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**OWNERSHIP OF WATER RIGHTS IN IRRIGATION WATER DELIVERY
ORGANIZATIONS: AN OUTLINE OF THE MAJOR ISSUES**

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OWNERSHIP OF WATER RIGHTS IN IRRIGATION WATER DELIVERY ORGANIZATIONS: AN OUTLINE OF THE MAJOR ISSUES

by

Jeffrey C. Fereday

Introductory note. This outline reports on one water lawyer's investigation into the issue of ownership of water rights in irrigation water delivery organizations in the West.¹ It does not examine law on this subject from all appropriation doctrine states; indeed, it includes authorities from only a few—primarily California, Colorado and Idaho. It also does not presume to be exhaustive even in these jurisdictions. The practitioner interested in this arcane area of course will need to conduct his or her own research pertinent to the jurisdiction in which the lawyer is interested. However, and within these limits, the outline attempts to identify the major issues, commentary and case law on this question. As with most such presentations, I hope it will prove a useful starting place for those who ponder the question, and perhaps the relevance of the question, of "who owns the water rights" delivered by various irrigation entities.²

This presentation provides an overview of the three basic forms of water delivery organization in the West: not-for-profit corporations, often referred to as **mutual ditch corporations**, which deliver irrigation water only to their own shareholders at cost; **commercial, or "carrier," ditch companies** organized for profit and delivering to non-shareholder irrigators under a rental, sale or similar contract arrangement; and **irrigation districts**, water conservancy districts or similar "quasi-municipal" entities that provide irrigation water to irrigable lands in a prescribed area. In the course of evaluating these three forms, the outline digresses to consider the concept of "public use" in the irrigation water delivery concept; this concept helps to explain many of the case authorities in this area. The outline also looks briefly at the question of restrictions, regardless of ownership, on transfers of water delivery entitlements out of the organization's service area. The outline also evaluates authorities pertaining to deliveries from federal irrigation projects.

¹There of course are many types of irrigation water delivery organizations in the West. One treatise reports that, as of 1978, there were at least 7,000 irrigation water delivery organizations in the 17 western states, which together delivered about half of the irrigation water in the region. 3 *Waters and Water Rights* § 25.01 at 470 (Beck, ed. 1991), see also Meyers, Tarlock, Corbridge and Getches, *Water Resource Management* at 704 (1988).

²For a discussion of the nature of "ownership" in the context of water resources, see Dean Trelease's amusing and insightful article, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638 (1957). While not dealing with the subject of water right ownership within irrigation delivery organizations, the article provides useful insights on this sometimes evasive concept.

I. Characteristics of the three basic types of water delivery organizations (and a comment on the "public use" concept).

A. The mutual ditch corporation.

1. A mutual ditch (or mutual canal, or mutual irrigation, or cooperative ditch) corporation is "formed expressly for the purpose of furnishing water to shareholders, not for profit or hire." *Jacobucci v. District Court*, 541 P.2d 667, 671 (Colo. 1975). It is engaged in the business of storing and/or transporting irrigation water for use by its shareholders, in return for payment of assessments levied to meet operating expenses of the company. *Nelson v. Lake Canal Co.*, 644 P.2d 55, 57 (Colo. App. 1982).

2. Dean Trelease notes that "a mutual water company is a non-profit corporation that owns diversion or storage works and delivers water at cost to users who own its stock, and that derives its operating funds from assessments levied against the stockholders." Trelease, *Water Law, Resource Use and Environmental Protection*, Ch. 6 at 612, n. 1. Trelease notes that mutuals come in a variety of forms; he considers Carey Act operating companies (see below) to be mutual irrigation companies. *Id.* at 613. According to Trelease, the distinguishing feature of a mutual ditch company appears to be its direct control by its shareholders, and its lack of any purpose beyond supplying the shareholders with irrigation water (meaning, no profit motive, even though it may be organized under the state's general corporation laws).

3. Hutchins' view is to the same effect: "The distinctive feature of the mutual irrigation company is service rendered at cost to the lands of members only." Wells A. Hutchins, *Mutual Irrigation Companies*, USDA Tech. Bull. No. 82 at 3 (1929).

4. Wiel describes mutual ditch corporations as "a special kind of private service companies . . . [which] are usually such that shares of stock represent rights to specific quantities of water, and the stockholder's right to a supply rests upon his stock and not upon his status as a member of the public, the company being formed to supply water to its stockholders only." 2 S. Wiel, *Water Rights in the Western States* ("Wiel") § 1266 at 1170-71 (3d ed. 1911). Wiel's treatise distinguishes mutuals from ordinary "public service" entities:

[I]t is very important to note that, being in private service only, [mutual irrigation companies] are not subject to the public control which obtains as to public service companies. Nor can a mutual company be forced to deliver water to others than its stockholders.

Id. at 1171. As discussed below, companies engaged in public service are subject to special requirements. See Wiel Ch. 54 at 1179.

5. Kinney describes mutuals as

private corporations which are organized for the express purpose of furnishing water only to the shareholders thereof, and not for profit, or hire. . . . Such corporations can not be deemed "public service" or "quasi-public" corporations, as they are not organized for the purpose of either furnishing, or carrying water to all whose lands are so situated that they may be irrigated from the system of works of the corporation.

3 Kinney, *Irrigation and Water Rights* § 1480 (2d ed. 1912).

6. In some states, mutual ditch corporations were formed (or at least now operate) pursuant to specific statutory requirements. See, e.g., Colo. Rev. Stat. §§ 7-42-101 et seq.

7. Many mutuals were formed by individual water right holders who pooled assets, incorporated the ditch company and conveyed their rights to it in return for stock. See, e.g., historical discussion in *Jacobucci v. District Court*, 541 P.2d 667, 671 (Colo. 1975). This pattern was followed in establishing the "cooperative" ditch company—another term sometimes used to describe this form of company—which was the subject of *Fuller v. Azusa Irrigating Co.*, 71 P. 98 (Cal. 1902). However, it is clear that mutuals were formed in a "variety of ways." 2 *Waters and Water Rights* § 26.02 at 477 (Beck, ed. 1991). There seems to be no reason, in law or logic, to distinguish between a mutual ditch corporation formed in such a way and one which was formed before any shareholder had acquired water rights. In either case, the resulting arrangement is the same.

8. The Carey Act irrigation companies. The federal Carey Act of 1894, as amended, 43 U.S.C. § 641 is a homestead law under which Congress guaranteed to make available for actual settlers in the seventeen western states up to 1,000,000 acres of public domain if the state would carry out a water development and land settlement program. The state would contract with a for-profit "construction company" which would obtain water rights in its own name, build the irrigation project and sell to settlers stock in a successor "operating company"—a private water delivery corporation formed pursuant to state statutory procedures established to implement the Carey Act. In other words, the construction company was the promoter of the operating company; in the interim, the construction company operated the project. Once the project was completed and all (or nearly all) of the operating company stock sold to entrymen, the construction company departed (presumably with its profit), conveying to the operating company all of its remaining interest in the project facilities and water rights. The federal government issued land patents directly to the settlers, who proceeded with the non-profit stock company in place. For a discussion of the Carey Act process, see 3 Water and Water Rights § 26.02(g) (Beck, ed. 1991). Idaho, Wyoming, Montana, and Oregon saw the most lands

patented under the Carey Act process, with 630,000, 200,000, 92,000 and 73,000 acres patented, respectively. The other western states each patented less than 40,000 acres under the Act, and therefore today have relatively few Carey Act operating companies. In Idaho, water lawyers frequently encounter Carey Act operating companies; in Colorado, they rarely do.

a. Carey Act operating companies are mutuals. The operating company provides water deliveries on a per-share basis in return for an assessment. It operates not for profit, but merely in order to deliver irrigation water at cost to its shareholders. Shareholder/ irrigators control the company. Thus, Carey Act operating companies are mutual irrigation companies. The Idaho Supreme Court also has referred to a Carey Act operating company as a "mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their respective interests. . . ." *Ireton v. Idaho Irrigation Co., Ltd.*, 30 Idaho 310 (1917). However, the statutory scheme under which they were formed entitles them to powers in dealing with their shareholders which other mutuals may not have absent a charter, article, or by-law provision (such as the right to impose liens against lands and water rights of shareholders for failure to pay assessments).

b. Carey Act scheme employed both carrier and mutual corporations. Interestingly, the Carey Act program was carried out using both a commercial, or carrier ditch corporation (the construction company which sold water entitlements to settlers), and a mutual ditch corporation (the operating company established to take over from the construction company and operate the project on behalf of the stockholders/entrymen). For a description of carrier corporations, see below.

