

# SAFEGUARDING COLORADO'S WATER SUPPLY: THE NEW CONFLUENCE OF TITLE INSURANCE AND WATER RIGHTS CONVEYANCES

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*As water rights transfers in Colorado increase in magnitude and frequency due to water scarcity and population growth, it is becoming increasingly necessary to have a method of protecting water rights owners against unknown risks or encumbrances. The inability to obtain reliable new water rights through appropriation has compelled many municipalities, businesses, and other water users to purchase or lease existing water rights. The emergence of water rights title insurance in Colorado has become an important development because of the greater potential for defects and ambiguities in water rights records. Despite the current limitations in water rights title insurance policies, this comment argues that this extension of title insurance is a positive development for protecting water rights ownership.*

## INTRODUCTION

The combination of water scarcity and rapid population growth has caused Colorado to evolve from a state where water rights are acquired through appropriation to a state where existing water rights must be purchased from other water rights owners. In many areas of Colorado and other western states, the inability to obtain reliable new water rights through appropriation has forced municipalities, businesses, and other water users to purchase or lease existing water rights. Thus, new water supplies are primarily obtained by acquiring older, more reliable agricultural rights and transferring them to municipalities, golf courses, ski areas, energy producers, and other new water users.<sup>1</sup> Cities have spent

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1. See James N. Corbridge, *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law*, 69 U. COLO. L. REV. 503, 503 (1998).

millions of dollars in the last several decades<sup>2</sup> on the acquisition of existing water rights in order to meet the increasing water demands of growing populations.<sup>3</sup>

Because Colorado law considers a water right to be a form of real property,<sup>4</sup> water rights conveyances can be made either in conjunction with or completely independent of other property transactions.<sup>5</sup> The conveyance of water rights can present significant issues. One of the current issues facing municipalities and other water rights purchasers is the potential misfortune of purchasing water rights from a seller who does not own title to the water right or who owns title to substantially less than the seller intends to convey. Failure to verify the ownership of existing water rights prior to the close of a transaction can lead to unfortunate results for any purchasing party. This is particularly true when a city or municipality spends millions of dollars to acquire water rights, and the actual acquisition and its benefit to the residents depends on the seller's valid ownership. With water rights acquisitions of this scale, and with so many people relying on a successful conveyance, it is important to have a method of assuring purchasers that they are receiving full ownership of the water right being conveyed. This comment analyzes title insurance for water rights as a potential solution to the risk of title uncertainties in water rights conveyances.

As with the purchase of other real property, ownership of water rights should be verified to ensure the seller has valid title and is protected against undetectable title risks. Title insurance policies issued in standard real estate transactions do not insure against title defects pertaining to associated water rights.<sup>6</sup> However, in recent years some title insurance companies have begun issuing title insurance specific to water rights.<sup>7</sup> A water rights title insurance policy insures against unknown defects in title to water rights and provides an opportunity for the regulated protection of the purchasers and mortgagees of water rights interests.<sup>8</sup>

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2. See, for example, David Olinger & Chuck Plunkett, *Liquid Assets: Turning Water Into Gold*, DENVER POST, Nov. 20, 2005, at A1, for a recount of how the City of Broomfield, Colorado paid \$58 million between 1995 and 2001 in water rights purchases (adding that Broomfield's City Manager, George Di Ciero, calculates that "if Broomfield had to buy the same amount of water at today's prices, it would cost \$110 million").

3. Joel C. Davis, *Water Title Examinations*, 34 ROCKY MTN. L. REV. 509, 509 (1962).

4. See *Knapp v. Colo. River Water Conservation Dist.*, 279 P.2d 420, 425 (Colo. 1955).

5. See A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 5:71, at 5-129 (2005).

6. See TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C., *ACQUIRING, USING, AND PROTECTING WATER IN COLORADO* 77 (2nd prtg. 2004).

7. See discussion *infra* Part III.B.

8. See, e.g., Stewart Water Information, L.L.C., <http://www.stewartwater.com> (last visited Nov. 21, 2005).

Parties involved in water rights transactions, especially transactions of the magnitude of municipal water rights acquisitions, would benefit from verified ownership information and the security of water rights title insurance.<sup>9</sup>

This comment examines the problems water users face when acquiring existing water rights and discusses the recent emergence of water rights title insurance policies. Part I surveys the history and development of Colorado water law and discusses the current status of the state's water supply, including the increase in water rights transfers. Part II discusses water rights acquisitions and the importance of verifying water rights ownership, and also outlines current difficulties in determining valid title to water rights. Part III introduces title insurance as a valuable method of protecting water rights purchasers. This section gives a brief overview of title insurance and explains the process of issuing title insurance policies specifically for water rights. In addition, Part III explains how the extension of title insurance in Colorado is a positive development for protecting water rights acquisitions and concludes with a discussion of current limitations in water rights title insurance policies.

## I. COLORADO WATER LAW

Although Colorado water law initially focused on resolving the problems miners faced using the limited supplies of available water, farmers came to rely on the developing body of water law, which was subsequently incorporated into the state constitution.<sup>10</sup> Colorado water law has evolved from rules to facilitate the simple needs of miners and farmers to a highly technical appropriation system governed by water courts and the State Engineer.

### A. *A Brief History and Overview*

Colorado water law is firmly rooted in the state's history, and it has evolved over time to adapt to changing needs of the state's population. Although Colorado's rules for the use of water emerged during the 1859 Colorado gold rush, the first water right was an 1852 appropriation for irrigation.<sup>11</sup> Even before Colorado attained statehood, its courts held that Colorado water law arises from necessity in an arid climate and that it

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9. *See id.*

10. JAMES N. CORBRIDGE JR. & TERESA A. RICE, *VRANESH'S COLORADO WATER LAW* 7-9 (rev. ed. 1999).

11. *See* 2 *WATERS AND WATER RIGHTS* § 11.02(d) n.36 (Robert E. Beck ed. Supp. 2004).

includes the right to cross public or private lands to build water diversion and conveyance structures.<sup>12</sup> This doctrine was subsequently adopted by the Colorado Constitution, which mandates that “[t]he 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 . . . .”<sup>13</sup> The constitution also guarantees that “[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.”<sup>14</sup> It was not until the landmark Colorado Supreme Court case, *Coffin v. Left Hand Ditch Co.*, however, that the state officially adopted the doctrine of prior appropriation as the fundamental standard of water allocation, holding “the first appropriator of water from a natural stream for a beneficial purpose has . . . a prior right . . . to the extent of such appropriation.”<sup>15</sup> This decision was an explicit rejection of the riparian doctrine, the primary water law framework imported to the eastern United States from England, which essentially apportioned water rights to those landowners whose property abutted a natural watercourse.<sup>16</sup> Given Colorado’s arid nature, the appropriation system was more suitable because diversion of water was essential to making the lands agriculturally productive.<sup>17</sup> Limiting the use of water to only riparian lands would have severely restricted population growth and development.<sup>18</sup> Colorado’s adoption of the prior appropriation doctrine, illustrated by the phrase “first in time, first in right,” grants water rights

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12. See, e.g., *Yunker v. Nichols*, 1 Colo. 551, 553 (1872) (“In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law.”).

