

COLORADO WATER LAW



SUMMARY OF THE LAW OF WATER RIGHTS IN COLORADO

Questions concerning Colorado water rights matters should be directed to Anne Castle or Chris Thorne of Holland & Hart's Denver office (303-295-8000), or Boots Ferguson of the firm's Aspen office (970-925-3476).

1. Doctrine of Prior Appropriation.

Pursuant to the State Constitution and statutes, the use of water in Colorado is governed by the doctrine of prior appropriation, also known as the "Colorado Doctrine" of water law. The essence of the doctrine of prior appropriation is that, while no one may own the water in a stream, all persons, corporations, and municipalities have the right to use the water for beneficial purposes. The allocation of water rests upon the fundamental maxim "first in time, first in right." The first person to use water (called a "senior appropriator") acquires the right (called a "priority") to its future use as against later users (called "junior appropriators"). Although the State Constitution declares that domestic users are to be "preferred" over agricultural users, and agricultural users are to be "preferred" over manufacturing users, this preference has been interpreted by the courts to mean only that a preferred user has the right to condemn and pay just compensation for the water rights of a less preferred user. In order to assure protection of senior water right priorities and to maximize the use of this scarce and valuable resource, Colorado has enacted a detailed framework for the determination and administration of water rights. This framework defines to a large extent just what a Colorado water right is.

2. Establishment of a Water Right.

To create a water right, one must make an "appropriation." The two essential elements of an appropriation are the diversion of water and its application to a beneficial use. A diversion is made simply by removing water from its natural course or location or by controlling water which remains in its natural course. The requirement of application to beneficial



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use is satisfied by irrigation, mining and industrial application, stock watering, domestic and municipal use, and other non-wasteful economic activities (including recreation). An applicant for a water right must also demonstrate that unappropriated water is available.

An appropriator may remove the water from its source and put it to beneficial use at any location. There is no geographical limitation as to place of use. In addition, the ownership of land bordering a watercourse carries with it no right to the use of the water in the absence of an appropriation. To gain access to the water source and to transport it to the place of use, the appropriator can obtain a right-of-way by eminent domain (condemnation), contract or grant, or by prescription (continuous, adverse use of an existing ditch, for example).

Water rights may be evidenced by a court decree and such a decree is necessary in order to obtain protection of one's priority on a stream. Presently, there are seven statutory water courts in Colorado, one in each of the seven water divisions which have been established in the seven major river basins of the state. These courts conduct adjudication proceedings in which water rights are decreed and also hear other cases involving water matters. Before 1969, the local district court of a water district had jurisdiction over water rights within the district and the adjudication of priorities; however, legislation passed in that year transferred jurisdiction to the seven water courts.

In an adjudication proceeding, evidence is given of the fact of the appropriation, the date on which the appropriation began, the point of diversion, the place and type of use, the quantity, and the time of year the water is taken. The appropriation date is either the date upon which the water was first put to a beneficial use or, in the case of a conditional water right, described in more detail below, the date on which the project to use the water was initiated. The water right is defined and limited by these factors. Under current law, water rights decreed pursuant to applications filed in the water court are junior (lower in priority) to all water rights awarded on applications filed in previous calendar years. As between water rights awarded on applications filed during the same calendar year, the appropriation date as stated in the decree will determine the relative priority. For example, any application for a new water right filed during 1997 will be junior to all water rights for which applications were filed in 1996 or earlier. Thus, both the appropriation date and the filing date of a

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water court application are important in determining the priority of a given appropriation. The water court has jurisdiction to determine the legitimacy of all changes in the nature or place of use of water rights, such as a different point of diversion, a change from agricultural to municipal use, a change from direct flow to storage, or a change from part-time (e.g., spring and summer use) to full-time, year-round use. The water court will approve such a change if it will not injuriously affect other appropriators. A change of water right proceeding frequently engenders substantial opposition from other water users on the stream. That opposition may result in protracted and expensive litigation.

Colorado recognizes both “absolute” and “conditional” water rights. Where an appropriation has been completed by diversion and beneficial use of the water by the time of the adjudication of the priority, the water court will recognize the right as absolute. An appropriator may, however, obtain a conditional water right before the water has actually been used. This is useful primarily where substantial projects to be planned, constructed, and completed over a period of years, are involved. The appropriator may obtain a decree to protect his priority before completing the appropriation in order to assure that water which was available at the time the project was initiated will still be available after completion. When a firm intent to appropriate certain water is established and certain acts in furtherance of the project are undertaken, a conditional water right may be decreed by the water court with a priority date as of the date the first step in the project was initiated. If the project proceeds with reasonable diligence and such diligence is demonstrated every six years in water court, an absolute decree for the water right can be obtained upon completion of the project with a priority date which “relates back” to the date in the conditional decree, that is, the date the project was commenced.

