



Rural Valuation Topic #RVT 23: Water Rights

Water rights are complex due to variation in state laws governing ownership. Generally, water rights in the private sector are discussed in this Advisory. There are two primary types of water rights in the U.S.:

Summary of Riparian & Appropriate Rights to Surface Water: <small>(American Society of Farm Managers and Rural Appraisers: <i>Valuing Rural America</i>, 2019 Edition, (Denver, ASFMRA, p. 549).</small>	
Riparian	Appropriative
Prevails in Eastern U.S.	Prevails in Western U.S.
Is based on English common law	Assumes public ownership of water
Is linked to land ownership and physical contiguity	Is acquired by diverting water for beneficial use and meeting specific local requirements
Entitles user to reasonable use, without materially diminishing quality of watercourse, “right to simple usufructuary while it passes along”	Entitles user to physical consumption of a certain amount of water for specified land
Entitles user to equal sharing	Entitles user to consumption on a seniority basis, “first in time is first in right”
Depends on ownership of land in physical proximity to water and transfers automatically with the land	Is a real property right, separate from right to land and separately transferable

Riparian rights are the least complex of the two forms of ownership rights. Riparian areas tend to have a higher percentage of sales with water features as compared to semi-arid areas west of the Mississippi River. Stated differently, the volume of sales supporting a water amenity occur with greater frequency east of the Mississippi River than west. The riparian “right” is part of the “riparian land” and cannot be lost through non-use like Appropriative Rights.

Appropriative or “Appropriated Water Right” is described by certain key elements. But, from a legal basis for this private property right to exist, any alteration to these elements requires a formal change by specified procedures defined by the state’s water administration or court system. An appropriative right must identify the source (*specific stream, reservoir, spring, aquifer*), point of diversion, place and type of use, date (*to establish priority*), and quantity or volume diverted. An appropriated right is only appurtenant to land irrigated and can be lost through non-use in most states. If the right was “decreed” (*formally acknowledged*) prior to statehood (*territorial right*), additional legal advice may be required.

Hypothetical Example of a “Quality” Appropriated Water Right: Property 17’s owner holds a water right dated XX, Y, ZZ with priority #2 (*recognized and affirmed by a state court prior to statehood*), specified at 5 cfs (*cubic feet per second*) diverted from the Red River at its confluence with Blue Creek for application to the S2 of Section 3 in Property 17 for agricultural crops during the growing season

(*legal season of use depends on the length of the growing season*). Priority #2 means there is only one other water right on this drainage that has senior rights. All water right filings occurring after XX, YY, ZZ are inferior, or “junior” to the already appropriated positions held by #1 and #2, i.e., are “senior” to all later filing dates.

- **Acre-Foot** is the volume of water necessary to cover **one acre of surface area** to a **depth of one foot**. It is equal to exactly 43,560 cubic feet, or to 325,851 U.S. gallons.
- However, a valuer should consult with the “water-master” that oversees the delivery system to verify the quantity of water diverted and applied, the years when there have been water shortages, if any; and for the points of application for the specified right.

In most “appropriative states”, such water rights could not be severed from the point of application and sold separately for “non-ag uses”. Over time, some states have passed laws making these transfers legal --- but subject to a “mandated” volumetric adjustment based on “beneficial use” or what actual volume of water was “consumed” by the agricultural use? Simply, you may have a 5 cfs right for ag-use during the growing season --- say for 4-6 months and sell that right to Commercial Property Owner “G” for year-round use. Each state that allows that transfer has a mathematical formula for the “annualization” of a “seasonal use” (*multiple factors considered and varies by state*). The point is a 5 cfs right may net 2.75 cfs for a non-ag related use in urban areas year-long. Again, a myriad of possible differences exist between each state’s law. Jurisdictional knowledge is required for these valuation assignments. If a valuer lacks the required experience, obtain a legal opinion and/or engage a water consultant to assist in understanding the specific rights valued.

While Riparian and Appropriative are the most common, there are others:

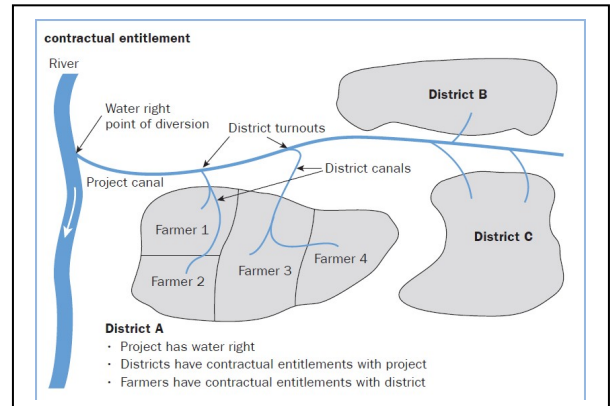
- Groundwater is “water that occurs beneath the land surface and fills the pore spaces of the alluvium, soil, or rock formation in which it is situated”¹.
- Prescriptive: ownership by treating as their own for an extended period; “water rights gained by trespass or unauthorized taking the ripen into ownership; similar to attainment of a prescriptive easement”².

¹ Appraisal Institute, *The Dictionary of Real Estate Appraisal*, 6th Ed., (Chicago: AI 2015, p. 373)

² Ibid, p. 174-5

- Pueblo, a “water right possessed by the municipality that, as a successor of a Spanish-law pueblo, is entitle to the beneficial use of all needed, naturally occurring ground and surface water of the original pueblo watershed”³.

- Contractual Entitlement (image right): “an entitlement created by means of a contract between the appropriative water right holder and another equity that takes delivery of the water diverted by means of the water right. For example, a farmer may have a contract for water delivery from an irrigation district, while the irrigation district has the right to extract the water from the river” --- see image right⁴.



In-Stream Flow: Most states maintain a “volumetric minimum” to protect the water source(s) and drainage basin(s). While this is not a “right” per se, states have moved to that “positive volume position”. Sales have then adopted the legal verbiage of “dedicated flow” to assure that volume.

ASFMRA Recommendation: Water rights are a specialty and vary from state to state. Either call for legal interpretations and/or associate yourself with a qualified water consultant.

³ Ibid, p. 181

⁴ Ibid, p. 50