

**WATER RIGHTS:
What Every Realtor Should Know**

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Objectives:

The purpose of this presentation is to provide to Realtors a working knowledge of water law in Colorado so as to spot and identify issues pertaining to water law that will make them more knowledgeable in assisting their clients understanding water issues as they exist in Colorado as well as identifying issues pertaining to water rights as early in the sales process as possible thereby increasing the likelihood of moving a property forward to a successful closing.

It bears mention that this is not meant to be a substitute for the seeking of legal counsel in appropriate circumstances. Instead, it is a purpose of this presentation to further provide realtors with additional knowledge to avoid potential liability involving the conveyance of real property impacted by water rights.

The Doctrine of Appropriation:

Water Law in Colorado is very different than water law east of the Mississippi and somewhat contrary to common sense. Merely because property is physically adjacent to water or has immediate access to water does not provide the right of that owner of adjacent to utilize that water.

The use of water in Colorado is based upon the rule of Prior Appropriation. The Prior Appropriation Doctrine also referred to as the Doctrine of Appropriation can be simplified in: "First in time, first in right."

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The priority of water law in Colorado is underscored by the fact that the Colorado Constitution as ratified in 1876 specifically recognized the doctrine of prior appropriation, in fact incorporating the practice used during the period of time that Colorado was a territory. Few State Constitutions address the right to use water. The Colorado Constitution provides, in part:

The water of every natural stream, notheretofor 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.

See Colorado Constitution, Article 16, Section V.

The Colorado Constitution further provides:

The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.

See Colorado Constitution, Article 16, Section VI.

Our current water law procedure and legal rights attendant to the same was adopted by the Colorado legislature in 1969. This replaced the original adjudicative statute originally enacted in 1879. That notwithstanding and as you shall see, as the law of Colorado has evolved; only "Waters of the State" are available for appropriation. "waters of the state" is a term of art with a very specific meaning. Non-tributary waters may also be adjudicated as well as a special category of ground water, designated basin ground water, which is subject to a "modified prior appropriation system" as established by statute.

The Prior Appropriation Doctrine allows the beneficiary of water rights to utilize available water from a common source (such as a river) based upon the appropriators priority, also referred to as seniority. The senior appropriator need not reduce his usage of water when the supply of water is low merely because other junior appropriators might need water. Use of water from a common source is established by priority and is established in descending order as the use of the water from that source. Senior users, in fact, may leave the stream bed entirely dry if that users rights permit the diversion of all the water available. Hence, a user with a date of appropriation of

September 1, 1925, will have the use of water, even if located downstream, before a user with an appropriation date of September 1, 1965.

Water Subject to the Appropriation System:

Not all water is categorized as "waters of the state" and thus subject to the Doctrine of Appropriation. As established by CRS §37-90-103(6) and CRS §37-92-103(13), "waters of the state" refers to all surface and underground water in or tributary to all natural streams located within the State of Colorado. Essentially, this is water from a primary source as well as secondary tributaries fed from that primary source. It is a legal presumption that all water, whether surface or groundwater, is tributary to "waters of the state." Hence, "waters of the state" includes not only traditional creeks and rivers, but also seepage, wastewater, floodwater, return flow, springs, mine water and groundwater and thus must be appropriated pursuant to procedure consistent with the Colorado Constitution. See CRS §37-92-101, and CRS §37-92-309.

Appropriated Water Rights:

Appropriation is the application of a specified portion of the "waters of the state" put to a beneficial use as permitted by procedure prescribed in CRS §37-90-101 to CRS 37-90-143. A successful application for use of water can result in the issuance of a Decree and thereafter the water right is subject to administrative protections through the deputies of the state and water division engineers. See CRS §37-90-103(6). Administrative protection of appropriative rights applies to both ground and surface waters. Hence, water rights have the same protection as a matter of law as do other property rights.

An appropriated water right is defined by its priority date, place of use, type of use, and an amount to be used. An appropriated right may permit the direct utilization of water, but it may also provide for the storage of water prior to being placed to beneficial use.

Legal Requisites For An Appropriation:

A water right is initiated as a consequence of a combination of an intent to appropriate water for application to beneficial use and the accomplishment of an overt act in furtherance of that intent. An appropriator that puts water to beneficial use

establishes property rights even before such right is adjudicated. One may think of the Decree as the formalization of the water right. However, without adjudication of the newly created right, defense, administration, and future maintaining of the water rights becomes difficult to enforce.

To satisfy the legal requirement for an appropriated right, the water user must establish by preponderance of the evidence a legal requirement established by the "First Step Doctrine." The "First Step Doctrine" includes three parts:

- a) an intent to appropriate;
- b) for beneficial use;
- c) by the performance of overt acts sufficient to give notice to the world and to reflect an intent to appropriate.

See City of Thornton v. Fort Collins, 830 P2d 915 (Colo 1992) and City of Thornton v. Bijou Irrigation Company, 926 P2d 1 (Colo. 1996).

This "First Step" test is easily satisfied once the appropriator has put a quantity of water to a beneficial use. Assuming that there exists adequate evidence of this beneficial use, the appropriator may then seek an "absolute" Decree from the water Court as said appropriator has now perfected the water right by putting it to use. For example, the actual use diversion, i.e., of water from the Yampa River to irrigate crops would satisfy the "First Step Doctrine."

