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THE RELEVANCE OF WATER "OWNERSHIP" TO WATER MARKETS AND OTHER ISSUES

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I. INTRODUCTION

A. Summary

Courts have given varying answers to the abstract question of who "owns" the water that is distributed by a water organization. In the case of mutual water companies, for example, most courts have held that the shareholders are the "real owners" of the water rights (even though the mutual might hold "naked title" to the rights). Some courts, however, have held that the mutual owns the rights, typically in trust for its shareholders; Colorado has adopted a mix of views. In the case of irrigation and other water districts, most courts have held that the district owns the water rights in trust for its landowners, although several courts have concluded that the landowners actually own the rights.

Abstract pronouncements on "ownership," however, can be highly misleading when applied to specific questions. Today, perhaps the most important question in which "ownership" plays a role is who, if anyone, has the right to transfer or market the water that is distributed to individual members of a water organization. Answers to this question are wildly varying--depending on the state, the type of organization involved, its articles and by-laws, and whether one is discussing "internal transfers" within the organization or "external transfers" to land or users outside the organization.

In most states, shareholders in a mutual water company can engage in both internal and external transfers, so long as the transfers do not injure other water users and are not

inconsistent with the mutual's by-laws or regulations. Law regarding transfers by landowners in irrigation or other water districts is quite sparse. What law exists, however, suggests that landowners will often be able to engage in internal transfers (at least where the district's board has authorized such transfers), but not external transfers. Districts themselves will often be able to engage in transfers, but typically only on restricted terms and in limited settings.

Given the growing importance of water markets, state legislatures should consider clarifying the rights of water organizations and their members to engage in transfers. Currently relevant statutory and judicial law developed decades ago before market issues were prominent and, as a result, the law is often vague, confusing, and even internally inconsistent. Reform efforts have already begun in California, where Congress has authorized landowners in the Central Valley Project to engage in direct external transfers, and where the state legislature is considering legislation that would give a similar right to members of all water organizations statewide.

As explained in Part IV, "ownership" issues can also be relevant to a wide variety of other questions. On most issues, courts have taken a flexible approach, awarding "ownership" interests to both the water organization and its members as needed. Courts have generally awarded interests to the members when needed to protect against arbitrary organizational decisions or outside attacks. Yet, courts have recognized organizational interests in disputes between the organization and third parties. Here again, however, courts have often reached quite varying decisions.

B. References

Few articles or books deal either comprehensively or well with ownership questions. The following references address the question at least in passing.

1. General references

Barton H. Thompson, Jr., *Institutional Perspectives on Water Policy and Markets*, 81 CALIF. L. REV. 671 (1993)

- discusses organizational roles in water markets and suggests a variety of possible reforms

John H. Davidson, *Distribution and Storage Organizations*, in 3 WATERS AND WATER RIGHTS 467 (1991 ed.)

Note, *Desert Survival: The Evolving Western Irrigation District*, 1982 ARIZ. ST. L.J. 377, 409-15

Frank J. Trelease, *Reclamation Water Rights*, 32 ROCKY MTN. L. REV. 464, 475-81 (1960)

- focuses on ownership of federal reclamation water

2. State-specific references

John H. Davidson, *South Dakota's Water Districts--An Introduction*, 36 S. DAK. L. REV. 500, 512-17 (1991)

- includes discussion of law outside South Dakota

Note, *The Efficient Use of Utah's Irrigation Water: Increased Transferability of Water Rights*, 1975 UTAH L. REV. 158, 161-67

A Survey of Colorado Water Law, 47 DENVER L.J. 226, 260-61 (1970)

Theodore W. Russell, *Mutual Water Companies in California*, 12 S. CAL. L. REV. 155, 157-82 (1939)

II. FORMAL VIEWS OF WATER OWNERSHIP

As discussed in Part III, asking who "owns" an organization's water can be highly misleading unless you also provide the context for the question. "Ownership" can mean

different things for different purposes. Yet many state courts have adopted general positions on who "owns" the water that typically provide the courts with at least a starting point for their analysis of more specific questions. These starting views vary according to what type of water organization is involved.

A. Mutual Water Companies

Courts have spent the most time examining the question of who owns the water rights in a mutual water company. States have adopted different answers, although there may be little practical consequence to many of the differences.

1. The majority view: shareholders own the water

Most states take the position that a mutual's shareholders are the "real owners" of the water rights (although the mutual might hold "naked title" to the rights). *See, e.g.*, Slosser v. Salt River Valley Canal Co., 7 **Ariz.** 376, 65 P. 332, 338-39 (1901); Snow v. Abalos, 18 **N.M.** 681, 140 P. 1044, 1048-49 (1914) (community ditch); Genola Town v. Santaquin City, 96 **Utah** 88, 80 P.2d 930, 936 (1938); *cf.* Gasser v. Garden Water Co., 81 **Idaho** 421, 346 P.2d 592, 594 (1959) (suggesting without explicitly holding that shareholders own the water).

