



Rosemary J. Beless  
Fabian VanCott  
215 South State Street, Suite 1200  
Salt Lake City, Utah 84111  
801-531-8900  
rbeless@fabianvancott.com

Rosemary J. Beless has over 37 years of experience in a practice focused on natural resources and environmental law, representing clients in the areas of water, mining, oil and gas, public lands, condemnation, and environmental law. She is currently representing a variety of clients in the Jordan River/Utah Lake General Adjudication of Water Rights. In addition to the state and federal courts, she regularly appears before the Utah Division of Water Rights, the Utah Board of Oil, Gas & Mining, and the United States Interior Board of Land Appeals. Rosemary conducts comprehensive title analyses for the acquisition of large blocks of mining claims, oil and gas leases, and water rights for industrial and municipal development. She recently obtained title for a developer to over 100 scattered fragments of public land in a BLM land exchange and completed the sale of an oil and gas field to an international resource group. Rosemary represented the prevailing parties in the landmark oil and gas case of *Cowling v. Board of Oil, Gas & Mining*, which defined where the law of capture ends and the law of correlative rights begins in Utah. She has successfully resolved complex False Claim Act, eminent domain, and CERCLA cases. Rosemary received her Ph.D. in English and her law degree from the University of Utah.

# WHAT EVERY REAL PROPERTY ATTORNEY NEEDS TO KNOW ABOUT UTAH WATER LAW

**Rosemary J. Beless**  
Fabian VanCott  
215 South State Street, Suite 1200  
Salt Lake City, Utah 84111  
801-531-8900  
rbeless@fabianvancott.com

## **I. Introduction**

In my presentation at the Utah Bar Convention in July 2017, I will focus on some of the water law pitfalls that await the unsuspecting real property practitioner in the purchase or sale of real property. You may not even mention water rights in your purchase and sale agreement or your deed, and yet you may have fallen into a water law trap.

We will discuss the eccentricities in title to water rights, the differences between water rights and water shares, the mysteries of water rights appurtenant to the land, and the problems in taking a security interest in water stock. We will consider what rights you will need to obtain if a residence is to be served by a water well, rather than municipal water service. We will also look into the type of conveyance you will want to use for the transfer of a water right and the problems you face with a warranty deed. Finally, we will address the issues of recording your water conveyance and the process of documentation of your water right with the Utah Division of Water Rights.

But first, you need the water law basics: the background of Utah water law, the terminology of water law, and applicable Utah statutes. This paper covers those fundamental

topics, so you will be ready to confront the challenging water law issues faced by every real property practitioner.

## **II. Background**

### **A. Utah Water Law in the Beginning**

Utah water law is a mixture of the culture of the early settlers and miners in Utah set against the arid desert climate of Utah. When the Mormon pioneers arrived in the Salt Lake Valley in 1847, they immediately began to irrigate by diverting streams and constructing dams, ditches and canals. Their water allocation system was based on a concept of sharing goods. Bishops were responsible for equitable water distribution, but they often delegated this function to appointed water masters. Controversies and conflicts over water use were decided in ecclesiastical courts composed of a bishop and two counselors.

In this early system, the water master held an important role. The water master delivered water by a system of rotation; water was delivered according to the user's needs. Ditches were repaired by labor from water users in proportion to the amount of water supplied to them.

However, conflicts over water increased in frequency and intensity. As a result of these conflicts, Utah abandoned its communal water system in favor of the prior appropriation system which was found in many of the other western states and territories.

### **B. The Doctrine of Prior Appropriation**

Utah's current system of water allocation is based on this doctrine of prior appropriation. The doctrine of prior appropriation is thought to have originated in the California gold camps where there was not enough water to satisfy the miners who wanted to use it in panning for gold. The miners decided to use the same rule for water as they did for gold. The Mining Law of 1872 provided that the first locator in time was the first locator in right. The first miner to find a

discovery and locate a claim was the owner of that claim. Likewise, the first person to beneficially use water was the person to have a right to use that water.

The climate and topography of the wild West also influenced the development of the prior appropriation doctrine. The riparian doctrine, used in the Eastern states, where use of waters from a stream was limited to owners of property adjacent to the stream, simply did not work in the West. More people needed to utilize the stream than merely the property owners on either side of the stream. Therefore, the appropriation system (first in time to use water, has first right to the water) became law through court decisions, constitutional provisions, and state statutes.

The prior appropriation system has two basic principles: priority and beneficial use. The first person to take a quantity of water and put it to beneficial use has a higher priority than a subsequent user. The priority doctrine of “first in time, first in right,” means that senior water right holders are entitled to their full water right before junior water right holders are entitled to any water. The principle of beneficial use means a water right is acquired by diverting water and putting it to a beneficial use, such as irrigation, stockwatering, or domestic use. Through lack of use, a water right may be abandoned or forfeited.

