

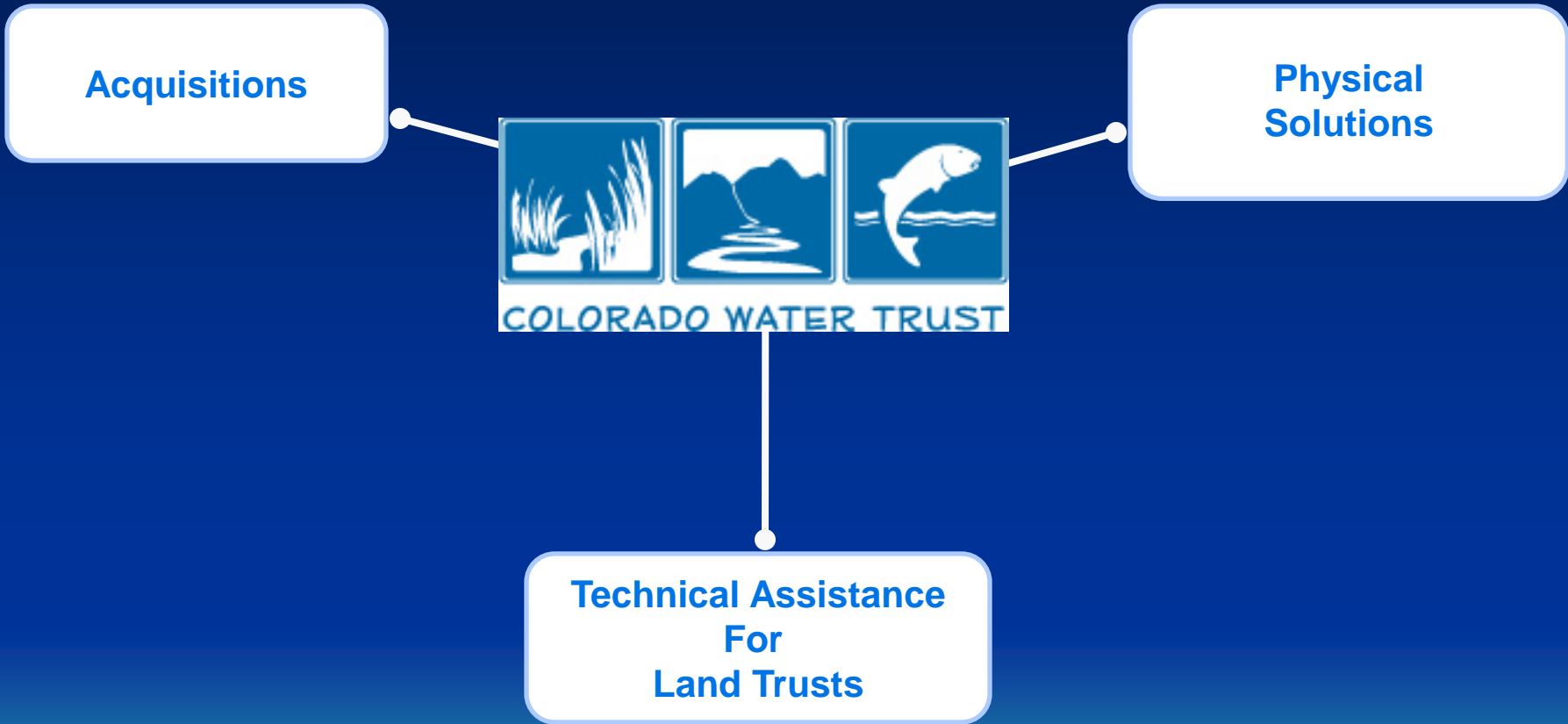
CCLT Webinar:
*Select Topics on Water Rights and
Land Conservation*



September 9, 2010
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Executive Director
Colorado Water Trust



CWT Program Areas



Acquisitions

Physical Solutions

**Technical Assistance
For
Land Trusts**

What Today Won't Provide

- Discussion today assumes knowledge of basic principles of water law, so will not provide an overview of Colorado's water rights system (unless questions are asked)
- Today will also not be a revisitation of topics available in our *Water Rights Handbook for Colorado Conservation Professionals*



