Water Rights, Ditch Rights, and Other Water Issues

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Topics

- Water Rights 101
- Ditch Rights (Rights-of-way)
- Land Boundaries Near Public Waters
Water Rights 101

- Prior Appropriation Doctrine
- Administrative and Judicial systems

Why water rights?

[Map showing annual precipitation with colored regions indicating less than 20 inches of rainfall and more than 20 inches of rainfall]
Water scarcity issues common in southern Idaho
North Idaho residents traditionally have not focused on Water Rights
But the same state law of prior appropriation applies

Prior Appropriation Doctrine
- Old law based in mining camp traditions
- Codified in Idaho Constitution and statutes
- “First in time, first in right”
  - Priority system—seniors v. juniors
  - Protect seniors from injury, but no “futile calls”
- Beneficial use—“the basis, the measure, and the limit of the right to use water”
What is a water right?

- The right to use water—a “usufructuary” right
  - User does not own the water molecules—water is a public resource, owned by the state
  - Diversion and beneficial use required
- A real property right (if licensed or decreed)
  - appurtenant to land – conveyed by deed
  - may be conveyed and transferred, and severed from land
- BUT applications, permits, water shares, and adjudication claims are personal property
  - Conveyed by assignment

What do you need a water right for?

- All diversions and beneficial uses, e.g.:
  - Irrigation, commercial, industrial
  - Aesthetic, wildlife, recreation storage
  - Instream (only State or Federal gov)
  - Note: storage (by itself) is not a beneficial use
- Some Exceptions (see next slide)
Exceptions to normal water right requirements:

- Domestic water rights (IC 42-111)
- Instream stock water rights (IC 42-113)
- Fire fighting (IC 42-201(3)(a))
- Forest practices and dust abatement (IC 42-201(3)(b))
- 24-hour fill policy
- Users of municipal or irrigation district water

Elements of a water right

- Source
- Priority Date
- Quantity
- Point of Diversion
- Purpose of Use
- Period of Use
- Place of Use
- Owner

Also see conditions in water rights

Set forth in:
- Permits,
- Licenses,
- Decrees,
- Transfer approvals

See also: IDWR database with caveat

Look at deeds, assignments
Water Right records
Idaho Department of Water Resources online database
Administrative and Judicial processes

**Administrative system**
- Idaho Department of Water Resources (IDWR)
  - Water quantity management
  - Also, well construction and stream channel alteration
- Idaho Water Resource Board (IWRB)
  - Water planning and policy: State Water Plan and CAMPs
  - Minimum stream flow water rights
  - Water Supply Bank

**Judicial system**
- SRBA, NIA, and BRA – general stream adjudications
- Private adjudications
- Administrative appeals go to Idaho’s “water court”

Regions, basins and subbasins
Administrative areas

- Water Districts
- Groundwater Management Areas
- Critical Groundwater Areas
- Areas of Drilling Concern
- Areas of Groundwater Concern
- Nitrate Priority Areas
- Water Measurement Districts
- more....

How do you establish a water right?

- Decree (from SRBA or other court) to confirm existing right

- Apply for a new water right (IDWR)
  - Required for ground water since 1963, surface water since 1971
General Stream Adjudications

- **Adjudication statutes – Chapter 14, Title 42, I.C.**
  - SRBA – commenced in 1987; “finished” in 2014
  - North Idaho Adjudication (NIA)
    - CSRBA – commenced in 2008; ongoing
    - Palouse River Basin – IDWR processing claims
    - Clark Fork – Pend Oreille River Basin - ?
  - Bear River Basin – 2020 legislation pending

- Decreed rights are *real* property, appurtenant to land

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Regions, basins and subbasins

[Map of Idaho's regions, basins, and subbasins with highlighted regions](image)
Application/Permit/License process

- Application for Permit
  - May be protested
  - Must satisfy statutory criteria
- Permit issued
  - Personal property right, conveyed by assignment
  - Not appurtenant to land
- Licensing
  - Conforms to Proof of Beneficial Use; due in 5 years (5 & 10 year extensions possible)
  - License is real property right appurtenant to land, conveyed by deed

Changing existing water rights
(it’s called a “transfer”)

