STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

ATTORNEY GENERAL OPINION NO. 88-6

TO: R. Keith Higginson, Director
Department of Water Resources
Statehouse Mail

Per Request for Attorney General's Opinion.

QUESTIONS PRESENTED:

1. Does Section 42-114, Idaho Code, prohibit the issuance of a water right permit to a landowner for stock watering purposes if the land is or is intended to be leased to another person for the grazing of livestock?

2. Section 42-220, Idaho Code, provides that a water right permit confirmed by the issuance of a license becomes appurtenant to, and shall pass with a conveyance of the land for which the right of use is granted. What is the effect, if any, of this provision upon the ownership of a licensed water right if the permit upon which it is based was issued to and held by a person other than the landowner?

CONCLUSIONS:

1. Idaho Code § 42-114 (Supp. 1988) does not prohibit the Idaho Department of Water Resources from issuing a water right permit to a landowner for stock watering purposes even though the landowner leases his land to another person for the grazing of stock.

2. Idaho Code § 42-220 has no effect on the ownership of the water right in the situation posed by your question.

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ANALYSIS:

Question No. 1

Courts have had difficulty in fitting stock watering from natural watercourses into the appropriative water rights doctrine. Recently, the legislature enacted legislation addressing this issue. Idaho Code § 42-114 (Supp. 1988). The first question asks us whether this statute precludes issuance of a water right permit to a landowner for stock watering if the land is or is intended to be leased to another person for the grazing of livestock.

Idaho Code § 42-114 states as follows:

> Any permit issued for the watering of domestic livestock shall be issued to the person or association of persons making application therefor and the watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water.
>
> As used in this section, the 'watering of domestic livestock' means the drinking of water by domestic livestock from a natural stream, ground water source or other source.

The statute, by its express language, requires the department to issue the permit for stock watering "to the person or association of persons making application therefor." It provides no restriction on who may apply. Therefore, any person, including a landowner who leases his land to stockmen, may file an application for a water right.

The statute further provides that "watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water." This sentence addresses an issue of particular importance to the livestock industry in a state that depends on summer grazing on lands administered by the U.S. Forest Service and by the Bureau of

Land Management. In such a case, the owner of the cattle has no legal title to the summer grazing land. This provision makes it clear that the owner of cattle is making beneficial use of the water even without any ownership in the underlying place of use.

Some of the correspondence received by the department concludes that this clause provides a negative implication, i.e., that a landowner/lessor who does not personally own the livestock grazed on his land is not a proper party to apply for and receive a permit/license to appropriate water for instream livestock watering on his land. Some statements in the legislative history arguably support this view.

Idaho Code § 42-114 was enacted in 1986. Act of April 3, 1986, ch. 199, 1986 Idaho Sess. Laws 498. The statement of purpose recites: "This bill will place the beneficial use clearly with the consumption and the ownership of the cattle and not with the land management agencies." This statement is repeated at several committee hearings. Minutes of House Resources and Conservation Committee (February 17, 1986). Minutes of Senate Resources and Environment Committee (March 19, 1986). In addition, the following statement appears in the legislative history: "Representative Brackett presented this legislation because he has heard so much discussion and questions as to who should file for water permits regarding domestic livestock." Minutes of House Resources and Conservation Committee (March 3, 1986).

None of these statements from the legislative history convinces us that Idaho Code § 42-114 should be read to require ownership of the cattle by the permittee/licensee. First, this interpretation rests on the assumption that the title holder of a water right in Idaho must make the actual beneficial use of the water appropriated under a permit/license and that beneficial use of the water by a lessee or permittee of the landowner is insufficient to maintain a water right held by the title holder/landowner. While a lower court in Nevada has accepted this analysis, State v. Morros, Elko County Civil Nos. 19404 and 19511, slip op. at 11 (D. Nev. Feb. 5, 1987), appeal filed, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10224 (June 1988), such is not the law in Idaho.

The appropriative water rights doctrine was created to address the arid conditions of the western states. The doctrine as developed by the courts recognized the necessity to transport waters from distant sources of supply to places of use for mining, agricultural and other beneficial uses. Significantly, much of the early mining and agriculture occurred on vacant public domain. Miners staked placer claims and courts recognized such claims even though title to the land remained in the United States. Irwin v. Phillips, 5 Cal. 140 (1855). In 1866, Congress confirmed in legislation the right of the public to go on the public domain and to appropriate water for "mining, agricultural, manufacturing, or other purposes." Act of July 26, 1866, ch. 262, 14 Stat. 251, 253.