What Today Will Provide

- Discussion of topics about which we have been asked fairly frequently
 - Irrigation of wetlands
 - Wetlands from seepage
 - Springs
 - Abandonment
- Information on Best Practices/Food for Thought
- Room for discussion, Q&A





Irrigation of Wetlands

- Two types of questions
 - Desire to discontinue traditional irrigation, but want to maintain irrigation-dependent wetlands (Irrigation of wetlands)
 - Wetlands on conserved property arise as a result of irrigation of neighbor (wetlands from seepage)



- Issues that arise: Is there a change of water rights? An expansion of use?
- Changes and expansion under the law
- Handout: Proposed Policy 2010-1 Regarding the Use of Irrigation Rights for Wetlands Irrigation (“SEO Draft Wetlands Policy”)
 - Policy has never been adopted and may not be
 - So what’s its value? Demonstrates the thinking that will likely be applied to this issue



Irrigation of Wetlands

- SEO Draft Wetlands Policy
 - Primary issue ends up being ponding (is there an expansion or change of use as a result)
 - Policy addresses when ponding may be appropriate
 - amount “appropriate for the growth and maintenance of wetland vegetation, even if such ponding also results in the incidental creation of wildlife habitat”
 - Problem arises when ponding looks more like storage (SEO General Administration Guidelines for Reservoirs, page 22)



Irrigation of Wetlands

- SEO Draft Wetlands Policy
 - Recognizes need to examine facts on case-by-case basis using site specific factors such as climate, soil, topography, and plant water requirements
 - Page 2 contains a non-exclusive list of what's acceptable
 - Compliance with decree, consistency with irrigation use, use of amount reasonable required
 - And at Page 2-3, what's not acceptable
 - Excess use, prolonged impoundment, use clearly for results other than irrigation, anything else requiring change application