In a few states such as Arizona and Washington, this conclusion is dictated by the local law that no one can appropriate water to irrigate land that they do not own or possess. In these states, water rights must be appurtenant and cannot be held in gross. *See Slosser*, *supra*; Tattersfield v. Putnam, 45 **Ariz.** 156, 41 P.2d 228, 234 (1935); Avery v. Johnson, 59 **Wash.** 332, 109 P. 1028, 1029 (1910).

2. **The mutual owns the water in trust**

California courts have held that mutuals are the legal owners of their water rights, but that the mutuals hold the water rights in trust for their shareholders who are the "beneficial owners" of the water rights. *See, e.g.*, Consolidated People's Ditch Co. v. Foothill Ditch Co., 205 Cal. 54, 269 P. 915, 920 (1928). The California courts have emphasized, however, that the shareholders' beneficial right is a limited one: a *shared* right to receive water through the mutual's facilities. Id. at 920.

3. **The mutual owns the water**

The South Dakota Supreme Court has held that mutuals own their water rights "the same as any other property, subject, however, to possible public regulation." Butte County v. Lovinger, 64 S.D. 209, 266 N.W. 127 (1936).

4. **Colorado law**

Colorado courts have described the relative ownership rights of mutuals and their shareholders in various ways over time. The courts have typically espoused the majority view that, although a mutual might have naked title to a water right, its shareholders are the actual owners. In the phrase typically used by the Colorado courts, a shareholder's stock certification is merely a "muniment of title" to the water. *See* Nelson v. Lake Canal Co., 644 P.2d 55 (Colo. Ct. App. 1981); Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667, 672 (1975); Billings Ditch Co. v. Industrial Comm'n, 127 Colo. 69, 253 P.2d 1058, 1060 (1953).

In a few cases, however, Colorado courts have alternatively suggested that mutuals own

water rights in trust for their shareholders. *See, e.g.*, Stuart v. Davis, 25 Colo. App. 568, 139 P. 577 (1914).

Finally, in at least one case, the Colorado Supreme Court has emphasized that neither a mutual nor a shareholder by itself is an "appropriator in the strict sense of the term." Instead, the appropriative right is dependent on the "joint and practically concurrent acts" of diverting and then using the water. Board of County Comm'rs v. Rocky Mountain Water Co., 102 Colo. 351, 79 P.2d 373 (1938).

B. Irrigation and Other Agricultural Water Districts

Courts have had less opportunity to address who owns the water rights distributed by irrigation and other agricultural water districts. Here again courts have diverged in their answer.

1. The majority view: districts own water rights, but in trust for their members

Most state courts have held that districts own the rights to the water they distribute, but that they hold the rights in trust for their members and to fulfill their statutory purposes. Thus courts often speak of district property owners as the "beneficial and equitable owners" of the water rights. *See, e.g.*, Bradshaw v. Milner Low Lift Irr. Dist., 85 Idaho 528, 381 P.2d 440, 449 (1963); Madera Irr. Dist. v. All Persons, 47 Cal. 2d 681, 306 P.2d 886, 892-93 (1957), *rev'd on other ground*, 357 U.S. 275 (1958); Merchants' Nat'l Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 P. 937, 939 (1904).

Some state authorizing statutes have codified this position by providing that the title to water rights is vested in the district, in trust for the district purposes. *See, e.g.*, COLO. REV.

STAT. §§ 37-41-115 & 37-42-113(1).

2. Members own the water rights

As noted earlier, a few states hold that no one can appropriate irrigation water unless they own or possess the land upon which they plan to use the water. *See* p. 4 *supra*. In these states, the members of irrigation districts by necessity must own the water rights.

The Washington Supreme Court has thus held that the members of a special water district are the actual owners of the water rights, and enjoy vested rights to the water. *See* State Dept. of Ecology v. Acquavella, 100 Wash. 2d 651, 674 P.2d 160, 163 (1983). At the same time, however, the Washington court has emphasized that the water districts act much like a "trustee" of these rights and thus can represent their members' interests as against third parties. In practice, therefore, the Washington view might not differ significantly from the majority view.

C. Federal Reclamation Water

The Supreme Court has twice held that recipients of federal reclamation water own the right to the water. According to the Court, the federal government holds no water right but is "simply a carrier and distributor of the water." *See* Nebraska v. Wyoming, 325 U.S. 589, 614 (1945); Ickes v. Fox, 300 U.S. 82, 94-95 (1937).