B. Commercial, or "carrier," ditch companies.

1. A commercial ditch corporation holds water right for its own profit. A commercial, or carrier, ditch company is an entity that holds a water right in its own name, for its own benefit, pursuant to which it rents or sells water to consumers for a profit. 2 Waters and Water Rights § 26.03 (Beck ed. 1991). "The commercial irrigation company is an organization designed to construct and operate irrigation works for the profit of persons who build the works and retain temporary or permanent ownership. It thus differs essentially from the mutual irrigation company and the irrigation district, which are nonprofit community enterprises." Wells A. Hutchins, "Commercial Irrigation Companies," USDA Tech. Bull. 177 (1930) ("Bull. 177"). The commercial ditch company's shareholders are not the persons making use of the water the company delivers. For a description of the difference between carrier ditches and mutual ditches as seen by the Colorado court, see *Denver v. Miller*, 368 P.2d 982 (Colo. 1962).

2. Minor role now, but important historically. Commercial ditch corporations play a very minor role in western irrigation today. See, e.g., Barton

H. Thompson, *Institutional Perspectives on Water Policy and Markets*, publication pending in 81 CAL. L. REV. 103, 118, Table 2 (1993) (indicating that the state with the greatest reliance on commercial ditch companies is Colorado, where they now supply only 1.6% of the irrigation water delivered in that state). "No known commercial companies are being organized now." 2 Waters and Water Rights § 26.03 at 496, n. 110 (Beck ed. 1991). However, a description of them here helps explain the sometimes confusing court decisions in the area of water right ownership and control in delivery organizations.

3. "Quasi-public" and subject to certain duties. The Colorado court has described a carrier ditch company as a "quasi-public entity with quasi-fiduciary duties to its contract consumers in setting rates and in permitting such consumers to exercise their rights to continue to put water to beneficial use on an annual basis." *City of Westminster v. City of Broomfield*, 769 P.2d 490, 492 (Colo. 1989); see also *Wanamaker Ditch v. Crane*, 288 P.2d 339 (Colo. 1955) (carrier ditch company as a quasi-public servant is charged with a public duty or trust to annually deliver water to its contract holders so long as they comply with the rules and regulations of the carrier company and pay the fixed carrying charges).

4. Three basic forms of commercial ditch company. Commercial ditch companies generally were organized one of three ways:³

a. The first form is a "construction or development company," a carrier ditch that would construct the canals and other facilities, then convey lands and water supply contracts to farmers. Once all lands had been irrigated and the canal's capacity fully subscribed, the carrier ditch would convey the water rights and facilities to the farmers—or, more likely, to a mutual irrigation company that the construction company would set up. At this point, the carrier ditch construction company would go out of business, presumably at a profit for its backers. This is precisely the formula used in implementing the Carey Act.

b. The "private contract company" is one which would set up for perpetual service to farmers with whom it would contract; they would pay for the water delivery at established rates, whether they used the water or not. The users never acquire any interest in the water rights or facilities. At least historically, such a company was not subject to state control of rates.

c. The "public utility company," which holds itself out to serve all comers, so long as there is adequate water supply, on an annual rental basis. The deliberate entry into public service caused a dedication to public use and subjected these companies to public utility regulation (at least after public utility commissions came into being).

³This description comes primarily from Wells A. Hutchins, "Commercial Irrigation Companies," USDA Tech. Bull. 177 at 5-6 (1930)

5. For an early discussion of the nature and duties of commercial irrigation companies in California, see Kenneth L. Blanchard, *The Relation Between Irrigation Water Users and Distributing Companies With Special Reference to Right Arising Out of Contract*, 7 CAL. L. REV. 295 (1919).

C. The "public use" concept.

1. Some water deliveries can become "dedicated" to public service. The delivery of water to an area, for irrigation or otherwise, in certain circumstances can be deemed a "public use," pursuant to which the appropriation is found to be subject to some degree of public control. In these circumstances "all who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not." S.Wiel, 2 *Water Rights in the Western States* § 1261 at 1160 (3d Ed. 1911), quoting *Hildreth v. Montecito Water Co.*, 72 P. 395, 398 (Cal. 1903). In *Hildreth*, plaintiff water user's complaint was held insufficient to support an injunction preventing a canal corporation from ceasing deliveries. The reason? Plaintiff had not alleged that the corporation was a carrier ditch which owned the water right pursuant to which plaintiff's deliveries had been made, thus plaintiff could not show that corporation had dedicated the rights to a public use to plaintiff's benefit.

2. Reasonable service to all. Wiel also points out that "[t]he common law of public service agencies is, since *Munn v. Illinois*, familiar, being, in general terms, that property devoted to the public service or use is affected with the public duty of performing reasonable service to all; that to secure this end, rates and terms of service must be reasonable, and service is compulsory upon tender of a reasonable rate; that there must be no discrimination; that the courts will enforce these things, and it needs no statute to give them the power." Wiel § 1247 at 1145 (footnotes omitted). *Munn v. Illinois*, 94 U.S. 113 (1876), spelled the end of the era when "companies of capitalists" distributed water supplies according to contract, on a *laissez faire* basis. As Wiel noted, *Munn* was "to the effect that one who devoted his property to public use owes the public corresponding duties, even at common law . . ." Wiel § 1247 at 1146. The Colorado court in *Wheeler v. Northern Colo. Irrigating Co.*, 17 P. 487, 490 (Colo. 1888), relied on *Munn* for the proposition that, by making water available for hire, a carrier ditch company "submitted itself to reasonable judicial control," the court having the power to prevent "unreasonable and extortionate demands." To be a public use at common law, it appears that the service must be "offered to the public generally" in the area to be served. Wiel at 1160.

3. Some western state constitutions declare certain types of irrigation water deliveries to be a "public use."

a. Idaho's constitution, which was adopted in 1889, contains four sections that relate to the public use or public dedication concept. These provisions are similar to, although perhaps more elaborate than those adopted in some other western states, evidently because of problems that irrigators experienced in the early years of western settlement with a plethora of

private carrier ditches that either failed financially or were not scrupulously managed. See Wiel at §§ 1244-46. The pertinent sections are Article 15, sections 1, 4,5, and 6:

The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.

Idaho Const., Art. 15, § 1.

Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have been once sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person . . . shall not, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and time of use, as may be prescribed by law.

Idaho Const., Art. 15, § 4.

Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of

settlement or improvement, may by law prescribe.

Idaho Const., Article 15, § 5.

The legislature shall provide by law, the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented, or distributed for any useful purpose."

Idaho Const., Art. 15, § 6.

(i) The Idaho Supreme Court, in construing the "sale, rental, or distribution" language of Art. 15, §§ 4, 5 and 6 of the Idaho Constitution, has ruled that "[c]ompanies or individuals may appropriate and take out the water of a stream for sale, rental or distribution, for any beneficial purpose. When so taken out, it becomes a public use, and the sale or rental of it for pay is a franchise." *Wilterding v. Green*, 4 Idaho 773,780 (1896). A subtlety implicit in this statement is that, presumably, when water is appropriated only for distribution—and not for sale or rental for pay—it is still a public use. In other words, this case could be read as meaning that even a mutual ditch company's diversion and its "naked title" to the water right would be impressed with the type of public trust described here, at least in Idaho.

