

BASICS OF COLORADO WATER LAW

The Colorado Doctrine

The Colorado Doctrine is a set of laws regarding water use and land ownership, adopted by the people of Colorado starting in the 1860s. It defines four essential principles of Colorado water law:

- 1) All surface and groundwater in Colorado is a public resource for beneficial use by public agencies and private persons;
- 2) A water right is a right to use a portion of the public's water resource;
- 3) Water rights owners may build facilities on the lands of others to divert, extract, or move water from a stream or aquifer to its place of use; and,
- 4) Water rights owners may use the streams and aquifers for the transportation and storage of water.

The Prior Appropriation System

A legal framework called the prior appropriation system regulates the use of surface water in rivers or tributary groundwater connected to the river basin. This system is mandated by Colorado's Constitution. It is also referred to as the "priority doctrine." To better understand how this system works, let's begin word-by-word.

PRIOR. Water users with earlier water rights decrees (senior rights) have better rights in times of short supply, and can fill their needs before others (junior rights) can begin to use water. The phrase "first in time/first in right" is a shorthand description of the prior appropriation doctrine.

APPROPRIATION. Appropriation occurs when a public agency, private person, or business places water to a beneficial use according to procedures prescribed by law. Only previously unappropriated surface or tributary ground water can be appropriated. The appropriator must have a plan to divert, store, or otherwise capture, possess, and control the water for a beneficial use.

SYSTEM. The prior appropriation system provides a legal procedure by which water users can obtain a court decree for their water right (see *Water Courts p. X*). This process of court approval is called adjudication. Adjudication of a water right sets the priority date of the water right, its source of supply, amount, point of diversion, type and place of use. It also confirms that this water right will not cause injury to existing water rights holders.

There are two basic types of prior appropriation water rights: direct flow rights and storage rights. The first takes water directly from a stream to its place of use. The second puts water into a reservoir for later use.

The prior appropriation system also lays out an orderly procedure so that state officials can distribute water according to decreed water right priority dates, shutting off junior rights as needed to satisfy senior rights. The only exceptions to this order of priority occur when there is an

Diversion or Divert. Remove or control water from or within its natural course or location, by means of a water structure such as a ditch, pipeline, boat chute, reservoir, or well.

Injury. The action of another that causes or may cause the holders of decreed water rights to suffer loss of water in the time, place, and amount they are entitled to use that water.

Developed or Imported Water. Water brought into a stream system from another unconnected source, for example, transmountain surface water or non-tributary well water.

approved replacement water supply plan in place that would allow out-of-priority diversions (e.g. *Augmentation Plans, Exchanges, and Substitute Supply Plans*) or because of a statutory exemption from administration (e.g. *Exempt and Non-Exempt Wells*), or in instances of a futile call.

Domestic Preference

The Colorado Constitution provides, in times of shortage, that domestic water use has preference over any other purpose, and that agricultural use has preference over manufacturing use.

In an early 20th century court case pitting a junior municipal use against a senior irrigation use, the Colorado Supreme Court said that this provision did not intend to alter the priority system. However, it does give municipalities the power to condemn water rights, if the owners of those water rights are paid just compensation. For example, in 1911 the City of Grand Junction used this power to condemn water rights others had previously exercised on Kannah Creek.

Municipal and domestic use currently amounts to about 10 percent of water consumption in Colorado; agriculture, about 85 percent; and all other uses some 5 percent.

Water Waste and Return Flows

In Colorado, a water right is a special kind of property right known as a usufructuary right. Usufructuary means having the right to use a resource without actually owning it. Ownership of the water resource always remains in the public domain under Colorado law.

The saying that a water appropriator must "use it or lose it" reflects only one facet of a usufructuary right. This simply means that if you do not need to use all or part of your decreed right, the water goes to those who can use the water beneficially, according to the priority date specified in their water right decrees.

Colorado Supreme Court water law decisions state that a water user may not take from the stream any more water than is needed for beneficial use at the time the actual diversion is made, despite the amount allowed on the face of the water right decree. To divert more water than is *needed* for beneficial use is water waste, and water waste cannot be included within the measure of a water right.

What defines need for beneficial use? Need is a combination of the amount needed to move water to the place where it will be used, and the amount needed for beneficial consumptive use.

