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Eric Robinson, Esq.



Kathleen Leuschen, Esq.

## Buyer Beware: A Guide to Water Supply Due Diligence for Real Property Acquisitions

Eric Robinson, Esq., and Kathleen Leuschen, Esq. California's ever-present water shortages must be taken into account when purchasing a property for a use that is dependent on water availability, regardless of whether the proposed use is urban or agricultural. Water law experts Eric Robinson and Kathleen Leuschen, of Kronick, Moskovitz, Tiedemann & Girard, guide buyers on strategies for evaluating water supply availability during the due diligence process of real property acquisitions.

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# Contributing Authors and Editors



## Eric Robinson, Esq.

Eric Robinson is an equity shareholder who manages the Natural Resources Group at Kronick, Moskowitz, Tiedemann & Girard. He specializes in water law and works with Kronick's 10 other water lawyers on due diligence projects for private- and public-sector clients throughout California. Following property acquisitions, Mr. Robinson assists clients in acquiring water supplies or firming up supply availability documentation to support client implementation of land use projects. Mr. Robinson assists clients in water rights and environmental regulatory negotiations and litigates in state and federal courts.



## Kathleen Leuschen, Esq.

Kathleen Leuschen is an associate attorney at Kronick, Moskowitz, Tiedemann & Girard, where she represents public- and private-sector clients on matters involving natural resources and water law. Ms. Leuschen focuses on water rights, environmental regulatory compliance, land use matters, and groundwater litigation. She is currently working with Mr. Robinson to defend a landowner's groundwater rights in a new court adjudication.



## Robia S. Crisp

Robia S. Crisp is a Content Attorney in CEB's Real Property Team. She edits various CEB titles relating to land use, common interest developments, and CEQA, and regularly writes "in-practice" articles for CEB's Current Awareness feature. Before joining CEB, Robia practiced land use, planning, and zoning law for over 15 years at a boutique real estate law firm, as well as at midsize and national law firms.



## Kyla K. Rowe

Kyla K. Rowe is a Content Attorney in CEB's Real Property Team. She manages the California Real Property Law Reporter and various titles relating to real estate law practice, as well as contributing real property knowledge to CEB's legal news features and other CEB products. Before joining CEB, Kyla served as a judicial law clerk at the Northern District of California and practiced law at a midsize California law firm, focusing on transactional real estate matters.

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## FEATURED ARTICLES

### Buyer Beware: A Guide to Water Supply Due Diligence for Real Property Acquisitions

Eric Robinson, Esq.  
Kathleen Leuschen, Esq.

#### Introduction

Whether buying land to build a home, RV park, planned community, vineyard, orchard, or other project, more clients should ask whether a reliable water supply will be available to serve the land's planned use. Land that seems really prime for urban or agricultural development might not be as prime after considering water availability, resulting in a reduced purchase price or no deal.

Lawyers experienced in real property acquisitions routinely consider zoning and land use entitlements, liens, and other encumbrances on title, and may have retained consultants to assess hazardous materials contamination. Some have experience working with consultants to evaluate whether wetlands, fish, or wildlife could complicate future land use plans. However, too many real property lawyers and their clients give short shrift to the question of whether water supplies will be available to support the future use of the land proposed for acquisition.

Past and current use of water on a property are a promising start, but do not guarantee future water availability. Nearby use of water on other lands is also a promising indicator, but does not guarantee water availability for the parcels proposed for acquisition. Being on the wrong side of a boundary line, new-service moratorium, deed restriction, judgment, or regulation can frustrate a land investment project.

This article proposes a structured method for evaluating water supply availability *before* purchasing land for development of urban, agricultural, or other uses that require a dependable water supply.

#### General Approaches to Real Property Acquisition Due Diligence

Sellers have a duty to disclose to buyers certain information about the property they propose to sell. *Lingsch v Savage* (1963) 213 CA2d 729, 735; CC §1710. But buyers should be proactive in their due diligence to avoid relying too much on representations and warranties in their purchase contracts. *California Real Property Sales Transactions* §4.45 (4th ed Cal CEB). Buyers should consider their land use objectives when requesting due diligence information from sellers, and they should specifically request information about the availability of a water supply to serve their planned land use.

