



The Intersection of Estate Planning & Water Law

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OREGON ♦ WASHINGTON ♦ IDAHO ♦ NEVADA ♦ UTAH ♦ INTERNATIONAL


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Learning to Tell Our Story, about me...

- Fourth Generation Farmer
- Third Generation Lawyer
- Focus on Water Law & Property Issues
- Still part of farming and ranching operations



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Outline

- Estate Planning
 - Intestate Succession
 - Will or Trust?
 - Valuation
- Water Law-Western US
 - Prior Appropriation Doctrine
 - State Jurisdiction
 - Water Ownership vs. Use
- Intersection: Title in Water Right



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Estate Planning

- What happens to the ranch or farm when I am gone?
- Do you want Working Ranch or Asset to Sell
- Distribution of property
 - Personal & Real
- Property
 - Land
 - Water
 - Grazing Permits/Preference
 - Equipment
 - Cattle
 - Current Crops

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Intestate Succession

- No Will or Trust
- Succession
 - State Statutes Control
 - Default for real and personal property!
 - Separate v. community property?
 - Know your States Real Property Default Rules
 - Tenancy of Entirety (Marriage) – survivor takes all
 - Tenancy in Common – each as distinct, proportionate, undivided interest – no right of survivorship
 - Joint Tenant with Right of Survivorship – survivor takes all
- Probate



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Estate Planning – Will or Trust

- Succession Plan
- Asset Inventory & Valuation*
 - Appraisal or Real Estate Broker (contested vs. not)
- Lease or Sale Assets
 - Full Market Value
- Real Property Deeds (funding the trust)*



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Estate Planning – Valuation

- Valuation of Land
 - Appraisers & Brokers
- Valuation of Water
 - Market based
 - Ag Economist
 - Comparable sales
 - Value depends on water right **elements**



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Water – Elements (valuation)

Prior Appropriation – first in time, first in right

- Non-District/Not Shared
- Priority
 - Vested/Adjudicated, or Permitted/Certificated
- Source
 - Surface, Ground
- Manner/Type of Use
- Point of Diversion
- Place of Use
- Season of Use
- Rate/Volume-Duty
- Designation Orders – Closed Basins

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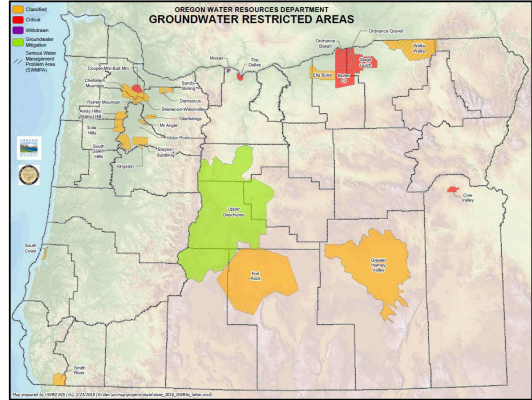
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How Elements Relate to Value

- Older priority dates – more valuable (limited “calls”)
- Larger POU, rate, & duty – more valuable
- POU location – certain regions, downstream transferability, more value



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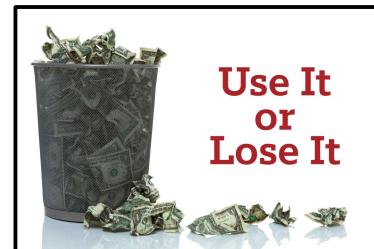
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Is water being used? Abandonment & Forfeiture

- **Forfeiture (Most States)**
 - Nonuse for 5 consecutive years (all or portion)
 - Incorrect POU
 - Incorrect beneficial use
- **Abandonment**
 - Intent to disregard a known right
- **Value Decrease**



