Idaho Water Rights and Easements in Property Transactions

Learning Objectives:

− Review Idaho water rights and associated easements requirements
− Describe how to ensure that water rights and associated easements are properly conveyed during a real estate transaction

Instructor Note: The focus of this topic should be in building a foundation of understanding surrounding water rights and associated easements in Idaho. Licensees are regularly the front line for questions on these issues—particularly during property transactions.

Instructors should keep in mind that these materials are NOT intended to make “water experts” out of any student or instructor, but to give licensees a basic introduction of the rights and duties associated with water and associated easements.

I. Water Rights and Easements

A. Water rights and easements can be a complicated subject. Often, questions arise during property transactions regarding the nature and scope of water rights and easements on the subject property.

Group Discussion:

1. What are some common questions or issues that arise when brokering a real estate transaction that includes water rights?
B. Most property transactions in Idaho will involve some connection to water and/or associated easements

C. As Idaho communities have developed and expanded into historical farmlands, two things remain:

1. The water rights and/or entitlements

2. Associated easements

Slides #3-6 provide aerial photos with examples of urban development around water infrastructure.

**TRUE or FALSE**

A recorded document is not required for a ditch easement to be valid.

TRUE. Idaho Code 42-1102(4) states that “the existence of a visible ditch” is sufficient to put others on notice of the existence of the easement. Recording of that easement is not required.

**TRUE or FALSE**

The roadways along irrigation canals are public property.

FALSE. In most instances, the canals are located on easements crossing private property owned by third party landowners. In many instances, such as when the canal passes through a residential development, the canal can cross property owned by hundreds, if not thousands, of different landowners.

Slide 10 shows an example of a plat for a subdivision. Note lots 1-6 of Block 1. Each butt up to the “Centerline of Church Lateral Canal” (Red arrow). The easement for that canal crosses each individual lot.

Slide 11 shows an aerial photo of the same location. Point out that the properties on both sides of the canal end at the centerline of the canal – meaning the easement in that section cross 18 different private properties.
II. Overview of Water Rights and Water Laws in Idaho

A. Important terms

1. Prior Appropriation: The priority date of a water right determines the order of water delivery during times of shortage. The earlier priority date being the better right.

2. Application, permit, license: The process for acquiring a new water right
   a. An application is filed, seeking permission to begin the process to acquire the right
   b. If approved, a permit is granted, authorizing the applicant to develop any infrastructure and begin diverting water
   c. Finally, a license is issued based on the actual development and use of water
      • A permit is personal property
      • A license is real property (I.C. § 55-101)

3. Claims, recommendations, decrees: The process for confirming a water right in the water court. Steps are as follows:
   a. The water user files a claim with the court identifying, among other things, how much water is used and the purpose and location of that use
   b. That claim is investigated by the Idaho Department of Water Resources, which submits a recommendation to the court
      • The recommendation includes the results of the investigation, including how much water is used, and the purpose and location of that use
      • Any discrepancy between the claim and the recommendation may be litigated before the court
   c. The court issues a decree, which formally adjudicates the water right
4. Domestic Use Water Right
   
a. Use of water for domestic purposes that does not require a documented water right, so long as the use is limited to:
      - No more than 13,000 gallons per day; **and**
      - In home use; **and**
      - Irrigation of no more than ½ acre. (I.C. § 42-111)

5. Water Entitlement: The right a water user has to use water based on:
   
a. Land ownership (in the case of an irrigation district)
   
b. Ownership of shares (in the case of a canal company)
      - It is common in Idaho to receive water from an irrigation district or canal company
      - In these instances, the district or company own the water right(s)

6. Shares: A canal company is a private non-profit corporation; water entitlement within a canal company is represented by shares
   
a. Those who own shares of the company are entitled to a proportional use of the company’s water rights

7. Canal, lateral, ditch: Man-made channels used to convey water from the river to the ultimate place of use
   
a. Generally, canals are large conveyance structures that feed water to laterals
   
b. Laterals feed ditches, which convey water to the ultimate destination

8. Headgate: A structure used to control the flow of water into a canal, lateral, or ditch
9. Pressurized Irrigation System: A system that receives irrigation water from a canal or lateral and distributes it through pressure pipes to the end user (parks, residential yards, etc.)
B. Water right elements (who, what, when, where)

Discussion of the basic elements of a water right. These identify the water a property owner owns in relation to the water appurtenant to the property. Slide #16 provides an example of a water right.

