

ADMINISTRATOR'S MEMORANDUM

To: Water Allocation Bureau and Regional Offices
From: Shelley W. Keen *SWK*
Re: **PROCESSING NOTICES OF CHANGE IN WATER RIGHT OWNERSHIP AND ASSOCIATED UPDATES TO WATER RIGHT RECORDS**
Date: June 27, 2022

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1 Background

This memorandum contains guidance for the review and processing of notices to change water right owners and for making associated updates to water right records. Idaho Code §§ 42-248 and 42-1409(6) state requirements for notices to change ownership and associated updates to water right records. In addition, Idaho Department of Water Resources (Department) administrative rules (IDAPA) and case law relating to conveyance of property and water rights may apply to review and processing of the notices.

This memorandum supersedes the May 21, 2015, version of Records Memorandum No. 9. This revised version is necessary to incorporate 2021 changes to Idaho Code § 42-248, 2022 passage of Idaho Code § 55-616, the issuance of recent Idaho Supreme Court decisions, and changes in Department processing practices.

It is important to maintain the proper owner names and addresses on all water right records of the Department to ensure that all water right owners are properly notified of any action proposed or completed by the Department. The guidance in this memo should be applied to water right applications, permits, licenses, decrees, claims, and recommendations for water rights. Circumstances not covered in this memo should be referred to the Department's legal staff for review.

There are several types of notices related to ownership and contact information for water right records. A *Notice of Change in Water Right Ownership* or an *Assignment of Application* notifies the Department that the owner of a water right, permit, or application has changed. A *Notice of Address Change* notifies the Department that the address for an existing owner or contact has changed. A *Notice of Security Interest* notifies the Department that a security interest in a water right or permit exists. Upon proper notice, the Department is required to notify the security interest holder of any proposed or final changes to the water right. Each type of notice is discussed in detail in this memo.

2 Change in Water Right Ownership

When a water right is conveyed to a new owner, either with the land where it is used or separate from the land, the new owner files a *Notice of Change in Water Right Ownership* with the Department. The purpose of the notice is to inform the Department of the change so it may update its record of the current owner of the water right. It is important to note that Idaho Code § 42-248 does not grant the

Department authority to change or determine the legal ownership of a water right.¹ The Department only has authority to record a change in ownership that has already occurred through proper conveyance. As stated in Idaho Code § 42-248(8), water right ownership disputes must be resolved in a water rights adjudication or in an action to quiet title pursuant to Idaho Code § 6-401.

In Idaho, water rights are real property. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797 (2011). Generally, water rights are considered an appurtenance of the land. See Idaho Code §§ 42-101, 42-220, and 55-616. Unless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even if they are not mentioned in the deed and the deed does not mention “appurtenances.” *Joyce Livestock Co. v. United States*, 144 Idaho 1, 14 (2007).²

An exception to this rule is where the underlying landowner did not own the water right being used on the land. The Idaho Supreme Court has held that “water may be appropriated for beneficial use on land not owned by the appropriator, and this water right becomes the property of the appropriator.” *First Sec. Bank of Blackfoot v. State*, 49 Idaho 740, 746, 291 P. 1064, 1066 (1930). A person who is leasing land can develop and own a water right for use on the leased land. *In re CSRBA Case No. 49576*, 165 Idaho 489, 497 (2019); *Joyce Livestock Co.*, 144 Idaho at 7. If the landowner does not own the water right appurtenant to the land, the water right does not transfer with the sale of the land. Even if a condition in the water right refers to the water right as an appurtenance to the land, it does not necessarily mean that the landowner owns the water right.³

A water right can be separately conveyed to a new owner. A separate conveyance or an express reservation of the water right when the land is conveyed may result in a water right having a different owner than the land where it is used.

2.1 Evidence of Ownership

Generally, some type of deed, contract of sale, or other conveyance document is used to convey land and/or a water right to another party. Idaho Code § 42-

¹ In *In re CSRBA Case No. 49576*, 165 Idaho 489 (2019) (commonly referred to as “*McInturff v. Shippy*”), the Idaho Supreme Court concluded that the updating of water right ownership by the Department was subject to judicial review under the Idaho Administrative Procedures Act (“IDAPA”), thereby inferring that the Department could decide ownership through an administrative proceeding. However, in 2021, the Idaho Legislature amended Idaho Code § 42-248 to state that action by the Department updating the ownership of a water right is not a determination of water right ownership, is not an administrative action subject to challenge under IDAPA and is not subject to a request for hearing pursuant to Idaho Code § 42-1701A.

² In *Russell v. Irish*, the Idaho Supreme Court stated, “[I]t is well established that a water is an appurtenance to the land on which it has been used and will pass by conveyance of the land. A division of the land would divide the appurtenant water right in the same proportion as it divided the land.” *Russell v. Irish*, 20 Idaho 194, 198, 118 P 501, 502 (1911).

³ In *McInturff v. Shippy*, the Idaho Supreme Court was asked to interpret the effect of an appurtenance clause that appeared on the face of a water right. The Court stated, “[T]he remark— ‘This water right is appurtenant to the described place of use’ —does not vest ownership of the water right with the landowner. Rather, the remark simply clarifies that the use of the water right is tied to (or in the language of the license ‘appurtenant to’) the described place of use, i.e., Cedar Creek’s land.” *In re CSRBA Case No. 49576*, 165 Idaho at 493.

248(5) states that “[a] notice of change of water right ownership . . . shall be accompanied by deeds, court decrees, or other evidence of conveyance of the water right...” It is important to review the entire conveyance document to be sure that attachments submitted are actually part of the deed or contract.

