



WATER RIGHT TRANSFERS AND REAL PROPERTY TRANSACTIONS

Disclaimer

This document is intended to provide guidance related to the transfer of water rights and real property transactions. It is not intended to serve as legal advice and all parties contemplating a transaction involving real property with appurtenant water rights are advised to seek advice of their legal counsel.

Introduction

In Oregon, water rights are generally “appurtenant” (attached) to the specific property where the water use is authorized. Water rights are conveyed with the sale of the property unless specifically excluded from the property transaction deed or the buyer otherwise receives notice that interest in the water right was conveyed to another party, prior to the sale of the property.

To change the place of use, character of use, and/or point of diversion/appropriation of a water right, a water right transfer (transfer) application must be approved by the Department. As part of the transfer process, generally the transfer applicant must be the landowner, have consent from the landowner, or be able to demonstrate that they have sufficient interest in the water right to pursue the transfer. The standards and procedures for the Department’s review of water right transfer applications are in Oregon Revised Statute (ORS) 540.505 to 540.580 and Oregon Administrative Rule (OAR) Chapter 690, Divisions 380 and 382.

Transfer applications involving water rights located within irrigation districts (districts) and other water supply organizations can involve additional issues. In certain circumstances, districts have additional flexibility in securing authorization for changes in the location where a water right is exercised. Early contact with the district can alert the landowner or water right interest holder to potential opportunities or problems in changing a water right. In addition, transfer applications associated with irrigation districts are processed by the Department under another set of rules, OAR Chapter 690, Division 385.

The meaning of the terms “transfer” and “convey” are frequently used interchangeably and, as a result, can be confusing when used in the context of land transactions involving real property and water rights. Within this document, the terms are used as follows:

- “Convey” means to change the ownership interest in real property (the land) and/or water rights through a Purchase and Sale Agreement, Quit Claim, Water Right Conveyance Agreement, or other legal instrument.

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- “Transfer” means to secure authorization from the Department to change the location of where water may be used (place of use), the location of the point of diversion/appropriation on a stream or from a well, and/or character (type) of use of a water right.

Conveyance of Interest in Non Irrigation District Water Rights

Transfer applications are a tool for changing water rights. Transfer applicants are generally the owner of the land to which the water right(s) proposed for change are appurtenant. However, the transfer applicant may not always be the landowner. To complete a transfer application, the applicant must be able to demonstrate that they are authorized to pursue the requested change. Pursuant to OAR 690-380-4010 (5), the applicant must show, as of the time the application is to be proposed for approval that:

1. The applicant is the current owner of the lands to which the water right is appurtenant,
2. The current landowner has consented to the transfer application, or
3. The applicant holds sufficient interest in the water right to pursue the transfer application in the absence of the consent of the current landowner.

Water Right Conveyance Agreements provide a method for a water right transfer applicant to demonstrate that the applicant holds a sufficient interest in a water right to pursue the transfer. The critical elements of these agreements are: (1) a specific conveyance of the interest in the land and the water rights separately, and (2) recordation of the document in the deed records of the relevant county. A variety of legal documents that are typically used in real estate transactions may qualify as Water Right Conveyance Agreements under OAR 690-380-0100(13), including, but not limited to, Purchase and Sale Agreements, deeds, and Quit Claims.

OAR 690-380-0100(13) “Water right conveyance agreement” means a **purchase and sale agreement, deed or other document** that has been **recorded** in the deed records by the relevant county describing land to which a water right is appurtenant and demonstrating that the interest in that land and interest in the appurtenant water right have been separately conveyed. <emphasis added>

If the interest in a water right is *not* being conveyed as part of a real estate transaction but is intended to be conveyed by the seller to another party or retained by the seller, the Department recommends that an agreement that qualifies as a Water Right Conveyance Agreement be executed by the parties prior to the sale of the property (the land) being completed. If a subsequent transfer application is submitted to the Department, a copy of the Water Right Conveyance Agreement will be required as part of the transfer application process.