This "First Test" is more difficult in the context of large water projects (such as municipal uses, industrial uses or ditch company agricultural uses) where appropriators cannot practically demonstrate as a "First Step" an overt act to put the quantity of waters sought to beneficial use. As one can imagine, the diversion of an out of water for domestic use involves a vastly different financial commitment than building water storage tanks. Thus, Colorado law provides for adjudication of a "conditional water right" that permits an appropriation of a water right without actually using any water upon the satisfaction of certain conditions. An Applicant for a conditional right must demonstrate that the intent to appropriate is not merely speculative, see CRS §37-92-305(9)(b), and that the "first step" instead of an act which "can and will" be completed diligently and in a reasonable amount of time.

Diligence and the Concept of "Can and Will":

The most applicable example as to the use of this doctrine would be in the context of a water storage facility. Diligence is also a requirement for obtaining a conditional right. An Applicant for conditional right must first make a showing that they will diligently complete the appropriation within a reasonable period of time. Further, to maintain a conditional water right, the holder of the right must timely file a diligence application. Although the period of time for filing a diligence application has been modified over the years, as the law now stands, conditional right owners must file a Due Diligence Application no later than six (6) calendar years after the calendar year in which their Conditional Decree was sought. This request is simply to determine as to any Conditional Decree the date of filing and hence priority.

The necessary diligence to maintain a conditional water right tends to be more detailed than that is required to demonstrate diligence at the time of the original application. CRS §37-92-301(4)(b). Ultimately, what constitutes diligence and more specifically, adequate diligence, is a fact specific inquiry depending upon the project in question. As one might expect, unlawful activities are not adequate to demonstrate due diligence. See TALCO Limited v. Danielson, 769 P2d 468 (Colo. 1989). Diligence also includes not only a continuing intent to develop the project, but a continuing need for the water in question. See City of Thornton v. Bijou Irrigation Company, *supra*, among others. All of this balances the time and cost to develop larger water storage projects, on the other hand, while making sure adjacent progress is being demonstrated.

"Can and will" is an independent doctrine within the diligence case and is a forward looking demonstration of intent to complete a water right as opposed to diligence which merely requires a historic examination of an Applicant's activities.

Conditional rights that have been put partially or entirely to beneficial use can be adjudicated as "absolute" water rights during a diligence case. Basically, in order to transition a conditional water right to an absolute right, the operation must utilize a Decreed structure. Operations through alternate points of diversion may be adequate to make a water right absolute if the alternative point of diversion has been decreed by the Water Court. In order for a Conditional water right to be made absolute, the water must have come from the same

structure to which the conditional right was decreed. The beneficial use of water diverted from a nearby source cannot be substituted unless the structure has been decreed as an alternate point of diversion. See Northern Colorado Water Association v. Three Peaks Water, Inc, 859 P2d 836 (Colo. 1993); Broils v. Fort Ryan Canal, 638 P2d 244(Colo. 1981).

The failure to satisfy the Due Diligence requirement, as established in the conditional water rights decree, can result in abandonment or cancellation of the water right. In re the matter of Board of County Commissioners of Arapahoe County, 891 P2d 952(Colo. 1995); Town of De Beque v. Enewold, 606 P2d 48(Colo 1980). The Colorado Supreme Court has equated due diligence deadlines as a defacto "statute of limitations" affirming cancellations of conditional water rights where diligent applications were not timely filed. See Broyles v. Fort Ryan Canal Company, 695 P2d 1136(Colo. 1985).

Legal Classifications of Water

As referenced above, Colorado generally follows the prior appropriation system for allocating its water, but there are several significant exceptions to the rule. Thus, it is important in the first instance to have an understanding of the various types of water in Colorado and how they are defined:

Surface Water

Surface water includes all water and rivers, streams, lakes, wetlands, and other natural waterways, and run-off from the same. Surface water is allocated according to the prior appropriation system. No administrative approval is required to create a water right in the first instance; however, adjudication is necessary to allow the water right to be ultimately recognized within the prior appropriation system.

Ground Water

Distinct from surface water, ground water is the water that is trapped in the soil and rock particles beneath the surface of the earth. Unlike surface water, the diversion of groundwater requires administrative approval in the form of well permits from the Colorado State Engineers Office prior to putting the same to any beneficial use. There exists three categories of

ground water for the purpose of understanding Colorado Water Law:

Tributary Ground Water - ground water that is hydraulically connected to surface water so as to influence the rate of flow of surface water is known as tributary ground water. While there exists many technical definitions, the simplest way of thinking of Tributary Ground Water is that this tends to be ground water that is replenished by surface water seeping into the ground. An example familiar to all of tributary ground water is water found underneath and surrounding a river or stream. Water from the stream seeps into the soils around the stream until the soils are saturated. The pumping of such ground water will eventually reduce the surface water in the stream because the surface water will continue to seep into the aquifer to fill the void left by any pumping. Thus, tributary ground water is specifically linked to surface water. An example of tributary ground water is the water immediately adjacent to the Yampa River through town especially on the bike path by the Iron Horse Inn.