Recording of conveyance documents is addressed in Title 55, Idaho Code. The purpose for recording is to give public notice of the contents of the conveyance documents and to protect against other parties who may be dealing in the same property. Recording is not required in Idaho to convey property; the conveyance of title to real property is effective when a grantor executes and delivers a deed to a grantee. Idaho Code § 55-815 provides that an unrecorded instrument is valid between the parties to the instrument and to those who have notice of the instrument. Therefore, the Department can process a water right ownership change based on an unrecorded conveyance document.

Deeds are true conveyance documents and are the best evidence to demonstrate a change in the ownership of the land or the water right has taken place. There are several types of deeds used to convey property. Common types of deeds are described below.

2.1.1 Quitclaim Deed

A quitclaim deed serves to convey any interest that may be held in property, but it does not contain any warranty of valid interest or title to the property. In other words, a quitclaim deed does not provide any assurance that the grantor has any legal interest to convey. If other documentation establishes that interest, then a quitclaim deed could be considered sufficient evidence of new ownership.

If a quitclaim deed were provided showing conveyance of the property from the last known recorded owner of the water right, there is some confidence that the grantor has an interest in the water right to convey. Therefore, the Department would process a water right ownership change based on the quitclaim deed.

There is some risk of error, because the grantor may have sold the property to someone else first. If conflicting information arises, a complete chain of title may be necessary to resolve questions.

2.1.2 Grant Deed

A grant deed contains warranties against prior conveyances or encumbrances. In other words, a grant deed provides assurance from the grantor that the property has not already been conveyed or encumbered. A water right ownership change based on a grant deed should be processed using the same guidance described for a quitclaim deed.

2.1.3 Warranty Deed

A warranty deed provides assurance that the grantor is the owner of the property and includes language that the grantor will defend title to the property. The Department will generally process a water right ownership change on the basis of land ownership unless additional information, such as a separate water deed or contract for sale of the water right, brings ownership of the water right into question.

2.1.4 Deed of Trust or Mortgage

A deed of trust or a mortgage are not conveyance documents, but instead are two different ways to protect the interests of a lender in real property transactions. A deed of trust creates a lien and allows a trustee to foreclose on the property on behalf of the lender if the debt is not paid. A mortgage is also a security instrument that creates a lien on the property and allows the lender to foreclose in a court of law. Instead of a deed of trust or mortgage, the Department should rely on a warranty deed or other type of deed as evidence of ownership of the property.

Deeds of trust or mortgages are acceptable to demonstrate a security interest in a water right for purposes of notification under Idaho Code § 42-248(9).

2.1.5 Correction Deed

A correction deed is used to correct minor errors on the original deed. A correction deed is not generally appropriate to correct significant errors or to add to a conveyance. Corrections may consist of pen-and-ink changes to the original deed, or a new deed, depending on the type of change. The grantor must execute the correction to be valid. A correction deed may be evidence of a water right ownership change when the property conveyance is described.

2.1.6 Other Types of Deeds

There are other types of deeds used to convey real property, such as a personal representative deed or a trustee deed. Most are forms of the deeds described above with modifications depending on the specific purpose and the status of the grantor. It is important to note that the title of the deed may not accurately describe the type of deed. The actual conveyance language, including warranties, will best characterize the type of deed.

2.2 Other Evidence of Ownership

Although deeds are the most common and certainly the preferred means for conveying real property, there are other documents that can be used as sufficient evidence of ownership of a water right. A contract for sale, a personal representative deed, a court decree, and a title insurance policy are examples

of documents that can be used as evidence of ownership of a water right.

2.2.1 Contract of Sale

A contract of sale is an agreement between a buyer and seller for payment and other conditions of the sale. A contract of sale generally includes a schedule for payment by the buyer. Some contracts of sale have the seller maintaining legal title to the property until the contract has been completely paid off. In those cases, if an ownership change notice is submitted, both buyer and seller should be listed as current owners of the water right until the deed is conveyed to the buyer after the last payment is completed at the end of the contract.

Once the property is deeded to the buyer, the buyer can submit an ownership change notice to remove the seller as a current owner. The contract should be reviewed for other instructions regarding ownership. An alternative to listing both buyer and seller as current owners would be for the seller to provide notice of a security interest to the Department (see below for notice procedures).

2.2.2 Purchase and Sales Agreement

A generic purchase and sales agreement is not the same as a contract of sale of property; it is a preliminary document stating terms and conditions for the purchase of property. A purchase and sales agreement should not be considered sufficient evidence of ownership of property because it does not confirm that property has been conveyed.

2.2.3 Final Will and Testament

A final will and testament alone should not be considered sufficient evidence of ownership of property. In Idaho, probate is required if an estate holds real property. In most probate proceedings, a court will appoint a personal representative. The court will sign an order giving the personal representative the authority to transfer property (commonly called Letters Testamentary). The personal representative can then sign a deed transferring the real property. The deed transferring property is commonly referred to as a personal representative's deed. If a deed is signed by an individual authorized by a court to act as legal representative of the estate, the Department may rely on the deed as evidence of ownership of the property or water right. In another type of probate proceeding, a court can issue a decree assigning property to the surviving spouse. Such a decree is acceptable proof of ownership.

2.2.4 Title Insurance Policy

A title insurance policy can be used as evidence of ownership of property. The buyer acquires title insurance to protect against claims against the property. Title insurance policies name the insured and

describe the property and the condition of title but do not convey title. If the Department receives conflicting information, the policy probably lists an instrument number for an actual deed that should be examined. A commitment for title insurance or other preliminary document should not be used as evidence of ownership of the property or water right.

2.2.5 Court Decree

A court decree may also be used as evidence of property or water right ownership. Divorce decrees and quiet title actions are examples of court rulings that may determine ownership of a parcel of land and/or a water right. Many court decrees require that the property at issue be transferred by deed. Any resultant deed will need to be reviewed before taking action to update the water right ownership records of the Department.

