

AVOID SENDING YOUR CLIENT UP A CREEK WITHOUT A PADDLE:

PRACTICAL TIPS FOR NAVIGATING A NEVADA WATER RIGHTS TRANSACTION

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In many respects, purchasing water rights is not much different from purchasing other real property. This being said, any practitioner advising a client in a transaction involving water rights should be aware of a few water right-specific steps that should be taken to ensure the client ends up with the interest they think they are getting. The following three recommendations will assist a practitioner in avoiding common pitfalls in water rights transactions.

Primer on Nevada Water Law

Before proceeding to the three specific recommendations, it is helpful to understand a few basic principles of Nevada water law. In Nevada, all surface and ground water is owned by the people of the state.¹ Pursuant to Nevada Revised Statutes Chapter 533 a person can acquire a usufructuary right to a certain quantity of surface water. Chapter 534 of the NRS allows for a similar right to groundwater. In order to acquire a water right, an application to appropriate must be made to the Nevada Division of Water Resources (NDWR). Assuming the application is granted, the NDWR issues a permit. In addition to identifying the quantity of water authorized for use, the permit also identifies the place of use, point of diversion, and manner of use for the water right. Each permit also contains two very important dates. The first is the date by which the diversion works must be constructed. The second is the date by which the water must be placed to beneficial use. Failure to meet either of these dates, or to obtain an extension thereof, results in the cancellation of the water right. Once a water right is placed to beneficial use, the NDWR modifies it from a permitted water right to

a certificated water right. A certificated groundwater right must continue to be placed to beneficial use at least once every five years or it is subject to forfeiture. A certificated water right is often referred to as a perfected right, though this term should be used carefully as its loose use in the past has led to some confusion of its meaning. Both surface and groundwater rights can also be lost by abandonment. The place of use, point of diversion and/or manner of use of a water right can be modified by filing an application with the NDWR. Such applications are often called change applications. When a change application is granted, a new permit is issued and the water right certification process commences anew.

Water Right-Specific Tasks

1. Determine Regulatory Status

When you are contacted by a client regarding a water right transaction, it is common for the client to provide you with a permit or certificate number. A common mistake is to just research the regulatory status of the permit involved in the transaction. This is not sufficient. When acquiring an interest in a water right, your client is inheriting the history of that permit all the way back to the permit's base right. The base right is the original appropriation permit. Even if not done by express permit term, the NDWR generally takes the position that a permit is also subject to all terms and conditions contained in each and every permit from the current permit back to the base right. To understand what terms your client must comply with, you must research all of the permits back to the base right. You may learn that the NDWR has issued a ruling involving one of the





right should be purchased without first taking the time to review the individual NDWR file for the water right.

A common mistake is the belief that a certificated water right, particularly for groundwater, requires less due diligence. When considering a certificated groundwater right, one of the primary concerns should be whether the water right has continually been put to beneficial use. If you fail to ask this question during due diligence, your client may receive a rude awakening when they file a change application to move the water to their property and the change application is denied on the basis that the water right was previously forfeited for non-use. The NDWR only maintains annual water usage records for a limited number of groundwater basins. Thus the prior owner, in most instances, will need to be the primary source of usage information. If the prior owner cannot provide historic usage data, this is another red flag. If the client elects to move forward notwithstanding the lack of usage data, you should advise them that there is a risk of forfeiture that may be difficult to quantify. A forfeiture can be cured by resuming beneficial use of the water right so long as the NDWR has not begun formal forfeiture proceedings prior to the cure being completed.²

permits and in that ruling certain conditions were placed on the permit. You may also find that there is a long history of extensions of time without the water being placed to beneficial use, yet there are only a few extensions on the current permit. Such facts are potential red flags regarding the ongoing viability of a permit. The entire permit history must be identified and understood to fully advise a client about the status of the water right they are acquiring. No water

2. Confirm Title

Another mistake often made in a water rights transaction is sole reliance on the records of the NDWR to determine ownership of water rights. While it is important to understand who the NDWR recognizes as the owner of record, it is not the NDWR's records that confirm ownership of a water right. A vital step in assessing ownership is to search

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the real property records of the applicable county recorder. In conducting a search of the county recorder records, it is not enough to solely look at deeds expressly conveying water rights. In addition, deeds that convey real property to which a water right is appurtenant (water is appurtenant to its place of use) are presumed to also convey such water right. It is important to note that occasionally the “place of use” will split two counties, thus requiring the records of both counties to be searched. If a water right is not expressly reserved in the deed, it will be conveyed along with the land to which it is appurtenant.³ Thus, both deeds conveying water rights as well as deeds conveying the land to which the water is appurtenant must be reviewed as part of the due diligence.

