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Record Title to Water and Ditch Rights

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cautions. He should require a certificate of release if a federal estate tax has been assessed but no certificate of payment or release has been noted in the administration proceedings. He should call it to the attention of his client that if he knows of any unreasonable underevaluation of estate property or omission of property which should be included in the gross estate that a lien may remain on the property to encumber it. If the client knows of such facts, a certificate of release should be required.²⁸ A court order ordering the sale of a certain piece of estate property to meet costs of administration would also allow an attorney to pass the particular property as free from the lien.²⁹

Practically, a title examiner is always faced with the problem of how much he should bring to a client's attention. Many technical objections are passed as a matter of calculated risk. It is submitted, however, that the risk should be calculated, not unknown. It is hoped that this article clarifies the risks which arise due to federal tax liens. The use of suggested requirements must be left to the discretion of the examining attorney in light of the particular circumstances.

RICHARD S. DUMBRILL.

RECORD TITLE TO WATER AND DITCH RIGHTS

"In many districts where the value of land is entirely dependent upon an adequate supply of water for irrigation purposes, heed is given to the matter of a good record title to the land with often no record title whatever to the water right."¹ In Wyoming, those valuable water rights have been made appurtenant to the land by the case of *Frank v. Hicks*² and by statute.³ An appurtenance passes with the land, so it is commonly assumed that a check of the record title to the land will automatically suffice as a check of the record title to the water right as well. That such an assumption is not true, and that not all water rights are appurtenant to the land, will be shown in this article. The purpose of this note is to urge heed of Patton's warning, "Examiners of titles in these localities should insist upon a good record title to both land and water right."⁴ From the standpoint of comparative values, such a check of the water right title is more important than that of the land itself. As the Wyoming Supreme Court

28. Internal Revenue Code, sec. 827(a).

29. *Ibid.*

1. Patton on Titles, sec. 176.

2. 4 Wyo. 502, 35 Pac. 475 (1894).

3. Wyo. Comp. Stat. 1945, sec. 71-401.

4. Patton on Titles, note 1 *supra*.

has pointed out, "land and water together are of great value. The value of the land without the use of the water is trivial."⁵

For convenient consideration of the broad topic under discussion, this note will be divided into three subtopics of direct flow rights, reservoir rights, and ditch rights. Each of these subtopics will be generally subdivided for consideration of the methods of checking, first, the original acquisition of the right and, second, any later conveyances of the right.

Direct Flow Rights

The main body of Wyoming water law is concerned with direct flow rights. Such a water right allows use of the water from a natural stream by direct flow only, as opposed to the reservoir right used to store water for later use.⁶ As the state owns the water,⁷ it cannot legally be used except through the statutory method of appropriation.⁸ If there has been a valid appropriation of the water, the State Engineer has the certificate of appropriation on file in his office, unless there has been an adjudication of the water right by a territorial court.⁹ The certificate of appropriation should also be on file in the office of the county clerk,¹⁰ but a check with the office of the State Engineer is advised as it may be useful in tracing later conveyances of the direct flow right.

Having established the validity of the original appropriation, the chain of title to the direct flow right must now be traced. In the case of an appropriation made subsequent to the 1909 statute¹¹ prohibiting change of use of the water, any change actually made will be on record in the State Engineer's office, as any such change must have had his approval.¹² Those water rights are actually inseverably appurtenant to the land and need no further checking. The check with the State Engineer is also useful to determine whether there has been a forfeiture under the statutory procedure.¹³ However, there are possibilities of loss of the water right which may not show up on any record. The statutory forfeiture proceeding can be initiated at any time within ten years after the cause of action (five successive years of continuous non-use) has accrued.¹⁴ There is also

5. Frank v. Hicks, note 2 *supra*.

6. Handy Ditch Co. v. Greeley and Loveland Irrigation Co., 86 Colo. 197, 280 Pac. 481 (1929).

7. Wyo. Const. Article 8, Section 1.

8. Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyo. 14, 236 Pac. 764 (1925).

9. If there has been an adjudication by a territorial court, a certificate of appropriation need not have been issued. Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258, 50 L.R.A. 747, 87 Am. St. Rep. 918 (1900). There is no special provision for the filing of such a decree of court.