A court decree resulting from an adjudication of water rights will list the water right owner's name. The decree can be used as evidence of ownership of the water right. In *First Security Corporation v Belle Ranch, LLC*, the Idaho Supreme Court stated that the ownership is an element of the water right. *First Sec. Corp.*, 165 Idaho at 743. Idaho Code § 42-1401A defines claimant as "any person asserting ownership of rights to the use of water within the state of Idaho..." In *First Security Corporation v Belle Ranch, LLC*, the Court stated, "When a court issues a decree in the name of a claimant, it is deciding whether that claimant's assertion of ownership is valid. Therefore, the issuance of the decree inextricably links a claimant with ownership of the water right." *First Sec. Corp.*, 165 Idaho at 743.

Ownership of a water right is not usually investigated by the Department in the adjudication claim investigation process. Instead, the Department generally presumes the claimant is the owner of the water right. The exceptions to non-investigation by the Department are when competing claims are filed for the same water right or a *Notice of Change in Water Right Ownership* is filed with the Department during the pendency of the claim. If there are competing claims to the same water right (or an objection to the Department's recommendation disputes ownership of the water right), the Department will make its recommendation to the court, and the court will make a final determination of ownership. If a *Notice of Change in Water Right Ownership* is filed with the Department during the pendency of the claim, the Department will review the evidence submitted and, if appropriate, update the claim records to ensure the water right is decreed in the name of the new owner.

Sometimes a claim is filed in an adjudication of water rights and the place of use described under the water right is not owned by the claimant (at the time the claim is filed). If there are no competing claims to the same water right, no other reasons not to recommend the water right be decreed, and no ownership objections to the Department's

recommendation, the Department will recommend the water right in the name of the claimant.

For the circumstances described above, the decree can be used as evidence of ownership of the water right as of the date of the decree. However, sometimes a change in property ownership occurs during the pendency of a claim, but the new owner fails to submit a timely *Notice of Change in Water Right Ownership* as required by statute. As a result, the court decrees the appurtenant water right in the previous owner's name. In the past, the Department considered conveyance documents that post-dated the filing of the claim but pre-dated the decree to be sufficient evidence for a *Notice of Change in Water Right Ownership* filed after the date of the decree. In *First Security Corporation v. Belle Ranch, LLC*, the Idaho Supreme Court held that challenges to ownership of a water right could and should be brought during the pendency of an adjudication by filing of a *Notice of Change in Water Right Ownership* or competing claim prior to issuance of the adjudication decree (partial or final). The Supreme Court also held that the ownership determination in a water right decree supersedes all claims of ownership based on actions pre-dating the decree. For that reason, Department staff should carefully evaluate water right ownership disputes during the claim investigation and notice of error phases of the adjudication process, i.e., prior to issuance of an adjudication court decree. In addition, the Department should not process an ownership change received after issuance of an adjudication decree (partial or final) if it is based on conveyance evidence that pre-dates the decree (partial or final).

Landowners may express frustration when they cannot change the water rights they are using on their land into their names on the basis of conveyance documents pre-dating the partial decrees for the water rights. One solution is for the decreed water right owner to quitclaim their interest in the water rights to the landowner. Conveyance of the water rights may be more complicated if the decreed water right owner cannot be contacted. Either way, Department staff members should advise the landowners that getting the water right ownership records updated is important and that the landowners may need to consult legal counsel about obtaining conveyance documentation. Department staff should also document the water right file(s) with correspondence or a memorandum sufficient to explain why the Department could not process the ownership change notice.

2.2.6 Tax Notices

Property tax notices should not be used as evidence of land ownership. The name on the tax notice does not necessarily indicate ownership. In addition, the tax notice generally does not provide a complete description of the property and does not describe conveyances or exclusions associated with the property.

2.2.7 Transfer

Pursuant to Idaho Code § 42-248(3), IDWR may change the water right ownership record when a transfer of water rights pursuant to Idaho Code § 42-222 or an amendment of permit pursuant to Idaho Code § 42-211 includes evidence documenting the change in ownership. A separate *Notice of Change of Water Right Ownership* form is not required. However, the ownership change filing fee is required in addition to the transfer application or amendment application filing fee.

2.3 Language Used to Convey or Exclude Water Rights

A deed or other conveyance document submitted as evidence of ownership of a water right should be reviewed for any language that may include or exclude specific water rights. The following examples confirm the conveyance of water rights with the land. It should be noted that the appurtenance language is not necessary to convey the water rights, but language excluding water rights is necessary if the seller intends to withhold any appurtenant water rights. In addition, specifically listing some of the appurtenant water rights, but not listing others should not be interpreted to exclude the unlisted appurtenant rights from the conveyance.

The following examples merely restate the concept that water rights are conveyed with the land.

“... said premises, with their appurtenances...”

“...together with all water and water rights belonging to or appertaining to all the above described land.”

The next example describes a water right to be included, but it should not be interpreted to mean the conveyance is limited to the described water right. All appurtenant water rights owned by the conveyor are still conveyed with the land. In addition, the described water right is not necessarily conveyed in its entirety; only the portion of the right appurtenant to the land is being conveyed.

“...together with all water rights, ditches and ditch rights used thereon or appurtenant thereto including but not limited to State of Idaho, Department of Water Resources Water Right No. 43-4221.”

The next example conveys a proportional share of a specific right or rights but should not be interpreted to mean the conveyance is limited to the described right(s). All appurtenant water rights are still conveyed with the land.

“Together with prorata share of Rainey Creek water...appurtenant to above mentioned property.”

The next example conveys all appurtenant rights; however, a quantity is specified for one of the rights. The quantity specified may or may not be proportional to the land conveyed.

“Together with all water rights appurtenant thereto, including but not limited to 140 inches of decreed water.”

The next example conveys all of a particular water right but should not be interpreted to mean conveyance is limited to the described right. All appurtenant water rights are still conveyed with the land.