- Source
  - Cannot change (for better)
- Priority Date
- Quantity
- Point of Diversion
- Nature of Use
- Period of Use
- Place of Use
- Owner
  - Changed by deed (or assignment, if permit)
Water right ownership

Important rules to remember:
- Licensed and decreed water rights are real property and are appurtenant to land, but can be severed from title to land
- Applications, permits, water shares, and claims are personal property and not appurtenant to land
- No title insurance—due diligence done by parties (often buyer’s responsibility)
- IDWR’s ownership records are not necessarily complete or accurate

Losing water rights

Water right lost by:
- Forfeiture: objective, statutory (IC 42-222)
  - 5 years of no beneficial use
  - Partial forfeiture possible
- Abandonment (subjective, common law)
  - Intent to give up right—no time period
  - Actual relinquishment or surrender

Resumption of use (common law)
- Same priority date, etc., if no injury to other rights
Protecting water rights

- Diversion & beneficial use to full extent, unless specific exception (IC 42-223), e.g.:
  - crop set aside program
  - municipal “RAFN” water rights
  - Water Supply Bank
  - “no control” exception

- Extension of Time to Avoid Forfeiture (IC 42-222)
  - 5 years
  - One time only
  - Notice published; may be protested

Water delivery / management entities

- **Commercial ditch companies**: for profit; deliver irrigation water to consumer-irrigators under rental, sale or similar contract arrangement; like a private utility; company holds legal title to water rights; beneficial title in users

- **Mutual canal or ditch companies**: not-for-profit corporations; deliver irrigation water at cost to members; company holds legal title to water rights; beneficial title in users

- **Irrigation districts**: quasi-governmental entities; taxing authority; formed pursuant to a statutory election process (Title 43, Idaho Code); provide irrigation water to all irrigable lands within boundary; BOR or District hold title to water rights; beneficial title in users

- **Municipal providers**: IC 42-202B(5): municipalities, political subdivisions, corporations operating public water supply, etc.; provider owns water rights

- **Lateral (Ditch) Water Users Ass’ns**: IC 42-1301 et seq: formed when 3 or more parties take water from same lateral / ditch; authority to operate and maintain ditch and assess property owners; amount assessed is a lien against land; water users own water rights

- **WATER DISTRICTS BUT NOT GROUND WATER DISTRICTS**
Ditch rights v. Water rights

- “Ditch right” = shorthand for easement/right-of-way for water diversion/delivery facilities
- Separate from water rights
  - Water right does not establish ditch right
  - Can own a water right and have no ditch right, and vice versa
  - Appurtenant to land
  - IDWR does not determine or enforce ditch rights

Establishing Ditch Rights

- Written/recorded document
- Common law (e.g. prescription, adverse possession)
- Condemnation (IC 42-1106)
Statutory Ditch Rights

- Statutory rights-of-way for irrigation (IC 42-1102)
  - By agreement, prescription, adverse possession
  - By condemnation
  - But existence of visible irrigation ditch, canal, or conduit is notice of right-of-way

Scope of Ditch Rights

- IC 42-1102 says irrigation ditch rights include:
  - Right to access, clean/maintain/repair
  - Width (including banks) necessary to properly clean/maintain/repair with personnel and equipment as is “commonly used or is reasonably adapted to that work” and to deposit spoils (but no greater than “absolutely necessary”)

  - Scope is determined by case-by-case facts; New Sweden owned 16-foot easement based on equipment used to maintain canals
Interference with Ditch Easements

No encroachments without written permission of ditch owner (IC 42-1102 & 42-1209)

- Encroachments placed without permission must be removed if they “unreasonably or materially interfere” with easement
- *Johnson v. Highway 101 Investments, LLC*, 156 Idaho 1 (2014) – permanent structure within an easement of definite location and dimension (i.e. not a 42-1102 easement) is per se unreasonable

Interference with Ditch Easements

Right to lateral and subjacent support (IC 55-310)

- Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjacent land; can excavate, but must give prior notice
Relocation of Ditch Easements

- Right to maintain/relocate ditches (IC 42-1207)
  - Landowner can relocate or bury ditch in pipeline with written permission of ditch owner.
  - Ditch owner cannot change location of ditch without permission of landowner, but can bury ditch in same right-of-way.
  - If landowner redirects right-of-way or buries pipeline, landowner and successors are responsible for increased operation and maintenance costs.