13. COLO. CONST. art. XVI, § 5.

14. COLO. CONST. art. XVI, § 6.

15. 6 Colo. 443, 447 (Colo. 1882). “The doctrine of priority of right by priority of appropriation for agriculture is evoked, as we have seen, by the imperative necessity for artificial irrigation of the soil.” *Id.* at 449. Colorado extended its adjudication and administration of water rights and their priorities to all beneficial uses in 1903. See *Empire Lodge Homeowners’ Ass’n. v. Moyer*, 39 P.3d 1139, 1149 (Colo. 2001).

16. Under riparian law, those with land which abuts a stream have a legal right to use the stream’s water. See TARLOCK, *supra* note 5, § 3:7, at 3–9 (citing *Tyler v. Wilkinson*, 24 F. Cas. 472 (C.C.D.R.I. 1827)).

17. Because annual rainfall averaged less than fifteen inches, melting snow was the principal supply of water in the state. See CORBRIDGE & RICE, *supra* note 10, at 3. Thus, most surface water available for use at the time of settlement in Colorado fluctuated widely with the time of year. See JOE DISCHINGER & SARAH KLAHN, *FUNDAMENTALS OF WATER LAW IN COLORADO: PROTECTING WATER RIGHTS, USE AND QUALITY* 18 (2003). For example, 90 percent of the South Platte River’s water flow occurred during only three months of the year. *Id.* In this environment, mining and agriculture were almost unfeasible without allowing water to be diverted from the stream for use. *Id.*

18. CORBRIDGE & RICE, *supra* note 10, at 7.

prioritized by the chronological order in which they were appropriated. The doctrine of prior appropriation generally consists of three requirements for obtaining a water right: (1) intent to make an appropriation; (2) taking or diverting the water from the stream; and (3) application of the water to beneficial use.<sup>19</sup>

Although the right to appropriate water in Colorado is constitutionally guaranteed, appropriators must use the statutory procedures prescribed in the Water Rights Determination and Administration Act of 1969<sup>20</sup> to receive a judicial decree from the proper water court in their district.<sup>21</sup> The adjudication of the water right establishes the source and amount of the water supply, the point of diversion, the type and place of use, and the priority date of the water right.<sup>22</sup> The State Engineer is responsible for administering water rights in priority and preventing injury to other water users.<sup>23</sup>

Water rights do not involve complete ownership of water but rather give the holder the right to use water for a particular beneficial use.<sup>24</sup> The Colorado Supreme Court defines a water right as "a right to use beneficially a specified amount of water, from the available supply of surface water or tributary ground water, that can be captured, possessed, and controlled in priority under a decree, to the exclusion of all others not then in priority under a decreed water right."<sup>25</sup> Despite variation in the requirement for a diversion, water must always be applied to benefi-

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19. TARLOCK, *supra* note 5, § 5:42, at 5-72; *see also* Farmers' High Line Canal & Reservoir Co. v. Southworth, 21 P. 1028, 1030 (Colo. 1889).

20. COLO. REV. STAT. ANN. §§ 37-92-101 to -103 (West 2005).

21. The 1969 Act created seven water districts based on the drainage patterns of Colorado's main rivers. Each water division has its own division engineer, water judge, water referee, and water clerk.

22. COLO. FOUND. FOR WATER EDUC., CITIZEN'S GUIDE TO COLORADO WATER LAW 6 (2003).

23. *See* COLO. REV. STAT. ANN. § 37-92-301(1), (3) (West 2005).

24. *See id.* §§ 37-92-101 to -602 (1998).

"Beneficial use" is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife. . . . For the benefit and enjoyment of present and future generations, "beneficial use" shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree.

*Id.* § 37-92-103(4). Despite potential ambiguity because the statute does not define "waste," the definition of beneficial use clearly allows for a full range of possible uses. *See* CORBRIDGE & RICE, *supra* note 10, at 44.

25. Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 53 (Colo. 1999).

cial use in order to establish an appropriation, and the beneficial use becomes the “basis, measure, and limit” of the appropriation.<sup>26</sup> Water rights are prioritized in the order each right was applied to beneficial use and adjudicated, and the priority list is used to distribute available water during times of shortage.<sup>27</sup>

### *B. Current Status of Colorado's Water Supply*

Water availability is determined by both its physical and legal limitations. The physical limitations refer to the water supply accessible from natural stream flows and tributary aquifers.<sup>28</sup> Legal limitations include the amount of water that has already been validly appropriated to other users in the state, as well as water that must be allowed to flow out of the state in order to fulfill interstate water compacts or equitable apportionment decrees as mandated by the United States Supreme Court.<sup>29</sup>

By the late 1960s, it became evident that the main river systems of Colorado—specifically the South Platte, Rio Grande, and Arkansas Rivers—had become over-appropriated.<sup>30</sup> Because almost every river and stream in Colorado has been over-appropriated for years,<sup>31</sup> it has become increasingly difficult to obtain substantial and reliable new water supplies under junior rights.<sup>32</sup> Junior water rights are not in priority regularly enough to ensure adequate water to meet water use demands.<sup>33</sup> Rather than developing new water supplies by acquiring less reliable junior water rights, water rights users have turned to other methods to meet their growing demand. Water users have relied more on ground water supplies,<sup>34</sup> water conservation,<sup>35</sup> and methods of reallocating existing

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26. *Id.*

27. See TARLOCK, *supra* note 5, § 5:30, at 5-49.

28. See COLO. FOUND. FOR WATER EDUC., *supra* note 22, at 9.

29. *Id.*

30. See *Empire Lodge Homeowners' Ass'n. v. Moyer*, 39 P.3d 1139, 1149-50 (Colo. 2001). Water is over-appropriated when “in the irrigation season, except during storm and flood times, there is not enough water in the streams to satisfy all of the decreed surface appropriations.” *Hall v. Kuiper*, 510 P.2d 329, 330 (Colo. 1973). Essentially, the water in a river or stream is over-appropriated if the local water court has approved more water rights decrees on a river or stream than there is water actually available for use during certain times of the year.

31. See Colorado Division of Water Resources, The Prior Appropriation System, <http://water.state.co.us/wateradmin/prior.asp> (last visited Feb. 6, 2006).

32. TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C., *supra* note 6, at 229.

33. *Id.*

34. There are several classifications of ground water in Colorado, including tributary ground water, non-tributary ground water, “not non-tributary” ground water, and designated ground water. Designated ground water, by virtue of the Ground Water Management Act of

water supplies in order to meet growing demands. Methods of reallocation have included reuse of imported water,<sup>36</sup> water exchanges,<sup>37</sup> augmentation plans,<sup>38</sup> and changes in water rights.<sup>39</sup> These reallocation plans allow newer uses, such as municipal, environmental, and recreational uses, to be created and run even though there is no new water to appropriate.<sup>40</sup> Another form of water reallocation is the acquisition of existing senior water rights. Water rights transfers can promise greater economic efficiency, while avoiding possible environmental and economic issues that may be associated with developing new water rights.<sup>41</sup> Because farmers and irrigation districts hold a considerable amount of the senior water rights in the major river systems and ground water basins, obtaining senior water rights frequently requires the purchase of farms and ranches in order to transfer the irrigation water for use in other water systems.<sup>42</sup>

### C. The Rise of Water Rights Transfers

Water rights transfers are increasing because of the water shortage in Colorado, which has been exacerbated by the state's rapid population

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1965, COLO. REV. STAT. §§ 37-90-101 to -143 (1998), is considered separate from surface water and thus has its own modified prior appropriation doctrine.

35. "Existing water supplies can be stretched to serve growing populations through a variety of management strategies, including demand reduction, efficiency improvements, wastewater reuse, and improved system operations." PETER D. NICHOLS ET AL., NATURAL RESOURCES LAW CTR., WATER AND GROWTH IN COLORADO: A REVIEW OF LEGAL AND POLICY ISSUES 125 (2001).

36. COLO. FOUND. FOR WATER EDUC., *supra* note 22, at 9. Imported water is water that is lawfully introduced into a stream system from an unconnected stream system. TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C., *supra* note 6, at 42. Because imported water is from an unconnected water system, it is not subject to subsequent use by other water rights holders. Thus, an "appropriator may make a succession of uses of such water by exchange or otherwise to the extent that its volume can be distinguished from the volume of the streams into which it is introduced." COLO. REV. STAT. ANN. § 37-82-106(1) (West 2005).

37. *See* COLO. REV. STAT. ANN. § 37-92-305(3), (5) (West 2005). An exchange allows upstream out-of-priority diversions through the use of replacement water at the same time, place, quantity, and quality to avoid injury to downstream users.

38. *Id.* An augmentation plan allows a junior appropriator to divert water out-of-priority while still protecting senior appropriators from the depletions by providing a substitute water supply that is adequate in both quality and quantity to meet the senior's requirements of use.

39. *Id.* Any change in a water right use requires an application with the water court to change the type of use, place, time or manner of use, or change in point of diversion, so long as the change does not injure other water rights.

40. *See* COLO. FOUND. FOR WATER EDUC., *supra* note 22, at 9.

41. Report of the Western Water Policy Review Advisory Comm'n, *Water in the West: Challenge for the Next Century* 3-22 (1998).

42. TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C., *supra* note 6, at 229.

growth.<sup>43</sup> Property buyers are now more apt to be concerned about the water rights associated with the land because of water's scarcity and consequent increase in value. Often "the availability of water rights [in a real estate transaction] can literally make or break a deal."<sup>44</sup> Independent water rights purchases especially are on the rise because new water appropriations are often unavailable, or if a new appropriation is possible, the priority date is so junior that the water right is unreliable in most years. In Colorado, specific water rights sales have traditionally been an important means for transferring water from one use to another to meet changing water demands.<sup>45</sup> In the past, new demands have also been met by developing reservoirs or by utilizing previously unused ground water resources.<sup>46</sup> Now, because most Colorado streams are over-appropriated and ground water supplies are being drained more rapidly than the rate of replenishment, transferring water from one use to another is becoming the principal means for meeting new water demands.<sup>47</sup>

Water issues have always been a part of Colorado's economic landscape.<sup>48</sup> Because of insufficient water supplies on the Front Range of the Rocky Mountains, where Denver and other large cities are situated, massive tunnel and pipe systems have been built and outlying mountain streams have been dammed.<sup>49</sup> Cities on the Front Range have been buying agricultural water rights and converting the rights to municipal use since the end of the nineteenth century.<sup>50</sup> However, the pressure has intensified in recent decades with the rapid growth of urban areas. Although agricultural uses in Colorado make up approximately eighty percent of all water diversions and withdrawals, new demand for water primarily comes from municipalities that serve Colorado's residential and commercial growth.<sup>51</sup> Thus, in the last several decades more than half of the water rights changes in Colorado have been from agricultural

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43. See Stewart Water Information L.L.C., *supra* note 8.

44. Joe Knox, *A Title That Holds Water*, W. REAL EST. BUS., Sept. 2005, available at <http://www.westernrebusiness.com/articles/SEP05/feature4.html>.

45. See CORBRIDGE & RICE, *supra* note 10, at 223.

46. *Id.*

47. *Id.*

48. Robert Tomsho, *Colorado Farmers Discover Worth of Water: Water Rights Emerging as Cash Crops*, BOULDER DAILY CAMERA, Apr. 30, 2000, at 6F.

49. See *id.*

50. See *Strickler v. City of Colo. Springs*, 26 P. 313, 314 (1891). The *Strickler* court stated "[i]f the priority to the use of water for agricultural purposes is a right of property, then the right to sell it is as essential and sacred as the right to possess and use." *Id.* at 316.

51. CORBRIDGE & RICE, *supra* note 10, at 223.



use to municipal and other non-agricultural uses.<sup>52</sup> Fast-growing cities and towns have rushed to procure the water reserves they will need for their residents. Additionally, developers frequently must secure a reliable water source for the property they wish to develop because city planners often are unwilling to approve developments that will place extra strain on their existing municipal water systems.<sup>53</sup>

For municipalities, the cost of developing new water supplies has increased so greatly that purchasing agricultural water is often less expensive.<sup>54</sup> Farmers looking to abandon their agricultural business are finding that their water rights have become more valuable than the land itself. "City suitors" will pay up to three times as much for the water rights per acre as they would for the irrigated land itself.<sup>55</sup> Agricultural water is often worth much more than the crops it produces. Cities will consistently pay more than \$10,000 an acre-foot for new water, while one acre of corn grown within that same acre-foot of water is valued at just over \$400.<sup>56</sup>

The magnitude of these agricultural-to-municipal water rights transfers should not be underestimated. The water demand for municipal and industrial use is projected to increase sixty-one percent by the year 2030, with the South Platte Basin accounting for two-thirds of that demand.<sup>57</sup> In the Gunnison area of south central Colorado, it is anticipated that over a quarter million acres of irrigated farmland, an area larger than Rocky Mountain National Park, will dry up over the next twenty-five years as fast-growing towns statewide move to buy the water.<sup>58</sup> East of the Rocky Mountains, along the South Platte River, the agricultural dry-up will be particularly intense as over 200,000 acres of irrigated land, about twenty percent of the irrigated acres along the South Platte, are expected to dry up because of municipal water rights purchases.<sup>59</sup>

Those in the public sector are not the only water rights purchasers. Water rights may be acquired any time property is purchased which includes associated water rights, or when a business entity needs water

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52. See TERESA A. RICE & LAWRENCE J. MACDONNELL, NATURAL RESOURCES LAW CTR., AGRICULTURAL TO URBAN WATER TRANSFERS IN COLORADO: AN ASSESSMENT OF THE ISSUES AND OPTIONS 4-5 (1993).