“And all rights to Water Right No. 43-4221...”

The following are examples that have been used to exclude a right or rights from conveyance with the land.

“...excluding water right no. 43-4221...”

“Excluding as non-appurtenant any and all water diverting from Raymond Creek.”

The next example appears to exclude all water rights from the conveyance.

“This property is conveyed dry without water shares.”

If the language is ambiguous in the conveyance document, clarification may need to be sought through other available documentation associated with the conveyance of the property. Use of a quitclaim deed could clarify ambiguities. Per Idaho Code § 42-248(8), a water right ownership dispute must be resolved through a quiet-title action in district court pursuant to Idaho Code § 6-401 or in an active water rights adjudication.

2.4 When is a Notice Required?

A notice is required for changes in ownership from one individual to another, from an individual to a business entity (even if the business is owned by the individual), or from one business entity to another (even if both businesses are owned by the same individual). The same would apply to trusts, partnerships, or other organizations.

In some cases, an individual desires to add another person, such as a spouse or child, as an owner of the water right. In other cases, an individual desires to remove a person as an owner of the water right (e.g., after a divorce). The Department cannot record a change in ownership of a water right unless it is accompanied by proper notice of the change, including sufficient evidence of the change. Adding or removing a name should be considered an ownership change subject to the filing fee and should not be processed without the appropriate evidence. One exception is the death of a spouse or other individual listed as an owner of the water right. The Department will accept a signed letter from the living spouse and a death certificate as sufficient evidence to remove the name of a deceased individual from a water right. Removal of the name of a deceased person does not require payment of the filing fee.

The death of an individual listed as an owner of a water right may result in a change in the ownership of a water right to a trust or beneficiary. Such a change is considered a change in ownership subject to the requirements of evidence and a filing fee.

Changes to a water right owner's name do not necessarily constitute a change in ownership of the water right. For example, an individual may make a name change through marriage, divorce, or judicial petition. Another example is a name change for a business entity (not to be confused with a change to a different business entity). Such name changes do not constitute an ownership change and should not require payment of the filing fee. Changes to Department records can be made after proper notice and evidence of the change is received from the water right owner. Documentation for a name change to a business entity can be obtained from a business entity search on the Secretary of State's website.

2.5 Ownership Change Forms and Filing Fees

The Department maintains a form for notifying the Department of an ownership change. The form is called a *Notice of Change in Water Right Ownership*. The new owners must submit the completed form with evidence of the ownership change and the appropriate filing fee. Pursuant to Idaho Code § 42-248(4), a filing fee is not required for a notice associated with a claim pending in an adjudication of water rights. Once the right is decreed (partial or final), the statutory filing fee is required. The fee also applies to all other rights, including those not claimed in a pending adjudication. The statutory filing fee is currently \$25 per water right or \$100 per water right if the water right is to be split based on the owner change. If evidence of an ownership change is submitted with an application for transfer filed under Idaho Code § 42-222 or an application for amendment of permit filed under Idaho Code § 42-211, the Department will not require a separate *Notice of Change in Water Right Ownership*. However, the filing fee for the ownership change is required in addition to the fee required for the application for transfer or application for amendment of permit.

2.6 Water Rights not Held by the Landowner

Water rights associated with a water delivery entity such as a canal company, irrigation district, or municipality are held in the name of the delivery entity and would not be subject to a change in ownership if a parcel of land within the service area is conveyed to a new owner. The same guidelines should be used for water rights acquired and held by a water users association or homeowners' association.

Sometimes water rights are excluded from a conveyance of land. This is often done in preparation for a transfer to be filed under Idaho Code § 42-222 by the original landowner to change the water right to a new place of use. In other cases, the water right may remain unused at the original place of use and held under separate ownership to mitigate for some other water use at another location. In other instances, water rights cannot be conveyed with the land because they were developed by the beneficial user of the water rather than the landowner and are, therefore, not owned by the landowner.⁴ Since ownership

⁴ *Joyce Livestock Co v. U.S. and In re CSRBA Case No. 49576 (McInturff v. Shippy)* are caselaw examples of this circumstance.

of these water rights is no longer tied to ownership of the land, evidence of ownership of the land would not be sufficient to show ownership of the water right. These situations, if known to the Department, should be documented in the water right file for future reference.

The Idaho Supreme Court confirmed that a landowner could establish and own a water right developed on federal land leased and used in association with the landowner's deeded land. *Joyce Livestock Co. v. U.S.*, 144 Idaho 1(2007). This decision applied to an instream stockwater right, but it could also apply to other uses, such as a mining operation where federal land is leased and water rights are developed on the federal land for use in association with land owned by the mining operator. The lease agreements should be reviewed for information regarding ownership of water rights developed in connection with the lease.

The 2021 amendments to Idaho Code § 42-248 added a new requirement for ownership changes. When the water right owner is not also the water right place of use landowner, Idaho Code § 42-248(6) requires a new water right owner to provide written notice of the water right ownership change to the water right place of use landowner of record with the county recorder. Idaho Code § 42-248(6) does not provide an exception for a water right with a generally described place of use, such as a municipal water right or an irrigation water right owned by a canal company or irrigation district. Therefore, the Department should require evidence of the required notice to place of use landowners for ownership changes to water rights with generally described places of use. The *Notice of Change in Water Right Ownership* form asks the new water right owner if they provided the required written notice to the water right place of use landowner. If the new owner marks the box confirming they notified the water right place of use landowner, the Department can process the water right ownership change without any additional documentation that the notice occurred. If the new owner marks the box indicating they have not given the required written notification to the water right place of use landowner, the Department will return the ownership change notice and inform the new owner of the statutory obligation to provide written notification of the proposed water right ownership change to the water right place of use landowner. If the new water right owner attaches documentation intended to show compliance with the requirement to notify the landowner, Department staff members should review the documentation. Refer questions about the acceptability of evidence to the Water Rights Section Manager, legal staff, or the Water Allocation Bureau Chief.

