Practical Guidance

Water Rights Law for Real Property Owners

A Practical Guidance® Practice Note by Eric Garner and Maya Mouawad, Best Best & Krieger LLP

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This practice note discusses key considerations in analyzing water rights. It provides guidance on determining water rights generally and those associated with real estate specifically, acquiring water rights from a state regulatory or permitting authority, and transferring water rights among water right holders. It also outlines special considerations for water rights in California. This practice note is written from a real property owner's perspective, but discusses issues concerning water rights that are not associated with property ownership as well. State and local laws, regulations, and practices relating to water law vary from state to state, with major substantive consequences. Additionally, the extent of water use under a certain water right may be limited by state, regional, and local rules and regulations. As such, you should consult counsel advising on water law matters for guidance on state-specific laws and regulations.

Water rights are different than rights in real property in that typically the government of the state holds all the waters of the state in trust for the people of the state. A water right only establishes a use right, not fee ownership of the body of the water. Absent a use or prospective use that falls within what the state considers reasonable and beneficial (each state has its own version of this concept), a water right cannot be held speculatively and, if not put to reasonable and beneficial use, may become available for use by others in order to prevent waste of this limited natural resource.

For an overview of state laws applicable to water rights, see Water Rights State Law Survey. For an overview of preliminary steps for purchasers and developers to take when considering the purchase or development of property with water on, under, or adjacent to the land, see Water Rights and Uses Checklist. For more information on water rights generally, see Powell on Real Property § 65.02 et seq. and Nichols on Eminent Domain § 13.16.

Determining Water Rights Generally and Those Associated with Real Estate

Water Rights, Generally

Water rights and the extent of use of a water right are regulated at the state, regional, and local levels. Water rights applicable to real property owned by the federal government and by Indian tribes are exceptions to this general rule and are outside the scope of this practice note. There are also special considerations for water used for municipal and industrial purposes under a water right owned by a water provider, such as a publicly or privately owned water utility or a mutual water company. A detailed discussion of those considerations is also largely outside the scope of this note.

Generally speaking, water rights are more important in the Western region of the United States because of its more arid conditions and limited water supply. California has what is likely the most complex water right allocation system in the world, containing elements of systems that are applicable in virtually all jurisdictions, so illustrations from its laws are used throughout this note. Examples from other western states, such as Oregon and Washington states, are included as well for illustrative purposes.

Please note that comparative water law information provided in this practice note is only illustrative, and is designed to highlight the diversity and specificity of state laws governing water rights. It is not intended as a comprehensive analysis of those laws. It is essential to consult with local legal counsel in the particular state where the water right is being examined.

Analyzing Water Rights

Analyzing water rights begins with identifying the following key facts:

- Source(s) of the water
- Location of the water use –and–
- The intended use of the water and its historical use, if any

Source(s) of the Water

Identifying the source of the water is important in determining the associated type of water right and the extent to which the right may be exercised. Many states, including California, divide water into surface water and groundwater and different legal regimes apply to each:

- **Surface water.** California defines surface water general as water in a "stream, lake or other body of water, . . . and [] subterranean streams flowing through known and definite channels." Cal. Water Code § 1200.
- **Groundwater.** Groundwater is underground water that is not included in the definition of surface water: "all water beneath the surface of the earth within the zone below the water table in which the soil is completely saturated with water, but does not include water that flows in known and definite channels." Cal. Water Code § 10752.

In addition to natural surface and groundwater sources, the sources of water to which a right may attach include artificially stored water, recycled water (aka treated wastewater), and water imported from distant sources. If the water originates from a source that has been adjudicated (i.e., where the rights have been quantified pursuant to a court decision), then the court document quantifying and regulating that water must be thoroughly reviewed.

