HOW WATER RIGHTS DRIVE AQUATIC RESOURCE MITIGATION IN THE WEST

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WATER RIGHT BASICS

- Water Right - right to use water from a water source
  - Prior Appropriation System
    - First in time, first in right
  - Riparian System
    - Gives all owners of land contiguous to streams, lakes, and ponds equal rights to the water, whether the right is exercised or not
- Administered by the State

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PRIOR APPROPRIATION

- First user to divert and put water to beneficial use has a prior right
- The prior user is entitled to divert the full amount of water to meet his or her entire water right before the next junior user may legally divert any water
- Use or lose

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PRIOR APPROPRIATION

- Distinct real property interests and may be conveyed or encumbered separately from the land upon which they have been historically used
- Water right may not be appropriated unless the water is put to a beneficial use
- Evidenced by a court decree
- Administration of water rights

PRIOR APPROPRIATION

- Calls - water right holder's request to curtail upstream junior water use when the water is needed by the senior appropriator

- Types of rights
  - Direct Flow - water that is diverted and immediately placed to beneficial use
  - Storage - water that is diverted and placed into storage for future application to a beneficial use
  - In-stream flow - water that is left in a stream but accounted for on paper against a water right

PURPOSE FOR OBTAINING A WATER RIGHT FOR COMPENSATORY MITIGATION

1) To ensure that the project complies with state water law and that the mitigation project won't injure senior rights

2) To ensure that the site is protected from future water depletions and that a call on water from a senior user won't cause injury to the mitigation project

3) To ensure that the site is compliant with the 2008 Mitigation Rule

- *Where needed, the acquisition and protection of water rights must be secured and documented in the permit conditions or instrument.*

IMPORTANT QUESTIONS TO ASK PRIOR TO SELECTING A SITE AND DESIGNING A MITIGATION PROJECT

- Is water necessary for the project?
- Is all the water historically used for the property necessary for the mitigation?
- What type of water is required (surface or groundwater), and what was the historic use?
- Is the watershed/river over appropriated?

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QUESTIONS CONTINUED

Does the project proponent have a water right for the quantity of water needed to sustain and protect the mitigation work?

- Determine the water rights involved through interviewing landowners, water commissioner, reviewing the water decree, and the State's database to ensure that there are no restrictions and that the water right has not been abandoned.
- Determine the ownership of the water right.
- Determine the actual historical use.
  - In most states, water rights cannot be diverted at a higher rate or for a longer period than has historically occurred.
- Determine reliability of the right.
  - Some water rights are "paper rights" only.

