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## **Colorado Ground Water Law and the Residential REALTOR®**

by [Joseph Adams Cope](#), Esq.

It is rare for the residential REALTOR® ever to encounter water rights, and for that reason it is even more rare to encounter a residential REALTOR® who understands water rights law. On that rare occasion, however, proceeding with the transaction without the advice of a water lawyer can be unnecessarily risky. The problem is, how does one lacking even the most basic understanding of water rights know when outside advice is needed? The purpose of this article, and its sequel to be published in the next issue, is to provide that basic understanding.

As with all things in the law, water issues fit into various pigeonholes, like those in a roll-top desk. The answer to the issue depends on which pigeonhole the issue best fits into. Thus, the first problem is one of classification.

The first division is between ground water and surface water. Ground water is water which is not visible on the surface of the ground under natural conditions, and is what this article is about. Surface water is everything else.

The first basic rule applicable to all ground water in Colorado is that, to use ground water, one must have a permit from the Division of Water Resources (those who are "in the know" will also call this the "State Engineer's Office"). There are exceptions to this basic rule, but are of minor importance as far as we are concerned here.

The second basic rule of ground water is that it can't be used at all. The exceptions to this rule are of major importance (or this wouldn't be much of an article).

Exception number one is "exempt wells." In 1969, the General Assembly told the State Engineer to begin regulating wells on the same priority system that applies to surface water. Since the ditches that are used to distribute surface water are decades older than the oldest of wells, that meant that wells would have to be shut off regularly to enable the senior ditches to get the water they are entitled to under their own senior priorities. Being shut off is at best an inconvenience when the well is being used for crop irrigation; when it is being used for domestic uses, being shut off is a downright crisis.

Hence, the legislature created four classes of "exempt wells," so-called because they are exempt from the priority system. The first two classes are of greatest interest to the residential REALTOR®. One is the "domestic" well drilled after May, 1971, producing 15 gallons per minute or less, and used for domestic purposes in no more than three single family dwellings, including watering of poultry and domestic animals and irrigation of no more than one acre of lawns and gardens. If drilled before May, 1971, the limit is 50 gallons per minute. The second class is the "household use only" well. It, too, is a "domestic" well, but cannot be used for any irrigation. These limitations are very strictly interpreted, and if any one of them is exceeded, the whole thing loses the exemption. I once represented a woman who moved here from another state with the intention of operating a training stable. The owner of the five-acre property she was looking at, and both the listing and selling REALTORS®, assured her that the well could be used to water all five acres. A contingency to this effect was even put in the contract and, before closing, my client was assured that the selling broker had confirmed that the well limitations met the contract. About a year later, she discovered by accident that the

well was, in fact, permitted for only household use, and contacted me. Both brokers and the seller contributed to the \$30,000 settlement two years later.

If you are dealing with a tract of vacant land, you will want to know what a buyer can get in the way of a well permit. The "exempt" well statute answers this question, also. If the tract is 35 acres or more, and has no existing well, then a domestic well permit can be obtained. If less than 35 acres, then only a household-use only well permit is available. If the tract should be in a subdivision which comes under the jurisdiction of Senate Bill 35, then even the household-use only permit is unavailable, and you will have to look at the second exception.

The second exception to the "can't be used at all" rule is the "plan for augmentation." A plan for augmentation is a detailed plan, approved by a Water Court decree, which permits the well to be used in accordance with detailed terms and conditions outlined in the decree.

In more practical terms, a Plan for Augmentation usually covers a number of wells in a subdivision by using the historical consumptive use of a senior agricultural water right caused by the use of the wells. A Plan for Augmentation works like a bank account: the senior water right is retired from irrigation use, creating a credit in the stream due to the fact that the farm is no longer consuming water; and the subdivision wells each consume some water, creating debits. As long as the debits don't exceed the credits, the plan is working, but if the balance goes negative, the Water Commissioner may come knocking at the door. Usually a homeowner's association will have been created to administer the Plan for Augmentation, with power to limit water use by individual lot owners. The Protective Covenants will reveal whether this is the case.

Exception number three is wells that capture "nontributary" water or "Denver Basin" water. "Nontributary" simply means that it is not connected to the surface streams by a direct hydraulic connection. The "Denver Basin" is a specific, deep, geological formation underlying an area of the front range extending basically from Brighton south to Monument, and from the mountains east to Deer Trail. (Most, but not all, water in the Denver Basin is also nontributary, by the way). For these wells, the amount of water and the permitted uses are determined by a lengthy set of regulations, and will be set out in detail in the permit.

From all of this, one can distill one basic thing the residential REALTOR® needs to know about ground water: look at the well permit! If a seller has a well, but no permit, treat it as if he has no well. If the permit has limitations that don't match the actual use, treat it as if he has no well. If the permit contains a reference to a Water Court case, find out about the case. If the permit shows an expiration date, make sure the permit was finalized by the timely filing of a "Statement of Beneficial Use" at the State Engineer's Office. If the well permit refers to a Plan for Augmentation, confirm that the plan is operating in compliance with the decree by calling the local Division Engineer of the Division of Water Resources.

Legal water is, of course, only half of the problem: is there really water there, and is it fit to use? And how much water is enough, anyway?

One way to find out how much is enough is to check with the lenders in the community. For a mountain home, with no lawn to water, many lenders consider 2-3 gallons per minute adequate to loan on. Personally, I would want at least five gpm, and preferably twice that, or a cistern that would hold several hundred or a thousand gallons; the well pumps into the cistern and the homeowner pumps out of the cistern's storage at any rate desired. If there is lawn to water, remember that an average garden hose will run five gpm or more, and an average size underground sprinkler system will use at least that much. Five gpm is not enough to take a good shower, if the washing machine is running.

It is customary for the seller to furnish a current well pump test, performed by a licensed well driller or pump

installer. Ground water levels change with the seasons, so "current" often means "during the current season." If there is no well in existence, refer the buyer to a reputable, licensed well driller, water resource engineer, or ground water hydrologist for information about the probability of drilling an adequate well. Particularly in the mountains, the probabilities are so variable from one location to another that you do not want to subject yourself to the liability that could result from guessing wrong.

Water quality is tougher to check. Certainly one can pour a glass of the stuff, to see how it looks, and take a taste. The local county health department will run a basic geological contamination test for a nominal charge. Beyond that, there are a wide range of tests that can be performed (but usually aren't), some of which are very expensive. Treatment systems to take care of quality problems can also range into the thousands of dollars, depending on the particular contaminants found in the water. If the water looks or tastes bad, then the best thing to do is to spend \$100 or so to have some more extensive testing done, and then take the results to a qualified water treatment contractor for an estimate of what treatment will cost.

The basic rule to remember in water, as in any other technical subject, is not to make any representations about facts unless you have a qualified expert's assessment to fall back on. Even then, never use qualitative or quantitative adjectives. Lines like "adequate water rights," "good well," or "plenty of water" are only disasters looking for a place to happen. Like beauty, the quality of a water supply is in the eye of the beholder. What may seem like a lot of water to someone from the desert will be a mere drop in the bucket to someone who grew up next to a swamp.

[Joseph Adams Cope](#) passed away September of 2011.

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