It is important to note that even if a Water Right Conveyance Agreement has been executed, the water rights remain appurtenant to those lands until the Department approves a water right transfer.

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Water Rights in Irrigation Districts or Other Water Districts or Corporations

Transferring or otherwise changing water rights that are located within an irrigation district, water control district, water improvement district, drainage district, or within an area serviced by a corporation or federal entity (referred to as “district” hereafter) can involve a number of additional issues. If the water right is served by such a district, the landowner should contact the district *prior* to attempting to sever the interest in the water rights from the property. Early contact with the district can alert the landowner or water right interest holder to potential opportunities or problems in changing how the water is used following the property transaction.

Potential problems associated with transferring and/or conveying interest in water rights within districts can include, but are not limited to:

- Relinquishing a landowner’s interest in appurtenant water rights may not release the landowner from assessment, repayment or other obligations owed to the districts or the federal government based on the water right. In some cases, districts have incurred long-term debt that must be repaid through assessments on the land, even when the water right associated with that land is relinquished or conveyed to another party or subsequent landowner.
- As the entity responsible for diverting and delivering water under the water right, the district must be aware of any proposed water right changes within the boundaries of the district, particularly if the changes involve modifications in the district’s water diversions or deliveries. For example, in some circumstances, a district’s delivery system may not have the capacity or infrastructure necessary to serve a proposed new place of use.
- In cases where the source of water includes stored water, a district’s right to store water or its contract with the Bureau of Reclamation may not allow the use of water at a new location or in the manner contemplated by the landowner. For example, many storage rights and contracts limit the use of the water to irrigation within the district boundaries. In addition, some districts may have water delivery contracts with their patrons that govern transfers or sale of water rights.
- Districts and their patrons each hold an interest in the water rights within the boundaries of the district. Districts hold an interest in the water rights for purposes of diversion and delivery of the water. The patron holds an interest in the water right for purposes of putting the water to beneficial use on the land that is described in the water right. Thus, there may be multiple and diverse interests in the water right. Because of this joint interest, neither can hold the water right on its own nor benefit from the water right without the cooperation of the other party. Because of this relationship **neither the district nor the landowner can unilaterally convey and/or transfer a water right without concurrence of the other interest holder**. Addressing the multiple interest holders when contemplating conveying the water right separately from a property sale is prudent.

For transfer applications filed under Division 380 (regular transfer process) or Division 382 (groundwater registration modification process), the Department requests that the district concur with a change to a water right issued in the District’s name or within their boundaries. This concurrence is documented on a form provided by the Department and signed by the district’s

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manager that (1) certifies that the applicant has consulted with the district; (2) the district has reviewed the proposed transfer application; and (3) concurs with the changes.

Failure to adequately address these issues can result in loss of the water right. After a transfer application is approved, the water right may only be used in the manner described in the transfer order. If a water right served by a district is transferred to a location or to a use that cannot be developed and put to beneficial use, then the transfer cannot be completed and that portion of the right is lost. Once the transfer is approved and the Order issued approving a change in character (type) of use or where water is used, the right cannot revert back to the original place or type of use

Critical Elements of Transactions Involving Water Rights

1. Description of Subject Property

The Water Right Conveyance Agreement or other agreement in which interest in water rights is retained or conveyed should describe the lands to which the water rights are appurtenant sufficient to satisfy the purpose of the seller and purchaser, and in a manner consistent with typical procedures for real property transactions. However, for the reasons described below, the Department advises that there are risks in such agreements or deeds purporting to definitively describe the number of acres of water rights on the identified parcel of property.

The number of acres of water right that are available to transfer from a parcel may not be definitively established until the Department processes a transfer application. Determining the number of acres for a water right that was issued recently for a specified parcel generally is straightforward. However, it is much more difficult to precisely determine the number of acres of water rights involved in many other situations. For example, if the original water right maps are of poor quality and the lands to which right is appurtenant have subsequently been divided, the manner in which the water right overlies the properties may be unclear. If only a portion of the rights appurtenant to a land parcel are involved, or the water rights encompass several properties, then the Department will have to determine the precise number of acres of water rights on the affected properties when processing the transfer application. In cases where only a portion of the water right(s) appurtenant to a land parcel are involved, the Department recommends that a map be included as part of the recorded Water Right Conveyance Agreement illustrating the acreage (footprint) from which the water right is being conveyed and what is intended to remain.

