Commission Core 2022

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

• As Idaho communities have developed and expanded into historical farmlands, two things remain:
  • The water rights and/or entitlements
  • Associated easements
Meridian (2002 v. 2021)
Idaho Falls (2003 v. 2021)
Post Falls (2003 v. 2021)
TRUE or FALSE?

A recorded document is not required for a ditch easement to be valid.
“The existence of a visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal or conduit has the right-of-way and incidental rights confirmed or granted by this section.” I.C. 42-1102(4)
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.
Important Terms

- Prior Appropriation
- Application, permit, license
- Claims, recommendations, decrees
- Domestic Use Water Right
- Water Entitlement
- Shares
- Canal, lateral, ditch
- Headgate
- Pressurized Irrigation System
Water Right Elements
# The Water Right

## IDAHO DEPARTMENT OF WATER RESOURCES

### WATER RIGHT REPORT

1/26/2002

**IDAHO DEPARTMENT OF WATER RESOURCES**

**Water Right Report**

**WATER RIGHT NO.: 37-2043**

### Owner Type

**Current Owner**

- Name and Address: BIG NAT LLC
  - 112 PRICE LN
  - BELLEVUE, ID 83313-9126
  - 48221448

**Attorney**

- Name and Address: BARNER RUSKLETT B. SHAPPEL LLP
  - 163 2ND AVE W PO BOX 63
  - TWIN FALLS, ID 83301-0063

**Original Owner**

- Name and Address: KERR PACIFIC CORP
  - C/O ANDREW P KERR
  - GILBERTSON BROWNSTEIN RISK
  - 1200 S MAIN BLDG
  - PORTLAND, OR 97205
  - 5032411772

**Security Interest**

- Name and Address: D L EAVES BANK
  - PO BOX 87
  - TWIN FALLS, ID 83301-0087
  - 2087316300

**Priority Date:** 01/24/1983

**Basis:** Decreed

**Status:** Active

**Water Supply Bank Status:** Active

### Source

- **Tributary:** BIG WOOD RIVER/JACK RIVER

### Beneficial Use From

- **Beneficial Use From:** IRIGATION
  - **Date:** 04/15
  - **Volume:** 0.3 CFS

### Diversion Rate / Volume

- **Diversion Rate:** 0.1 CFS

### Location of Point(s) of Diversion:

**BIG WOOD RIVER/JESSNW LT 3/Sec. 36/Township 8N/RANGE 18E/BLAINE County**

**Irrigation Use:**

- **Acre Limit:** 15

**Place of Use Legal Description:** IRIGATION BLAINE County

### Table: Water Right Details

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<thead>
<tr>
<th>Township</th>
<th>Range Section</th>
<th>Lot</th>
<th>Tract</th>
<th>Acres</th>
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</table>

**Total Acres:** 20.08

### Conditions of Approval:

1. This right is limited to the irrigation of 15 acres within the authorized place of use in a single irrigation season.
**WHO Owns the Water Right?**

### WATER RIGHT REPORT

1/28/2022

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report

WATER RIGHT NO. 37-20643

<table>
<thead>
<tr>
<th>Owner Type</th>
<th>Name and Address</th>
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<tr>
<td>Current Owner</td>
<td>BIG HAT LLC (112\ ) PRICE LN (BELLEVUE, ) ID 83313-5126 (4062234484)</td>
</tr>
<tr>
<td>Attorney</td>
<td>PAUL L ARRINGTON (BARKER ROSHOLT &amp; SIMPSON LLP 163 2ND AVE W PO BOX 63 TWIN FALLS, ID 83303-0063 2087330700)</td>
</tr>
<tr>
<td>Original Owner</td>
<td>KERR PACIFIC CORP (C/O ANDREW P KERR GILBERTSON BROWNSTEIN RASK 1200 SS MAIN BLDG PORTLAND, OR 97205 5032211772)</td>
</tr>
<tr>
<td>Security Interest</td>
<td>D L EVANS BANK (PO BOX 87 TWIN FALLS, ID 83303-0087 2087369300)</td>
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</table>

Priority Date: 03/24/1883
WHAT is the Source of Water for the Right?

<table>
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<td>MALAD RIVER</td>
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Security Interest: DL EVANS BANK  
PO BOX 87  
TWIN FALLS, ID 83303-0087  
2087369300

Priority Date: 03/24/1883
Basis: Decreed  
Status: Active  
Water Supply Bank Status: Active

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<th>To</th>
<th>Diversion Rate</th>
<th>Volume</th>
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<td>10/31</td>
<td>0.3 CFS</td>
<td>0.3 CFS</td>
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<tr>
<td>Total Diversion</td>
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<td></td>
<td></td>
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</tr>
</tbody>
</table>
WHAT is the authorized use of the water right?

Security Interest: D L EVANS BANK
PO BOX 87
TWIN FALLS, ID 83303-0087
2087369300

Priority Date: 03/24/1883
Basis: Decreed
Status: Active
Water Supply Bank Status: Active

Source
BIG WOOD RIVER

Tributary
MALAD RIVER

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Total Diversion | 0.3 CFS

18
WHEN can the water right be used?
WHERE can the water right be diverted and used?
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?
Common water delivery infrastructure?

- Headgates
- Canals, laterals, ditches
- Drains
- Pumps
- Pressurized irrigation systems
TRUE or FALSE?