(ii) Because the Idaho constitution declares that appropriation of waters for sale, rental or distribution is a "public use," the court found that deliveries under a commercial carrier ditch gave rise to the "exclusive dedication" to the consumer's use mentioned in Article 15, § 4:

The right to the use of such water after having "once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes," becomes a perpetual right subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use.

Id. at 459.

(iii) Naturally, where the appropriator is a municipal water supply company, the same rules apply, at least in Idaho: the company owns the water right, but the consumers have a perpetual right of use upon payment of established rates. Thus, in *Murray v. Public Utilities Commission*, 150 P. 47, 58 (Idaho 1915), the Idaho court reversed a public utilities commission ruling disallowing consideration of the municipal supply company's water right as part of its rate base.

When the provisions of the constitution and statutes of this state relating to water rights are carefully read

together, it is apparent that if one appropriates water for a beneficial use, and then sells, rents or distributes it to others who apply it to such beneficial use, he has a valuable right which is entitled to protection as a property right. . . . To be sure, the person who takes water from the water company or carrier, also acquires a right to the use of it, dependent upon user and payment, but this does not alter the fact that the water company has a right.

Obviously, one of the semantic problems in this area is that the "right to the use of it" the consumer holds sounds a lot like a water right—the right to use water for beneficial purposes. However, it probably is more accurate, in those unusual cases where sorting out the ownership question is important (as it was for the public utility in *Murray*), to conclude that the consumer holds a right of service, enforceable against the supplier so long as the consumer pays the bill. But, despite the fact that this entitlement arises from constitutional mandate, it is not part of the consumer's property holdings.

b. California has similar constitutional provisions establishing the public use principle. Article 10, section 5 of California's constitution provides:

The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner prescribed by law.

(i) In *Glenn Colusa Irrigation District v. Paulson*, 242 P. 494, 499 (Cal. App. 1925), a carrier ditch company became insolvent and transferred its water rights and canals to an irrigation district. A customer of the carrier company argued that he held a perpetual easement—that is, a water right⁴—that the district was bound to honor under the original scheme. The court disagreed. Construing a California constitutional provision similar to Idaho's, it concluded that a water delivery such as that being made by the carrier company constitutes a public use, and it is the company, not the landowner, who holds the water right, because "no private estate can be created in property devoted to a public use." At least in such situations, the landowner in California holds only a "right of service."

(ii) In *Thayer v. California Development Co.*, 128 P. 21, 25 (Cal. 1912), the California Supreme Court found that a development company (a commercial or carrier ditch corporation), which had sold shares in

⁴For the notion of a water right being a "perpetual easement," see *Ruhnke v. Aubert*, 113 P. 38, 40 (Or. 1911).

subsidiary mutual irrigation companies, was not supplying water for a "public use" because

the use of water for irrigation is not public unless the water is available, as of right, upon equal terms, to all landowners of the class and within the area to be benefitted who can get water from the ditches to their lands. If the dispenser of water has the right to say who shall have it, and upon what terms, selling to one and refusing to sell to another at will, it is not devoted to a public use. . . .

It appears . . . that the Development Company has always, either directly or through the auxiliary companies, selected the persons to whom it would sell and distribute the water and fixed its own prices. A use thus restricted, limited, and controlled by the owner is in no proper sense, according to the foregoing authorities, a public use.

Id. at 27.

Thayer appears to reach a result that contradicts the Colorado approach as stated in *Wheeler* and *Combs*, which is essentially that a commercial ditch cannot refuse to serve one who offers to pay the rate established by the county commissioners.

c. Idaho and California implemented the principle by explicit constitutional provisions. Colorado is an example of a state that did so by interpreting more general constitutional language. *E.g. Wheeler v. Northern Colorado Irrigating Co.*, 17 P. 487 (1888). Both approaches reach essentially the same result in terms of the obligations placed on the commercial ditch company, if not on the "ownership" analysis.

(i) Colorado's constitution, Art. XVI, § 8, authorizes the county commissioners to establish "rates to be charged for the use of water, whether furnished by individuals or corporations." Section 5 declares that waters within the state are "the property of the public," and is "dedicated to the use of the people of the state." *See also* Colo. Rev. Stat. § 37-85-110 (protecting a distributee's entitlement to continue receiving water).

(ii) The Colorado constitution does not contain the explicit "public use" language which the California and Idaho constitutions apply to those entities appropriating water "for sale, rental, or distribution." Nevertheless, the Colorado Supreme Court still has found these commercial entities to be subject to essentially the same duties as those imposed in these other states. In *Combs v. Agricultural Ditch Co.*, 28 P. 966 (Colo. 1892), the Colorado court ruled that the Colorado Constitution requires a carrier ditch

company to supply water to anyone whose lands are susceptible of being supplied from the canal and who tenders the established rate for water delivery; the court forbade the commercial carrier from imposing additional costs or "unreasonable regulations or demands." *Quoting Wheeler v. Northern Colo. Irrigating Co.*, 17 P. 487 (Colo. 1888).

(iii) The court in *Wheeler* stated that, given the "public interest" declarations of the Colorado constitution, the commercial ditch company is a "quasi public servant or agent"; it has a monopoly, and therefore is impressed with "a public duty or trust." *Id.* at 490. *See also Farmers Independent Ditch Co. v. Agricultural Ditch Co.*, 45 P. 444, 447 (Colo. 1896).

(iv) In *City and County of Denver v. Miller*, 368 P.2d 982, 984 (Colo. 1962), the court observed that the commercial ditch corporation holds legal title to the appropriation and "has a duty to protect it for the benefit of the consumers under the ditch."

(v) The distinction between "private" and "public," never crystal clear in the area of water rights, may have been unnecessarily confused, with respect to mutual ditch companies, by the Colorado Supreme Court in *Jacobucci v. District Court*, 541 P.2d 667, 671 (Colo. 1975). In *Jacobucci*, a mutual ditch company case, the court cited its 1896 decision in *Farmers Independent Ditch Co. v. Agricultural Ditch Co.*, 45 P. 444, 447 (Colo. 1896), for the proposition that "[m]utual ditch companies in Colorado have been recognized as quasi-public carriers." (The language in *Farmers* is: "Ditch corporations are quasi public carriers.") However, it appears that the *Jacobucci* court was mistaken on this point because the ditch corporation involved in *Farmers* was not a mutual ditch company. It was a commercial, for-profit carrier ditch corporation which, as explained below, is a form of organization that, from the early days, has been held to be subject to a public trust and certain special obligations of fair dealing with its consumers.⁵ In any event, this public vs. private distinction may be significant to some courts in evaluating the rights of water users in these distribution organizations.

⁵The court in *Farmers* did not state this expressly. But the description of the corporation that emerges from a close reading of the case clearly indicates that there is a distinction between its stockholders, on the one hand, and its "consumers," on the other.

D. The irrigation district.⁶

1. **The basic definition.** Irrigation districts⁷ are water distribution organizations formed pursuant to state statutory procedures which vest them with quasi-municipal powers, the most important of which are the powers to issue bonds and to levy assessments, backed up by liens, on lands within the district. These lands typically are the irrigable lands within certain boundaries that could be served by the district's canal system. Irrigation districts are governed by boards elected by voters within the district; voting usually is restricted to landowners, sometimes on the basis of the number of acres owned.⁸ Districts also often have authority to operate drainage or power facilities, or to carry out other water-related purposes. Irrigation district facilities are tax-exempt.

2. **The Wright Act and Fallbrook.** In general, legal authority for the formation of irrigation and other special water districts in the West (such as water conservancy districts) can be traced to the Wright Act, an 1887 California law, Ch. 34, 1887 Cal. Stat. 29, and to *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112 (1896), which upheld the act's constitutionality.

3. **Further reading.** For discussions of irrigation and other special water districts, see John Leshy, "Special Water Districts—The Historical Background," in James Corbridge, Ed., "Special Water Districts: Challenge for the Future," Natural Resources Law Center, Boulder, Colorado (1983); Wells Hutchins, "Irrigation Districts, Their Organization, Operation and Financing," U.S. Dept. of Agriculture Technical Bulletin No. 254 (1931); Comment, "Desert Survival: The Evolving Western Irrigation District" 1982 Ariz. St. L. J. 377 (1982); and 3 Waters and Water Rights § 27.02 (Beck, ed. 1991).

