

Legal Considerations for Water Re-Use

Whose Water Is It?
Where Does It Come From?
and
Where Does It Go?

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Whose Water Is It?

Ownership of Water

- The waters of the State of Idaho are a public resource and the State of Idaho owns the water, not the individual water users



Ownership of Water

(cont.)

- Because the State owns the water, it has the right and responsibility to supervise its use and appropriation. The Idaho Department of Water Resources (IDWR) is the state agency charged with the duties of water administration.

Prior Appropriation Doctrine

- The State of Idaho, more particularly IDWR, administers the waters of the state according to the prior appropriation doctrine, which operates upon the basic premise of “first in time is first in right”
- Applies equally to surface and groundwater sources and conjunctively managed sources

Appropriation of Water

- Appropriation of water is its physical diversion from its source and its application to a beneficial use. Appropriated water is appurtenant to the ground upon which it is applied.



Appropriation of Water

(cont.)

- In general, only water in its natural state can be appropriated. This includes water flowing in a natural channel or stream, springs flowing at the surface, and ground water to the extent that these waters have not been fully appropriated already. Water flowing in non-natural channels (such as canals, laterals, or ditches) ordinarily cannot be appropriated, as it has already been appropriated by another.

Beneficial Use

Beneficial uses recognized in the State of Idaho include:

- Irrigation
- Domestic uses
- Stock watering
- Municipal supply
- Commercial uses
- Industrial uses
- Cooling
- Fish propagation (aquaculture)
- Recreation
- Fire protection
- Power generation
- Mining
- Ground water recharge
- Fish & Wildlife
- Heating

Elements of a Water Right

- Name and address of owner
- Source of water – ground water or surface water – name of stream
- Quantity – cubic feet per second; gallons per day; acre-feet
- Priority date – determinative of the right to use water relative to all other water rights

Elements of a Water Right

(cont.)

- Point of diversion – legal description of where water is diverted from its source
- Place of use – specifies property upon which the water may be applied
- Purpose or nature of use – the beneficial use
- Season of use – dependent upon purpose of use

Obtaining Water Rights

- Traditionally, all that was required was the diversion of water from its source and its application to a recognized beneficial use
- 1963 – Legislation enacted requiring that those seeking to appropriate ground water must apply and obtain a permit and subsequent license from IDWR
- 1971 – Amended legislation requiring same application and administrative process for the appropriation of surface water

Changes in Water Rights

- Once secured from IDWR, transfers (changes made to the elements of a water right) and changes in ownership require that proper application and/or documentation be submitted to and approved by IDWR
- Transfer criteria (I.C. § 42-222(1))
 - Injury criterion

Legal Attributes

- Real property rights
- Appurtenances
- But severable
- Tension between right to use and IDWR right to administer
- Decreed right not necessarily absolute

Where Does It
Come From?

Water Entities

- Irrigation districts
- Canal companies
- Lateral ditch water users' associations



Idaho law provides for the formation of various entities designed to distribute water through the construction, operation, and maintenance of diversion and distribution works. Entities, oftentimes, own the water rights.

Other Entities



- Drainage districts
- Flood control districts
- Water and sewer districts
- Watershed improvement districts

Easements and Rights-of-Way

- Fee simple
- Idaho Code Section 42-1102
- Idaho Code Section 42-1204
- Express
- Prescriptive

Ditch Rights

- Real property rights under the law recognized separate and apart from water rights

Irrigation Entity Duties and Responsibilities

- Idaho Code Section 42-1201 (1899)
- Idaho Code Section 42-1202 (1899)
- Idaho Code Section 42-1203 (1899)
- Idaho Code Section 42-1204 (1881)

Idaho Code Section 42-1201

- Those who “own or control” irrigation facilities must maintain sufficient flow of water through the system during the irrigation season to meet the needs of those entitled to receive the water therefrom

Idaho Code Section 42-1202

- Those who “own or control” irrigation facilities must maintain the same and keep them in “good repair” for the delivery of water to those entitled to the delivery

Idaho Code Section 42-1203

- Owners of irrigation facilities must “carefully keep and maintain” any embankments constituting the facilities in “good repair” so as to minimize and/or prevent the wasting (leaking) of water. Owners may only turn a proper amount of water into the facility so as not to overwhelm its capacity, thereby resulting in the waste of spilled water breaching the levels of the embankments.