Non-Tributary Ground Water - Ground water may be physically separated from surface water as a result of impenetratable layers of subsurface materials or by the distance between the ground water in question and the closest existence of any surface water. Non-tributary ground water is defined by statute as set forth in CRS §37-90-103(10.5) and is ground water located outside a designated ground water basin such that its withdrawal will not within 100 years deplete the flow of a natural stream of annual rate greater than 1/10 of 1% of the annual rate of withdrawal. The right to use non-tributary groundwater is allocated based upon ownership of the overlying land, rather than the prior appropriation system. This is a significant deviation from the Doctrine of Appropriation and is similar in concept to Riparian Rights. With non-tributary ground water, the owner of the overlying land may obtain a right to use non-tributary ground water by

obtaining a well permit from the state engineer or may seek to have the Water Court determine the non-tributary ground water rights prior to drilling the well.

Not Non-Tributary Ground Water - The final category is one of statutory creation and has virtually no significance in Routt County. The Colorado legislature has defined as a new category of ground water that located outside the boundaries of designated ground water within the Dawson, Denver, Arapahoe and Laramie - Fox Hills Aquifers in the Denver Basin.

Designated Ground Water

The final type of Ground water classification created by the legislature is groundwater that is within areas known as designated ground water basins. Designated ground water is ground water within the geological boundaries of a designated ground water basin that 1) in its natural course would not be available; 2) required for the fulfillment of decreed water rights; or 3) is an area not adjacent to a continuously flowing natural stream in which ground water withdrawals constitute the principle usage for at lease 15 years prior to the designation of the basin. Generally, there is a complex set of rules and statutes governing this category, none of which are readily applicable to Routt County.

How Much Water

The question of how much water is required for a particular use can be difficult to answer. The law is established to use water efficiently. Depending upon the circumstances, resolution of the amount of water to be taken may require the services of a water engineer. This issue is often complicated by considerations of whether existing water rights will be compromised, whether existing rights will need to be altered to allow a new use, whether a new place of use will impact senior water rights, or if junior water rights will be used and whether such will be reliable.

Impact Change of Use

If existing water rights are sought to be changed to new uses, this new use will require that one obtain from the Water Court a change of the use of the Water Right. Typically, if a new purchaser will be using water differently (changing an irrigation use to a domestic use) this will require a historic use analysis prior to obtaining such approval. A realtor is always wise in suggesting in writing that a water engineer be consulted if a purchaser intends to use water in a fashion different from a historical use. These include large complex projects, changes of water rights, and augmentation plans.

Irrigation

The amount of water required for irrigation depends on the type of crop and soil, the method of irrigation, and the natural precipitation and climate of the area in question. The amount of water that must be applied to meet crop irrigation requirements varies based upon the type of irrigation being used. Conventional soil irrigation methods are said to be approximately 55% efficient. Efficiency in this context is defined as meaning only 55% of the water applied will ultimately be utilized by plants. Sprinkler irrigation is approximately 75% efficient. Drip irrigation may be as much as 90% efficient. These efficiencies do not include any deep seepage losses that is customary resulting from evaporation or that resulting from unlined ditches. A general rule is often utilized establishing that by a direct flow of water diversion of one cubic foot per second (CFS) such is sufficient to irrigate 40 acres of agricultural crops in Colorado. Again, this rule of thumb may or may not be accurate depending on the soil type, seepage and other issues.

Agricultural property may also that benefit from the use of water by way of a mutual ditch company stock or contractual rights from a water conservancy district. Here, the ditch company or district is typically glad to make recommendations on how much water is required for irrigation, although many may also have regulations pertaining to the same.

Please make sure as a Realtor that when individuals are purchasing agricultural land, they consider not only the water rights historically used, but whether or not such water supply is sufficient. It is not uncommon that land historically irrigated may have been supplemented by water supplies from water conservancy districts or other water organizations. However, in instances where the supplemental supplies have been

sold or abandoned, the remaining supply may be inadequate to meet the intended irrigation requirements. Never presume that what was historically adequate is still sufficient. Inquire of your client what type of water uses they foresee. Remember, it is not uncommon that agricultural use is contemplated so as to effect the tax classification of the real property. Do not presume historical water use is adequate, even if the use is merely to satisfy tax classification as opposed to actual commercial benefit.

Ditch Companies

Ditch companies have been authorized by law in Colorado for over one hundred years. They may be non-profit corporations or they may be non-profit unincorporated associations. Most Ditch Companies that have full time employees are incorporated. Smaller ditch companies still operate as non-profit unincorporated associations. Such mutual ditch companies are not operated for the purpose of direct monetary gain, but rather are created for the purpose of providing water to their shareholders. The Colorado Supreme Court has recognized the special status of mutual ditch companies and has determined that "unique character of these corporations mandate different treatment which is not fully in accord with the principles applicable to corporations in general." Southeastern Colorado Water Conservancy District v. Fort Lyon Canal Company, 720 P.2d 133, 141 (Colo. 1986).