Lower courts have not taken this language literally, but have assumed that the Court was speaking only to the narrow question of the federal government's rights *as against its water recipients*. Thus, both before and after the *Nebraska* and *Ickes* cases, federal and state courts have held that the United States does hold an interest in the water *as against third parties*. *See,*

e.g., Ide v. United States, 263 U.S. 497, 506 (1924); United States v. Tilley, 124 F.2d 850 (8th Cir. 1941), *cert. denied*, 316 U.S. 691 (1942); Bean v. United States, 143 Ct. Cl. 363, 163 F. Supp. 838, *cert. denied*, 358 U.S. 906 (1958); Jensen v. Dept. of Ecology, 102 Wash. 2d 109, 685 P.2d 1068 (1984).

D. Commercial Water Distributors

Only a few courts have addressed the question of who owns the water rights of a commercial water distributor--the distributor or its customers? The prevailing view appears to be that the distributor owns the water right. *See, e.g.*, Willis v. Neches Canal Co., 16 S.W.2d 266 (Tex. Comm'n App. 1929).

Once again, however, commercial water distributors arguably cannot own appropriative rights in those states that require appropriators to own the land they are irrigating. Thus, the Arizona Supreme Court has held that a mutual that distributes water to non-shareholders for a fee does not own those water rights but acts as a "public agency" and must distribute water "with due regard to priority of appropriation." Slosser v. Salt River Valley Canal Co., 7 Ariz. 376, 65 P. 332, 338-39 (1901).

III. THE IMPORTANCE OF CONTEXT

The general views of a court regarding "ownership" of water rights can be quite misleading when applied to specific questions without any sense of context. For a variety of reasons, it is important to analyze each question individually and not fall back on the simplistic talisman of "ownership." *See, e.g.*, Guy v. Donald, 203 U.S. 399 (1906) (warning of the

danger of "being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied"); Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667, 673 (1975) (warning against "the use of simplistic, categorical definitions").

A. "Ownership" Has Multiple Meanings

As we are all taught in first-year property, ownership consists of a bundle of rights. A court's conclusion that a mutual shareholder "owns" water rights for one purpose, therefore, does not necessarily mean that the shareholder "owns" the water rights for a different purpose.

B. Courts Often Change Their Views Regarding "Ownership" Depending on the Context

Partly for this reason, state courts have never been fully consistent in their conclusions regarding who "owns" the water rights in any given organization. In a number of early cases, for example, the Colorado Supreme Court held that mutual shareholders are the actual owners of the water rights and that their shares are "simply a muniment of title to the water rights, which are real property." In Denver Joint Stock Land Bank v. Markham, 106 Colo. 509, 107 P.2d 313 (1940), however, Markham had mortgaged his land and accompanying water rights; the trust deed did not mention Markham's shares in a mutual. When the mortgagor later foreclosed, it claimed the water rights underlying the shares, citing as support the earlier rulings of the Colorado courts. The Colorado Supreme Court held that the earlier cases were irrelevant because they dealt with different issues, and held that the mortgage did not include the water

rights. Id. at 315.

It is particularly misleading to use opinions concerning the relative rights of an organization and its members over *internal issues* to resolve questions regarding *external relationships*, and vice versa. Early courts frequently awarded members of an organization legal or equitable interests in their water to protect them against arbitrary or discriminatory behavior by the organization. Courts, however, have frequently emphasized the water interests of the organization in addressing whether outside parties have any claim over the water or whether members can transfer their water out of the organization's jurisdiction. *See* Frank J. Trelease, *Reclamation Water Rights*, 32 ROCKY MTN. L. REV. 464, 476 (1960).

C. "Ownership" Is Often Only Part of the Analysis

Although "ownership" may be relevant to a specific question, it will often constitute only part of the analysis. Whether a member of a water organization "owns" his or her water rights, for example, might be relevant to whether the member can transfer the water right to a third party. But even if the member owns the water, the organization might still have the power to regulate the transfer, or the owner's transfer rights might be contractually limited. Seldom will "ownership" alone answer specific questions of relevance to water organizations, their members, and customers.

IV. APPLICATION TO SPECIFIC QUESTIONS

The question of who "owns" the water rights in an organization can be relevant to a variety of questions. The following is a necessarily brief analysis of a number of the questions

that the courts have addressed.

A. Right to Transfer or Market Water

Perhaps the most important question today is who, if anyone, has a right to transfer an organizational water right. This question is best broken down into three more specific questions:

(1) Can the member of an organization transfer his water within the organization's boundaries, either to other land that he owns or to another member?

(2) Can the member transfer his water out of the organization?

(3) Can the organization transfer water without the approval of each affected member?