53. See Knox, *supra* note 44.

54. See RICE & MACDONNELL, *supra* note 52, at 1.

55. See Tomsho, *supra* note 48.

56. Jerod Smith, *A Shrinking Oasis*, ROCKY MTN. NEWS, Aug. 31, 2004, at 4A ("An acre-foot equals 326,000 gallons, enough to serve up to two homes for one year.").

57. See WILLIAM Y. DAVIS ET AL., COLO. WATER CONSERVATION BD., COLORADO STATEWIDE WATER SUPPLY INITIATIVE: SWSI WATER DEMAND FORECAST 27 (Aug. 6, 2004), [http://cwcb.state.co.us/SWSI/Technical\\_Memorandu\\_%20080604\\_with\\_Apps.pdf](http://cwcb.state.co.us/SWSI/Technical_Memorandu_%20080604_with_Apps.pdf).

58. See Smith, *supra* note 56.

59. *Id.*

rights to run its business. For example, farming and ranching operations, golf courses, ski areas, power plants and other energy producers, and commercial bottling operations all rely on the availability of water rights to successfully operate their businesses.<sup>60</sup> Thus, both public and private entities are increasingly conscious of the bearing that water rights can have on a transaction.

## II. PURCHASING EXISTING WATER RIGHTS

As a general matter, existing water rights may be purchased in one of two ways. First, in standard real estate transactions, water rights are commonly sold with the land with which they are associated, and the value of the water right is simply included in the property's purchase price. Second, because a water right is a property right separate from the land on which it is used,<sup>61</sup> a water right may be sold independently from the land.

Water rights are conveyed in the same manner as real property. They can be conveyed with the land on which they are used by specifically describing the water rights being conveyed,<sup>62</sup> by general description,<sup>63</sup> and potentially by the general "appurtenancy clause" in a deed.<sup>64</sup> Although the same rules and formalities of a real estate transaction must be satisfied in a water rights transaction,<sup>65</sup> several aspects of water rights complicate the determination of title and the successful conveyance of a water right.<sup>66</sup>

Water rights essentially have two main components, the validity of the right and the extent of the right.<sup>67</sup> The validity of water rights is the legally recorded ownership of a water right; it is evidence of a vested property interest with a priority number that can be ascertained and guar-

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60. See Knox, *supra* note 44.

61. See Nielson v. Newmyer, 228 P.2d 456, 458 (Colo. 1951).

62. See Arnett v. Linhart, 40 P. 355 (1895).

63. Kinoshita v. N. Denver Bank, 508 P.2d 1264 (1973). A general example of appurtenance language is "any and all water rights appurtenant to the land."

64. See discussion *infra* Part II.B.

65. See COLO. REV. STAT. ANN. § 38-30-102 (West 2004) ("In the conveyance of water rights in all cases, except where the ownership of stock in ditch companies or other companies constitutes the ownership of a water right, the same formalities shall be observed and complied with as in the conveyance of real estate.").

66. See Star L. Waring et al., *Water Rights Title and Conveyancing*, 28 COLO. LAW., May 1999, at 69.

67. These two components of a water right are sometimes referred to as the "paper side" (validity) and the "wet side" (extent). Interview with Joe Knox, President, Stewart Water Information, L.L.C., in Crested Butte, Colo. (Jan. 8, 2005) [hereinafter Interview with Joe Knox].

anteed. The extent of water rights includes the physical supply of water as well as the quantity of water to which the owner is entitled. The physical supply of a water right is contingent on factors such as its priority date and the historical consumptive use.<sup>68</sup> The extent of the water right is further limited by the physical availability of water in the stream or in the ground and therefore the extent is always to some degree relative and uncertain.

In a water rights purchase, the major issues that must be resolved are the validity of the water right, the extent of the right, and whether the conveyance will cause injury to other water rights holders.<sup>69</sup> Because water rights transfers usually involve a permanent change in the place and type of use of the water, the purchaser must also obtain approval for the transfer from the appropriate water court.<sup>70</sup> Whenever a change in water right is required, the water court will take into consideration several factors that may affect the extent of the water right. The court will consider such factors as the historic beneficial use of the water right, the duty of the water, the implied volumetric limitation of the right, whether the right has been abandoned, and whether the change will injure other water rights holders.<sup>71</sup> The measurement of the amount of water historically used is a critical element in establishing the quantity that can be transferred without injury to other water users.<sup>72</sup> Determining the extent, or quantity, of the right is essential because it provides the key variable with which to assess the costs and benefits of the proposed transfer.

#### *A. Verifying Water Rights Ownership*

One of the most important matters in a successful water rights conveyance is determining that the seller has valid ownership of the right. Although ownership of a water right is ascertainable, issues related to the unique character of a water right as a separate real property interest complicate the undertaking. Water rights title verification presents distinct issues when compared to land sales because of inconsistencies and uncertainties caused by the historic lack of attention to ownership and title search methods. These issues must be carefully considered to ensure that the expectations of both the buyer and seller are met.<sup>73</sup>

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68. See TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C., *supra* note 6, at 78.

69. A. DAN TARLOCK ET. AL., *WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY* 227 (5th ed. 2002).

70. CORBRIDGE & RICE, *supra* note 10, at 319; *see also* COLO. REV. STAT. § 37-92-103(5) (1998).

71. See CORBRIDGE & RICE, *supra* note 10, at 245-58.

72. See *id.* at 246.

73. See *id.* at 232.

At the outset, a water right in Colorado is valid only if it meets the three fundamentals of appropriation: the intent to divert, actual diversion, and application to beneficial use.<sup>74</sup> Thus, unlike traditional land transactions, records alone do not always indicate title to a water right because human action actually initiates the water right.<sup>75</sup> There is no equivalent to the recorded land patent, which starts the chain of private interests in land.<sup>76</sup> Instead, facts must be assembled, often from numerous sources, in order to prove the ownership of a water right.<sup>77</sup>

Verifying ownership of water rights has become necessary for several reasons. Determination of water rights ownership in connection with a sale or transfer is increasingly important because of water scarcity and the rising economic value of water. Regardless of whether the water right to be purchased will continue to be used for the same purpose, on the same land, and under the same timing of operations, or whether the purchaser will file a change application in order to use the water for another purpose at another location, evidencing title is essential once the legalities of the water right use are resolved.<sup>78</sup>

The need to ascertain title to water rights is also important for state administration purposes. Fair and accurate water rights administration and adjudication is essential, but such state administration requires accurate records of the water rights and ownership.<sup>79</sup> Prior to the twentieth century, appropriations were simply created by diverting and applying water to a beneficial use, with no official legal procedure other than posting signs of notice at the diversion point.<sup>80</sup> In response to the growing number of water users, the Colorado legislature in 1901 established a recording requirement and created the Office of the State Engineer to administer the appropriations.<sup>81</sup> While the task of adjudicating water rights remained with the courts, the State Engineer is now in charge of administration of actual water supply and demand. Water commissioners, who are representatives of the State Engineer, administer diversions according to decreed priorities by controlling the headgates to manage the flow of water through the streams, releasing appropriated water for irrigation ca-

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74. *Id.* at 23.

