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### SLIDES: Ag Water Sharing: Legal Challenges and Considerations

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# 2015 Martz Summer Conference

Getches-Wilkinson Center for Natural Resources,  
Energy, and the Environment  
11 June 2015 – Boulder, CO

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## **AG WATER SHARING: LEGAL CHALLENGES AND CONSIDERATIONS**

## AG CONSERVATION AND SHARING

- ◎ Why pursue ag conservation & sharing?
  - Nearly all water appropriated
  - Ag uses 80-95% across West
  - Municipal demands continue to grow
    - Municipal use more valuable than ag use
  - Climate change
    - Variability the “new norm”

## AG CONSERVATION AND SHARING

- ⦿ Why pursue ag conservation & sharing?
- ⦿ BOR Colorado River Basin Study
  - 1 million a-f ag water needed by 2060
- ⦿ Draft Colorado Water Plan
  - *Status quo* projections for 2050
  - Front Range “gap” up to 600,000 ac-ft
  - Pot’l 500,000 acres add’l dry-up
    - 35% of South Platte irrigated ag

## AG CONSERVATION AND SHARING

- ◎ Why pursue ag conservation & sharing?
  - Opposition to buy-and-dry
    - WGA, WSWC, CWCB, IBCC, BRTs, Colo Water Plan: *minimize dry-up*
  - Local economic, social and environmental harm of dry-up
    - Ag sharing can fund farm improvements, supplement income, hedge against commodity cycles, retire debt

## AG CONSERVATION AND SHARING: CHALLENGES

- ◎ 19<sup>th</sup> Century laws
  - Policies to encourage economic development
    - Farming fostered and still protected
- ◎ 20<sup>th</sup> Century infrastructure
  - Federal Reclamation projects
  - State water projects
  - Municipal provider projects
- ◎ 21<sup>st</sup> Century challenges
  - Urban population growth
  - Climate change

## AG CONSERVATION AND SHARING: CHALLENGES

- ⦿ Change of water right required
  - Type and place of use from ag to . . .
  - Water Court (Colorado)
  - Administrative (Western States)
    - Some limited Colorado ag sharing
- ⦿ Ditch co. restrictions on moving water
- ⦿ State and local permitting requirements

## TEMPORARY AG SHARING: LEGAL CHALLENGES

### ◎ No-Injury Rule

- Any diminution of water available to a vested water right no matter how small or distant
  - Historical return flows must be maintained
    - Time, location and amount
      - Subsurface recharge req'd for lagged groundwater depletions



## TEMPORARY AG SHARING: LEGAL CHALLENGES

- ◎ Quantification of Historical Consumptive Use and Return Flows
  - Fallowing, reduced CU cropping, deficit irrigation
- ◎ Computers have supplanted professional judgment
  - Virtually anything can model with a spreadsheet to x decimal places for x years is injurious
  - Calls for change
    - conservative standardized models to simplify engineering, reduce costs and protect vested rights
      - Pay up front (with water) rather than later
    - Burden shifting

## TEMPORARY AG SHARING: CHALLENGES

- ⦿ Delivery to new place of use
  - Usually *upstream* in Colorado from ag lands to front range municipalities
    - Requires upstream exchange
      - Limited exchange capacity
        - Water Court adjudication of exchange priority
        - Shepherding water past other diversions problematic
    - County constraints on transfers
    - Often requires storage
  - Usually *downstream* in California
    - Wheeling right
    - CEQA if > one year
    - No unreasonable effects on fish or wildlife or other beneficial uses
    - Local rules to protect economies

## TEMPORARY AG SHARING: LEGAL CHALLENGES

- ◎ Anti-speculation doctrines
  - Discourage long-range planning
  - Inhibit flexibility
  - Work against movement of water to area of greatest need

## AG CONSERVATION LAWS

- ◎ “Use it or lose it” major deterrent to conservation
  - Many attorneys recommend diversion of full water right whether or not needed
  - Many states protect conservation from CU diminishment, forfeiture, abandonment when enrolled in federal or state conservation program

## TEMPORARY AG SHARING: LEGAL CHALLENGES

### ◎ HIGH transaction costs

- Same process as a permanent transfer
  - Colorado water courts are civil courts with special rules
    - 2-4 years to adjudicate
    - \$400,000 and up legal and engineering fees for applicant
- Municipal disincentive compared to buy-and-dry
- Municipal discomfort with temporary supplies
- High bar for irrigator participation
- Third party “broker” required?
  - Lower Ark Valley Super Ditch (Colo.)
  - State water bank (Idaho)

## COLORADO LEGISLATION FOR TEMPORARY AG SHARING

1. HB 02-1414 Substitute Water Supply Plans (SWSPs)
2. HB 03-1334 Interruptible Water Supply Agreements (IWSAs)
3. HB 05-1215 Rotational Crop Management Contracts
4. HB 11-1068 Ag Water Transfers (withdrawn)
5. HB 13-1130 Expand IWSAs
6. HB 13-1248 CWCB Ag to Muni Fallowing-Leasing Pilot Program
7. SB 15-198 Expand CWCB Ag Fallowing-Leasing Pilot Program to Agricultural, Industrial, Environmental, Recreational

