



OVERVIEW OF WATER LAW IN NEVADA

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Nevada is on the cutting edge of many issues concerning water law. Much of the population expansion in the United States over the past 60 years has occurred in the arid portions of the west, including Nevada. As one of the country's most arid states, and for years its most rapidly growing state, major and developing metropolitan areas in both northern and southern Nevada today require water resources at a rate, and in quantities, few in the 1950s could have envisioned being possible in a desert.

In meeting this challenge, our state must consider how best to use all available resources. To that end, Nevada's portion of the water from the Colorado River is increasingly utilized for southern Nevada's needs. Water importation and interbasin transfers of water from sparsely populated areas to densely populated areas are at the forefront of Nevada water law, and interbasin transfers have been approved by the state engineer in southern and northern Nevada. The federal government owns a large portion of Nevada's less-populated regions, and significant issues regarding federal reserved water rights, which are not subject to the permit system of the state and which often take priority in use,¹ add to tension on the water resources in the state.

In addition to water supply challenges for communities, Nevada water law involves environmental and water quality issues, endangered species requirements (such as the cui-ui fish in Pyramid Lake and the pupfish at Devil's Hole in Amargosa Valley) and the Native American tribes' reserved

groundwater right claims in the state. With these competing interests, the state engineer must often perform tricky balancing acts.

The complexity that permeates administrative issues involved in the establishment of water supply is also a feature of the transactions that involve the exchange and use of that supply. While many lawyers in Nevada are familiar with the principle that water rights are an appurtenance to the land that is the place of use, this principle and its corollaries are only the tip of the iceberg in water-rights transactions. The process of changing the use of water rights from agricultural to municipal use, the due diligence involved in buying and selling water rights, and encumbering

water rights to secure a lender's loan are all transactions that present traps for the unwary. These issues and others will be briefly discussed in the following overview of Nevada water law.

Background

As background, there are two dominant water-rights systems in the United States. The riparian model provides that water is an incident to owning land adjacent to a water course. The prior appropriation model, which is the dominant model in the arid west, is essentially a "first in time, first in right" system granting water rights to the first person to put the water to beneficial use.

Nevada's present system of new appropriations of surface and groundwater through applications to the state engineer was enacted by the legislature in 1905, with comprehensive reforms and updates being approved by the legislature in 1913. When this permitting system was put into place, any existing water use became a "vested" water right and therefore not subject to the otherwise applicable permitting system.² The process of determining amounts and priority of vested rights is by an adjudication that culminates in a final judicial decree, as statutorily provided in NRS Chapter 533. Examples of adjudicated stream systems in Nevada, for which the allocations and priorities of vested water rights have been set by a final judicial decree, include the Muddy River in southern Nevada (state decree) and the Truckee River in northern Nevada (the federal Orr Ditch decree). Vested rights, once subject to a final judicial decree, are typically referred to as "decreed" water rights, and operate outside the scope of the general permitting system except if there is a change in the point of diversion, or manner or place of use. Other than vested rights, however, the statutory permit process is the exclusive means of obtaining surface water rights³ and groundwater rights,⁴ both of which are under the jurisdiction of the state engineer.

Permitting

All of Nevada's water resources, whether surface or underground, belong to the public.⁵ Water rights are rights to use the water in a specific manner and place, and with a specific point of diversion. Subject to some exceptions, all water not yet put to beneficial use within the state is subject to appropriation.

Once available water is identified, and except as to the vested rights discussed above, a person must obtain a permit from the state engineer prior to initiating use of such water.⁶ The permit, if granted, may be subject to conditions, including metering, monitoring, mitigation of impacts and term of use. Water rights used in mining operations, for example, are temporary water rights that may continue during the life of the particular mine. Water appropriated pursuant to a permit must be put to beneficial use within 10 years.⁷ As long as the applicant is proceeding in good faith with reasonable diligence, this statutory deadline may be extended by the state engineer.⁸ A physical diversion of the water is not absolutely necessary to establish the use of a water right; however, the water must be put to a state-recognized beneficial use in order to formally establish (and maintain) a water right.⁹