Permission to encroach / relocate

*Pioneer Irr. Dist. v. City of Caldwell, 153 Idaho 593 (2012)*

- City constructed stormwater discharge conduits in Pioneer canal – encroachment.
- “A ditch owner’s determination whether to permit an encroachment will be reviewed to determine whether [a] the decision-making process was reasonable, [b] the determination was arbitrary and capricious, or [c] the findings upon which the determination was reached were clearly erroneous.”

Does same standard apply to relocation?
Lateral Water Users Associations

- Lateral WUA formed by statute whenever 3 or more people take water at “the same point” and through a common ditch (I.C. 42-1301)
- Association may: Organize, Assess, Record and collect liens (like HOAs)
- Association (usually) doesn’t own ditch or easement; need Association permission for encroachments? or each water user’s?
  - *Beach Lateral Lateral Water Users Ass’n v. Harrison*, 142 Idaho 600 (2006) – Ass’n doesn’t own ditch, but can enjoin encroachments / interference

Ditch fights

- Common issues with ditch rights
  - NEWCOMER SYNDROME – shared facilities
  - Ditches crossing lands of others
    - Landowner restricts access
    - Water users desire access
  - Buried pipelines – visible?
  - Condemnation potential
Example 1: Ditch on neighbor's land

Example 1.1: "Invisible" buried pipe on neighbor's land
Example 1.2: "Visible" buried pipe on neighbor's land

Shared water facilities

- Types of Shared Facilities
  - Wells
  - Ditches
  - Pumps, pipelines, electrical facilities, etc.

- Reasons for Sharing facilities
  - Access to source limited
  - Subdivision of larger common parcel
  - Hydrologic or Hydrogeologic limitations
  - Economics
  - Residential or commercial real estate developments
Shared water facilities

Potential problems

- NEWCOMER SYNDROME
- Assuring adequate supply
- Assuring ongoing operation and maintenance
- Assuring access
- Assuring water quality
- Assuring transparency
- Assuring appropriate control and enforcement of rights

Solution: written and recorded agreements

Shared water facilities

Who cares about shared facilities?

- Buyers - part of their due diligence
- Sellers – affects value and marketability
- Lenders/mortgage holders – affects value of their security
- Contractors – affects likelihood of getting paid
- IDEQ – regulation of community water systems
- IDWR – water rights administration
Example 2: Shared Ditch

Ditch serving Owner A's entire property

Example 2.1: Shared Ditch

Ditch serving Owner A's and Owner B's properties
Example 2.2: Shared Well

Well serving Owner A's and Owner B's properties

Example 2.3: Shared Ditch

Owners A and B are gone. Ditch still serves same lands now owned by Owners C, D, E, F, and G
Drains and drainage

Idaho recognizes a natural servitude of natural drainage between adjoining lands so that the lower owner must accept the ‘surface’ water which naturally drains onto his land.

But the upper landowner cannot accumulate and release water in unnatural concentrations in such a manner as to increase the damage on the lower landowner.


Drains and drainage

Drain owners protected like ditch owners

IC 42-1207:

- requires written permission of drain owner for landowner to change or bury drain
- drain owner can bury it, but landowner can say where
- drain owner responsible for operation and maintenance, but landowner responsible for increased costs

Who owns the drain: upstream or downstream users?
Enforcement of ditch and water rights

- **Administrative**
  - IDWR administers water rights, not ditch rights

- **Civil**
  - injunctive relief
  - damages – perhaps triple (IC 42-902)

- **Criminal** – misdemeanor for:
  - interference or injury to ditch (IC 18-4301, -4306)
  - wrongful diversion of water (IC 18-4304)
  - burying or relocating ditch without permission of ditch owner (IC 18-4308)

Stream channel alteration / CWA 404

- **Idaho Stream Channel Alteration permits**
  - Permit needed to obstruct or change any “stream channel”
  - “Stream channel” means a “natural watercourse of perceptible extent, with definite bed and banks, which confines and conducts continuously flowing water.” Does not include ditches, canals, laterals and drains for irrigation or drainage purposes

- **Federal Clean Water Act 404 permits**
  - Permit needed for discharge of pollutants into “waters of the United States.”
Waters of the US


Includes the discharge of “dredged or fill material” under Section 404

What are the “waters of the United States” (WOTUS)?