In all cases, conveyance agreements in which a water right is retained or conveyed must clearly describe the lands to which the right is appurtenant. For the purposes of the Department processing transfer applications, the following types of legal descriptions are acceptable. However, it should be noted that such legal descriptions may not be sufficient for other purposes. The department advises that legal counsel be consulted to insure that the legal descriptions are sufficient for other purposes.

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If the lands constitute the entirety of a tax lot, then a description of the lands as illustrated in Example A may be appropriate.

Example A: Legal Description according to Public Land Survey System

Tax Lot _____, Township 14 South, Range 14 East, Section 28, NW $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$.

If an entire tax, partition or subdivision lot is *not* involved, or if the lot was not created by partition or subdivision, then a metes and bounds description as shown in Example B, or an equivalent, should be used.

Example B: Parcel Description, as may appear on a property deed or title report

A parcel of land located in the North half of the Northwest quarter of Section 28, Township 14 South, Range 14 East of the Willamette Meridian, Crook County, Oregon, being more particularly described as follows: Beginning at a two inch brass cap marking the Northwest corner of said Section 28; thence along the West boundary of said Section 28 South 701.92 feet to a five eighths inch iron rod on the northerly right of way of the City of Prineville Railway; thence along said northerly right of way North 75°50'37" West 1701.95 feet to a one half inch iron pipe on the westerly boundary of that parcel described in said MF# 136838 thence along said westerly boundary North 00°00'19" West 322.37 feet to a five eighths inch iron rod on the North boundary of said Section 28; thence along said North boundary South 88°43'34" West 1650.64 feet to the point of beginning and terminus of this description.

Most Water Right Conveyance Agreements seen by the Department have included both of the examples above. In many cases its helpful if the agreement includes both legal description examples, especially in cases where the property has been substantially changed since the Conveyance Agreement was recorded. However, care should be taken when describing the property. The Department has encountered several cases where the legal descriptions did not apply to the entirety of the property, described a different property or was otherwise erroneous. Errors of this nature may result in a Water Right Conveyance Agreement that is not sufficient to show that interest in the water right has been conveyed separately from the real property. In these cases, to pursue the transfer, the transfer applicant will need provide additional documentation which could include consent from the current owners of the property.

2. List of Water Rights in Which Interest is Retained or Conveyed

A Water Right Conveyance Agreement, or other agreement in which interest in water rights is retained or conveyed, should list and describe those rights with specificity. At a minimum, the identification of the water rights in a Water Right Conveyance Agreement should include appropriate water right reference information such as a certificate number or water use permit number.

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The Department recommends that the Water Right Conveyance Agreement also retain or convey the interest in any other water rights that may be later determined to be appurtenant to the subject lands (often referred to as other “layered” or “supplemental” water uses). Water rights, typically supplemental rights, that are overlain on an area of land covered by a primary water right generally cannot be separated and moved independently. Supplemental rights or other layered water uses must be either included in the transfer of the primary water right or be cancelled.

“Layered” means a situation in which there are multiple water uses subject to transfer, permits, or certificates of registration that are appurtenant to the same place of use and that have been issued for the purpose of irrigation. OAR 690-380-0100(4)

“Primary water right” means the water right designated by the Commission as the principal water supply for the authorized use, or if no designation has been made, the water right designated by the applicant as the principal water supply for the authorized use. OAR 690-380-0100(8)

“Supplemental water right or permit” means an additional appropriation of water to make up a deficiency in supply from an existing water right. A supplemental water right or permit is used in conjunction with a primary water right. OAR 690-380-0100(12)

Without a statement clearly establishing that **all** of the water rights appurtenant to the subject land and/or same *footprint* of the water right(s) involved are conveyed, the subsequent identification of another, unlisted water right appurtenant to the lands may raise issues. For example, related to the transfer applicants’ authority to transfer (or agree to cancellation) the unlisted water right. This may result in processing delays and/or jeopardize the transfer application process.

