

Colorado Water Rights

Understanding Water Rights:

The laws defining water rights and the institutions involved in water resources allocation represent the framework for managing water resources in the United States. Water rights and water allocation programs in the US have largely been the provinces of the states. At this time, there is no national water rights system.

Water rights law and water allocation arrangements reflect differing traditions and conditions across the country. In water resources, the challenge for government is not one of regulation, but of fair and even-handed allocation. When demand exceeds supply, more sophisticated water allocation arrangements are required than when supply is plentiful.

The law of water rights in the US has included two distinct systems: riparian rights in the East and the appropriation doctrine in the West. A more accurate picture presents three systems: 1) riparian rights; 2) regulated riparianism (which lays a system of government permits and regulation by state agencies on top of the traditional court-made riparian doctrine); and 3) the appropriation doctrine. Groundwater policy is often some blend of these options.

Riparian Rights:

Riparian rights are the basic rules to allocate water in the eastern US--considered to be roughly east of Kansas City. These policies evolved almost naturally in an environment where water was generally plentiful and excessive government involvement was unwanted.

Under the riparian doctrine, the right to use water from a stream or lake belongs to whoever owns the land on the bank. Every riparian owner is entitled to use water from the stream. This right is defined as the right to enjoy the advantage of a reasonable use of the stream as it flows through the landowner's property. This right, however, is subject to an equivalent right belonging to other riparian owners.

Two rules govern how much water a riparian owner may use. The older rule held that the landowner must leave the natural flow of the river unchanged. Each riparian owner downstream was entitled to have the water in its natural condition, without other landowners altering the rate of flow or the quantity or quality of the water. The more modern rule of reasonable use is that each riparian owner may use the water, regardless of the natural flow, as long as their use does not cause an unreasonable injury to any other riparian user.

Regulated Riparian:

With time, increasing population and development in the East have increased the problems of water distribution. The proliferation of problems and an increased faith in government regulation have caused most states to overlay the traditional riparian system with new administrative schemes, such as permit systems, for regulating water use. This has been described as regulated riparianism.

The most important feature of regulated riparian statutes is that direct users of water must have a permit from a state administrative agency to use water. Although the standard for granting permits is typically similar to reasonable use, reasonable use may be applied differently from the common law riparian doctrine.

Appropriation System:

The arid climate of the western US is less conducive to the use of the riparian system than that of the wetter eastern US. As early trappers, miners, and settlers migrated west, they encountered a hostile environment. Early explorers referred to the Great Plains as the Great American Desert and not all believed that it could be settled. It was obvious that most of the land would require irrigation. Limiting use of streams to only adjoining landowners was not practical; such an action would drastically curtail the settlement and development of the new lands, because nonriparian lands would be practically useless.

The early miners are credited with finding a solution to the problem. By custom, they all accepted the fact that the first miner who used water from a stream to work a placer claim was protected against latecomers. Soon this custom expanded to include the use of water for all purposes, not just for mining. Finally, as the land was organized into territories and then into states, the custom became law through express recognition by court decisions, constitutional provisions, and state statutes.

The appropriation doctrine envelops several interrelated concepts. The two major concepts are: 1) a water right is a right to the use of the water; the right is acquired by appropriation; and 2) an appropriation is the act of diverting water from its source and applying it to a beneficial use.

Under appropriation doctrine, the oldest rights prevail. The earliest water users have priority over later appropriators during times of water shortage. Another fundamental philosophy expressed in western water law is that public waters must be used for a useful or beneficial purpose. The appropriator can use only the amount of water presently needed, allowing excess water to remain in the stream. Once the water has served its beneficial use, any waste or return flow must be returned to the stream.

In contrast to a riparian right, an appropriation right is independent of land ownership; the right to a certain quantity of water may be acquired by appropriating and applying water to a beneficial use. Often an appropriation right may be limited to a specific time (e.g., day or night, summer or fall, etc.). Appropriation rights are never equal because first-in-time appropriators are guaranteed an ascertainable amount of water. Unlike riparian rights, which are not lost by nonuse, appropriation rights are held only as long as proper beneficial use is continued. Appropriation rights are subject to abandonment.

