



WATERLAW<sup>®</sup>

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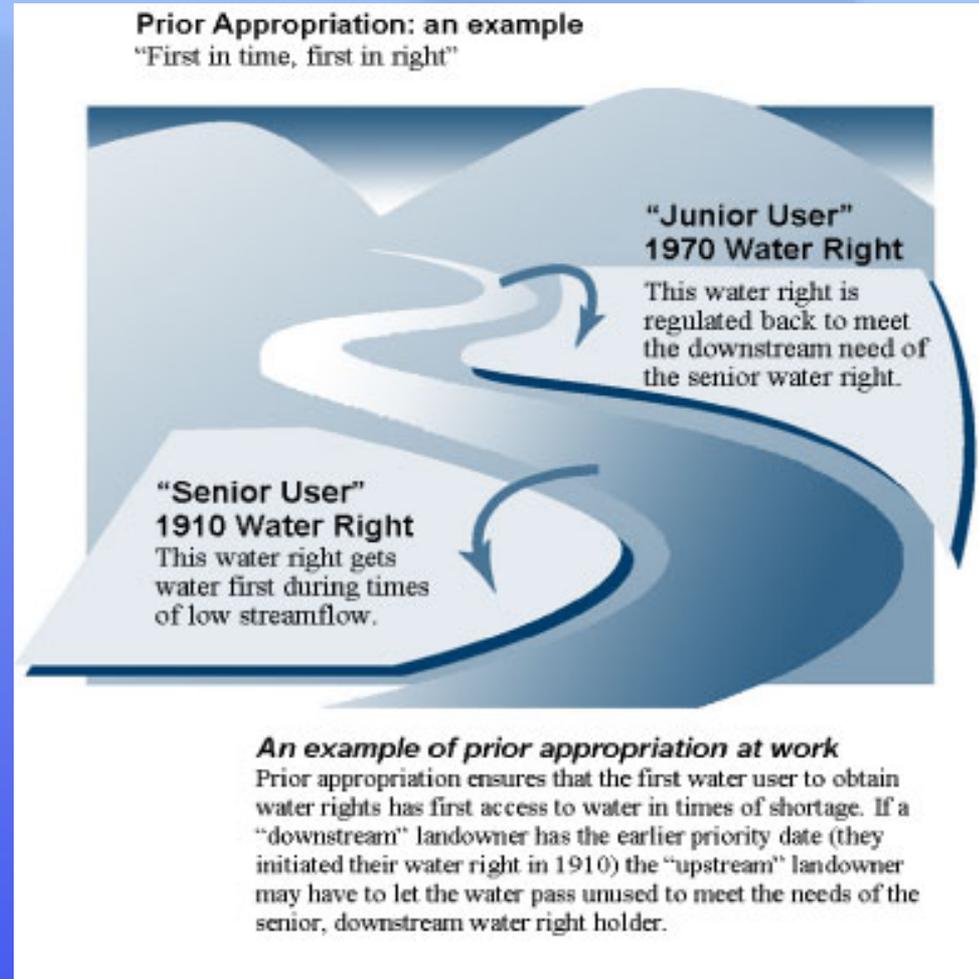
Denver Bar Association Real Estate Section Luncheon  
November 6, 2014

# Water Law in Real Estate Transactions

by Paul Noto, Esq.  
[noto@waterlaw.com](mailto:noto@waterlaw.com)

# Prior Appropriation Doctrine

- Prior Appropriation Doctrine
  - First in Time, First in Right
- Water allocated exclusively based on priority dates
- Earliest priorities divert all they need (subject to terms in decree)
- Shortages of water are not shared
- “Pure” prior appropriation in CO



# A historical sketch of Colorado water law

- Early rejection of the Riparian Doctrine, which holds that landowners adjacent to a stream can make a reasonable use of the water flowing through your land.
  - This policy was ill-suited to Colorado and would have hindered growth, given that climate and geography necessitate transporting water far from a stream to make land productive.
- In 1861 the Territorial Legislature provided that water could be taken from the streams to lands not adjacent to streams.
- In 1872, the Colorado Territorial Supreme Court recognized rights of way (easements), citing custom and necessity, through the lands of others for ditches carrying irrigation water to its place of use. *Yunker v. Nichols*, 1 Colo. 551, 570 (1872)