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An example for displaying the type of water right information suggested to be included in a Water Right Conveyance Agreement is below:

Example:

The parties to this transaction understand the water rights appurtenant to the subject lands to be as follows:

Water Right Certificate: 50000, issued in the name of John Doe Use:
Irrigation of 11.62 acres

Priority Date: November 16, 1976

Place of Use: T2N, R2W, Section 12, NW SE, 9.0 acres
T2N, R2W, Section 12, SW SE, 2.62 acres

Water Use Permit: 48500, issued in the name of John Doe Use:
Supplemental Irrigation of 11.62 acres

Priority Date: October 12, 1984

Place of Use: T2N, R2W, Section 12, NW SE, 9.0 acres
T2N, R2W, Section 12, SW SE, 2.62 acres

In addition to the rights as described herein, all interest in these and any other water rights that may be later determined as being appurtenant to the subject lands are included in this transaction.

Or if only portion of a water right is being conveyed:

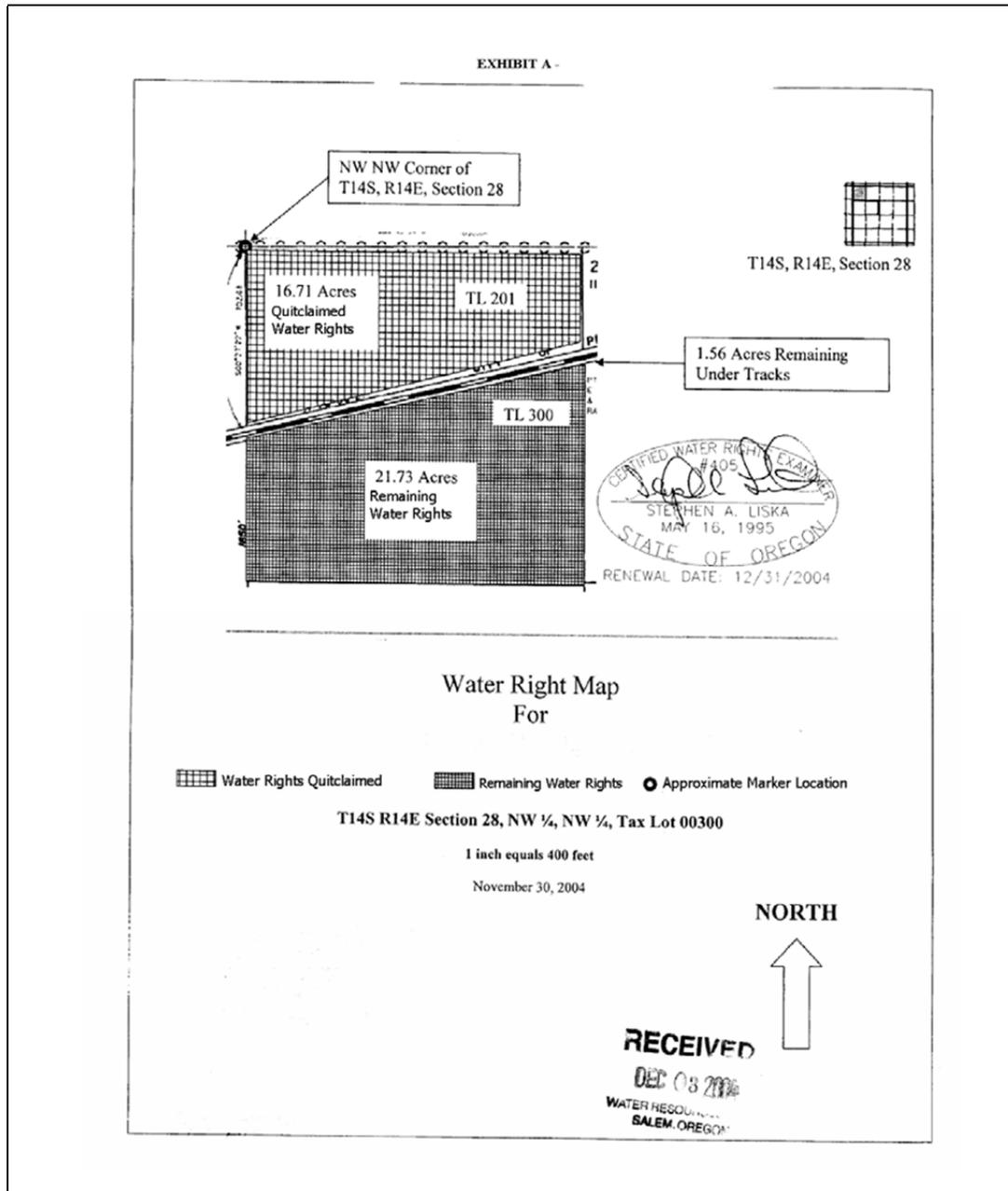
In addition to the rights as described herein, all interest in these and any other water rights that may be later determined as being layered with the portion of the water right on the subject lands that is being conveyed are included in this transaction.

