

UTAH WATER RIGHTS TRANSFER LAW

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Utah is one of the most arid states in the country. But its precipitation varies greatly, from an average of less than five inches over the Great Salt Lake Desert to more than sixty inches on the Wasatch Mountains peaks. Along the Wasatch Front, where Utah's major cities and richest agricultural areas lie, the average annual precipitation is between ten and fifteen inches. As a result, irrigation is essential for agriculture and water importation necessary for continued urban development. It is fortunate that the more humid mountainous zones are adjacent to the agricultural and urban areas. Winter snows in the high country supply much of the surface runoff and ground water recharge needed to meet the state's water needs.¹

As urbanization proceeds and populations shift and grow in Utah's urban areas, the need for reliable and legally-firm additional water rights grows. But, because of the over-all aridity of the state, the scarcity of its finite water resources is more apparent. There is only a limited amount of unappropriated surface water and state officials have either closed or restricted development in important ground water basins.² Increased water storage and trans-basin diversions are costly and federal funding is less reliable. Also, there are increased costs associated with the need to minimize environmental consequences of development.³ Technology, such as desalination and weather modification, also is subject to cost considerations and to scientific and environmental uncertainties.⁴ Moreover, conservation programs are only a partial answer to meet the need. "Estimates of con-

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1. R. BROUGH, D. JONES & D. STEVENS, UTAH'S COMPREHENSIVE WEATHER ALMANAC 33 (1987).

2. Utah Division of Water Rights, Summary of the Utah State Division of Water Rights Policies Regarding the Appropriation of Water As of September 1, 1987 (1987) (preliminary, subject to revision), reprinted in P. Hansen, Review of Water Right Transfer Process In Utah (1988) (thesis at Utah State Univ., Logan, UT) [hereinafter Hansen] at 134-45.

3. Shupe, *Water Marketing: An Overview*, 80 AM. WATER WORKS ASS'N J. 18-26 (1988).

4. The Utah Division of Water Resources sponsored a series of conferences discussing issues raised by weather modification in the state. See, e.g., Utah Division of Water Resources, Utah's Annual Cloud Seeding Seminar (1977). As a part of its role in water planning, it made an assessment of the potential impact in Utah of weather modification. Utah Division of Water Resources, The Assessment of Cloud Seeding Programs and Evaluation Techniques in the State of Utah (1975).

served water may be overstated or the cost of conservation programs underestimated."⁵

During the past decade, Utah water users exercised their additional option to obtain needed firm supplies—water rights transfer. Cities in Salt Lake County, in which over forty percent of Utah's population reside, purchased water rights from canal companies and have exchanged rights to relatively low quality Utah Lake water for high quality, potable water from the Wasatch mountain streams east of the metropolitan area.⁶ Fifteen percent of Salt Lake City's water comes from its rights in Deer Creek Reservoir on the Provo River south of the city in Wasatch County. The drought of the late 1980s led to concern over water shortages. Accordingly, water users wished to reduce winter flows below the 100 cubic feet per second (cfs) into the Provo River below Deer Creek Dam. That amount, however, was "guaranteed" by the Bureau of Reclamation in its environmental impact statement for Jordanelle Dam which is being constructed upstream on the Provo River. In November 1988, a compromise was reached among the water users and environmental groups which feared that reduction of stream flow would ruin a blue ribbon fishery. Fishing on the river was temporarily closed, water was held in the reservoir with only 85 cfs released, and a one-time, 9,599 acre-foot water purchase was made by the Bureau to make the compromise viable.⁷

Growing mountain resorts, such as Brian Head and Park City, have obtained needed water from canal companies to support winter ski centers and year-round vacation lands.⁸ The Intermountain Power Project and Utah Power and Light Company purchased adequate water supplies in Millard and Emery Counties from agricultural water users to meet the needs of their huge electric power generation facilities.⁹

Large newsworthy water rights transfers are only the tip of the mound of water rights transactions in Utah. In 1988, a study of computer records and additional files available for public inspection from the State Engineer's

(report prepared for the Bureau of Reclamation). During dry years, the Division joins with interested counties in sponsoring cloud seeding operations.

5. Smith, *Irrigation Districts: Obstacles to Water Marketing*, 80 AM. WATER WORKS ASS'N J. 10 (1988).

6. J. FOLK-WILLIAMS, S. FRY & L. HILGENDORF, *WESTERN WATER FLOWS TO THE CITIES* 180-88, 192-95 (1985).

Sandy City, a fast-growing municipality in the southern part of Salt Lake County, has been scrambling for adequate usable water supplies. In August 1989, Sandy City voters approved a plan to become part of the Metropolitan Water District of Salt Lake City. *Deseret News*, Aug. 30, 1989, at B1. The water election involved leaving the Salt Lake County Water Conservancy District, but continuing to buy water from it for over the following dozen years. With other water exchanges and projects, the Metropolitan Water District will be able to meet Sandy City's needs and there will be sufficient water for the remaining customers of the Conservancy District. *Deseret News*, Aug. 27, 1989, at A18.

7. C. Chandler, *Utah Water Law and the Lower Provo River: Can Instream Flows Realistically be Established?* (1988) (thesis at J. Reuben Clark Law School, Provo, UT); *Deseret News*, Dec. 17, 1985, at D5.

8. Interviews with Lee Kapaloski, attorney with Parsons, Behle & Latimer, Salt Lake City, UT, Feb. 29, 1988, and E. C. Deutschlander, mayor of Brian Head, UT, June 24, 1988.

9. R. Little & T. Greider, *Water Transfers from Agriculture to Industry: Two Utah Examples* (1983) (Inst. for Social Sci. Res. on Nat. Res., Utah State Univ., Logan, UT, Res. Monograph # 10).

Office covering the period from 1980 to 1987 revealed 3,331 change applications and 874 exchange applications. The total number of change applications varied from a low of 333 in 1984 to a high of 466 in 1983. Fifty-one percent of the applications were filed on water in the southwestern quarter of the state. Although southwestern Utah supports only six percent of the state's population, there have been many ground water basin closures there and new appropriations of surface water have been limited. Moreover, that area's population increased fifty percent during the study period.¹⁰

Half of the applications involved requests for a change in the nature of use—mainly away from agriculture. Alterations in the point of diversion and/or place of use often accompanied change in the nature of use. Nineteen percent of the applications involved requests to relocate the point of diversion, while the water purpose and place of use remained intact. A fourth of the applications were for changes in the place of use and/or point of diversion, but without alteration in the nature of use.¹¹

The amount of water involved in the studied transactions indicates that relatively small quantities were most commonly the subject of change requests. Nearly half the filings were for less than five acre-feet of water. And applications for changes involving between .004 and .015 cfs were the most frequent.¹²

In comparison, exchange applications filed each year since 1980 remained steady, with the exception of 1981 when there was significant increase connected with development in the Park City area. Exchanges, unlike changes, did not occur state-wide during the study period. In fact, 713 of the 874 exchange files pertained to the Ogden/Weber River Area, apparently a result of both population growth and limitations upon new appropriations there. The bulk of exchanges involved one acre-foot of water.¹³

Utah water rights transactions take place within a framework of water rights law. The purpose of this study is to consider the legal aspects of water marketing in the state, and to look at the law relating to changes in ownership, nature of use, place of use, and point of diversion.¹⁴ The background is laid by considering Utah water rights acquisition law. Then the system of changes and exchanges through the State Engineer's Office is examined, followed by analysis of other water rights entitlement transfers. Special problem areas, such as federal water rights and federal water transfers and interstate water transfers, are considered. Finally, there is an evaluation of the Utah water rights transfer system.

I. ACQUISITION OF APPROPRIATIVE RIGHTS

Utah follows the doctrine of prior appropriation for acquisition of

10. Hansen, *supra* note 2, at 39-42.

11. *Id.* at 42-44.

12. *Id.* at 44-48.

13. *Id.* at 51-56.

14. The focus of this article, however, is upon voluntary transfers, not upon transactions which are part of administering insolvents' or decedents' estates, or which involve governmental condemnation or taking.

rights to use surface, underground and atmospheric waters.¹⁵ Such rights, however, may be obtained only through following the administrative permit process as outlined by law.¹⁶ By statute, regulation, judicial decision and practice, appropriative water rights are established, defined, categorized and administered.