The purchase agreement should incorporate the due diligence process and specify a time period for a buyer to conduct its due diligence investigation. Purchase agreements are typically subject to conditions precedent, warranties, covenants, or a combination of these. *Real Property Sales* §4.46. Buyers also should ensure that their purchase agreements allow termination if fatal flaws arise during due diligence. See *Real Property Sales* §4.48.

When water availability is questionable, the best option is to start due diligence prior to entering into a purchase agreement, perhaps following execution of a letter of intent and nondisclosure agreement. *Real Property Sales* §4.46. Doing so benefits buyers by

- Allowing more time to investigate property-related issues that could impact their planned future land use and financial return;
- Advancing negotiations regarding the purchase price or other seller concessions; and
- Making it easier to terminate the transaction if they find a fatal flaw, like no foreseeable water supply.

#### Water Supply Due Diligence

When a client plans to buy land for a future use that requires a city or county to exercise discretion in deciding whether to approve land use entitlements, the land use agencies typically consider water supply availability before approving any new land uses during *California Environmental Quality Act (CEQA)* (Pub Res C §21000–21189.57) review. Even when no new discretionary land use approvals are needed, the principles arising from CEQA review of water supply availability provide a useful guide for prospective buyers to assess water availability before closing a land-purchase transaction.

### **“Show-Me-The-Water” Law Should Inform Water Due Diligence**

Evaluation of water supply availability for a new land development project is typically triggered by CEQA, the SB 610 water supply assessment law (Wat C §§10910–10915), or the SB 221 water sufficiency verification law (Govt C §66473.7), and can be informed by water availability projections published under the Urban Water Management Planning Act (Wat C §§10610–10657). There is also case law applying the preceding statutes in a wide range of factual settings. See, e.g., *Sonoma County Water Coalition v Sonoma County Water Agency* (2010) 189 CA4th 33 (upholding water supply availability projections under Urban Water Management Planning Act); *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568 (applying SB 610 to groundwater availability); *Vineyard Area Citizens for Responsible Growth v City of Ranch Cordova* (2007) 40 C4th 412 (applying CEQA and discussing SB 610 and SB 221 in finding inadequate water supply availability demonstration). We refer to the preceding statutes and case law as “show-me-the-water” law.

“Show-me-the-water” law responds to policy concerns about the risks of land use agencies approving new land development without considering whether water supplies will be adequate to sustain the new development for the long term. Any client planning to acquire land for development requiring land use approvals triggering show-me-the-water review should carefully assess water supply availability *before* closing the deal. Even when a property buyer plans a future land use that does not trigger show-me-the-water review, this body of law still frames good questions to guide a prospective purchaser’s evaluation of water supply availability.

To that end, a land buyer’s due diligence should ask whether it is reasonably foreseeable that existing or planned future water supplies will likely be adequate to meet demand from build-out of their planned project in normal, single dry, and multiple dry years. See Wat C §10910(c) (asking if “total projected water supplies available during normal, single dry, and multiple dry water years during a 20-year projection will meet the projected water demand associated with the proposed project, in addition to the public water system’s existing and planned future uses, including agricultural and manufacturing uses”). In some circumstances, a project might reduce water availability to others consistent with California’s water rights priority system, but proposing to do so might trigger opposition that seeks to delay or stop the new project.

Most of California has a long dry season and suffers periodic droughts, so buyers should ask whether water supplies will be adequate throughout normal years, single dry years, and multiple dry years. Redevelopment of land

that previously used water would not necessarily create new demand exceeding the land’s historic water use but might exceed its current use. See *Save Our Peninsula Comm. v Monterey County Bd. of Supervisors* (2001) 87 CA4th 99 (analyzing impact of recent water use increase on CEQA review for new land use). Urban development generally creates permanent new water demand, while agricultural development tends to create wider variations in demand according to crop type. Orchards and vineyards are considered permanent crops because they cannot be fallowed without replanting, which delays harvest revenue until after a crop maturation period that can take several years. Vegetables and other crops that require replanting with every harvest generally can be fallowed without dramatically increasing the cost to produce the next crop.

Different buyers considering the same likelihood of water availability may come to different conclusions about whether the water risk outweighs the potential return of a successful project. Water supply certainty does not really exist. As one court put it:

[U]ncertainty is “a permanent, inherent feature of modern water management. It arises from a wide range of scientific and legal regulatory factors that cannot be avoided.” Water management is subject to the vagaries of climate, competing demands from agricultural, industrial and residential uses, environmental constraints, and overlapping regulatory regimes at both the federal and state levels.