1. Internal transfers by members

In most agricultural water organizations, members enjoy entitlements to specific quantities or percentages of water. Because of the need for flexibility to meet changing demands and conditions, members will frequently want to transfer water either between their properties or among themselves. As explained below, courts have been quite sympathetic to such needs.

a. Transfers within mutuals

i. As a general rule, courts have upheld the right of mutual shareholders to transfer

water internally. In upholding this right, courts have often emphasized that shareholders are the actual or equitable owners of the water rights. *See, e.g.*, Great Western Sugar Co. v. Jackson Lake Reservoir & Irr. Co., 681 P.2d 484 (**Colo.** 1984); Consolidated People's Ditch Co. v. Foothill Ditch Co., 205 **Cal.** 54, 269 P. 915, 929 (1928); Hard v. Boise City Irr. & Land Co., 9 **Idaho** 589, 76 P. 331 (1904); George v. Robison, 23 **Utah** 79, 63 P. 819, 820 (1901); Cache La Poudre Irr. Co. v. Larimer & Weld Reservoir Co., 25 **Colo.** 144, 53 P. 318, 319-20 (1898).

ii. But shareholders cannot transfer their water if the transfer would injure other shareholders. *See, e.g.*, Great Western Sugar Co., *supra*; Hard, *supra*.

iii. And mutuals might have a right to condition or even prohibit internal transfers. The California Civil Code explicitly authorizes mutual water companies to provide in their articles or by-laws that water is "appurtenant to certain lands" and transferable only with the land. CAL. CIV. CODE § 330.24. Even prior to the passage of this section, however, California courts held that mutuals could restrict and even outlaw internal transfers. *See, e.g.*, Riverside Land Co. v. Jarvis, 174 **Cal.** 316, 163 P. 54 (1917) (decided prior to passage of § 330.24); *cf.* Billings Ditch Co. v. Industrial Comm'n, 127 **Colo.** 69, 253 P.2d 1058 (1953) (noting restrictions on transfers).

Perhaps recognizing the value of internal transfers, however, courts have sometimes gone out of their way to evade local restrictions. In Locke v. Yorba Irr. Co., 35 **Cal.2d** 205, 217 P.2d 425 (1950), for example, a shareholder sold 62 of his 118 acres but reserved all of his

shares for use on his remaining acreage. The court upheld this action even though the mutual's by-laws explicitly provided that "stock should not be transferable except with the land for which it was issued" and that "a conveyance of the land should constitute a transfer of the stock appurtenant thereto." According to the court, the prohibition on off-land transfers was irrelevant because the water would be used on the shareholder's remaining land; the provision that conveyances included the water applied only if the shareholder did not provide to the contrary in the sales agreement. *See also* Stone v. Imperial Water Co., 173 Cal. 39, 159 P. 164, 166 (1916).

iv. State statutes or law requiring water rights to be appurtenant to particular parcels of land may pose an obstacle to at least some internal transfers. Concerns have been raised that the statutes of some states may require mutual water rights to be appurtenant to particular parcels of land and therefore not transferable. *See, e.g.*, John H. Davidson, *Distribution and Storage Organizations*, in 3 WATERS AND WATER RIGHTS 467, 485-92 (1991 ed.).

b. Transfers within irrigation districts

i. Statutory provisions

Because irrigation and other water districts are authorized by statute, the first place to look in determining whether landowners can transfer their water internally is the authorizing statutes. A number of states expressly permit district boards to authorize intradistrict transfers. *See, e.g.*, NEB. REV. STAT. § 46-158 (irrigation districts); NEV. REV. STAT. ANN. § 541.290

(water conservancy districts); S.D. CODIFIED LAWS ANN. § 46A-5-24 (irrigation districts); UTAH CODE ANN. § 17A-2-711 (irrigation districts) (limited to one-year assignments); *id.* § 17A-2-1435(5) (conservancy districts); WYO. STAT. § 41-3-749(a)(v) (conservancy districts).

A few states impose special requirements or limitations on internal transfers, but otherwise expressly authorize them. *See, e.g.*, KAN. STAT. ANN. § 42-121; N.M. STAT. ANN. § 73-9-14.

ii. Judicial decisions

In many states, unfortunately, authorizing statutes are silent regarding whether landowners can transfer water rights internally within a district. Several courts, however, have indicated that landowners do have the right to engage in internal transfers. *See, e.g.*, Cline v. McDowell, 132 Colo. 37, 284 P.2d 1056 (1955); Jenison v. Redfield, 149 Cal. 500, 87 P. 62, 64 (1906).

Inconsistent statutory provisions, of course, would override this general conclusion. None of these cases, moreover, involved attempts by a landowner to engage in an internal transfer over the opposition of a district.