# A historical sketch of Colorado water law

- In 1876 the Colorado Constitution declared:
  - “The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.” *Const. of Colo., Art. XVI, Sec. 5.*
  - “The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water....” *Const. of Colo., Art. XVI, Sec. 6*
  - All persons and corporations shall have the right-of-way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.” -*Const. of Colo., Art. XVI, Sec. 7.*

# A historical sketch of Colorado water law

## The Colorado Adjudication System

- Water Right created @ time of application to a beneficial use
- Adjudication Acts of 1879 & 1881 provided for adjudication of irrigation water rights by amount and priority, and for administration of the court's decrees by state water officials.
- The Colorado Water Right Determination and Administration Act of 1969 (C.R.S. §37-92-101 et seq.)
  - Note: Adjudication of Federal Reserved Rights in CO system
- Groundwater Management Act of 1965 governs the permitting of wells. Sought to integrate groundwater diversions into Colorado's prior appropriation system.

# Colorado Water Law Primer

- Two General Types of Water Rights:
  - Absolute: perfected, actual use; subject to abandonment for non-use
  - Conditional: future completion; subject to cancellation for failure to file diligence



# Colorado Water Law Primer

## Water Rights

- Types of Water Rights (Cont.):
  - Direct Flow: Well, Ditch, Pipeline, etc. (measured by flow rate)
    - “c.f.s.”: 1 cubic foot of water per second = 449 gallons of water per minute
  - Storage: Reservoir, Pond, etc. (measured in volume)
    - “1 acre-foot” = 325,900 g (one foot deep covering one acre)



# Colorado Water Law Primer

## Water Rights

- Types of Water Rights (Cont.):
  - Groundwater rights
    - **Tributary Groundwater**
    - **Non-Tributary Groundwater**
    - **Designated Groundwater Basins**
    - **Not Non-Tributary Groundwater - Denver Basin**
  - Appropriative Exchange



# Colorado Water Law Primer

## Elements of Appropriation

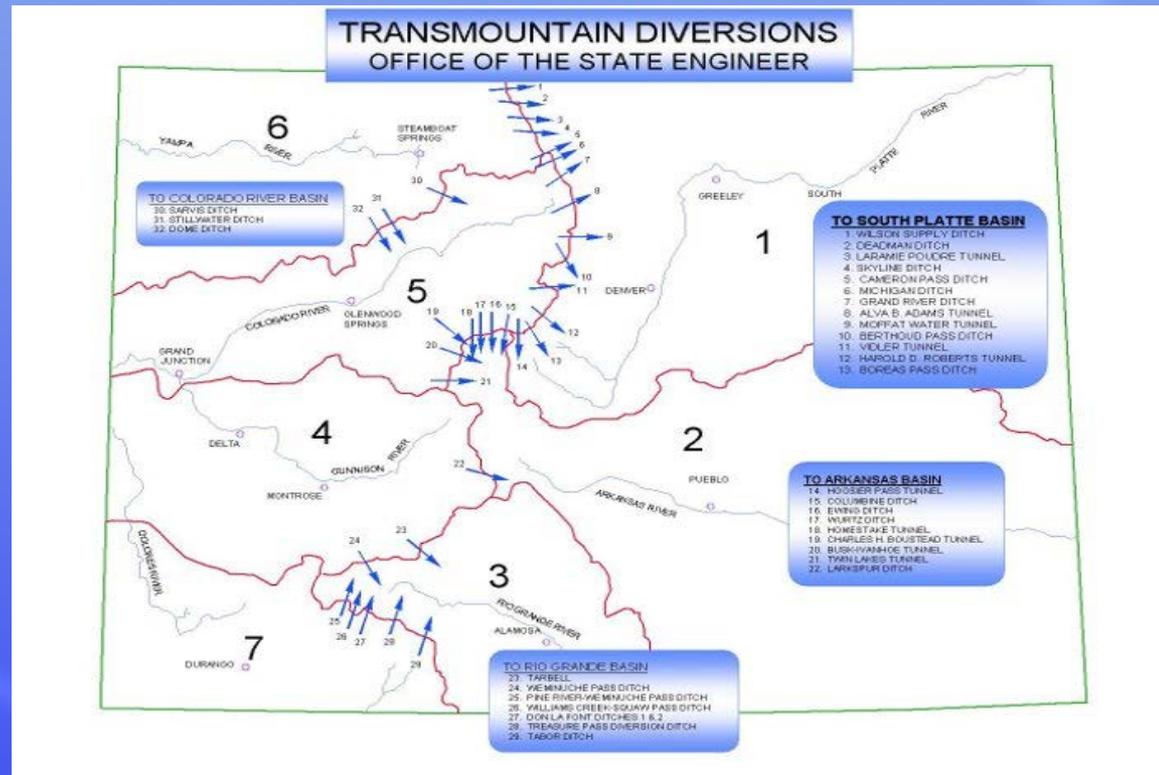
- Unappropriated water available
- Beneficial Use
- Without Waste
  - Duty of water
  - Means of diversion
- Anti-speculation
- Diversion required