A. *Establishing Appropriative Rights*

Immediately upon their arrival in Utah in 1847, the Mormon pioneers set about developing watercourses in the Great Basin for agricultural and domestic uses. They founded villages near streams as they emerged from the mountains, and they established outlying farms. This was contrary to the pattern of isolated farmsteads that characterized much of the earlier settlement in the country.¹⁷ Construction of ditches and canals was a community effort. Rights to use of water for irrigation were associated with use of the land. Ecclesiastical leaders selected persons to supervise equitable distribution and maximize efficient use of available water supplies.¹⁸

Until the Treaty of Guadalupe-Hidalgo ended the Mexican War, technically the area was governed by Mexican law; but the Mormons, ignoring that fact, organized the "State of Deseret" as a structure for civil government. Deseret was not, however, recognized by Congress.¹⁹ As part of the Compromise of 1850, by congressional creation, a territorial government for Utah succeeded the self-created state. Section six of this organic act delegated legislative power to the territorial legislature and authorized it to deal with "all rightful subjects of legislation."²⁰ This, the legislature assumed, gave it the power to enact water resources legislation.

The first Utah Territory water statute granted counties "control of all timber, water privileges, or any watercourse or creek" and authorized them "to grant mill sites, and exercise such powers as in their judgment shall best preserve the timber and subserve the interests of the settlements in the distribution of water for irrigation or other purposes." Appropriations were effected by placing a notice of intent "in three of the most public places in the county at least ten days previous to the sitting of the court"²¹

In 1880, a more detailed law superseded this early statute. Failure by the counties to enforce the earlier law, something which resulted in more water being claimed than ever was carried in streams, prompted enactment of the 1880 statute. In 1897, new water rights statutes were passed. Copied from other states' water rights laws, they formally adopted the doctrine of prior appropriation. The 1897 statutes were the first Utah statutes to require recording an appropriator's rights as the means of perfecting them. The laws were deficient because they did not limit the number of claims that

15. UTAH CODE ANN. §§ 73-3-1, -15-8 (1953 & Supp. 1989).

16. *Id.* at §§ 73-3-2, -3-25, -15-3.

17. L. NELSON, *THE MORMON VILLAGE: A PATTERN AND TECHNIQUE OF LAND SETTLEMENT* (1952).

18. L. ARRINGTON, *GREAT BASIN KINGDOM* 52-53 (1953).

19. L. ARRINGTON & D. BITTON, *THE MORMON EXPERIENCE* 162-63 (1979).

20. Act of Sept. 9, 1850, ch. 51, 9 Stat. 453 (1850).

21. 1852 Utah Laws ch. 1, § 38. See E. Wilkinson, *Administration and Control of Irrigation* 3 (1927) (thesis at Harvard Law School and J. Reuben Clark Law School, Provo, UT).

could be filed to the same water. Nor did they provide a method for determining whether the water actually was diverted and used.²²

Although the position of State Engineer as chief state water administrator was created by the 1897 statutes, not until significant changes were made in the laws in 1903 did the State Engineer gain any real authority. These changes embodied a compromise between the existing programs in Wyoming (solely administrative) and Colorado (solely judicial). There have been many changes in Utah water acquisition laws since 1903, but at that time the foundations for the modern water laws were established.²³

Currently and for the past fifty years, the permit system is the only method of obtaining an appropriated water right in Utah.²⁴ Rights obtained by use, notice and/or recording prior to 1903 when the present permit system was instituted have been for the most part adjudicated by the courts. The amount of water, date of the appropriation, and other relevant information is spelled out by judicial decree.²⁵ Until the code was amended in 1939, it was possible to obtain water rights by adverse possession. The amendment, however, foreclosed the possibility of future adverse possession claims.²⁶

A permit to appropriate surface water may be obtained by any qualified person or organization by complying with the permit-issuance process which the applicant initiates by filing a form prepared by the State Engineer. The application requires the name and address of the applicant, the nature of the proposed use for the water, the quantity of water in acre-feet or the flow of water in second-feet, the time during the year when it will be used, the name of the stream from which the water is to be diverted, the place of diversion and nature of diverting works, and any other facts disclosing the purpose of the proposed appropriation. Storage in a reservoir is considered a diversion; the dam is the point of diversion.²⁷ The State Engineer also is authorized to require a statement of financial means to complete the project.²⁸

The State Engineer's Office processes an application by endorsing the date of receipt, checking to determine if changes are necessary for clarification, and then filing and recording it.²⁹ The Engineer's Office may request additional information from an applicant, particularly if there are prior conflicting claims.³⁰ Notice of application is published by the State Engineer in

22. E. Wilkinson, *supra* note 21, at 6.

23. For the history of Utah water law, see 3 W. HUTCHINS, *WATER RIGHTS IN THE NINETEEN WESTERN STATES* 535-70 (1977); Swenson, *A Primer of Utah Water Law: Part I*, 5 J. ENERGY L. & POL'Y 165, 166-74 (1984); E. Wilkinson, *supra* note 21, at 1-18; Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 289 P. 116 (1930); Moyle v. Salt Lake City, 111 Utah 201, 176 P.2d 882 (1947).

24. See, e.g., Hanson v. Salt Lake City, 115 Utah 404, 412-16, 205 P.2d 255, 258-60 (1949); Wrathall v. Johnson, 86 Utah 50, 101, 40 P.2d 755 (1935).

25. Utah Water Research Laboratory, Utah Water Laws, Politics, Institutions, ACQUARIUS, June 1978, at 6.

26. UTAH CODE ANN. § 73-3-1 (1953); Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co., 104 Utah 448, 456-57, 462, 482, 137 P.2d 634, 638-39, 640, 650 (1943).

27. With respect to storage rights, see Hansen at 14; Bush, *Dealing for Water in the West: Water Rights as Commodities*, 80 AM. WATER WORKS ASS'N J. 30, 31 (1988).

28. UTAH CODE ANN. § 73-3-11 (1953).

29. *Id.* at § 73-3-5.

30. *Id.* at § 73-3-11.

a newspaper published within the county, if there is one, otherwise "in a newspaper having general circulation near the water source from which the appropriation is to be made."³¹ Within thirty days after publication, anyone who wants to protest the proposed use must file a written statement with the State Engineer.³²

Processing an appropriation application requires administrative fact finding. If there is unappropriated water in the proposed source, a permit is granted to an applicant whose water development plan is physically and economically feasible and who has the financial capacity to complete it. But a permit is denied when the proposed use impairs existing rights, interferes with a more beneficial use of the water, is speculative or monopolistic or otherwise is detrimental to the public welfare.³³ It may be necessary, particularly in the event of a protest, to hold a hearing to get the facts.³⁴

Upon making his decision, the State Engineer endorses the application with approval or rejection and sends a copy to the applicant. In the event of approval, the applicant can proceed with the physical steps needed to divert the water.³⁵ The time allowed by the state for completion of construction work is noted on the application. Construction time can be extended, not exceeding fifty years from the date of approval of the application, upon a showing of diligence or reasonable cause for postponement.³⁶ If people protest the applicant's delay, a hearing is held to determine whether there has been due diligence. Upon a finding of no diligence, the application and rights under it are declared forfeited.³⁷

The water code requires the applicant to file proof of completion of the physical acts necessary for the appropriation, including application of the water to beneficial use.³⁸ The applicant then receives a certificate of appropriation which is evidence of his right to appropriate the water, subject to prior rights. The certificate states the quantity of water, the purpose and time of use, and the place of use and diversion. The date of the appropriation relates back to the time of the original application.³⁹

When the State Engineer system was implemented, applicants who had been denied permits and unsuccessful protesters against grants of permits could seek judicial review through a *de novo* hearing in the district court in

31. UTAH CODE ANN. § 73-3-6 (1953 & Supp. 1989).

32. *Id.* at § 73-3-7.

33. *Id.* at § 73-3-8.

34. For a discussion of the hearing process with respect to transfer applications, see *infra* text accompanying notes 99-108. The same process is applicable to applications for initial appropriations.

35. If the application is denied, the applicant may neither divert nor use the water. UTAH CODE ANN. § 73-3-10 (1953).

36. UTAH CODE ANN. § 73-3-12 (1953 & Supp. 1989).

37. *Id.* at § 73-3-13.

38. UTAH CODE ANN. § 73-3-16 (1953).

39. *Id.* at § 73-3-17.

In the case of a temporary application to appropriate water, proof of appropriation is unnecessary. UTAH CODE ANN. § 73-3-5.5 (1953 & Supp. 1989).

