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CRE Commission-approved contracts: Water rights tips, traps

This is the fifth in a series of articles that come from some years of experience using the Colorado Real Estate Commission-approved Contracts for Purchase and Sale of Real Estate. This is the first of two articles about water rights.

The contract addresses the water supplies associated with the property in the section on property. Water rights are not, however, included in the contract's definition of "property." Water supplies may include water rights, which are rights to use water that have been decreed by the water court for a specific beneficial use, in a specific amount, under a determined priority. Under Colorado law, water rights are considered real property and should be conveyed as such. (See C.R.S. § 38 30 102.) Water rights in Colorado are, however, separate and distinct property rights from land and live in their own legal world. Hence, Colorado has water courts, water judges, water engineers and a lot of water lawyers.

In Colorado, water rights are generally administered by the Colorado Division of Water Resources according to a priority system. In most locations, one must have legal authorization prior to diverting, storing or pumping any amount of surface water or groundwater for any purpose. The legal authorization can come in many forms, including: 1) taps or extra-territorial service agreements from municipalities, special districts or other central water systems (e.g., homeowners' associations); 2) shares in mutual ditch or reservoir companies that entitle the owner to delivery and use of a pro rata share of the water rights held by the company; 3) various types of well permits issued by DWR to authorize the use of groundwater; and 4) various types of water court decrees that serve to confirm water rights



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2) nonexempt well permits that authorize amounts and types of groundwater use from tributary aquifers pursuant to the priority system; and 3) "nontributary" well permits that authorize amounts and types of use of groundwater from certain designated groundwater basins (e.g., the Denver Basin) that are administered separate from the priority system. Water court decrees can include approvals of surface, storage and underground water rights, as well as plans for augmentation or exchange that can facilitate out-of-priority water use during times of shortage. **Tip:** Unless the property's water supply will come from a tap, consider getting professional advice from a water lawyer or other water rights professional.

Tip: The contract should specify the water supply and the water rights associated with the property that are included in the sale using the same description that is contained in the vesting deed (or other instrument of conveyance) for the water supply. The water rights may have been conveyed in the vesting deed for the property, but often they are not, in part because water rights are more commonly conveyed without warranties by quit claim or bargain and sale deed, whereas land is conveyed by general or special warranty deed. And some interests in

priorities.

Common types of well permits include: 1) exempt well permits that generally serve to authorize small-capacity residential or commercial use of groundwater exempt from the priority system;

2) nonexempt well permits that authorize amounts and types of groundwater use from tributary aquifers pursuant to the priority system; and 3) "nontributary" well permits that authorize amounts and types of use of groundwater from certain designated groundwater basins (e.g., the Denver Basin) that are administered separate from the priority system. Water court decrees can include approvals of surface, storage and underground water rights, as well as plans for augmentation or exchange that can facilitate out-of-priority water use during times of shortage. **Tip:** Unless the property's water supply will come from a tap, consider getting professional advice from a water lawyer or other water rights professional.

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water rights might not be conveyed by a deed at all, as discussed below. The important thing for purposes of the contract is to identify the conveyance document, and include the original descriptions of the water rights and well permits, if known, together with a statement that any other water rights historically associated with or utilized upon the property also are included. If all of those water rights are not included in the sale, add a reservation of the water rights that the seller does not intend to include. Then, during the inspection and title review periods, the buyer should develop a complete understanding of what water rights or other rights to water are to be conveyed to it and include accurate descriptions in the deed, and any other necessary conveyance instruments at closing.

Trap: Although water rights may be an appurtenance to the land, if a deed merely recites "all appurtenant water rights," it may not convey all the water rights owned by the seller. Whether or not that language conveys a particular water right depends on the intent of the parties. See *Arnett v. Linhart*, 40 P. 355 (Colo. 1895). **Tip:** Include a complete description of the water rights that are included in the sale, and any water rights that are being reserved by the seller, in the contract and the deed and in any other necessary conveyance instruments at closing.

Tip: Part of the review of title to the property by a buyer should include title research into the water rights being conveyed and their ownership. There is no central registry for the ownership of water rights. Water courts do not determine title to or ownership of water rights. Title insurance companies do not insure title to water rights, and they provide little assistance in this task as water rights are expressly excepted from the title insurance policy for the property. Title research is best

accomplished by an experienced water lawyer. Though few lawyers will issue title opinions for land, water lawyers do issue title opinions for water rights.

Trap: The contract does not contain a specific procedure to address title to water rights. Because water rights are not included in the definitions of the "property," they are not part of the title review procedure in § 8 and they would be only incidentally covered in the Inspection provided for in § 10.8.3, which suggests that title to water should be addressed as an Off-Record Matter. § 8.7 advises that "water on or under the property" might "affect the title, ownership and use of the property." **Tip:** When the purchase includes significant water rights, supplement the contract so the buyer has the right to do proper due diligence about the water supply, including as to title, quantity and quality, and to raise issues with the seller in the same way as the buyer can with respect to the property.

Tip: Consider adding a provision to § 10.6.1 (Due Diligence Documents) that the seller provide relevant information regarding water and water rights. Useful information would include all documents related the water rights and rights to use water on the property, including water court decrees and other filings from the water court proceedings, maps, permits, copies of any water share certificates together with mutual ditch or reservoir company articles and bylaws, any contractual rights to use water, irrigation or other historical use affidavits or records from the seller, diversion records, well pump test reports and water quality test results.

In the next article in this series, we will address the conveyance of water rights by the buyer to the seller. ▲