# Colorado Water Law Primer

## Imported Water

- Imported (or transmountain) water, non-tributary groundwater (e.g., Denver Basin), and quantified “consumptive use” water can be used & re-used to extinction
- Exception:  
CBT water



# Colorado Water Law Primer

## Conditional Water Rights

- Intent, Overt acts
- Relation back
- “Can and Will” Requirement
- Reasonable Diligence
- Cancellation - failure to file
- Make absolute

# Colorado Water Law Primer

## Change of Water Rights

- Owner has right to change his/her water right and still maintain its priority, so long as other water rights not injured
  - Historic return flow patterns must be maintained
  - Junior appropriators entitled to maintenance of stream conditions at time of appropriation
- Measure of every water right is its “historic beneficial use” at its decreed location
- One may not alter the historic use or pattern of use of a water right if it would enlarge the use in amount or time

# Colorado Water Law Primer

- Administration by State Engineer's Office
  - Carried out by Division Engineers, Water Commissioners
- “Call” scenarios
- Futile Call



# Colorado Water Law Primer

## Plans For Augmentation

- Detailed court-approved plan, designed to protect existing water rights by replacing water used in a new project. C.R.S. 37-92-103(9).
- *Central City* case & instream flow reaches' impact on exchanges
  - Instream flow entitled to protection even though it's not "in priority"
  - Curtailed water right takes on new exchange priority

# Colorado Water Law Primer

## Well Permitting - Exempt Wells

- Tract of 35 acres or larger: entitled to well exempt from water administration for up to 3 single-family residences, livestock, fire protection and one acre of lawns and gardens. C.R.S. §37-92-602.
- Household use only: inside use only, in a subdivision created prior to 1972 or a parcel less than 35 acres that is exempt from the subdivision laws.
- Pre-existing wells: wells prior to 05/22/1971 exempt from permits for up to 50 gpm used for up to 3 single-family residences, livestock, fire protection and one acre of lawns and gardens. *Cautions: Limited by continuous historic uses. Onsite non-evaporative wastewater treatment required.*
- Commercial exempt wells: wells used for drinking and sanitary facilities in individual commercial businesses; lot created pre-'72. No outside use allowed

