source in determining title is the State Engineer's office. The State Engineer maintains an index of title to all water rights filed with or approved by the State Engineer. Additionally, pre-1903 diligence claims, if memorialized, are on record there. The records of the State Engineer should always be carefully reviewed.

It should also be determined whether a general adjudication has been held or is ongoing in the drainage where the water right exists. A general adjudication is a court proceeding which determines all of

the water rights in a particular drainage. For example, the Weber River had been adjudicated. The quantity and priority dates of most water rights in the Weber River drainage are found in the general adjudication decree entered by the Court. There are many adjudications that, while not complete, are ongoing and affect water rights in those drainages. It should always be determined whether an adjudication has been completed or is ongoing which may affect the water right in question.

Finally, if the water right is represented by shares of stock in an irrigation or mutual water company, the records of the company should be checked. Company records should, if accurate, indicate owners of all shares of stock issued or transferred. The validity of the ownership of shares of stock can be readily ascertained. The company issuing the stock can also advise as to unpaid stock assessments, and potential marketability or value of the stock.²⁷

CONCLUSION

There are numerous areas of water law omitted or only mentioned briefly in this article. Many of these areas, such as water quality, federal reserved water rights and security interests in water rights are too complex to be dealt with here. Hopefully, this discussion of basic Utah water law will help the reader to recognize water law issues which would otherwise go unnoticed.

¹See for example, Utah Code Ann. §73-1-10 (1989), which requires that all water rights be transferred by deed in substantially the same manner as real estate, except for water rights

represented by shares of stock.

²Utah Code Ann. §73-1-2 (1989).

³See Utah Code Ann. §73-1-3 (1989).

⁴See *J.J.N.P. Co. v. State, etc.*, 655 P.2d 1133 (Utah 1982), for a discussion of the ownership issue.

⁵A water right is entitled to legal protection including due process protection. See *Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967).

⁶In Utah, only the Division of Wildlife Resources and State Parks may hold an instream flow right. Utah Code Ann. §73-3-3(1) (1993 Supp.).

⁷Utah Code Ann. §73-1-4 (1989).

⁸Utah Code Ann. §73-1-4 and §73-3-1 (1989). See also *Smith v. Sanders*, 189 P.2d 701 (Utah 1948).

⁹Federal water rights and the implied reservation of water by the federal government or Indian tribes are complex subjects outside the scope of this article. Many articles and treatises have been written on these subjects.

¹⁰See Utah Code Ann. Title 73, Chapter 2 for duties of State Engineer.

¹¹Utah Code Ann. §73-2-1.2 (1989).

¹²Utah Code Ann. §73-3-1 (1989).

¹³Utah Code Ann. §73-5-13 (1989). See *East Jordan Irrigation Co. v. Morgan*, 218 Utah Adv. Rep. 62 (Aug. 5, 1993), for a recent discussion of the two methods to appropriate water.

¹⁴Utah Code Ann. Title 73, Chapter 3 (1989).

¹⁵Utah Code Ann. Title 73, Chapter 4 (1989).

¹⁶Utah Code Ann. §73-5-1 to 5 (1989).

¹⁷Utah Code Ann. Title 73, Chapter 5a (1993 Supp.).

¹⁸Utah Code Ann. §73-3-22 to 26 (1989).

¹⁹Utah Code Ann. §73-3-29 (1989).

²⁰Utah Code Ann. Title 73, Chapter 22 (1989).

²¹Utah Code Ann. §73-1-10, §73-2-11, and §73-3-18 (1989).

²²Utah Code Ann. Title 63, Chapter 46(b) (1989).

²³Utah Code Ann. §63-46(b)-14(3) (1989).

²⁴Utah Code Ann. §63-46(b)-15 (1989).

²⁵Utah Code Ann. §73-3-12 (1989).

²⁶Utah Code Ann. §73-1-11 (1989).

²⁷A recent Utah Supreme Court ruling held that the corporate structure of mutual water companies prohibits individual shareholders from filing a Change Application without the water company's approval. *East Jordan Irrigation Co. v. Morgan*, 218 Utah Adv. Rep. 62 (Aug. 5, 1993).

NOTICE

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