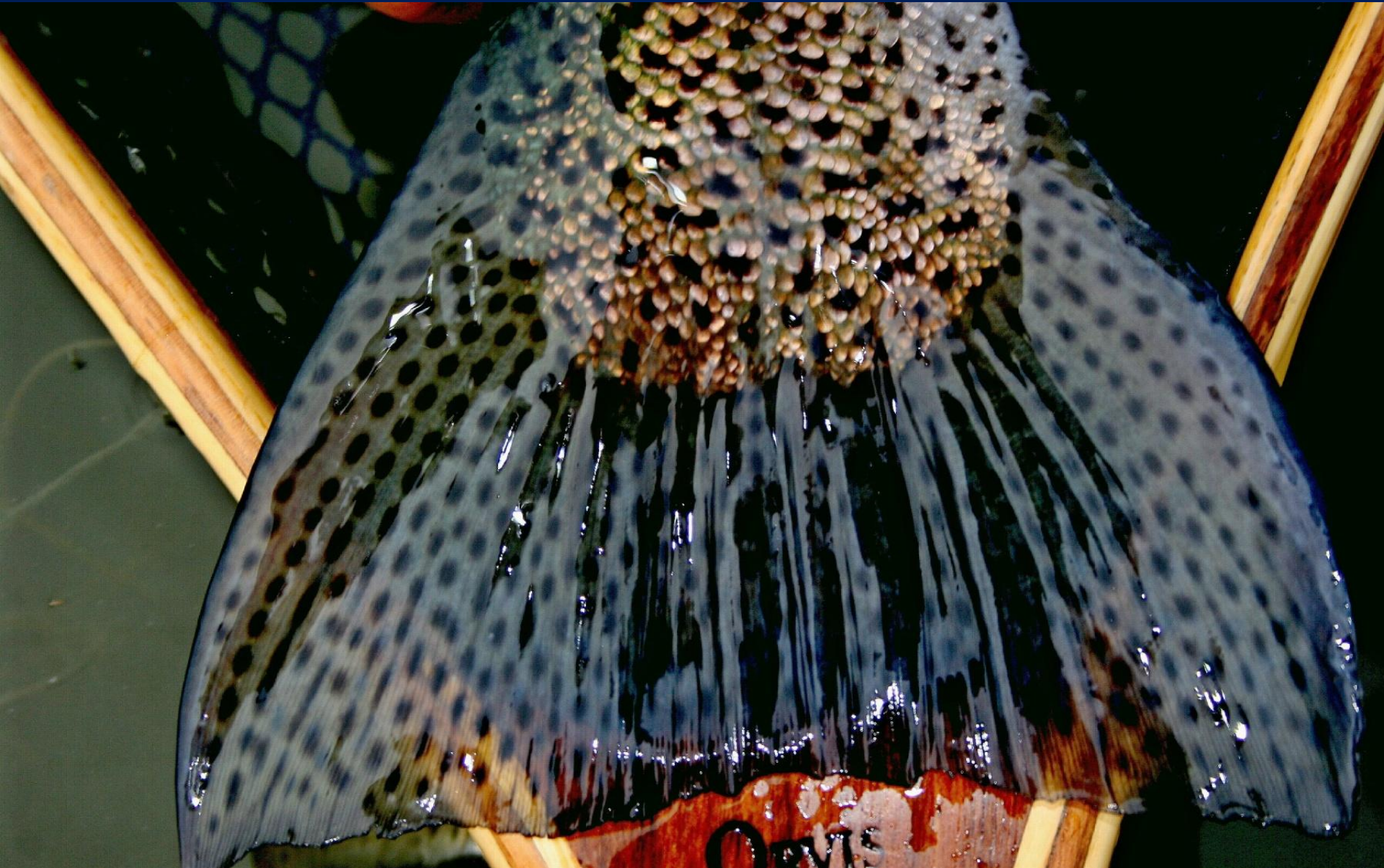


Irrigation of Wetlands

- Thoughts for conservation easements
 - Find out in advance if there may be changes in irrigation practices
 - Consider negotiating the ability to use water for maintenance of wetlands
 - Be sure concept is lawful
 - Food for Thought: Maintenance of artificial wetlands may run counter to good conservation concepts: are you requiring continued sloppy over-irrigation?



Questions ?



Wetlands from Seepage

- Context: Lands below reservoirs or adjacent to ditches or neighbors' irrigated fields often see seepage that feeds a wetland or subirrigates a field, contributing to the conservation values of piece of land incidentally benefiting from that water
- Careful: different types of seepage and runoff, and one should be aware of this before tying a conservation value to one of these incidental water sources
 - Runoff from a neighbor's property
 - Seepage from a ditch
 - Reservoir seepage



Wetlands from seepage

- Neighbor's runoff/seepage
 - Colorado Supreme Court has held that “an appropriator of waste water cannot obtain a right against the water waster to compel continuation of the waste water discharge.” *City of Boulder v. Boulder & Left Hand Ditch Co.*, 557 P.2d 1182, 1185 (Colo. 1976).
 - **Practice note:** if an encumbered piece of land had benefited from seepage or runoff, but subsequently the ditch runs dry or the neighbor ceases irrigation, neither the landowner nor land trust can force the ditch to run again or for the neighbor to irrigate again: that water is lost. **Therefore**, it is important to carefully consider conservation values that rely on water from ditch seepage and field runoff.

