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A Summary of Colorado Water Law

by Michael F. Browning

This article briefly summarizes the basic principles of Colorado water law. It is intended primarily as an introduction or general overview to assist attorneys who do not regularly practice in this area.

Prior Appropriation Doctrine

Colorado water law is based on the doctrine of prior appropriation.¹ Under that doctrine, a water right is acquired by the act of diverting water and placing it to a beneficial use.² All surface and underground water in or tributary to all natural streams within Colorado is subject to appropriation. This includes springs, surface drainage and groundwater that ultimately will find its way to or is hydraulically connected with a surface stream.³ Anyone can appropriate water for beneficial use and can condemn a right-of-way for ditches and pipelines to transport the water to its place of use.⁴

Colorado does not recognize the doctrine of riparian rights.⁵ Landowners do not own and cannot use the water that

arises on or runs through their property unless they have made a valid appropriation of such water and the appropriation is in priority.⁶ (As discussed below, nontributary water and groundwater in the Denver Basin are exceptions to this general rule.)

Administration by Priority

Water rights are administered in accordance with their priorities. Senior priorities from a common supply are entitled to divert the full amount of their rights, even if this leaves no water for more junior water rights. This is accomplished by senior rights "calling out" more junior rights—that is, requiring them to discontinue diversions. In Colorado, there is no prorationing of water during shortages. First in time is first in right.⁷ Moreover, no types of use are given preference over others, except for a limited constitutional right to condemn less-preferred uses on payment of fair compensation.⁸

The priority of a water right normally is based on two factors—the appropriation date and the adjudication date. The appropriation date is the date that the appropriator formed the initial intent to divert water for beneficial use and began overt work on the project, such as digging the ditch.⁹ The earlier the appropriation date, the more senior the water right. However, Colorado has provided for the adjudication of water rights to provide greater certainty. In order to offer an incentive for adjudication, Colorado statutes provide that a water right decreed in a later adjudication should be

administered as junior to any water right adjudicated in an earlier adjudication, regardless of their respective appropriation dates. This is known as the "postponement doctrine."¹⁰ For example, within the same water district, an 1890 appropriation decreed in 1910 is senior to an 1880 appropriation not adjudicated until 1920. Among water rights that were adjudicated in the same proceeding (or, since 1969, that were filed for adjudication in the same year), priority is determined by the seniority of the appropriation date.

The "futile call doctrine" is an exception to the normal rule of administration by priority. If the user of a junior water right can establish that even if it stopped its diversion the additional water would not reach the calling senior, the senior call is deemed futile and will not be enforced against that junior right.¹¹ An example is where there is a dry section of stream bed between the senior and junior so that water left in the stream by the junior would not reach the senior's headgate. Because the futile call doctrine disrupts normal priority administration, its assertion is usually vigorously contested and rarely successful.

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The Water Courts

Water right matters are adjudicated in special state district courts, which are commonly referred to as water courts.¹² For this purpose, Colorado is divided into seven Water Divisions, one for each of the seven major drainage systems in the state. For example, all water tributary to the South Platte River is in Water Division No. 1.¹³

Since 1969, water matters have been governed by the Water Right Determination and Administration Act of 1969 ("1969 Act").¹⁴ The 1969 Act provides that all water matters, including adjudication of water rights, must be heard by the water court.¹⁵ A water right filed for adjudication in any given calendar year is considered to have the same adjudication priority as any other water right filed in that water division in that year, but is senior to any water right filed for in later years.¹⁶ Notices of water right applications are published in local newspapers and in monthly "resumes" that are prepared by the water clerk and mailed to subscribers. Any person can object and oppose an application.¹⁷ Contested matters are handled much like any other civil litigation.

Prior to 1969, district courts in each of the former eighty water districts handled water right adjudications. The water districts were smaller geographic subdivisions that did not necessarily follow natural drainages. Each water district had an "original adjudication," which normally occurred prior to 1900. Any adjudication following the original adjudication in a water district is known as a "supplemental adjudication." Administration of water rights between water districts is complex, but is based on the relative appropriation and adjudication dates involved.¹⁸

Decreed and Implied Limitations

A water right can be defined as the right to use, in accordance with its priority, a certain portion of the waters of the state by reason of the appropriation of the same.¹⁹ A direct flow water right is limited to a decreed flow rate (cubic feet per second or gallons per minute) for immediate use. A storage right is limited to a decreed volume (normally measured in acre feet) for storage for later use. A storage right is entitled to only one fill per year, unless the decree provides otherwise.²⁰ A water right has a specific point of diversion or storage and is decreed for specific uses, often on a partic-

ular piece of property. Other limitations also may be set forth in the decree.