For example, agricultural water use can be 20 to 75 percent consumptive, depending on soil type, crop planted, geographic location, or irrigation method. Municipal use varies from 5 percent consumptive during the winter, to 50 percent consumptive during summer landscape irrigation.

Consumptive Use.
The amount of water used up by application to beneficial use.
Examples include: water for drinking, water taken up by growing crops.

Return flow. Water that returns to streams and rivers after it has been applied to beneficial use. It may return as a surface flow, or as an inflow of tributary groundwater.

Beneficial consumptive use over a representative historic time period is the measure and limit of a water right. However, It is calculated by volume of acre-feet only when a water right is changed to another type of use, point of diversion, or place of use.

Many types of water use produce ground or surface water return flows. Some examples of return flows are water that percolates below the root zone of a crop and into the shallow groundwater, water seeping from unlined earthen ditches, or discharges from wastewater treatment plants, among other sources. Return flows are important for satisfying downstream water rights, providing instream flows, and delivering water for interstate compacts.

Many water rights depend on surface and subsurface return flows. Under Colorado case law, return flows are not wasted or abandoned water. Junior water users cannot intercept return flows upon which senior water rights depend, unless they replace them with another water supply of suitable quantity and quality for the historic use of the senior rights. This is because decreed water rights are entitled to maintenance of the same stream conditions that existed at the time the appropriation began. However, if the water is imported into a river basin via an entirely different source, that water can be used and reused to extinction.

Water Courts

In Colorado, water courts have jurisdiction over all water right decree applications for surface water, tributary groundwater, non-tributary, Denver Basin groundwater outside of designated groundwater basins, and geothermal resources. In addition, they review cases of reasonable diligence for conditional water rights, changes of water rights, exchanges, and augmentation plans, and appeals from State or Division Engineer enforcement orders.

Water courts also have jurisdiction to review cases where the state and division engineers have refused to enforce reductions or shutdowns of undecreed water uses or decreed junior water rights after a “call” was placed by a senior water right. Appeal of a water court decision goes directly to the Colorado Supreme Court.

Water courts set the priority date for the water rights decree based on the year in which the application is filed, and, within that year, the date when water appropriation was initiated.

In decreeing water rights priorities, Colorado water courts are not free to choose between different types of beneficial uses. They are also not allowed to deny water right applications based on public interest or environmental grounds.

The public trust doctrine is not recognized in Colorado, although the Colorado Supreme Court has ruled that the Colorado Water Conservation Board has a legal responsibility to the people of Colorado to enforce its instream flow water rights.

<p>Public Trust Doctrine. A doctrine of state ownership of stream and lakebeds that has been applied, most notably in California, to cut back on historic diversions to sustain fish and wildlife habitat and recreation.</p>

Different Types of Decrees and Water Rights

Absolute Decree: a water court decree recognizing that a water right has been perfected, or made real, by placing previously unappropriated water to a beneficial use.

Augmentation Decree: a water court decree that allows a water user to divert out of priority by replacing water depletions made to the stream system.

Change of Water Rights Decree: a water court decree that allows a different use, different point of diversion, or different place of use, while retaining the senior priority of the original water right. The water consumption under the change is limited to the beneficial historic consumptive use of the original water right based on a representative time period, maintenance of the historic return flow pattern, and other conditions necessary to prevent enlargement of the water right or injury to other water rights.

Conditional Decree: a water court decree recognizing a priority date for a new proposed appropriation. The water right is conditional upon actual physical appropriation of the water. The applicant for a conditional decree must show that there is unappropriated water available, and must have a plan to divert, store, or otherwise capture, possess, and control the water. To continue to hold a conditional decree, the potential water user must prove to the court that he is making diligent progress towards putting the water to a beneficial use. A holder of a conditional decree must show diligence every six years after issuance of the original conditional decree or issuance of the most recent diligence decree.

Direct Flow Right: a right that takes its water directly from the surface stream or tributary groundwater for application to beneficial use. It is expressed in cubic feet per second of flow (cfs).

Exchange Decree: a water court decree that allows an upstream diverter to take the water that would usually flow to a downstream diverter. The upstream diverter must provide the downstream diverter with a suitable replacement supply of water, in amount, timing, and quality, from some other source.

Federal Reserved Right: a right to previously unappropriated water expressly created by federal law. Federal reserved rights may also be created by implication, meaning that even if such rights were not named explicitly, Congress implied that it was necessary to reserve water rights for use on federal lands such as tribal reservations, national parks, forests, and monuments.