## COLORADO LEGISLATION FOR TEMPORARY AG SHARING

- ◎ Common elements of legislation
  - Administrative (State Engineer) approval
    - Finding of no injury to other water rights
    - Finding of no impairment of interstate allocations
    - Limited duration
    - Notice thru division (basin) SWSP notification list
    - Appeal available to water court
      - Expedited, limited to question of injury
      - Recently full APA review or de novo
  - Easier to tweak process than address fundamental problems with legal standards

## COLORADO LEGISLATION FOR TEMPORARY AG SHARING

### ◎ HISTORY

### ◎ SWSP

- 2004 and 2005 Aurora ~ 12,500 ac-ft
  - Approved w/o opposition, minimal terms and conditions
  - Successful, altho only ~ 9,500 ac-ft realized
- 2012 Super Ditch – 250 ac-ft
  - Conditional approval over strong opposition
    - 45 unprecedented and preclusive terms and conditions
  - Opponents sued State and Super Ditch anyway
  - Dry before could meet t&c, resolve litigation



# COLORADO LEGISLATION FOR TEMPORARY AG SHARING

- ◎ HISTORY

- ◎ Interruptible Water Supply Agreements

- United Water 2012 (withdrawn)

# COLORADO LEGISLATION FOR TEMPORARY AG SHARING

## ◎ HISTORY

### ◎ Rotational Crop Management Contracts

- None
- 2 pre-existing decrees under 1969 statute
  - Would be cost-prohibitive to adjudicate under current legal standards

## COLORADO LEGISLATION FOR TEMPORARY AG SHARING

### ◎ HISTORY

### ◎ HB 13-1248 Ag-Muni Pilot Projects

- 2014 Lower Ark Super Ditch/LAVWCD
  - Highline Canal – 2 farms
  - 250 ac-ft/year for Town of Fowler
  - Withdrawn after farmers threatened
- 2015 Lower Ark Super Ditch/LAVWCD
  - Catlin Canal – 5 farms
  - 250 ac-ft/year for Town of Fowler
    - 125 ac-ft/yr ea for Fountain and Security
  - Approved by CWCB 26 Jan 2015
    - 60 tough but doable terms and conditions
    - Delivering water since March 1st

## COLORADO LEGISLATION FOR TEMPORARY AG SHARING

- ◎ HB 13-1248 CWCB Ag-Muni Following-Leasing Pilot Program
  - Modeled on 2009 rainwater harvesting pilot program
  - Ltd to 10 projects – 3 per 4 major river basins
  - Ltd to 10 years
  - No trans-mountain/Rio Grande exports
  - CWCB developed criteria and guidelines
    - Procedural and substantive
    - Lots of stakeholder participation
  - State Engineer must find no injury
  - State Engineer must find no impairment of interstate allocations
- ◎ SB15-198
  - Expanded to include Ag to Ag, industrial, environmental, recreational leases

## AG CONSERVATION LAWS

- ⦿ Recognize “conserved water” from efficiency improvements
- ⦿ Allow use or transfer of conserved water
  - Instream flows
    - Oregon
    - Washington
    - Colorado (proposed)
  - Other uses
    - California
    - Montana

## COLORADO LEGISLATION FOR AG CONSERVATION

- ⦿ Allow ag user to obtain right to “conserved water” from efficiency improvements
- ⦿ 1990s attempts
  - Reduced diversions = conserved water
    - Expansion of use/reduced return flows
- ⦿ Recent legislation
  - ⦿ Non-consumptive use between headgate and location of historical return flows
    - SB 13-019 – stricken before passage
    - SB 14-213 – Governor vetoed
    - SB 15-1222 – Senate killed

## AG SHARING FOR PERMANENT M&I SUPPLY

- \* *Paired Conservation Easements & Municipal Option Agreements*
- \* How the conservation easement works:
  - \* Purpose is to conserve irrigated land
  - \* Ties the irrigation water rights to the irrigated land
  - \* Can permit temporary transfer of water if it fosters preservation and protection of the conserved irrigated land
  - \* Additional crop (H<sub>2</sub>O) with predictable yield and price supports long term ag viability

## AG SHARING FOR PERMANENT M&I SUPPLY

- *Paired Conservation Easements & Municipal Option Agreements*
- How the municipal option agreement works:
  - Conceptually/functionally /legally equivalent to municipal purchase of perpetual option from farmer/H<sub>2</sub>O owner for right to lease H<sub>2</sub>O in future under defined terms and conditions
  - Secures additional municipal supplies for future needs
    - Drought, drought recovery, climate change
    - Base supply?



## COLORADO LEGISLATION FOR TEMPORARY AG SHARING

### ◎ CONCLUSIONS

- Temporary ag sharing critical for future of irrigated ag and West
- Water court process not conducive to testing
  - Uncertainty=risk + Cost + Time
- Key strategy in Colorado River Basin Study
- Key strategy in draft Colorado Water Plan
  - Need to find out if/how it will work
    - Need to make simpler, cheaper than buy-and-dry
- Can pair with conservation easements for perpetual municipal supply

## COLORADO LEGISLATION FOR TEMPORARY TRANSFERS

- QUESTIONS?