The mutual ditch company does not formally own the water in the ditch but is the owner of the easement encompassing the ditch and improvements in the ditch (for example headgates) which carries the water for the beneficial use of the owners of the water. The expenses of a mutual ditch company are assessed similar to a condominium association. The total expenses are divided amongst the percentage share ownership of the water and then collected accordingly. If an owner does not pay his/her ditch assessment then the ditch rider employee for the mutual ditch company may not allow water to be turned into that owner's property. Colorado has adopted statutes which grant mutual ditch companies the power to make these assessments on its members shares of stock to pay for ditch maintenance and upkeep. Statutory procedure for mutual ditch companies would have its equivalent in statutes regulating a condominium association and their authority and obligations with regard to assessments and maintenance.

The ownership and use of water is so vital to the settlement of the west that the Colorado Courts have determined that the operator of a ditch acts as trustee for the shareholders and is bound to protect their interest. This heightened sense of duty by mutual ditch companies for the benefit of their owners is another way the Colorado Courts and legislatures support ditch companies and their role in delivering water for beneficial use in arid Colorado.

Realtors are cautioned to advise their clients to investigate a ditch company if water rights in a ditch are to be transferred with the purchase of a parcel of property. The investigation should include determining the formation of the entity, its custom as to the keeping of regular minutes, its history of maintenance and upkeep, whether it has insurance to protect its activities, whether any shareholder has not received its share of water due to shortage, and whether the district is involved in or has been threatened to be involved in litigation. This due diligence would be much the same as the purchaser of a condominium with common area assessments.

Domestic or Household use

The typical family of four uses approximately 1/3 of an acre foot of water per year for in house uses, an amount specifically excluding outside irrigation (i.e. water the grass, garden, etc). In house use means water utilized in the kitchen, for washing clothes, or for baths and showers and for sinks and toilets. Only ten percent or less of domestic water is typically consumed. Ninety per cent or more of the water that is used in house is typically returned to the stream system through either underground percolation, septic system, or through a waste treatment plant.

Typically, where the source of water for a household use is not from a water treatment plant it is instead serviced by a well. This requires a well permit allowing a small capacity "exempt" well. This is a domestic well that pumps up to fifteen (15) gallons per minute benefiting a household. This type of water well does not require any augmentation plan (i.e. a replacement of water plan) and usually uses a small pressure tank of approximately 40 gallons which is typically more than enough to satisfy a single family household and its needs.

It bears mention that after a small subdivision will be served by one or more private wells. In this instance the subdivision

will typically be required to utilize an augmentation plan to replace the amount of water that is consumed by its owners and not returned to the source. In such a circumstance, an augmentation water supply will be needed to replace the water that is consumed by the subdivision users. As referenced above, if water use is restricted to in-house use only, an augmentation plan may require replacement of only approximately ten percent (10%) of the total conversion that is consumed. Outside irrigation or other uses, such as livestock watering, will substantially increase the amount of water that will need to be replaced.

When industrial or commercial uses exist, the amount of water needed or used depends on the specific use and general rules of thumb typically are not of any use.

If you know that a piece of property is being purchased for an industrial or commercial use, it is always prudent to suggest in writing at or about the time the contract is signed that a water engineer be retained by the buyer to make sure that there is adequate water for the intended use. Also, it is always a good idea to establish deadlines as to providing analysis of water and conditions upon which earnest money can be returned.

Exempt Wells

The Water Right Determination and Administrative Act of 1969 (See CRS §37-92-101 to §37-92-602) was designed to integrate tributary ground water and surface water use so as to provide maximum utilization of water resources by providing for flexible "plans for augmentation" and provide to the state engineer discretion to not administer water rights in a situation where curtailment of junior water rights would not result in more water being made available for a senior appropriator. See CRS §307-92-501(1).

As it applies to most real estate brokers in Routt County, the 1969 Act exempts the following types of small capacity tributary wells from application of the 1969 Act and administration under the priority system:

1. Wells not exceeding fifteen (15) gallons per minute of production and used for ordinary household purposes, fire protection, watering of poultry, domestic animals, and livestock on farms and ranches, and for

the irrigation of not over one acre home gardens and lawns but not used for more than three single family dwellings. This by far is the exemption seen most frequently in Routt County;

2. Wells not exceeding fifteen (15) gallons per minute of production and used for drinking and sanitation facilities in individual commercial businesses;
3. Wells used exclusively for firefighting purposes so long as said wells are capped, locked, and available for use only in fighting fires;
4. Wells not exceeding fifty (50) gallons per minute that were in production as of May 22, 1971 and were and are used for ordinary household purposes for not more than three single family dwellings, fire protection, the watering of poultry, domestic animals, and livestock on farms and ranches, and for the irrigation of not over one acre of gardens and lawns; and
5. Wells that are used exclusively for monitoring and observations purposes if said wells are tapped and locked and used only to monitor water levels and for water quality sampling.

For the first three types of wells, well permits are necessary. The wells themselves must be constructed within two years after the issuance of a permit, although the state engineer may extend the period upon a showing of good cause. A well permit is not required for the fourth type of exempt well unless it is relocated. Hence, if you are representing the Seller, make sure that the Seller has their well permit if you are listing a property using an exempt well. On the other hand, when representing a Buyer, demand a copy of the well permit immediately after placing a property under contract.