In addition to express decreed limitations, a water right is implicitly limited to a reasonable "duty of water." That is, a water right cannot be diverted in excess of the amount reasonably required to satisfy the decreed uses.²¹

A water right can be lost, in whole or in part, by abandonment, which is defined as the intent permanently to discontinue the use of all or a part of the water right. Nonuse of a water right for an unreasonably long period of time gives rise to a presumption of abandonment.²²

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Conditional Water Rights

A conditional water right can be awarded before water actually has been diverted and put to a beneficial use. A conditional water right is given an appropriation date based on when the requisite intent to make the appropriation was formed and an open physical step toward the appropriation taken (such as beginning to dig the ditch).²³

Where a water project will take significant time to complete, a conditional water right generally is decreed to fix the project's priority before substantial sums are spent on construction. If the project is completed with diligence and the water is put to beneficial use, the conditional right can be made absolute. The absolute right then retains the appropriation and adjudication date of the conditional water right.

Strict requirements recently were imposed to ensure that a project can and will be completed with diligence before a conditional water right is awarded.²⁴ Moreover, in order to maintain a conditional water right, an application for finding of reasonable diligence must be filed with the Water Court every six years or the right is deemed abandoned.²⁵

Transfers and Changes Of Water Rights

A water right is a distinct real property interest. It can be bought and sold as private property. Normally, it can be

conveyed either with or without the land on which it historically has been used. Consequently, care must be taken when transferring land to specify whether any appurtenant water rights are to be conveyed or reserved.²⁶

A water right can be changed to a new use, point of diversion, place of use or manner of use without loss of priority, provided that no other water rights are injured by the change.²⁷ Such changes must be authorized by a decree of the water court. Changes are becoming increasingly common because (1) little, if any, unappropriated water is left and (2) demands for municipal and industrial water are increasing without a similar increase in supply. Typical change proceedings involve changing a senior agricultural water right to municipal use at a new point of diversion.

In change proceedings, a water right generally is scrutinized closely to assure that the change does not result in an enlarged use or increased call on the stream. The change normally is limited to the amount of the water right's actual historic use, not its full decreed amount.²⁸ Complex terms and conditions often are imposed to avoid injury to other water users. These provisions can include limiting diversions to the historic season of use; limiting the amount of consumption to historic levels; and requiring that the amount, location and timing of historic return flows be continued.²⁹

Exchanges and Augmentation Plans

Colorado law also permits various exchanges of water rights. For example, water from a downstream reservoir can be released and a like amount of water diverted into an upstream reservoir, as long as no intervening water rights are injured. Such exchanges can be adjudicated and awarded their own appropriation dates. This adjudication gives the exchange a priority over any subsequent water right that may be established in the reach of the stream affected by the exchange.³⁰

To accommodate complex changes, exchanges or other new water uses, augmentation plans commonly are adjudicated. Such augmentation plans can permit junior water rights that otherwise would be out of priority to divert by replacing their out-of-priority depletions with water from existing senior water rights.³¹ In this way, new water uses can be permitted to occur within the existing priority system. Augmentation plans

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must be adjudicated in the water court and can be extremely complex.

Administration by State Officials

Water rights are administered in Colorado by a number of state officials, headed by the State Engineer. Their duties are to (1) administer water rights within the priority system, (2) maintain records of the adjudication and (3) maintain use of all of the waters of the state. The State Engineer also handles a number of other matters, including a dam safety program, the regulation of well drilling and administration of interstate compacts. Day-to-day administration of water rights in the field is handled primarily by water commissioners who normally reside in the local water districts. Their task is to administer water rights in priority and to shut down any out-of-priority diversions that may be occurring. The water commissioners are under the supervision of division engineers who coordinate water right administration between the water districts in their respective divisions.³²

Groundwater

Groundwater is a particularly complex area of Colorado water law. Groundwater that is connected hydraulically to a surface stream, even one far away, is administered as part of the stream system. Groundwater that is not connected hydraulically to a surface stream is considered "nontributary" and is not administered as part of the appropriation system.³³ All groundwater is presumed tributary, unless proven otherwise.³⁴

