

Water - One Stick in the Bundle of Property Rights

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During the December Mega-Ag Convention in Casper, I spoke about how a Wyoming water right fits into a landowner's "bundle of sticks." This article provides a summary of those remarks.

Ownership

"The water of all natural streams, springs, lakes or other collections of still water within the boundaries of the state are hereby declared to be the property of the state." Wyo. Const., Article 8, § 1. The Board of Control is tasked with "supervision of the water of the state and of their appropriation, distribution and diversion. . . ."¹ Title 41, Article 5 describes the permit system that was developed and adopted for the purpose of allowing individual landowners to divert and appropriate waters for beneficial use.²

Landowners obtain the right to use water of the state by applying the water to beneficial use in accordance with the law.³ "Beneficial use shall be the basis, the measure and limit of the right to use water at all times."⁴ An adjudicated water right is "attached" to those lands that are described in the water right permit.⁵

Severing Water Rights

A water right may be severed from the land to which it is attached in two primary ways – through an abandonment proceeding or by a temporary or permanent transfer (changes of use and changes in place of use).

The abandonment procedures are defined in W.S. §§ 41-3-401 and 41-3-402. The first statute applies to the situation whereby a landowner with an equal or junior water right from the same source of supply seeks abandonment of an equal or senior water right. The second statutory provision defines the State Engineer's authority to seek abandonment of a water right (a procedure rarely invoked in Wyoming history). The standard of abandonment is as follows: "Where the holder of an appropriation of water from a surface, underground, or reservoir water source fails, either intentionally or unintentionally, to use the water therefrom for the beneficial purposes for which it was appropriated . . . during any five (5) successive years, he is considered

¹Wyo Const. Article 8, Section 2.

²See Title 41, Article 5 of the Wyoming Statutes.

³*Wyoming Hereford Ranch v. Hammond Packing Co.*, 33 Wyo. 14, 236 P. 764 (1925).

⁴W.S. §41-3-101.

⁵*Scherck v. Nichols*, 55 Wyo. 4, 95 P.2d 74 (1939).

as having abandoned the water right and shall forfeit all water rights and privileges appurtenant thereto.”

The second manner in which a water right may be severed from the land to which it is attached is to seek a permanent or temporary transfer pursuant to W.S. §§ 41-3-104 and 41-3-110. In order to effectuate any such transfer, the water right holder must obtain prior approval from the Board of Control or the State Engineer (depending upon the nature of the transfer involved). A temporary transfer involves submitting an application (on a pre-printed form) to the State Engineer’s Office. A permanent transfer (for either type of use or place of use) is generally more complicated, and the Board of Control will evaluate many different factors, including the historical rate of diversion, consumptive use, and return flows (to ensure that there is no injury to existing lawful appropriators).

Protecting Your Water Right

You, as the individual water right holder, are in the best position to protect it. There are several steps that you should take to do so. First, make sure that you have copies of your permits. Second, know your priority date(s), the lands to which those rights are attached, and the uses permitted. Third, if you have not already done so, have your water right adjudicated.⁶ Fourth, make sure that the actual use matches that of the permitted use. If it does not, pursue a redescription of your water right through the Board of Control.⁷ Fifth, keep records of your use.

MOST IMPORTANTLY, exercise your water right by applying it to beneficial use.

For more information about this article or water rights in general, please contact Hageman & Brighton at 307-635-4888.

⁶See Title 41, Chapter 4, Article 3 of the Wyoming Statutes.

⁷See Title 41, Chapter 3 of the Wyoming Statutes.