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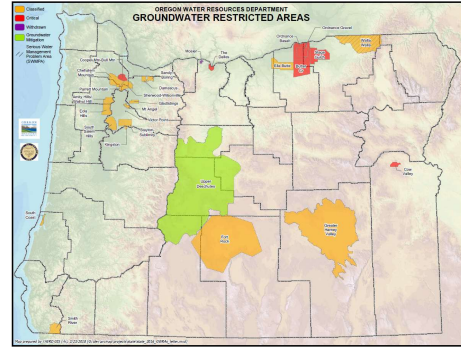
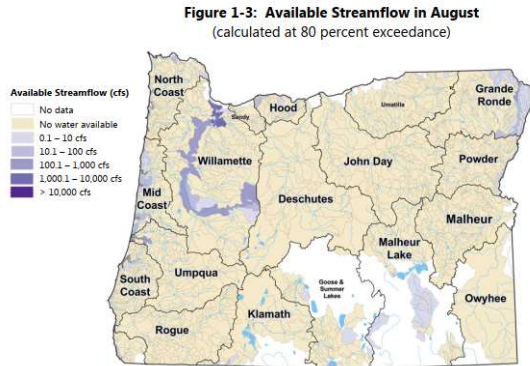


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“Closed” Basins: Oregon



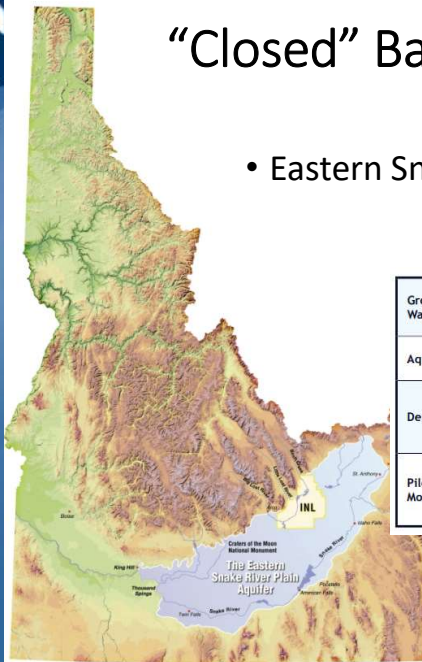

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“Closed” Basins: Idaho

- Eastern Snake Plain Aquifer



Ground Water to Surface Water Conversions	Approximately 100 kaf/year annual average (by acquiring water supplies below Milner Dam to replace water required from the Upper Snake River for salmon flow augmentation).
Aquifer Recharge	Approximately 150-250 kaf/year (using the Board's natural flow water permit and storage water when available).
Demand Reduction	Approximately 250-350 kaf/year (using voluntary mechanisms based on the principle of willing seller/willing buyer to reduce aquifer and spring flow demands, including CREP, purchases, subordination agreements, fallowing and crop mix changes, and other mechanisms).
Pilot Weather Modification Program	Implement a 5-year pilot weather modification project in the Upper Snake River Basin and potentially the Wood River system, with state, local and other agency support. Include a detailed monitoring program for the weather modification program.



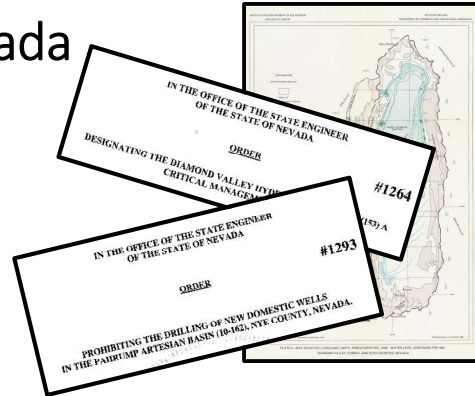
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“Closed” Basins: Nevada

- Diamond Valley CMA
 - Order 1264 (August 25, 2015)
 - Market-based GMP adopted
- Pahrump
 - Order 1107 (November 8, 1994) – Denying most new appropriations
 - Order 1293 (December 19, 2017) - No new domestic well development



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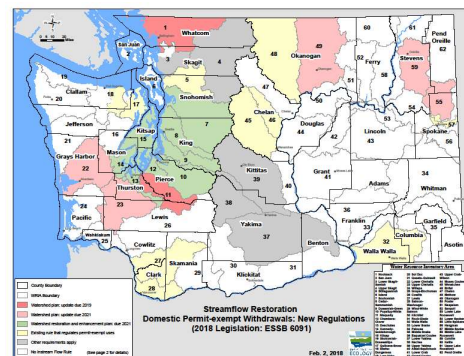
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“Closed” Basins: Washington

- *Hirst* Decision (2016)
 - Growth Management Act – required counties to limit growth to “available water resources”
- ESSB 6091 (2018)
 - Allows permit-exempt well development
 - Counties required to develop watershed plans & mitigate new development