2. External transfers by members

As metropolitan areas have begun looking for additional water, their gaze has naturally landed on agricultural water users. A major issue today in many parts of the West, therefore, is whether members of a water organization have the right to sell or transfer their water out of the organization. Here, the few cases that have been decided suggest that mutual shareholders

in most states typically have the right to transfer their water shares so long as other water users are not injured thereby, but that members of irrigation districts do not have the right absent enabling legislation.

a. External transfers by mutual shareholders

i. Colorado courts have expressly recognized the right of shareholders to transfer their water rights to external users, subject to reasonable regulation by the mutual. Colorado courts have long held that shareholders have a right to transfer their shares to outside water users. *See, e.g.*, Wadsworth Ditch Co. v. Brown, 39 **Colo.** 57, 88 P. 1060 (1907); Cache La Poudre Irr Co. v. Larimer & Weld Reservoir Co., 25 **Colo.** 144, 53 P. 318 (1898).

Colorado courts have also held that mutuals can impose reasonable restrictions on external transfers, and that these restrictions are subject only to limited review by the courts. Thus, in Fort Lyon Canal Co. v. Catlin Canal Co., 642 P.2d 501, 508-09 (**Colo.** 1982), the Colorado Supreme Court approved a mutual by-law requiring board approval of any external transfer. In a followup case, the Colorado Supreme Court held that the board's refusal to approve a particular external transfer was subject to judicial review, but only under an "arbitrary, capricious, or abuse of discretion" standard. Fort Lyon Canal Co. v. Catlin Canal Co., 762 P.2d 1375 (**Colo.** 1988).

2. The California Supreme Court has held that shareholders do not have the right to engage in external transfers, at least over the opposition of the mutual. In Consolidated

People's Ditch Co. v. Foothill Ditch Co., 205 Cal. 54, 269 P. 915 (1928), an irrigation district bought up shares in a number of mutuals and tried to change both the points of diversion and the places of use to outside the mutuals' borders. The California Supreme Court held that a shareholder's right is merely to a supply of water through the mutual's facilities. To permit unrestricted external transfers, according to the court, could lead to "inextricable discord and confusion." In this case, however, the mutuals opposed the transfers; whether shareholders can engage external transfers with the approval of their mutuals is an open question in California.

iii. External transfers are generally subject to the same restrictions as other transfers of water rights, including the "no injury" rule. Courts have repeatedly emphasized that shareholders cannot engage in external transfers that would injure other appropriators. *See, e.g.*, City of Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151, 153 (1952); Wadsworth Ditch Co., *supra*; Cache La Poudre Irr. Co., *supra*, at 320.

iv. State statutes providing for appurtenant water rights may again pose an obstacle to at least some external transfers. See p. 4 *supra*.

b. External transfers by landowners in irrigation districts

i. Statutory provisions

Most state statutes are silent on the question of whether landowners in irrigation or other water districts can engage in external transfers.

Statutory authorization of internal transfers (which are often limited to particular settings

or require board approval), with no mention of external transfers, however, can be read as implicitly proscribing external transfers by landowners.

ii. Judicial opinions

Most courts have not dealt with the question whether landowners in irrigation districts can engage in external transfers. The California Supreme Court, however, has held that landowners do not have a right to engage in external transfers. *See* Jenison v. Redfield, 149 Cal. 500, 87 P. 62 (1906) (emphasizing that irrigation districts hold water in trust for use in "the irrigation of lands within the district"); *cf.* Madera Irr. Dist. v. All Persons, 47 Cal. 681, 306 P.2d 886 (1957), *rev'd on other grounds*, 357 U.S. 275 (1958) (holding that property owners who ask for and get excluded from a district cannot take their share of water from a federal reclamation project with them).

iii. Disputes surrounding the Middle Rio Grand Conservancy District

Under New Mexico law, landowners within a conservancy district whose water rights predate the organization of the district hold vested rights to that water. N.M. STAT. ANN. § 73-14-47(c). Landowners within the Middle Rio Grand Conservancy District, joined by the state engineer, have argued that this entitles the landowners to transfer their rights within or outside the district's borders without the district's approval. *See* Micha Gisser & Ronald Johnson, *Institutional Restrictions on the Transfer of Water Rights and the Survival of an Agency*, in WATER RIGHTS: SCARCE RESOURCE ALLOCATION, BUREAUCRACY, AND THE ENVIRONMENT 137, 150-160 (T. Anderson, ed. 1983). The district has strongly disagreed and, to date, the

appellate courts have not been forced to resolve the dispute.

iv. Statutory reforms

In the last several years, several legislatures have considered the desirability of authorizing members of water organizations to engage in external transfers.