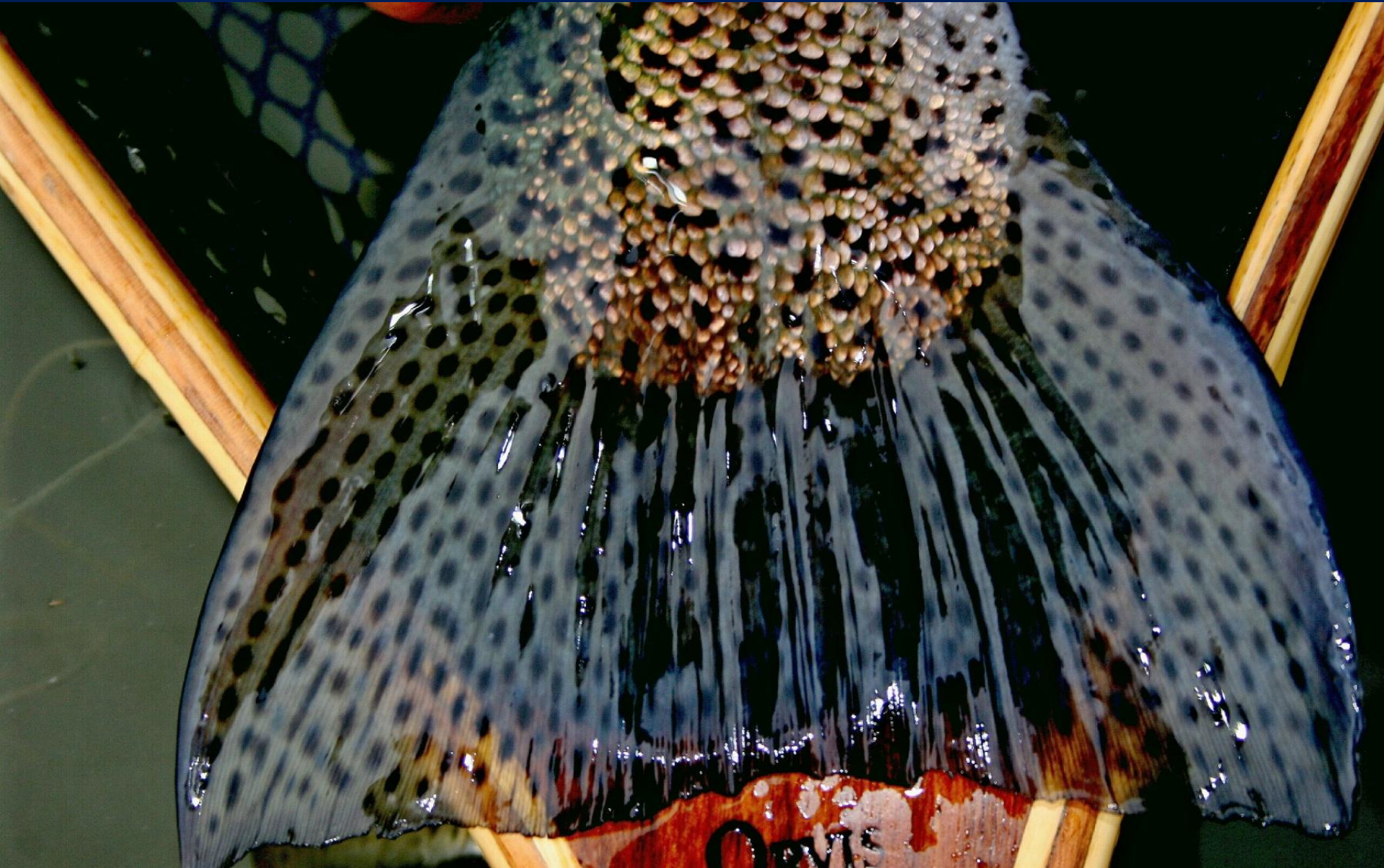


Wetlands from seepage

- Reservoir seepage
 - Colorado Supreme Court: “This court has held consistently, and, indeed, frequently, that reservoir seepage which would be tributary to a natural stream, if allowed to flow unarrested, is part of that natural stream and this the property of the People of the State of Colorado . . .” *Lamont v. Riverside Irr. Dist.*, 498 P.2d 1150, 1152 (Colo. 1972).
 - Because the water is part of the natural stream, the water is available for appropriation and protection.
 - **Practice note:** You should determine if a conservation value relies on reservoir seepage. If so, consider filing for a water right to that seepage and encumbering that right.



Questions ?



Springs

- **Governed by statute:**

All ditches constructed for the purpose of utilizing the waste, seepage, or spring waters of the state shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams; but the person upon whose land the seepage or spring waters first arise shall have the prior right to such waters if capable of being used upon his lands.

§ 37-82-102 (2009), C.R.S.