3. Map to Illustrate Property Conveyed

A map may be necessary to depict or clarify the lands to which appurtenant water rights are retained or conveyed. This is especially helpful in instances where the property referenced in the conveyance agreement has been reconfigured or otherwise changed since the agreement was recorded. Conversely, a map may also aid in identifying the portion of the water right not being conveyed. At a minimum, the Department recommends that such a map satisfy standards for a transfer application as found in OAR 690-380-3100 because the purpose of the Water Right Conveyance Agreement is generally to allow subsequent transfer application. In most cases, transfer application maps must be prepared by a Certified Water Right Examiner (CWRE). Thus, a CWRE may be a logical choice to prepare a map depicting or clarifying the lands to which the water rights involved in the property transaction are appurtenant.

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The following example maps were included with recorded Water Right Conveyance Agreements.



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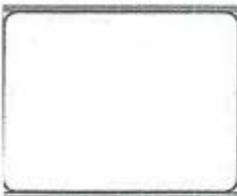
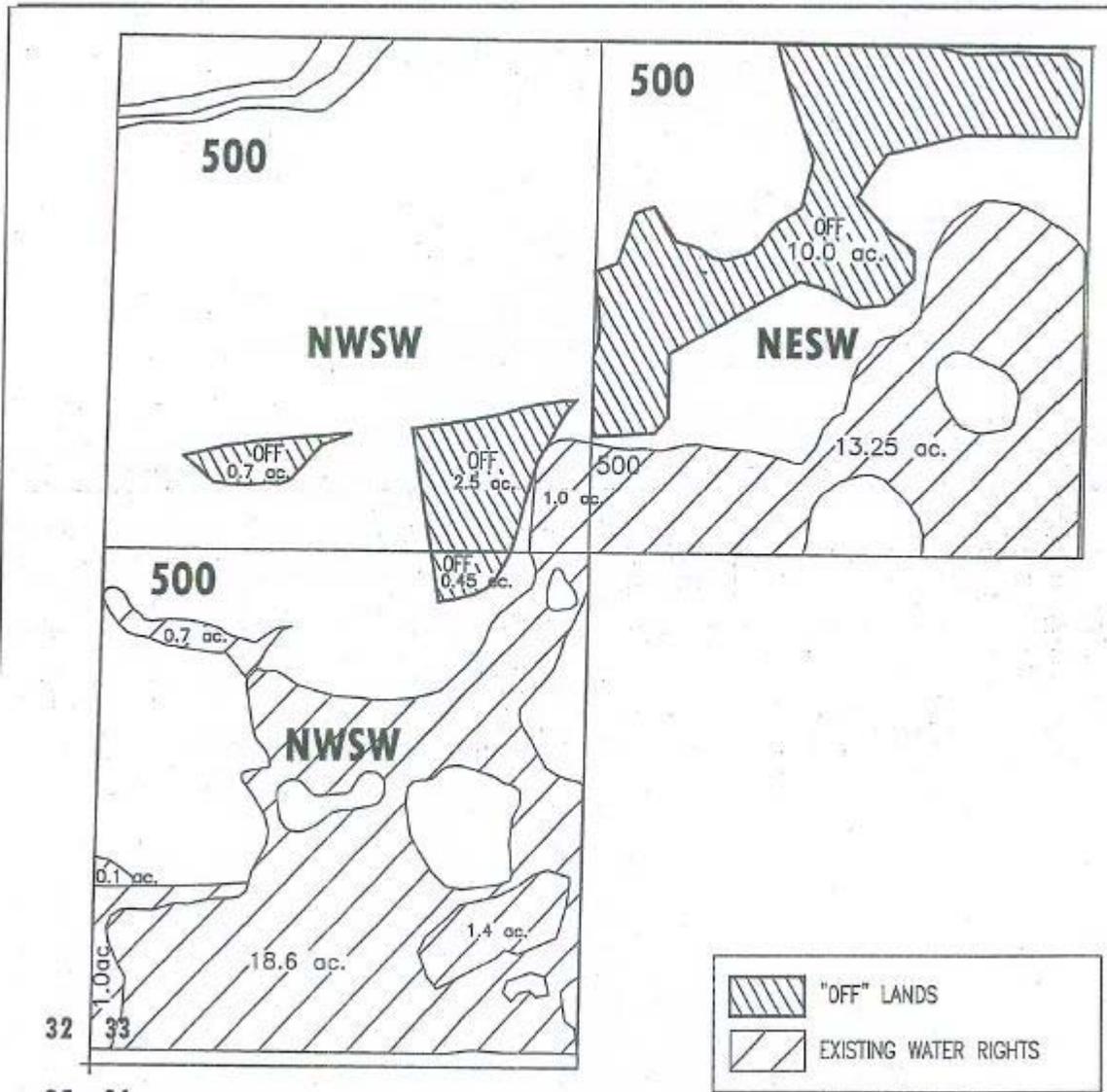
Example 2

**JEFFERSON COUNTY
SEC.33 T13S. R13E. W.M.**

SCALE - 1" = 400'



SW 1/4



QUITCLAIM DEED FOR WATER RIGHTS TRANSFER
QUITCLAIM MAP

NAME:

TAXLOT #: 500

13.65 ACRES 'QC'

DATE: 05-18-10

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4. Statutory Requirements

The form and content of Water Right Conveyance Agreements may be subject to additional statutory requirements. For example, a properly executed quit claim deed must meet the minimum standards for conveying and recording of property transactions as described by ORS Chapter 93. ORS 93.865 states that quit claim deeds may be made in the form included in the following example:

Example

_____(name)____, Grantor, releases and quit claims to _____(name)____, Grantee, all right, title and interest in and to the *water rights appurtenant to the* following described real property: (Describe the property conveyed.)

(Following description of property, here insert statement required under ORS 93.040(1).)

The true consideration for this conveyance is \$_____. (Here comply with the requirements of ORS 93.030.)

Dated this _____ day of _____, 20__ .

NOTE: The reference to appurtenant water rights in italics is added and is not included in ORS 93.865. In the context of the statutory language, the “property” quitclaimed is the water right, **not** the land to which the right is appurtenant.

Most Water Right Conveyance Agreements reviewed by the Department have been in the form of recorded quit claim deeds. However, other recorded deed types have and can be used to convey interest in water rights, including (not limited to) bargain and sale and special warranty deeds.

5. Legal Counsel and Assistance

Parties involved in real estate and other transactions in which the interest in real property and the interest in the appurtenant water rights are to be severed are advised to seek legal counsel and assistance in preparing the necessary documents to ensure compliance with any relevant statutory requirements.

The Department also recommends if a water right is served or within the boundaries of a district the landowner should contact the district *prior* to attempting to sever the interest in the water rights from the property

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