### **C. Determination/Allocation of Water Rights**

A complete water code was enacted in the State of Utah in 1903. The State Engineer, through the Division of Water Rights, is responsible for the administration of water rights, including the appropriation, distribution, and management of the State’s surface and groundwater. The Utah State Engineer’s Office was created in 1897 and was the first State agency in Utah. The State Engineer is the chief water rights administrative officer and has broad

discretionary powers in the allocation of water rights. The establishment of a new water right or changing an existing water right requires the filing of an application with the State Engineer.

**D. Beneficial Use**

Another basic tenet of Utah water law is the requirement of beneficial use. Beneficial use is the basis, the measure, and the limit of water rights in the State of Utah. Utah Code Ann. § 73-1-3. Water is scarce in the State of Utah. Because water is owned by the public, not by individuals, you cannot hoard water. You can beneficially use the water that you need, but that water you cannot use must be allocated to other members of the public.

Beneficial use of water is regulated by the common law doctrine of abandonment and the statutory doctrine of forfeiture:

1. Abandonment. Abandonment is a common law doctrine. The water user must intentionally give up his water right so that it becomes abandoned and reverts to the public. Intent is the key to abandonment. There is no particular period of time in which a water right must be abandoned.

2. Forfeiture. Forfeiture is statutory. When a water user ceases to use all of his water, or a portion of his water, for a period of seven years, the water right is forfeited and reverts to the public. However, a water right is not automatically forfeited. In the 2011 Utah Supreme Court case of *Jensen v. Jones*, 2011 UT 67, the court held that the State Engineer cannot adjudicate water rights or declare forfeiture. However, the State Engineer can bring a lawsuit to enjoin unlawful appropriation of water because of forfeiture and have a change application stayed by the court.

There are several statutory exceptions to forfeiture, including:

- if the water right is being used under a lease or other agreement

- if the surface water or groundwater source fails to yield sufficient water to satisfy the water right
- if the water is unavailable because of the water right's priority date
- if the water right is subject to an approved change application and the applicant is diligently pursuing certification
- if the water right is owned by a public water supplier and is being held for reasonable future water requirements of the public.

A water user can also partially forfeit a water right. In a 2002 amendment to Utah's water code, partial forfeiture was specifically included in the forfeiture statute. However, in the 2013 case of *Delta Canal Co. v. Frank Vincent Family Ranch*, 2013 UT 69, the Utah Supreme Court held that Utah law included partial forfeiture even prior to 2002. The court held that partial forfeiture is based on the reduced use of the volume of water to which the water user is entitled. Of course, it is one thing for the court to declare that there is a partial forfeiture under Utah law, but it is quite another thing to determine the amount of water that was forfeited. Not surprisingly, the Utah Supreme Court remanded the issue of the amount of partial forfeiture to the district court.

3. Non-Use Application. You can also protect your water right from forfeiture by filing a non-use application with the State Engineer. If the non-use application is approved, it lasts for seven years and then you may refile for another seven-year period. In your application for non-use, you must provide a reason for your non-use of your water right, including such reasons as financial hardship or litigation.

**E. Water as Property of the Public**

Utah Code Ann. § 73-1-1(1) provides that “[a]ll waters of this State, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof.”

This is another basic principle of Utah water law: all waters in the State are owned by the public. You may acquire a right to use water, but you can never own water in the State of Utah.

Water rights have some of the characteristics of real property, in that they can be transferred and conveyed in the same manner as real property, and they must be recorded just like real property. However, water rights also have some important differences from real property. Because the water is owned by the public, there are restrictions on your use of the water right. While your ownership of real property may be basically unrestricted, your water right is subject to many statutory limitations, including forfeiture, priority limitations, and the State Engineer’s enforcement authority.

**F. Water Law Terminology and Characteristics of Water Rights**

Water rights, like real property rights, have a number of component parts. Each component of a water right must be evaluated in order to determine the value and validity of a water right.

1. Priority. The first component, of course, is priority. The Utah water code was established in 1903, and the Office of the State Engineer was the first state agency in the State of Utah. Of course, water was used in Utah before 1903. Therefore, individuals who beneficially used water before 1903 were grandfathered into the water right system. The water user with the earliest priority date would be satisfied first in a dry year.

Indeed, water users with subsequent priority dates may find themselves without any water during a drought year.

