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CHAPTER EIGHT

Validating a Water Right

Under Water Code section 1707, the validity of an existing water right must be confirmed before the SWRCB can grant a change in place and purpose of use. Just because a right holder is currently using water, has filed a notice of appropriation, or possesses a permit identifying the water right, does not ensure that a valid water right exists.

For example, the right may never have been valid or the right holder may already have lost the right—in part or in full—due to forfeiture or abandonment. To validate a water right, you will need to determine the extent of the consumptive use, which should have been documented by the water right holder.

PAPER WATER



In some cases, a right holder may seek to sell water that is considered to be surplus—water allotted to them by their right that they have not used. Surplus water is transferable, but sometimes the right holder has lost her right to that water due to five years of consecutive non-use. This is called “paper water”—and can be described as a water right that may not be validated or fully exercised.¹

For example, a property owner may produce a Notice of Appropriation under the old Civil Code or an old court decree that sets forth the extent of a water right. The quantity of the water right in these notices or decrees often is greater than the amount of water that has actually been put to reasonable and beneficial use. Likewise, the rate of diversion under the water right often exceeds the capacity of the existing diversion facilities. Because the allotted amount of water has not been used, this water would be considered paper water and therefore not available for transfer.

VALIDATING PRE-1914 APPROPRIATIVE RIGHTS



Any investigation into the validity of a water right should focus on the priority of the water right to be purchased and the quantity of water that the right holder has historically put to reasonable and beneficial use. For example, while the most senior rights, such as pre-1914 appropriative rights, on any given stream are the most desirable, it is important to note that riparian rights are superior to these appropriative rights.

Validating a pre-1914 appropriative water right can be complicated by the passage of time. Poor or nonexistent records related to the original diversion and the historic use of the water can hamper an investigation. Nevertheless, in making a determination about the validity of a claim to a pre-1914 right, you must determine the nature of the original water right (including the rate and time or season of diversion), the place and purpose of use, and the priority date (when the water was first used). You must then establish the current water right, which may differ from the original right. Determine the quantity of water that the right holder has historically put to reasonable and beneficial use. Start by identifying the place and purpose of use. For example, if the water right holder irrigates 100 acres of a particular crop, then the water right would not exceed the amount of water necessary to irrigate those particular 100 acres. DWR, as well as the University of California Agricultural Extension offices, will have information about the amount of water that various crops grown throughout the state demand. The original water right generally cannot exceed the amount of water used prior to December 1914, as pre-1914 water rights can be reduced, but not expanded, over time. (See Appendix A, "Summary of California Water Law," item 5, The Doctrine of Relation.) Any expansion of a right would be considered a new appropriation and thus require a permit from the SWRCB.

In addition to investigating the amount of water used, your historic analysis should examine the amount of land that has been irrigated with the water,

as well as the capacity of the diversion, the conveyance facilities, and the storage facilities.

The capacity of the existing conveyance facilities also can provide a good indication of the amount of water that has been diverted historically. Many facilities have been modified since 1914, and a pre-1914 appropriative water right must be based on the capacity of the original, pre-1914 storage and conveyance facilities. For example, if the original water right provided for a diversion rate of 10 cfs, but the capacity of the ditch used to deliver that right is only 6 cfs, then the pre-1914 appropriative right cannot exceed 6 cfs. Likewise, if the capacity of the diversion facilities has decreased over time due to lack of maintenance or reconstruction of the diversion facilities, the water right is similarly reduced.

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If the appropriator of water recorded a Notice of Appropriation, the county clerk's office should have this on file.² The Notice will identify the original appropriator, the rate of diversion, the point of diversion, the place of use, and the purpose of use.

Court judgments provide another source of information about pre-1914 rights. Many water disputes have resulted in judicial decrees quantifying pre-1914 appropriative water rights. You can obtain these decrees from the local court. In reviewing the decrees, pay particular attention to any supplemental decrees or judicial orders that have modified the original decree. You also should investigate whether or not there were any property transactions or judicial decisions or settlements that may have limited the water rights in any way.

You can obtain helpful information about the historic use of water in an area from long-time residents. Although few, if any, living individuals have personal knowledge of the first use of original pre-1914 appropriative rights, some may be able to provide testimony regarding historic uses on the property. Such testimonials can help establish the continuity of use and support a claim that the water right has not been lost to forfeiture or abandonment. Testimonials also can help determine the rate of diversion or the quantity of water diverted. For example, if the testimonial indicates that a portion of the



property was planted in a particular crop, you can estimate the water demand based on that limited information. Local historical societies, newspapers, and historic and aerial photographs also are good sources for information regarding local land use.

The Statement of Water Diversion and Use and supplemental statements in the SWRCB's files also can indicate evidence of historic water use.

VALIDATING POST-1914 APPROPRIATIVE RIGHTS



Investigating the validity of a post-1914 appropriative water right begins with a review of the SWRCB's physical and computer files. There you can find the water rights permit or license, including the Reports of Permittee or Reports of Licensee. In addition, you can investigate some of the same sources described for investigating pre-1914 rights. Gather as much information as possible regarding the capacity of the diversion works, the capacity of storage facilities (if a storage right is involved), the acreage irrigated, the place of use, and so on. As with pre-1914 water rights, there may be very few records to support the historical use of water.

To determine the validity of a post-1914 appropriative water right, you can review the SWRCB's physical and computer files.

It is important to note that while you have invested significant time in investigating the validity of a pre- or post-1914 water right, and the amount of water available for transfer and dedication to environmental purposes, neither you nor the water right holder ultimately decides the validity of the water right. The final decision will rest with the SWRCB or the courts.