2.7 Reviewing and Processing Changes in Ownership

A notice of change in ownership of a water right must be signed by the new owner and include appropriate evidence of ownership and fees, as described above. A signature by at least one of the new owners or authorized representatives should be considered sufficient for the notice.

To verify a trustee's authority to sign for a trust, the Department should require a copy of the trust documents or a "certification of trust." Idaho Code § 68-114 states:

A trustee may present a certification of trust to any person in lieu of a copy of any trust instrument to establish the existence or terms of the trust. The trustee may present the certification voluntarily or at the request of the person with whom he is dealing. Notwithstanding any provision of this chapter to the contrary, no person is required to accept and rely solely on a certification of trust in lieu of a copy of, or excerpts from, the trust instrument itself. Such a certification must be in the form of an affidavit signed and acknowledged by all of the currently acting trustees of the trust.

IDWR should not accept a certification of trust unless it contains: (1) the identity of the trustee; (2) the powers of the trustee and any restrictions imposed upon the trustee in dealing with assets of the trust; and (3) if there is more than one trustee, whether all the currently acting trustees must, or less than all may, act to exercise identified powers of the trustee.

Review of the notice should start with a review of the existing records of the Department to determine the appropriate records to update.

For water right claims pending in an adjudication, updates need only be made to the adjudication record unless the record is based on a permit (see Section 3, Change in Permit Ownership, below).⁵ If the Department receives a *Notice of Change in Water Right Ownership* listing unclaimed or recently decreed water rights along with adjudication claims, a complete copy of the notice with all documentation should be forwarded to designated staff for processing and updating the appropriate records.⁶ Ensure that water right records have been properly updated by recent decree data before attempting to update the record to show the new owner. Data entry to a pre-decree water right record will be overwritten when the decree data is moved from adjudication records to the water right records. If the court has issued a partial decree but the recommendation data has not been moved to the water right record, update the water right record and close the recommendation before processing an ownership change notice.

Ownership changes notices may have discrepancies between the information listed on the notice and the information on the deed or other conveyance document. The deed or other conveyance document should be the basis for the change. The deed or other conveyance document should be used to

⁵ The adjudication record contains the most recent contact information and will supersede the water right record once decreed.

⁶ If the Department receives a notice to change ownership for a water right that is required to be claimed in a pending adjudication, Department staff should notify the new owner of the requirement to file the claim and the claim filing options. If the new owner files the claim and withdraws the ownership change notice, the fee submitted for the notice to change ownership can be credited towards the claim filing fee or refunded to the owner.

determine the owner's name (or names if multiple owners), name connectors, property descriptions and exclusions and split quantities. One exception is the current mailing address for the owner (see Change in Address below). Other information submitted with the notice should not be used as the basis for change, especially if it conflicts with information in the deed or other conveyance document.

2.8 Notice to New and Previous Owners of Completed Processing

After processing a *Notice of Change in Water Right Ownership* that does not split the water right, the Department sends notification only to the new owner. Sending notification to the original owner(s) is not necessary because the documentation evidencing ownership of the water right was evaluated before processing. Furthermore, the contact information of the original owner is generally not available or is no longer valid, so sending notice provides no practical benefit. In fact, sending notice to the original owners often results in returned mail because the new owner now lives at the mailing address the Department has on file for the original owners of the water right.

When a water right is split, the Department notifies the owners that retain a portion of the water right. For example, when only part of a water right is sold, the Department will send the new owners a copy of the water right they own (changed portion) and the previous owners a copy of the water right they own (unchanged portion). When the entire water right is sold in parts to different owners, the Department notifies the new owner of each part and does not notify the original owner.

2.9 Example Situations

2.9.1 *Domestic Water Rights*

Ownership changes for water rights authorizing domestic use are the most common owner changes processed by the Department. Although processing these ownership changes is usually straightforward, processing is sometimes complicated by the small size of domestic parcels and the quarter-quarter section legal descriptions used for the associated water right records. A decree or a license describing a quarter-quarter section as the place of use for the water right could apply to many domestic parcels within the same quarter-quarter. To determine whether a domestic water right is appurtenant to a particular parcel, Department records indicating current and previous owners' names can be compared to the grantor's name listed on the deed conveying the property.

Sometimes the holder of a domestic water right subdivides his or her parcel and sells the vacant portion. If the new owner files a notice and provides a deed from the prior owner for land in the correct quarter-quarter, it could be processed in error because ownership of the portion of the original parcel with the original domestic use is not changed. If information is available in the water right or claim file, it can be used to

investigate further. Information such as parcel number, priority date (to indicate relative age of the home), and maps illustrating the locations are often helpful in determining the place of use associated with a particular right.

2.9.2 Subdivisions

Large irrigated parcels are being split up for subdivisions in many parts of the state. As individual lots are sold within the subdivision, portions of appurtenant water rights are often inadvertently conveyed to the lot owners with the land. The original owners or developers may have had plans to sell or transfer the water rights for some other place of use, or they may have wanted to convey the entire right to a single community water supplier. They are unable to carry out their plans because they have already conveyed portions of the right when the lots were sold. In this situation, because they no longer own the water right (or portion), a quitclaim deed from the original owner or developer to a third party may not be effective to convey the right. If a water right was inadvertently conveyed to a lot owner, a quitclaim deed conveying the water right from the lot owner to the appropriate party can correct this situation.

2.9.3 Permissible Places of Use

Multiple water rights listing a permissible place of use (PPU) can present complications related to ownership changes. Since each of the rights is appurtenant to the commonly described place of use, the rights are generally conveyed together (in whole or in part). If the seller desires to convey only one of the rights with a subdivided parcel of land, the deed or other conveyance document must specify the right to be included (in whole or in part) and exclude the remaining rights from the conveyance.

