SLIDES: Ag Water Sharing: Legal Challenges and Considerations

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AG WATER SHARING: LEGAL CHALLENGES AND CONSIDERATIONS
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
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

- **19th Century laws**
  - Policies to encourage economic development
    - Farming fostered and still protected

- **20th Century infrastructure**
  - Federal Reclamation projects
  - State water projects
  - Municipal provider projects

- **21st 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
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
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
"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 Fallowing-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
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 (H2O) with predictable yield and price supports long term ag viability
Paired Conservation Easements & Municipal Option Agreements

How the municipal option agreement works:
- Conceptually/functionally/legally equivalent to municipal purchase of perpetual option from farmer/H2O owner for right to lease H2O in future under defined terms and conditions
- Secures additional municipal supplies for future needs
  - Drought, drought recovery, climate change
  - Base supply?
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?