*Sonoma County Water Coalition v Sonoma County Water Agency*, 189 CA4th at 46. So it always comes down to a land buyer’s tolerance for a given transaction’s water risk.

#### **Define the Water Supply Needed for the Proposed Land Acquisition Project**

A good starting point to evaluate the water risk of a proposed land acquisition is to define the project and estimate its water needs. What project land uses will require what volumes and rates of water at what quality over what time periods?

Civil engineers with water experience can estimate water demand from different land uses (e.g., residential, commercial, institutional). Such work estimates demand from factors like population; persons per household by residential product type (e.g., single-family, multi-family); any significant industrial, commercial, or institutional land uses; local climate; and state and local water conservation laws. See, e.g., 24 Cal Code Regs pt 11 (California Green Building Standards Code (CALGreen)); Executive Order No. EO B-29–15 (2015) (Model Water Efficient Landscape Ordinance (MWELO)). Civil engineers with agricultural experience estimate crop water needs based on local soil, climate, water quality, and planned irrigation methods.

The required water quality varies according to land use. Urban development requires treated potable water



meeting [California Safe Drinking Water Act \(Health & S C §§116270–116755\)](#) standards, but can use nonpotable water for landscape irrigation and industrial applications. See [22 Cal Code Regs §§60304, 60307](#). Agricultural land uses can use less costly raw water, although its quality (e.g., total dissolved solids or salt) can significantly affect crop growth, harvest yield, and resulting farm revenue. In coming years, nonpotable and potable uses of recycled municipal wastewater are expected to grow.

The required physical availability, or reliability, of a water supply can also vary widely. Urban land uses normally require a reliable year-round supply to meet demand that in California peaks during the dry season due to landscape irrigation. In some cases, urban demand patterns may fluctuate due to factors like peak recreation seasons or special events. For agricultural land, the required reliability of irrigation water varies by whether crops are permanent or seasonal. Permanent crops, like nuts, citrus orchards, and grapes, require irrigation at least every dry season and cannot be fallowed temporarily during drought without replanting at significant cost. Some permanent crops also might need to apply water for frost control in certain locations (e.g., North Coast vineyards). Row crops, like vegetables, require irrigation to produce a harvest but can be fallowed during drought without having to make the same level of replanting investment required for permanent crops. In some regions, irrigation water needs may be driven by multiple crop harvests within a single year.

### ***Evaluate Water Supplies Potentially Available for the Project***

Once the land acquisition project's water needs are defined, the buyer should evaluate supply availability. Sometimes, it makes sense to analyze supply availability first, in order to narrow down project options to ones fitting more easily within anticipated supplies.

#### **Is the Land Within a Public Water Supplier's Service Area?**

Take a stepwise approach to investigating potential water supplies that starts with identifying the most likely source(s) to serve the land proposed for acquisition. Evaluate if the land lies within the service boundaries of a public water supplier, like a city, special district, mutual water company, or investor-owned utility regulated by the California Public Utilities Commission (PUC). If not, the buyer would need to negotiate an extra-territorial water service agreement, annex the land to an existing water supplier's service area, or develop its own supply. The Local Agency Formation Commission (LAFCO) statute's "reorganization" sections authorize annexation. See, e.g., [Govt C §56857](#) (special district annexation); [Govt C §56133](#) (extra-territorial water service agreements); [Voices for Rural Living v El Dorado Irrig. Dist. \(2012\)](#)

[209 CA4th 1096](#) (LAFCO conditions on water service extension to tribal casino project). Previously developed land typically is already connected to a public water service system or has already developed its own supply. Even undeveloped land might lie within a public water supplier's service boundary. In those cases, the supply investigation can focus on whether the public water supplier will be able to meet the water needs of the planned future use of the land, existing customers, and other planned future land uses in its service area.