- WOTUS not defined in Clean Water Act, instead defined by USEPA and USACE regulations
- Complicated analysis and history of regulatory changes

Remember: Tributaries to traditional WOTUS always WOTUS

* For illustrative purposes only. Proposed jurisdictional waters in bold.
Determining land boundaries near public waters

- This is not a water rights issue—as mentioned:
  - Right to use water in Idaho does not depend on proximity to water source
  - And, right to use water in Idaho does not guarantee access to water source
- This issue concerns title to lands adjacent to and submerged under natural waters

Land boundaries near public waters

- Navigability for title - Equal footing doctrine
  - If stream or lake is navigable, bed and banks are owned by the state in trust for the public, and title to lands bordering on navigable streams stop at the natural or ordinary high water mark (OHWM)
  - If stream or lake is not navigable, the riparian (stream) or littoral (lake) landowner owns to the thread of the stream or center of the lake
  - Also, riparian landowner could own bed and banks of navigable water if title passed to landowner prior to statehood (not common)
Land boundaries near public waters

Navigability and OHWM are based on circumstances existing at the time of Idaho statehood (1890)

Idaho Department of Lands (IDL) maintains a list of navigable streams and lakes

IDL’s list is not exclusive—IDL or courts may determine that additional lakes and rivers are navigable for title purposes.

Land boundaries near public waters

Navigability in fact test

“rivers must be regarded as public navigable rivers in which are navigable in fact” even if “many hundreds of miles” from the sea. The Daniel Ball, 77 U.S. 557, 563 (1870).

Waters are navigable if in 1890 they were “used either for transporting freight or passengers by boats, or for floating lumber, logs, wood, or any other product to market” Johnson v. Johnson, 14 Idaho 561, 95 P. 499 (1908)

Also “6 inch log” test in “Recreational trespass” statutes IC 36-1601(a)
Land boundaries near public waters

**OWHM**

"natural or ordinary high water mark" is defined to be “the line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes.” IC 58-104(9); IC 58-1302(c) (lakes only); IC 58-1202 (public trust).

- Lakes: “uninfluenced by man-made dams or works” IC 58-1302(c).
- Public trust doctrine: “where it would have been if no alteration had occurred” IC 58-1202(2).

Evidence of OWHM


- Presence of vegetation is important, but is merely an aid in proving the location of that line.
- Where no evidence exists of an actual line in 1890, the required finding is simply the ‘ordinary high water mark,’ which may be established by evidence that is unrelated to either soil or vegetation.
Changes to beds and banks

<table>
<thead>
<tr>
<th>Type</th>
<th>Description</th>
<th>Boundary changes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accretion</td>
<td>Gradual and imperceptible deposit of solid material creating new dry land</td>
<td>Owner of riparian land ordinarily gains title to land added by accretion</td>
</tr>
<tr>
<td>Erosion</td>
<td>Gradual washing away of solid material bordering stream by action of water</td>
<td>Owner of riparian land ordinarily loses title to land lost by erosion</td>
</tr>
<tr>
<td>Reliction</td>
<td>Gradual and imperceptible but permanent withdrawal of water exposing dry land</td>
<td>Owner of riparian land ordinarily gains title to land added by reliction</td>
</tr>
<tr>
<td>Avulsion</td>
<td>Sudden and perceptible loss of, or addition to, riparian land</td>
<td>Boundary line remains the same</td>
</tr>
</tbody>
</table>
Access to natural waters

- State owns beds and banks of navigable waters in trust for public use
- State’s ownership is subject to public’s right to use waters “as public highways”
- Interstate navigable waters subject to federal control for navigation

Access to natural waters

Recreational use of Navigable Waters

- Navigable streams between OHWM lines and all streams flowing through State public lands are open to public use as a public highway for travel and to exercise the incidents of navigation – boating, swimming, fishing, hunting and all recreational purposes. I.C. § 36-1601(b).
- No trespass on private land allowed other than between the OHWM lines of navigable streams. I.C. § 36-1601(c).
  - except trespass allowed if irrigation dams etc. interfere with navigability, limited to accessing private land “at the nearest point where it is safe to do so” I.C. § 36-1601(c).
Thank you!

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Questions?