As mentioned above, rights to surface and groundwater may be subject to limitations imposed by the state. In addition, further limitations on use of the water may be imposed by local agencies statutorily authorized to discretionarily impose certain limitations on water diversions, pumping, and use. For example, extraction of groundwater in California was largely unregulated until the Legislature adopted the Sustainable Groundwater Management Act (SGMA), Cal. Water Code § 10720 et seq., which became effective January 1, 2015. It was the last state to adopt statewide groundwater regulations. SGMA requires that all high-priority and medium-priority groundwater basins, as designated by California Department of Water Resources, be governed by one or more groundwater sustainability agencies (GSA) and that each GSA develop and adopt a comprehensive groundwater sustainability plan (GSP) or an alternative to such a plan. Among other things, SGMA grants GSAs authority and enforcement tools, such as the ability to assess pumping fees, make pumping allocations, and order pumping cutbacks in order to help bring the basin into balance within the SGMA deadlines. Other states also have long-standing regulatory regimes applicable to groundwater rights. In Oregon, for instance, the Oregon Water Resources Commission may impose restrictions on extractions to both existing and new groundwater uses under certain conditions, regardless of the priority of the water right. Or. Rev. Stat. § 537.740.

Certain waters carry special rights. For example, in California, the owner of a wastewater treatment facility acquires "the exclusive right to the treated waste water as against anyone who has supplied the water discharged into the waste water collection and treatment system" subject to the treatment plant owner's "obligations to any legal user of the discharged treated waste water." Cal. Water Code § 1210. Similarly, an importer of water that would not otherwise be in the basin has the exclusive right to use that water. The right extends to the return flows (imported water that enters the basin after use) of the imported water, including return flows that percolate to groundwater, the rationale being that the party that expended the effort to bring the water to the watershed should be entitled to the fruits of their endeavor. City of Santa Maria v. Adam, 211 Cal. App. 4th 266, 301 (2012). As such, it is important to track the source of the water at issue in order to identify the rights that attach to it and any applicable use limitations.

Location of the Water Use

Identifying the specific location where the water is to be used, in terms of proximity to the source of the water supply,

is an important initial step in identifying and defining the type of water right at issue, as well as the priority of the use of the water right in relation to water rights held by others.

Riparian Water Rights

California categorizes a water right in part based on where the water will be used relative to the location of its source. California is one of the few western states that continues to recognize riparian water rights, although riparian rights are common in the east. Riparian water rights allow the owner of land contiguous to a natural stream to directly divert a portion of the naturally available water for reasonable, beneficial use on that land. Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 528 (1938); Cal. Water Code §§ 101, 102. Under California law, a riparian water right arises by virtue of ownership of riparian land, which is defined as the smallest parcel of land contiguous to a watercourse, in a single chain of title from the original private owner, that is within the watershed of the stream. Rancho Santa Margarita, 11 Cal. 2d at 529; Boehmer v. Big Rock Irrigation Dist., 117 Cal. 19, 26–27 (1897). It entitles the landowner to use a correlative share of the water flowing past his or her property but does not entitle a water user to engage in artificial storage of the water for longer than 30 days, or to divert water to storage in a reservoir for use in the dry season. Cal. Code Regs., tit. 23, § 658; Colorado Power Co. v. Pacific Gas & Electric Co., 218 Cal. 559, 565 (1933) ("seasonal storage [is] not a riparian use"). Generally, riparian rights are senior to other rights; thus, in times of shortage, riparian water right holders are entitled to take and use water on their land before other water right holders are entitled to any. City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224 (2000); Cal. Const., art. X, § 2; Pleasant Valley Canal Co. v. Borror, 61 Cal. App. 4th 742, 776 (1998); Peabody v. City of Vallejo, 2 Cal. 2d 351, 352 (1935). Riparian rights cannot ordinarily be lost through nonuse, and no state-issued permit is required to exercise the right.

It is important to note that riparian water rights can be severed from the water source through subdivision and lose their riparian nature as to the subdivided parcel that does not adjoin the watercourse. Therefore, it is crucial to determine the boundaries of the riparian parcel and examine the chain of title.