a. 1992 Omnibus Water Bill

In an attempt to expand water markets in California, Congress has recently approved external transfers by landowners in districts which receive federal reclamation water from the California Central Valley Project ("CVP"). Under the Reclamation Projects Authorization & Adjustment Act of 1992, 106 Stat. 4600, any individual receiving CVP water can engage in direct external transfers. In most cases, external transfers are subject only to limited restrictions and to circumscribed review and approval by the Secretary of the Interior (and, where appropriate, to approval by the state water permitting agency). A district can veto a transfer only if the transfer involves more than 20 percent of the CVP water received by the district, and then only on narrow grounds. The Secretary of the Interior and, where relevant, the district must act on a proposed transfer within 90 days; if a transfer is disapproved, the Secretary or district must explain why and describe any alternatives that would be approved.

b. Proposed state legislation

The California legislature has also considered authorizing landowners to engage in external transfers in all irrigation or water districts across the state.

1. In 1991, California Assemblyman Richard Katz introduced a bill that, in its early versions, would have given anyone receiving water from a public water organization the right to sell his or her individual "allocation" to outside users even over the opposition of the organization. Assembly Bill 2090, 1991-1992 Reg. Sess. § 2 (Cal.). Katz extolled the bill as "breaking the backs of water districts who are blocking water trades." Agricultural water organizations vigorously opposed the bill, and it ultimately died in the California Senate, even though a variety of committee amendments had already weakened it.

2. A similar bill, however, was introduced earlier this year and is under active consideration. *See* Assembly Bill 97, 1993-1994 Reg. Sess. (Cal.).

3. External transfers by organizations

The right of the members of an organization to transfer their water raises a correlative question: can organizations sell or transfer water to outsiders without the approval of those members to whom the water would otherwise go?

a. External transfers by mutuals

Few courts have considered the transfer rights of mutuals. The Colorado Court of Appeals, however, has held that mutuals cannot surrender or sell their water without the approval of their shareholders. Stuart v. Davis, 25 **Colo. App.** 568, 139 P. 577, 579 (1914). According to the court, a mutual is bound "by its trust" to deliver water to its shareholders. Id. at 581. A similar proscription on unilateral transfers by mutuals should apply in all states recognizing shareholders as either the legal or equitable owners of the underlying water rights.

b. External transfers by irrigation districts

The right of a district to transfer or sell water to users outside the district is controlled primarily by statute. Unfortunately, virtually all relevant state statutes were written before interregional water markets became important. As a result, the statutes are often vague, confused, or unnecessarily restrictive of the right of an irrigation or water district to engage in external transfers.

i. Direct statutory limitations

Few state statutes proscribe all external transfers. *But see* WYO. STAT. § 41-3-742(a)(x) (authorizing sales and leases of water by conservancy districts only for "use within the district").

State statutes, however, often authorize only limited sales or leases of district water or explicitly proscribe certain sales or leases. Examples of common state legislation include:

(1) Bans on permanent transfers. *See, e.g.*, N.M. STAT. ANN. § 73-14-47(J) (conservancy districts); WYO. STAT. § 41-7-815 (1977) (irrigation districts).

(2) Limits on the length of leases. *See, e.g.*, COLO. REV. STAT. ANN. § 37-42-135 (twenty years); N.M. STAT. ANN. § 73-14-47(J) (ten years, although court can expand); UTAH CODE ANN. § 17A-2-711 (five years).

(3) Restriction of transfers to "surplus" water that is not "needed" by district users. *See, e.g.*, CAL. WATER CODE §§ 22259,35425; COLO. REV. STAT. ANN. § 37-42-135;

IDAHO CODE § 43-318; MONT. CODE ANN. §85-7-1911(3); OR. REV. STAT. § 545.110; TEX. WATER CODE ANN. § 51.173, 51.188, 55.197; UTAH CODE ANN. § 17A-2-711.

ii. Procedural hurdles

Several states also place procedural hurdles in the way of external transfers by districts. Examples include requirements of:

(1) Special district elections. *See, e.g.*, COLO. REV. STAT. ANN. §§ 37-43-124 to -125 & 37-42-135; IDAHO CODE § 43-318 (election required for sales only if minimum number of electors request one); S.D. CODIFIED LAWS ANN. § 46A-9-70.

(2) Written permission of district landowners. *See, e.g.*, MONT. CODE ANN. § 85-7-1910(1).

(3) Court approval. *See, e.g.*, COLO. REV. STAT. ANN. §§ 37-43-126 & -129.

