Water Rights in New Mexico

September 10, 2012

Prepared For: NM Real Estate Commission, Continuing Education Course
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Kyle S. Harwood is an attorney and water resources professional who has recently left the City of Santa Fe Attorney’s Office to open Harwood Consulting, PC. He has advised, drafted, and litigated land and water law, regulation and policy issues, and has lectured on land use and water law. He is the author of “Santa Fe Water: Evolving Wet Growth Regulations” in the February 2007 Issue of The Water Report. He earned a B.S. in Natural Resources at Cornell University, M.P.A. degree in water resources from the University of New Mexico, and his J.D. degree from the University of New Mexico School of Law, where he specialized in water and Indian law. He is a former board member and chair of the New Mexico State Bar Natural Resources, Environment and Energy Law (NREEL) Section. Harwood Consulting, PC represents public, private, nonprofit and governments in water and natural resource issues, including special master assignments and expert witness services.

Course Overview
This course is designed to introduce New Mexico water law and water rights to real estate agents in the Continuing Education program of the NM Real Estate Commission. This course is not legal advice, and is not a substitute for a review of the facts and relevant requirements of a particular fact pattern.

Introduction (45 minutes)
How are water rights and water law relevant to real estate transactions …
Professional and ethical considerations, real estate disclosures …
Informed consumer of legal services …

Water for Humans as a "3 Legged Stool" - water supply, water infrastructure, water right
Water Right Market and Water Quality …
Hydrologic cycle - where water comes from, where it goes …

Water system types - domestic well, shared wells, mutual domestic, private or public utility
Water use and features - domestic, irrigation, stock ponds, acequias, springs, streams, reservoirs, cisterns

Prior Appropriation & The Milagro Beanfield War
Instream Environmental Flows & the Rio Grande Silvery Minnow …

What is a Water Right?
What a Water Right is Not.

Discussion and Parking Lot for Audience Questions
Review of Course Outline
Water Right Terms and Definitions (45 minutes)

Scientific and Legal terminology

Surface water and ground water
Acre Foot, Acre Foot per Year, Acre Foot per Year per Acre
Consumptive Use, Diversion Use, Farm Delivery Requirement
Declaration, Permit, License, pre-1907
Prior Appropriation, Priority, Hydrographic Survey
Adjudication, Orders, Decrees
Domestic Well, Acequia Bylaws,
Office of the State Engineer
ABCWUA, MRGCD, ISC, BOR, BDDB, NMED, COE, GPM, and AFY
Return Flow, Groundwater Mining, State Water Plan and other terms

Ten Common Client Questions Regarding Water Rights (30 minutes)

"Understanding New Mexico water law is not unlike learning statistics. It seems inscrutable at first, causing confusion and consternation. After a while, basic rules and principles are learned and the rest eventually falls in place, at least for some. For others, we conclude it will never make sense and hope we’ll never really have to deal with it. Unlike statistics, water law questions regularly do appear in the practice of law in New Mexico and the frequency is likely to increase as competition for limited supplies escalates."

Credited to Tim De Young, J.D., RIP

1. Who owns the water located on or under my property?
2. Do I have a water right?
3. Are water rights conveyed with real estate?
4. How much are my water rights worth?
5. When is public notice required?
6. Is my well share agreement enforceable?
7. Have my water rights been lost through non-use?
8. Should I file a ‘Proof of Beneficial Use’ or an ‘Extension of Time’?
9. Can I move my water rights?
10. How many homes can share a domestic well?
11. Should I hire a water law attorney?

Water Law and Property Law (30 minutes)
Prior Appropriation
First in Time, First in Right
Beneficial Use
Diversion, Intent, Due Diligence

Property Right
Compare to land title, easement, and zoning
Adjudication
Water Easement

Title review and title insurance
Office of the State Engineer
Researching water rights
   District Offices
   WATERS database
   Jurisdiction of related state agencies

Common Water Issues in Real Estate Transactions (45 minutes)
Title Commitments
   Water Right exception
Change of Ownership
   Wells and acequia water rights
   Requirements for a COO
   Review of OSE application
   County Clerk recordation
Shared Well Agreements
   Common terms and issues
   Review of typical shared well agreement
   County Clerk recordation
Water Right Transfers
   Requirements
   Review of OSE application
   Application, Legal Notice, Opportunity for Protest, and Hearing
   Water Right banks and utility requirements
   Review of sample utility applications, requirements
Well and Water Right title transfers
   Contract and title considerations
   Water Right Purchase Agreement
   Filings and OSE applications
Other issues
   Replacement well
   Supplemental well

General Water Law topics (30 minutes)
   San Juan Chama Project
   Federal Reserved Water Rights Doctrine
   Endangered Species Act
   Native American Water Rights and the Winters Doctrine
   Interstate Compacts

Conclusion (15 minutes)
Review of Parking Lot
Additional Resources
Q&A