For further information about establishing water rights in Utah, see *Summary of Utah Real Property Law*, 2 B.Y.U. LEGAL STUDIES 624-26 (1978); D. JENSEN, *THE UTAH LAW OF WATER RIGHTS* 18-24 (1965); Swensen, *A Primer of Utah Water Law: Part II*, 6 J. ENERGY L. & POL'Y 1-17 (1985); Swensen, *supra* note 23, at 174-84.

which some part of the stream was located. The court, however, could consider only those issues which were or could have been raised at the administrative level.⁴⁰

The recent adoption of the Utah Administrative Procedures Act,⁴¹ which changed the review system, now provides for reconsideration by the agency⁴² as well as judicial review. The new administrative review law does not call for a de novo judicial proceeding in which evidence is taken; instead the reviewing court determines from the administrative record whether the agency made an error of law or a finding of fact not based upon substantial evidence in the record.⁴³

There are special provisions relating to underground water and to weather modification. Well drillers are licensed⁴⁴ and replacement wells may be drilled within a radius of 150 feet from existing wells without using the full formal change process.⁴⁵ Cloud seeders also must be licensed and cloud seeding projects must be approved by the Division of Water Resources.⁴⁶ Runoff derived from weather modification is regarded as "part of the natural water supply of the basin . . . and . . . shall not be subject to new appropriations but shall be administered and distributed to users on the stream system in accordance with existing water rights."⁴⁷ Accordingly, the most senior appropriator whose water right is not met by existing flow is the one who benefits from streamflow augmentation by cloud seeding.

B. *Defining Appropriative Rights*

The legislature declared that waters in Utah, whether on the surface or underground, are public property. Appropriative rights holders receive a right to the use of water, not ownership of the corpus of water.⁴⁸ Although water rights are merely usufructuary, there are similarities between water rights and real property rights. The Utah Supreme Court has said that a

40. Clark v. Hansen, 631 P.2d 914 (Utah 1981).

41. UTAH CODE ANN. §§ 63-46b-1 (1987). The review provisions of the Water Code are UTAH CODE ANN. §§ 73-3-14 to -15 (1953 & Supp. 1989).

42. UTAH CODE ANN. § 63-46b-13 (1987).

43. *Id.* at § 63-46b-16(4).

44. UTAH CODE ANN. § 73-3-25 (1953 & Supp. 1989).

45. UTAH CODE ANN. § 73-3-28 (1953).

46. *Id.* at § 73-15-3.

47. *Id.* at § 73-15-4. See also T. Parker, Report on Rights of Ownership to New Water Supplies Resulting from Winter Orographic Precipitation Enhancement in the Colorado River Basin, June 28, 1976, memorandum to the Chief of the Division of Atmospheric Water Resources Management, Dep't of the Interior, reprinted in R. DEWSNUP & D. JENSEN, LEGAL ASPECTS OF WEATHER MODIFICATION IN UTAH at B1 (1977).

Water developed through use of cloud seeding bears some similarity to imported water—water brought from one watercourse to another—and to salvaged water—water which has been lost from beneficial use but which later is made available through artificial methods. An importer is given the right to capture and use imported waters in the basin to which he has brought it through his own efforts. It is necessary to obtain a permit to use salvaged water. Big Cottonwood Tanner Ditch Co. v. Shurtliff, 56 Utah 196, 189 P. 587 (1920); see also Bullock v. Tracy, 4 Utah 2d 370, 294 P.2d 707 (1956). There are no reported cases in which Utah water users have sought authority to transfer water clearly labelled as "imported" or "salvaged." Nor are there any Utah cases dealing with an effort to transfer water derived through cloud seeding.

48. UTAH CODE ANN. § 73-1-1 (1953). See also J.J.N.P. Co. v. State, 655 P.2d 1133 (Utah 1982); Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755 (1935); Oldroyd v. McCrea, 65 Utah 142, 235 P. 580 (1925).

right to use water is a right in real property.⁴⁹ In *Hammond v. Johnson*,⁵⁰ the court held that a suit to quiet title in water rights is similar to a suit to quiet title in real property. Also, reference in the Utah code to water rights transfer "by deed in substantially the same manner as real estate . . ."⁵¹ suggests similarities between water and other property rights.

Usually water rights are permanent. There may, however, be instances of appropriations for limited periods of time.⁵² Also an owner may lose water rights by forfeiture or abandonment. The Utah Code stipulates that, when an appropriator ceases to use the water for five years, the right ceases, unless, before that time expires, the appropriator files an application with the State Engineer for an extension of time in which to resume use of the water.⁵³

Water rights are limited by the fact that appropriations must be put to beneficial uses.⁵⁴ Such uses must be reasonable in relation to the reasonable requirements of other appropriators.⁵⁵ Beneficial uses listed in the Utah Code include irrigation, domestic or culinary, stock watering, power or mining development, manufacturing and recreation.⁵⁶ By contrast, the Utah court has held that flooding public lands solely to propagate wild fowl for sporting purposes is not a beneficial use.⁵⁷ However, the code establishes no hierarchy of uses and does not list all possible beneficial uses.⁵⁸ The law specifically notes that speculation and monopoly are non-beneficial uses.⁵⁹

Water rights also are defined in terms of quantity, diversion point, and time and place of use. The certificate of appropriation states the quantity. The amount appropriated is described either by discharge measured by cubic feet per second or by volume measured by acre-feet.⁶⁰ In surveyed territory, the point of diversion is designated by reference to survey corners or monuments, when either the diversion point or the point of return is located within six miles of such corners and monuments. In unsurveyed territory, the diversion point is designated with reference to a permanent prominent natural object.⁶¹ Sometimes the certificate of appropriation limits a water

49. *Bear River Drainage Area v. United States*, 2 Utah 2d 208, 211, 271 P.2d 846 (1954). See also *Garner v. Anderson*, 67 Utah 553, 565, 248 P. 496, 500 (1926).

50. 94 Utah 20, 66 P.2d 894 (1937).

51. UTAH CODE ANN. § 73-1-10 (1953). For discussion of transfer of water rights in Utah through transfer of land, see *infra* text accompanying notes 121-22.

52. UTAH CODE ANN. § 73-3-5.5 (1953 & Supp. 1989).

53. *Id.* at § 73-1-4.

54. UTAH CODE ANN. § 73-3-1 (1953); *Wrathall v. Johnson*, 86 Utah 50, 76, 40 P.2d 755, 767 (1935).

55. *In re Water Rights of Escalante Valley Drainage Area*, 10 Utah 2d 77, 82, 348 P.2d 679 (1960).

56. UTAH CODE ANN. § 73-3-8(1) (1953 & Supp. 1989). Some beneficial uses are listed by the Utah Supreme Court in *Hague v. Nephi Irr. Co.*, 16 Utah 421, 429, 52 P. 765, 767 (1898); *Jensen v. Birch Creek Ranch Co.*, 76 Utah 356, 289 P. 1097 (1930); and *In re Escalante Valley Drainage Area*, 11 Utah 2d 77, 355 P.2d 64 (1960).

57. *Lake Shore Duck Club v. Lake View Duck Club*, 50 Utah 76, 80-81, 166 P. 309, 310-11 (1917).

58. *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957, 963-64 (1943).

59. UTAH CODE ANN. § 73-3-8(1) (1953 & Supp. 1989).

60. UTAH CODE ANN. § 73-1-2 (1953).

61. UTAH CODE ANN. § 73-3-2 (1953 & Supp. 1989).

right to certain times or seasons. These restrictions are binding.⁶² Finally, the place of the proposed use is stated in the application and listed on the certificate.⁶³

C. *Categories of Appropriative Rights*

Appropriative rights are categorized by priority and by preference. Priority is a significant aspect of a water right. Often the chief value of an appropriation is its priority, and thus interference with a person's priority is deprivation of a valuable property right.⁶⁴ The first appropriator in time is the first in right. In times of shortage, water is delivered to senior rights holders in the order of their priority. Thus, junior water rights holders go without.⁶⁵

The preference concept is a major variation in the prior appropriation system. Utah law recognizes that, "in times of scarcity, while priority of appropriation shall give the better right as between those using water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over uses for all other purposes, and use for agricultural purposes shall have preference over use for any other purposes except domestic use."⁶⁶ Homesteaders, desert entrymen and purchasers from the state have a preference over prior applicants to appropriate water for use on all or part of the same land.⁶⁷

D. *Administration of Water Rights*

The State Engineer's Office, otherwise known as the Division of Water Rights, is a subagency within the Utah Department of Natural Resources, and the State Engineer reports to the executive director of that department.⁶⁸ In addition to processing water permit applications, the division has been delegated significant flood management authority,⁶⁹ and participates in drainage basin water rights adjudication.⁷⁰ The State Engineer's Office is organized into four operational sections—adjudication and distribu-

62. See, e.g., *Hardy v. Beaver Country Irr. Co.*, 65 Utah 28, 40, 234 P. 524, 529 (1924); *In re Water Rights of Escalante Valley Drainage Area*, 10 Utah 2d 77, 82-83, 348 P.2d 679 (1960).