4. Rights of External Users

A related question that has occasionally arisen is whether an external water user who has been purchasing surplus water from an organization can claim a right to the water that prevents the organization from reallocating the water. As a matter of water rights (versus contract or regulation), most courts have held that external users of surplus water do not have any vested property interest in the water. *See, e.g.*, Yaden v. Gem Irr. Dist., 37 **Idaho** 300, 216 P. 250

(1923).

States that require appropriators of irrigation water to own or possess the land upon which the water will be used (see p. 4 *supra*) may reach a different result. Thus, in Slosser v. Salt River Valley Canal Co., 7 **Ariz.** 376, 65 P. 332 (1901), the court held that a mutual is acting as a "public agency" when selling surplus water and must allocate water "with due regard to priority of appropriation." The agency, therefore, could not shut off an external user in favor of more recent customers.

B. Right to Delivery of Water

As various water organizations come under public pressure to reduce or otherwise restrict their water deliveries, an important question becomes whether organizations can unilaterally reduce or restrict deliveries without the individual approval of affected members. There are relevant cases concerning both mutuals and the federal Bureau of Reclamation.

1. Mutuals

Courts have held that mutuals can adopt reasonable regulations for the delivery of water. *See, e.g.*, Gasser v. Garden Water Co., 81 **Idaho** 421, 346 P.2d 592, 594 (1959). However, courts have also emphasized that shareholders have a "right to use the water" and that mutuals cannot therefore "defeat or alter" the shareholders' right to receive their water when needed. *See, e.g.*, Nelson v. Lake Canal Co., 644 P.2d 55 (**Colo. Ct. App.** 1981) (shareholder can insist on 5-day delivery schedule although must pay additional charge); Swasey v. Rocky Point Ditch Co., 617 P.2d 375 (**Utah** 1980) (mutual has duty to deliver water, but need not build ditch to

shareholder's property).

2. Reclamation water

One of the more intriguing (and undercited) cases regarding the right of an organization to cut back deliveries is Ickes v. Fox, 300 U.S. 82 (1937). There, the federal government threatened to cut back on the water delivered to the Sunnyside unit of the Yakima project unless the landowners agreed to pay more for the extra water; the government planned to use the funds to help pay for a related unit of the project. The landowners claimed that the government could not cut back on the original quantity because they, and not the government, owned the rights to the water. The Supreme Court agreed, holding that the government was "simply a carrier and distributor of the water." Id. at 94-95.

C. Constitutional Protections

The threat of increasing governmental regulation of water rights, primarily through the Endangered Species Act and other environmental laws, makes future "takings" claims all but inevitable. This in turn raises the question whether water users within an organization have constitutionally protected rights for which they can individually claim compensation.

1. Protection of "legal" interests

Where state courts recognize the water users as the actual owners of the water rights, the users should have a clear right to compensation if they can prove a taking. *See, e.g.*, State Dept. of Ecology v. Acquavella, 100 Wash. 2d 651, 674 P.2d 160, 163 (1983).

2. Protection of "equitable" interests

Several courts have also held that the "equitable" interests of landowners in the water distributed by irrigation districts is a vested property right protected by the Constitution. Although these cases have typically involved procedural due process claims, their logic should also extend to takings claims. *See, e.g.*, Dedeke v. Rural Water Dist., 229 **Kan.** 242, 623 P.2d 1324, 1331 (1981); Merchants' Nat'l Bank v. Escondido Irr. Dist., 144 **Cal.** 329, 77 P. 937 (1904).

D. Rights to Return Flow

Another question of considerable importance today is whether a water organization can claim the right to recapture and either use or sell the return flow from the water that it distributes. Here, courts have generally held that the organization does have an interest in the water (even if inferior or subservient to the interests of its members) and thus can recapture and use the return flow. *See, e.g.*, Ide v. United States, 263 U.S. 497 (1924) (seepage from federal reclamation water); Jensen v. Dept. of Ecology, 102 **Wash.** 2d 109, 685 P.2d 1068 (1984) (same); Hudspeth County Conservation & Reclamation Dist. v. Robbins, 213 F.2d 425 (5th Cir.), *cert. denied*, 348 U.S. 833 (1954) (same); Stevens v. Oakdale Irr. Dist., 13 **Cal.** 2d 343, 90 P.2d 58 (1939) (recapture right of irrigation district).

E. Civil Procedure Issues: Service and Indispensable Parties

A final question of importance in many states is who are the appropriate parties to stream adjudications or other lawsuits concerning the water rights of an organization. Where an

adjudication or other action is brought, is it adequate to serve just the organization or must the individual members also be served? Can the member of a water organization maintain an adjudication or similar action, or must such an action be brought by the organization?