10. Wyo. Comp. Stat. 1945, secs. 71-224, 71-249.

11. Wyo. Comp. Stat. 1945, sec. 71-401.

12. Wyo. Comp. Stat. 1945, sec. 71-253.

13. Wyo. Comp. Stat. 1945, secs. 71-701 to 71-707.

14. *Ibid*; Horse Creek Conservation District v. Lincoln Land Co., 54 Wyo. 320, 92 P. (2d) 572 (1939).

the possibility of loss through adverse use,¹⁵ and such aberrations as a parol sale or faulty deed in the chain of title may be considered an abandonment of the water right.¹⁶

Actually, the probabilities of outright loss of the water right are small. But direct flow rights appropriated prior to the 1909 statute mentioned above¹⁷ are not controlled by that statute¹⁸ and are, therefore, freely alienable. The State Engineer may not know of a severance of such a water right from the land, so a check of the records is essential. *Frank v. Hicks*¹⁹ made direct flow rights appurtenant to the land, so if there has been no severance the right will pass with the land. This check, then, will be for the sole purpose of finding a severance, which is an always present possibility even though the right is appurtenant to the land.

A conveyance of the water right alone must be by deed,²⁰ notice of which must be given by proper recording.²¹ Thus we need not worry about a severance unless the conveyance is on the record books. The only problem is with finding that deed in the records. The State Engineer's office in its pamphlet on regulations and instructions provides a form of water right deed which describes the water right in relation to the specific tract of land to which it was attached. Such a deed could easily be found in the records by reference to that land. But other methods of describing the water right in the deed are possible; for example, the right may be described merely by reference to the number of the original certificate of appropriation. At any rate, the possibility of a severance of the water right makes necessary a specific check of the record title of that right.

Reservoir Rights

The certificate of appropriation is as necessary to a valid appropriation of a reservoir right as to a direct flow right.²² A check with the State Engineer will determine the validity of the appropriation, and will also determine what kind it is. There are two types of permits issued by the State Engineer for reservoir water: (1) the primary permit for construction of the reservoir and impounding the water;²³ (2) the secondary

15. *Hammond v. Johnson*, 94 Utah 20, 66 P.(2d) 894 (1937). As the statute of limitations for adverse possession is ten years, while the cause of action for forfeiture accrues in five years, the question of forfeiture will be raised. However, forfeiture is not automatic, title being retained until there has been an actual declaration of forfeiture. *Horse Creek Conservation District v. Lincoln Land Co.*, 54 Wyo. 320, 92 P.(2d) 572 (1939). So if no action for forfeiture has been brought within the period of adverse possession, it seems likely that the adverse user will have obtained title to the water right, even though the forfeiture action could have been brought against the previous owner at any time during the preceding five years.

16. *Whalon v. North Platte Canal & Colonization Co.*, 11 Wyo. 313, 71 Pac. 995 (1902).

17. Wyo. Comp. Stat. 1945, sec. 71-401.

18. *Quinn v. John Whitaker Ranch Co.*, 54 Wyo. 367, 92 P.(2d) 568 (1939).

19. 4 Wyo. 502, 35 Pac. 475 (1894).

20. 2 Kinney, *Irrigation and Water Rights* (2d Ed. 1912) sec. 996.

21. *Ibid.*

22. Wyo. Comp. Stat. 1945, secs. 71-601, 71-602.

23. Wyo. Comp. Stat. 1945, sec. 71-601.

permit for appropriation of the stored water to particular lands.²⁴ The primary permit is necessary, the secondary merely permissive.²⁵ As the applicable law differs depending on whether only the primary permit or both permits are issued, those two situations will be separately discussed to determine how the title to the water right should be checked.

The application for the primary permit need not contain a description of the lands proposed to be irrigated by the stored water.²⁶ Such a description is necessary in an application for a direct flow permit.²⁷ The most important result of this difference is the apparently necessary conclusion that such a reservoir right is not attached, and therefore not appurtenant, to any particular lands. A 1921 statute²⁸ fortifies this conclusion, providing that reservoir rights shall not attach to any particular lands except by deed. Provided, then, that it has not been attached by deed, the reservoir right appropriated under only the primary permit will not be appurtenant to the lands on which it is used. The result is that its entire chain of title must be specifically checked.

If the reservoir right has been attached to particular lands by deed, the situation is, of course, entirely different. But a difficult question arises as to whether the right will thereby become inseparably appurtenant or just generally appurtenant and so capable of severance. The statute is in negative form, providing that any reservoir rights not so attached by deed are feely alienable and may be used on any land,²⁹ so either construction is possible. Until this question has been answered, the title examiner is cautioned to check the records for possible severances.