Springs

- But limited by the Colorado Supreme Court:

“We have held that section 37-82-102 is applicable only to nontributary springs; and, therefore, unavailable to protect tributary springs and seeps.” *SRJ I Venture v. Smith Cattle, Inc.*, 820 P.2d 341, 345 (Colo. 1991). Within this context, “tributary” means “such seepage water [that] would ultimately reach and become part of a natural stream.” *Id.* (citations omitted).

- Three considerations:
 - Unmodified
 - Shallow device or pump
 - Deep device or pump

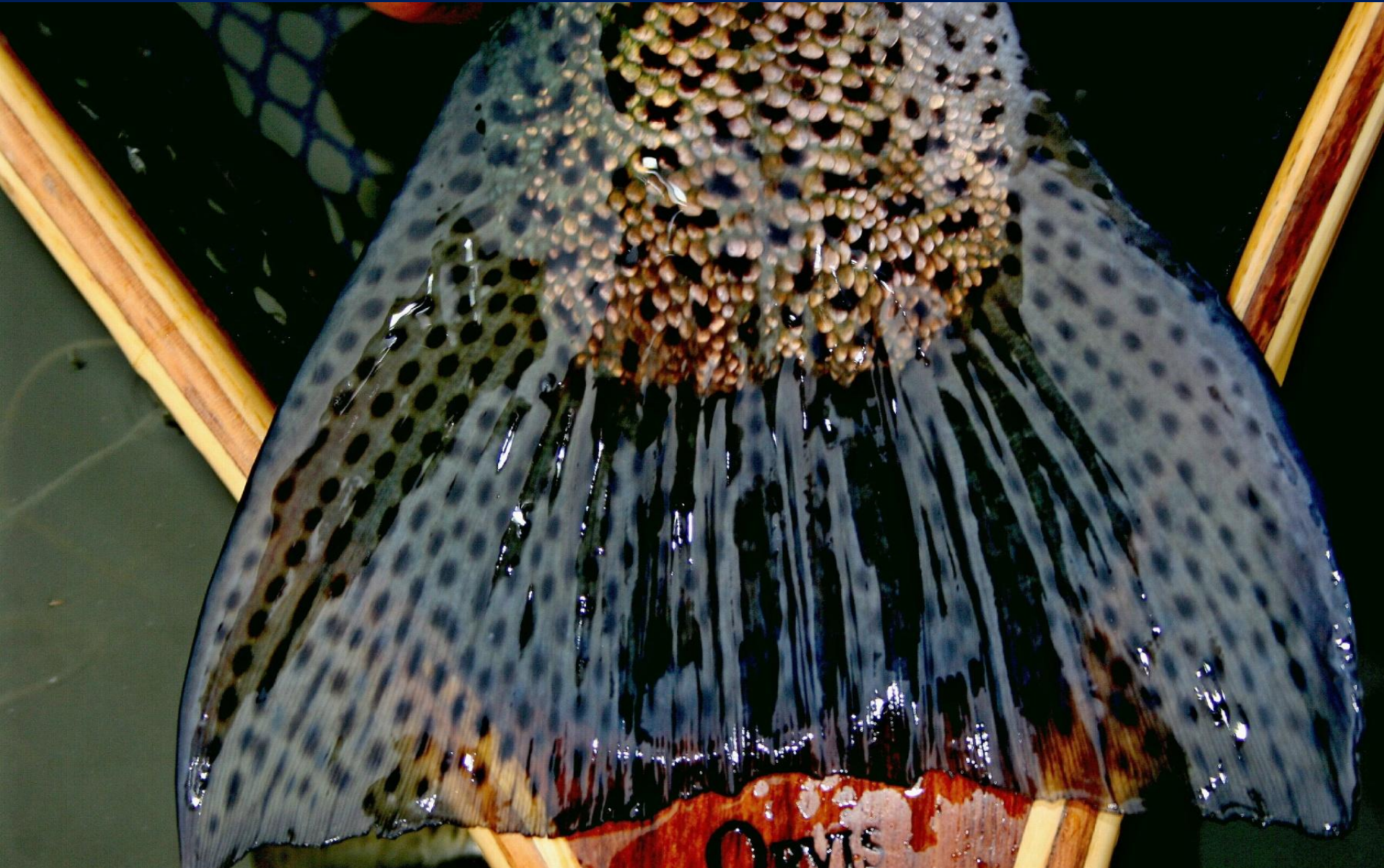


Springs

- Practice Notes:
 - Does the spring support a conservation value?
 - Are any artificial means used to pull up or collect water out of the spring?
 - If no, the determination on whether to file for a water right within the priority system hinges on the likelihood of future ground water production nearby, competition for the spring water, or some other reason (case-by-case analysis).
 - If yes, how deep does the device or pump extend into the ground? If the device or pump extends less than ten feet down, the landowner will need to file for a water right and then you should consider encumbering the water right.
 - If the device or pump extends deeper than ten feet, the spring is now considered a well under jurisdiction of Colorado's ground water law. The landowner will need to file for a well permit and then you should consider encumbering the permit.



Questions ?





ABANDONMENT

A picture is worth 1,000 words.

Abandonment

▣ “Use it or lose it”

- “the property right is the right to use the water . . .”
Turkey Canon Ranch, 937 P.2d 739, 748 (Colo. 1997)
- “the measure of a water right is the amount of water historically withdrawn and consumed over time . . .”
Santa Fe Trail Ranches Property Owners Ass’n v. Simpson, 990 P.2d 46, 56 (Colo. 1999)
- If the amount withdrawn is zero or less than the decreed amount: “nonuse retires them to the stream [and] the property rights adhering to the particular water right no longer exist.” *Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548, 553 (Colo. 2000)



Abandonment

- Because of the special nature of water as a property interest that can be “lost,” a water right may be wholly or partially abandoned. And once abandoned, the water reverts to the stream and the priority date is gone forever.