The legislative policy behind the exempt well provisions is to permit citizens to obtain a water supply in less densely populated areas for in-house and domestic animal uses where other supplies are not available. See CRS §37-92-602(6). The State Engineer's policy is generally not to issue an exempt well permit where well service to the property is available from a municipality or water district.

Prior to issuing a permit, even for an exempt well, the State Engineer must find that the proposed well will not cause material injury to vested water rights of others. There exists a rebuttal presumption of no injury to other water rights or existing wells if the proposed well meets the first exempt well criteria listed above and 1) will be the only well on the residential site and will be used solely for ordinary household purposes inside a single family dwelling and will not be used for irrigation; or 2) the only well on a tract of land of 35 acres or more; or 3) will be the only well on a cluster development locked, serving one single family residence, where the ratio of water usage in the cluster development does not exceed one acre foot of annual withdraw for each 35 acres within the cluster of development and such well will be used solely for household purposes with return flows from such uses return to the same stream system in which the well is located. See CRS §37-92-602(3)(b)(II)(a). Hence the standard is exceptionally low.

It is important to mention that although exempt wells are not administered under the priority system, they nevertheless have water rights that are vested by virtue of the application of water to a beneficial use. When considering whether to issue well permits, a State Engineer must consider possible injury that a non-exempt well will create upon an exempt well, and vice versa. Typically, this is not an issue for domestic use. However, as subdivisions become more crowded, do not presume facts.

One significant point of emphasis must be made pertaining to the original priority date of exempt wells. The 1969 Act specifically allows exempt well owners to adjudicate a priority for the exempt well like other water rights, except that the exempt well owner is entitled to a priority date equal to the original priority date of the well, regardless of when the Application is made. Once the exempt well owner obtains a priority, that priority shall be equal to the original priority date of the well.

Securing new Surface Water Rights

As previously mentioned, the Colorado Constitution guarantees the right to appropriate water from any natural streams through the application of water to a beneficial use. The water right itself is created at the time water is put to a beneficial use, but the owner of such water right is not actually entitled to

administration (i.e. enforcement) of the water right under the appropriation system until that water right is confirmed by a Water Court Decree (i.e, the owner cannot prohibit others from using junior rights that would compromise his own usage). To obtain a decreed water right and, more importantly, a priority that is enforceable under the Prior Appropriation System, the appropriator must demonstrate that all elements of an appropriation have been met by preponderance of the evidence. Once the Appropriator has put water to beneficial use, the appropriator may then seek a decree for a "absolute" water right. Where water has not been put to beneficial use, but there exists a requisite intent to do so, one may seek a decree for a "conditional" water right. At that point, once the conditional water right owner completes the appropriation with reasonable diligence they may obtain an absolute priority that relates back to the date on which the appropriation process was initiated.

Beneficial Use

As previously referenced, the Colorado Constitution provides for the right to divert the unappropriated water of a natural stream for "beneficial uses." See Colorado Constitution, Article 16, Section VI. This beneficial use requirement encourages the actual use of water and discourages the holding of water for only speculative purposes.

Courts have interpreted beneficial use most broadly. Beneficial uses include, but are not limited to, irrigation, mining, manufacturing, domestic and impoundment for recreational, fishing and other wildlife purposes.

Doctrine of Waste

The antithesis of beneficial use is waste. The wasting of water cannot be the basis of an appropriation. The limit of beneficial use is the amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish the intended use without waste. See CRS §37-92-103(4). Interestingly, waste is not specifically defined in any statute, but instead by a common sense approach tells one that any amount of water beyond that which would be reasonable needed to accomplish the intended purpose utilizing reasonable efficient practices constitutes waste. The Water Courts have not typically scrutinized the efficiency of any claimed use.

However, where there is no showing that an effort of efficiency is being made, a Court may deny a water claim.

Duty of Water

Because quantifying the amount of water to be used can be a challenge in and of itself, one of the limitations includes that of the "Duty of Water." This limitation takes into account that for irrigational uses, one should be allocated only the amount of water reasonably needed to be applied to a given tract of land to produce the maximum crop.

Reasonable Means of Diversion

Another foundation of Colorado Water Law related to beneficial use is a requirement that the appropriator establish diversion by reasonable means. CRS §37-92-102(2)(B) provides that a diverter may not:

. . . command the whole flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled.

Colorado Courts have required that water be diverted or removed from a stream to constitute a valid appropriation. Diversion is statutorily defined as "removing water from its natural course or location, or controlling water in its natural course or location by means of a ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump, or other structure or device. . . " See CRS §37-91-103(7).

Essentially, the means of diversion must be reasonable taking into account the use, amount, and other similar variables as to the water in question.

Making Conditional Rights Absolute

Once water has been beneficially used consistent with a conditional water right, the conditional water right owner may file an application to the water court to transition a conditional water right to an absolute one. This applicant will be required to provide proof as to when, how, and to what extent the water was first put to a beneficial use. This Applicant may also be required to show that the water used was legally available in priority. Accordingly, an applicant must carefully

document all water uses to support the application to make a conditional right absolute.