You can also obtain other information about water rights from a local water master if the stream system you are interested in has been adjudicated.³ A water master is someone appointed by the court to oversee water allocations in an adjudicated basin, and is responsible for determining who receives how much water based on their respective water rights. The water master not only will have current information on each water right for that system but also may know who is interested in selling or donating their rights.



RISK PROTECTION

To protect you from the risk that the water right is deemed invalid or otherwise not available for transfer, several possibilities exist. First, in your purchase agreement, you can make all or a portion of the transaction contingent on the SWRCB approving a change petition pursuant to Sections 1700 or 1707. If the SWRCB agrees to transfer only a portion of the requested amount, then the transaction agreement would allow that the purchase price be prorated accordingly, assuming the amount of water approved under the change petition meets your needs.

A second possibility would be to ask the seller to reduce the purchase price of the claimed water right, if you determine that the reduced price would be an acceptable risk if a court or agency determines that all or a portion of the water right is not available for transfer or dedication for environmental purposes.

If the adjudicated stream system contains pre-1914 appropriative water rights, the water master will have information about all of the water rights in the basin in order to properly manage the timing and rate of diversions for the water right holders.

If the water master is employed by a public agency, then the water master's records are available for public review and inspection under the Public Records Act.⁴ If the water master is associated with a federal agency, such as the BOR, then the records are available under the Freedom of Information Act.⁵

AVOIDING POTENTIAL PROBLEM TRANSACTIONS



A lack of specific details regarding the type, priority, and physical characteristics of the right to be acquired will at best result in confusion. At worst it could result in litigation and the loss of the water right that you purchased.

You must work closely with the seller, the SWRCB, technical consultants, and others to obtain all information relevant to the water acquisition. The following is a sample scenario. Farmer John utilizes his pre-1914 water right to divert 20 cfs from Salmon Creek during the irrigation season, and an additional 10 cfs during the non-irrigation season. Historically, however, Farmer John's rate of diversion has been 12 cfs during the irrigation season and 3 cfs during the nonirrigation season. Farmer John decides that he wants to sell a



portion of his water rights and contacts a nonprofit organization that has announced a program to acquire water for environmental purposes. After negotiations, Farmer John agrees to sell a 5 cfs water right to the nonprofit. Unfortunately, the agreement did not identify either the priority of the water right or the season of diversion. This ultimately resulted in parties questioning the legitimacy of the transfer and a lawsuit.

You must work closely with the seller, the SWRCB, technical consultants, and others to obtain all information relevant to the water right.

To prevent confusion, the agreement between Farmer John and the nonprofit must identify the water right to be purchased; the priority of the water right, in relation to Farmer John's remaining water rights; and the season of diversion. For example, the purchase agreement should identify Farmer John's pre-1914 water right and then state that the purchase is for the *first* 5 cfs diverted under the water right during the irrigation season and the *first* 3 cfs diverted during the nonirrigation season. The benefit of providing specificity regarding the priority of the right purchased means that if a portion of Farmer John's water right has been lost through non-use (for example, abandonment or forfeiture), it can be determined whether the purchased right falls within the portion lost. Additionally, it also sets forth the priority of diversion and use in times of shortage.⁶

OBTAINING A WATER RIGHT OPINION



Once you have completed the investigative work, you will want to pursue a water right opinion. This essentially is a ruling on the specifics of the transfer from the SWRCB establishing how the right will be used in the future. A water right opinion may also identify the extent to which a water right may be vulnerable to challenge.

Often, due to a lack of knowledge about water laws, a right holder is unaware of issues associated with the water right they claim to hold. As a result, the right holder's understanding of their right may differ considerably from the conclusions drawn in a water right opinion about the validity and extent of their right.

The opinion is a critical aspect of any environmental water acquisition and will require the involvement of an attorney. Engaging an attorney for this

means an additional expense. If your seller is motivated, he or she may be willing to arrange for the preparation of this opinion. If the seller's attorney prepares the opinion, make sure in advance that the seller will share not only the opinion, but also all of the documents and factual information used to develop it. Any opinion prepared by the seller's attorney should be independently reviewed and verified by your attorney. If the seller does not agree to provide a water right opinion, then you will be responsible for its preparation.

It bears mentioning that the SWRCB assesses each water transfer on a case-by-case basis.⁷ Thus, groundbreaking efforts to acquire and transfer water for environmental purposes in California require much in the way of documentation and legal support. Resources spent in the course of early efforts may seem great relative to the amount of water being transferred, but these expenditures will likely lay the groundwork for the success of future efforts.

1. *Planning and Conservation League v. Department of Water Resources*, 83 Cal.App. 4th 892, 914 (2000).
2. The Notice of Appropriation will be on file in the county in which the appropriation occurred. In cases in which the county boundaries have changed or the county has been split into several counties, the Notice of Appropriation may be filed in the county where the appropriation took place.
3. See Appendix A, Summary of California Water Law, subdivision G, *infra*. See also State Water Resources Control Board, Hearings Program: Water Right Determinations, available at <http://www.waterrights.ca.gov/Hearings/Adjudications.htm>.
4. CAL. GOV. CODE §§ 6250 et seq. (Deering 2003).
5. 5 U.S.C. § 552 (2003).
6. Because the appropriative water rights system is based entirely on a priority of right, any portion of a claimed water right should, without exception, identify the purchaser's water right priority in relation to the purchaser's remaining water rights.
7. *California State Water Resources Control Board, Division of Water Rights, A Guide to Water Transfers* (draft) p. 6–12 (1999), available at <http://www.waterrights.ca.gov/watertransfer/watertransfer.htm>.