If past water availability was good, consider whether the supplier's water sources in the future might be less reliable or more costly due to water rights disputes, water supply contract disputes, environmental restrictions, or droughts. See, e.g., [Preserve Wild Santee v City of Santee \(2012\) 210 CA4th 260](#) (surface and groundwater for residential subdivision); [Habitat & Watershed Caretakers v City of Santa Cruz \(2011\) 213 CA4th 1277](#) (environmental regulatory threats to surface water and uncertainty of desalination supply for university housing project); [Cherry Valley Pass Acres & Neighbors v City of Beaumont \(2010\) 190 CA4th 316](#) (groundwater for residential use); [County of Madera v Madera Ranch Quarry, Inc. \(2008\) 167 CA4th 1099](#) (groundwater for industrial use); [Brewer v Murphy \(2008\) 161 CA4th 928](#) (surface water for domestic and irrigation use). In a worst-case scenario, such factors can result in a moratorium on new water system connections. [Wat C §§356, 71640](#).

Many public water suppliers serving urban or partly urban areas publish Urban Water Management Plans (UWMPs) comparing projected availability of existing and planned future water supplies to existing and planned future demand over a 20-plus-year horizon. [Wat C §§10621, 10631](#). If a prospective buyer's planned project is located within the service area of a public water supplier that prepares UWMP updates, the buyer will need to consider whether the water demand from the project was included in the comparison of water supplies and demands in its most recent UWMP update. Smaller public water suppliers that do not publish UWMPs typically have master plans and other studies from which to evaluate existing and future availability of water to serve a new project.

If a local public water supplier's UWMP update or other water planning documentation shows an existing or projected future shortfall in availability of water for your client's land acquisition project, you may need to develop or acquire a water supply for the project. Typical options for a do-it-yourself (DYI) water supply approach are described below.

Even when a public water supplier has adequate supplies to serve a new land development project, the cost to connect to the service system can be considerable. If the land is not adjacent to an existing water main, the cost

for a new pipeline might be steep. New storage tanks, pumps, or treatment capacity might be needed. When land already is connected to a water service system, the existing connection might be too small to supply the water needed for the planned future land use. The cost to increase the connection size might be considerable, with related increases in the monthly service fee.

When the land acquisition project is located outside any public water supplier's service area, there are two main approaches. A landowner can request annexation to an existing public water supplier's service area, which generally requires approval by the LAFCO or the PUC, respectively, depending on whether the supplier is a local public agency or an investor-owned utility. [Govt C §56375](#). In some cases, extra-territorial water service agreements might be an option. [Govt C §56133](#). But if the nearby public water supplier lacks supplies needed to serve the project, the proponent of the land acquisition project may need to acquire or develop its own source of water supply for use by whichever entity will serve the project.

#### Is a DIY Water Supply Required?

If connection to an existing public water system is infeasible, or if the local system lacks supplies needed to serve the land acquisition project, the buyer might need to undertake a DIY water supply solution.

When a DIY approach is needed, the land's purchase price should reflect the risks arising from the lack of an available water supply. Adding water to dry land is a California tradition, and when the land purchase price reflects the water risk, the buyer's later solving the water supply problem can provide a significant return on investment. But solving the water problem can impose costs and take time that not all buyers can afford.

Potential options for a DIY water supply solution vary widely by location. Development of groundwater wells, acquisition of a surface water right, construction of a seawater desalination facility, or assignment of a contractual water supply entitlement are all examples of potential water supply solutions. Even when such options might be physically feasible, California's water rights regime and local, state, and federal regulatory restrictions might make all or some options legally or economically infeasible or at least complicated, time-consuming, and costly to successfully carry out.

**Groundwater Rights.** A DIY groundwater approach should consider the physical availability of groundwater in connection with water rights, regulatory restrictions and fees, and any agreements affecting groundwater use. A groundwater investigation typically starts with a consulting geologist or water engineer reviewing technical reports on well construction, groundwater use,

and availability, and can involve well-pumping tests to estimate physical production capability.

California's [Sustainable Groundwater Management Act \(SGMA\)](#) provides for regulation of groundwater use in 127 high- and medium-priority groundwater basins across the state. [Wat C §§10720–10737.8](#). Even when groundwater production is physically feasible to serve a land acquisition project, formation of local groundwater sustainability agencies (GSAs) to adopt and enforce groundwater sustainability plans (GSPs) could complicate a groundwater solution or take this option off the DIY table. Alternatively, if groundwater production for a proposed land acquisition project is consistent with a GSP's regulatory scheme, this potential water supply solution might be enhanced by the [SGMA](#). For example, if a GSP creates a groundwater allocation program, a prospective land purchaser should evaluate whether an allocation can be obtained to confirm the availability of a reliable groundwater supply for the land acquisition project.

