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CRE Commission-approved contracts: Conveying water rights

This is the sixth in a series of a dozen or so articles that come from some years of experience using the Colorado Real Estate Commission-approved contracts for purchase and sale of real estate for commercial real estate transactions. Previous articles addressed the buyer, the seller, the seller's name, the property and water rights. This article continues the discussion of water rights with a focus on the documents required to convey water rights from the seller to the buyer.

Trap: One of a number of shortcomings in the water provisions of the contract is the failure to contain a complete description of the documents required in order to convey the water supply and water rights included in the sale. Consider supplementing the contract to add what types of documents the seller needs to sign in order to convey the water supply and water rights included in the sale to the buyer.

As to "legally described water rights" (which are typically understood to include any decreed water rights), the contract calls for a deed and contains a blank to allow the parties to specify the type of deed – which would be a quitclaim, bargain and sale, special warranty or general warranty deed, depending on the what title warranties, if any, the seller is willing to give.

As to the conveyance of rights to use water from wells, §2.7.3 of the contract explains at length the change in ownership form that needs to be filed with the Colorado Division of Water Resources. Section 2.7.6 provides for conveyance of the rights to use water from the well by the "applicable legal instrument." The customary practice is to convey a right to use water from a well with a deed in



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one of the four customary forms. But to the extent that a well is permitted for a specific use by the DWR, the well permit should also be assigned by the seller to the buyer.

Several subsections of §2 of the contract call for water rights to be conveyed to the buyer by the "applicable legal instrument," but do not specify what that might be. **Trap:** By leaving uncertain what instruments are required to convey the water rights included in the sale to the buyer, the contract invites disputes and may lead to an unwanted termination of the contract.

As to the conveyance of "rights related to water" not otherwise described in §2.7, §2.7.6 also provides for their conveyance by the "applicable legal instrument," without specifying the type of instrument. Kent Jay Levine, chair of the Colorado Real Estate Commission Forms Committee, in his useful Levine's Bible for 2016 Colorado Real Estate Transactions, published by Bradford Publishing Co., indicates the type of rights that may be included in §2.7.2. These would include rights needed to use the water rights themselves, such as "infrastructure, easements, ditch rights, etc." Section 2.7.2 can also be used to describe things like "Colorado-Big Thompson contracts, water leases, water service agreements, etc." The "applicable legal instrument" depends on what is described in §2.7.6, and could include a bill of sale, a transfer of a stock cer-

tificate, or a water contract assignment or a particular transfer document required by the grantor of the right to water.

As to water stock certificates to be described in §2.7.3, §2.7.6 again merely provides for their conveyance by the "applicable legal instrument." Customary practice would require the seller to deliver to the buyer a deed, and most important, the original stock certificate(s), which must be properly endorsed. Often a stock assignment is provided in place of endorsing the original stock certificate. If an original stock certificate has been lost, the seller should be required to comply with C.R.S. §7-42-113 through 117. In any case, the buyer should confirm with the ditch or reservoir company what that company requires in order to issue a new certificate to the buyer. The contract should require the seller to deliver those items to the buyer at closing.

As to "other rights relating to water," the contract also provides for conveyance by the "applicable legal instrument." What the contract needs is a more precise requirement that assures the seller will provide what the buyer needs to fully acquire the water right, any rights to water, and those rights associated with the use of the water. **Tip:** Any water right, since it is an interest in real property, should be conveyed to the buyer, at a minimum, by a deed.

The contract no longer addresses water taps (except inadvertently in the caption to §2.7). For developed real property generally nothing is required to convey a water tap other than to change the name on the account with the municipality or special district that provides the water service. For undeveloped real property, the buyer needs to investigate the

right to the taps, their probable cost, the regulations that pertain to use of water from the system, and the proper means to convey them. The buyer may need a deed, a bill of sale, and sometimes specific assignment documents, notices and approvals in order to satisfy the issuer of the taps.

Trap: If the contract leaves open what water rights are included in the sale of the property, or how they are to be conveyed, both the seller and the buyer are given the opportunity to get out of the contract if they want. I once had a client who sought to buy property with significant water rights lose the deal because the seller got a better offer and, to get out of the contract, limited what water rights the seller was willing to convey. The seller also limited the conveyance documents it was willing to sign. With that "poison pill," the seller thwarted the buyer's purchase of the property. The only recourse for the buyer was to sue for breach of the covenant of good faith and fair dealing, which is not an easy or inexpensive undertaking.

CRS §38-35.7-104 requires the seller to give a potable water disclosure to the buyer on a form prescribed by the Colorado Real Estate Commission, but this requirement is for residential transactions only. It is important that a legally and physically adequate domestic water supply is confirmed for any property during the inspection process. Often water quality issues in rural properties can be addressed at the location of use; however, it is important to test the quality at the source of the water to fully understand any concerns that need to be addressed.▲