⁶This section focuses primarily on the law of Idaho.

⁷The term "irrigation district" is used in this outline as a generic term to refer to any type of quasi-municipal entity that was formed to deliver water from an irrigation project to consumers. The term distinguishes this type of entity from mutual irrigation companies and includes water conservancy districts, reclamation districts and other similar forms of "special water districts" that are concerned with irrigation supply. This outline does not investigate any issues that may be peculiar to special districts concerned only with municipal water supply.

⁸Because the Supreme Court has found irrigation districts to be special purpose entities which do not exercise normal governmental functions, it has affirmed their entitlement to restrict voting to landowners, despite the constitutionally-grounded "one-person, one-vote" rule. *Ball v. James*, 451 U.S. 355 (1981).

II. Ownership of water rights in each of the three forms of organization.

A. Ownership of water rights in mutual ditch corporations.

1. Legal title in corporation, beneficial title in shareholder.

Kinney states that, in a mutual water corporation, "legal title to these rights is in the corporation, while the equitable title remains in the original owners, or their grantees. In other words, the company holds the legal title to the property in trust for its respective shareholders, the terms of the trust to be governed by the articles of incorporation, or the by-laws of the same." 3 Kinney on Irrigation and Water Rights § 1481 at 2661-62.

The judicial decision containing perhaps the clearest and most comprehensive statement about water right ownership in mutual ditch companies is that of the Colorado Supreme Court in the well-known case of *Jacobucci v. District Court*, 541 P.2d 667, 672-73 (Colo. 1975), where the court ruled that

the shares of stock held by the consumers in a mutual ditch corporation represent a specific property interest in a water right. The interest of these shareholders cannot be "defeated or altered by any action of the ditch company or its other shareholders." *United States v. 508.88 Acres of Land*, U.S. District Ct. (D. Colo. May 8, 1973, Unpublished); *Bent v. Second Extension Water Co.*, 51 Cal. App. 648, 197 P. 657 (1921). While the "naked title" may stand in the name of [the mutual ditch corporation], the ditch, reservoir, and water rights are actually owned by the farmers who are served thereby.

See also *May v. United States*, 753 P.2d 737 (Colo. 1988). The dispute in *Jacobucci* was about whether the ditch company's shareholders were indispensable parties in a city's action seeking to condemn the ditch company's water rights. Because of the "ownership" principles described above, the court ruled that the shareholders should have been joined.

2. The theory that mutuals might hold water rights as trustee.

The court in *Jacobucci* also observed that there is some authority for the proposition that the ditch company holds the water right subject only to a trust in favor of the shareholders. *Jacobucci*, 541 P.2d at 673, quoting Kinney, *Irrigation and Water Rights* § 1482 (2d ed. 1912). However, the court rejected the trust theory in favor of "actual ownership . . . in the shareholder." 541 P.2d at 673.

3. Importance of statute to the ownership question. While the *Jacobucci* court noted the existence of a Colorado statute setting forth certain

obligations of mutual ditch companies, Colo. Rev. Stat. §§ 7-42-101 et seq., it did not look to this statute as authority for its conclusions about water right ownership. (Incidentally, the statute does speak, in the context of the ditch company's lien for assessments, of the "shares of stock and the water rights represented by the same" *Id.* at § 7-42-104(3).)

4. Non-profit, either formally or in fact. In other states, such as Idaho, mutual corporations were formed under the general corporate code, and operate on a non-profit basis as a matter of practice. Carey Act corporations are subject to statutory provisions, but these do not contradict the conclusion that shareholders may hold beneficial title to the water rights.

5. The shareholder/corporation "contract." The *Jacobucci* court further noted that "[t]he relationship between the mutual ditch corporation and its shareholders arises out of contract, implied in a subscription for stock and construed by the provisions of a charter or articles of incorporation." Citing *Supply Ditch Co. v. Elliot*, 10 Colo. 327, 15 P. 691 (1887); C. Kinney, *Irrigation & Water Rights* § 1482 (2d ed. 1912). Kinney's perspective is that "[t]he relations between private incorporated water companies, whether organized as mutual corporations, or as corporations for profit or hire, is that of contract, and the rights and duties of both parties grow out of the contract implied in a subscription for stock, and construed by the provisions of their charters, or articles of incorporation." Kinney on *Irrigation and Water Rights* § 1482 at 2662 (footnotes omitted). It follows that the exact dimensions of a shareholder's ownership, or what flexibility that ownership affords (such as the conditions that may limit transferring the right) may depend upon the terms of the corporation's "contract" with the water user.

6. The status of stock in a mutual ditch company.

a. In *Pacific Savings & Loan Corp. v. Schmitt*, 103 F.2d 1002 (9th Cir. 1939), the federal court held that if a landowner sells his land and water rights, his ditch company stock is included, even though not mentioned. The stock is a mere muniment of title to the water right. It has only nuisance value in the hands of one who has sold his water right. However, stock "certificates represent indicia of title and the essential right to participate in management" of the corporation.

b. In *Butte County v. Lovinger*, 266 N.W. 127 (S.D. 1936), shares of ditch company stock were deemed to be personal property. Plaintiff obtained land in a mortgage foreclosure and contended that stock in the irrigation association represented certain water rights which were appurtenant to the land, and that he acquired these rights by virtue of his deed in foreclosure. The court disagreed, and held that water rights represented by shares of stock in a water company are personal property and may be sold and transferred independently of land and that they had not been intended to be included in the mortgage. *Id.* at 132.

c. In *Genola Town v. Santaquin City*, 80 P.2d 930, 936 (Utah 1938). the Utah court observed that a certificate of stock in a mutual ditch company "is not like the stock certificate in a company operated for profit. It is really a certificate showing an undivided part ownership in a certain water supply." In other words, shareholders in a mutual ditch might be seen as tenants in common in the water rights delivered by the company.

d. In *Vonburg v. Farmers Irrigation Dist.*, 270 N.W. 835, 839-40 (Neb. 1937), which, despite its caption, involved a mutual ditch company, the farmers were held to hold full title to the water rights when they conveyed away the other assets of the company.

7. Shareholder ownership in canal, reservoir and other works. The court in *Jacobucci* also emphasized that the shares of stock represent, in addition to "a definite and specific water right," "a corresponding interest in the ditch, canal, reservoir, and other works by which the water right is utilized." *Id.* at 672. For a comment on this subject, see Jeffrey J. Kahn, "Who Owns Mutual Ditch Company Assets," publication available from Natural Resources Law Center, Boulder, Colorado.

8. Right of ditch company to approve or disapprove of transfer or change of shareholder's water right. As is well known by water lawyers dealing with water right sales and transfers that involve delivery organizations, the question of ownership of rights is an interesting one, but it often is not dispositive of anything. Other issues, such as traditional injury concerns or alleged limitations on transferability imposed by company bylaws, often define the debate, with the scope and meaning of ownership being a secondary discussion. For example, the courts on several occasions have dealt with the extent to which a mutual ditch company effectively can limit a shareholder's right to deal freely with his water right.

a. The mutual ditch company shareholder's right to change or transfer his water right may be limited, at least to reasonable degree, by corporate articles or bylaws. In *Wadsworth Ditch Co. v. Brown*, 88 P. 1060 (Colo. 1907), both the mutual ditch company and other shareholders objected to a proposed change of point of diversion to another canal. The court found in favor of the stockholder despite the company's assertion that the change would violate a bylaw, and a customary practice in the company, to the effect that shareholders could use the water of another when he had no immediate need for it. The court clearly presumed that the shareholder, not the company, holds vested water rights, although this was not expressly stated.