# Colorado Water Law Primer

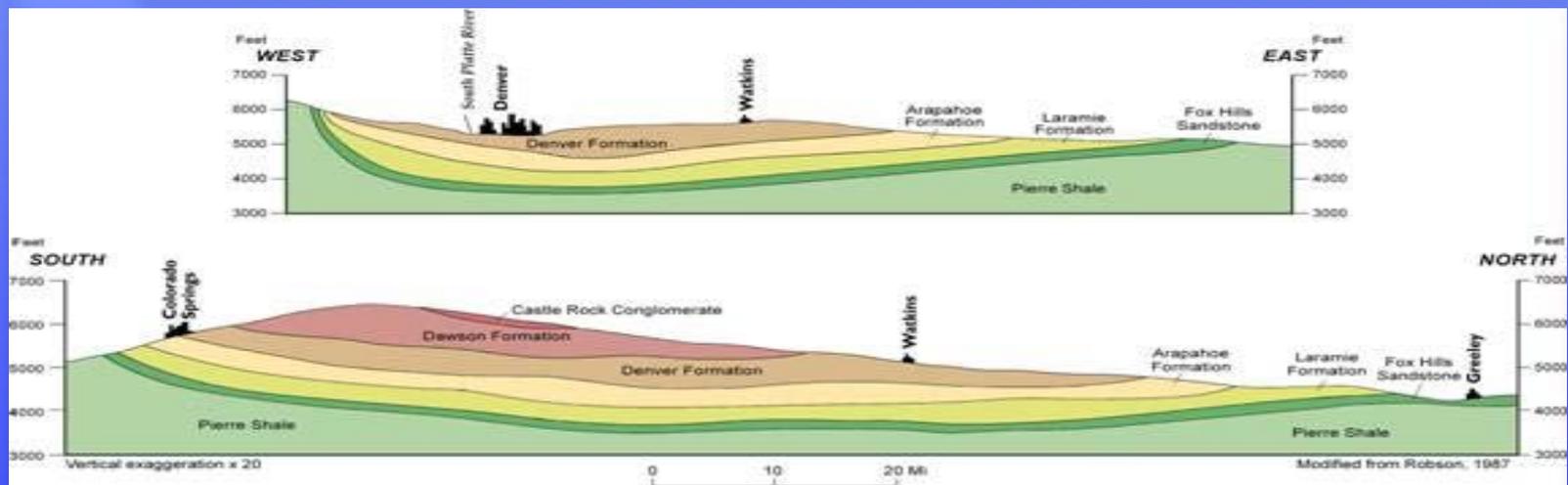
## Well Permitting

- “Fee Wells:”
  - Cannot obtain absent an approved Substitute Supply Plan or Judicially Approved Plan for Augmentation;
  - Must consider delayed impact of well pumping
  - Can be interconnected, used for any beneficial use or amount but limited to 200’ rule.
- Wells in Designated Groundwater Basins:
  - Designated groundwater basins are established by the Colorado Ground Water Commission. Located in the Front Range and in Eastern Colorado. Commission has sole jurisdiction over designated groundwater.
    - Within the designated basins there are separate groundwater management districts, which provide recommendations to the Commission on applications, and establish rules.
  - Groundwater in designated basins called “designated groundwater” (groundwater that is essentially not available to surface water rights b/c not tributary)

# Colorado Water Law Primer

## Well Permitting

- Denver Basin Wells:
  - Denver Basin stretches from Greeley to Colorado Springs, and from the foothills to Limon. Must consider delayed impact of well pumping
  - Series of aquifers that are isolated from each other geologically, and how deep you drill will determine which aquifer you are pumping from.
  - Landowner is limited to pumping 1% per year of the amount of water that is determined to be beneath their land in these aquifers.
  - Augmentation requirements are common.