75. *Id.* at 232. See also Amy W. Beatie & Arthur R. Kleven, *The Devil in the Details: Water Rights and Title Insurance*, 7 U. DENV. WATER L. REV. 381, 387 (2004).

76. CORBRIDGE & RICE, *supra* note 10, at 232.

77. *Id.*

78. See DISCHINGER & KLAHN, *supra* note 17, at 37.

79. Michael V. McIntire, *The Disparity Between State Water Rights Records and Actual Water Use Patterns: "I Wonder Where the Water Went?"*, 5 LAND & WATER L. REV. 23, 34-35 (1970).

80. See CORBRIDGE & RICE, *supra* note 10, at 15.

81. *Id.*

nals and storage facilities.<sup>82</sup> Because water commissioners must give notice to those affected by the closing of headgates, verified water rights ownership is important so the water commissioner knows whom to notify. Furthermore, strict administration of water rights can create the need for owners to assert their water rights against other water users. The determination of valid title at least ensures that a water rights owner has a certain priority date as against other users.

### *B. Current Difficulties in Determining Water Rights Ownership*

The transfer of water rights by recorded deeds or conveyances in a chain of title has been "notoriously sloppy"<sup>83</sup> because of the limitations and uncertainties inherent in water rights. Lack of evidence by a recorded document, quantitative limitations inherent in the right, contractual limitations imposed by ditch companies, and issues of abandonment and prescription all make determining ownership difficult.<sup>84</sup>

There are several common title problems in water rights transactions when a conveyance instrument uses general water rights language or considers the water right as an appurtenance to land. Legal descriptions of water rights are frequently absent from the deeds, or include only a portion of the water rights historically associated with the real estate being conveyed, or inadequately describe the water right to be conveyed.<sup>85</sup> In general, there is a presumption of nonappurtenance and non-conveyance of water rights<sup>86</sup> in the absence of an express description in the deed. But where the circumstances establish intent to do so, courts will find that a water right has been passed as an appurtenance to the land.<sup>87</sup> Thus, despite Colorado law requiring that the conveyance of water rights follow the same formalities as the conveyance of real estate,<sup>88</sup> in many cases water rights may be conveyed even when not mentioned in the deed.<sup>89</sup> The intention of the grantor is to be determined from all the circumstances of the case, "including the fact as to the use of the water and whether it is necessary and essential to the beneficial use and enjoyment of the land."<sup>90</sup> From the standpoint of a title examiner, the diffi-

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82. *Id.*

83. TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C., *supra* note 6, at 77.

84. Davis, *supra* note 3, at 509-10.

85. See TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C., *supra* note 6, at 77.

86. See Bessemer Irrigating Ditch Co. v. Woolley, 76 P. 1053, 1054 (Colo. 1904).

87. *See id.*

88. COLO. REV. STAT. ANN. §38-30-102 (West 2005).

89. See Ward H. Fischer, *Water Title Examination*, 9 COLO. LAW. 2043, 2046 (1980).

90. Kinoshita v. N. Denver Bank, 508 P.2d 1264, 1267 (Colo. 1973) (quoting Hastings & Heyden Realty Co. v. Gest, 201 P. 39 (Colo. 1921)).

culty is that the record does not always disclose the parties' intent. Thus, because tributary water rights can be transferred under a deed's standard appurtenancy clause, even a complete examination of the documents of record may not be sufficient to establish clear title.<sup>91</sup>

Colorado cases can provide helpful guidelines when the conveying instrument is silent as to water rights. The broad rule is that whether "a water right passes in a deed conveying lands, without any specific mention of the right, depends upon the intention of the grantor, which is to be gathered from the express terms of the deed, and, if that is silent, from the presumptions arising from circumstances surrounding the transaction."<sup>92</sup> For example, if the land is useful only if irrigated, there is a presumption that the water rights were conveyed.<sup>93</sup> If the land's purchase price represents the price of irrigated land, as opposed to non-irrigated land, this presumption will be particularly strong.<sup>94</sup> In the conveyance of land, if only a part of the appurtenant water right is described and specified as being conveyed, this specific designation defeats any presumption of the intention to convey the remainder of the water right.<sup>95</sup>

The type of water being conveyed has implications for its chain of title. Tributary ground water rights, as well as the right to withdraw non-tributary ground water, may be transferred with or independent from the land.<sup>96</sup> Whether a deed conveys tributary water rights is a question of fact that depends on the parties' intent and the circumstances surrounding the conveyance.<sup>97</sup> If a deed contains no language as to the transfer of water rights, no presumption arises regarding the parties' intent.<sup>98</sup> The conveyance of land overlying nontributary ground water is an exception to the general rule that silence in the deed of land does not give rise to a presumption that water rights pass as an appurtenance to it. The right to withdraw nontributary ground water is presumed to pass with the land

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91. TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C., *supra* note 6, at 78 (citing *Kinoshita*, 508 P.2d at 1264).

92. See Fischer, *supra* note 89, at 2046 (citing *Insurance Co. v. Childs*, 54 P. 1020 (Colo. 1898)). See also *King v. Ackroyd*, 66 P. 906 (Colo. 1901); *Daum v. Conley*, 59 P. 753 (Colo. 1899).

93. Fischer, *supra* note 89, at 2046 (citing *James v. Barker*, 64 P.2d 598 (Colo. 1937)).

94. *Id.*

95. *Id.* (citing *Nielson v. Newmyer*, 228 P.2d 456 (Colo. 1951); *Wanamaker Ditch v. Crane*, 228 P.2d 339 (Colo. 1955); *Davis v. Randall*, 99 P. 322 (Colo. 1908)).

96. *Bayou Land Co. v. Talley*, 924 P.2d 136, 150 (Colo. 1996). Tributary ground water is ground water that is outside of any designated ground water basin and is tributary to a natural stream. Non-tributary ground water is water that is outside of any designated ground water basin and is not tributary to any stream.

