

# WATER IS NOT “REAL” PROPERTY

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### Introduction

Private rights to surface waters are usually justified as a means of creating the security necessary for economic investment, while allowing the flexibility to change to better water uses (Trelease 1965). Under the appropriation doctrine found in the western U.S., water is considered to be “real property” like land. Generally, legal commentators limit this property right by calling it a “usufruct” which gives a right to a specific flow and use (O’Brien 1988). This right is not “ownership” because surface waters are considered to be owned by the state or by the people of the state (Fischer and Fischer 19&4). Much of the confusion surrounding marketing water rights and the public’s right to use water, stems from equating water with land. But, water is not like real property, and using traditional property rights concepts should be avoided when discussing water.

Certain rights are usually associated with real property: 1) a right of exclusive possession, 2) a right to use property including the receipt of income, and 3) a right to freely transfer possession. Often these rights are expressed in terms of “absolute” rights, but complete freedom to use property has seldom been present (Rose 1986). Owners of water rights, however, frequently feel these rights are absolute, and these feelings are reinforced by equating water rights with real property. But, real property has boundaries that can be surveyed. Creating “ownership” boundaries around water, a mobile resource, is more difficult.

### Exclusive Possession

“Exclusive possession” allows the land owners to keep others off with this property right being reinforced through the common law

concept of trespass. Water, however, is a shared resource. In the West, irrigation return flows may amount to 50% of the water diverted, making one user’s return flow the source of supply for another (Gould 1988). Sharing the same drop of water is not the same as sharing land under the joint tenancy arrangements recognized by normal property law. Joint tenants have simultaneous shared rights, often equal, where the appropriation doctrine recognizes consecutive rights with the senior appropriator having priority over others. This introduces a time and location element in water rights which are not present with shared land rights. Joint land rights are exercised at the same time and place.

In the eastern United States the riparian rights doctrine attaches a water right to land adjacent to a water course. All land owners along a stream share rights to use the water. Under the most common riparian right doctrine, individual property owners can make use of the water if the use is reasonable. Reasonableness depends on balancing the interests of all the “common owners.” The balancing process may create unequal rights which can change with circumstances over time. The water right is exclusive in one way; property owners who are not adjacent have no rights.

### Right of Use

The second attribute of real property is a right to use property, including a right to receive income produced by the property use. This particular right is similar to the usufructuary right found in the appropriation doctrine and the right of reasonable use in the riparian doctrine. Differences exist, however. Landowners do not have to use their property and may actually destroy its value. Although the right to use land may be limited by other common owners (doctrine of waste), adjacent

owners (nuisance doctrine), or the community as a whole (zoning), the legal system generally does not require that land actually be used. Even though the use of land was considered less restricted in the 19th century, the water use law that developed during that time was far from granting absolute rights.

Under the appropriation doctrine, water must be put to a “beneficial” use before a water right exists. Failure to use a water right under the appropriation doctrine results in a statutory forfeiture or abandonment. As long as taxes are paid, non-use of land will not cause a forfeiture unless required by a condition in a deed. The passive “ownership” of land is very different from water uses which must be beneficial and continuing.

The uses associated with an appropriated water right generally define the nature of the water right. These include “1) diversionary entitlement, 2) point of diversion, 3) purpose of use, 4) place of use, and 5) priority date” (Gould 1988,5). These rights define how, when, and where water is to be used. Freedom of choice is limited by the parameters set by these rights so that no harm can occur to third parties who also have rights on a river system. These factors are the boundaries of the water right which is ultimately defined by the amount of water a water rights holder consumes or takes out of the integrated water system. The boundaries around this right are unlike boundaries associated with land ownership because they are temporal (priority), spatial (point of diversion and place of use) and tied to a specified use and volume.

### **Transferability**

The last attribute of real property is the right to freely transfer ownership. With real estate this right is very strong and is closely guarded by the court system. Transfers of water rights are

more restricted. In riparian states the water right cannot be severed from the adjacent land unless a statute modifying the common law rules has been passed (Abrams 1989). A sale of land adjacent to a water source carries with it the riparian water right.

In the appropriation states, water rights can be sold or changed, but no harm to junior or senior appropriators can occur as a result (Musick 1990). Senior appropriators are protected by the priority system, and junior appropriators are entitled to have the stream conditions continue as they were at the time of their appropriation. Any change in use, place of use, point of diversion, time of diversion or volume of diversion has the potential for creating third party effects (Gould 1988). In some states, a public hearing must be held to give other users a chance to protest before changes can take place. If only the consumptive use is “sold” no harm will occur to others. In some states an active water market is developing. Even so the “sale” of a water right is not as free from restrictions as the sale of land.

### **Private Property**

Frequently private property has restrictions imposed on it by government. Ownership does not give absolute rights. But, ownership of real property is protected by the constitution from “taking” without compensation. Water rights are part of the constitutionally protected property rights. In spite of this protection, water rights can be “lost” through the exercise of the public trust and reserved rights doctrines (Huffman 1987). A discussion of these doctrines would require too much space, but they have both been used to create public rights in water. In doing so private rights, thought to be secure, have been superseded. The public trust doctrine is not as well developed for public land, and the reserved rights doctrine is limited to water.

## Suggestions

In comparing water with other real property, we must abandon our reassuring notions about private property ownership. The law of surface water bears little resemblance to traditional concepts of real property and has significant elements of both contract law and the law of personal property. According to Freyfogle, “[a]utonomous, secure property rights have largely given way to use entitlements that are interconnected and relative” (1989, 1530). He goes on to argue that water law is the most advanced form of property law and suggests that other property rights will evolve into use-rights. Whether this is true or not remains to be seen. Clearly, water is not like real estate and the law governing its use is not the same as real property law. In many ways the wrong direction was taken in the 19th century when the appropriation doctrine labeled water as real property.

Water law in the United States is in a state of flux. In an effort to provide some focus in a time of change, the American Society of Civil Engineers has created a Model Water Code Task Committee which is in the process of creating a Model State Water Code. Perhaps in the process the outmoded concept of water as property can be changed. A mobile resource like water is inherently different than land, and the law controlling water use should reflect those differences.

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