b. In *Model v. Madsen*, 285 P. 1100, 1101 (Colo. 1930), the Colorado court ruled that mutual ditch company bylaws constitute a contract between the shareholder and the corporation that will be enforced unless they violate public policy or are unreasonable. In *Model*, the company had refused to allow shareholder to change his place of use. See, also *Fort Lyon Canal Company v. Catlin Canal Company*, 762 P.2d 1375, 1379 (Colo. 1988), quoting *Fort Lyon*

Canal Co. v. Catlin Canal Co., 642 P.2d 501, 507 (Colo. 1982) (upholding mutual ditch company board decision, based on a bylaw "approval" provision and reasonable findings that the change would cause injury, to disapprove a shareholder's proposed transfer). See also *Riverside Land Co v. Jarvis*, 174 Cal. 316, 162 P. 54 (1917).

c. The case of *East Jordan Irrigation Company v. Morgan*, Utah Supreme Court docket no. 920125 (filed 1992), bears watching in this context. It squarely presents the question whether a mutual ditch company shareholder may change his right's point of diversion and place of use over the company's objection.

d. In some cases, statutory provisions provide the primary authority for imposing these limitations on ownership. Idaho Code § 42-108, which grants general authority for holders of water rights to change the place of use, nature or time of use, or point of diversion under a water right, contains the following proviso:

if the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change . . . shall be made or allowed without the consent of such corporation or irrigation district.

(i) In *Bishop v. Dixon*, 483 P.2d 1327, 1331 (Idaho 1971), this proviso was held inapplicable to a lateral ditch association because it was not a corporation. Therefore, the association's bylaw prohibiting any transfer was held to violate section 42-108's grant of authority to make such a change.

(ii) In *Johnson v. Pleasant Valley Irr. Co., Ltd*, 69 Idaho 139 (1949), the proviso in section 42-108 was enforced in favor of the mutual ditch company which opposed shareholder's proposed change. Shareholder appealed, asserting primarily constitutional arguments. The Idaho Supreme Court ruled as follows:

(A) Section 42-108 does not violate the 14th amendment to the U.S. Constitution because the administrative procedure involved in considering the transfer afforded plaintiff a hearing. Furthermore, absent a statute to the contrary, a mutual irrigation corporation is not required to hold a hearing on a matter having to do with "the handling of its affairs and in dealing with its stockholders." *Id.* at 145.

(B) Section 42-108 does not impermissibly delegate legislative power. Stockholder had cited land use cases overturning legislation granting consent power to neighboring landowners. The court found the analogy inapt: "[T]here is no analogy between the relation of a property

owner to his neighbors and the relation existing between a stockholder and his corporation. The refusal of a corporation to permit one of its shareholders to substantially withdraw from the corporation and change his relationship to the other stockholders without its consent, does not involve legislative power but is concerned with the internal affairs of the corporation." 145-46. The court found no authority recognizing the right of "a shareholder in a water corporation to change his point of diversion and place of use *without the consent of the corporation*, to a place where he could not be served by the irrigation system of the corporation. The exercise of such a right would tend to disrupt the unity of the corporation, and to impair the very purpose for which the same was formed. Carried to excess, it would destroy the usefulness of the corporation." *Id.* at 145 (emphasis in original). The court did not cite any facts to support the argument that Johnson's proposal would "disrupt the unity of the corporation."

(iii) It would appear that, despite the language of *Johnson*, there would be solid legal and public policy arguments for the position that statutes like Idaho's section 42-108 should be interpreted to mean that the company can withhold permission only for reasons of actual injury to the corporation or other shareholder.

9. Ownership of water rights in Carey Act operating company.

Under the Carey Act land settlement scheme, the state entered a contract with the project construction company. The terms of this contract, to take one example described in *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 209, 3 P.2d 1105 (1931), were that the construction company's contracts with settlers would involve a "sale or contract of the water right to the [settler, which] shall be a dedication of the water to the land to which the same is applied and the water right so dedicated shall be a part of and relate to the water right belonging to the said system of canals." In turn, the stock certificate issued to the settler entitled him or her "to proportionate interest in the dam, canal, water rights and all other rights and franchises of the [Carey Act operating company], based upon the number of shares finally sold . . ." The Carey Act operating company received deeds from the construction company for both the water rights and the irrigation water delivery system; the local county records will reflect this "naked title." However, the operating company is a mutual irrigation company, and beneficial title to the water rights and facilities rest with the shareholders.

a. In *Leland*, the court ruled that, pursuant to these contract arrangements, the settler "buys a water right dedicated to his land," and that "the water right is an appurtenance to the land to which it was dedicated, and is part of that property." *Leland v. Twin Falls Canal Co.*, 51 Idaho at 211. "It was clearly the intention of the legislature, as well as the construction company, that the individual contract holder or settler should be the owner of the water right upon the completion of the construction works." *Id.*

b. In *Ireton v. Idaho Irrigation Co., Ltd.*, 30 Idaho 310, 317 (1917), the court found that the foreclosure of mortgage on a Carey Act company stockholder's land included the shareholder's portion of the water right delivered

by the company, as well as the debtor's stock in the company. While the stockholder had pledged his shares as security to another lienholder, this second lienholder could not assert an ownership in the water right because, at least once the right becomes appurtenant to land by delivery and beneficial use, the certificates are mere "muniments of title" to the water right, and "ownership of [the certificates] passes with the title which they evidence." *Id.* at 317, citing *In re Thomas' Estate*, 81 P. 539 (Cal. 1905) and *Berg v. Yakima Valley Canal Co.*, 145 P. 619 (Wash. 1915).

c. Idaho statutes support the proposition that Carey Act corporation shareholders, as opposed to the corporation itself, own the water rights. *See, e.g.*, Idaho Code sections 42-2501 through 42-2509, which recognize a Carey Act corporation stockholder's right to transfer the "water right" appurtenant to his land to other lands within the same Carey Act system.

d. I.C. § 42-2025 provides that "[t]he water rights to all lands acquired under [the state's Carey Act procedures] shall attach to and become appurtenant to the land as soon as title passes from the United States to the state."

10. Carey Act company shareholder's interest in reservoir, canal and other facilities. The court in *Leland* also stated that, under the contract, the settler obtains "an interest in the remaining property of the corporation, to wit: the dam, franchises and other remaining property to be used in connection with the water right." *Id.* *But see Hobbs v. Twin Falls Canal Co.*, 24 Idaho 380, 394 (1913), where the court at first appears to presume that a Carey Act operating company is a commercial irrigation corporation whose duty to supply water arises from the constitutional "public use" provisions. However, the court ultimately concludes that the corporation "is nothing more than a holding company" for the interests of the irrigators. *Id.*

B. Ownership of water rights in commercial ditch corporations.

1. In general. Hutchins' equivocal comment about the ownership of the water right in commercial ditch corporations is a good indication of the difficulty encountered in trying to sort out this question: "Water rights vest in the consumers in some States, and in others may vest in either the company or consumers, depending upon the statutes and court decisions involved." Wells A. Hutchins, "Commercial Irrigation Companies," *Tech. Bull.* 177 at 16 (1930). It appears that the "general rule" would be that the water rights vest in the company, and the consumer has only a right of service. *Glenn-Colusa v. Irr. Dist. v. Paulson*, 242 P 494 (Cal. 1925).

2. The Colorado approach. The Colorado court in *Wheeler v. Northern Colorado Irrigating Co.*, 17 P. 487, 490 (Colo. 1888), noted that, by diverting the water, the carrier company acquires "certain peculiar rights," but that "giving these rights all due significance, I cannot consent to the proposition that the carrier becomes a 'proprietor' of the water diverted." *Id.* It is not

completely clear whether the court is saying that the commercial ditch company holds no water right; the court certainly does state that the company has no property right in the "water" itself, which is obvious enough. The court's reasoning makes much of the fact that it is the consumer who puts the water to beneficial use although it does not go so far as to say that only the consumer holds a water right. On the question of "ownership," the case is confusing.

a. Kinney's treatise identifies *Wheeler* as using "strained" reasoning, but concludes that it stands for the proposition that Colorado adheres to the rule that commercial ditch companies do not hold title to water rights. 3 Kinney on Irrigation and Water Rights § 1476 at 2653 (2d ed. 1912).

b. It appears that the Colorado court, even after finding the company to be a "quasi-public servant or agent," felt that the consumer needed yet more protections.