63. UTAH CODE ANN. §§ 73-3-2; 73-3-17 (1953 & Supp. 1989).

64. See *Whitmore v. Murray City*, 107 Utah 445, 453, 154 P.2d 748 (1944).

65. See *Lehi Irr. Co. v. Moyle*, 4 Utah 327, 340, 9 P. 867, 875-77 (1886).

66. UTAH CODE ANN. § 73-3-21 (1953). See also *Summary of Utah Real Property Law*, 2 B.Y.U. LEGAL STUDIES 628 (1978); D. JENSEN, *supra* note 39, at 35-36.

67. UTAH CODE ANN. § 73-3-9 (1953).

68. UTAH CODE ANN. §§ 73-2-1.1 to -1.2 (1953 & Supp. 1989). The terms "State Engineer's Office" and "Division of Water Rights" apply to the same governmental entity and are used interchangeably herein.

69. UTAH CODE ANN. §§ 73-2-22, -22.1, -23 & -23.1 (Supp. 1989). For discussion of those powers and other flood control responsibilities of Utah state and local governments, see Comment, *The Only Way to Manage a Desert: Utah's Liability Immunity for Flood Control*, 8 J. ENERGY L. & POL'Y 95 (1987); see also Davis, *Settling Flood Hazard Conflict: The Utah Lake and Jordan River Experience*, 8 J. ENERGY L. & POL'Y 199, 214 (1988).

70. UTAH CODE ANN. §§ 73-4-1 to -24 (1953). See also Note, *Water Rights—Finality of General Adjudication Proceedings in the Seventeen Western States*, UTAH L. REV. 152 (1966).

Six areas in Utah are currently under adjudication. In two of them, the Ogden and Weber River Basin and the Sevier River Basin, interlocutory decrees have been served. For a map of the status of general adjudications, see Hansen, *supra* note 2, at 34. See also *id.* at 103-32 for status as of August 1988 of proposed determinations and adjudications in Utah.

tion, appropriation, dam safety and investigations. To some extent, these operational divisions are intertwined, but the adjudication and appropriation sections are most directly involved in evaluation of appropriation and transfer applications. The State Engineer divided the state into seven jurisdictional areas for administrative purposes—northern, eastern, Ogden/Weber River, Utah Lake/Jordan River, Sevier River, southwestern, and southeastern. Each of the seven regional areas are divided along watershed boundaries. They are further subdivided into fifty smaller watersheds and are referenced by area code numbers. Applications to the State Engineer's Office are assigned a number which ties them into one of the fifty area codes.⁷¹ This system facilitates the work of the Division of Water Rights and aids persons researching water rights in the state.

In addition to the legal and administrative structures, effectiveness of water rights administration in Utah turns upon other factors including the quality of preparation of applications and of protests, the extent to which participants obtain expert legal and technical assistance, and the willingness of the legislature to fund the operations of the State Engineer's Office at an adequate level. "Do-it-yourselfers" delay the process by filing applications and protests which, because they are inadequate, are returned for more adequate compliance with statutory and administrative requirements.⁷² There also are administrative delays because legislative funding does not provide for enough technical and legal staff for the Division of Water Rights.⁷³

II. CHANGES OF APPROPRIATIVE RIGHTS

Utah law recognizes water rights transfers that comply with legal requirements. As in the case of initial appropriations of water, the State Engineer and the Division of Water Rights in the Department of Natural Resources administer the law. There are procedures and forms for various types of changes. The legal and institutional framework, however, imposes certain limits and restrictions upon which changes are possible in Utah.

A. *Changing Water Rights*

The Utah water code provides for water rights changes by stipulating: "Any person entitled to the use of water may change the place of diversion or use and may use the water for other purposes than those for which it was originally appropriated"⁷⁴ Although the statute does not specifically recognize the right to make changes by sale, lease, divisions of rights, exchanges or substitution of one water right for another, case law and administrative practice regard such transfers as part of the right held by a water rights owner.

A transfer may take place because of a sales transaction. A water right may be transferred through execution of a deed "substantially" in the same

71. Hansen, *supra* note 2, at 10.

72. *Id.* at 72-73.

73. *Id.* at 33-35.

74. UTAH CODE ANN. § 73-3-3(1) (1953 & Supp. 1989).

manner as change of ownership in fee of real property.⁷⁵ Such deeds, to be effective against third persons, must be recorded with the county recorder who transmits a copy to the State Engineer for filing. Subsequent purchasers and other persons are deemed to have notice of recorded deeds.⁷⁶ As well as recognizing in the deed recording provision that purchases take place, the water code also authorizes the Division of Wildlife Resources to buy water rights.⁷⁷

In addition to permanent transfers through sales, there also are temporary transfers for specified periods of time. These are leases. Utah law recognizes water rights leases.⁷⁸

The code provides for "segregation" or division of water rights upon request to the State Engineer and receipt of his approval. Such requests "shall be rejected if the approval thereof would impair rights or would prove detrimental to the public welfare."⁷⁹ The Division of Water Rights developed a form which is used to apply for division of water rights.

As noted in the introduction,⁸⁰ there is a brisk business in Utah for the exchange of water rights as well as in straight transfers. The State Engineer has authority to rule on exchange applications. Conditions may be imposed upon such exchanges. An application for an exchange may be lapsed by the State Engineer if the underlying water right used to facilitate the exchange has been lost, the exchange no longer can be carried out as stated in the application, or the applicant has not complied with conditions imposed in establishing the exchange.⁸¹ In *State ex rel. Ellerbeck v. Salt Lake City*,⁸² the Utah Supreme Court allowed Salt Lake City to exchange relatively low quality irrigation water for better quality water from Big Cottonwood, Mill Creek, and Little Cottonwood Creeks. In *Genola Town v. Santaquin City*,⁸³ the court also stated that water given in exchange need not be fit for all uses.

An appropriator of water from a running stream is entitled to have it flow down the natural channel to his diversion point or, if diverted from the natural channel by other appropriators for their convenience, to have it delivered to him at available points by other means paid for by subsequent appropriators. In Utah, changes in established means of diversion of prior appropriators by junior claimants also must be at their own expense. The substitute water should be delivered at a point where the prior appropriator can make full use of it, and the substitution must be without injury or damage to him.⁸⁴

A junior appropriator may use underground water as replacement for

75. See *infra* text accompanying note 122. See also UTAH CODE ANN. § 73-1-10 (1953).

76. *Id.* See also *id.* at §§ 73-1-11, -12.

77. UTAH CODE ANN. § 73-3-3(11) (Supp. 1989). See also *infra* text accompanying notes 118-20.

78. *Tilton v. Sterling Coal & Coke Co.*, 28 Utah 173, 77 P. 758 (1904); see also *Lasson v. Seely*, 120 Utah 679, 238 P.2d 418 (1951).

79. UTAH CODE ANN. § 73-3-27 (1953).

80. See *supra* text accompanying note 13.

81. UTAH CODE ANN. § 73-3-20(2), (3) (Supp. 1989).

82. 29 Utah 361, 81 P. 273 (1905).

83. 96 Utah 88, 80 P.2d 930, 936-37 (Utah 1938).

84. See UTAH CODE ANN. § 73-3-20(1) (1953 & Supp. 1989). See also *United States v. Caldwell*, 64 Utah 490, 231 P. 434 (1924); *Big Cottonwood Tanner Ditch Co. v. Shurtliff*, 56 Utah 196,

the impact of surface or ground water withdrawals upon senior appropriators.⁸⁵ Integration of surface and underground water use is a frequent goal of water rights transfers.

B. *Types of Changes Permitted*

Changes are allowed in quantities of water or flow of water including changes in ownership, alterations of the place of diversion, changes in the place of use, and shifts in the purpose for which the water is used.⁸⁶ From 1980 to 1987 all of these types of changes took place in varying combinations.⁸⁷ The Division of Water Rights has application forms available for such changes. Also there may be a change from carriage of water in a man-made canal to diversion of it into a natural stream. Upon application to the State Engineer, such a change may be made to prevent waste and to facilitate distribution.⁸⁸

Utah law distinguishes between permanent and temporary changes. "Changes for an indefinite length of time with an intention to relinquish the original point of diversion, place, or purpose or use" are permanent changes.⁸⁹ Temporary changes are those made for fixed periods of time not exceeding a year.⁹⁰ Both permanent and temporary changes are made according to the provisions of the transfer law.

As previously noted, the Utah law deals with exchanges as well as with other transfers and provides for application to and approval by the State Engineer.⁹¹ A permanent exchange application form, developed by the State Engineer's Office, is used for such permanent exchanges.