(the preceding was based on Water Resources Planning *AWWA Manual of Water Supply Practices* M50 No. 30050)

Background on Colorado Water Rights System:

Under Colorado water law, the right to utilize the waters of the State is based on the priority of a party's appropriation of a specified amount of water, at a specified location, for specified uses (a "water right"). The essence of a water right is its place in the priority system. Colorado's "first in time, first in right" or "prior appropriation" doctrine applies to both surface water and groundwater tributary to a surface stream. In times of water shortage, a senior right may place a "call" on a stream to obtain a full supply. The stream will then come under the administration of the Colorado Division of Water Resources. Reservoir seepage that returns to the stream system is available for appropriation, as is any other unappropriated water of the stream, but the reservoir may be repaired to avoid the loss.

Method of Acquiring Water Rights

The Colorado Constitution declares that the right to appropriate the unappropriated water of the state "shall never be denied."

The first step of an appropriation is an action on the ground, such as a survey, coupled with an existing intent to apply the water to beneficial use. The appropriation date of a water right is the earliest date on which the applicant can demonstrate the initiation of the appropriation: i.e., the coexistence of both an intent to appropriate and an action on the ground manifesting that intent.

The existence of an appropriation is confirmed and the priority of a water right is determined in a proceeding in state Water Court. An application for a water right is made to the Water Court in the appropriate division of the seven water divisions into which Colorado is divided on a stream basin basis. Water court applications must set forth a legal description of the requested diversion, a description of the source of the water, the date of the initiation of the appropriation, the amount of water claimed, and the use of the water. A priority decree for an application filed in a calendar year

is junior to decrees awarded to applications filed in previous calendar years. An exception exists for a federal reserved federal land reservation for which water was impliedly reserved to meet the land reservation's primary purposes.

Conditional Water Right

Because some projects take a long time to complete, an applicant for a water right who has taken the first steps to appropriate water for beneficial use may obtain a "conditional" water right with a definite priority. In order to maintain a conditional water right, an Applicant must demonstrate to the Water Court reasonable diligence in perfecting the appropriation every six years from the date the decree is awarded. Reasonable diligence is demonstrated by showing continuous efforts and interest in developing the water right. To change the conditional decree to an absolute water right, an Applicant must demonstrate to the Water Court that the water has been put to beneficial use. The water right may then become absolute with the conditionally decreed priority relating back to the originally decreed appropriation date.

Plan of Augmentation - Water Critical Basins

If an established municipal water supply is not physically and economically feasible for a new project, the Project may obtain a junior water supply from wells or through stream diversions without the constant threat of curtailment by senior water rights by "augmenting" or increasing the water supply in the stream through a court-approved plan of augmentation. The amount of augmentation water that will need to be provided and the time during which it will need to be available will depend on the amount of water and the timing of the stream depletions of the development, i.e. diversions less return flows. Upon the filing of the plan of augmentation with the water court, parties who believe their water rights may be injured by the plan may file statements of opposition. Prior to approval of a plan of augmentation, the Water Court must determine that the operation of the water supply under the "plan of augmentation" will not injure the vested water rights of others on the stream to which the supply is tributary.

A plan of augmentation may take a number of forms. A developer could acquire senior water rights, stop the former uses, and transfer this water to the development. In the alternative, a developer may construct a reservoir to store water early in the year when the stream is not on call for release later in the year when the stream is under administration.

Wells

Colorado has both an administrative and a court system for determining the right to produce and utilize groundwater. To have permission to drill a well, an applicant must obtain a well permit from

the State Engineer's Office ("SEO"). The SEO must grant the permit if the well will not injure the vested water rights of others. When a stream system, including tributary groundwater, is designated water critical, the permit will be denied unless the application can demonstrate a source of augmentation water which will avoid such injury. An applicant, however, may drill test wells without an official well permit if the driller follows certain notification procedures.

While the administrative process provides a right to drill and utilize a well, a decree of the court may be necessary to ensure a legal right to utilize groundwater within Colorado's priority system. In an order of the Water Court decreeing a Plan of Augmentation, the Court can require the SEO to issue the appropriate well permits.