2. Quantity: Flow and Volume. Another component of a water right is the quantity. The quantity is described in terms of the flow and the volume of the water right. The flow is the rate that water can be diverted from its source. The flow is generally measured in terms of cfs, or cubic feet per second, or gpm, gallons per minute. The volume is measured in acre-feet, or the amount of water that would fill an acre one-foot high. Irrigation water rights are always measured in acre-feet per acre. The Duty of Water is a phrase which describes the number of acre-feet of water per acre necessary to grow alfalfa in a certain area of Utah. For example, the duty of water is five acre-feet per acre in Salt Lake City, but the duty of water is three acre-feet per acre in Park City. The elevation and climate of the area have a great effect upon the Duty of Water in each area.

3. Nature of Use. The Nature of Use of water is another component to the water right. Water rights may be used for domestic, municipal, stockwatering, irrigation, and mining uses or such non-consumptive uses as a saw mill or a hydro-power generation plant.

4. Period of Use. The nature of use of a water right also generally determines the period of use of the water right. For instance, irrigation water rights are used during the irrigation season, usually from about April 1 to October 31. On the other hand, domestic, municipal, industrial, and stockwatering water rights are generally used year-round.

5. Place of Use. Another component of water right is its place of use. The place of use is usually described within a quarter/quarter section, or 40 acres.

6. Point of Diversion. The Point of Diversion is also a component of a water right. The point of diversion is the point where the water right is diverted from its source. The water right is generally measured at this point of diversion.

7. Supplemental Nature. A water right may also be supplemental in nature. You should always check to see if a water right is supplemental to another water right in order to fulfill a specific beneficial use. For instance, a water user may use a water right from a stream during the spring and early summer, but when the stream dries up in July and August, the water user will pump water from his well in order to supplement the stream flow. The water right from the well is a supplemental water right.

8. Title to Easements, Ditches, Canals, and Facilities Necessary for Conveyance and Use of Water. Facilities necessary for the conveyance of water, such as easements, ditches, and canals, are also essential components of a water right. Without these facilities, the water right cannot be used. Title to these facilities may be established by prescription (open, notorious, adverse use for 20 years) or by written easement.

9. Diversion and Depletion. The diversion and depletion of a water right have become important components of the water right in the last fifteen years. The diversion rate is the amount of water which can be diverted from the source. The diversion rate is generally the volume of the water right. However, with irrigation water rights, not all of the water that is diverted is consumed. The depletion rate is the amount of water actually consumed. The amount of water not consumed is the return flow back to downstream users. Therefore, if an irrigation water right, with a return flow, is

changed to a municipal use which is totally consumptive, the amount of water changed has to be decreased in order to provide for a return flow for downstream users.

10. Place of Storage. A water user can also obtain storage rights for water. For instance, a water user may store spring runoff water in a reservoir for use during the dry summer months. Storage is another component of a water right.

11. Productivity of Source. The productivity of the water source for the water right is also an important component of the water right. You have heard of “paper water rights” which look good on paper but have no actual wet water source. Productivity of the source is an important exception in any water rights title opinion because the title examiner generally does not do an on-the-ground review of the water source.

12. Quality of Water. Finally, the quality of water in the water right is an important component. This is not merely an environmental concern; the usefulness of the water is at stake. For instance, the salinity of water will make it less useful for irrigation purposes, and therefore, less valuable.

### **III. The Transfer of Title and Purchase/Sale of Water Rights**

Depending on the type of water you are transferring, you may draft a deed, an assignment, an assignment of a contract, or you may transfer shares of stock in a mutual water company.

#### **A. By Deed**

You will use a deed if you are transferring perfected water rights. Perfected water rights include certificated water rights. In other words, these are water rights under which an application or change application has been approved by the State Engineer, Proof of Beneficial Use has been approved by the State Engineer, and the water right has been certificated. A Water

User's Claim filed in a general adjudication of water rights, in lieu of filing proof of appropriation, is also considered to be a perfected water right. In addition, diligence claims filed for surface water use prior to 1903 or filed for groundwater use prior to 1935 are also considered perfected water rights. Finally, decreed water rights, which have been adjudicated by a court, are also considered perfected water rights which may be transferred by deed.

A warranty deed, a special warranty deed, or a quitclaim deed may be used to transfer water rights. However, you should be aware that warranty deeds may be risky in a water right situation because of the beneficial use component of a water right and the priority issue.

**B. By Assignment**

Applications, which have not yet ripened into water rights, are transferred by assignment. These applications would include an unperfected application to appropriate or an unperfected change application. In these cases, there may be no State Engineer's approval of the application, no proof of beneficial use filed for the application, or no certificate issued for the application.