In like manner Idaho courts recognized that water may be appropriated for beneficial use on land not owned by the appropriator. For example, in First Security Bank v. State, 49 Idaho 740, 291 P. 1064 (1930), the bank's predecessor in interest had been decreed a water right for use on unsurveyed public land. When the land was surveyed, that portion of the land within section 36 passed to the state, and the bank's predecessor thereafter leased the land from the state. After the bank acquired the land, it sought to transfer the water right for the leased land to other land owned by the bank. The Idaho Supreme Court concluded that the bank possessed a water right and that the bank could transfer it to other land. 49 Idaho at 745-747, 291 P. at 1066. Thus, a bifurcation of ownership of the land and of the water right used on the land is allowed under Idaho law. See also, Sanderson v. Salmon River Canal Co. Ltd., 34 Idaho 145, 199 P. 999 (1921); Sarret v. Hunter, 32 Idaho 536, 185 P. 1072 (1919).

Your question asks whether the landowner/lessor can hold the stock water right used by a lessee. It presents the issue of what relationship is allowed under Idaho law among the landowner, title holder of the water right, and the water user. Four different fact patterns are apparent. First, the landowner holds title to the water right and makes beneficial use of the water. This consolidation of all roles in one person is obviously allowed by Idaho Law and needs no further discussion. Second, a person other than the landowner holds title to the water right and makes beneficial use of the water on landowner's land. Idaho courts confirmed the existence of a water right in that situation in

First Security Bank. Third, a person other than the landowner holds title to the water right; the landowner makes actual beneficial use of the water. This situation occurs frequently in Idaho. Canal companies, irrigation districts and other organizations routinely hold valuable water rights. The title holder--the canal company or irrigation district--does not itself make beneficial use of the water. Rayl v. Salmon River Canal Co., 66 Idaho 199, 209, 157 P.2d 76, 81 (1945). Individual landowners who hold shares in the canal company or who own land within the irrigation district make beneficial use of the water. Fourth, the landowner holds legal title to the water right; a person other than the landowner makes actual beneficial use of the water on landowner's land. Your question asks whether the fourth fact pattern is allowed by Idaho law. We are not aware of an Idaho decision that answers your question. Since Idaho courts have recognized the relationships stated in the second and third fact patterns, we believe Idaho courts would recognize the slightly different relationship stated in the fourth fact pattern. If the legislature had intended to limit the circumstances when it would allow different persons to be the title holder to the water right and the user of the water right, its intent to do so would have to be clearly expressed in section 42-114. We find nothing in the section to express such a limitation.

Second, Idaho Code § 42-501 specifically recognizes the appropriation of water for stock watering by the Bureau of Land Management, U.S. Department of the Interior. The interpretation of Idaho Code § 42-114 suggested by the correspondence received by the department would prohibit the appropriation of water for stock watering by the Bureau of Land Management that Idaho Code § 42-501 authorizes. Since repeals by implication are not favored, Doe v. Durtschi, 110 Idaho 466, 478, 716 P.2d 1238, 1250 (1986), it is unlikely that a court will find that the legislature intended a repeal of Idaho Code § 42-501 by enactment of Idaho Code § 42-114.

Based upon the foregoing analysis, we conclude that Idaho Code § 42-114 does not prohibit the Idaho Department of Water Resources from issuing a water right permit to a landowner for stock watering purposes even though the landowner leases his land to another person for the grazing of stock. Section 42-114 merely affirms that stock watering is a beneficial use of water and that any person may file an application for that use.

Question No. 2

This question asks what effect the appurtenance provision of Idaho Code § 42-220 has on the ownership of a licensed water right if the permit upon which it is based was issued to and held by a person other than the landowner. Idaho Code § 42-220 states:

> Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted.

Although Idaho Code § 42-220 was first enacted in the Act of March 11, 1903, 1903 Idaho Sess. Laws 223, 233, we are unaware of any court decision that discusses the issue raised by your question.

The effect of Idaho Code § 42-220 on ownership may be analyzed from two perspectives. First, the effect of issuance of a license to a permit holder when no change in ownership of the water right or of the underlying land occurs. Second, the effect of a change in ownership of the underlying land after the department has issued a license.

The first effect is answered in our response to the first question. Idaho courts have long recognized a bifurcation of ownership of a water right and of the underlying land. Furthermore, in Sanderson v. Salmon River Canal Co. Ltd., 34 Idaho 145, 199 P. 999 (1921), the court construed an appurtenance provision relating to Carey Act projects now codified at Idaho Code § 42-2025. The court concluded that the appurtenance provision did not make the water right inseparable from the underlying land. 34 Idaho at 160, 199 P. at 1003. Similarly, Idaho Code § 42-220 cannot be read to make the water right inseparable from the underlying land or to change the long standing court interpretation of our appropriative water rights doctrine.