- Two types: judicially-recognized and statutory abandonment



Abandonment

- Judicially-recognized claims of abandonment can arise within a water case or independently *at any time*
- Abandonment is the “termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder.” C.R.S. § 37-92-103(2).
- Water Court has jurisdiction and looks for two elements:
 - Nonuse
 - Intent to Abandon



2010 Abandonment List

- The division engineer “shall also prepare decennially, no later than July 1, 1990, and each tenth anniversary thereafter, a separate abandonment list comprising all absolute water rights which he has determined to have been abandoned in whole or in part and which previously have been adjudged to have been abandoned.”
C.R.S. § 37-92-401(1)(a).



2010 Abandonment List Dates

Task	Fee	Deadline
Abandonment List prepared		July 1, 2010
List mailed to owner of water rights/published		July 31, 2010
Statement of objection filed with Division Engineer	\$10	July 1, 2011
Revisions made to abandonment list		
Abandonment list filed with water court		December 31, 2011
Abandonment list published in water court resume		January 31, 2012
Protests filed with water court	\$45	June 30, 2012
Decree of abandonment entered if no protest		July 1, 2012
Hearings held on protests		September/October, 2012

2010 Abandonment List

- From the 2010 San Juan Basin List:

Division Engineer Abandonment List							July 07, 2010	
Structure Name	Source Stream	Decreed Amount	Abandoned Amount	Remaining U* Amount	Abandoned Decreed Use**	Adjudication Date	Appropriation Date	WDID
ALEXANDER DITCH	RITTER DRAW	0.5000	0.5000	0.0000	C	03/22/1963	12/22/1933	3200723
ANIMAS AGGREGATE PUMP	ANIMAS RIVER	0.6670	0.6670	0.0000	C	12/31/1977	09/01/1972	3000700
ANTHONY DITCH	DRY CREEK	0.5000	0.5000	0.0000	C	12/31/1974	07/14/1969	3100689
B AND C WELL	SPRING CREEK	0.0270	0.0270	0.0000	C	12/31/1978	04/01/1978	3006178
B T O DITCH	HOVENWEEP CANYON	0.5000	0.5000	0.0000	C	12/31/1972	06/12/1961	3200515
BADER SPRING	CHICKEN CREEK	0.0200	0.0200	0.0000	C	12/31/1973	12/31/1932	3405000
BANKSTON DITCH	BEAVER CREEK	12.0000	6.0000	6.0000	C	06/11/1968	08/01/1949	7100500

2010 Abandonment List

- So how does a right end up on the list?