Temporary changes in place of diversion, place of use and purpose of use for which water originally was appropriated must follow application requirements which are set forth in law. The State Engineer investigates all temporary change applications. If the change would cause no impairment of vested rights, it must be authorized. If the change would impair vested rights, the State Engineer notifies all persons whose rights might be affected. The State Engineer may require a deposit of money for investigation and notice before making an investigation or giving notice.⁹²

C. *Change Procedure*

A water rights holder initiates the change process by obtaining a transfer application from and then filing it with the Division of Water Rights. The application sets forth the name of the applicant, a description of the water right including the quantity of water, its source and place of diversion,

189 P. 587 (1920); *Salt Lake City v. Gardner*, 39 Utah 30, 114 P. 147 (1911); *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 25 Utah 456, 71 P. 1069 (1903).

85. UTAH CODE ANN. § 73-3-23 (1953).

86. The basic section of the law respecting transfers is UTAH CODE ANN. § 73-3-3 (1953 & Supp. 1989). See also *Lehmitz v. Utah Copper Co.*, 118 F.2d 518 (10th Cir. 1941).

87. See *supra* text accompanying notes 10-12.

88. UTAH CODE ANN. § 73-3-20 (1953 & Supp. 1989).

89. UTAH CODE ANN. § 73-3-3(1), (2) (Supp. 1989).

90. *Id.* at § 73-3-3(1)(b).

91. See *supra* text accompanying note 13.

92. UTAH CODE ANN. §§ 73-3-3, -3(6) (Supp. 1989).

the place, purpose and extent of the present and the proposed uses, the point to which the water will be diverted, and such other information as the State Engineer requires.⁹³ The Division of Water Rights, upon request of the applicant, provides assistance in preparing the form.

The completed application is filed with the State Engineer's Office and the filing fee is paid. Fees are based upon the quantity of water involved in the transfer application. Depending upon the flow rate or the acre-feet involved, fees range from a low of \$30 (for up to 0.1 cfs or up to 20 acre-feet) to a high of \$450 (for over 24 cfs or over 12,000 acre-feet). The fee does not cover the entire processing cost.⁹⁴

The application is reviewed by the division prior to giving public notice of its filing to ensure that the application is complete and in order. This generally includes verification of the validity of the water right. Thereafter the division follows the same procedures to process a transfer application as it does for an initial appropriation. Also the water code provides that "the rights and duties of the applicants with respect to applications for permanent changes of point of diversion, place, or purpose of use . . ." are the same as those of applicants for initial appropriations.⁹⁵

Accordingly, the State Engineer must advertise the application for a permanent transfer in a newspaper published in the county in which the water source is located. The advertisement may be in a paper having general circulation in the area near the water source if the county does not have a paper. Publication must be for three consecutive weeks. The publisher will submit a certified copy of the published advertisement and it will be attached to the change application.⁹⁶

In instances of applications for temporary, rather than permanent, changes, the advertising process is not required. The State Engineer investigates the application and, if there is no impairment of existing rights, issues an order authorizing the change. But, if the change impairs existing rights, notice of the application is given to all persons whose rights might be affected by the change.⁹⁷

Any interested person may, within thirty days after notice is published, file a protest.⁹⁸ A significant number of the protests filed are not lodged due to actual fear of impairment, but instead to record concern about the application in case legal action later becomes necessary.⁹⁹

93. *Id.* at §§ 73-3-3, -3(4)(b).

94. Hansen, *supra* note 2, at 24-25.

95. UTAH CODE ANN. § 73-3-3(5)(a) (Supp. 1989).

96. *Id.* at § 73-3-6. See *Whitmore v. Murray City*, 107 Utah 445, 154 P.2d 748 (1944), for discussion of the proposition that notice by publication, not personal service, does not violate the state constitution. This is the case in spite of the fact that some persons affected by action on a transfer application may not in fact receive actual notice as the consequence of a newspaper advertisement.

97. UTAH CODE ANN. § 73-3-3(6) (Supp. 1989).

98. UTAH CODE ANN. § 73-3-7 (1953 & Supp. 1989). On January 1, 1988, a 1987 amendment went into effect which decreased the length of time within which a protest may be filed to twenty days, but the time period was restored to thirty days by a 1988 amendment effective April 25, 1988. There is no indication of a significant change in the number of protests filed during the period of the shortened protest time. Hansen *supra* note 2, at 27.

99. Hansen, *supra* note 2, at 27.

When the State Engineer receives protests, copies are sent to the applicant for response. The State Engineer may hold a hearing on his own motion or upon request by a protestant. Formal or informal hearings provide a forum for gathering additional information upon which the State Engineer may act. Especially in cases of minor transfers, informal hearings are preferred by the State Engineer, the applicants and the protesters. Informal proceedings encourage openness in which the parties state their positions in dialogue form.¹⁰⁰

Formal proceedings are more common when transfer applications are for larger quantities of water or raise complex issues. They involve lawyers and water experts. The applicant's case is presented first; witnesses for the applicant are examined and then cross-examined by counsel for the opposition. Then the same process is followed for the case of the protesters. Testimony may become stifled and the atmosphere tense. But a record is made which brings out evidence in support of or opposition to the transfer. On appeal, that record is the basis for judicial approval or reversal of a decision.¹⁰¹

Hearings are conducted by the State Engineer or by an administrative law judge acting as a hearing officer for the Division of Water Rights. Generally, hearings are held twice a year in each county in the state, with additional hearings as warranted by special circumstances. More frequent scheduling of hearings could speed the process and facilitate water marketing.¹⁰²

After an administrative law judge hears testimony, the case is taken under advisement. The judge may seek further information prior to making a recommendation to the State Engineer. Area engineers make recommendations for approval or rejection of the transfer and the appropriations engineer in the state office reviews the area engineer's views. Finally, all of the recommendations are submitted to the State Engineer for review. Thereupon the State Engineer will issue a memorandum decision.¹⁰³

The parties have twenty days in which to file a request for reconsideration of a memorandum decision by the State Engineer. He reviews such requests in a timely fashion and, if he decides that a rehearing is not warranted, he issues the final formal written decision. If, on the other hand, the

100. By virtue of the Administrative Procedures Act, agencies may designate certain proceedings as informal. UTAH CODE ANN. at § 63-46b-4 (1987). Procedures for informal hearings are set forth in *id.* § 63-46b-5. See also Hansen, *supra* note 2, at 27-30.

101. Procedures for formal administrative hearings are governed by UTAH CODE ANN. §§ 63-46b-6 to -10 (Supp. 1989). Judicial review is covered in UTAH CODE ANN. §§ 63-46b-16 to -18 (1987).

102. Hansen, *supra* note 2, at 28. By special arrangement, hearings may be held at additional times in Salt Lake City. *Id.* at 70.

103. *Id.* at 30. See also UTAH CODE ANN. § 63-46b-10(1) (1987). An administrative agency may rely upon its experience, technical competence and specialized knowledge to evaluate the evidence. *Id.* at § 63-46b-10(2). Moreover, it sometimes accepts hearsay evidence, but cannot base rulings solely on hearsay evidence unless that evidence is the sort that would be admissible in Utah courts. *Id.* at § 63-46b-10(3).

The applicant bears the burden of proof in a change proceedings. See *Piute Reservoir & Irr. Co. v. West Panguitch Irr. & Reservoir Co.*, 13 Utah 2d 6, 367 P.2d 855 (1962); *Salt Lake City v. Boundary Springs Water Users' Ass'n*, 2 Utah 2d 141, 270 P.2d 453 (1954); *American Fork Irr. Co. v. Linke*, 121 Utah 90, 239 P.2d 188 (1951); *Tanner v. Humphreys*, 87 Utah 164, 48 P.2d 484 (1935).

State Engineer finds that additional information regarding the transfer should be considered, he will authorize reconsideration of the case.¹⁰⁴

After approval by the State Engineer of the application for a permanent change, the applicant makes the physical alterations necessary to effectuate the transfer. Actions undertaken without following the statutory process are criminal and do not create legal water rights.¹⁰⁵ In notification of an application's approval, the State Engineer indicates the time within which construction and the physical change must take place.¹⁰⁶ Sixty days before the date set for proof of permanent change, the applicant is given a form to describe the construction and provide other data regarding the change.¹⁰⁷ If the change appears appropriately perfected, the division issues a certificate indicating the nature of the water right.¹⁰⁸

Judicial review of administrative decisions concerning transfers is similar to that used for initial applications to appropriate water. The provisions of the Administrative Procedures Act are followed by the reviewing court looking for errors of law and factual decisions not supported by substantial evidence upon the whole record.¹⁰⁹

D. *Restrictions on Changes*

There are three situations in which transfers of water use rights in Utah are restricted. First, there is the "no-impairment rule." Second, there is a ban on municipal sales of waterworks, water rights or sources of water supply. And, third, there are limitations upon purchase of water rights by the Division of Wildlife Resources.