**C. By Assignment of Contract**

If you have a contractual water right, such as a long-term lease or a water contract with a water conservancy district, you will need to assign the contract. For instance, if you have a contract for water with the Weber Basin Water Conservancy District, you will need to assign that contract and have the assignment approved by the District. In addition, you will assign the exchange application, approved by the State Engineer, authorizing the use of the water contract. It is the exchange application, approved by the State Engineer, that allows the water user to divert water from a well and satisfy the needs to downstream users from the water purchased in a contract from the water conservancy district.

#### **D. Shares of Stock in Mutual Water Companies**

If you want to transfer shares of stock in a mutual water company, you will use an entirely different method of transfer. Water stock or water shares in a mutual water company are considered personalty, not real property, and are transferred by endorsement and physical possession of the share certificate. The certificate is then surrendered to the water company with a request that a new certificate be issued to the new owner of the shares.

It is not uncommon for a bank to assume that water shares are included in their deed of trust when it is recorded against the real property. However, the only way a bank can take a security interest in water stock is to obtain possession of the stock certificate. Otherwise, the holder of the certificate has a negotiable instrument and can transfer the water stock to a third party who is a bona fide purchaser, without notice, and the purchaser can request the water company to transfer title to the shares to him, rather than the bank.

You should also review the articles and bylaws of the water company to find out if the stock is appurtenant to certain land or if there are rules regarding stock conveyance and changing the place of use.

#### **IV. Recording Requirements**

The recording of the water deed is essential—just as it is with the deed to real property. You should record the water deed in the county of the place of use of the water right and in the county of the point of diversion of water right. Therefore, you may be recording in two different counties if the place of use and point of diversion are located in different counties. Of course, it is important to include the property descriptions for the place of use and point of diversion in the water deed so that the county recorder can properly abstract the water deed. If the recorder has

no property descriptions, then your water deed will be abstracted in the miscellaneous book and will be practically impossible to locate. Every county should have a water deed book, but you should not be surprised if the county recorder tells you that the county does not have one.

**A. Effect of Failure to Record**

Every water deed that is recorded imparts notice from the date of recordation to all persons. All subsequent purchasers, mortgagors or lienholders take title with notice of the recorded deed's contents and effect. If your water right deed is not recorded, then it is void against any subsequent purchaser of the water right who takes title in good faith and for valuable consideration, where the subsequent purchaser's deed is first recorded.

**B. Effect of Unrecorded Water Deed**

The Utah Supreme Court case of *Haik v. Sandy City*, 2011 UT 26, decided in 2011, is very instructive for those of us who do water rights title work. In this case, Sandy City entered into an agreement of sale, which was an executory contract, in 1977. The executory contract was recorded, but no deed was ever recorded. From the record, you could not tell whether the parties ever completed the sale. In 2003, the Haik parties bought the same water right and recorded their deed. Sandy City did not record its quitclaim deed until 2004. Sandy City argued that the parties were on notice of the sale because of the recording of the executory contract. However, the Utah Supreme Court held that the executory contract was ambiguous and that the Haik parties purchased the water right as bona fide purchasers without notice of the prior sale to Sandy City. This should give title examiners some comfort when we see a recorded option to purchase or purchase and sale agreement and there is never a recorded deed. We need not assume from a recorded option or purchase and sale agreement that the sale was ever finalized.

## **V. Report of Conveyance**

Certified copies of recorded deeds should be filed with the State Engineer with a Report of Conveyance form. The purchaser of the water right is responsible to see that this is done. Filing with the State Engineer is important, but not essential, to the issue of legal notice to subsequent purchasers. Legal notice is supported only by recording with the county recorder. Unless the conveyance is extremely simple, such as a one-document transfer by water right number from a seller already listed on the Division's records, or in the case of a name change or death of a water right owner, the Report of Conveyance must be prepared by an attorney, a professional engineer, a licensed title insurance agent, or a professional land surveyor.

It is important to remember the limitations of a Report of Conveyance. While the information contained in the Report of Conveyance is extremely valuable to anyone reviewing title to the water right, the filing and processing of a Report of Conveyance is not an adjudication of water right ownership and it is not an opinion as to title. The Report of Conveyance shows only the documents that water users have filed with the Division of Water Rights. It may not reflect mortgages or deeds of trust on water rights if these have never been filed with the Division. However, the Report of Conveyance is essential to provide the State Engineer with evidence of water rights title before he can approve an application filed by the water user. For instance, the State Engineer must be provided with evidence that a person is "entitled to the use of water" before he can approve a change application on the water right.