1. Who owns the water right?
   a. Generally identifies the current owner, prior owners, attorney of record and known security interests

2. What is the source of the water being used?
   a. A river, stream, lake, groundwater, etc.

3. What is the authorized (i.e. beneficial) use of the water?
   a. Irrigation, aesthetic ponds, fish propagation, etc.

4. When can a water right be used?
   a. Also known as “season of use”

5. Where can a water right be diverted and where can it be used?
   a. Also known as “point of diversion” and “place of use”

**Group Discussion:**

What are some things you might see on property that would provide an indication that water rights or ditch easements may be involved in a property transaction?

C. Common Water delivery infrastructure

1. Headgate – *(See picture on slide for common example)*

2. Canals, laterals, ditches, drains
a. These channels can be open and visible; or

b. The channels can be buried in a pipeline. Check with property records and local water delivery entities to determine location of any buried channels on the property.

3. Pumps

a. Will usually be placed in a canal, lateral, ditch or drain.

b. Can be used for individual properties or for a group of properties. If used for a group of properties, be sure to check for any shared well agreements.

4. Pressurized irrigation systems

a. Commonly used for developments to deliver water to multiple property owners.

**TRUE or FALSE**

Irrigation districts and canal companies are the same—they just have different names.

FALSE. Although they have similar purposes, they are different types of entities under the law (public v. private). This may impact how water entitlements are conveyed in a property transaction.
III. Taxing and Assessing

A. Irrigation Districts and Ground Water Districts

1. Entitlement based on land ownership (Generally, if land is owned within the boundaries of an irrigation district, they are entitled to receive, and will be assessed for the proportional share of water – even if the water is not used. In some instances, properties have been “excluded” from the irrigation district and are not entitled to water or obligated to pay assessments)

2. Taxing authority (Assessments are set pursuant to Chapter 7, Title 43, Idaho Code and are based on the costs of operating the district. A lien is placed on property for any unpaid assessments)

   a. I.C. 43-706: “All assessments shall be liens against the property assessed...”
3. Tax deed for unpaid assessments (Failure to pay assessments will result in water not being delivered to the property and may lead to a tax deed being taken on the property)

a. I.C. 43-716: “If the property is not redeemed within three (3) years from the date of delinquency entry [i.e., if delinquent assessments are not paid], the treasurer of the district or his successor in office must make to the district...a tax deed to the property.”

b. I.C. 43-720(7): “The deed conveys to the grantee the absolute title to the lands described therein, free of all encumbrances, except purchase contracts, mortgages, deeds of trust or leases of record to the holders of which notice as has not been sent as in this chapter provided...”

B. Canal Companies

1. Entitlement based on shares owned (A canal company is a private, non-profit corporation. The entitlement to water is based on ownership of shares in the company. The shares are considered personal property.)

2. Assessments (Assessments are set pursuant to Chapter 22, Title 42, Idaho Code and are based on the cost of operating the company. A lien is placed on property for any unpaid assessments.)

a. I.C. § 42-2201: “Such company, corporation or association of persons shall have a first and prior lien, except as to the lien of taxes” for any unpaid assessments.

3. Unpaid Assessments (Failure to pay assessments will result in water not being delivered to the property and may lead to foreclosure proceedings on the water right)

IV. Easements and Rights of Way

A. Ditch Owner’s Rights

1. Elements of an Easement

   a. Recording of ditch easement not required!

      • Visible ditch = notice of easement

      • I.C. § 42-1102(4)

Discussion Questions:

1. What are the rights of a landowner as it relates to a ditch easement across that landowner’s property?

   Although the property is owned by the landowner, there are limitations on what the landowner can do. The landowner does have the right to access and use that property. However, the landowner cannot interfere with the operation and maintenance of the ditch easement. As will be discussed further below, this includes a prohibition against any “encroachment” within the easement. Common encroachments include fences, gardens and other vegetation, parking vehicles (including recreational vehicles) within the easement, and outbuildings like sheds and shops.