The principal restriction is that the State Engineer cannot approve an application if, among other things, the proposed use impairs existing rights.¹¹⁰ If there are conflicting rights, "changes may be approved as to part of the water involved or upon the condition that conflicting rights are acquired."¹¹¹ That restriction seeks to protect the interests of third persons, usually other water rights holders, whose water rights would be adversely affected by the change. It is a necessary restriction upon rights transfers because, unlike most real property rights, water rights are correlative—the rights of any one water right holder exist in relationship to those of other water right holders on the same watercourse. For example, consider farmers

104. Reviews and reconsiderations by the agencies in Utah are governed by UTAH CODE ANN. §§ 63-46b-12 & -13 (1987).

105. UTAH CODE ANN. § 73-3-3(9) (1953 & Supp. 1989). See also *Lasson v. Seely*, 120 Utah 679, 238 P.2d 418 (1951).

106. UTAH CODE ANN. § 73-3-12 (1953 & Supp. 1989).

107. UTAH CODE ANN. § 73-3-16 (Supp. 1989).

108. *Id.* at § 73-3-17.

109. *Id.* at § 63-46b-16.

110. *Id.* at § 73-3-8(1). For exposition of the no-harm rule, see D. TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* §§ 5.17(4), (5) (1988).

111. UTAH CODE ANN. § 73-3-3(7) (Supp. 1989).

No application for a transfer will be approved without payment of just compensation if the change would impair a vested right. See, e.g., *Tanner v. Humphreys*, 87 Utah 162, 48 P.2d 484 (1935). Therefore, applicants must either alter their application so it will not impair vested rights or they must negotiate a compensation arrangement with the injured parties. See *East Bench Irr. Co. v. Deseret Irr. Co.*, 2 Utah 2d 170, 271 P.2d 449 (1954).

who only partly consume irrigation water. Other users, probably junior to the senior agricultural users, rely upon their return flows. If the seniors sell to a consumptive user, such as the transferees in Millard and Emery Counties who operate power plants, junior water rights holders are affected and are able to negotiate payments or other means to protect their interests.¹¹²

As for the second restriction, according to the Utah Constitution, Article XI, section 6, "[n]o municipal corporation, shall . . . sell . . . any water-works, water rights, or sources of water supply" it owns.¹¹³ However, exchanges of water rights or sources of water supply for other water rights or sources of water supply of "equal value" are not banned by the provision. Hence, in *Genola Town v. Santaquin City*,¹¹⁴ the Utah Supreme Court allowed a trade between two municipalities of culinary water for irrigation water. Moreover, section 6 does not bar water transfers by the Metropolitan Water District of Salt Lake City. It is not a "municipality."¹¹⁵ The restriction upon municipalities, however, is an unfortunate hangover from earlier fear of abuse of power by municipal officials, concern that the legislature might confiscate municipal water rights, and apprehension over possible ecclesiastical influence upon municipal decisions. Those considerations have waned with the passage of time.¹¹⁶

Finally, as to the third limitation, some Utah case law casts doubt upon appropriations which do not involve diversions of the water.¹¹⁷ Hence, protection of instream uses and minimum flows is not as strong as it should be. In order to protect fisheries and other wildlife dependent upon minimum stream flows, the legislature enacted an instream flow amendment to the Utah water code. Under the amendment, the Division of Wildlife Resources, a division within the Department of Natural Resources like the State Engineer's Office and the Division of Water Resources, may file change applications respecting (1) perfected water rights already owned by the division; (2) perfected water rights purchased by that division through funding provided for that purpose by the legislature, or acquired by lease, exchange or gift; or (3) appurtenant water rights acquired through buying real estate for other wildlife purposes.¹¹⁸

Transfers to the Division of Wildlife Resources do not enlarge the original water right which is transferred to the division, nor may they impair any existing water right. The division must indicate in its change application the projected benefits to fisheries; it cannot obtain the water right merely for instream flow protection purposes. And, in order to acquire a long-term

112. See *supra* discussion in text accompanying note 9.

113. UTAH CONST. art., XI § 6. For discussion of this constitutional provision, see G. Whiting, *Municipal Water Rights in Utah: A State Constitutional Perspective* (1987) (thesis at J. Reuben Clark Law School, Provo, UT).

114. 96 Utah 88, 80 P.2d 930, *reh'g denied*, 96 Utah 104, 85 P.2d 790 (1938).

115. *Lehi City v. Meiling*, 87 Utah 237, 48 P.2d 530, 541 (1935).

116. See F. HAWS, *A STUDY OF ALTERNATIVE METHODS TO MODERNIZE WATER INSTITUTIONS AND ELIMINATE PROBLEMS OF MULTIPLE JURISDICTION AND CONFLICTING OBJECTIVES* 45 (1975).

117. See, e.g., *Adams v. Portage Irr. Reservoir & Power Co.*, 95 Utah 1, 72 P.2d 648 (1937), *reh'g denied*, 95 Utah 20, 81 P.2d 368 (1938).

118. UTAH CODE ANN. § 73-3-3(11)(a) (Supp. 1989).

interest, prior legislative approval is required.¹¹⁹ Its power to act is so circumscribed that it has not as yet obtained water rights through the instream flow amendment process.¹²⁰

III. OTHER WATER ENTITLEMENT TRANSFERS

Acquisitions and transfers of appropriative rights can be tracked by checking the records in the State Engineer's Office. Applications, hearings and certificates are matters of public record. There are, however, certain voluntary water entitlement transfers which do not follow the usual change processes. One type of transfer that takes place outside the aegis of the Division of Water Rights is the sale of land with appurtenant water rights. Another involves water company stock transactions.

A. *Landownership-Based Water Entitlements*

Water rights in Utah have a distinctive historic origin. During the late 1840s, Mormon ecclesiastical leaders directed water resources development and allocation. Communities built irrigation canals and ditches under direction from church leaders. Water use rights therefore became associated with utilization of land.¹²¹

Today, although Utah is a prior appropriation state, water rights may or may not be appurtenant to land. Thus, water rights pass with conveyance of the benefited land unless they are expressly reserved. If appropriative rights are intended for the exclusive benefit of particular land and are therefore appurtenant to it, they pass with conveyance of title to that land, in absence of an express reservation severing them from the land. The land transaction is recorded at the county courthouse, and the recorder sends notification of the recording for filing with the Division of Water Rights.¹²²

B. *Stock Ownership-Based Water Entitlements*

Land settlement in pioneer Utah was based upon rural villages in which farmers lived along with other townspeople. This made tight-knit church communities feasible, and gave rise to cooperative resources development. In such a setting, it was quite natural to build irrigation works on a community basis. There still are Utah communities with a "town ditch."¹²³

The community canals were forerunners of today's private water distribution organizations. The cooperative canal system continues to function in Utah whereas the public irrigation districts do not enjoy any real promi-

119. UTAH CODE ANN. § 73-3-3(11)(b) to -3(11)(e) (Supp. 1989).

120. For a critique of the amendment, see Comment, *Recent Developments - Water Law: Instream Flow Amendment*, UTAH L. REV. 322 (1987).

121. See Mead, *Irrigation Institutions: A Discussion of the Economic and Legal Questions Created by the Growth of Irrigation Companies in Utah* 1 (1927) (Utah Experiment Station Bull. 199).

122. *Stephens v. Burton*, 546 P.2d 240 (Utah 1976). For the legislative provisions dealing with transfer of landownership-based water rights, see UTAH CODE ANN. § 73-1-10 (Supp. 1989) (recording and filing deed); *id.* at 73-1-11 (1953) (passing title to water appurtenant to land); § 73-1-12 (1953) (unrecorded deeds void against subsequent purchasers).

123. E. GEARY, *GOODBYE TO POPLARHAVEN* 21-29 (1985).

nence.¹²⁴ There is a Utah Code provision dealing with irrigation districts,¹²⁵ but little use has been made of it. On the other hand, use is made of the provisions authorizing creation of metropolitan water districts¹²⁶ and of water conservancy districts.¹²⁷ Those provisions deal with such matters as real property assessments to pay operating costs,¹²⁸ water rates that may be charged users,¹²⁹ and, in the case of water conservancy districts, sale of water to municipalities, irrigation districts, or private persons or corporations.¹³⁰ But, as noted, it is the private water organization that is of interest with respect to stock ownership-based water entitlements.