Overlying Water Rights

Similar to a riparian right is what is referred to in California as an overlying water right, which is the right to extract and use groundwater on land overlying a groundwater basin. An overlying right attaches to the land overlying a groundwater basin. Landowners with real property overlying a groundwater basin have the right to the reasonable and beneficial use of groundwater underlying their property for use on overlying lands. Overlying rights are correlative, meaning that the native groundwater supplies are shared by all overlying landowners within the groundwater basin. If the supply of groundwater is insufficient for all overlying uses, each overlying user is entitled to a fair and just proportion of the water, and reductions in pumping are shared between the overlying users. Overlying rights are generally senior in priority to rights to groundwater used outside the basin. Overlying rights are not lost due to nonuse and cannot be used outside the groundwater basin.

One issue to be aware of when consulting a client as to their riparian and overlying water rights is that those types of water rights are not quantified absent a court determination, but rather allow the use of the amount of water reasonably needed on the associated real property. This concept is referred to as "correlative" water use, meaning the rights are held in common with all real property-based users of the water source. This means that whenever there is a water shortage, the water is shared by all users regardless of their specific location on the watercourse or in the basin, or when their use of that water began.

Appropriative Water Rights

In contrast with riparian and overlying water rights, water transported away from its source for use on land that is not adjacent to the surface water source or at a location outside the watershed or groundwater basin generally falls under a different category of water rights, and thus is subject to a distinct set of rules and regulations. In California, this use is categorized as an "appropriative" water right. Appropriative water rights:

- Are generally junior to riparian and overlying rights (which means they can only be exercised when there is surplus water after all reasonable and beneficial overlying and riparian needs are met)
- Are subject to the doctrine of prior appropriation which means that priority is determined as of the date the use began or a permit was obtained
- Can be used away from where they originate
- Can be lost through nonuse –and–
- May be subject to the state permitting authority

There are specific considerations to keep in mind if the right at issue is an appropriative right, including that, as between appropriators, the "first in time, first in right" rule governs and that burden of proof is on the appropriator to prove that a surplus exists beyond the needs of those holding prior and paramount rights.

Permitting Considerations

One further layer of complexity in California, and several other states, is that when permitting systems were established, existing uses were allowed to continue without permits. In California, for example, when examining appropriative water rights associated with surface water, it is crucial whether the use of the water began before or after 1914, the year that the California Water Commission Act became effective. Pre-1914 appropriative surface water rights are only subject to limited regulation by the California State Water Resources Control Board (State Board). The holder of a pre-1914 appropriative surface water right may change the place of use, purpose of use, or point of diversion without obtaining approval from the State Board, and without affecting the right to such water, so long as others are not injured by the change. Cal. Water Code § 1706. The burden is on the person claiming injury to prove the injury. Barnes v. Hussa 136 Cal. App. 4th 1358, 1366 (2006). An injury cannot be established where the appropriator's water rights predate the rights of those claiming the injury. San Bernardino v. Riverside, 186 Cal. 7, 28 (1921).

Conversely, since 1914, water rights can only be acquired through an application for a permit to appropriate water to the State Board. Cal. Water Code § 1250. The application must:

- Demonstrate that water is available to be appropriated
- Demonstrate that the appropriation will not harm other legal users of water
- Specify the place of use and point of diversion –and–
- Describe the intended beneficial use(s)

The burden is on the applicant to provide "sufficient information" demonstrating a "reasonable likelihood" that water is available for appropriation. Cal. Water Code § 1260. The application process includes publication, a public comment period, and a hearing process to resolve any disputes. If water is appropriated and diverted during times of shortages, the right may potentially ripen into a prescriptive right if certain elements are met. Therefore, it is important to consider the timing of the water use in the context of the overall local water supply in order to better advise landowners on the nature and extent of their water right.

It is important to note that all water use in California is subject to the constitutional doctrine of reasonable and beneficial use. Under the California Constitution, water resources must be put to

> beneficial use to the fullest extent of which they are capable, and the waste or unreasonable use or unreasonable method of use of water be prevented, and the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.