97. *Id.* (citing *Kinoshita v. N. Denver Bank*, 508 P.2d 1264, 1267 (Colo. 1973); *Hastings & Heyden Realty Co. v. Gest*, 201 P. 37, 39 (Colo. 1921)).

98. *Bayou Land Co.*, 924 P.2d at 150 (citing *Travelers Ins. Co. v. Janitell Farms, Inc.*, 609 P.2d 1116, 1118 (Colo. 1980)).

unless explicitly excepted from the conveyance instrument.<sup>99</sup> Because rights in nontributary ground water arise either by owning the overlying land or having consent of the overlying landowner, and thus are "integrally associated with and incident to ownership of land," such rights are presumed to be conveyed with the land unless explicitly excepted from the deed.<sup>100</sup>

Furthermore, even an explicit conveyance of water rights does not ensure valid title.<sup>101</sup> Because water rights may be conveyed independently from the land,<sup>102</sup> there is no guarantee that one of the owners in the chain of title did not convey the water right to another party.<sup>103</sup> If such a conveyance did occur, and if the deed of conveyance was properly recorded, the grantee would be provided the protection of the Colorado recording statutes.<sup>104</sup> The only method to truly assure that the water right was not separately conveyed is to conduct a complete record examination in the office of the county clerk and recorder.<sup>105</sup> Even though the initial adjudication decree may be the starting source for an examination of title to the water right, and has been suggested by some to be similar to a patent,<sup>106</sup> it is a mistake to assume that the inquiry of "title" is predetermined by the decree. The decree simply confirms that waters may be diverted, in priority, for beneficial uses, by means of the described structure.<sup>107</sup> An adjudication proceeding does not purport to describe, and it is not designed to determine, the ownership of the water right.<sup>108</sup>

Another problem in ascertaining title is ambiguity in the scope of the original water right. Especially in earlier decrees, the elements of the water right often were not clearly specified.<sup>109</sup> Furthermore, "the practice of describing direct flow water rights in terms of flow rates without any volumetric limitation in itself causes problems in determining the transferable quantity of water."<sup>110</sup> Many decrees do not identify any specific time of use, though it may be implied to a certain degree by the

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99. *Id.*

100. *Id.*

101. Fischer, *supra* note 89, at 2046.

102. See Arnett v. Linhart, 40 P. 355 (Colo. 1895).

103. Fischer, *supra* note 89, at 2046. See also Nielson v. Newmyer, 228 P. 456 (Colo. 1951); Strickler v. City of Colo. Springs, 26 P. 313 (Colo. 1891).

104. Fischer, *supra* note 89, at 2046.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 2046-47.

109. See LAWRENCE J. MACDONNELL ET. AL., NATURAL RESOURCES LAW CTR., TRANSFERS OF WATER USE IN COLORADO 3 (1990).

110. *Id.*

type of use.<sup>111</sup> Also, water rights often are decreed for more than one nature of use, so the actual use of water under the right may not be evident from the decree itself.<sup>112</sup> Implicit in every decree is the established state law that an owner of a water right may use the quantity decreed only when proper irrigation usage justifies it, and when the needs of the land are fulfilled, the water must be returned and allowed to flow uninterrupted in the stream.<sup>113</sup> A municipality may only use the purchased irrigation rights in accordance with this law.<sup>114</sup>

Even if the chain of title to a water right is without "kinks," there is still an array of other risks to the legal status of the right.<sup>115</sup> First, historical use of a water right in rates or quantities below the decreed amounts may reduce the value of a water right in a number of ways.<sup>116</sup> For instance, marginal use or non-use of a water right can notably reduce the transferable yield of the water right for a new use or place of use.<sup>117</sup> Other potential problems with the legal status of a water right include claims of adverse possession, termination of conditional water rights for failure to meet due diligence requirements, and inconsistencies between decreed and actual uses and points of diversion.<sup>118</sup>

Abandonment can also create problems in the chain of title. If a water right is lost through abandonment, there generally will not be any existing document that will alert a purchaser to this fact.<sup>119</sup> Abandonment is the failure to use a water right, coupled with the intent to abandon the right.<sup>120</sup> Such failure to use a water right for a continuous period of ten years, when the water is available, creates a rebuttable presumption of abandonment<sup>121</sup> that can result in the complete or partial loss of the right.<sup>122</sup> Mere non-use does not necessarily constitute abandonment, since abandonment involves the subjective element of intent.<sup>123</sup> Courts, however, have had little difficulty finding abandonment where the non-

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111. *See id.*

112. *See id.*

113. *Baker v. City of Pueblo*, 289 P. 603, 605 (Colo. 1930) (citing *New Mercer Ditch Co. v. Armstrong*, 40 P. 989 (Colo. 1895)).

114. *Davis*, *supra* note 3, at 528.

115. *See* TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C., *supra* note 6, at 78.

116. *See id.*

117. *See id.*

118. *Id.* at 79 (internal citations omitted).

119. *See* Fischer, *supra* note 89, at 2047.

120. *Id.* (citing *Commonwealth Irr. Co. v. Rio Grande Canal Water Users' Ass'n*, 45 P.2d 622 (Colo. 1935); *S. Boulder Canyon Ditch Co. v. Davidson Ditch & Reservoir Co.*, 288 P. 177 (Colo. 1930)).

121. COLO. REV. STAT. ANN. § 37-92-402(11) (West 2005).

122. *See* TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C., *supra* note 6, at 78.

123. *Id.*



use period has exceeded the statute of limitations for prescriptive use of real property.<sup>124</sup>

As a final point, if the water right is a contract right or is associated with a mutual ditch company, water conservancy district, or other entity, ownership verification must also take into account the legal obligations and requirements of these entities, including any articles of incorporation, bylaws, rules and regulations, or other relevant policies.<sup>125</sup>

With all of the complexities and ambiguities of Colorado water law and water rights transactions, it is paramount to assure water rights purchasers that they will receive all of the rights specified in the conveyance. Because specific purchases of water rights are more prevalent than ever before, solutions that allow for more reliable and less costly water rights transfers are needed.

### III. TITLE INSURANCE FOR THE WATER RIGHTS PURCHASER

Title to real property is the evidence of an owner's right to or the extent of interest in the real property, which enables an owner to assert and maintain his or her right to possess and use the property to the exclusion of others.<sup>126</sup> Title insurance has been used in real estate for over one-hundred years as a means of protecting ownership against undiscoverable defects in title, but has only recently become available for water rights. Because of the potential ambiguities in water rights deeds, the evolution of water rights acquisitions in Colorado from appropriation to purchases has made it necessary to develop means of safeguarding against the risks involved in water rights conveyances. One viable solution is the use of water rights title insurance in transactions. Title insurance for water rights is currently an important development, not only because of the state's over-appropriated waters and the demands of urban development on the state's water resources, but because of the risks and complexities inherent in water rights title. Because ownership of the right must be established to the satisfaction of the purchaser, the rise in water rights purchases has increased the need for protecting the seller's ownership against unknown defects or encumbrances.