In-channel Recreational Diversion Right: water right held by a local governmental entity for structures that control the flow of water for rafting and kayaking.

Instream Flow Water Right: a water right held by the state (CWCB) to protect or improve the water-dependent natural environment.

Storage Right: a right to impound water in priority for later use, expressed in number of acre-feet of water (af) that the reservoir or storage vessel can hold.

The following steps for obtaining a decree for a conditional water right are provided as a guideline. They are not intended to address all situations. The Colorado Courts Web page contains application forms for the various types of water applications at www.courts.state.co.us

To initiate a surface or tributary groundwater right and obtain a decree, the water user must:

- 1) Intend to divert previously unappropriated water;
- 2) Demonstrate this intent openly, for example, by conducting field surveys, posting notice at a diversion point, or filing for a well permit application;
- 3) File an application with the regional water court. The year in which the application is filed sets the date of priority;
- 4) Publish the application through the water division monthly water resume and by legal notice in local newspapers;
- 5) Allow two months for other parties to file statements of opposition;
- 6) Colorado Division of Water Resources engineers at the local Division Engineer's Office review the application;
- 7) Staff from the Division Engineer's office, generally the local water commissioners, perform field investigations to confirm the claims in the application;
- 8) Division Engineer submits a written report to the regional water court, with recommendations;
- 9) If there is no opposition, the application is reviewed by a water court referee who then issues a ruling;
- 10) If no protest is filed, the ruling goes before the water court judge and he/she signs it in the form of a decreed water right.
- 11) If there is a protest, the case goes before the water court judge for trial, unless the parties can reach agreement. In that instance, the water court may enter an agreed-upon decree.

Access for Building and Operating Water Facilities

The right to cross another person's land to construct, maintain, and operate a water facility, such as a reservoir, ditch, or headgate, has always been an essential feature of Colorado water law. Maintenance may include activities such as cleaning of ditches, weed control, or monitoring water diversions, among others.

Those who interfere with the operation of a water facility, damage it, or prevent access for those who own the structure, are subject to trespass lawsuits, payment of damages, and restoration of the structure.

If applying for a new water right, the applicant must have the necessary legal interest in the land where the water facilities will be built, or show that he or she can obtain it. If the landowner does not consent, the Colorado Constitution and statutes provide a private right of condemnation across the lands of others for the construction and operation of water facilities, such as pipelines and reservoirs, upon payment of just compensation to the property owners. Consent is also typically required when a governmental entity owns the land. This is usually obtained through a permit process.

Administration of Water Rights: Colorado Division of Water Resources

The Colorado Division of Water Resources, which includes the State Engineer, division engineers, and water commissioners, has the authority to administer all surface and tributary groundwater in the state of Colorado.

The 1969 Act states that rules of the State Engineer “shall have as their objective the optimum use of water consistent with preservation of the priority system of water rights.” Although Colorado statutes and court decisions appear to refer interchangeably to maximum utilization and optimum use, the Colorado Supreme Court says that Colorado water law does not require squeezing out every drop of water available. Rather, the law favors optimum use, which entails “proper regard for all significant factors, including environmental and economic concerns be taken into account.”

Throughout Colorado, the holders of decreed water rights depend on the State Engineer to shut down or reduce undecreed, as well as decreed, junior uses to satisfy the demand of decreed senior uses.

There is a division engineer's office located in each of the 7 water divisions in Colorado. Each division office employs a number of water commissioners. It is the primary job of the water commissioners to go into the field and allocate the waters of the state. This involves monitoring headgates, responding to calls for water, issuing orders to reduce or cease diversions, and collecting data on diversions. The State Engineer operates a statewide satellite-linked monitoring system that records stream flows on a real-time basis. This system is a vital component to water administration and flood monitoring efforts.

The State Engineer also administers non-tributary and Denver Basin groundwater under its well permit and rulemaking authority. The Colorado Groundwater Commission and local groundwater management districts administer groundwater in the designated groundwater basins. The State Engineer has the authority to develop new regulations for tributary, non-tributary, and Denver Basin groundwater, subject to judicial review.

Much information regarding water administration in Colorado appears on the Division of Water Resources' Web site, www.water.state.co.us.