Only that portion of the water right that was placed to beneficial use may be made absolute. Once a water right is made absolute, the owner need not make any further showing of reasonable diligence with respect to that portion or those uses that have been made absolute. Such a flow rate is considered perfected and may be lost only by abandonment or adverse possession.

Abandonment

The abandonment of water rights results in the termination of that water right in whole or in part as a result of the intent of the owner to discontinue permanently the use of all or part of the water available under the water right. CRS §37-92-103(2). This is very important because it may appear by review of the public records that there exist water rights. However, if these water rights have been abandoned, a purchaser may be under the false impression that there exist water rights where there are none. Particularly as to older rights the public record is silent as to rights that have been abandoned. When a water right has been partially or wholly abandoned, the abandoned portion of the water right ceases to exist and the amount of water that the abandoned water right could have diverted becomes available to other water rights in order of their priority. The water court possesses jurisdiction over applications for determination of abandonment of a particular water right which usually are filed by the owner of a junior appropriator.

Abandonment occurs where there is a non-use of the water right coupled by the owner's intent to permanently abandon the right. Temporary non-use is not consistent with abandonment. An unreasonable period of unexplained non-use creates a rebuttal presumption of an intent to abandon a water right. This determination of what precisely constitutes an unreasonable amount of time varies with the facts of any given case. However, once there is a presumption of an intent to abandon, the water right owner then has the burden of establishing facts and conditions to the excuse the non-use and must show that the owner's intent was not to abandon that water right.

Above and beyond Court proceedings determining the abandonment of water rights, starting in 1990 and every ten (10) years

thereafter, each division engineer was required to compile a list of water rights that the division engineer has determined to be abandoned in whole or in part. For the purposes of this abandonment list, the failure for a period of ten years or more to apply the water available to a water right for a beneficial use when needed by the person entitled to use the water creates a rebuttable presumption of abandonment. The abandonment list for each water division is available online at <http://water.state.co.us/pubs/abandonment.asp>. If you are involved in the sale of agricultural property, take at the time of listing the property an opportunity to review this website. As an alternative, the local water engineer tends to be very approachable and do not hesitate to call. Never presume that water rights exist merely because you possess a piece of paper, decree or otherwise, that suggests such exists.

Also note that merely because a piece of property is included as abandoned by the water engineer does not mean that the right is abandoned legally. Any person can file a protest on or before June 30th of the year following such abandonment contesting the same. A protest should include evidence that water right is being used or justifies the non-use. At that juncture, the Water Judge is required to hold hearings and make determinations pertaining to the same.

Adverse Possession

People tend not to think of adverse possession in the realm of water rights, but such does exist. Water Rights are deemed to be real property for the purposes of adverse possession claims. Bagwell v. V-Hart Ranch, Inc. 690 P2d 1271 (Colo. 1984). The statutory period of adverse possession of real estate in Colorado is 18 years. See CRS §38-41-101. Where an individual claims ownership under color of title and payment of taxes of real estate, the statutory period for adverse possession is reduced to seven (7) years. See CRS §38-41-108. A party seeking to establish ownership of a water right by adverse possession must first establish his possession of the water right as being actual, diverse, hostile and under claim of right, as well as open, notorious, exclusive, and continuous for the prescribed period. Adverse possession claims, whether traditional real property or those involving water rights, tends to be fact specific.

If used by a co-owner of a ditch or reservoir or by a share holder in a mutual ditch company of more than his or her per

rata share of available water, such water use does not necessarily establish adverse possession. For adverse possession to occur under these circumstances, that individual must be actually prevented in some way from using their share of water by a person claiming adverse possession. See Fallon v Davidson 320 P2d 976 (Colo. 1958).

An adverse possession claim must be made against a specific decreed water right. A claim of adverse possession can never occur against unappropriated water in a stream, which remain property of the public under the Colorado Constitution. At most, this circumstance will yield a result where the appropriation of water right must be adjudicated in the Water Court before the State and Division Engineers will recognize any priority and such will be junior to water rights already decreed.

Conveyance of Water Rights

As one might expect, because the priority of senior water rights, existing water rights often provide a more reliable water supply than new appropriations. However, the acquisition of senior rights is hardly straight forward. Depending on the purchasers intended use, acquisition of these rights may also involve somewhat costly and time consuming efforts before the Water Court to obtain required approvals for use. If you recall, a change of use will result in a required change of decree.

To justify and protect an investment, those buying water rights need to consider:

- a) the conducting of an adequate pre-purchase "due diligence" investigation into the legal status and suitability of the water rights for its intended use; and
- b) the making certain that the purchase will include all interests necessary for use of the water right.

Please recall that the sale of a water right is entirely independent of the real property being sold. Merely because real property is being sold does not by itself include the sale of the water rights that benefit that real property.

Due Diligence

The question of who has to perform due diligence in advance of closing is one of negotiation. As one might expect, a valuation of water related issues should be made prior to any buyer paying too much for inadequate water. Often, an eager seller can be persuaded to take on the responsibility for curative work to provide for the conveyance of water. It is also noted that well prior to closing is the best time to secure affidavits and other information concerning the historic use of water rights from knowledgeable individuals. This will help water engineers to calculate the amount of transferable water in later Water Court change of right proceedings, if such are necessary. Further, a valuation can uncover additional or different water rights than the seller thinks he or she owns.

