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CHAPTER ELEVEN

Protecting an Acquired Water Right

Once you have successfully transferred a water right, you will need to prepare and record the conveyance of the right, and be vigilant about taking the necessary steps to ensure that the acquired water is protected from future infringements or misuse.

PREPARING AND RECORDING A DEED



Any party acquiring a water right should record a conveyance document (usually a deed) with the appropriate county office. This step is critical for putting the public on notice that the water right has changed ownership and, in some instances, that the water right may have been severed from land. Failure to properly record the deed may result in future legal disputes over the water rights should the land be acquired by another party. (See Appendix G, “Sample Deed.”) An attorney familiar with water rights transactions should always review a deed.

From this point forward, you will need to take the appropriate steps to protect the water right from infringement or misuse. These steps include putting the water to reasonable and beneficial use, documenting all water use and conservation efforts with the SWRCB to protect against any claim of forfeiture, and monitoring any third-party actions that may infringe on the water right.

PUTTING THE WATER TO REASONABLE AND BENEFICIAL USE



California water law says that if an appropriative water right holder fails to put the water to reasonable and beneficial use for five or more consecutive years, then the water right may be subject to a forfeiture claim. This water may then be available for transfer.

If this is the case at the time of purchase, you should then take immediate steps to put as much of the water to reasonable and beneficial use as possible. Such immediate steps may include a short-term transfer to a third party for irrigation. In some cases, however, you may not be immediately in a position to put the water to reasonable and beneficial use. In these situations, you should maintain detailed documentation of all the actions that you take regarding the water right.

DOCUMENTING WATER USE AND CONSERVATION EFFORTS



Under all circumstances, even when water has been dedicated for environmental purposes, the water right holder should document usage and develop a system that provides for regular reports regarding use. Such records will be the best evidence you have against any claims that all or part of the water right has been lost through non-use. You also should file a Statement of Water Diversion and Use or a Report of Licensee/Permittee with the SWRCB that includes information regarding water use and water conservation.

PROTECTING THE WATER RIGHT FROM INFRINGEMENT



After acquisition, the water right must be protected from actions of third parties that may infringe on the right. Infringement can occur when someone seeks to acquire a new water right, seeks to modify existing water rights through changing the place or purpose of use or point of diversion, or as a result of local land use changes that might affect water use in the stream (see Monitoring Local Land-Use Changes on page 64).

PROTESTING WATER RIGHTS APPLICATIONS

The SWRCB notifies all water rights holders in a particular watershed when a water right changes hands. In addition, the SWRCB notifies all water right holders of any applications to appropriate water that may affect their newly acquired water right. Should you receive such a notice, you can file a written protest. You may also, if necessary, submit testimony and evidence at the time of a hearing as to why the application should be denied or conditioned. Even though an application to appropriate would result in a right that is junior in priority to your acquired right, you should still file a protest if there is any question regarding how the new appropriation may affect your rights. The protest also alerts the SWRCB that steps must be taken to protect your senior water rights. The protest also allows you to continue to challenge such an application or the issuance of a water rights permit.

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You may protest an application to appropriate water on the grounds that the appropriation may impact environmental and public trust resources. In other words, the proposed appropriation may not only directly infringe on your acquired water right, it also may have the effect of diminishing or impacting the environmental and public trust resources that you sought to restore, enhance, or protect. In such instances you should file an environmental protest in addition to the appropriation protest. An environmental protest will put the SWRCB on notice as to its public trust obligations for that watershed and watercourse when considering the new application.

Protests, which are resolved through negotiations with the applicant, usually result in the inclusion of conditions in the water rights permit issued by the SWRCB, which is then responsible for enforcing these conditions. If conditions are not met, you can either file a complaint with the SWRCB or bring an action in Superior Court.





LIMITING CHANGE PETITIONS

To illustrate the importance of monitoring change petitions, consider the following example. If the acquired water right is dependent on return flows from an upstream irrigator, then a change in place or purpose of use of an upstream water right may significantly impact your downstream water rights. If the petitioner's claims to consumptive use, return flows, or conserved water are not scrutinized and properly reviewed, the SWRCB may approve a petition that significantly infringes on your ability to use the water acquired for environmental purposes. By reviewing the requested change and claims regarding the amount of water available for transfer, you—as the downstream water user—can work to have the change properly conditioned and, if appropriate, have limits set on the amount of water transferred to another place or purpose of use.

PROTESTING PETITIONS TO CHANGE PLACE OR PURPOSE OF USE



As indicated previously, changes in purpose and place of use of a water right only can take place if they do not harm any other water right holder as determined by the SWRCB. When a change petition is filed with the SWRCB that may affect your water right, you will receive a notice. You also can request to be put on the Division of Water Rights mailing list to receive notices of petitions filed throughout the state. Upon receiving notice, you may file a written protest to the change petition and submit evidence and testimony if the petition requires a hearing before the SWRCB. Failure to file a protest may prevent you from challenging the approval of the change petition or participating in any SWRCB hearing.

MONITORING LOCAL LAND-USE CHANGES



Protecting the environmental purpose of the transferred water will require constant vigilance, even outside the water rights arena. Monitoring local land-use decisions—such as zoning changes that affect properties on the stream, or other local agency determinations that may impact development and water use in any way—will be necessary for as long as the water is used for environmental purposes. Maintaining communication with local groups will likely prove beneficial.

Monitoring local land-use changes is particularly important if those changes involve the use of pre-1914 appropriative water rights, as the water right holder will not have to seek approval from the SWRCB. Since the SWRCB need not approve a change in the place of use or purpose of use, an important safeguard does not exist.

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Changes in local land uses also may affect groundwater usage in the area. Increased groundwater usage may affect water tables and recharge rates from surface streams. Therefore, depending on the local hydrology, increased groundwater usage may increase recharge rates from local surface water streams, resulting in decreased surface flows. Each situation will have a unique set of issues, and it is always best to attempt to resolve these issues before your acquired water right is impacted.

Finally, the onus to protect an acquired right rests largely on the acquiring party. The SWRCB can provide oversight, but vigilance on the part of the water right holder to stay current regarding what is happening in the local watershed is imperative.

MEASURING SUCCESS



Once you achieve your objectives of acquiring, transferring, and dedicating water, it is important that you ensure the integrity of the deed by monitoring the activities in the stream system. The ultimate success of any water rights project is hinged upon this stewardship component, which also will help ensure that the right is not infringed upon. It is also through monitoring that the success of your project can be measured. Measuring and capturing the success of environmental water acquisition projects is essential to building momentum for achieving support and funding for future projects.

The SWRCB and DWR can help you gather some of the data you will need by providing stream flow information, particularly on larger streams. In addition, DFG, FWS, and NMFS actively collect biological data about the health of stream systems; this information also will be useful in tracking the potential response of fish populations to an increase in streamflows. When comparing your monitoring data to the pre-transfer environmental conditions



and the initial environmental need, you can begin to determine whether your objectives for the project may be contributing to the desired effect. This will of course be challenging. It will likely take several years before the effects of the transfer become apparent; however, it is critical that data and information be made available to the agencies and the public as a means of generating support for this project as well as future efforts.

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Through the process of trying to quantify success, do not overlook the possible ancillary benefits of an individual transfer, such as the experience that you, the SWRCB staff, and the rest of the stakeholders have gained in the process. All of this experience will pave the way for future environmental transfers. Early transfers not only contribute to building the basis for a future market, but they also may contribute to building trust among different water interests, and ultimately provide templates for future transfers.