Apart from the [SGMA](#), groundwater allocations and pumping fees can arise from comprehensive court adjudications of groundwater rights, including overlying rights, appropriative rights, prescriptive rights, and potentially other rights. California has seen nearly 30 groundwater adjudications, including the largest-ever adjudication completed in 2021. See [Antelope Valley Groundwater Cases \(2021\) 63 CA5th 17 \(Tapia\)](#); [Antelope Valley Groundwater Cases \(2021\) 62 CA5th 992 \(Willis Class\)](#); [Antelope Valley Groundwater Cases \(2021\) 59 CA5th 241 \(Phelan\)](#).

Partly in response to disputes over who should bear the burdens of achieving groundwater sustainability in [SGMA](#)-regulated basins, groundwater rights adjudications are now being litigated in Ventura County's Las Posas, Oxnard Plain, and Pleasant Valley basins, and in the Indian Wells basin in Riverside County's Coachella Valley. [OPV Coalition v FCGMA \(Ventura Super Ct, No. 56–2021–00555357\)](#); [Las Posas Valley Water Rights Coalition v FCGMA \(Santa Barbara Super Ct, No. VENC100509700\)](#); [Indian Wells Valley Water Dist. v All Persons Who Claim a Right to Extract Groundwater in the Indian Wells Valley Groundwater Basin, etc., et al. \(Orange Super Ct, No. 30–2021–01187275-CU-OR-CJC\)](#). More groundwater adjudications are expected as competition for sustainable water supplies intensifies.

If groundwater is identified as a potential source of supply for a land acquisition project, the buyer should evaluate whether local well-development regulations; local groundwater use regulations; or a past, pending, or expected future water rights adjudication affects the feasibility of this water supply solution approach. Any such regulations or adjudication judgment should be

reviewed by counsel experienced in these complicated matters.

**Surface Water Rights.** A DIY surface water approach should consider the physical availability of surface water from a stream, lake, or manmade delivery facility in connection with water rights, regulatory restrictions, and any applicable agreements affecting how the surface water may be used.

A surface water investigation typically starts with engineering and legal review of any records documenting past surface water use and the water right(s) claimed to allow the use. California recognizes a range of different surface water rights, including riparian rights; pre-1914 appropriative rights; post-1914 appropriative water right permits, licenses, and registrations; pueblo rights; and potentially prescriptive rights. Each right has its own restrictions and conditions governing the allowed volume, rate, timing, location, and purposes of surface water use.

Some surface water rights are easier to evaluate than others. For example, riparian rights only apply to riparian lands within the watershed of the surface water source, and they can be evaluated by reviewing parcel maps arising from the chain of title for lands that were adjacent to a stream or lake at the time of patent. Title-chain review can help reveal whether a parcel might have lost its riparian rights after a deed created one or more new parcels that lost adjacency to the surface water source. Riparian rights may not be transferred from one parcel for use on another.

Post-1914 appropriative rights are ones approved by the SWRCB or its predecessor in the form of permits, licenses, or registrations specifying allowed volume, rate, timing, location, and purposes of surface water use. Pre-1914 appropriative rights are ones initiated by taking and using surface water before 1914 and typically have much less substantiating documentation than post-1914 appropriative rights. Generally, pre- and post-1914 appropriative rights may be transferred for use in a new location, as long as the change does not reduce water availability to others. The SWRCB regulates all transfers of post-1914 appropriative rights. Prescriptive rights sometimes arise from litigation between competing surface water users.

As with groundwater rights, courts sometimes adjudicate surface water rights in judgments that specify allowed volume, rate, timing, location, and purposes of surface water use. For example, certain surface water rights have been adjudicated for the Scott and Shasta rivers in Northern California, while Ventura River water rights are now being adjudicated in Southern California. See, e.g., *In re Determination of the Relative Rights, Based Upon Prior Appropriation, of the Various Claimants to the Waters of Shasta River & Its Tributaries,*

*in Siskiyou County, Cal.*, No. 7035, *Shasta River Adjudication Proceeding Judgment and Decree* (Dec. 30, 1932), Judgment Book 12, p 189; *Santa Barbara Channelkeeper v State Water Resources Control Bd.*, Los Angeles Super Ct, No. 19STCP01176 (filed Sept. 19, 2014).