3. The Idaho approach—strongly influenced by the "public use" and "dedication" language of the Idaho Constitution. The Idaho court appears to have had an easier time guaranteeing protection for irrigation water consumers without struggling to show that the commercial supplier holds no water right. In *Wilterding v. Green*, 4 Idaho 773 (1896), the court found that Idaho Const. Art. 15 §§ 1 and 4 mean that "all waters appropriated before or after the adoption of the constitution, for sale, rental or distribution, are declared to be a public use, and are exclusively dedicated to such use." *Id.* 779-80. The court further observed that individuals "who are in a condition to use such waters . . . have a constitutional right to the use of such waters, under such reasonable rules and regulations, and upon such payment, as may be prescribed, which payments and regulations must at all times be reasonable." *Id.* at 780. The court noted that Art. 15 § 4 also means that

a party, having once used the water upon his land, cannot be thereafter deprived of it without his consent, if needed, when he shall pay therefor, and shall comply with such equitable terms and conditions as the law prescribes. This section also gives the party using such water under the conditions a perpetual right to such use.

Id.

The *Wilterding* court also concluded that the Idaho constitution was intended "to deal only with the 'use' of water, and not with the property rights of appropriators therein The sale, renting, and distributing of the water is a dedication, and brings its use under the control of the state, but it in no sense destroys or abrogates the property rights of the appropriator therein." *Id.* at 786.

Thus, the court in *Wilterding* indicates that the public use provisions in the Idaho constitution do not address the question of water right ownership, but

specifies only that the use of consumers or distributees is a dedication to their lands that cannot thereafter be interrupted so long as they pay reasonable assessments.

a. In *Hard v. Boise City Irr. and Land Co.*, 76 P. 331 (Idaho 1904), the court ruled that, because of the Idaho constitutional provisions, a consumer supplied by a carrier ditch obtained a perpetual right to use the water, upon payment of annual rentals, and thus was entitled to change its place of use to another location on the ditch. The opinion comes close to declaring that the consumer holds the water right. See also *Slosser v. Salt River Valley Canal Co.*, 65 P. 332 (Ariz. 1901).

b. *Farmers Cooperative Ditch Co. v. Riverside Irr. Dist.*, 94 P. 761 (Idaho 1908), involved an appeal from a decree adjudicating rights on the Boise River. The Idaho Supreme Court had before it both kinds of ditch companies—mutuals and commercial canal corporations—as well as private ditches. Its opinion provides a straightforward description of the two types of ditch companies and the nature of their respective ownership of the water rights under which they divert.

(i) The court first observed that there were several purely private ditches where “the appropriators were also the users of the water; they owned the water right and used the water on their own lands.” *Id.* at 457. But the court focused its attention on the two types of delivery corporations. First were the mutuals:

Others were co-operative ditch companies where a number of water users had joined together and constructed a ditch, each one owning a number of shares in the company which entitled him to a proportionate amount of the water of the canal

Id. Second, the commercial ditch corporations: “By still other ditches the waters were appropriated and diverted not for the immediate use of the ditch owners, but for the purpose of sale, rental and distribution.” *Id.* The court then described what it saw as the basic rule as to ownership of the “appropriation”—that is, the water right. In both cases, the “ditch owners” are the appropriators:

Whatever the differences may be in the facts with reference to the use and application of the water, *the ditch owners in every instance are necessarily the appropriators* of the water within the meaning of the constitution and statute.

Id. at 457-58 (emphasis added). Because the ditch owners in a mutual company are the shareholders, each shareholder also is an owner of the appropriation—that is, an owner of the water right—according to the number of his or her

respective shares. However, as to a commercial carrier ditch, applying this same rule means that the irrigators/consumers are *not* vested with ownership of the water right because they are not also the company owners: "The appropriation of waters carried in the ditch operated for sale, rental and distribution of waters does not belong to the water users, but rather to the ditch company." *Id.* at 458.

C. Ownership of water rights delivered by irrigation districts.

1. District ownership of property as a matter of statutory declaration. State statutes authorizing the creation of irrigation districts may shed light on the type of "ownership" the district is to obtain in various property interests. For example, Idaho Code § 43-316 provides:

The legal title to all property acquired under the provisions of this title shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this title. Said board is hereby authorized and empowered to hold, use, acquire, manage, occupy and possess said property as herein provided.

This section suggests that an irrigation district holds legal title to water rights it delivers. In *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 141, 269 P.2d 755, 760 (1954), the Idaho court took this position, although it did not attempt to make a distinction between "legal" and "equitable" title:

As held by this court, and as expressly provided by § 43-316, I.C., the title to all property acquired by an irrigation district, including its water rights, is vested in the district and held by the district in trust for, and dedicated and set apart to, the uses and purposes set forth in the law.

2. Court decisions relevant to water right ownership by the district. There is no definitive Idaho law on the question of the nature of the irrigator's title to water rights received from the district. However, it is clear that a trust relationship exists between the irrigation district and the landowners which it serves. *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho at 141, 269 P.2d at 760. The irrigation district holds title to its property, including any water rights it may own, in trust for the purpose of irrigating lands within the district.⁹ *Bradshaw v. Milner Low Lift Irrigation District*, 85 Idaho 528, 381 P.2d

⁹ Chapter Eight of Title 43 provides that an irrigation district may retain title to or repossess a water right where the landowner is delinquent in payment of his assessments. To reconcile this section with Idaho Code Section 43-316, one could conclude that its application is limited to the retaining or repossession of the title held by the irrigator, i.e. beneficial title. Or, where the landowner owns his water right independently of the irrigation district's distribution, chapter eight could provide authority for the district's ability to obtain title via the repossession

440 (1963); *Lewiston Orchards Irrigation District v. Gilmore*, 53 Idaho 377, 23 P.2d 720 (1933). One of the characteristics of a trust is the separation of legal and beneficial interests. *Pacific States Savings & Loan Co. v. Commercial State Bank*, 46 Idaho 481, 486, 269 P. 86, 87 (1928).

a. Because the district has no shareholders, the ownership analysis presumably would reach results different from those reached in the case of mutual companies. Nonetheless, the public use doctrine, which effectively operates to vest the irrigator with the entitlement to continue receiving water, regardless of his or her "ownership," will apply in the case of the district (and probably not in the case of a mutual). For example, given the language in the above-quoted Idaho constitutional provisions, it is not surprising that an irrigation district in Idaho would be seen as an entity involved in providing irrigation water under a "distribution" within the meaning of the constitution. Accordingly, not only is legal title to district water rights held in trust, the use of water in a district is a "public use," subject to the regulation and control of the state. Idaho Const., art. 15, § 1; I.C. § 43-304 (1990):

The defendant district, having acquired by purchase the rights of the original appropriator and having itself made subsequent appropriations and purchases of water, stands in the position of appropriator for distribution to the landowners within the district, within the meaning of Const., Art. 15, § 1. . . . The landowners, to whose lands the water has become dedicated by application thereon to a beneficial use, have acquired the status and rights of distributees under Const., Art. 15, §§ 4 and 5.

Bradshaw v. Milner Low Lift Irrigation District, 85 Idaho 528, 545, 381 P.2d 440, 457 (1963). See also *Nampa & Meridian Irrigation Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916 (1935).

The framers of Idaho's Constitution clearly intended that whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental or distribution, that it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes.

Mellen v. Great W. Beet Sugar Co., 21 Idaho 353, 359, 122 P. 30, 31 (1912). The right to continue to use the water delivered by the district, in Idaho at least, thus is a perpetual entitlement.