Cal. Const., art. X, § 2. There is no right in the unreasonable use of water. Other states also have similar limitations applicable to all water rights in order to prevent the wasteful use of this limited natural resource.

By way of contrast, Oregon and Washington regulate water rights quite differently from California. Under Oregon law, for example, there is no distinction under the law between surface water and groundwater. Instead, all water within the state "from all sources" belongs to the public. Or. Rev. Stat. § 537.110. Unless a use exemption applies, all water users must first obtain a permit, certificate, or license from the state's Water Resources Department to use or store water from any source and regardless of where the water is to be used. The priority of the water right is determined based on the date of the water permit application under the doctrine of prior appropriation, and all water use, including water use exempt from the permit requirement, is subject to the "beneficial use" limitation, similar to the limitation in California. Or. Rev. Stat. § 537.120. However, neither a water right permit nor a certificate guarantees water for the appropriator. Or. Rev. Stat. §§ 537.250, 537.270. Continuity of the water use is critical in Oregon. Water right certificates continue to be valid as long as the water is used in accordance with the provisions of the water right at least once every five years. Or. Rev. Stat. § 540.610. Any portion of the water right certificate that is not exercised for five consecutive years gives rise to a rebuttable presumption that the right was forfeited. Id.

By the same token, Washington requires permitting from the Washington State Department of Ecology, for both surface water and groundwater, unless an exemption applies. In 1917, Washington adopted a regulatory permit system to manage surface water. See W. Side Irrigating Co. v. Chase, 115 Wash. 146, 149–50 (1921). The State of Washington requires most diversions of surface water to be permitted. After the permit has been approved, the permit holder must perfect the water right through the actual, physical appropriation of water for the proposed use in order to receive a certificate evidencing a vested right. Wash. Rev. Code Ann. §§ 90.03.320, 90.03.330. When looking into water rights in Washington, care must be taken to research whether the permit holder has in fact exercised his or her right under the permit because failure to do so may result in the cancellation of the permit. Wash. Rev. Code Ann. §§ 90.03.250, 90.03.320. Though Washington recognizes riparian rights, these rights were lost if they had not beneficially used before 1932. In

re Deadman Creek Drainage Basin in Spokane County, 103 Wn.2d 686 (1985). Just as in Oregon, water rights can be lost under the "use it or lose it" doctrine. Thus, if the water right holder does not maintain the actual beneficial use of the diverted water, that holder may lose their water right. A water right holder relinquishes that right to the State of Washington if the water is not used beneficially for five consecutive years. City of Union Gap v. Dep't. of Ecology 148 Wn.App. 519, 526–27 (Wash. Ct. App. 2008).

Similar to the Surface Water Code, Washington regulates rights to groundwater under a permitting system and follows the prior appropriation doctrine. Wash. Rev. Code Ann. §§ 90.44.020, 90.44.050. However, permitting of groundwater, unlike surface water, is constrained by the feasibility and reasonableness in pumping water from a particular aquifer. Wash. Rev. Code Ann. § 90.44.070. As such, a senior groundwater right holder is not entitled to absolute protection "in either his historic water level or his historic means of diversion." Baker v. Ore-Idea Foods, Inc., 95 Idaho 575, 584 (1973). As a result, a senior groundwater right holder may need to modify their diversion system to accommodate for the changing aquifer levels.

The above comparison of California, Oregon, and Washington laws underscores the complexity associated with determining water rights and the importance of the location of use in making this determination.

The Historical and Intended Use of the Water

Generally, water right permits specify the uses to which the water may be put. A change in the place of use or type of use generally requires a new approval by the state and local regulatory authority. Therefore, water permits must be reviewed carefully to check for any such limitations.