Even when a valid water right might be documented, the right might not ensure water supply availability. When demand for surface water exceeds supply, California's water rights priority system generally requires "junior" water rights to curtail their water use to preserve water availability for "senior" water rights.

Environmental regulation can affect the availability of water under an otherwise valid surface water right. See, e.g., *National Audubon Soc'y v Superior Court* (1983) 33 C3d 419 (reopening water rights licenses to protect public trust values in Mono Lake); *Natural Resources Defense Council v Houston* (9th Cir 1990) 146 F3d 1118 (setting aside Central Valley Project (CVP) water service contract approvals in response to alleged [Endangered Species Act](#) violation). For example, the California Department of Fish and Wildlife (CDFW) now commonly requires negotiation of Streambed Alteration Agreements for construction, operation, and maintenance of existing and new surface water diversion works that may substantially affect fish and wildlife. [Fish & G C §1602](#). [Fish and Game Code §5937](#) generally requires dam owners to bypass water to keep downstream fish in good condition. The California [Endangered Species Act](#) prohibits unauthorized direct take of fish or other wildlife listed by CDFW as threatened or endangered. The National Marine Fisheries Service and United States Fish and Wildlife Service enforce the federal [Endangered Species Act](#) to prohibit unauthorized take of fish or wildlife listed as threatened or endangered, including indirect take arising from adverse modification of habitat for listed species.

The application of such state and federal environmental laws can significantly reduce the water supply available under an existing surface water right and can make it difficult or impossible to acquire a new surface water right. When surface water rights are part of the water supply solution for a land acquisition project, a water engineer and counsel familiar with the application of environmental law to surface water development projects should evaluate the proposed solution for feasibility risks.

**Contract Water Entitlements.** Another potential DIY water supply solution approach can involve water supply contracts with the State Water Project (SWP), CVP, or other water development projects. The SWP and the CVP each deliver surface water pursuant to contracts with cities, local water districts, or other entities. Such contracts specify terms and conditions of water service, including the maximum amount of water available to each contractor and how available supplies will be allocated

among competing contractors during times of shortage from dry years or environmental restrictions on water supply operations.

In some cases, an existing SWP or CVP contractor may be willing to assign or transfer all or a portion of its contractual water entitlement to another SWP or CVP contractor. For a land acquisition project located within the service area of an SWP or CVP contractor, the acquisition of excess SWP or CVP water entitlements from a willing seller can provide all or part of the water supply needed. See, e.g., *Sierra Club v West Side Irrig. Dist.* (2005) 128 CA4th 690 (upholding CVP water transfers against CEQA challenge).

Even when no excess contract water supply might be available for acquisition, a land acquisition project's location within the service area of an SWP or CVP contractor can provide access to capacity in a statewide water distribution grid that allows delivery of other water supplies acquired from elsewhere in the state. Such transactions typically involve consulting engineers and water counsel familiar with the SWP and CVP distribution system and contracts.

**Other Potential Water Supply Solutions.** A wide range of potential water supply solutions may be possible, depending on the available ingredients.

For example, we have negotiated an agreement to refurbish a moth-balled desalination plant to ensure water supply availability to a senior housing project that was part of a larger military base re-use program on California's Central Coast. In other cases, we have assisted clients in carrying out a net-zero water supply impact solution that would reduce existing agricultural water use on the land acquisition project site by an amount equal to or exceeding the demand from the new urban land uses planned for the site.

In some locations, public water suppliers or land-use agencies have adopted formal programs to implement water-neutral development through water conservation offset projects. See *Harder, Demand Offsets: Water Neutral Development in California*, 46 *McGeorge L Rev* 103 (2014).

With creative water counsel, support from qualified technical consultants, and the time and financial resources needed to identify and assemble available "ingredients," the range of potential water supply solutions may be wider than first meets the eye.

### Conclusion

Water supply availability should be evaluated before acquiring land for a planned project the success of which requires a reliable water supply. California's "show-me-the-water" laws outline questions to ask before or during the due diligence phase of a proposed land acquisition. Technical consultants and water counsel can assist buyers

and their real property transaction counsel in assessing water availability to help manage California's endemic water risk.