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124. See *id.* (citing 2 KINNEY, IRRIGATION AND WATER RIGHTS § 1104 (2d ed. 1912)). See also *Boulder Farmers' Ditch Co. v. Leggett*, 168 P. 742 (Colo. 1917); *Irrigation Dist. v. Alamosa*, 135 P. 769 (Colo. 1913).

125. See TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C., *supra* note 6, at 79.

126. See BLACK'S LAW DICTIONARY 1522-24 (8th ed. 2004).

*A. A Brief Overview of Title Insurance*

In the second half of the nineteenth century, title insurance emerged as a means of protecting against inherent risks involved in the uncertainty of real estate title by insuring against certain potential losses from title defects, while excluding other defects from the title insurance policy.<sup>127</sup> Before the establishment of the title insurance industry, real estate title was assured through written title opinions based on title searches.<sup>128</sup> Title insurance evolved as a method of protecting real estate purchasers from suffering losses from any title defects not reasonably ascertainable from a property inspection or public record search.<sup>129</sup> It provides property owners protection against title defects, liens, encumbrances, adverse claims, and other risks to title, other than those explicitly excluded from coverage, that were unknown at the time of purchase but in existence as of the policy date.<sup>130</sup> Since 1950, title insurance has been the primary means of assuring title to land in this country.<sup>131</sup> In most states, including Colorado, title insurance companies issue commitments and policies using standard forms issued by the American Land Title Association ("ALTA").

Title insurance policyholders essentially are afforded two kinds of protection. First, the title insurer has a duty to defend any claim that disputes the insured's title to ownership of the property.<sup>132</sup> This means the title insurance company must pay for a legal defense for any claims that are within the scope of the insurance coverage. Second, the insured party has a contractual right to indemnification.<sup>133</sup> If a claim is determined to be valid, the title insurance company must reimburse the insured for all actual losses up to the amount of the policy.<sup>134</sup>

Although water rights are not mentioned in the standard ALTA policy, a standard exception states that "this policy does not insure against loss or damage . . . which arise[s] by reason of the following: . . . reservations or exceptions in patents or in acts authorizing the issuance thereof; water rights, claims, or title to water."<sup>135</sup> Thus, most title insurance

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127. See Quintin Johnstone, *Title Insurance*, 66 YALE L.J. 492, 492 (1957).

128. See Charles B. DeWitt III, *Title Insurance: A Primer*, 3 TENN. J. PRAC. & PROC. 15, 17 (2000).

129. See Beatie & Kleven, *supra* note 75, at 393.

130. See BARLOW BURKE, LAW OF TITLE INSURANCE §1.01, at 1-3 to -4 (3d ed. Supp. 2005).

131. *Id.* §1.01[B], at 1-9.

132. Beatie & Kleven, *supra* note 75, at 396.

133. *Id.*

134. *Id.*

135. Peter C. Dietze, *Water Rights and Title Insurance*, in PRACTISING LAW INSTITUTE, 358 REAL ESTATE LAW AND PRACTICE COURSE HANDBOOK SERIES 279, 290 (1990).

companies do not insure title to water rights in real estate transactions or otherwise.

### *B. Water Rights Title Insurance*

Water rights are a valuable asset that should be protected through insurance. As previously mentioned, title insurance for water rights has recently become a viable option because of the growth in water rights transfers.<sup>136</sup> The most important issues when buying, financing, or leasing land with water rights or water rights alone are determining whether the seller, borrower, or lessor has title and whether any encumbrances, if any, affect the title. Discrepancies in title are much more apt to come up in water rights title than in title to land, because of a historic lack of attention to ownership and search techniques.<sup>137</sup> Water rights title can be conveyed and encumbered by the same legal documents that affect land, documents such as deeds, deeds of trust, mechanic's liens, contracts, patents, powers of attorney, abstracts of judgment, federal liens, oil and gas leases, assignments, releases, leases, inheritance tax records, and other instruments affecting title to real property.<sup>138</sup> Title insurance for water rights insures the most essential aspect of the transfer process, the ownership of water rights. Because defects or failure to have valid title to water rights can occur just as with land title, it is essential to confirm legal title to water rights. Water rights title insurance is analogous to title insurance for a home and is just as necessary. It provides recourse to a buyer who purchases water rights that the seller did not own.

In the past, municipalities and other purchasers have often accepted deeds from a water right seller without properly verifying title.<sup>139</sup> Subsequently, when the buyer went to water court to request a change of use or a change in point of diversion, it was not uncommon for several objectors to claim that their water rights would be injured.<sup>140</sup> As a result, a municipality may have intended to purchase five cubic feet per second, but ultimately could buy only 0.5 cubic feet per second to avoid injury to

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136. This emergence of water rights title insurance in Colorado is mainly the result of one company, Stewart Title Guaranty Company, a Texas based title insurance company. Stewart Title Guaranty Company is the fourth-largest in the country and has been established for over 100 years. Stewart Water Information, L.L.C., a subsidiary of Stewart Title, has issued all of the water rights title insurance policies in Colorado to date. Stewart Title Guaranty Company has also insured water rights in several other states, including California, Idaho, Texas, Utah, and Washington.

137. See Knox, *supra* note 44.

138. Interview with Joe Knox, *supra* note 67.

139. *Id.*

140. *Id.*

other users. With the advent of title insurance for water rights, municipalities may have a proper due diligence period of title examination.<sup>141</sup> A major objective of the due diligence period is to quantify what the purchaser is buying before the transaction closes.<sup>142</sup>

In evidencing title, the search process commonly known as completing a "chain of title" lists deeds and other instruments by which title to property has passed from the original source to the present owner. Successive conveyances and other instruments are the links that constitute the chain. In the case of water rights, the chain enables tracing the title from state sovereignty to the present owner. When compiling a chain of title, base files used by title companies are often inapplicable to water searches. The abstracts within these base files are indexed by geographic location, and not by grantors' or grantees' names. Because water rights may be severed from the land, water rights conveyances or reservations require that searches be conducted by grantor/grantee indexes and not location.<sup>143</sup> Accordingly, it may take much more time to produce a water rights chain of title than to produce a similar report on a parcel of land.<sup>144</sup> Therefore, water purchase agreements or contracts must allow for a sufficient period of time for the completion of due diligence regarding the water rights title.<sup>145</sup>

Title insurance can provide several advantages to both the seller and buyer of a water right. First, water rights title insurance is arguably more valuable than an attorney's opinion. Because a public records search may not always reveal all matters affecting title, even the most careful attorney cannot guarantee there are not uncertainties in the title.<sup>146</sup> Furthermore, if the attorney's opinion is inaccurate there is no immediate remedy as with the payout of a title insurance policy. Title insurance offers a no-fault remedy for damage or loss caused by unforeseen defects or encumbrances in the title.