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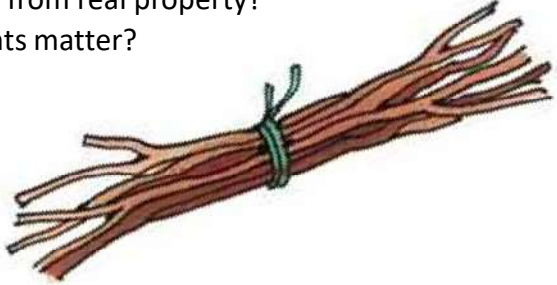
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Estate Planning - Deeds

- Probate Partition
- Deed the property from individual to trust
- Issue:
 - Are the water rights included in Deed?
 - Are water rights severed from real property?
 - Name on deed documents matter?
- State by State



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Water – State Jurisdiction

- Like estate planning, know your jurisdiction
- Public ownership of waters.
 - Nevada: All water within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public. NRS 533.025
 - Oregon: All water within the state from all sources of water supply belongs to the public. ORS 537.110
 - Idaho: All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state... IC 42-101
 - Washington: Subject to existing rights all waters within the state belong to the public... RCW 90.30.010



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Water – Property: *Real v. Personal*

- Generally: Permit-*Personal* vs. Certificate-*Real* ~ state by state
- Nevada: Nevada law is clear that appurtenant water rights are a separate stick in the bundle of rights attendant to real property. *Dermody v. Reno*, 931 P.2d 1354 (Nev. 1997)
- Oregon: Water Rights when certificated, become appurtenant to land, not the landowner. *Wilber v. Wheeler*, 534 P.2d 520 (Or. App. 1975)
 - Water that is taken into possession and confined = personal property. Example: City water reservoir where diverted from source and placed into artificial works, etc.
- Idaho: Water rights are real property and can only be conveyed and transferred as other real property. *Hale v. McCammon Ditch Co.*, 244 P.2d 151, (Idaho 1951)
- Washington: A water right is considered real property, appurtenant to and passes with a conveyance in land. *Foster v. Sunnyside Valley ID*, 687 P.2d 841, (Wash. 1984)


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Alienation of Water Rights

- Nevada – **Yes**. Free to alienate by deed without accompanying water right change application. *Adaven Mgmt. v. Mt. Falls Acquisition Corp.*, 191 P.3d 1189 (Nev. 2008)
- Oregon – **No**. If for any reason it should at any time become impracticable to beneficially or economically use water for the irrigation of any land to which the water is appurtenant, said right may be severed from said land, and simultaneously transferred, and become appurtenant to other land. *Fort Vannoy ID v. Water Res. Comm'n*, 188 P.3d 277 (Or. 2008)
- Idaho – **No**. The right to sever a water right from the land to which it is appurtenant is recognized only for the purpose of transferring it to other beneficial use. The finding that the water right was an inseparable appurtenance to the land is clearly correct. *Leland v. Twin Falls Canal Co.*, 3 P.2d 1105 (Idaho 1931)
- Washington – **No**. Water rights attach to the land or place upon which the same is used. RCW 90.03.380(1). Nevertheless, the right may be transferred to another and become appurtenant to any other land or place of use. The change application process is not automatic. See *Benton Co. Water Conservancy Bd. v. DOE*, 524 P.3d 1075 (2023 Wash. App. 2023) (Under an APA appeal, when asked for administrative confirmation of a water right, DOE would not process the request where a water right owner was not the same as the appurtenant landowner)

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Transferring Water Ownership



- Nevada - Deed Required
 - NDWR: ROC/AOT Required
- Oregon - Assignment, Deed or Other Documentation
 - OWRD: Ownership Update Form or Assignment (Notice Only)
- Idaho - Assignment, Deed or Other Documentation
 - IDWR: Notice of Change
- Washington
 - DOE: Assignment if Application/Permit
 - Certificate goes with land (deed), no update with DOE
- *Some Exceptions:* A holds legal title, B holds equitable title
 - Reclamation
 - Irrigation District
 - Water Banking

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Nevada: Deed Required

- NRS 111.167: Presumption of conveyance with the land (appurtenance). Includes applications, permits, certificates, adjudicated and unadjudicated rights.
- NRS 533.382: Every conveyance of a water right must be made by deed.
- NRS 533.384: A person whom is conveyed a water right, shall file report of conveyance and abstract of title (to water) with the State Engineer.
- NRS 533.386: The State Engineer, confirms ROC including no conflict in the chain of title. If conflict, need court judgment to confirm ownership.



