

Water Rights Title and Due Diligence



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Water Rights and the Economy



- **Decreased tap sales in existing water districts**
 - Newer water districts especially vulnerable
 - E.g. Parker's Rueter-Hess (2005-1700 taps; June 2009-18 taps)
 - E.g. Arabian Acres
 - E.g. Colorado Springs Utilities
 - Check water district financials before buying
- **Senior water rights holding value**
 - Augmentation requirements and population growth help stabilize water values
- **Difficult to get new water projects started; those financed before crash are proceeding**

Elements of a Water Right in CO



- **Right to**
 - divert
 - from a certain point
 - on a certain source
 - a specified amount of water
 - for a specific beneficial use
 - at a specific location

See Exhibit 1



WaterPresentationExhibit1.pdf

But, how much water REALLY!



- True measure of a water right is the actual historic consumptive use, NOT necessarily the decreed amount!
 - Amount of water lawfully diverted and applied to a beneficial use that is actually used
 - Decree for 10 cfs but ditch never capable of carrying more than 7 cfs – right is for no more than 7 cfs

Cooperation in Water Due Diligence Efforts



- **Water Attorney** – legal status of water right (title, historic use, legal suitability for new use)
- **Water Engineer** – physical characteristics of water and value (historic consumptive use, suitability for new use)

Due Diligence Resources



- **State Engineer records** (e.g. decrees, diversion records, division tabulations, abandonment lists, well permits)
 - See Exhibits 2, 3, 4



WaterPresentationExhibit2.pdf



WaterPresentationExhibit3.pdf



WaterPresentationExhibit4.pdf

- **Court records** (e.g. decrees, change of water rights, disputes involving subject water rights)

Due Diligence Resources



- Clerk & Recorder records – Grantor/Grantee search (e.g. deeds, encumbrances, lis pendens, quiet title, foreclosures, water leases)
 - See Exhibits 5, 6



WaterPresentationExhibit5.pdf



WaterPresentationExhibit6.pdf

- Ditch and reservoir company records (e.g. share transfers, restrictive by-laws, assessments, diversion records, water/share/year)

Due Diligence Resources



- On the ground surveys (e.g. interviews with water users, division engineer/local water commissioner, land owner, other water users, neighbors; consumptive use analysis; land/acreage served by subject water; return flows of unused water; state of diversion works; environmental setting)
- Research regarding legal framework surrounding water (e.g. federal reserved water rights, interstate compacts, in-stream flow rights, environmental statutes)

Potential Problems (why due diligence is important)



- **Abandonment: non-use of available water for an unreasonable length of time with an intent to abandon the right**
 - Seller produces a decree for 10 cfs water right, absolute
 - State Engineer diversion records show no diversions for last 10 years
 - On the ground examination reveals diversion works are inoperable
 - Interview with ranch manager reveals that he knew diversion works were inoperable but the owner told him not to worry about it because they were no longer irrigating crops on that land anyway
 - Result: the water right is highly susceptible to an abandonment action by the State Engineer and of little or no value
 - See Exhibits 7, 8



WaterPresentationExhibit7.pdf



WaterPresentationExhibit8.pdf

Potential Problems (why due diligence is important)



- **Adverse possession: water rights = interest in real property and can be adversely possessed**
 - Example: your seller produces his vesting deed for 2 cfs water right but interviews with other water rights holders on the same ditch reveal that the neighbor has been using his own 2 cfs plus your seller's 2 cfs for 20 years and the seller has never stopped him from doing so
 - Result: value of water right is less because of possible adverse possession claim
- **Affect of new adverse possession statute on water rights**

Potential Problems (why due diligence is important)



- **Undeclared water uses on subject land**
 - E.g. buyer notices ponds on subject land – intends to use for stock watering or as fishing pond for children
 - Due diligence reveals ponds are not decreed
 - Therefore, ponds open to attack by senior water rights holders – presumption of injury – possibly have to drain ponds
 - Result: ponds of little to no value unless water rights application is filed with water court and decree granted – then have to operate within priority

Potential Problems (why due diligence is important)



- **Ambiguities in chain of title (very common!)**
 - **Ambiguous description or incomplete description of water rights**

- ✦ **See Exhibit 9**



WaterPresentationExhibit9.pdf

- **Water rights not described in conveyance document**

Ambiguities in Chain of Title



- How to deal with ambiguities in chain of title
 - Intent to convey water rights?
 - Look to extrinsic evidence:
 - ✦ Ditch company share records
 - ✦ Language in earlier deeds in chain
 - See Exhibits 10, 11



WaterPresentationExhibit10.pdf



WaterPresentationExhibit11.pdf

- ✦ Separate deeds for water
- ✦ Language on encumbering documents
- ✦ Interviews with knowledgeable parties
- ✦ State Engineer records re: water rights on the land

Potential Problems (why due diligence is important)



- **Water not suited for new intended use**
 - **Water quality**
 - **Environmental road blocks (e.g. ESA, wetlands)**
 - **Other legal or physical barriers, examples:**
 - ✦ **Restrictive ditch company by-laws**
 - ✦ **Bureau of Reclamation project involved**
 - **See Exhibit 12**



WaterPresentationExhibit12.pdf

- ✦ **Interstate compacts**
- ✦ **Federal reserved water rights (e.g. Indian water rights, national parks and monuments, national forests)**
- ✦ **In-stream flow rights**

Valuing Water Rights



- **Largely function of:**
 - Priority of water right
 - Amount of water
 - Historic consumptive use
 - Reliability of water
 - Status of title
 - Restrictions on water's use