Conversely, some water uses are entirely exempt from the permit requirement in order to encourage those uses or reduce the regulatory burden as to certain water right holders. For example, Washington recognizes exemptions from the permitting system for groundwater, such as distribution and use of reclaimed water generated from a wastewater treatment facility. Wash. Rev. Code Ann. § 90.46.120; Jensen v. Dep't of Ecology, 102 Wn.2d 109, 113 (1984); see Hillis v. Dep't of Ecology, 131 Wn.2d 373. Other uses exempt from the Washington permit requirement include water for stock watering, watering of lawns or noncommercial gardens not exceeding one-half acre in area, single or group domestic uses not exceeding five thousand gallons a day, and industrial uses not exceeding five thousand gallons a day. Wash. Rev. Code Ann. § 90.44.050. However, these types of uses must still conform with the beneficial use requirement and remain subject to the priority system. Wash. Rev. Code Ann. §§ 90.44.020, 90.44.040, 90.44.060. The water right holder must still provide information such as "the means for and the quantity of that withdrawal" to the Department of Ecology. Wash. Rev. Code Ann. § 90.44.050.

Water Rights Associated with Real Estate

In California, both riparian and overlying water rights attach to and run with the land, unless specifically transferred (leased or sold) separate from the land. Therefore, it is important to examine the official recorded chain of title of the land in order to determine whether the right was severed in a prior transfer of title. A water right sold separately from the land may be permanently severed from the land, meaning the right may have been lost. Conversely, appropriative rights do not run with the land and can be owned, transferred, and used independent of land ownership.

In Oregon, and notwithstanding the above, surface water abutting a property and used prior to the enactment of the Oregon water code (pre-1909), and continuously since then, may have developed into a vested water right which transfers with the property.

In Washington, a perfected right to use the water may attach to the land, but additional steps need to be taken to transfer the right when land ownership changes. Wash. Rev. Code Ann. § 90.03.380; United States v. Ahtanum Irr. Dist., 124 F. Supp. 818, 827–28 (E.D. Wash. 1954); Neubert v. Yakima-Tieton Irrigation Dist., 117 Wn.2d 232, 237 (1991). If there is an express reservation (i.e., where the grantor of the land reserves in writing rights to the water, whether in whole or in part), water does not pass with the land. Drake v. Smith, 54 Wn.2d 57, 61 (1959); Tedford v. Wenatchee Reclamation Dist., 127 Wash. 495, 499–500 (1923); Geddis v. Parrish, 1 Wash. 587, 591 (1889). Furthermore, a water right can be assigned to a third party. See Wash. Rev. Code Ann. § 90.03.310. However, the new water rights holders must then notify and receive approval from the Department of Ecology if they wish to change the use of water (e.g., place of use, purpose of use, time of use, or point of diversion or withdrawal). Wash. Rev. Code Ann. §§ 90.03.395, 90.03.397, 90.44.100. Upon receiving the approval of the change of use for the water rights, the rights then attach to the new parcel of land and do not lose its priority. R.D. Merrill Co. v. Pollution Control Hearings Bd., 137 Wn.2d 118, 125–26 (1999); Schuh v. State, 100 Wn.2d 180, 185 (1983).

Acquiring Water Rights from the State

Although some water rights do not require a permit in order to perfect or exercise the right (such as pre-1914 riparian water rights and groundwater rights in California, for example, or specific exempt water uses in Washington), a water right permit is generally required, irrespective of land ownership. The process to acquire a water right permit varies procedurally from one state to another, but generally follows a similar structure that commences with submitting an application form and supporting documentation to the state agency in charge of regulating water use in that state. Often, a public notice and hearing process is required as part of the permit approval process, followed by periodic reporting of water use (assuming the permit was approved).

When assisting a landowner in obtaining a water right permit, it is best to check with the regulatory agency on the length of time needed to complete the process completed and whether certain water uses are eligible for an expedited or shortened process. For example, in California, it may take a decade to obtain a water right permit through the regular permitting process, but recently adopted regulations allow for an expedited process (two to five years) to obtain a water right permit for purposes of complying with certain components of SGMA.