The second effect is more difficult to answer. The use of the word "all" in the statute appears to state that in a land conveyance situation the grantee of the land receives the water right as an appurtenance even though the grantor did not possess the water right in the first instance. This confiscatory result is not a reasonable interpretation of the statute because that interpretation would deprive water right holders of property without due process of law. Sanderson v. Salmon River Canal Co., Ltd., 34 Idaho 145, 160-161, 199 P. 999, 1003 (1921). Furthermore, that interpretation is not consistent with Paddock v. Clark, 22 Idaho 498, 126 P. 1053 (1912). In Paddock, the court concluded that an express limitation in a deed regarding the quantity of water rights conveyed to a grantee operated to reserve the excess appurtenant water rights to the grantor. 22 Idaho at 504-505, 126 P. at 1055. Although the water rights described in Paddock were apparently decreed in Farmers' Cooperative Ditch Co. v. Riverside Irrigation Dist., Ltd., Canyon County Civil Case No. 1323, aff'd, 14 Idaho 450, 94 P. 761 (1908), aff'd in part, rev'd in part, 16 Idaho 525, 102 P. 481 (1909), the court in Paddock failed to discuss the application of section 3262 of Idaho Revised Code (1908) to the facts of that case; section 3262, a predecessor of Idaho Code § 42-220, required "all rights to water confirmed ... by any decree of court ... [to] pass with a conveyance of, the land for which the right of use is granted." Nonetheless, the conclusion of the court in Paddock clearly indicated that a grantor of land had authority to retain to himself appurtenant water rights.

A more logical interpretation of Idaho Code § 42-220 is that it codifies the common law rule concerning the conveyance of appurtenances with a conveyance of land. This common law rule provides:

> In the absence of any language in a deed indicating a contrary intention on the part of the grantor, everything that is properly appurtenant to the land granted thereby--that is, everything which is essential or reasonably necessary to the full beneficial use and enjoyment of property and which the grantor has the power

> to convey--is to be considered as passing to the grantee.

23 Am. Jur. 2d Deeds § 65 (1988) (footnotes omitted) (emphasis added). See also Russell v. Irish, 20 Idaho 194, 118 P. 501 (1911) (a division of land produces a proportional division of the water right, absent a reservation of the water right). This common law rule creates a presumption in favor of the passing of appurtenances upon the conveyance of the underlying land. However, if a grantor of the land does not have the power to convey the water right or if a grantor reserves the appurtenant water rights, Idaho Code § 42-220 does not cause the water right to pass to a grantee of the land.

The question of whether a particular grantor has the power to convey a stock water right held by another may involve an interpretation of many different documents such as leases, federal regulations and statutes, or state regulations and statutes. The determination of such factual issues may be quite difficult. However, your question does not raise these difficult factual issues because it stipulates that the water right is owned by a person other than the underlying landowner. In that case the landowner does not have the power to convey the water right. Therefore, Idaho Code § 42-220 would not change the ownership of the water right--it remains with the licensee.

Under the fact pattern you pose, the issue becomes what happens to the water right if the new landowner denies the licensee access to the place of use. The licensee would have three options: (1) sell the water right to the new landowner, (2) transfer the water right to other land for himself or for a third party, or (3) lose the water right by forfeiture, if the nonuse of the water right continues for five years when water is available under the priority of the water right. Finally, none of these options may be available to the licensee if the facts of the particular conveyance of land also constituted an abandonment of the water right.

AUTHORITIES CONSIDERED:

Idaho Statutes

Act of March 11, 1903, 1903 Idaho Sess. Laws 223.
Section 3262 of Idaho Revised Code (1908).
Act of April 3, 1986, ch. 199, 1986 Idaho Sess. Laws 498.
Idaho Code § 42-114.
Idaho Code § 42-220.
Idaho Code § 42-501.
Idaho Code § 42-2025.

Idaho Cases

Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).
Farmers' Cooperative Ditch Co. v. Riverside Irrigation Dist., Ltd., Canyon County Civil Case No. 1323, aff'd, 14 Idaho 450, 94 P. 761 (1908), aff'd in part, rev'd in part, 16 Idaho 525, 102 P. 481 (1909).
First Security Bank v. State, 49 Idaho 740, 291 P. 1064 (1930).
Paddock v. Clark, 22 Idaho 498, 126 P. 1053 (1912).
Rayl v. Salmon River Canal Co., 66 Idaho 199, 157 P.2d 76 (1945).
Russell v. Irish, 20 Idaho 194, 118 P. 501 (1911).
Sanderson v. Salmon River Canal Co., Ltd., 34 Idaho 145, 199 P. 999 (1921).
Sarrett v. Hunter, 32 Idaho 536, 185 P. 1072 (1919).

Other Statutes

Act of July 26, 1866, ch. 262, 14 Stat. 251.

Other Cases

Irwin v. Phillips, 5 Cal. 140 (1855).
State v. Morros, Elko County Civil Nos. 19404 and 19511 (D. Nev. February 5, 1987), appeal filed, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10224 (June 1988).

Other

Minutes of House Resources and Conservation Committee (February 17, 1986; March 3, 1986).
Minutes of Senate Resources and Environment Committee (March 19, 1986).
23 Am. Jur. 2d Deeds § 65 (1988).
Statement of Purpose for Act of April 3, 1986, ch. 199, 1986 Idaho Sess. Laws 498.

DATED this 21st day of October, 1988.

JIM JONES
Attorney General
State of Idaho

JIM JONES

Analysis By:

David J. Barber
Deputy Attorney General
Natural Resources Division