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Fereday: OWNERSHIP OF WATER RIGHTS IN IRRIGATION ORGANIZATIONS—22

Givens Parsley & Huntley
Boise, Idaho

b. However, as to the narrow "ownership of the water right" issue itself, the same court has not been so solicitous of the irrigator in an irrigation district. In *Nampa & Meridian Irrigation District v. Barclay*, 47 P.2d 916, 921 (Idaho 1935), another of the cases where the issue was whether the irrigators are necessary parties to litigation concerning rights to water the district delivers, the Idaho court stated that

The consumers possess no water right which they can assert as against any other appropriator,—their rights are acquired from the district which is the appropriator and owner and it is the district's business to protect the appropriation and defend it in any litigation that arises. (*Yaden v. Gem Irr. Dist.* 37 Ida. 300, 216 Pac. 250.) One who acquires from an appropriator, whose right was initiated by appropriation under sec. 1, art. 15, for "sale, rental or distribution," is not the owner of the appropriation and does not acquire the rights of an appropriator but he simply acquires the rights of a *user and consumer*, as distributee of the water under secs. 4 and 5, art. 15, of the Constitution.

3. California authorities. California's irrigation district law, upon which is based similar laws throughout the West, *see, e.g., Progressive Irr. Dist. v. Anderson*, 19 Idaho 504, 114 P. 16 (1911), provides that legal title to district water rights is held by the irrigation district in trust for the landowners, who are the equitable title holders. *United States v. Imperial Irrigation Dist.*, 559 F.2d 509 (9th Cir. 1977), *modified* 595 F.2d 524 (9th Cir. 1977). Equitable ownership of the water is held in common by all the irrigators within the district. *Id.*, *see also Merchants' Nat. Bank v. Escondido Irr. Dist.*, 144 C. 329, 334, 77 P. 937, 939 (1904) (property owner/irrigators are "the beneficiaries of the trust" who enjoy "the equitable ownership of [the district's] water rights, reservoirs, ditches, and property generally, as the means of supplying water").

The landowner's interest in the water right comes with restrictions, however, and, at least as the California court sees it, it a different interest than, say, the interest of a shareholder in a mutual company.

[T]o sustain the claim of plaintiff, it must be held that the effect of our statutes relative to irrigation districts, is to make each owner of land within a district the absolute owner of the proportionate share of the water of the district to which his land entitles him, to do with as he sees fit, even to the extent of diverting all thereof from the irrigation of lands within the district. It seems very clear that such a conclusion would be opposed to the whole plan or scheme of the legislation for irrigation districts The right of a landowner of the district to the use of the water acquired by the district is a right to

be exercised in consonance with and in furtherance of such ultimate purpose, viz, for the improvement by irrigation of lands within the district, and in no other way. His right is always subordinate to the ultimate purpose of the trust. So far as he proposes to use the water for the irrigation of lands within the district, he is proposing to use it in furtherance of the purpose of the trust, and is entitled to have distributed to him for that purpose, such proportion as his assessment entitles him to. To this extent only can he be held to be the owner of any share or portion of the water

Jenison v. Redfield, 87 P. 62, 63-64 (1906) (citations omitted). *Accord*, *State v. Birdwood Irrigation Dist.*, 46 N.W.2d 884 (Neb. 1951).

4. Colorado on irrigation districts. Colorado's irrigation district law also is based on California's. *Anderson v. Grand Valley Irr. Dist.*, 85 P. 313 (Colo. 1906). In *Anderson*, the Colorado court found that "all the property acquired by the districts, including the water rights, in equity belongs to [the landowners]." *Anderson*, 85 P. at 316.

D. Ownership of water rights delivered by a federal reclamation project.

1. Irrigators probably would be seen as holding beneficial title.

There is no definitive rule concerning the ownership of water rights in reclamation projects. However, the theory that landowners in federal reclamation projects are the beneficial owners, and that the federal government is the legal title holder of the water rights, seems to have gained the most support. Underpinning this view is that the United States, in carrying out the mandates of the Reclamation Act of 1902, must proceed pursuant to state water law, at least so long as such law does not frustrate the purposes of the federal act. Section 8 of the Reclamation Act, 43 U.S.C. §§ 372 and 383, provides:

The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or in any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such law, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner,

appropriator, or user of water in, to or from any interstate stream or waters thereof.

2. Rights held by U.S.: beneficial use by irrigators. The federal government has acquired water rights for federal reclamation projects in two ways: primarily, it has applied to state authorities and received a permit, license or decree, as the case may be, recognizing the right pursuant to state law. In addition, the federal government has obtained water rights by conveyance from entities or individuals (such as those who either failed to fully develop their own storage project or chose for other reasons to throw in with the federal project). In either case, the United States holds the water rights in its name. But, as is the case with all water delivery organizations, the United States (or its contracting irrigation district) itself is not the entity making beneficial use of it. The act thus sets up the same dual involvement in the water right—one diverts, the other applies to beneficial use—that exists with respect to private and quasi-public water distribution entities and their shareholders or distributees.

3. Ickes v. Fox. In *Ickes v. Fox*, 300 U.S. 82, 84 (1937), the Bureau of Reclamation attempted to reduce water long-standing water deliveries to irrigators, who received their water under repayment contracts. The United States argued that it had acquired water rights in its own name under state law in compliance with section 8, and that its distribution of water under the rights gave the irrigators no property interest in the water rights, but only "contract rights against the distributor." The Supreme Court disagreed:

Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. The government was and remained simply a carrier and distributor of the water with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefor, it was provided that the government should have a lien thereto—a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the landowner.

Ickes v. Fox, 300 U.S. at 94-95 (citations omitted).¹⁰

4. *Nebraska v. Wyoming*. The rule in *Ickes* was reaffirmed in *Nebraska v. Wyoming*, 235 U.S. 589 (1945), which concerned a dispute between Nebraska, Wyoming, Colorado and the United States regarding the waters of the North Platte River. The United States claimed it owned all of the unappropriated water in the river, and that its entitlement was derived not from appropriation but from its underlying ownership of the lands and waters—all acquired by cessions from foreign governments—which entitled it to an apportionment free from state control. The Court rejected the federal assertion, noting that the water rights in the North Platte Project all had been obtained in compliance with state law, and that “[t]he property right in the water rights is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator.” *Id.* at 614. The court found that the appropriators were the ones who put the water to beneficial use, thus perfecting the water right that had been issued in the name of the United States. In this way, the landowners had “become the appropriators of the water rights, the United States being the storer and the carrier.” *Nebraska v. Wyoming*, 325 U.S. at 615.

5. *Nevada v. United States*. In *Nevada v. United States*, 463 U.S. 110 (1983), in an attempt to obtain additional water rights for the Pyramid Lake Indian Reservation, the United States sought to undo the 1944 Orr Ditch decree for Truckee River waters. After reviewing *Ickes* and *Nebraska v. Wyoming*, the Court concluded that the landowners, not the government, receive the beneficial interest in the water rights, and therefore the government is not at liberty to reallocate project water rights as if it owned these rights in fee. *Id.* at 128.

[W]e conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the Orr Ditch decree in 1944 for use in the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, *the government's "ownership" of the water rights was most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.*

¹⁰According to Professor Sax, the irrigator relying on federal water project supplies has no more than “a right to fair treatment” by the federal government, which is “essentially the same as that to which he is entitled as a public utility user.” Joseph L. Sax, *Federal Reclamation Law, in 2 Waters and Water Rights* § 118.3 at 187 (R. Clark ed., 1967).

Nevada v. United States, 463 U.S. at 126 (emphasis added). However, the Court in *Nevada v. United States* noted that the federal government retains *legal title* to the water right. *Id.* at 27.