The foregoing discussion was based upon the assumption that the reservoir right was appropriated under the primary permit alone. Now let us examine the effect of the secondary permit on the freedom of use and alienability of the reservoir right. The statute³⁰ provides that any person desiring to appropriate stored water to any particular lands may apply for the secondary permit, and such an application must include a description of the lands to be irrigated.³¹ The obvious intent, then, of the secondary permit is to make the water right appurtenant to the particular lands to which it was appropriated. It should be treated like the direct flow appropriation, being similar to it, and is apparently included in the rule of *Frank v. Hicks*.³² If the secondary permit does have the effect of

24. Wyo. Comp. Stat. 1945, sec. 71-602.

25. Wyo. Comp. Stat. 1945, secs. 71-601, 71-602.

26. Wyo. Comp. Stat. 1945, sec. 71-602; *Anderson v. Wyoming Development Co.*, 60 Wyo. 417, 154 P. (2d) 318 (1944).

27. Wyo. Comp. Stat. 1945, sec. 71-239.

28. Wyo. Comp. Stat. 1945, sec. 71-613.

29. *Ibid.*

30. Wyo. Comp. Stat. 1945, sec. 71-602.

31. Wyo. Comp. Stat. 1945, secs. 71-239, 71-602.

32. 4 Wyo. 502, 35 Pac. 475 (1894). See discussion in connection with direct flow rights, *supra*.

attaching the water right to the land for which it was appropriated, the only title check necessary is the check for later severances, as it will otherwise pass with the land.

However, the statute³³ providing that reservoir rights shall not attach to particular lands except by deed may be controlling, at least as to those rights acquired subsequently to this 1921 statute. The only purpose of the secondary permit was to appropriate, and attach, stored water to particular lands, as the water can be used on any lands without the secondary permit. If this statute does control, we must treat the secondary permit as having no effect whatsoever, disregard it entirely, and treat all reservoir rights as being appropriated under the primary permit alone. This appears to be an illogical result, but until the conflict has been resolved the title examiner has no choice but to treat all secondary permits issued after 1921 as being non-existent and to check the title to the water right independently from that of the land.³⁴

This statute³⁵ causes no trouble with respect to Carey Act lands as it is expressly excluded from application to them or the reservoirs for their irrigation.³⁶ And the water rights to Carey Act lands attached to and became appurtenant to the land when title passed from the United States to the State.³⁷ Thus, they are appurtenant even though appropriated under only the primary permit. The previous discussion concerning direct flow rights has pointed out what differences in result the appurtenance of a water right, or lack of it, will make.

A further problem arises in regard to reservoir rights by reason of the distinction drawn between the right to sell the use of the water (which is realty) and the right to sell the water itself (which is personalty).³⁸ The water itself being personalty, a sale of it is not entitled to recording and cannot be discovered by the abstractor on the record books. All that may be done within the scope of this article is to warn that the water already impounded in the reservoir may have been sold secretly.

There are also several statutes, which should be called to attention, relating particularly to the sale and recording of reservoir rights, apart from the question of appurtenance. One provides that any sale of the right to the use of the water shall carry with it a proportionate interest in the reservoir itself.³⁹ Another provides for the recording of all deeds and leases for reservoir rights and water rights in the office of the State Engi-

33. Wyo. Comp. Stat. 1945, sec. 71-613.

34. For effect if attached by deed, see discussion of 71-613 in connection with reservoir rights under primary permit, *supra*.

35. Wyo. Comp. Stat. 1945, sec. 71-613.

36. Wyo. Comp. Stat. 1945, sec. 71-618.

37. Wyo. Rev. Stat. 1899, sec. 955.

38. 2 Kinney, Irrigation and Water Rights (2d Ed. 1912) sec. 1032.

39. Wyo. Comp. Stat. 1945, sec. 71-612.

neer, and all such deeds and leases of three years or more in the office of county clerk.⁴⁰ A sale of the water itself is not contemplated by these statutes.

Another peculiar statute⁴¹ makes an unrecorded conveyance of a ditch, canal or reservoir null and void against subsequent bona fide purchasers. There is no requirement that the subsequent purchaser record first, as is provided in the general recording statutes of Wyoming.

Ditch Rights

The ditch carrying the water to its place of use frequently was required to cross other land than that belonging to the original appropriator. This was necessary either because his land did not border the stream, or, if it did border the stream, because the contour of his land would not allow a downhill running of the ditch to the desired area without crossing a neighboring tract of land. Thus our first question in this section will be whether the original appropriator acquired legal title to an easement for the right of way of the ditch. Such title may have been acquired in a variety of ways. If gotten by deed, or by condemnation through the statutory procedure,⁴² the easement will readily show up on the record books.

However, most of the ditch rights in this state were acquired by less formal methods. If the land across which the ditch was to run was in the hands of a private owner, the appropriator may have obtained oral consent before building his ditch. Such a parol license may, and probably has, become irrevocable through expenditures in reliance upon it.⁴³ Or, if there has been no consent by the owner, the ditch right may have been acquired by prescription.⁴⁴ On the other hand, if the land was public domain, the appropriator probably acquired his right of way under one of several Acts of Congress,⁴⁵ or by user adverse to the subsequent patentee. If the right was acquired by any of these methods, it will not be in the record books, so a deed from the owner or court action⁴⁶ seems indispensable to proof of the validity of the title asserted.