“Failure for a period of ten years or more to apply to a beneficial use the water available under a water right when needed by the person entitled to use same shall create a rebuttable presumption of abandonment of a water right with respect to the amount of such available water which has not been so used; except that such presumption may be waived by the division engineer or the state engineer if special circumstance negate an intent to abandon.” C.R.S. 37-92-402(11).



2010 Abandonment List

- ▣ How do you rebut the presumption of abandonment?
 - “[t]here must be established not merely expressions of desire or hope or intent, but some fact or condition excusing such long nonuse.” *Mason v. Hills Land & Cattle Co.*, 204 P.2d 153, 156 (1949).
 - “Use it” circumstances:
 - ▣ Water physically and legally unavailable at diversion point
 - ▣ Legal defense of the right
 - ▣ Actual diversions at undecreed point of diversion
 - ▣ Entering into agreements to lease or forgo diversion
 - ▣ Preparing fields for irrigation
 - ▣ Building, repair or rehabilitation of headgates, ditches or culverts
 - ▣ Actual, good faith efforts attempting to sell right



2010 Abandonment List

- Wrap Up

- Ten years of nonuse as determined by the division engineer gets a right on the list
- Three opportunities to save the right:
 - Use the right and make sure the division engineer knows it
 - Protest to the division engineer before the revised list goes to the water court
 - Protest to the water court
- Many circumstances will rebut an intent to abandon, but “not merely expressions of desire or hope or intent”