**"Whiskey is
for drinking;
water is for
fighting
over."**

Mark Twain

Since most of Nevada's surface water and much of its groundwater has been appropriated, there is great demand to acquire existing water rights. To effectuate a transfer of existing rights, typically the holder of the water rights would apply to the state engineer to change the water right to the place and manner of use and point of diversion required by the purchaser, pursuant to the provisions of NRS 533.370(5) (change applications). The process provides for the opportunity to protest and, if required by the state engineer, have an administrative hearing on the protests. These change applications occur regularly. The state engineer determines if the changes will conflict with existing water rights or protectable interests in existing domestic wells or if the change threatens to prove detrimental to the public interest.¹⁰ Change applications of water rights used for agricultural uses to municipal uses may cause a loss of a portion of the water rights because of the difference in consumptive use. It would be a mistake to pursue a transfer of water rights without first giving full consideration to the change application process and whether it will lead to any obstacles, collateral attacks or reductions in the rights being conveyed.

In addition to considering the issues involved in a change application, the purchaser of water rights should be certain to give thought to whether it will be able to promptly put its water rights to beneficial use. Beneficial use is the essence of the water right, and it controls both the use to which the water may be put as well as the quantity of water a diverter is entitled to use ("Beneficial use shall be the basis, the measure and the limit of the right to use the water." NRS 533.035). Beneficial

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use is a broad concept that brings in many pragmatic considerations, including reasonableness and economic use, and it encompasses long-established uses like irrigation and mining, recreation,¹¹ wildlife support¹² and municipal water supply,¹³ among others. Once a recognized beneficial use is made, such use must continue in order to keep the water rights permit in good standing (subject to the water right holder's ability to file a change application). A purchaser should always satisfy itself prior to acquisition that it will be able to satisfy Nevada's beneficial use test, lest it find its rights at risk of loss immediately after acquisition.¹⁴

Appurtenances and Severability

Water rights, whether vested, permitted, certificated or simply at the application phase, are treated as real property under Nevada law. Once a water right is granted, it becomes appurtenant to the land upon which it is used. Unless water rights are specifically reserved to the grantor in a deed conveying land, appurtenant water rights are conveyed along with the land.¹⁵ Additionally, as long as the water right is appurtenant to the land, any deed of trust or lien encumbrance on the land will also serve to encumber the water rights.¹⁶ The water right may also be encumbered by a deed of trust separately from the land. Because of the complexities surrounding recording issues and severance of water rights, each discussed below, major issues can arise in both purchase and financing transactions.

As real property, the same types of recording procedures that apply to land transactions also apply to water rights. Water rights, deeds, deeds of trust encumbering water rights and memorandums of water rights leases must all be recorded with the recorder for the county in which the water is beneficially used and the recorder of the county where the water is diverted.¹⁷ The state engineer employs a separate filing system for administrative purposes. A report of conveyance should be filed with the state engineer upon conveyance or encumbrance of water rights.¹⁸ Searches of water rights should be conducted in the state engineer's office and the applicable county recorder's office.

Water rights can be severed from the land in various ways. A water right holder may file a change application with the state engineer, which, if approved, allows the holder to change the place of beneficial use for a water right to a new parcel of land. Additionally, water rights can be separately deeded apart from the real property upon which the water right is used.¹⁹ The owner can reserve water rights

in a conveyance of the land. If a lender secures its note with only water rights and not the land, the purchase by the lender or third party of the water rights at a foreclosure sale causes a severance of ownership although the place of use remains the same.²⁰ In northern Nevada and some other counties in the state, developers often enter into "water banking agreements" with water purveyors and in this process, the place of use for the water right is converted into the entire water service area of the water purveyor. These changes, in the place of use, sever the water right from the land where the water was originally put to beneficial use. This severance of the water rights from the land means a deed conveying that same land or a deed of trust encumbering such land does not convey or encumber the water rights.

Summary

In the current contraction in Nevada's real estate market, water rights have retained their value in a much more substantial way than land. As such, land owners, developers, lenders and their legal counsel will continue to have more than a passing interest in understanding Nevada's water rights system. However, all should take care not to avoid complacency once that understanding is achieved. Nevada's system will continue to evolve to address future and continuing challenges. For example, in a pending appeal to the Nevada Supreme Court, appellant argues for implied reserved underground water rights for Native American tribes. Additionally, significant importation projects are pending that will continue to refine the interbasin transfer process. In sum, although the basic principles of appropriation have been in place for some time, it is likely that water law in Nevada will continue its historically dynamic development. ■

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