Even though the original acquisition of title to the ditch right has been proved, we are left with the problem of tracing later conveyances or reservations of the right. While the holding in *Frank v. Hicks* is limited to the facts, and so apparently holds only the water right to be appurtenant to the land, the reasoning of the court can and should be applied to

40. Wyo. Comp. Stat. 1945, sec. 71-615.

41. Wyo. Comp. Stat. 1945, sec. 71-2303.

42. Wyo. Comp. Stat. 1945, sec. 3-6301.

43. *Gustin v. Harting*, 20 Wyo. 1, 121 Pac. 522 (1912).

44. *Allen v. Lewis*, 26 Wyo. 85, 177 Pac. 433 (1919).

45. 3 *Water Resources Law*, pp. 631-4.

46. 2 *Kinney, Irrigation and Water Rights* (2d Ed. 1912) secs. 1057, 1541.

the ditch right as well. Whether the ditch is labeled an appurtenance or an incident to the land and necessary to its beneficial use and enjoyment⁴⁷ makes little difference, so long as it is considered to be attached to the land. Assuming that the Wyoming Court will consider it to be attached, the task of checking the chain of title to such a ditch right is made that much simpler. However, it might be well to point that, as was the case with direct flow rights, although the right may be appurtenant to the land, it is still separate and distinct real property and may be separately transferred.⁴⁸ Nor are there any statutory restrictions upon the alienation of the ditch right. Thus the ditch right will always be severable, and a check of the records will always be necessary to discover any such severance.

There is also the possibility that the ditch right may pass as an appurtenance to the water right, and vice versa. While there is no Wyoming authority on this proposition, appurtenance seems reasonable if it appears that the one is actually necessary to the beneficial use and enjoyment of the other. But as it stands, such an actual necessity appears to be a fact question in each case. Therefore, both ditch and water right should be specifically mentioned in the deed if the purpose of that deed is to sever both from the land. Otherwise, the one not mentioned may remain appurtenant to the land.

The purpose of this article has been to point out difficulties in finding the chain of title to each of the various rights under discussion. The law is quite clear and uncomplicated as to how each of the rights can be acquired, so the method to be used to check those acquisitions is also clear. The original appropriation of the water right, either reservoir or direct flow, can be found through the office of the State Engineer,⁴⁹ while the original acquisition of the ditch right, although probably not easily found, is governed by the well settled law of easements.

But when we come to the problem of checking later conveyances or reservations of each of the rights, we seem confronted by a maze of rules. A particular right may be inseverably appurtenant, appurtenant though severable, or completely unattached to the land. The body of this article has attempted to point out when each of these different legal effects will be ascribed to a particular right. But, for purposes of summary, a classification along different lines might serve to clarify the material. As the method to be used in checking the title to a particular right depends upon which degree of appurtenance will be ascribed to that right, the following will be merely a list of the various rights according to the degree of appurtenance ascribed to each.

I. The first group consists of those rights which are inseverably

47. Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 531 (1894).

48. Hamp v. State, 19 Wyo. 377, 118 Pac. 653 (1911).

49. See note 9 *supra* for exception.

appurtenant, always pass with the land, and need no independent checking.

- A. Direct flow water rights which were appropriated subsequent to the 1909 statute prohibiting change of the use of the water.
- B. The certificate of incorporation of mutual stock companies customarily makes the stock and water right inseverably appurtenant to the land.

II. The second group consists of those rights which are appurtenant but severable, pass with the land until severance, and need an independent check only to determine whether such a severance has been made.

- A. Direct flow water rights which were appropriated prior to the 1909 statute prohibiting change of use.
- B. Reservoir rights appropriated under the secondary permit, at least those prior to the 1921 statute (71-613).
- C. Water rights of Carey Act lands.
- D. Probably all ditch rights, at least those which are necessary to the beneficial use and enjoyment of the land.
- E. All reservoir rights attached to the land by deed are placed in this category, though they may possibly be considered inseverably appurtenant.

III. The third group consists of those rights not attached to the land, never pass as an appurtenance, and require an independent check of the entire chain of title.

- A. Reservoir rights appropriated by primary permit alone, and not since attached to particular lands by deed.
- B. Such reservoir rights under secondary permits which are considered to come within the 1921 statute (71-613), and have not since been attached by deed.
- C. Such ditch rights as may be considered unattached to the land by the Wyoming Court.

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