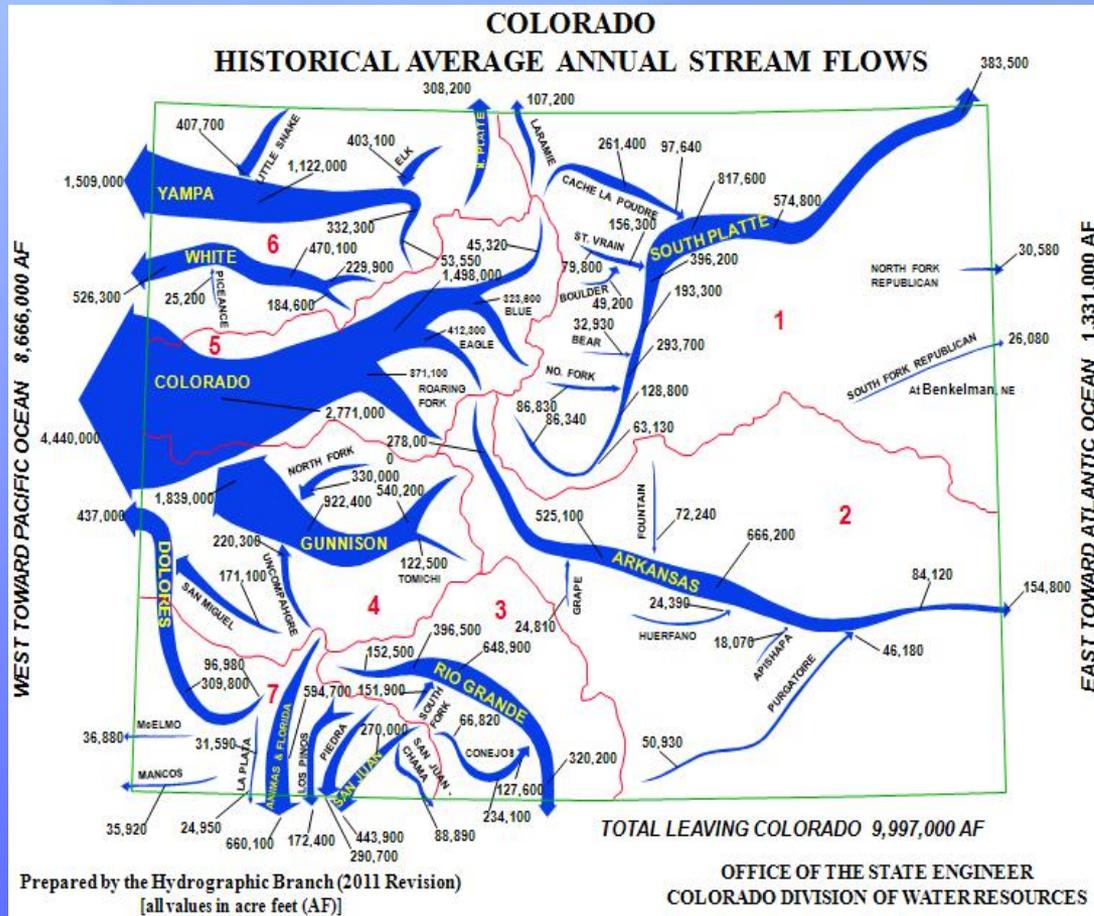
# Colorado Water Law Primer

## Ditch Easements

- Ditch easements exist where ditches or pipelines carry water across a property
  - Can arise by prescription, express grant, acquiescence, etc.
- *Roaring Fork Club* rule:
  - “Accommodation doctrine”
  - Allows a servient estate to alter a ditch easement upon prior written consent from the ditch owner; or, if the ditch owner will not consent, the servient estate can seek a declaratory judgment that the proposed alteration will not:
    - Significantly lessen the easement’s utility
    - Increase the burdens on the easement owner’s use and enjoyment of the easement
    - Frustrate the purpose of the easement

# Colorado Water Law Primer

## Physical Water Availability & Compacts



### Headwaters for Several Major Interstate Rivers:

- Colorado
- Arkansas
- S. Platte
- Rio Grande
- San Juan

# The Colorado River Basin



7 states—1400 miles

Principal Source for:  
33 million people  
1/3 of Nation's  
GDP

Division a Marvel of  
Compromise &  
Source of Stress

Source: Map  
Dept. of the Interior

# Water due diligence in a real estate transaction

- The need for due diligence
  - Title policies exclude water rights- no central clearinghouse for who owns water rights
  - Water rights are not necessarily appurtenant to the land- what you see may not be the Seller's
  - Priority system of water rights and the stream regime can affect availability and hence value of the water rights
  - Potential for unrecorded agreements that impact use
  - Historic use is the scope and limit of every water right, especially so when dealing with the potential to change water rights for different uses
    - What the decree states is often greater than the historic use measure of the water right

# Water due diligence in a real estate transaction

- The need for due diligence (cont'd)
  - Other potential limitations a Buyer should be aware of:
    - Season of use
    - Type of use
    - Place of use
    - Amount
    - Extent and place of return flow
  - Filing requirements to maintain conditional water rights
  - Can almost always secure more water, but at a cost = client business decision

# Water due diligence in a real estate transaction

- Due diligence steps and factors:
  - Identify water resources, structures, and features
  - Determine validity, attributes, and any defects with water rights
  - Determine transferability of water to meet client goals
  - Assess suitability of water resources for the intended use, and whether additional water rights or changes of water rights will be necessary
  - Note conditional water right filing deadlines

# Water due diligence in a real estate transaction

- When to consider engaging water counsel?
  - Ideally, when the contract is being negotiated that would include water rights
    - If representing a buyer, you may negotiate a special warranty deed
    - If representing a seller, you should negotiate a quit claim or bargain and sale deed