6. Solicitor's opinion. The Interior Department Solicitor has opined that, as to waters held in Bureau of Reclamation storage reservoirs, the state-granted water right—the “paper” entitlement—rests “exclusively with the distributor,” that is, with the United States. *Filing of Claims for Water Rights in General Stream Adjudications*, M-36966, 97 I.D. 21, 23 (1989). However, the opinion also notes that “it is [the individual irrigators] and not the distributor who actually put the water to a beneficial use as required by state law,” and concludes that *Nevada v. United States* “conclusively reaffirmed the concept that beneficial ownership of a reclamation project water right is in the water users who put the water to a beneficial use.” *Id.* at 27.

a. The Solicitor also concluded, based on the ruling in *Nevada v. United States*, that the legal title held by the Bureau carries with it an obligation “to preserve, maintain, protect, or have confirmed project water rights that are held in the name of the United States.” 97 I.D. at 28. Thus, the Bureau has the obligation to file for and defend project water rights in any general stream adjudication in which the federal government might be joined. *Id.* The Solicitor noted that such a filing is the means by which the water user, the beneficial title holder, can effectively participate in the proceeding with actual proof of beneficial use to back up the agency's filing. *Id.*

b. The Solicitor's opinion found that *Ickes* did not contradict the Supreme Court's earlier ruling, in *Ide v. United States*, 263 U.S. 497, that, primarily in order to protect project water entitlements and the project itself, the federal government retains some “control over the water” in federal reclamation projects, as well as those rights “incident to the appropriation” not placed in the hands of the appropriator. Likewise, the Solicitor cited *United States v. Humboldt Lovelock Irrigation Light & Power Co.*, 97 F.2d 38 (9th Cir. 1938); *Hudspeth County Conservation & Reclamation Dist. v. Robbins*, 213 F.2d 425 (5th Cir. 1954); and *United States v. Tilley*, 124 F. 850 (8th Cir. 1942), for the proposition that the federal government retains some control over the water right and is entitled or obligated to protect it.

7. Other authorities regarding ownership of water rights delivered by federal projects. The Secretary of the Interior is empowered to transfer the operation and management of irrigation works in a reclamation project to project landowners once payments for a major portion of the project lands are made, but title to the reservoirs and works remains in the government, despite any transfer of operation and management responsibility. 43 U.S.C. § 498. “The lack of mention of water right title in this section implies that title to the water right had already passed to the farmers with their land patents.” *United States v. Alpine Land & Reservoir Co.*, 503 F.Supp. 877, 879 (D. Nevada 1980). See also *U.S. v. Union Gap Irr. Co.*, 209 F. 274 (1913); *Westside Irr. Co. v. U.S.*, 246 F. 21 (D. Wash. 1916), both holding that the United States is the

appropriator of water in reclamation projects and others have merely contract rights against the U.S.

a. In *Madera Irrigation Dist. v. Hancock*, 982 F.2d 1397 (9th Cir. 1993), the court ruled that the federal government may end subsidies federal water project beneficiaries despite the fact that the beneficiaries hold "a vested property right to a permanent water supply."

b. For further comment on this issue, see Roos Collins, *Voluntary Conveyance of the Right to Receive a Water Supply from the United States Bureau of Reclamation*, 13 Ecology L. Quarterly 773, 835 (1987).

E. Forfeiture of the water right by shareholder or consumer.

1. Forfeiture within any water delivery organization. This issue appears clear cut. Regardless of who owns it, there is a complete dependence on the irrigator to place the right to beneficial use. Failure to place a water right to beneficial use violates the most basic rule of the appropriation doctrine and will subject the right to scrutiny, and potential cancellation, under doctrines of forfeiture and/or abandonment.

[T]he appropriation and diversion of water by a ditch company that is not prepared to use the water itself is practically valueless without water consumers. In other words, it takes the water user, applying the water to a beneficial purpose, to enable a ditch company that has appropriated waters for sale, rental or distribution, to continue the diversion of the water. If it should cease to have water users or consumers, and cease to apply the water to a beneficial use, its right to divert the water would cease.

Farmers' Co-Operative ditch Co. v. Riverside Irrigation Dist., Ltd. 94 P. 761, 766 (Idaho 1908).

2. Use elsewhere in the company system. The fact that the water right is delivered through a canal corporation may provide additional defenses to a finding of forfeiture. For example, if the company's bylaws allow for internal transfers of rights, it might be argued that water under the right in question still was being diverted and used upon other lands during the period of non-use at its assigned location.

3. Statutory immunization from forfeiture. In *City of Raton v. Vermejo Conservancy Dist.*, 678 P.2d 1170 (N.M. 1984), the court held that because of the provisions of N.M. Stat. Ann. § 73-17-21, conservancy district water rights could not be lost by prescription, adverse possession or for nonuse. In the absence of such a statute, state law presumably will subject conservancy district water rights to scrutiny under a forfeiture or abandonment theory.

4. Forfeiture of water rights held by the United States.

a. Section 8 of the Reclamation Act, 43 U.S.C. §§ 372 and 383, recites the fundamental state law precept that beneficial use is the basis, the measure and the limit of a water right. It is fundamental to the appropriation doctrine, as reflected in statutes and common law, that failure to apply the resource to a beneficial use renders the water right vulnerable to statutory forfeiture and/or common law abandonment. *See, e.g.*, Idaho Code § 42-222(2). Quite apart from what state law might require, section 8 bases acquisition of water rights upon the concept of beneficial use. Given this provision's mandate of federal conformance with state water law, it is evident that what constitutes a beneficial use must be determined by that state's law. Even if section 8 expressly allowed some question of whether the Bureau must comply with all elements of state water law, presumably the element expressly mandated in the reclamation laws, beneficial use, is the one that unquestionably must be observed.

b. A recent law review comment has concluded that the Bureau of Reclamation can lose its water rights by forfeiture for failure of its contracting entities to put it to beneficial use. Gregory Harwood, *Forfeiture of Rights to Federal Reclamation Project Waters: A Threat to the Bureau of Reclamation*, 29 IDAHO L. REV. 152 (1992).

III. Conclusion.

All of the above essentially comes down to some general conclusions, at least for the jurisdictions reviewed:

A. The water users in irrigation water delivery organizations are likely to be found to hold beneficial title to the water rights under which the deliveries are made. In the case of mutual irrigation companies, this conclusion appears to be established beyond serious question.

B. Because of principles of "public use," which have been embodied in many state statutes and constitutions, and also are reflected in the common law, any entity supplying water to the public, or to property owners in a particular area who are not shareholder/owners of the supplier, is likely to be deemed engaged, at least to some degree, in a public use activity and will be required to meet certain trust obligations analogous to the obligations placed on public utilities. An irrigator receiving water from a commercial or carrier ditch presumably will not be seen as holding an ownersh interest in the water right, but the irrigator will be entitled to a continued use of it, under fair terms, due to the public use doctrine and the various authorities implementing it.

C. There are important differences between the history and the legal structure of the two basic types of organization that are most active today—mutuals and districts. The courts have not extensively explored the

scope of these differences with reference to a water user's ability to act independently with his or her property, the water right. However, the authorities are in general agreement that a shareholder in a mutual company may sell or change his or her interest in the water right, including selling or changing it to a use outside the area served by the mutual canals. But this ability will be restrained somewhat by the needs, concerns and rules of the company. The restraint most likely will be imposed on a contract theory, although there are some state statutory controls as well.

D. An irrigator in an irrigation district probably would be deemed, at least technically speaking, to hold the beneficial title to the water rights being delivered by the district. However, because of the statutorily-based trust established in the district in favor of the lands within its boundaries, the irrigator's ability to realize many of the attributes of "ownership" will be substantially constrained.

E. Any analysis of the relationship between the delivery organization and the individual water user must recognize that it is the latter who makes the beneficial use, and thus supplies this critical element of the water right. No matter what the identity or structure of the supplier organization, water users can forfeit the water rights that are delivered by it, regardless of who, technically, might be seen as "owning" the water right.

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D. The ownership analysis as applied to irrigation district irrigators probably differs from that applicable to mutual irrigation company shareholders. Nevertheless, if it were concluded that an irrigation district irrigator holds beneficial title to the water rights, the irrigator's ability to realize many of the attributes of "ownership" will be substantially constrained because of the quasi-municipal nature of the entity, its statutory roots, and the trust recognized in the district in favor of the lands within its boundaries.

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