Irrigation districts and canal companies are the same—they just have different names.
Although they have similar purposes, they are different types of entities

- Irrigation districts: Quasi-municipal organizations
- Canal Companies: Private, non-profit corporations
TRUE or FALSE?

An Irrigation District can take a tax deed (acquire ownership) on property for unpaid assessments (no matter how small the unpaid assessment bill is).
I.C. 43-706: Unpaid assessments are liens against the property

I.C. 43-716: After 3-years, if still unpaid, the irrigation district can take a tax deed to the property

I.C. 43-720(7): “The deed conveys to the grantee the absolute title to the lands described therein...”
Irrigation Districts and Ground Water Districts

- Entitlement based on land ownership
- Taxing authority
- Tax deed (i.e. take ownership of property) for unpaid assessments
Canal Companies

- Entitlement based on shares owned
- Assessment
- Can foreclose of water rights (i.e. take water only) if assessments are not paid
1. What are the rights of a landowner as it relates to a ditch easement across that landowner’s property?

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

• Recording of ditch easement (*including ditch and roadway*) is not required!

• Right to “enter land”:
  • To inspect, operate, clean, maintain, and repair the ditch;
  • During any season and without notice

• How wide?
  • “Such width as is necessary to properly” maintain the ditch
Debris Within an Easement

• I.C. 42-1102(2)(b)

• Debris includes “soil, vegetation, and other material” that must be removed to properly maintain the ditch

• An Easement includes the right to remove debris and either:
  • Clear the debris from the property
  • Incorporate debris into the ditch and related roadways, OR
  • “Deposit and leave” the debris within the easement
Ditch Owner’s Obligations

• Make sure you know who owns / operates the infrastructure

• Owner / operator of the infrastructure:
  • Has a duty to keep the ditch “in good repair”
  • 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”
  • I.C. 42-1102(3) & 42-1204
Landowner’s Rights & Obligations

• Ditches, including roadways along either side, are not public property

• Landowner can be on land, but encroachments are prohibited

• Landowner cannot exclude water management representatives from accessing the easement
Encroachments Prohibited

• Idaho law prohibits any encroachment on a ditch easement without written permission from ditch owners.

• Encroachments include “public or private roads, utilities, fences, gates, pipelines, structures, landscaping, trees, vegetation, or other construction or placement of objects.”

• Unauthorized encroachments will be “removed at the expense of” those causing the encroachment.

• I.C. 42-1102(5) & 42-1209
What happens to the water when property changes ownership?

• **All water rights/entitlements** are conveyed to the new owner **unless the seller expressly reserves** the water rights/entitlements in the sales documents
  
  • Silence = conveyance

• The new owner assumes all rights and duties associated with the water right/entitlement
  
  • I.e. the right to use the water and the duty to pay any related assessments.
When property is conveyed, the ownership records of the water rights/entitlement must be updated.
Notice Depends on Who Owns the Water Right(s)

- Property Owner (Notice of Change of Ownership)
  - “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)

- Irrigation District (Proof of purchase)

- Canal Company (Assignment of shares)
How to Search Water Rights

www.idwr.idaho.gov

Water Rights → Search Water Rights → “I Agree to the Terms of Use”
Search Criteria

Can include:

• Water right number
• Legal description of property
• Use of the water

Try multiple searches using different criteria
How to determine if property is within an irrigation organization’s boundary

Idaho Department of Water Resources Map and GIS Data Hub:

https://data-idwr.opendata.arcgis.com/pages/maps

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

Select “Irrigation Organizations”
Enter Property Address

(Make sure the “Irrigation Organizations” box is checked)
Results will identify irrigation organization.
Common Questions

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

• If there is a well on the property, do I have a right to use it? Do neighbors have a right to use it?
  • Is there a water right?
  • Neighbors may have the right to use the well. Look for a shared well agreement.
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?

- Check historical use - domestic use requires that water use be (1) less than 13,000 gallons per day; (2) used for 1 home; and (3) used to irrigate ½ acre or less.

- Talk to prior owners, review well driller logs (www.IDWR.Idaho.gov)
• There is a ditch on my property. Can the landowner move it to a different location on my property?
  • The landowner may not move the ditch easement without written permission from the ditch owner.

• There is a ditch on my property. Can the ditch owner move it to a different location on my property?
  • The ditch owner may not move the ditch easement without written permission from the landowner.
Common Questions (Cont.)

• There is a ditch on my property. Can the landowner bury the ditch in a pipeline?
  • The landowner may not pipe the ditch without written permission from the ditch owner.
  • Must meet “standard specifications” and cannot disrupt water delivery
• There is a ditch on my property. Can the ditch owner bury the ditch in a pipeline?
  • The ditch owner may pipe the ditch within the existing easement.
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?

- Yes! Land within the service area of an irrigation district is subject to assessments.
  - **EVEN IF** you do not use the water;
  - **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).
- Landowners can petition to be excluded from the irrigation district:
  - Will eliminate the obligation to pay assessments and the right to receive water. (I.C. §§ 43-1101, et seq.).
  - Contact the local irrigation district to learn about this process.
What Should the Seller Do?

- Identify all water rights/entitlements
- Is the seller retaining any water?
- Provide copies of water documents (water rights, shares, well agreements, etc.)
What Should the Buyer Do?

• Make sure water rights/entitlements are identified on the purchase agreement
• Update ownership records following closing
If you or your client have questions, contact a water attorney or expert!
QUESTIONS?