The option of water rights title insurance also can be a powerful marketing tool and can provide negotiating leverage. It creates a process whereby sellers and buyers can agree to essential terms and conditions, and provides the means to cure title defects quickly and efficiently. In the absence of fraud, a water rights purchaser who fails to protect himself with title insurance has no recourse against the seller for the failure of water rights title once the transaction has closed. A municipality that

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Beatie & Kleven, *supra* note 75, at 400.

purchases water rights with title insurance can be more confident of ownership because the title company has performed a thorough title examination and assures the municipality of compensation if the title proves defective in any way.

### *C. Current Limitations to Insuring Water Rights*

Despite the benefits of insuring title to water rights, there are important limitations to water rights title insurance policies currently being issued. These primarily stem from the numerous standard exceptions, which are potential title defects that are not covered under the insurance policy. The following are standard exceptions to the title policy and thus are uninsurable if not shown by the public records: rights or claims of parties in possession; easements or claims of easements; discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts that a correct survey would disclose; and any lien, or right to a lien, for services, labor or material furnished, imposed by law.<sup>147</sup> An exception is made as to all oil, gas, or other mineral interests and geothermal rights and interests in the property, including all rights of ingress, egress, exploration and production in connection with the property.<sup>148</sup> Also a standard exception is any loss or damage arising from a future action to adjudicate water rights as provided for in the Water Rights Determination and Administration Act of 1969.<sup>149</sup> Another exception is loss or damages arising from use of waters, including historical use, actual use, type of use, location of use or diversion, or partial or total forfeiture due to non-use since the pertinent division's last "engineer abandonment" list.<sup>150</sup> Other matters not covered under the title policy are the terms and conditions of the decree, adverse or prescriptive use or claims against the

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147. Stewart Title Guaranty Company, Sample Title Policy, Schedule B – Section 2, Exceptions, at 1 (2004).

148. *Id.* Although ownership of the land surface carries with it ownership of the underlying minerals, the mineral estate can be severed by clear and distinct language in a conveyance. *Radke v. Union Pacific R.R. Co.*, 334 P.2d 1077, 1088 (Colo. 1959). Because of this, title insurance companies typically will not insure mineral rights in a standard policy for land, especially if the seller does not own the mineral right in addition to the property. See BURKE, *supra* note 130, § 3.04[D], at 3-65 (“[W]hen a vendor is the owner of the surface of the land, but does not own the mineral rights beneath the surface, the mineral estate is not insured.”).

149. Stewart Title Guaranty Company, *supra* note 147.

150. *Id.* See also COLO. REV. STAT. ANN. § 37-92-401(1)(a) (West 2005), which states: [T]he division engineer . . . shall . . . prepare decennially, no later than July 1, 1990, and each tenth anniversary thereafter, a[n] . . . abandonment list comprising all absolute water rights which he has determined to have been abandoned in whole or in part and which previously have not been adjudged to have been abandoned.

waters, and local, state, or federal laws or regulations.<sup>151</sup> Any reservations of rights by the United States, any rights created by federal claims, and any prior rights held by another state, territory, sovereign tribe, nation, or country obtained by appropriation, treaty, compact, legislation or otherwise are also not insurable.<sup>152</sup> Other exceptions are any future administrative action by the State Engineer or appropriate Division of Water Rights, lack of right of access to or transport from the point of diversion or well bores and drilling of wells, and lack of priority of the water right.<sup>153</sup> Finally, included in the exceptions are any physical aspect of the water including, but not limited to, availability, existence, utility, recoverability, source, quality, condition, potability, chemistry, or other characteristics of water, if any, lying on, under or over the land or lands that may be produced or used.<sup>154</sup> It is important to note that these exceptions mainly involve either the physical availability of the water right, which are variable aspects that cannot be guaranteed, or any defects that may arise after the policy has been issued. Water rights title insurance, as with all title insurance, can only insure the owner's valid and marketable title against any unknown defects or encumbrances as of the date of the policy.

Currently, the substantial expenses for water rights title insurance also create practical limitations on who may realistically purchase a policy. Customers of water rights title insurance have thus far included real estate brokers, lending institutions, attorneys, real estate purchasers, water purchasers or sellers, appraisers, engineers, cities, towns, counties, states, land trust organizations, land developers, mining companies, water companies, oil and gas companies, farm and ranch owners, water districts, and surveyors.<sup>155</sup> Because the emergence of water rights title insurance is so recent, however, the clientele is limited to those purchasing considerably large water rights. This is because establishing the chain of title for a water right is costly and time-consuming, since there are currently no title plants as in land title and thus each title search must trace title back to the origin of the water right.<sup>156</sup> Consequently, while the availability of water rights title insurance is now a viable option to protect title to rights in a conveyance, it is only currently accessible to those entities involved in large-scale transactions that are willing to pay considerable expenses.

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151. Stewart Title Guaranty Company, *supra* note 147.

152. *Id.*

153. *Id.*

154. *Id.*

155. Interview with Joe Knox, *supra* note 67.

156. *Id.*

As a final note, while water rights title insurance can protect the owner against any undetectable risks to the title, it cannot determine whether the water right is valuable or even usable. For those purposes, due diligence should be performed by an expert.

It is uncertain whether water rights title insurance will become more affordable and will be institutionalized on a broader scale in the near future. The ability to issue title insurance for water rights requires a great amount of expertise in both the fields of water law and title insurance, and the merger of these two highly specialized fields is a slow progression.

## CONCLUSION

Rapid population growth in the western United States, particularly Colorado, demands careful and planned management of Colorado's natural resources. Urban development and industrial growth, compounded by an arid climate, have produced increased pressure on Colorado's already scarce water resources.<sup>157</sup> With the growing demand for water, the need for certainty of title in transfers has increased. This is especially true of municipal water needs, where the growth has been greatest. An effective water rights market for transferring agricultural water to municipal use requires an efficient conveyance process.<sup>158</sup> Uncertainty of title to the water being transferred will hinder the further development of Colorado municipalities.

There are inherent problems in the conveyance of water rights because of inconsistencies in recording procedures, uncertainty in the scope of the interest being conveyed, and the frequent ambiguity of previous grantors' intent. With water rights acquisitions increasing in magnitude and frequency, it is important to have a method of guaranteeing the purchasers that they are receiving the full amount of water rights intended in the transaction. The recent emergence of water rights title insurance policies is a potential solution to some of these issues. Any water rights transaction benefits from the water rights ownership information and security offered by water rights title insurance. A water rights title insurance policy insures against defects to water rights and provides an opportunity for the regulated protection of consumers. While there are still issues left unresolved by water rights title insurance, title insurance has the potential to pave the way for more efficient and reliable water rights title transfers.

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157. Corbridge, *supra* note 1, at 503.

158. *Id.* at 529.