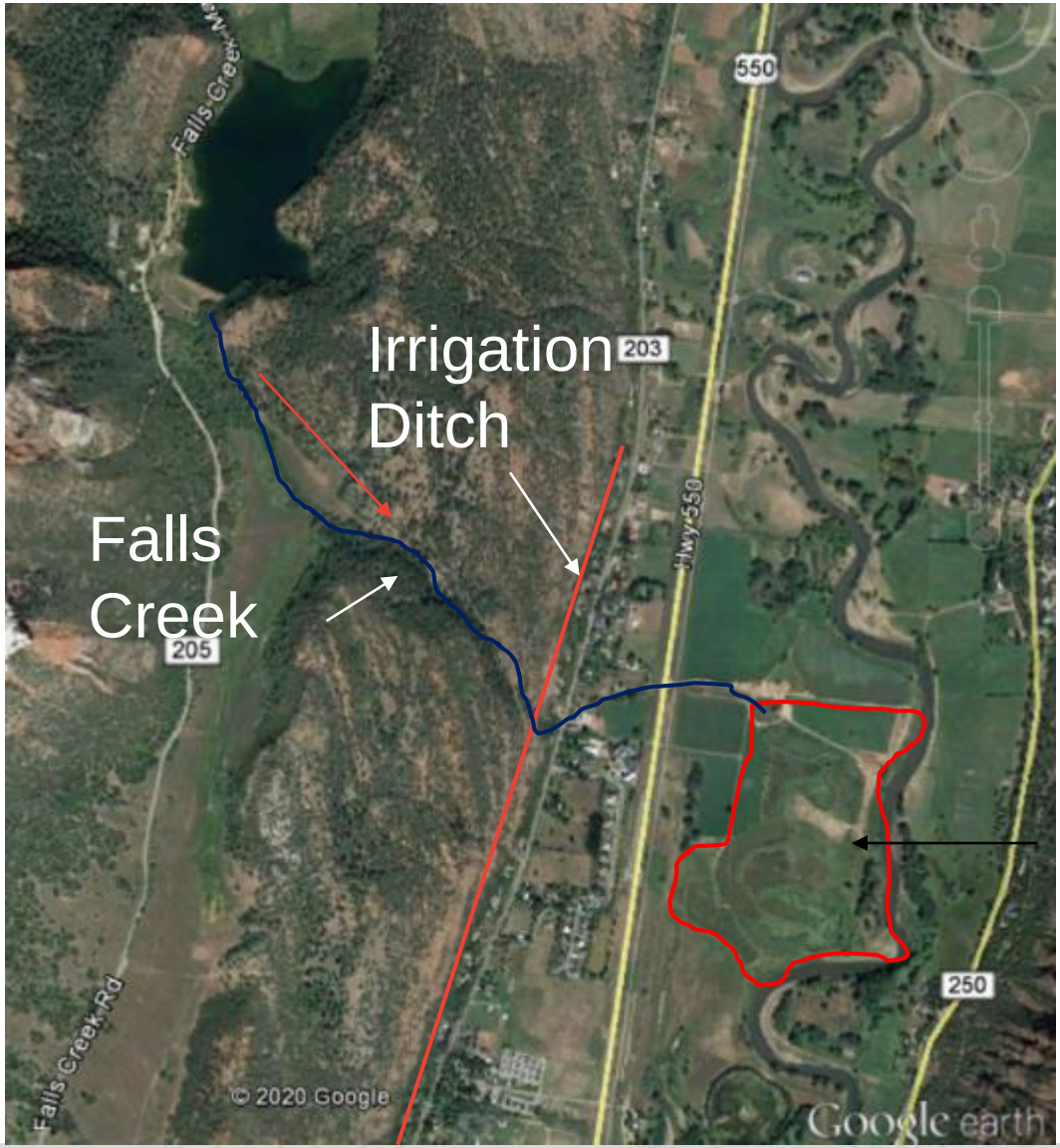
QUESTIONS CONTINUED

- If the water right is junior, what is the reliability of the right?
- Will the project require a change of water use?
- Does the deed contain language to properly tie the water right to the land and protect the water right in perpetuity?
- Is the land trust agency or entity holding the deed capable of long-term monitoring, maintenance, and enforcement of the easement, and/or is there enough money secured for another entity to perform these duties.

ITEMS TO NOTE

- In some states, a water right can only be obtained if you put a surface water to beneficial use.
- Putting a water to use may require that the water pass over a structure so that the use can be quantified.
- In some states, such as Colorado, in-stream water rights cannot be held by private entities.
- The level of seniority can be difficult to determine.
- State agencies may require that the site contains a “drain,” in order to supply water if a call should be made.
- Hydrology in many areas has been significantly modified through irrigation, and many sites may be dependent on irrigation return flows.

CASE STUDY
ANIMAS RIVER WETLANDS



Mitigation Bank Location

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CONCLUSION

- Choose sites with restoration potential in which the project proponent or landowner already owns a water right.
- Choose sites in under-appropriated watersheds in which water rights may still be available.
- Consider the mitigation type based on the quantity of water right that may be reasonably available.
- When mitigation work does not require a water right, additional water assurances, such as implementing alternate hydrology sources, may be needed to ensure sustainability.

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CONCLUSION

- Protect water rights within a conservation easement.
  - Water rights in an easement can be lost by nonuse.
  - Water rights can be severed from the conservation easement if the conservation organization fails to enforce the use restriction of the conservation easement (estoppel).
- Ensure long-term management plan includes an action that shows intent to use the water right to prevent abandonment and identifies a long-term sponsor that is responsible for managing the water and placing calls when needed.
- For stream credits, work with agencies that can hold in-stream right.
- Additional water assurances may be required, such as a contractual agreement with an upstream user.

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THANK YOU

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