2.9.4 Points of Diversion

Subdividing a large irrigated parcel can also lead to questions about the point(s) of diversion described under the water right. If a parcel is subdivided into multiple parts, each new owner's portion of the water right should list all the original points of diversion unless the conveyance document provides other instruction. If a new owner wants to add a point of diversion to one of the subdivided parts, a water right transfer application under Idaho Code § 42-222 would be required even if the additional point of diversion is within the same legal subdivision as the current point of diversion recorded for the water right being split.

2.9.5 Place of Use Errors

Sometimes an alleged error in the place of use listed on the water right prevents a new owner from proving ownership with a deed or other conveyance document. Depending on the facts and the timing of document issuance, the Department may sometimes correct clerical errors on licenses or transfers through administrative processes consistent with the Department's Rule of Procedure (IDAPA 37.01.01).

The Department cannot change an alleged error on a decree issued by a court. The court may provide an error correction process, or the new owner may need to pursue a motion asking the court to set-aside or amend the decree.⁷ Alternatively, the new owner may choose to file a transfer application pursuant to Idaho Code § 42-222 to change the place of use listed on the license or decree. The Department should carefully review the transfer application to confirm that the applicant is authorized to change the water right with the alleged error. A transfer applicant can submit post-decree conveyance documentation showing their ownership of the water right (in other words, the water right is specifically identified by number or other description). Prior to the Department processing the ownership change and issuing a decision on the transfer application, the transfer applicant must notify the owner of the land identified as the place of use on the water right, consistent with Idaho Code § 42-248(6). Authorization from the owner of the place of use listed on the water right will not be required to update the water right ownership record and process the transfer application.

More commonly, the transfer applicant has post-decree conveyance documentation showing only his or her ownership of the land where the water right supposedly has been used. The Department can process the ownership change and transfer application if the new owner locates the decreed water right owner, receives a quitclaim deed or other conveyance document for the water right, and notifies the owner of the land identified as the place of use on the water right, consistent with Idaho Code § 42-248(6). The Department will also process the ownership change notice if all the following criteria are met:

- There is evidence that the water right has been used on the decreed owner's land.
- The applicant cannot locate or contact the decreed water right owner.
- The owner of the land identified as the place of use on the decree agrees to the change in writing, such as with a quitclaim deed, or takes no action to contest the change within a reasonable time (such as 30 days) after notice consistent with Idaho Code § 42-248(6).

If the Department processes the change based in part on no action to contest the change within a reasonable time after the notice, Department staff should advise the new water right owner that there may be some ambiguity in the water right ownership conveyance documentation and the new water right owner of record may want to consult legal counsel about obtaining additional conveyance documentation and/or pursuing a quiet-title action in court pursuant to

⁷ Requests for changes to elements other than name and address should be referred to the court. If the right holder identifies the error to the Department, the claimant should be advised to contact the court. See Adjudication Memo #45 for additional information.

Idaho Code § 6-401.

It is unlikely, but possible, that the decreed water right owner, who could not be located or contacted, conveyed land to the transfer applicant and conveyed the water right separately to a third party. If a third party eventually submits an ownership change notice with conveyance documentation specifically listing the water right, the Department should communicate to both the transfer applicant and the third party that ownership of the water right appears to be disputed and that water right ownership disputes must be resolved in a water rights adjudication or in a quiet title suit in court.

If the Department does not have evidence that the water right has been used on the decreed owner's land, or if the owner of the land identified as the place of use on the decree opposes the ownership change, the Department will not process the ownership change and transfer application. The transfer applicant may consult legal counsel about a quiet-title action in district court to confirm water right ownership pursuant to Idaho Code § 6-401. Department staff should document the water right file(s) with correspondence or a memorandum sufficient to explain why the Department could not process the ownership change notice.

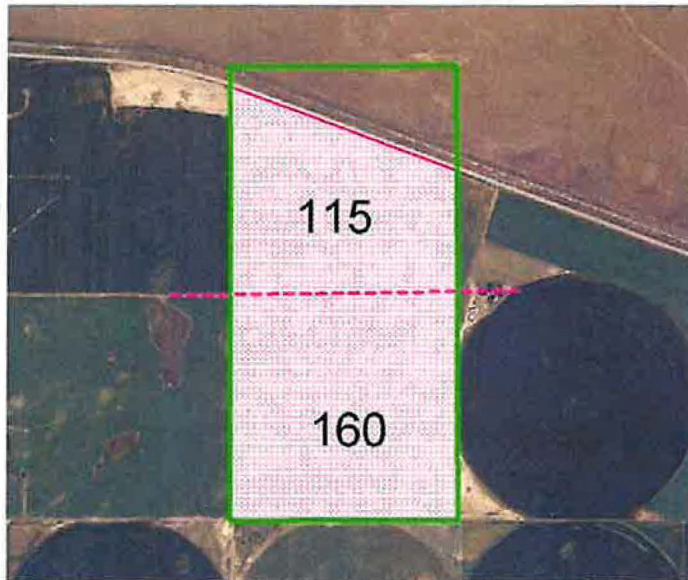
2.10 Processing Ownership Changes Resulting in Split Rights

Water right ownership changes sometimes result in the need to split a single water right among two or more owners. If a change of ownership resulting in a division of a water right into two or more parts is submitted as a package, the Department charges a single split fee, consistent with the legislative intent for House Bill 545 in 2000. This guidance applies whether the new owners submit one or separate notices related to the same water right, if the separate notices are submitted as a package. When parties submit notices separately over time (initial notice has been processed and completed), the Department charges a separate fee to process a new split to the same base water right.