Reviewing the ownership of water rights is complicated by Nevada’s historical and current requirements relating to the recording and filing of deeds

relating to the establishment and transfer of such rights. Prior to 1995, there was no statutory requirement under Nevada law that required that a deed conveying water rights be recorded with a county recorder. Instead, there was only a statutory duty to file such deed with the NDWR.⁴ Accordingly, some water rights deeds might have been recorded with the county recorder, while others might not. Likewise, some water rights deeds might have been filed with the NDWR, while others might not. Unfortunately, the legal consequences of such failures to file or record have not been specifically determined by the Nevada Legislature, nor have these issues been addressed by the Nevada Supreme Court.⁵

In an attempt to prospectively remedy this historic confusion, the Nevada Legislature enacted legislation in 1995 requiring water rights deeds to be both recorded with the county recorder and filed with the NDWR.⁶ While these revisions to the NRS provided clear direction on how water rights conveyances should be addressed going forward, the legislation did not apply retroactively to conveyances that occurred prior to October 1, 1995.⁷ Thus, despite the Legislature’s intent to provide clear direction on water rights ownership and title issues, the 1995 legislation did not adequately address the risk created by unrecorded, or un-filed, water rights deeds prior to October 1, 1995.

Notwithstanding the ambiguities in Nevada law, it is both prudent and necessary to search the applicable county recorder records (in addition to the records of the NDWR) when researching the ownership of water rights in Nevada. A search of the applicable county recorder records to determine the ownership of water rights should be conducted in the same manner as one would search the county recorder records to determine ownership of land (i.e., through the grantor/grantee index).

3. Record and File Proper Conveyance Documents

The last recommendation comes into play in closing a water rights transaction. In light of the 1995 legislative changes, the process for conveying water rights has been significantly clarified. Water rights, like real property, are conveyed by deed.⁸ The deed must be recorded in the county in which the point of diversion and the place of use is located.⁹ As noted above, in some instances, this will result in the deed being recorded in multiple counties. Unlike real property, however, recording of the deed is not the final step in transferring ownership.

In addition to recording the deed, a report of conveyance must be filed with the NDWR.¹⁰ A copy of the recorded deed and a completed abstract of title must accompany the report of conveyance filing.

The forms are available on the NDWR website. It is important to read the representation in the report of conveyance signature block. The signer has to swear under penalty of perjury that he or she has completed a review of the records of the applicable county recorders. Once the report of conveyance is filed, the NDWR will review the forms and either reject or accept the filing. The NDWR will not review the records of a county recorder in the process of reviewing the report of conveyance. A rejection occurs if there is any defect in the chain of title based on the deeds on file with the NDWR. The NDWR cannot and does not resolve title disputes. Any title dispute must be resolved by a court of competent jurisdiction.¹¹ If the filing is accepted, the NDWR recognizes the new owner as the owner of record and he or she has the ability to make various administrative filings with the NDWR. The Nevada Supreme Court has made clear that the effect of failing to file a report of conveyance is that the NDWR has no obligation to provide notice of any administrative action taken against the water right.¹² Thus, a water right could be cancelled or forfeited without notice to the owner if no report of conveyance is filed.

Recently, people have begun to realize that in Nevada, land without water is of limited value. Thus, there is a growing trend for those financing land transactions to specifically collateralize water rights as part of such transactions. Water is collateralized in much the same way as real property, generally through a deed of trust. The deed of trust should be recorded in the county or counties in which the point of diversion and place of use are located. In many cases it is also advisable to make a UCC filing on the infrastructure necessary to divert the water. In addition to the deed of trust, the lender and borrower should execute a notice of pledge (in duplicate original). Again, these forms are available on the NDWR website. In a situation involving water rights as collateral, a report of conveyance is filed with the NDWR along with copies of the notice of pledge and an abstract of title. If a notice of pledge is prepared, one does not need to file the entire deed of trust (the NDWR appreciates keeping their files smaller). Failure to make the security filings with the NDWR again relieves the NDWR from any obligation to provide the secured party with notice of any administrative filings on the water right. Thus, the water right could be cancelled, forfeited or modified without the security interest holder having knowledge of any of these events.

By knowing the regulatory status of a water right, confirming ownership in the records of the county recorder and the NDWR and making the necessary statutory filings, a client will be better positioned to understand what they are acquiring and will also be better able to enjoy the benefits of owning a right to use one of Nevada's most precious resources. ■



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- 1 Nev. Rev. Stat. §§ 533.025, 534.020.
- 2 See *Town of Eureka v. State Engineer*, 108 Nev. 163, 169 (1992).
- 3 See *Margrave v. Dermody Properties*, 110 Nev. 824 (1994); NEV. REV. STAT. § 111.167.
- 4 Nev. Rev. Stat. § 533.385(2) (1993) *Repealed*.
- 5 See Testimony of Senator Mark James, Nevada Senate Committee on Natural Resources, 3-4 (February 20, 1995). Available at <http://leg.state.nv.us/Session/68th1995/minutes/SNR220.txt>.
- 6 See S.B. 93, 68th Session, Nevada Legislature (June 19, 1995).
- 7 See Nev. Rev. Stat. § 533.382.
- 8 Nev. Rev. Stat. § 533.382.
- 9 *Id.*
- 10 *Id.* at § 533.384.
- 11 *Id.* at § 533.386(4).
- 12 See *Division of Water Resources v. Foley*, 121 Nev. 77, 82 (2005).

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