Relevant cases on this question include:

1. Jacobucci v. District Court, 189 **Colo.** 380, 541 P.2d 667, 672-73 (1975) -- shareholders are indispensable parties to a an action by a city seeking to condemn a mutual's water priorities

2. Snow v. Abalos, 18 **N.M.** 681, 140 P. 1044, 1048-49 (1944) -- recipient of water from an acequia can maintain a stream adjudication

3. State Dept. of Ecology v. Acquavella, 100 **Wash.** 2d 651, 674 P.2d 160 (1983) -- members of a large water distributing entity need not be personally served in a complex stream adjudication, but court reserves question of whether same result would apply to different facts

F. Other Issues

The question of who "owns" the water rights in an organization has also arisen in a variety of other more limited contexts. The following cases are examples of just some of the disputes that have raised the "ownership" question.

1. Dilution of interest

"Ownership" has often been an issue in cases where the current members of a water organization have complained that plans by the organization to expand the membership would dilute the current members' water rights. Courts have typically protected the current members in these cases. *See, e.g.*, Laramie River Co. v. Watson, 69 **Wyo.** 333, 241 P.2d 1080, 1092 (1952) (mutual cannot sell more shares when water supply is already barely sufficient); Bradshaw v. Milner Low Lift Irr. Dist., 85 **Idaho** 528, 381 P.2d 440 (1963) (prior landowners in an irrigation district cannot, without their approval, be deprived of the water they need and have been using); McDermont v. Anaheim Union Water Co., 124 **Cal.** 112, 56 P. 779 (1899) (mutual shareholders can sue to enjoin issuance of new stock that will result in reduction of available supply).

2. Allocation during shortages

In Willis v. Neches Canal Co., 16 S.W.2d 266 (**Tex. Comm'n App.** 1929), water users served by a canal company argued that, under the prior appropriation system, they should receive their full supply before later users received any water. The court disagreed, deciding that the canal company was the actual appropriator of the water and that, under TEX. WATER CODE § 11.039, the water should be distributed on a pro rata basis.

3. Abandonment

What happens if a water organization ceases to exist? Is its water abandoned or can its members continue to use the water? In St. George City v. Kirkland, 17 **Utah** 2d 292, 409 P.2d

970, 971 (1966), a mutual's charter temporarily lapsed, raising this exact issue. The court held that the shareholders were the "real owners" of the water and therefore there was no abandonment if the shareholders continued to use the water.

4. **Foreclosure**

The question has often arisen as to whether a mortgage of land includes the shares of a mutual used to supply water for the land. "Ownership" of the underlying water rights has typically been the deciding factor. Examples include:

1. Comstock v. Olney Springs Drainage Dist., 97 **Colo.** 416, 50 P.2d 531, 532 (1935) (water rights belong to shareholder and are therefore liable for assessment by an irrigation district in which the mutual is located). *But see* Denver Joint Stock Bank v. Markham, 106 **Colo.** 509, 107 P.2d 313 (1940) (concluding that a trust deed did not cover mutual rights).

2. Yellowstone Valley Co. v. Associated Mortgage Investors, Inc., 88 **Mont.** 73, 290 P. 255 (1930) (water rights belong to shareholder and thus are subject to foreclosure)

3. Butte County v. Lovinger, 64 **S.D.** 209, 266 N.W. 127, 130-32 (1936) (water rights belong to mutual and therefore are not subject to foreclosure)

5. Taxation

Whether a member of a water organization "owns" water rights will sometimes be relevant to property taxation. In Beaty v. Board of County Comm'rs, 101 Colo. 346, 73 P.2d 982, 985 (1937), for example, the Colorado Supreme Court held that mutual shares were "merely muniments of title" to the underlying water and thus were improvements to the shareholder's property for property tax purposes.

6. Rate base for public utility

In Board of County Comm'rs v. Rocky Mountain Water Co., 102 Colo. 351, 79 P.2d 373, 375-76 (1938), a commercial company argued that the water it distributed should be included in its rate base for purposes of rate regulation. The court disagreed, noting that the company could not by itself appropriate the water.

V. CONCLUSION

Who "owns" the water that is distributed by an organization is an extremely complex question that depends on a number of issues, including the reason why the question is being asked. Unfortunately, the law here is not only complex, but often sparse and confused.

State legislatures could help eliminate some of the confusion involved in answering some of the relevant questions--particularly the question of who has the right to transfer or market water distributed by an organization. Given the increasing need for flexible water rights and the growing interest in water markets, the right of organizations and their members to transfer or market water rights will be a frequently raised issue in the next decade. Because the law in most

states is currently unclear, disputes and expensive litigation are all but inevitable. By addressing the issue now, legislatures could both avoid these costly disputes and provide some needed policy guidance on the normative question of who *should* have the right to transfer the water.