- When to consider engaging water counsel? (cont'd)
  - Consider a potential water right and water resource contingency clause:
    - Contingency language for water issues:
  - This Agreement is contingent on Buyer's review of the adequacy of the water rights and water resources, any jurisdictional wetlands, any easements held by third parties for water structures, and the adequacy of wastewater disposal (the "Water Issues"). If during this contingency period Buyer finds any Water Issue unacceptable, for any reason in Buyer's sole discretion, Buyer may terminate this agreement. Seller will timely deliver to Buyer all documents and information available to Seller related to the Water Issues. If Buyer does not provide Seller with written notice that Buyer terminates this Agreement under this contingency within the [30-90] period, then Buyer waives this contingency. If Buyer delivers written notice of termination under this contingency during the contingency period, Seller may not claim that Buyer acted arbitrarily or unreasonably in terminating the Agreement.
  - During the contingency period, Buyer and Buyer's consultants, including attorneys, may access the Property to inspect and test the availability, yield, and quality of the water resources; delineate wetlands; and inspect water disposal. Buyer and Buyer's consultants may inspect any structure used to convey, pump, or dispose of water. Buyer must provide notice to Seller under paragraph \_\_\_ of this Agreement prior to accessing the Property, and will obtain Seller's permission before disturbing any land or fixtures. Buyer may not cause any harm to the Property, and will bear all expenses of these inspections.
  - This Agreement is contingent on Buyer's satisfaction about the Water Issues. This contingency is for Buyer's benefit and Buyer may waive it in his or her discretion. Seller will cooperate with Buyer in Buyer's review under this contingency.

# Water due diligence in a real estate transaction

- When to consider engaging water counsel?
  - Almost always, water counsel is engaged after the property is under contract.
    - Consider allowing for a sufficient diligence period considering water rights review
    - Engage water counsel before or early on in the diligence period
      - Give time so that they can clear potential conflicts
      - Will there be water title work? More time necessary
- Title Commitment
  - Title policies do not insure water
    - May wish to have a water title opinion, or at least sufficient title work to reach a reasonable comfort level that Seller owns what they purport to
    - Water title opinion is about the only way to conclusively establish title
  - Title exceptions often have agreements, easements, and other documents that affect water use

# Water due diligence in a real estate transaction

- Survey
  - Generally looking for the location of ditches, wells, water features, ponds, pipelines, etc., and any easements for them
  - If it is an important transaction, consider a site visit (surveys can miss items)
  - Ditch easements
    - Ditch easements exist where ditches or pipelines carry water across a property
      - Can arise by prescription, express grant, acquiescence, etc.
    - Very important aspect of water right due diligence because:
      - If your client intends development through or near a ditch easement, they will need consent from the ditch owner
      - For as little as a driveway crossing, piping a ditch, or moving a ditch

# Water due diligence in a real estate transaction

- Survey (cont'd)
  - Ditch easements (cont'd)
    - Roaring Fork Club rule:
      - “Accommodation doctrine”: competing uses between two interested owners should be accommodated if possible
      - Allows a servient estate to alter a ditch easement IF:
        - » He or she gets prior written consent from the ditch owner; or, if the ditch owner will not consent
        - » Servient estate can seek a declaratory judgment that the proposed alteration will not:
          - » Significantly lessen the easement’s utility
          - » Increase the burdens on the easement owner’s use and enjoyment of the easement
          - » Frustrate the purpose for which the easement was created
      - (Comes from the Restatement of Property)

# Water due diligence in a real estate transaction

- Survey (cont'd)
  - 100 year floodplain
    - Conjunction of water and land use issues
    - Survey should delineate it
      - Make sure they are using the most recent FEMA-County mapping
    - Note that they can and do move
    - Development is often limited within the 100 year floodplain per county code
- Seller's property disclosure and off record matters disclosure
  - Can be important in water due diligence because often water decrees, well permits, water agreements are not of record
  - Consider the timing
  - Water counsel should separately obtain and review the adequacy of decrees for all known water rights, diversion records showing historical use, and well permitting documents for all known wells

# Water due diligence in a real estate transaction

- Consider a site visit (within a client's budget)
  - Visual inspection can reveal problems with physical structures that may prohibit taking the full amount of water
  - Can reveal an abandonment or adverse use issue
  - You may even discover water rights not claimed by the seller, or third party water rights and related easement issues

- Water due diligence opinion
  - What is the scope – reconnaissance level vs. title opinion?
  - What is the purpose – to uncover fatal flaws or objectionable items? Or is it to provide a valuation of water for transfer, annexation, subdivision?
  - Include a brief and simple explanation of CO water law
- Special considerations for development properties and potential annexations
  - Local government determination of adequacy of water supply
    - C.R.S. § 29-20-303(1) (2013): “A local government shall not approve an application for a development permit unless it determines in its sole discretion, after considering the application and all of the information provide, that the applicant has satisfactorily demonstrated that the proposed water supply will be adequate.”
    - Subdivisions: C.R.S. § 30-28-133(3)(d) (2013): “Subdivision regulations adopted by a board of county commissioners pursuant to this section shall require subdividers to submit... adequate evidence that a water supply that is sufficient in terms of quality, quantity, and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed.”