2. What are the rights and duties of a ditch owner as it relates to a ditch easement across a landowner’s property?

   The owner of the easement has the right to enter the property for the inspection, operation, maintenance and repair at any time of the day and any season of the year. This includes the right to remove any debris or encroachments. The owner of the easement is also obligation to maintain the ditch in proper working order to avoid damage to surrounding properties.
2. Right of access & maintenance:
   a. I.C. § 42-1102(2)
   b. Right to “enter land”
   c. Right to inspect, operate, clean, maintain, and repair
   d. Right to occupy the easement (ditch and roadway)
   e. Rights extend “during any season” and do not require notice

3. Width of easement: “such width as is necessary to properly” maintain the ditch. (I.C. § 42-1102(2)(a))

B. Debris Within an Easement

1. I.C. 42-1102(2)(b)

2. Includes “debris, soil, vegetation, and other material” that must be removed to properly maintain the ditch

3. An easement includes the right to remove debris and either:
   a. Clear the debris from the property;
   b. Incorporate the debris into the ditch and related roadways (i.e. sediment), OR
   c. “Deposit and leave” the debris within the easement

4. Private property with easement for the facilities

C. Obligations associated with an easement

1. Make sure you know who owns or operates the infrastructure (general rules):
   a. Canals or Laterals: Irrigation Districts, canal companies
   b. Ditches: Landowners
c. Groundwater Pumps: Generally, individual water right owners
d. Pressurized Irrigation System: Landowners, subdivisions, HOA

2. Owner or operator of the infrastructure:
   a. Has a duty to keep the ditch “in good repair”
   b. Is liable for “all damages occasioned by the overflow thereof, or resulting from any neglect or accident (unless the same be unavoidable) to such ditch”
   c. I.C. 42-1102(3) & 42-1204

D. Landowner’s Rights & Obligations
   1. Ditches, including roadways along either side, are not public property
   2. Landowner can be on their land, but encroachments are prohibited
   3. Landowner cannot exclude water management representatives from accessing the easement

E. Encroachments Prohibited
   1. Idaho law prohibits any encroachment on a ditch easement without the written permission of the ditch owner.
      a. Encroachments include: “public or private roads, utilities, fences, gates, pipelines, structures, landscaping, trees, vegetation, or other construction or placement of objects”
      b. Must have “written permission of the owner or operator of the right-of-way” to place any encroachment
      c. I.C. 42-1102(5) & 42-1209
   2. Any unauthorized encroachments will be “removed at the expense of the person or entity causing” the encroachment

The following slides show images of common prohibited encroachments:
• Slide 35: Images from eastern Idaho showing a fence built right on a diversion structure and a construction road built by filling in a lateral

• Slide 36: Images from the Mini-Cassia area showing a fence built near a canal leaving insufficient room for the equipment necessary to maintain the canal

• Slide 37: Images from the Magic Valley showing fences and other structures blocking access to the right of way.

• Slide 38: Images from the Magic Valley showing how encroachments can impact the ability to remove debris from a right of way.

V. Notice and Property Transactions (That Include Water)

A. What happens to the water when property changes ownership?

1. **ALL** water rights and/or entitlements are conveyed to the new owner **unless the seller expressly reserves** the water rights and/or entitlements in the sale documents

   a. Silence = conveyance

2. The new owner assumes all rights and duties associated with the water right and entitlement

   a. I.e., the *right* to use the water and the *duty* to pay any related assessments

B. When property is conveyed, the ownership records of the water right or water entitlement **MUST** be updated

C. Type of notice depends on who owns the water right(s)

1. **Property Owner:** Submit a Notice of Change of Ownership to the Idaho Department of Water Resources

   a. “All persons owning or claiming ownership of a right to use the water of this state ... shall provide notice ... of any change in ownership ... within [120] days ...” (I.C. § 42-248)


2. **Irrigation District:** Submit proof of purchase (i.e., recorded deed) to irrigation district to demonstrate land ownership – i.e., entitlement to water

3. **Canal Company:** Contact company to notify them of transaction and learn process of assigning the shares to the new owner
D. How to search water rights?