Typically, the amount of due diligence necessary prior to closing will be directly proportional to the purchase price. One might expect a much more detailed and intrusive evaluation of water rights in the purchase of a ranch for \$20 million than a 35 acre rural parcel for \$100,000. Likewise, if the use of water will be merely for that of livestock watering, that is entirely different fact pattern than if there is an anticipated development.

Purchase Contract Language

While there are many types of contract language that might be used, one set of suggested language might include:

Buyer's obligation under this contract is expressly conditioned upon Buyer, at Buyer's sole expense, having obtained, on or before ninety (90) days after the effective date of this contract, a water opinion prepared by an attorney or other duly qualified person of Buyer's choosing, which water opinion shows the water rights to be in a status of title, quantity, and condition satisfactory to Buyer at Buyer's sole discretion. The legal description of the Water right shall be determined from such water opinion. If this condition is not met on or before such date, and Buyer has given written notice of such fact to Seller within the time for such condition to have been met, Buyer, at Buyer's sole option, shall have the right to terminate the contract and, upon such termination, to receive all amounts previously paid to Seller

hereunder, and both parties shall be relieved of all further obligations hereunder.

A word of warning, if you use this language you assume any and all risks as the providing of this language is not any warranty or guaranty as to the applicability of the same as to any circumstance.

Title to Water Rights

As a historical matter, the transfer of water rights by recorded deed has been at best haphazard. Accurate description of water rights often do not appear in deeds or include only some of the water rights historically associated with the land in question. Deeds can also describe water rights that long ago were either conveyed or abandoned. It is telling that standard land title and insurance policies issued in real estate transactions do not insure against defects in title to associated water rights.

Because water rights are typically listed in the "Exceptions" portion of the title insurance policy, the question then becomes what to recommend pertaining to the purchaser of water rights. To reduce the risk of buying water rights from someone who does not own them, a Buyer can either a) attempt to purchase specific water right title insurance or b) obtain a formal water right title opinion from an attorney. Each of these requires time and money while typically remaining subject to a list of exceptions and limitations as to the scope of the policy or the opinion. As an alternative to a full blown title opinion, a Buyer may wish to obtain a less intrusive evaluation of the chain of title from an attorney who only looks at a portion of the time the water rights in question have existed (sometimes referred to as a "take-off").

Where the water rights are a meaningful portion of the purchase price, a Buyer considering not undertaking any title evaluation should ask the fundamental question as to whether or not the transaction makes sense if no water rights are ever received. From a liability point of view, it is important that a broker reduce to writing recommendations that a Buyer conduct his/her own due diligence pertaining to the purchase of these water rights and, more importantly, that the purchaser is not relying upon representations or positions of the broker in making the ultimate decision to purchase.

The entire issue of water ownership is fraught with peril and as water becomes more scarce based upon growing population, it is a certainty that claims against brokers involving the failure to adequately address water rights will be more common. The broker should not take the position of an attorney, but should document that the Buyer should be undertaking their own due diligence emphasizing that it is the Buyer that bears the risk, not the broker.

Application for Decree

Any party seeking a determination of a water right must first file a Verified Application with the Water Clerk of the appropriate Water Court. The party seeking an award of water rights is referred to as the "Applicant." In the most general sense, the Applicant sets forth the facts supporting the water right sought. Those facts will absolutely depend on the type of water right being sought in the application (absolute, conditional, storage, exchange, etc). The services of a Water Engineer are often sought to provide the requisite data required for a completed application. The documents utilized in this process are of a form nature and can be easily obtained.

Unlike other civil litigation, which is commenced by the filing of a Complaint then service of the Complaint and Summons upon the defendant, here the Water Clerk prepares a resume of all Applications of the Water Division that had been filed in the preceding month. The resume provides the name and address of the Applicant, description of the water right involved, and the description of the ruling sought. No later than the end of that month, the Water Clerk then issues an application of each resume in a newspaper of general circulation (here the Steamboat Pilot), as well as any other county as determined by the water judge. Applications must also be supplied by mail to the record owner of property upon which the water right is claimed. This is a distinctive part of Water Law in that ownership of the land upon which the water is diverted is not a prerequisite for filing a water claim.

Statement Of Opposition

Any individual who wishes to oppose an Application or a Republished Amended Application may file with the Water Clerk a Verified Statement Of Opposition establishing facts as to why the Application ought not be granted or why it should only be granted in part or upon certain conditions. See CRS §37-92-

302(1)(b). This Statement Of Opposition must be filed by the last day of the second month following the month in which the Application is filed. See CRS §37-92-302(1)(c). It is not a requirement that one own a water right in order to oppose an Application. The Statement of Opposition should place the Applicant, the Division Engineer and the Water Referee on Notice of the specific concerns.

