

# THE DUFFORD WALDECK QUARTERLY

A NEWSLETTER FOR OUR CLIENTS

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## THE FUTURE OF WATER SHARES

by Matthew A. Montgomery

Dufford Waldeck attorneys recently filed a petition of certiorari to the Colorado Supreme Court to challenge the Court of Appeals' holding in *Mesa Land Conservancy, Inc. v. Allen*, \_\_\_ P.3d \_\_\_, 2012 WL 2044781 (Colo. App. 2012). In *Mesa Land*, the Court of Appeals held that shares of a mutual ditch or reservoir company are real property rights that are subject to the notice and recording requirements generally applicable to real property. This holding drastically changes the historical understanding of how shares in mutual ditch and reservoir companies are transferred, and potentially poses problems for mutual ditch and reservoir companies and anyone who holds stock in them.

The dispute in *Mesa Land* arose because of a conservation easement which the Mesa Land Trust claimed applied to several shares of mutual reservoir company stock that were owned by two ranchers. In 1983, the Farmers Home Administration (the FmHA) acquired title to 140 acres of ranchland located in Mesa County, Colorado, through a foreclosure. In 1990, acting pursuant to Executive Order, the FmHA granted a deed of conservation easement to the Mesa Land Trust encumbering the Property. The Easement was recorded in the real property records of Mesa County and provided that "[a]ll water rights held at the date of this conveyance shall remain with the land."

In 1994, the two ranchers purchased the Property from the FmHA. However, there was no notation on the shares stating that they were encumbered by the conservation easement. In 2007, the ranchers sold the Property, but did not include the shares in the sale. In 2008, Mesa Land Trust filed suit

asserting that withholding the shares from the conveyance violated the terms of the conservation easement.

The ranchers advanced several arguments about why the conservation easement was insufficient to encumber the shares. Most notably, the ranchers argued that the conservation easement did not apply to the shares because it was not noted on the face of the shares, nor was the mutual reservoir company given notice of the conservation easement.

The Court of Appeals rejected this argument. The Court concluded that the ranchers had constructive notice of the easement (or in other words, that they should have discovered the easement) because it had been recorded in the real property records of Mesa County. The Court held that the provisions of Colorado's Uniform Commercial Code, requiring that restrictions be noted on the face of certificates, did not apply to the shares because shares of a mutual ditch company were not securities. Rather, the Court reasoned that the requirements of constructive notice are based on "the common understanding of such shares derived from Colorado case law."

Thus, despite the fact that the shares are not tied to land, the Court concluded, relying on the Colorado Supreme Court's holding in *Jacobucci v. Dist. Court*, 541 P.2d 667 (Colo. 1975), that "[b]ecause mutual ditch shares are water rights, which are real property interests, they are subject to notice and recording requirements provided by sections 38-35-106(1) and 38-35-109, C.R.S. 2011."

The Court of Appeals' opinion contradicts the provisions of the Ditch and Reservoir Companies Act, § 7-42-104(2), C.R.S. that have historically governed the transfer of mutual ditch and reservoir company shares. As a result, we are concerned that this holding fundamentally changes the nature of stock

ownership in mutual ditch and reservoir companies throughout the state.

For example, banks and purchasers of such shares will no longer be able to rely on share certificates and company records to determine share ownership. Going forward, it will also be necessary to examine real property records. In addition, the water represented by mutual ditch and reservoir company shares is not necessarily appurtenant to any particular parcel of property, and the shares are routinely leased or sold without any concomitant conveyance of land. The real property records are poorly suited to keeping track of these types of transactions, and as a result, mutual ditch and reservoir companies will regularly be exposed to uncertainty and potential-liability when they are asked to deliver water to a changed location or to a different user.

If you own shares in a mutual ditch or reservoir company, or are considering acquiring some, you should be aware of this new holding. Unless the Colorado Supreme Court intervenes, it no longer appears that company records are sufficient to determine who owns shares. As a result, if you want to make sure that your title to shares is secure in the future, it now may be necessary to get a title opinion from an attorney.

## **BARBARA BUTLER TO MODERATE VOTER FORUM**

Dufford Waldeck attorney Barbara R. Butler will be moderating a candidate forum presented by the League of Women Voters of Mesa County on October 2, 2012.

The League of Women Voters, a nonpartisan political organization, encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. Ms. Butler has been a member for over 15 years and currently serves as its First Vice President and interim Treasurer.

The forum will be held at the Grand Junction City Hall Auditorium, 250 5th Street and starts at 7:00 p.m.

Candidates from the Mesa County Commissioners' races, the State House District 54 and District 55 races, as well as the two candidates for CU Regent District 3 have committed to attending.

The forum will start with opening remarks from the candidates followed by a series of prepared questions. Time allowing, questions from the audience will be presented. The forum is open to the public and all interested voters are encouraged to attend. More information is available at the League's new website: [www.Vote411.org](http://www.Vote411.org).

## **ANNIE MURPHY GIVES "EVICTION BOOTCAMP"**

On September 19, 2012, Dufford Waldeck attorney Annie Murphy was a member of the faculty at the Rocky Mountain Affordable Housing Management Association (AHMA). She presented three seminars as part of the AHMA's 30th Annual Conference, which was held from September 19 to 21 in Broomfield, Colorado. Attendees from all seven states in the Rocky AHMA region were present at the conference, most being property owners and managers of federally subsidized multi-family properties.

Annie frequently provides training sessions to landlords and was chosen to speak at this conference because of her practical experience in landlord/tenant litigation and her knowledge of both federal and state landlord-tenant law.

At the AHMA Conference, Annie taught three classes. Her first and most popular talk focused on terminating tenancy and evicting tenants pursuant to HUD regulations. As Annie has learned, many landlords are confused by the conflicts that the interplay between federal regulations and state landlord-tenant laws present.

Annie's eviction presentation began with a discussion of the limited circumstances in which a landlord may terminate a tenancy. The most common reason is for the nonpayment of rent, but Annie also discussed issues such as material noncompliance, drug abuse and criminal activity, and material failures to comply with the Uniform Tenant Act. Annie focused on the requirements for Demands for Compliance, Notices of Termination of Tenancy, and Notices to Quit. She also discussed common tenant defenses to eviction.

Annie also presented a class for property owners and managers entitled "Transitioning to a Smoke Free Property." In the past several years, HUD has encouraged properties to implement smoke-free policies. Annie discussed with owners and managers the benefits of going smoke-free, and how to draft, implement, and enforce such a policy. She also discussed the drafting and implementation of a medical marijuana policy, which HUD requires in states such as Colorado where medical marijuana is legal.

Finally, Annie gave a seminar entitled "Fair Housing for Maintenance Staff." Annie addressed the importance of training maintenance staff in fair housing issues, as they often have the most contact with residents. She suggested do's and don'ts in talking with residents, performing maintenance requests, and considering reasonable accommodations.

Annie will again be presenting on the topic of fair housing in Grand Junction on October 16 for the CHFA Reach program. If you are interested in attending, please go to [www.chfainfo.com/chfareach](http://www.chfainfo.com/chfareach) for more information.