When land is subdivided, the appurtenant water right is also split or divided based on the appurtenant portion of the water right unless otherwise stated on the deed or other conveyance document. For example, if a water right completely covers a parcel of land, the land is subdivided into two equal parts, and one or both parts are sold, then the water right would also be split into two equal parts.

Another example with a different result would be a water right covering only a portion of a parcel of land and the land is subdivided into two equal parts. Each subdivided portion of the land would only be conveyed a portion of the water right based on the amount that was appurtenant. The figure below illustrates the situation.

Owner Change Split



Parcel
320 acres

Water Right
5.5 cfs on 275 acres

Parcel split into two parts
(North and South)

Water Right split is:
 $115/275 = 42\%$ (North)
 $160/275 = 58\%$ (South)

Water rights with conditions limiting rate, volume, acres or some other element should be adjusted to reflect the proportional amounts resulting from the split. In addition, digital shapes for the place of use and point of diversion should be updated to reflect the split in the Department's database.

Another complication arises when a water right lists a place of use for irrigation of a number of acres, but the water right is conditioned to limit the number of acres that can be irrigated during a single irrigation season within the permissible place of use (PPU). For example, a water right lists a PPU of 100 acres but is limited to irrigation use on any 60 acres within the PPU. If the 100-acre parcel is subdivided into two 50-acre parcels, then each parcel would be conveyed a 30-acre portion of the right to be used within the corresponding 50-acre parcel (unless the conveyance document specifies otherwise).⁸

A deed or other conveyance document might list multiple owners, each with some specified undivided interest in the property. An undivided interest does not result in splitting the water right; the specified owners would all be listed as current owners of the water right. Comments can be added to the Department's database to indicate the percentage specified for each owner.

Some conveyances create complications that cannot be easily resolved by splitting the right. For example, a conveyance that appears to split a domestic right for one home into two parts could, if split, create the misconception that two homes would be authorized under separate domestic rights. If the issue

⁸ Processing of *Notices of Change in Water Right Ownership* involving PPUs can be further complicated if not all the acres within the PPU were historically irrigated. In other words, if the farmer did not rotate crops from year to year in such a manner that all of the acres within a PPU were irrigated at least once in a five-year period. Staff should discuss processing notices under this circumstance with a supervisor or manager.

cannot be easily resolved, the right could show multiple owners, but should not be split. Some domestic rights may include more than one home but are limited to a statutory volume of 13,000 gallons per day. If the right is split to show one home for each part, a statement should be added to the record (in conditions) indicating that both (or all) parts are limited to 13,000 gallons per day in combination.

Another potentially challenging scenario is the splitting of small stockwater rights. The distribution of water to stock troughs may not be spread evenly across the authorized place of use. Consequently, splitting the water right proportionately according to the land base might not reflect the actual use. If it's clear from documentation in the water right file that stock troughs are not included in the split portion, then the stockwater use should not be split unless the deed or other conveyance document clearly specifies how to split the right. When the deed is not specific and when information in the water right file does not add clarity, the Department should split the right according to the proportionate division of the place of use.

In cases where a strictly proportionate split of a small stockwater right would result in a diversion rate expressed to the thousandth of a cfs, the Department should define each right to the nearest hundredth of a cfs, even if the total of the split portions exceeds the original amount. All splits resulting in a diversion rate less than one hundredth of a cfs should be described as 0.01 cfs on the face of the water right and a condition should be added to the right describing the split diversion rate to the nearest thousandth of a cfs. Annual volume limits should be addressed similarly to the nearest tenth of an af but not less than one tenth of an af. If the stockwater right being split includes the volume limit of 13,000 gallons per day, a statement should be added to the record (in conditions) indicating that both (or all) parts are limited to a combined total of 13,000 gallons per day.

As described in more detail in Section 2.8 above, when the Department processes an ownership change splitting a water right, the Department will send the new owners a copy of the water right they own (changed portion) and the previous owners a copy of the water right they own (unchanged portion).

3 Change in Permit Ownership

Through June 30, 2022, a water right permit issued by the Department has been considered personal property, not real property. On July 1, 2022, House Bill 748 takes effect with the following statement in Idaho Code § 55-616(1):

A transfer of real property passes appurtenant water rights decreed by court order pursuant to chapter 14, title 42, Idaho Code, **permitted** or licensed by the department of water resources pursuant to chapter 2, title 42, Idaho Code, or established by the constitutional method of appropriation, and that are owned by the seller and are not reserved by the seller in the instrument of conveyance. [Emphasis added.]

The Department interprets Idaho Code § 55-616(1) to mean that water right permits

are real property appurtenant to the authorized place of use, and permits are conveyed to new owners in the same manner as decreed or licensed water rights, as explained in Section 2 above. Because of this statutory change, the Department will no longer accept an *Assignment of Permit* or charge the associated filing fee required by Idaho Code § 42-221.E unless the assignment occurred before July 1, 2022. Instead, the new owner of a permit should submit the ownership change form described in Section 2.5. above, attach conveyance documentation, and pay the filing fee required by Idaho Code § 42-248(4).

When proof of beneficial use has been submitted for a permit, staff should, as often as possible, complete the beneficial use field report and issue appropriate water right license simultaneous with processing of the ownership change notice. This approach is intended to ensure that Department communication to the new permit owner (preferably a water right license) reflects the authorized extent of water use. If the Department cannot issue the water right license while confirming the ownership change, Department staff should inform the new permit owner that proof of beneficial use has been submitted and further development of the water use is not authorized.

3.1 Application for Amendment of a Permit

An application for amendment of a permit filed pursuant to Idaho Code § 42-211 can suffice as notice of an owner change for a permit without separate notice, but it must include adequate conveyance documentation, the ownership change fee, and evidence of landowner notification, if such notification is required by Idaho Code § 42-248(6).