Private canal companies and ditch companies were among the earliest water appropriators in Utah. Some of them hold priority dates from pre-Civil War times. An example of an older right is that of the canal companies taking water from the Jordan River at Turner Dam near the boundary of Utah and Salt Lake Counties. They built their works between 1872 and 1883.¹³¹ With their senior priority to water in Utah Lake and the Jordan River, they have firm, and consequently valuable, water rights.

When a company is formed for the purpose of supplying water to its stockholders, in Utah it is normal for each share of stock to represent a proportionate share of the water in which the company has a right. Procurement of stock is necessary to confer the right to use the water. However, a water right cannot be acquired by the mere purchase of stock in an irrigation company; there also must be actual use of the water. Water rights represented by shares of stock in a water company are personal property and may be sold and transferred independently of any land; and the water represented by such shares cannot be said to be appurtenant to the land on which it is used.¹³²

There is a relatively brisk trade in leasing and selling water company stocks. Water rights holders whose interests are represented by water company stock may ascertain in the spring of a year that they will not require all the water to which they hold entitlement through stock ownership. They place the stock with company employees or other persons acting as brokers. Other water users who do not have adequate water check with the company to determine if there is water to lease for the season. Supply and demand set the price for the transfer.¹³³ In some cases, large water users purchase stock to meet their needs. This procedure has allowed large water users such as electric power generating companies, resort towns, and a university to meet

124. Utah Water Research Laboratory, *Utah Water Laws, Politics, Institutions*, ACQUARIUS, June 1978, at 21. For discussion of Utah water distribution agencies, see *id.* at 15-29. See also Swenson, *Water Distribution Agencies*, in 4 R. CLARK, *WATERS AND WATER RIGHTS* § 340 (1970).

125. UTAH CODE ANN. §§ 73-7-1 to -68 (1953 & Supp. 1989).

126. UTAH CODE ANN. §§ 73-8-1 to -59 (Supp. 1989).

127. *Id.* at §§ 73-9-1 to -43.

128. *E.g.*, UTAH CODE ANN. § 73-7-16 (1953).

129. *E.g.*, UTAH CODE ANN. § 73-8-31 (Supp. 1989).

130. *E.g.*, *id.* at §§ 73-9-17, -18, -19.

131. See the final decree in *Salt Lake City v. Colladge*, 13 Utah 522, 45 P. 891 (1886).

132. *George v. Robison*, 23 Utah 79, 63 P. 819 (1901). See also Swenson, *A Primer of Utah Water Law: Part II*, 6 J. ENERGY L. & POL'Y 35-52 (1985).

133. Interview with Lee Kapaloski, attorney with Parsons, Behle & Latimer, Salt Lake City, UT (Feb. 29, 1988).

part of their needs.¹³⁴

Trading in private water supplier stock is not reflected in the records of the State Engineer. Because the company holds the water right, transactions involving its stock are not changes in water rights as the terms "temporary changes" and "permanent changes" are used in the water rights transfer provisions of the Utah Code.¹³⁵ Instead, they are stock transactions. Therefore, it is necessary to look for governing law to state legislation regulating issuance and transfer of stock. Private water distribution agencies are organized and regulated under the Utah Non-Profit Corporation and Co-operative Association Act. The Act refers specifically to "mutual irrigation, canal, ditch, reservoir and water companies and water users' associations."¹³⁶ They may issue stock "evidencing . . . interests in water."¹³⁷

Such water companies must register their securities offerings under the Utah Uniform Securities Act. It does not exempt them from the registration requirement¹³⁸ like it does agricultural co-operatives through reference to the statutory provision which deals with those entities.¹³⁹

According to the Utah stock fraud law, it is unlawful to fraudulently sell or buy any security, to make an untrue statement of a material fact or omit stating a material fact, or to engage in any act which would operate as a fraud or deceit. Damages can be recovered by the injured party.¹⁴⁰ Water stock swindles can be policed by parties to transactions who are harmed by them.

IV. SPECIAL PROBLEM AREAS

Water rights transactions, whether through the State Engineer's Office, by sale of land or by stock transaction, thus far have been considered only with respect to state law. There are, however, water rights transactions that also involve federal law. These include Indian tribal sales, exchanges and leases, federal agency transfers and interstate water transactions.

A. *Transactions in Federal and Indian Reserved Rights*

Federal water resources development and federal reserved water rights both play roles in water rights transactions in Utah. Two large federal water resources development construction projects are currently under way in Utah. They are the Little Dell Dam in Parley's Canyon above Salt Lake City and the Jordanelle Dam on the upper Provo River. Federal purchase of water rights accompanied construction of these projects.¹⁴¹ Transfer of water by the Bureau of Reclamation could facilitate management of the Cen-

134. See, e.g., R. Little & T. Greider, *supra* note 9.

Although Paul Hansen made an effort to track the volume of such intradistrict transactions, he was unable to get a clear picture of their volume. Hansen, *supra* note 2, at 56-57.

135. UTAH CODE ANN. § 73-3-3(1) (Supp. 1959).

136. *Id.* at § 16-6-20.

137. *Id.* at § 16-6-42.

138. *Id.* at § 61-1-14(1)(h).

139. *Id.* at § 61-1-21.

140. *Id.* at § 61-1-22.

141. Hansen, *supra* note 2, at 45.

tral Utah Project.¹⁴²

There are a number of Indian reservations in Utah—Goshute, Skull Valley, Piute (six bands), Navajo and Uintah-Ouray (which is usually known as the Ute Indian Reservation). Under the Indian reserved rights doctrine which originated in *Winters v. United States*¹⁴³ and *Arizona v. California*,¹⁴⁴ Indian tribal reservations have sufficient implied water rights associated with them to irrigate all the “practicably irrigable” acreage thereon. Such reserved rights have a priority dating from establishment of the reservations.¹⁴⁵ The federal reserved rights include underground water as well as surface water.¹⁴⁶

Utah and the Ute Indian Tribe negotiated a water compact approved by the state legislature.¹⁴⁷ Under the terms of the compact, the tribe may use the water reserved to it “for any purpose” it selects. But, if the tribe wishes to make a change in the place or nature of use, it must comply with the regular state transfer process as set forth in the code.¹⁴⁸ In 1989, the Ute Indian Tribe ratified the agreement. Congressional action to confirm it is pending.¹⁴⁹ Similar agreements have not been made with other tribal groups in the state.

Inasmuch as Indian tribal reserved rights are a product of federal law, selling or leasing such water for uses off reservations is subject to federal law. By congressional enactment, Indian property cannot be alienated without congressional consent.¹⁵⁰ Presumably water rights are property within the meaning of that statute.¹⁵¹ Therefore, agreements such as the Ute Indian Compact require approval by Congress as well as the state and the tribe.¹⁵²

In 1965 the Ute Indian Tribe and the Central Utah Water Conservancy District entered into the so-called “Deferral Agreement.” It was signed by officials of the Bureau of Reclamation and the Bureau of Indian Affairs. This agreement, which federal officials deemed necessary to federal financing of the Central Utah Project, allowed the Central Utah Project to proceed without tribal objection to interference with its water rights, confirmed the Indian right to use necessary water on some lands within the reservation, deferred quantification of waters for Ute Indian use on other lands, and allowed a water exchange. By its terms, the Deferral Agreement remains in

142. See, e.g., *supra* text accompanying note 7.

143. 207 U.S. 564 (1908).

144. 373 U.S. 546 (1963).

145. For discussion of the Indian water rights cases, see F. TRELEASE & G. GOULD, *WATER LAW* 761-69 (4th ed. 1986).

146. *Cappaert v. United States*, 426 U.S. 128, 142-43 (1976).

147. UTAH CODE ANN. §§ 73-21-1 to -2 (Supp. 1989).

148. *Id.* at § 73-21-2.

149. H.R. 1285, 101st Cong., 1st Sess. (1989). For discussions of developments since ratification, see C. Hogg & J. Riley, *Water Right Transfer Analysis (Utah's Report)* (Aug. 1989) (draft) [hereinafter Hogg & Riley].

150. 25 U.S.C.A. § 177.

151. See Palma, *Considerations and Conclusions Concerning the Transferability of Indian Water Rights*, 20 NAT. RESOURCES J. 91 (1980).

152. Congress has approved similar compacts elsewhere. See, e.g., the Southern Arizona Water Rights Settlement Act of 1982, Title III, Pub. L. No. 97-293, 96 Stat. 1274 (1982).

effect for forty years—until 2005.¹⁵³ Tribal ratification of the compact with the state has led to efforts by the Utes to get congressional authority to lease water to non-Indians off the reservation as well as on it, to persuade the federal government to pay for construction of works benefitting their water distribution, and in the process inevitably re-do the Deferral Agreement.¹⁵⁴ Transfers of Indian water would facilitate overall water resources management in Utah, just as would transfers of other federally-owned water rights.