1. [www.idwr.idaho.gov](http://www.idwr.idaho.gov)

2. Water Rights → Search Water Rights → “I Agree to the Terms of Use”
E. Enter search criteria (enter everything you have and do multiple searches with different criteria):

1. Property owner’s name
2. Water right number
3. Legal description of property (“Location of Use or Diversion”)
4. Use of Water

![Water Right and Adjudication Search](image)
F. How to determine if property is within an irrigation organization’s boundary

1. Idaho Department of Water Resources Map and GIS Data Hub

2. Select “Irrigation” under the “Maps by Subject” tab

G. Select “Irrigation Organizations”
H. Enter Property Address (make sure the “Irrigation Organizations” box is checked)

I. Results will identify irrigation organization

1. Buyer should contact the organization to identify steps to update ownership records
VI. Common Questions

A. If there is water on the property (i.e. in a ditch, stream, etc.), do I have a right to use that water?

1. Only if there is a water right for the use (be sure to search as discussed in prior slides)

2. If there is no water right for the use, then the landowner cannot use the water.

B. If there is a well on the property, do I have a right to use it? Do neighbors have a right to use it?

1. You may use the well if there is a water right (be sure to search as discussed in prior slides).

2. If there is no water right, the well may be used by a neighboring landowner (be use to search water rights as discussed in prior slides).

3. Look for a shared well agreement.

C. Since a documented water right is not required for a domestic use (up to 13,000 gallons per day), how do I know if a water right associated with the property?

1. Even if there is no documented water right on the property, the landowner likely has a domestic use right if water user on the property is (1) less than 13,000 gallons per day; (2) used for 1 home; and (3) irrigates ½ acre or less.

D. There is a ditch on my property. Can the landowner move it to a different location on my property?

1. The landowner may not move the ditch easement without written permission from the ditch owner.

2. I.C. § 42-1207
E. There is a ditch on my property. Can the ditch owner move it to a different location on my property?

1. The ditch owner may not move the ditch easement without written permission from the landowner.

2. I.C. § 42-1207

F. There is a ditch on my property, can the landowner bury the ditch in a pipeline?

1. The landowner may not pipe the ditch without written permission from the ditch owner.

2. Must meet “standard specifications” and cannot disrupt water delivery.

3. I.C. § 42-1207

G. There is a ditch on my property, can the ditch owner bury the ditch in a pipeline?

1. The ditch owner may pipe the ditch within the existing easement.

2. Landowner’s written permission required to move the ditch (or pipeline) to different location.

3. I.C. § 42-1207

H. I live in a neighborhood and receive an assessment from the local irrigation district. I do not use any irrigation district water and, in fact, have no way to get that water to my house. Do I have to pay the assessment?

1. Yes! Land within the service area of an irrigation district is subject to assessments.

   a. EVEN IF you do not use the water;

   b. EVEN IF you have no ability to get the water to your property (i.e. the ditches were filled in when the land was developed).
2. Landowners can petition to be excluded from the irrigation district:
   a. Will eliminate the obligation to pay assessments and the right to receive water. (I.C. §§ 43-1101, et seq.).
   b. Contact the local irrigation district to learn about this process.

VII. Steps for when Property Changes Hands

A. What should the seller do?
   1. Identify and disclose all water rights and/or entitlements
   2. Provide copies of water documents (i.e., water rights, shares, well agreements, etc.)
   3. Identify any water rights / entitlements being retained by the seller
   4. Make sure that any water being retained is clearly and expressly identified in the sales agreement

B. What should the buyer do?
   1. Make sure water rights / entitlements are identified on the purchase agreement
   2. Update ownership records with state and/or water delivery entities following closing

C. Don't be afraid to contact a local water attorney or expert to answer any questions about water rights and/or easements