3.2 Assignment of Permit for Power Purposes

Idaho Code § 42-207 requires the new owner of a permit for power generation purposes to include evidence of residency in Idaho (for an individual) or qualification to do business in Idaho (for a business entity). In addition, the statute requires the change in ownership of the permit to be made in good faith and not for purposes of speculation or delay. An *Affidavit for Water Rights to be Used for Power Purposes* should be submitted with an ownership change for a permit or an assignment of application for permit authorizing power use.

3.3 Processing Permit Ownership Changes Resulting in Splits

Water right ownership changes sometimes result in the need to split a single permit among two or more owners. The notice and processing requirement are the same as for decreed or licensed water rights. Refer to Section 2.10 above for details.

3.4 Permits Pending in an Adjudication

For permits claimed in an adjudication, updates to the ownership record should be made to both the adjudication and permit records because the permit record will not be superseded by a decree. When adjudication staff process an ownership change for a claim based on a permit, it should always be forwarded to water rights staff for updating the permit record.

3.5 Ownership Change Required Prior to Permit-Related Filings

The Department will not accept permit-related filings – such as requests for extension, requests for reinstatement, proofs of beneficial use, or licensing amendments – from a person or entity other than the permit holder or the permit holder's authorized representative. A new owner of a permit must submit ownership change evidence and the filing fee before the Department will accept their other permit-related filings. Such evidence, when filed with an application for amendment of a permit pursuant to Idaho Code § 42-211 (including licensing amendments) will not require a separate notice but will require the ownership change fee as described in Section 3.1 above.

4 Assignment of Applications for Permit or Transfer and Other Applications

Water Appropriation Rule 35.02(d) indicates an applicant's interest in an application for permit is personal property. Other water right applications (e.g., transfer, temporary approval, temporary change, etc.) before the Department are considered personal property as well. Since applications are personal property, they are not conveyed as an appurtenance to the land. Conveyance is normally accomplished through an assignment by the applicant. Conveyance could be accomplished in conjunction with a deed conveying land if the application is specifically stated on the deed and the grantor (assignor) is the application owner according to Department records.

Water Appropriation Rule 35.04(f) requires notice to the Department if an application for permit is assigned to a new owner, but there is no fee to file an assignment of an application. An application for permit or application for transfer can be assigned by the owner to another party in a deed, bill of sale, the *Assignment of Application for Permit* or *Assignment of Application for Transfer* forms provided by the Department, or other conveyance document, as long as appropriate language is included indicating the assignment or conveyance of the application for permit or application for transfer with a notarized signature of the owner.

4.1 Processing Application Assignments Resulting in Splits

An application for permit can be assigned in part. There is no fee for an assignment of an application, even if that assignment results in a division of the application. The assignment should specify the split portions, including how the proposed place of use will be divided. If information cannot be obtained to split the application, the ownership record can be updated to show more than one applicant with comments in the database indicating multiple ownership.

5 Notice of Security Interest

A security interest in a water right can be acquired through a mortgage, deed of trust, contract or other agreement where the property (i.e., the water right or land with associated water right) is used to secure payment of an obligation such as a loan. Evidence of a security interest would be the mortgage, deed of trust, etc., identifying the property used as security.

Although notice to the Department is not required, any person or entity having a security interest in a water right and desiring notification from the Department regarding any proposed or final action or changes to the water right must file a *Notice of Security Interest* form provided by the Department with the appropriate fee of \$25 per water right per Idaho Code § 42-248(9). Note that, unlike a notice for change in ownership, a *Notice of Security Interest* filed on a water right pending in an adjudication is not exempt from the filing fee.

A *Notice of Security Interest* should be processed by adding the secured party to the water right or adjudication record with a "security interest" owner type. For water rights pending in an adjudication, updates need only be made to the adjudication record unless the record is based on a permit. The adjudication record contains the most recent contact information and will supersede the water right record once decreed. For permits, the security interest should be added to both the permit and adjudication records since the permit record will not be superseded by a decree.

All correspondence relating to an action or change to the water right, claim, recommendation, or permit must be copied to the secured party until the security interest expires or is terminated by the secured party. When a record is updated due to an ownership change, including splits or through a transfer, the security interest owner should remain as part of the record(s) to ensure that they receive notice of the change through the Department's database workflow processes.

A security interest can be removed from a record upon notice to the Department that the interest has terminated, or at the end of the designated term of the security interest.

6 Change of Address

Idaho Code § 42-248(1) states that water right owners are required to notify the Department of changes in their mailing addresses. In addition, Water Appropriation Rule 35.04(f) requires notice to the Department if an applicant's address changes. Idaho Code § 42-248(2) states:

The department may rely on the name and address of the owner of the water right shown in the records of the department when sending notice of any action related to that water right.

It is important to update the records once notice of an address change has been submitted to ensure water right owners receive notice of any action regarding their water rights or applications.

The Department can receive notice through a *Change of Address* form submitted to the Department, or by a letter indicating the new address and signed by the owner(s) of the water right, claim, permit, or application. Notice can also be accomplished through other Department forms (e.g., a water right transfer or well drilling application) indicating the new address with proper signature on the document. The Department can also update the address for a contact through notice provided by the Post Office. There is no fee for a change of address.

The Department will accept signed *Change of Address* forms (or other signed

documents) saved in PDF format and submitted to the Department as an attachment to an email. Signed *Change of Address* forms (or other signed documents) provide the appropriate level of certainty. The Department will not process an address change submitted solely in the text of an email with no signed supporting form or documentation attached.

The Department's database was designed to share contact records between business processes to avoid duplication of records, to speed up data entry, and to maintain current records across all processes. Design of the database allows an address change to be updated through a single business process with automatic updates to linked records across multiple business processes. This update process requires data entry of the business process and file location where the notice can be found for future reference.