Idaho Code Section 42-1204

- The “owners or constructors” of irrigation facilities, and their successors in interest, must “carefully keep and maintain the same” in “good repair” so as not to damage or in any way injure the property of others
- Grants right-of-way for purposes of cleaning, maintaining, and repairing the irrigation facility—including the right to deposit debris or spoils on the banks of the facility

Urbanization Challenges and Growing Pains

- Idaho Code Section 42-1207 (1907)
- Idaho Code Section 42-1208 (1981)
- Idaho Code Section 42-1209 (2004)



Idaho Code Section 42-1207

- Where an irrigation facility traverses the land of another, that landowner has the right to relocate or bury the facility or to bury in a pipeline any open facility. However, any and all changes to an irrigation facility are made at the landowner's expense and the landowner must first obtain the written permission of the facility owner—no permission, no right to move the facility. Increased maintenance costs are also borne by the landowner and not the irrigation entity.

Idaho Code Section 42-1208

- Irrigation entity rights-of-way and easements are not subject to adverse possession
- No person may prevent an irrigation entity free access to the rights-of-way or construct any obstruction in/on the rights-of-way in an effort to adversely possess the same

Idaho Code Section 42-1209

- Easements and rights-of-way for irrigation entities are “essential.” Thus, no person may cause or permit any encroachments onto the easements or rights-of-way. Any encroachments placed without permission shall be removed at the expense of the person or entity causing or permitting the encroachment.

Where Does It Go?

Recapture / Waste / Re-Use

- Who owns reclaimed wastewater?
- States differ on the answer

- Arizona

- Reclaimed wastewater belongs to those who treat it; can use it for any reasonable use; outside of prior appropriation doctrine

- New Mexico

- Similar to Arizona with addition that downstream users can compel continuing discharge; artificial surface water outside of prior appropriation doctrine

- Montana

- Hybrid: Reclaimed wastewater owned by treater, water can be appropriated so it is “in-doctrine,” but downstream users cannot compel discharge/waste

- Idaho

- ???

Idaho

- Unlike the states discussed, Idaho has no judicial decisions or legislation on point. Most likely a hybrid similar to Montana. What is known are the concepts of “recapture” and “waste,” and that municipal water rights are viewed as being entirely consumptive and, therefore, lost to the system.

Idaho

(cont.)

- Surface waste and seepage may be appropriated, but the subsequent appropriation is subject to the right of the owner to cease wasting it, or to recapture it within their property boundary before injection into a natural water course. Downstream users cannot compel waste for their benefit. Limited to original appropriation, for the same use, on the same land.

Questions that have not been directly resolved

- Who owns the underlying water right and, therefore, has the right of recapture?
- While junior takes a source as they find it at the time of their appropriation, they also have the right/expectation of that continued construct subject to legal use by seniors; context of transfer—no injury criterion—leave carriage behind?

- In Idaho, the lack of comprehensive legislation on re-use rights is a good thing in my opinion, at least at this point. Common law-based doctrines in the absence of legislation allow the courts and agencies some flexibility in approach and outcome. Rigid legislation can be short-sighted and incomplete and can create tension with common law doctrines . . . Ask Washington state.

Irrigator Discharge Considerations

- CWA Agricultural Return Flow Exemption—
§ 402(I)(1)
 - Those discharges “composed entirely of return flows from irrigated agriculture” are exempt from the NPDES Permit requirements of the Act

IDAPA 58.01.02.101.02

Man-Made Waterways

- Protected for uses for which the water body was developed—agricultural water supply
- Entirely man-made?
- Former natural water course hybrid change calculus?
- Singular “only” use; or additive undesignated waterway protected for fishable/swimmable standards too?

NPDES-Based Discharges Permit Compliant?

- If so, Region 10 has taken a largely hands-off approach
- Ditch = receiving water body or conduit? (Permit implications)
- Intersection of agricultural return flow exemption and permit-based discharges . . . permit a shield?
- What about “waters of the U.S.?”



Beyond the regulatory red tape
there are practical water
quantity and water quality
concerns

Water Quantity / Timing

- Facility capacity?
- In-season vs. off-season?
- Free-board bottlenecks?
- Maintenance considerations?

Water Quality

- Plant upsets – likely a question of “when,” not “if”
- Crop irrigation water quality constraints (*e.g.*, FSMA)?
- Urbanization and increased animal and human exposure concerns

Discharge Benefits

Yes . . .

- Less natural source demand
- Less storage demand/lease opportunities
- Increased re-use has cleansing benefits for Boise River
- Reliable supply in lean years

Discharge Benefits

(cont.)

But, do the potential benefits outweigh the risks . . . maybe (hopefully) . . .

- Indemnity provisions – regulatory permit needs and harm/damages
- Financial incentives to provide initial capital
- Maintenance burden share
- Technical aspects / flow control / automation
- Patron education and support

Questions?



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