

## **General Principles of Colorado Water Law**

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*(The following is a recitation of general principles of relevant law for use only as general background information, and should not be used as a substitute for legal advice on any specific matter)*

Under Colorado water law, a water right is a right to use a specific portion of the flow of a stream, at a particular point on the stream, for a specific use at a specific place, provided that the water is not needed to satisfy senior water rights. While the point of diversion, rate of flow, type of use, priority and other aspects of the water right are typically described in a judicial decree evidencing that right, the decree itself does not completely define the water right, but instead sets an “upper limit.” In fact, subject to that upper limit, the right is defined by the manner in which it has historically been exercised. For example, a decree may state that the holder is entitled to divert 2.0 cubic feet per second (“c.f.s.”) to irrigate 100 acres. Yet, if the holder has historically diverted an average of 1.0 c.f.s. and applied the water to only 50 acres, the latter rate of flow and number of acres are controlling. Thus, the value set forth in the decree represents a maximum value, which may be effectively reduced by the pattern of historical use.

This result is a function of the principle that junior appropriators are entitled to the maintenance of stream conditions existing at the time of their respective appropriations. When a new appropriator arrives, he takes the stream as he finds it. The stream is typically an indistinguishable mix of natural flows and the return flows of upstream water users. Return flows can even provide a live stream at certain times, even though under natural conditions there would be no stream flow. Thus, a junior appropriator may rely on return flows of upstream users for his source of supply. The law recognizes that the junior appropriator is entitled to this reliance and will protect him against changes by seniors in the exercise of their rights which would adversely impact the junior’s appropriation. In recognition of these principles, the law requires that before anyone may change any of the essential parameters of a water right (i.e., point of diversion, type of use, place of use, etc.), he just obtain judicial approval for such a change. The change will not be approved if it will injuriously affect the exercise of other water rights including the rights, of junior appropriators.

Under Colorado’s “appropriation” doctrine, the right to divert water for beneficial use is allocated “first in time, first in right.” Under this principle, priorities of water rights are recognized and satisfied in accordance with their age, or seniority, so that more senior rights are fully satisfied before more junior rights may take any supply from the same source. Seniority is based upon adjudication dates first, and for water rights with the same

adjudication date, by appropriation date. Thus, in times of shortage, Colorado's appropriation doctrine does not provide for a prorationing of the available water among rights in the same source. Rather, the more senior rights must be fully satisfied in the time and to the extent of their beneficial need before more junior rights may be exercised.

A water right is created by the simple act of diverting and using water from a natural stream. However, the *priority* of a water right can be established only by adjudication, i.e., the process of having the claim confirmed by the water court. The priority of a water right is a combination of two dates; the most important being the date of adjudication. A water right adjudicated in a given year is senior to all water rights adjudicated in subsequent years. As between water rights adjudicated in the same year, the date of appropriation controls.

A water right may be denominated as either "absolute" or "conditional." An absolute water right is one which has actually been exercised and the water applied to beneficial use. A conditional water right, on the other hand, represents judicial confirmation that certain steps have been taken to initiate an appropriation of water, and when the appropriation has been completed by the diversion of water and its application to beneficial use, an absolute right may be awarded which will have the same priority as the conditional water right. The purpose of a conditional water right, then, is to preserve a certain priority until such time as the infrastructure necessary to exercise the water right is completed and water is actually diverted and applied to beneficial use. The owner of a conditional water right is obligated to pursue the development of the water right with "reasonable diligence," and will be required to prove that he has been reasonably diligent by filing an application with the water court every six years, until the infrastructure is complete, the water has been put to beneficial use, and the water right thereby made absolute. Failure to timely file an application for finding of reasonable diligence or to adequately demonstrate reasonable diligence results in the abandonment of the conditional water right.

All underground water in the state is presumed to be tributary to the water flowing in surface streams, and rights to the use of such tributary groundwater are allocated and administered under the same appropriation system described above. Groundwater which can be proven to be nontributary to a surface stream is allocated to the owner of the land overlying the water and is not subject to administration under the priority system.

The use of underground water typically requires acquisition of a well permit from the Colorado Division of Water Resources. For the purposes of such permits, a "well" is considered to be any excavation of the ground which intercepts groundwater with the intent to put that water to beneficial use. Thus, any excavation to develop a spring, build or improve a pond, or for the purpose of mining typically will require a well permit. As part of its review of any well permit application, the state must determine whether construction and operation of the well will cause material injury to existing water rights. If injury will occur, the state must deny the permit. This would ordinarily trigger the need for judicial approval of an augmentation plan in order to prevent the injury. Augmentation plans are discussed below.

Certain wells are exempt from the priority system, *i.e.*, they may be constructed and operated irrespective of the fact that senior water rights may not be wholly satisfied. Generally speaking, these are wells which are strictly limited in the amount of water which may be withdrawn and the types of uses to which that water may be put. *See*, C.R.S. §37-92-602, attached. There is a rebuttable presumption of non-injury where the only well on a residential site, which is not part of a subdivision, will be used solely for in-house purposes in a single-family dwelling, or, will be the only well on a tract of 35 acres or more and will be used in no more than three single-family dwellings for ordinary household purposes, fire protection, stockwatering, and irrigation of not more than one acre of lawn and garden, and the return flow will accrue to the same stream system in which the well is located.

Many stream systems in Colorado are over-appropriated, meaning that there is not enough water to satisfy all the claims on that stream system. Under these conditions, new junior water rights would not ordinarily be able to divert reliably. However, in many cases an augmentation plan can overcome this obstacle. An augmentation plan is a judicially-approved plan which allows a junior water right to continue diverting when it would otherwise be curtailed for the benefit of senior water rights. A “plan for augmentation” is statutorily defined as:

A detailed program to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, but water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means.

C.R.S. §37-92-103(9). Plans for augmentation take a variety of forms, but typically involve the provision of water to senior water rights either by releasing such water from storage upstream of the senior rights, or by drying up land historically irrigated under a senior right upstream of the senior calling rights and bypassing diversion of that water.

Traditionally, most water users have applied their water to a single use, *i.e.* the water is applied to some use and that portion of water which is not consumed returns to the stream system. Because junior water users are entitled to stream conditions at the time of their original appropriation, water under most water rights cannot be reused or successively used. Exceptions to this general rule exist for nontributary and “foreign” water, *i.e.*, water imported from an unconnected drainage basin. Such foreign water may be used and recaptured for application to the same or some different use until fully consumed; provided that the user maintains dominion over the water. For this reason, foreign water is substantially more valuable than native water. There are many unsettled issues regarding rights or reuse and successive use, including whether they may be severed and conveyed separately from the right of first use, and whether a right of reuse may be abandoned as a result of nonuse.

Under Colorado law, water is severable from the land. A water right is a property right and title to water rights is conveyed with the same documentation and under the same principles as those applicable to real estate. It is often represented that water rights are appurtenant to land; however, the apparent attachment of water to land by virtue of a recorded instrument in a chain of title is not sufficient to give assurance of the title of water rights being in the owner of the land. A water right is subject to loss through abandonment if water available under the right is not used for many years without sufficient legal justification. Ten years of nonuse establishes a presumption of abandonment. Furthermore, if water is actually used on lands other than those indicated in the instruments of conveyance, a title problem could arise because title to water rights may be acquired by adverse possession in the same manner that land can be acquired by adverse possession.

There are, of course, many other issues related to water use in Colorado that are not addressed here. The foregoing discussion is offered as general background to assist your understanding of water allocation and administration, and should not be used as a substitute for legal advice regarding any specific matter.