## **VI. Water Rights Addendum**

Utah Code Ann. § 57-3-109, from the Real Estate Code, states that beginning July 1, 2011, a person submitting a deed to a county recorder's office may also attach a "water rights addendum" in the form provided by the State Engineer. Utah Code Ann. § 73-1-10(1)(d)(i),

from the Water Code, mirrors this rule. Utah Code Ann. § 57-3-109 goes on to require that upon recording of the water rights addendum, the county recorder must transmit a copy to the State Engineer.

Utah Code Ann. § 73-1-10(1)(d)(ii) also provides that the State Engineer shall consider a water rights addendum, which has been forwarded to the State Engineer by a county recorder, as a submitted report of water rights conveyance. In other words, the State Engineer will update the ownership records based on the receipt of a water rights addendum, rather than requiring the purchaser to file a separate report of water rights conveyance. This process may work very well if all the boxes are correctly checked and the blanks are correctly filled out in the addendum. However, if a mistake is made in filling out the form, it may cause more problems than would otherwise occur.

## **VII. Transfer by Appurtenancy**

Another issue in the transfer of title to real property is the question of whether or not a water right passed by appurtenancy with the transfer of the real property. In order for water rights to be appurtenant to the land, there must be unity of title to the land and the water. In other words, the same person must own title to the land and the water right. Water becomes appurtenant to land when it is used in connection with the land and is necessary for the beneficial enjoyment of the land. A water right will pass appurtenant to the land unless the grantor specifically reserves the water right in the land conveyance, conveys part of the water right in the land conveyance, or conveys the water right in a separate conveyance document prior to or contemporaneously with the land conveyance document.

The rationale for appurtenancy of water rights to land is the idea that the use of water on land creates a condition on the land like an easement, visible to the purchaser. The water on the land is one of the conditions in the minds of the parties when they bargain for the purchase and sale of the land. For example, the buyer looks out over the forty acres of land he is about to purchase and he sees a field of alfalfa growing on the land. He knows that it takes water to grow alfalfa, and he assumes he is buying an adequate amount of water to raise that crop of alfalfa.

The presumption of law is that the parties contracted to the condition of the property as it actually was at the time of the transaction. After the sale, neither party has the right, without the consent of the other, to change the condition of the property which openly and visibly existed at the time of the transaction. In other words, the seller cannot present the buyer with a barren, dried-up tract of land, when the buyer saw a healthy field of alfalfa at the time of the transaction.

In deciding whether your water right is appurtenant to certain real property, you must look at the date of execution of the conveyance. If your conveyance was executed before May 4, 1998, then Utah Code Ann. § 73-1-11 provides that if a water right has been used in irrigating different parts of the land at different times, then the water right passes by appurtenancy on the parcel of land where the water right was used just before the conveyance of the land was executed. In other words, if the water right was used on more than one parcel of land, it passes by appurtenancy with the land upon which it was last used prior to the conveyance.

Therefore, for a conveyance executed before May 4, 1998, you will need to figure out where the water was last used prior to the conveyance. As time goes by, there may be conflicting evidence or conflicting memories as to the last use of the water. Probably what the buyer saw on the real property on the date of the conveyance would be good evidence as to the property upon which the water was last used and the intent of the parties. The water will pass by

appurtenancy on the land upon which it was last used unless the grantor specifically reserves the water right, or only conveys a part of the water right, or conveys the entire water right in a separate conveyance.

In contrast, in conveyances executed on or after May 4, 1998, there is a different rule of appurtenancy which has two parts. The first part concerns the type of water right which will be appurtenant to real property. For the purpose of a land conveyance executed on or after May 4, 1998, a water right is appurtenant to land if it is evidenced by any of the following documents: (1) a decree; (2) a certificate; (3) a diligence claim for surface or underground water; (4) a water user's claim executed for general determination of water rights; (5) an approval for application to appropriate; (6) an approval for application to permanently change water; or (7) an approval for application to exchange water. Therefore, this statute provides by implication that an unapproved application to appropriate, an unapproved change application, or an unapproved exchange application does not evidence water which is appurtenant to the land and does not pass by appurtenancy with conveyance of the land. These unapproved applications must be assigned separate from the land conveyance.

For land conveyances on or after May 4, 1998, the statute also provides that a water right is appurtenant to that land which is the authorized place of use for the water in applicable decree, certificate, diligence claim, water user's claim, approved application to appropriate water, approved application to permanently change water, or approved exchange application. Therefore, the best evidence is not what the buyer saw in the land when he purchased the land, it is what the buyer saw in the title document regarding the water. In other words, the description of the place of use of the water in the certificate is the land upon which the water is appurtenant.

Therefore, it is important to remember that the law of appurtenancy changes depending upon the date of the land conveyance.