After an Application has been filed, the Water Judge refers the matter by Order to a Referee. The Referee must possess such training as to qualify them to render expert opinions and decisions on matters pertaining to water rights administration and adjudication. See CRS §37-92-203(6). The Referee must investigate whether the statements in the Application and the Statement of Opposition are true and must become fully advised with respect to the subject matter of the application and the statements of any opposition. The investigative process includes a mandatory consultation with the Division Engineer. As a consequence of the consultation, a report typically entitled the "Summary of Consultation" will be prepared by the Division Engineer.

The Referee possesses the discretion to determine whether or not to approve the Application or disprove the same. It is important to note that an Application can be denied even in the circumstance where there is no Opposition filed. CRS §37-92-303(1). A Referee's Ruling must contain the name of the Applicant, the location of the point of diversion or place of storage, the means of determination, the type of use, the amount and priority of the water rights, and all other pertinent information. See CRS §37-92-303(1). Although there exists a requirement that the Water Referee make his or her ruling within sixty (60) days from the last day on which Statements of Opposition are to be filed, unless extended by a Water Judge, time frames are not strictly followed. Within twenty (20) days after the date the Water Court mails its ruling, any person, even a person not party to the proceedings, who wishes to Protest or support the ruling must file a pleading with the Water Court setting forth the Protest or support. A Protest must clearly identify the ruling being contested and establish a factual legal ground for the Protest. Improperly prepared Protests may dismiss. Even in the circumstance where no Protests are filed, a Water Judge must confirm and approve the ruling of the Referee by Judgment and Decree. The Judge may reverse, or reverse and remand any ruling that he deems to be

contrary to law. The ultimate decisions of the Water Judge are subject to the same statutory standards as the Referee.

There also exists an alternative process known as "re-referral." A re-referral may occur anytime after the filing of Statements of Opposition upon Order of Referee. A Referee may, upon his or her own volition, have the matter re-referred or such may occur as a result of motion by any party. This occurs very infrequently. In an event of re-referral to the Water Judge prior to the consultation with the Division Engineer, the Division Engineer must instead give the Court a written recommendation within thirty (30) days of re-referral.

Rulings that have been protested and matters that have been re-referred to the Water Judge are reviewed by the Water Judge consistent with other civil proceedings. An Applicant will sustain the burden of proof pertaining to the Application and will have to provide evidence by form of testimony and exhibit so that a ruling can be provided. The ultimate decision by the Water Judge with respect to a protested ruling of the referee shall either confirm, modify, reverse or reverse and remand (return the matter to the referee) of the ruling. See CRS §37-92-304(5). A Water Judge can modify the ruling and it is entirely within his/her power to grant a different priority or may specifically alter the terms and conditions with respect to that granted by the Water Referee.

Ultimately, the decision of the Water Judge can be subject to a "Motion for Reconsideration," at which time either party may request that the Judge revisit his decision, a request that the Judge may either grant or deny. Lastly, the decision of the Water Judge itself is appealable to only the Colorado Supreme Court. There exists no ability of the Colorado Court of Appeals to review the matter.

EXAMINING OF WATER RECORDS

Research at the State Engineer's office pertaining to surface water rights should begin with an identification of the particular Water Division and Water District in which the diversion structure is located. A relatively inexpensive map setting forth the boundaries of the Divisions and Districts can be purchased from the State Engineers office. Currently, the State Engineer's Office is undertaking the availability of decrees electronically. It is noted that pre-1969 Act surface rights are also searchable via traditional card indexes. A trip

to the State Engineer's office will provide an ability to review 4x6 inch cards organized by Water District and then alphabetically according to structure name within each water district. The structure index cards establishes information on the Water Right Decree to the structure such as the amount of water decreed. Generally speaking, it is important to recall that a trip to the Water Engineer's office is not the same as a trip to the Water Court. Further, it is often necessary to review records held by the Clerk and Recorder of the County in which the diversion exists. Typically, if it is necessary to research the public record pertaining to these water rights, it is often best to employ the services of legal counsel and to not undertake these types of tasks and obligations as a broker. Water records are notoriously difficult to locate and then often deceiving in nature once found. What may look like a document that would clearly establish a water right sometimes is anything but. Chains of title that are easy to follow when looking at real estate but may be nothing but the preverbal "red herring" when it comes to water law.

CONCLUSION

The purpose of this presentation is to create an environment where brokers are more aware of issues concerning water and the steps that need to be taken early on concerning the same. When listing property where water rights will be required to be resolved prior to closing, start your due diligence immediately. Be particularly mindful of circumstances where physical examination (such as points of diversion) must be made and where such cannot be accomplished during winter months. Issues involving Water Rights typically cannot be resolved in a matter of days or even weeks. By being proactive as a listing broker in addressing issues involving water rights at the time of listing, the likelihood of moving forward from the time of contract to closing resulting a successful closing will increase dramatically. Likewise when representing a buyer, make sure to identify issues at the time of going under contract involving water rights. Take that time to begin to educate your buyer that they might be better served by the retaining of a water lawyer or other professional so as to begin the immediate resolution of water issues.

The existence of water issues can create much anxiety whether representing the Buyer or Seller. Furthermore, as water becomes more scarce, it is almost a certainty that greater litigation

will be initiated against brokers pertaining to post closing realities involving water. By making sure these matters are identified under circumstances where other professionals are consulted in a timely fashion, such will result in more closings and less post closing litigation.

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