Transfer of Water Rights among Water Right Holders

Depending on water laws specific to each state, water rights that are acquired by virtue of land ownership attach to and run with the land, and therefore automatically transfer with title upon change of land ownership, without further action by the parties. Water rights acquired pursuant to a state-issued permit, unless specifically restricted in the language included in the permit itself, are transferable and assignable, but the transfer does not occur automatically. In those instances, the parties will need to submit specific forms to the issuing agency to inform them of the change of ownership.

In California, for example, a simple change of owner name must be submitted to the State Water Resources Control Board to update the record. If the right involves an adjudicated groundwater right, certain forms will need to be submitted to the entity responsible for enforcing the court order (aka, Watermaster), in order to effectuate the transfer. The value of the water right is negotiated by the parties without state interference.

Conversely, in Oregon, water rights under a permit, certificate, or license may be temporarily or permanently transferred, subject to the Oregon Water Resources Department approval. Or. Rev. Stat. §§ 540.510, 540.520, 540.523, 540.532, 540.580, 539.710; OAR 690.019, 690-380, 690-385. To be binding, any such transfer must be recorded with the Water Resources Department. Or. Rev. Stat. § 537.220. The Water Resources Department may request proof of ownership of land specified in the permit or license, and other information prior to entering the assignment in its records. Id. Public notice, protest, and hearing requirements apply. Or. Rev. Stat. §§ 537.225, 537.227. Unlike the free market approach adopted in California, the value of the water right in Oregon may not exceed the owner's cost of perfecting the right in accordance with the Oregon Water Rights Act. Or. Rev. Stat. § 537.390.

When negotiating a water right transfer, take care to make sure the transfer instruments include language that covers the transfer of not just the permitted or adjudicated right, but also of any unused amounts of water that the owner may be allowed to carry over from year to year under local laws, and any unused amounts of water that may have been stored under that right in the groundwater basin or in a reservoir. If the water right owner has constructed certain wells, pipelines, or water treatment systems in order to use or transport its water, the transfer documents must provide for the transfer of those facilities and equipment, if that is something that the new owner is interested in acquiring as well. In certain situations, water use is subject to certain assessments with by the GSA, the state, or the Watermaster. In those instances, it is important to address any pending accounting issues prior to the transfer of the water right.

Special Considerations for Water Rights in California

As stated earlier, California has a very complex water law system. One of its unique aspects is the legal distinction between surface water and groundwater and the recent regulation of groundwater. Due to climate change, the state is also experiencing increasing in hydrologic stress leading to water supply shortages. The combination of the two present a challenge as well as new opportunities for water right holders. Water supply reliability has spurred innovation among farmers and water suppliers in terms of building redundancy into their supplies wherever possible. It has also given rise to water trading opportunities (commonly referred to as water markets) in high water demand areas such as the Central Valley and the Central Coast regions. Landowners concerned about their ability to maximize the use of their

water right must stay informed as to changes in regulation impacting surface and groundwater supplies or imposing fees or use cutbacks.

One of the challenges in doing so is the fact that the law is continuously evolving and that the authority to regulate water use is not exclusive to one agency, but rather decentralized whereby authority is granted to local agencies (such as a GSA) to regulate water use while other, sometimes conflicting, regulations are issued at the state level.

Those are only some of the challenges water law attorneys face when advising landowners on their water rights. It is critically important to take a holistic approach when analyzing water rights, looking at state and local regulations where the real estate is located as well as where the water use is applied.

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In 2019, Maya completed a Water Education Foundation Water Leaders Class, a competitive one-year program for professionals working in the water field in diverse capacities, designed to deepen their knowledge of California water and enhance leadership skills.

Prior to attending law school, Maya spent more than 14 years working in the public and private sectors. This mix of public-private sector experience provides Maya with a thorough understanding of client issues and allows her to formulate out-of-the-box solutions.