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Oregon: Assignment/Deed Required

- ORS 537.220: Assignment of application, permit or license – give notice to current record owners of property.
- ORS 537.225: a record landowner holding a water right permit for an irrigation, nursery, temperature control, stock watering or agricultural water use, requesting assignment, must: provide copy of deed showing ownership. OWRD must verify the deed matches the property proposed for assignment.
- Ownership Update Form (cert only) (real property owner)
- Request for Assignment by Proof of Ownership (app, permit, etc) (deed, sales contract, court order)

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Idaho: Assignment, Deed or Other

- IC 9-503: Transfers of real property to be in writing.
- IC 42-248:
 - Submit Notice of Change of water right ownership (all or part) of a water right shall be accompanied by *deeds, court decrees, or other evidence of conveyance* of the water right.
 - If the person filing the notice does not own the land identified as the place of use for the water right, the notice shall be accompanied by evidence that written notice of the change of water right ownership was given to landowner.
 - Water right ownership disputes arising from a notice of change of water right ownership must be resolved either in a water rights adjudication or in an action to quiet title pursuant to section 6-401, Idaho Code.
- Assignment – use for Applications
 - Permits – can use assignment (pre 6/30/2022)
 - Permits post 6/30/2022 – passes as appurtenance IC 55-616 – submit Notice of Change in Water Right Ownership.
- Notice of Change – water rights and claims (must have copy of conveyance document: deed, decree, contract of sale, etc)

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Washington:

- **Certificated:** Remains with the land unless specifically reserved from a sale by deed. RCW 90.03.380
 - A water right is an interest in real property appurtenant to the land and passes to the grantee when the land is conveyed. *Tedford v. Wenatchee Recl. Dist.*, 499, 221 P. 328 (Wash. 1923); *Perrin v. Derbyshire Water Corp.*, 388 P.2d 949, (Wash. 1964).
 - No update with DOE required
- **Application or Permit:** Assignment RCW 90.03.310
 - DOE's acceptance of an assignment is only for the record-keeping purposes of RCW 90.03.310. DOE is not empowered to construe the validity of transfer of the water permit, where it is challenged--that is the province of the courts. *David Moore v. DOE*, Hearing Office Decisions, No. 96-158 (1996)

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Intersection Issues - Nevada

Adaven Mgmt. v. Mt. Falls Acquisition Corp., 191 P.3d 1189 (Nev. 2008):

- In Nevada, water rights must be transferred by deed, and such deeds must be acknowledged and recorded in the office of the county recorder.
- The difficulty of searching for transfers of water rights separate from the land (no APN number required on water rights deeds)
- Buyers are required to file a ROC/AOT with the State Water Engineer; however, under the current system, failure to do so has no effect on a subsequent purchaser's notice of the transfer.
- **“The system of documenting water rights transfers could be greatly improved.”**

NRS 111.167: Presumption of conveyance with the land (appurtenance). Includes applications, permits, certificates, adjudicated and unadjudicated rights.

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Intersection - Issues



- NV – deeds
 - Grantor/grantee do not match
 - Parcels in Washoe County with appurtenant water rights
- NV - Water reserved in deed, property sold, water never transferred to another property
 - Not pushed to trust or forgot about in probate
 - Water appurtenant to property but owned by someone else
- NV – Water conveyed separately by deed:
 - To water on public land grazing permits (people pass, no grantor to then convey to new permittee holder).
 - Subsequent deeds (grantor does not match prior grantee)

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Intersection – Issues



- OR – Developer buys 100 acres, transfers appurtenant water rights to City for System Development Charges, property developed before OWRD transfer, must have all developed property owners sign transfer
- ID – Developer buys 180 ac that has water, but now water delivered by municipality. How does developer successor move water off?
- WA – Appurtenant water rights, but then City or Irrigation District overlays area? How do you know what you have?

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Summary

- Know your state law
- Is deed or something else required to transfer water ownership
 - Application vs. Permit vs. Certificate vs. Claim/Proof
- Title: watch out for water rights being left behind!
- Avoid Quiet Title Actions
- Avoid Opening Probate



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~ Thank You ~

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