- Other issues:
  - Wetlands
    - If your client intends to develop a property that may have jurisdictional wetlands under the CWA, the only way to establish where those are is to do a wetland delineation
    - Development within jurisdictional wetlands generally needs a “404 Permit”
      - Consider: nationwide permits, regional permits, exemptions
  - ESA
  - FLPMA and other authorizations if water facilities on federal land
  - Energy development – fracking
    - *Vance v. Wolfe*, 205 P.3d 1165 (Colo. 2009): Pumping produced water uses water to achieve the benefit of mineral production. Thus produced water is a beneficial water use that the SEO must permit.
    - Demand for frack water in hotbed areas such as northeast Colorado has made the water very expensive
    - Determine availability, pricing, and development strategy during the due diligence phase

# Water Title Issues

- In the due diligence phase, you want to ensure the seller has adequate title to the water rights they purport to own.
- Generally you want to go back at least 18 years (the prescriptive period). But for a complete title opinion, you need to trace the water right back to its decree date, and the land back to its patent from the United States.
- REMEMBER: water rights can be sold separate and apart from the land, and are often conveyed in deeds without specific reference (i.e. are conveyed as an “appurtenance”).
- There is no title insurance for water rights, and those that have tried it have included exceptions swallowing any benefit of the insurance.
- The need for title examination is evident.

# Water Title Issues

- How to do a water right title search:
  1. Start with the current owner (based on the current deed or ditch company records)
  2. Trace it backwards by grantor-grantee searches of the county records.
  3. Watch out: because the water right may not be specifically mentioned, you may have to trace the property legal description. This requires painstaking attention to detail.
    - a. If the water right was sold and severed from the original land, you may need to trace the new owner backwards or forward, or the new land, as the case may be.

# Water Title Issues

4. You can also start with the original water right decree and owner, and trace it forward.

- In either case, watch out for “wild deeds” and double conveyances.
- Make sure encumbrances have been released or foreclosed.
- Make copies of all documents, and arrange them in order.
- Double check your work. Carefully. Very carefully.

# Water Title Issues

- Draft the title opinion. The conclusion (ideally) is the owner has “good and marketable” title with an unbroken title chain.
- If there are defects or clouds, explain them.

# Water Right Conveyancing

- A water right conveyance is a conveyance of an interest in real property. C.R.S. §38-30-102 (2014).
- Water rights can be conveyed separately from the land on which they are used.
- You should follow all of the formalities of conveying real estate in the conveyance of water rights.
- Consider use of statutory short form deeds.
- Remember: water right decrees do not establish ownership.
- Practice pointer: specifically listing water rights can lead to an implication water rights not listed are not conveyed. So if you specifically list, state, e.g. “...any and all water rights, including, but not limited to, the following....”

# Water Right Conveyancing

- The four types of deeds can be used: general warranty, special warranty, bargain and sale, quit claim.
- As a practical matter, bargain and sale and quit claim are the most common, because owners are hesitant (with good reason) to warrant title to water rights.
- **IMPORTANT:**
- well permits are considered personal property and should be assigned (can have a deed and assignment conveying water rights and well permits)
- Ditch company stock certificates are personal property but represent an interest in real property (the underlying water rights), and therefore should be deeded and assigned.

# Water Rights Conveyancing

- After closing, for well permits you should (must) file a Notice of Transfer form with the State Engineer.

Available at

<http://water.state.co.us/DWRIPub/Documents/gws-11.pdf>

- After closing, for conditional water rights you should (must) file a Notice of Transfer of Conditional Water Right with the applicable water court.

Available at

<http://www.courts.state.co.us/Forms/PDF/JDF%20307%20r%2010-11%20Notice%20of%20Change%20in%20Ownership%20of%20Conditional%20Water%20Right%20or%20Change%20of%20Address.pdf>

# Water Rights Conveyancing

- At or after closing, if you are dealing with ditch company stock certificates, you will need to work with the ditch company to transfer the share certificate to the new owner. If the owner holds onto the certificate, make sure it is not lost.
- For water contracts, those are typically assigned. If you are dealing with a water conservancy district, there may be a process.





Video:

[http://www.youtube.com/watch?  
v=mqYcC7jEe44](http://www.youtube.com/watch?v=mqYcC7jEe44)

Questions