B. *Interstate Water Rights Transactions*

The Utah State Engineer is directed by statute to cooperate with administrative officials of adjoining states and, with the consent of the governor, to enter into agreements with states in order to determine and regulate water and water rights in interstate streams.¹⁵⁵ Utah is a party to the Colorado River Compact, the Upper Colorado River Compact, the Bear River Compact, and the Columbia River Compact.¹⁵⁶ These provide for allocation of waters from interstate streams on which Utah is a riparian state. Further development of the Bear River remains a long-time dream in Utah.¹⁵⁷ A proposal to transfer some of Utah's water right in the Colorado River system for a period of time to the benefit of San Diego met with hostility in the state.¹⁵⁸ The Central Utah Project is seen as a hedge against losing water in the Colorado watershed to other states.

Water may be appropriated in Utah from interstate streams to be conveyed into another state for beneficial use therein, provided the State Engineer evaluates and publicizes the advantages to Utah of such water exportation.¹⁵⁹ Some water from the upper Bear River in Utah is available for use in Wyoming, but that does not involve a transfer from a Utah appropriator to a Wyoming transferee. A proposal afoot for some time to operate an open pit coal mine near Alton, Utah (just outside Bryce Canyon National Park) and ship the coal into Nevada by a slurry pipeline involves a transfer of water rights. Among other objections, environmental concerns thus far blocked the project.¹⁶⁰ But, if it ever comes to pass, the Utah interstate water rights transfer provisions would be invoked. Federal courts struck down laws in Nebraska and New Mexico which had protectionist features restricting interstate water rights transfers as violative of the Commerce Clause of the federal Constitution.¹⁶¹ Utah's statute, which, but for requir-

153. For the text of the agreement, see Horrocks, *Chronological Status Report: Water Resources Issues: Ute Tribe and Central Utah Project* (app. 1987).

154. Hansen, *supra* note 2, at 19-23. See also Hogg & Riley, *supra* note 149. Tribal leaders have attempted to abrogate the Deferral Agreement. *Deseret News*, Sept. 22, 1989, at B11. This seems to be a re-negotiation tactic.

155. UTAH CODE ANN. § 73-2-8 (Supp. 1989).

156. UTAH CODE ANN. §§ 73-12a-1 to -3; 73-13-10; 73-16-1 to -5; 73-19-6 to -10 (1980 & Supp. 1989).

157. See, e.g., Utah Division of Water Resources, *Multi-objective Interagency Study: Bear River Basin: Water and Related Land Resources* (1976).

158. Hansen, *supra* note 2, at 23.

159. UTAH CODE ANN. § 73-2-8 (Supp. 1989).

160. Hansen, *supra* note 2, at 2-3 discusses the transfer application in this case.

161. *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984); 563 F. Supp. 379 (D.N.M. 1983).

ing an administrative evaluation of an interstate transfer, treats in-state and out-of-state transfers alike, does not appear to impose an unconstitutional burden upon interstate commerce.

CONCLUSIONS

The Mormon settlers who founded Utah nearly a century and a half ago perceived the state as a nineteenth century Israel. They took great pride in taming the wilderness. The verdant fields in the Great Basin valleys testify to their success. Irrigation made their accomplishments possible.¹⁶² The legal system upon which Utah's agriculture is based has served the state well. In the late twentieth century, the heirs of the pioneers inherited the fields and farms and villages, and are transforming many of them into a modern urban complex. The water laws that profited Utah's forbearers condition today's challenge—not to subdue a wilderness, but to build cities while retaining the soul and spirit of those who came before.

The volume of water rights sales, exchanges and leases in Utah demonstrates that the state code has not thwarted operation of a water rights transfer system.¹⁶³ Essentially, the legal process does not block water rights transfers from agricultural to urban uses. However, the system should be fine-tuned to encourage greater use of the market in water allocation among Utahans. When water can be put to a more valuable use, a prospective transferee can pay a price exceeding the present owner's return, a transfer takes place, and the resource is employed more productively.¹⁶⁴ Water transfers are a key to successful water resources management which is essential to Utah's economic well-being.

Two kinds of adjustments in the Utah water rights change system would enhance its viability. First, it would be made more efficient by administrative changes such as fewer formal hearings, better funding of the Division of Water Rights and water stock transaction monitoring. Second, some substantive changes, such as authorizing tribal water rights transfers, state purchases to maintain minimum instream flows, and municipal sales, would enhance use of water and water rights.

The most important administrative change is under way. Adoption of the Administrative Procedures Act¹⁶⁵ which takes reviewing courts out of holding de novo trials of water acquisition and transfer proceedings from the State Engineer's Office is a step forward. Utah's drawn-out general water rights adjudication process¹⁶⁶ is an indication that judges should stick to deciding legal questions, not matters of hydrology and other water rights technical issues. Judicial review now is properly limited to consideration of whether the Division of Water Rights committed a legal error. Judges are experts on matters of law.

162. See *supra* text accompanying notes 17 & 18.

163. See *supra* text accompanying notes 10-13.

164. For discussion of recommendations for changes in western water rights transfer legal doctrines and their economic impact, see NATIONAL WATER COMMISSION, *Water Policies for the Future* 260-70 (1973) (Final Report).

165. UTAH CODE ANN. §§ 63-46b-1 (Supp. 1989).

166. See *supra* note 70.

Administrative practices which encourage better preparation by transfer applicants and protesters would save time. Guidelines should be developed and parties should meet with area engineers before applications or protests are filed.¹⁶⁷ Disputes would be nipped in the bud; more hearings would be informal; appeals to the courts would be minimized. These improvements would be facilitated by better funding of the State Engineer's Office. Increased money also would allow more frequent hearings sessions which would speed the transfer process.¹⁶⁸

A final administrative change facilitating a more effective market system would be to use the Division of Water Rights as a clearinghouse for water stock transfers. That would create a state-wide market place, and it would enhance accumulation of data on water stock transfers which would improve administrative performance.

An important addition to substantive law would be negotiation of additional Indian tribal water rights quantification and transfer agreements. Reservations are not hydrologically independent of neighboring lands, and parcels of reservation and non-reservation lands often are mingled. Transfers and exchanges would make irrigation more efficient on and around reservations. State, tribal, and federal officials would negotiate agreements like the Ute Indian Water Compact.¹⁶⁹ Congressional approval of such compacts can authorize sales, exchanges, leases and other transfers. Both Indians and their non-Indian neighbors can profit from such arrangements.

Dewatering stream beds during irrigation seasons is a fact of life in arid states. However, important aesthetic and ecological needs are served by maintaining minimum flows along some reaches of Utah streams. Environmental needs are important human needs—important in many senses, including economic. But the Division of Wildlife Resources has inadequate authority and funding to meet its needs to acquire water rights for instream flow protection purposes.¹⁷⁰ Other divisions of the Department of Natural Resources lack express power and also have no money to buy water rights to protect instream flows. The Utah instream flow law should be broadened to give explicit power to all state water agencies to obtain water rights to meet instream flow needs, and the legislature should make regular appropriations of funds to make the purchases.

A final necessary substantive change is repeal of Article XI section 6 of the Utah Constitution which bans municipal water rights alienation. The ban, which now serves no useful purpose, is a burden on cities and towns.¹⁷¹ While it may be evaded by exchanges (if they can be accomplished)¹⁷² and by creating separate non-municipal water entities (such as the Metropolitan Water District),¹⁷³ allowing municipalities to sell water reduces market transfer costs, thus enhancing efficient use of water and water rights.

167. Hansen, *supra* note 2, at 72-73.

168. *Id.* at 33-35.

169. See *supra* text accompanying notes 147-49.

170. See *supra* text accompanying notes 118-20.

171. For illustrations of the burdens placed on cities by the constitutional provision, see G. Whiting, *supra*, note 113.

172. See, e.g., *Genola Town v. Santaquin City*, 96 Utah 88, 80 P.2d 930 (1938).

173. See, e.g., *Lehi City v. Meiling*, 87 Utah 237, 48 P.2d 530, 541 (1935).

The legal linchpin of the Utah water transfer system—the no-impairment rule—should be retained.¹⁷⁴ It serves the useful purpose of protecting the rural environment. Transfers need not cause economic losses in the agricultural sector. The no-impairment rule both paves the way for meeting the needs of the urban present by making water marketing possible and protects the state's rural heritage. Today's Utahns can take satisfaction as did the pioneers in the fulfillment of Isaiah's prophecy: "and the desert shall rejoice, and blossom as the rose."¹⁷⁵

174. NATIONAL WATER COMMISSION, *supra* note 164, at 261, 269.

175. *Isaiah* 35:1.