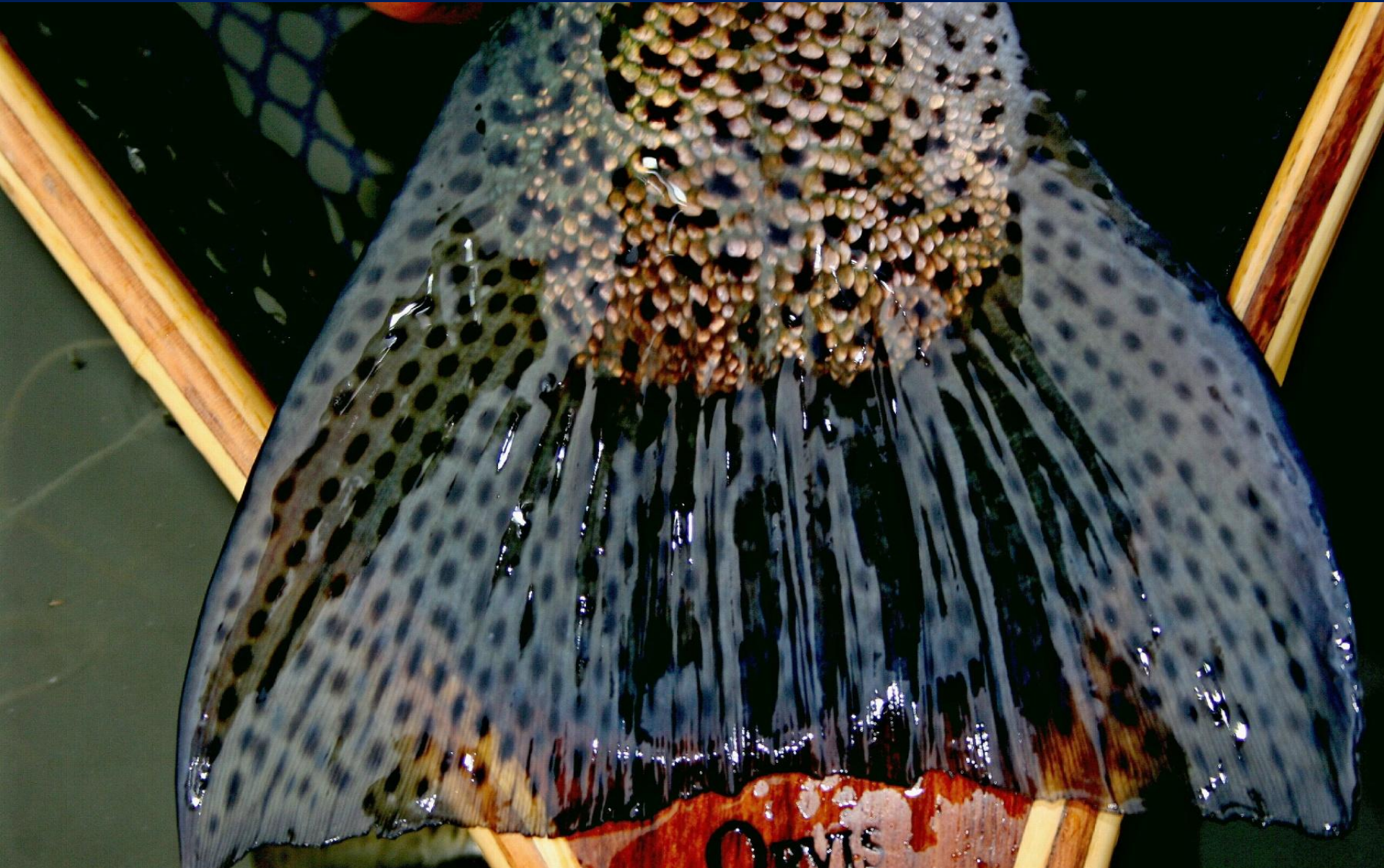


Abandonment for Land Trusts

- Practice notes:
 - Know your water rights
 - Know which conservation values depend on water rights
 - Check the abandonment list and file protests if necessary to protect conservation values – get off list early!
 - Develop a water rights monitoring plan as part of your stewardship
 - Avoid the “lose it circumstances,” such as ditches in disrepair
 - For suggestions, visit www.coloradowatertrust.org, then click on Technical Assistance



Questions ?



Best Practices/Food for Thought

- Outreach to put the recommendations of CWT in the *Water Right Handbook for Conservation Professionals* into context
- Rule A-1 on Qualifications for Certification to Hold Conservation Easements
- Note: The Division may “deny, refuse to renew, or revoke” certification – these are ongoing rules governing easement processes
- On water encumbrance:
 - Section 5. 1) b) (ii) (1): Must have “reasonable policies and procedures” for due diligence for water rights
 - Section 5. 1) b) (ii) (4): Must have “reasonable policies and procedures” for obtaining legal review commensurate with complexity of transaction
- On water stewardship:
 - Section 5. 1) c): general discussion of stewardship requirements. If not being met for general easement stewardship, not being met for water.



Best Practices/Food for Thought

- State Certification of Nonprofit Conservation Easement Holders: Summary of Findings
- Process: Found inadequate documentation of water rights during due diligence
 - Page 3: “Only a couple of organizations provided additional water rights documentation when they were tied to the property in the easement.”
 - Documents suggested: deeds, decrees, ditch share certificates, contracts, etc.
 - Page 7: “These documents should be maintained as part of the permanent easement file.”
- Process: Inadequate legal review of documents other than CE deed
- Process: Stewardship
 - Pages 4-5 and 6: Focused on general easement stewardship but notes of caution apply to water rights as well
 - If spent the time and energy to encumber water rights, must figure out way to steward



Best Practices/Food for Thought

- Academic vs. practical approaches
- Writing on wall seems to show that encumbered water rights will create lots of responsibility going forward – be sure it's wanted/needed responsibility
- If it is, be prepared for the more sophisticated discussions: Changes allowed? Development of new supplies allowed? Mixed jr./sr. portfolio considerations? Exactly what entry and operation rights are there? Prepared to use them? Limitations on transfer of landowner's reserved rights? Right of first refusal? Fish ponds?



Best Practices/Food for Thought

- CWT Technical Assistance Program
 - Assessments/model language
 - Update Handbook?
 - Organizational Assessment



Final questions ?