3. Types of Water Rights.

Water rights in Colorado are of two general types, direct flow and storage. A direct flow right is generally measured in terms of a rate of flow, not a total volume of water. For example, a direct flow right for “1.0 c.f.s.” means that the appropriator is entitled to take water at a rate of not more than one cubic foot of water per second of time. The appropriator may continue to take water at this rate of flow for so long as it is physically available in priority and he needs the water for beneficial use. If a water right was initiated to irrigate a 40 acre tract, the need, or “duty” of that

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water right is measured as the amount of water necessary to properly irrigate that 40 acre tract. The duty of water thus operates as a limit on the amount of water which may be diverted under a priority and is designed to prevent waste. In the example, the appropriator may divert 1.0 c.f.s. to the 40 acre tract only until it is fully irrigated.

A storage water right is measured in terms of volume. For instance, the owner of a reservoir may have the right to store up to 1,000 acre feet of water each year to be used at some later time for a beneficial use. An acre foot is that amount of water required to cover one acre with one foot of water (43,560 cubic feet or 325,851 gallons). Occasionally a limit is placed on the rate at which water can be stored, such as a right which declares 1,000 acre feet, to be stored at a rate no greater than 5.0 c.f.s." Storage rights are typically permitted for only one filling of the storage vessel per year.

4. Ground Water.

The Colorado legislature has established three different classifications of ground water. The first is called "designated ground water," which lies within specific ground water basins as designated by the Colorado Ground Water Commission (the "Commission") and is generally not tributary, i.e., not hydrologically connected to surface flow. The administration by the Commission of ground water within a designated basin is governed by a "modified prior appropriation system," which protects the rights of senior water users but permits the full economic development of the ground water resources. Priority dates are assigned to wells located in designated ground water basins according to the date of first beneficial use. New wells are permitted only if the proposed appropriation will not unreasonably impair existing rights from the same source.

The second type of ground water in Colorado is that located within a nontributary aquifer, not located within a designated ground water basin. These are underground sources of water which, because of their unique geology, contain waters which will never have a practical impact upon a natural stream. More specifically, nontributary ground water is defined as ground water the withdrawal of which will not, within one hundred years, deplete the flow of a natural stream at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal. Unlike all other water rights in Colorado, ownership of nontributary water is dependent upon

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ownership of the land overlying the water itself. Although the owner of the land can transfer the right to use this water to another party, the water right cannot be secured simply by virtue of withdrawal of the water and application to beneficial use. The State Engineer will issue a permit for use of nontributary ground water but may regulate the use to prevent injury to other users and to conserve the waters of the aquifer.

The third and most common type of ground water in Colorado is tributary ground water, or water that is hydrologically connected to surface flow. A legal presumption exists that all ground water is tributary. Such ground water is administered within the priority system and is integrated with the administration of surface waters. Thus, a well withdrawing tributary ground water is treated in precisely the same manner as a surface diversion from a stream for the purposes of adjudication in water court and administration in accordance with the priority system.

5. Administration of Water Rights.

Water rights are administered by the State Engineer and his seven division engineers. Additionally, each division engineer may appoint a water commissioner to administer the allocation of water on a particular stream or streams. Competition for water, as well as proper enforcement of the priority system, requires comprehensive administration. For instance, those appropriators with the oldest priority dates (senior water rights) can require that others stop taking water so that the water remaining in the stream system will reach the diversion works of the senior users. This type of demand by senior water rights is known as a “call.” In times of shortage when senior water rights are calling for water, water users may be shut off in inverse order of priority. The predicted administration of a water right must be considered in the evaluation of the actual yield that can be expected from that water right.

6. Augmentation Plans.

Colorado law provides for the adjudication of a “plan for augmentation” which is defined as a program to increase the supply of water available for beneficial use by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by development of new sources of water, or by any other appropriate means. A plan for augmentation is most often used to allow the out-of-priority diversion of water from the tributary

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stream system and the replacement of the depletion caused by that diversion from some other source. Sources of replacement water include senior direct flow water rights, nontributary ground water, or water stored in priority and available for later release. The replacement water must be of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used. Water court approval of a plan for augmentation will permit the applicant to continue diversions of water when curtailment would otherwise be required to meet a valid senior call for water.

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