



Water and Water Rights

February 2005

Water Rights and Title Insurance

Even though not all title policies include language specifically excluding water rights, neither water nor water rights are insurable by title insurance.

The ownership of water rights is decided through the water courts. Most of the flowing water has been appropriated for many years. Since title companies don't have systems to track this information, one would typically contact an attorney specializing in water rights when trying to locate this information.

A History of Water Rights

Originally in the United States, the English doctrine of water law was applied. English water law held that an owner of riparian land had the right to the "natural flow" of water past, over, across, or under his land for domestic use. (Riparian means belonging to or relating to a watercourse, which is defined as a natural stream having a definite bed and banks, that flows on a regular basis. A stream may still be a watercourse even if it does not flow in the dry season.)

However, the rapid industrialization of the East and migrations to the arid West caused water to become very precious in some areas. The continued reliance on the "natural flow" of water was often unreasonable, unnecessary, and wasteful. As a result, water law was adapted to better suit the needs of the continuing migration and industrialization.

Two basic types of water law developed concerning the use of the water itself (as distinguished from the rights in land on or near water):

- the Riparian Doctrine, which is an adaptation of the English common law concerning water, and
- the Appropriation Doctrine, which developed as the West's response to its arid climate.

Generally, the geographical dividing line between the states' application of the two doctrines is the Missouri River. With some exceptions, the states west of the river apply the Appropriation Doctrine and those east of it employ the Riparian Doctrine. We will consider only the Appropriation Doctrine here as it applies to Colorado.

Appropriation Doctrine

The Appropriation Doctrine is based upon the priority of a beneficial use of a particular body of water (i.e., appropriating it for one's own use) rather than upon occupancy or ownership of riparian land. The application of the doctrine is not limited to owners of riparian land.

The appropriation right rests upon an application of the water to a reasonable use with the intention of acquiring an exclusive benefit. The use to which the water is put forms the basis, the measure, and the limits of the right to appropriate.

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In the majority of the states employing the appropriation doctrine, certain uses are recognized as being well established and beneficial, including domestic use, municipal use, irrigation, stock watering, mining, manufacturing, and hydro-electric power. State law sometimes gives preference to these over other uses. Subject to the doctrine of just compensation, these preferred uses may be allowed to impair or hamper prior existing uses. No predilection exists for up-stream as opposed to down-stream appropriators.

Waterside Property

Boundaries: Accretion and Reliction

Due to the difficulty of surveying a course following the sinuosities of a stream or other body of water, surveyors usually run straight lines, called meander lines, on courses approximating the trend of the water line. The general rule is that, in a conveyance of land described as bounded by a meander line, the true boundary is the shore of the stream or other body of water. However, in the case of small non-navigable streams, the distances are generally considered to run from one point to another point rather than along the true boundary of the water.

Title insurance policies generally contain an exception for accretion and reliction.

Accretion is the gradual deposit of solid matter (silt, gravel, and/or clay) upon the shore line by a body of water.

Reliction is additions made to the land as the result of a gradual recession or withdrawal of the water.

As a rule, when the channel has shifted gradually either by accretion or reliction, the land boundary is held to have shifted with it.

Ditch Rights

A ditch or a drain is ordinarily an artificial channel or trench through which water or sewage is caused to flow.

Ditches and drains are most commonly found in agricultural areas where swamps, sloughs, and even lakes have been drained to provide fertile crop land. The drains and ditches are ordinarily established by easement agreements or by eminent domain proceedings. However, it is not always possible to examine the title and determine from the record that such easements exist.

Many statutes do not provide for adequate record evidence of the drains or ditches. There are times when the only indication of such an easement will be a record of a ditch assessment lien for construction or maintenance. Even if the land is physically inspected, a ditch or drain may not be visible if the drainage water is carried away through a covered drain tile.

A title company does have some options to protect over ditch exceptions that may appear on the commitment. Additional underwriting conditions will usually be made, including a positive statement by the surveyor that the ditch does not affect the property being insured.

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