

**COMMENTS ON PERUVIAN WATER RESOURCES LEGISLATION:
TRANSFERENCE OF WATER USE RIGHTS**

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1. Description of the problem

As established in Peruvian legislation, water use rights are granted for a determined place and activity with a non-transferable character. Nevertheless, places and activities to which granted water is destined are freely transferable within a market economy. On this regard, how is this problem solved between both Law and Economics?

2. The domanial regime of natural resources

The Political Constitution in force states that natural resources –water among them– are Heritage of the Nation and the State is sovereign for their exploitation.¹ This statement is not idle but establishes the domanial regime of natural resources in the highest ranked Peruvian legal standard.

Unlike the accession principle, by which natural resources are the property of the land's owner in which they are located, under the domanial regime natural resources are property of (virtually) all Peruvians, but their dominance –the capacity to legislate, administrate and resolve controversies related to their exploitation– correspond to the State, which must exercise it in function of the interest of the Nation.

Therefore, natural resources –located in their source– are not subject of private property but they are established in goods of public domain although the products and profits

(*) This article has been prepared based on Peruvian jurisprudence and legislation effective on the date the article was published on the website of "Enfoque Derecho" (<http://enfoquederecho.com/publico/ambiental/comentarios-a-la-legislacion-peruana-de-recursos-hidricos-cambio-de-titularidad-de-derechos-de-uso-de-agua/>), a legal news blog posted by the Peruvian law review "Themis".

¹ "Nation" is to be understood as the group of people with common interests while "State" is the nation politically organized (governmental system).

which derive from them are property of the titleholders who have been granted rights over them.

3. Water use rights and other certifications

To use freshwater, except for primary needs,² it is necessary to hold a right of use granted by the competent agency of the National Water Authority, the highest authority in the area of water resources in Peru.

Water use rights are granted under determined conditions in respect of a fixed or variable amount of water for a determined place and activity, subject to economic retribution payments.

There are a series of additional certifications in the field of water resources which do not grant the right to use them but they are established in requirements to obtain them or are related to them. In this regard, we may appoint the gender “certifications” and the species “water use right” in a way that all water use rights are certifications but not vice versa. Gender and species are subject to common and particular rules.

4. The non-transferability of water use rights

In line with the aforementioned legal regime, natural sources of water and water use rights are out of the legal trade; that is, they are non-transferrable. If the case, the transference of a water use right is invalid because of being legally impossible³ and, therefore, unable to produce legal effects between the transferor and acquirer as well as between them and third parties. If the holder of a water use right does not wish to continue using it, he must return it to the State. Likewise, its extinction by any of the causes legally established implies the reversion to the State of the granted volumes of water.

The non-transferability of water use rights are not only consequence of the domanial regime to which they are subjected but it also reinforces the roll of the State of looking after the most equitable and efficient management of the resource before and after its

² Food preparation, direct consumption, personal hygiene, and use in cultural, religious and ritual ceremonies.

³ Article 219, section 3, of the Civil Code, Legislative Decree No. 295.

granting. The contrary would imply the creation of a market of water by granting freely-marketable real rights (market economy).

5. Change of title of water use rights

On the other hand, as part of the economic dynamism, the activities, establishments and lands to which water is destined are subject of direct and indirect transference by way of many kinds of juridical acts as the purchase, corporate restructuring, inheritance advance, execution of guarantees, liquidation of companies, among others as applicable.

Under the aforementioned legal regime, the transference of the activity, establishment or land to which water is destined would imply the extinction of the water use right hold by the transferor and the reversion to the State of the granted volumes, opening the possibility to third parties unconnected to such transference to apply for those volumes, jeopardizing or even preventing the acquirer the access to the required water and, finally turning pointless the transference.

To resolve the problem of the non-transferability of water use rights before the dynamism of the economy, the law and regulations of the area have established that, in case is executed the transference of an activity, establishment or land to which water is destined, the acquirer has preference to obtain the water use right under the same conditions of its transferor, to which he must request the extinction of the right to be declared and the granting of a new one.

6. Change of title of other certifications

The change of title of certifications different than the water use rights does not have a special procedure. On this regard, it would not be necessary because the non-transferability is a restriction that affects only water use rights although it is in order to ask if such procedure may be applied to them by analogy.

Article IV of the Civil Code⁴ states that *“the law⁵ which establishes exceptions or restricts prerogatives may not be applied by means of analogy”*. Since the rule in the Peruvian legal

⁴ Legislative Decree No. 295.

⁵ The term law is to be taken in a broad sense: to these effects, law is not only the one approved by the Congress and enacted by the President of the Republic, but also the legislative decrees enacted by the President of the Republic having the Congress delegated such function for specific issues, urgency decrees, law decrees, supreme decrees, ministerial resolutions, as well as all other legal standards in force in the country.

system is the non-transferability of water use rights, the provision that establishes a mechanism which regulates the change of title may be considered exceptional and, therefore, not applicable by means of analogy to assumed facts not comprehended in it.

It would be enough to invoke the right of all administrated to promote in writing the commencement of an administrative procedure in its own particular interest. In practice, the National Water Authority is approving the change of title of the certifications different than the water use rights by means of the modification of the original approbatory resolution, replacing the former titleholder by the new one.

7. Conclusions

Unlike the liberal model of management of water resources, mostly adopted by common law legislations, in which water use rights are marketable under a market economy, Peru follows quite the contrary a paternalist model adopted by the majority of civil law legislations, in which water use rights are not subject of private property so they are, therefore, non-transferrable.

The non-transferability of water use rights would hinder the transference of the activities and goods related to them –and therefore would dampen the Economy– if it weren't for the procedure for its reversion to the State and new granting to the acquirer of the goods or business matter of transference.

This model of management of water resources reflects the preference of a society for the State to look after the most equitable and efficient assignment of water distribution rather than leave it at the mercy of the interaction of supply and demand. Each model has advantages and disadvantages which are matter of a more extended debate and analysis.

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