Tributary groundwater generally is subject to the normal rules of the prior appropriation doctrine. The administration of wells is integrated into the system of priorities for surface diversions. Most wells were not drilled or adjudicated until after World War II. Consequently, they normally have very junior priorities relative to surface water users. Rules and regulations adopted by the State Engineer greatly restrict, or prohibit outright, diversion by such wells unless an augmentation plan is decreed to replace all resulting out-of-priority depletions to senior surface water users.³⁵ By statute, various small-capacity wells are exempted from administration and allowed to divert without an augmentation plan, regardless of their priority.³⁶

The most commonly encountered nontributary groundwater in Colorado lies

in a geologic formation known as the Denver Basin. The Denver Basin is a series of water-saturated geologic formations running from Greeley south to Colorado Springs and from the Front Range east to Limon. These formations normally include the Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers.

Denver Basin water is allocated by the state on a different basis than tributary water. By statute, the overlying landowner (or those with the landowner's consent) has the right to withdraw each year an average of one percent of the amount of nontributary Denver Basin

water that lies under his or her land. This right can be adjudicated in water court, but adjudication is not necessary. Appropriation dates are not awarded because withdrawals are based on land ownership, rather than on prior appropriation.³⁷

Some of the water in the Denver Basin is not nontributary. This water also is allocated by statute on the basis of land ownership and can be diverted at the rate of one percent per year. However, prior to its use, the landowner must adjudicate an augmentation plan to provide replacement water in an amount and location adequate to prevent injury

to any tributary water rights that may be affected.³⁸ These plans can be complex.

In large portions of eastern Colorado, wells historically have been the principal source of water supplies. Because administration of water rights between wells presents somewhat different issues than administration of water rights between surface rights, the Colorado legislature has created various designated groundwater basins in portions of eastern Colorado. Tributary groundwater within these basins is administered under a modified doctrine of prior appropriation. The permitting and administration of designated groundwater rights is in accordance with special procedures allowing considerable local control.³⁹ The Designated Ground Water Commission, rather than the water courts, has jurisdiction over designated groundwater matters.

Well Permits

Prior to the drilling of any well, a well permit must be obtained from the State Engineer. The State Engineer generally will not issue a well permit unless he determines that unappropriated water is available and that the new withdrawal can occur without injury to other water users.⁴⁰ Various small-capacity wells, commonly called "exempt wells," are presumed statutorily not to cause injury. Thus, these wells normally are issued permits.⁴¹ Well permits for nonexempt wells normally are denied unless an augmentation plan is decreed.

Recent cases have held that any structure or excavation which exposes groundwater to evaporation can be considered a well. Thus, many gravel pits or other excavations that commonly would not be considered wells are subject to well permitting requirements.⁴² The State Engineer generally denies well permits for such structures because they normally are nonexempt. In the case of such requests, the user is required to obtain water court approval of an augmentation plan before a well permit will be issued.

Dam Regulation

Dam safety also is regulated heavily by the State Engineer. Prior to the construction of any "jurisdictional" dam, approval of detailed plans and specifications must be obtained from the State Engineer. A jurisdictional dam is any dam greater than ten feet in height or which creates a reservoir with a surface

area larger than twenty acres or a capacity of more than 100 acre-feet. Jurisdictional dams are subject to extensive, ongoing safety inspections and requirements. Nonjurisdictional dams are subject to a lesser degree of regulation and control.⁴³

Drainage Water

Considerable case law has developed in Colorado regarding drainage water. In general, Colorado provides that an up-gradient landowner has a natural easement across lower properties for drainage of surface water flowing in its natural course and manner. Such natural flow cannot be prevented by the down-gradient landowner. However, the up-gradient landowner cannot increase the amount or manner of such discharge in a manner that does more harm to the down-gradient landowner than has occurred historically.⁴⁴

Although appropriative rights can be obtained in such drainage waters, they normally are administered in accordance with the priority system. Unless the priority awarded is senior to all other water rights that might be satisfied by such drainage water, a landowner is not entitled to use or store it. However, flood control dams that detain and regulate storm runoff may be permitted to impound such drainage temporarily, provided no beneficial use is made of the water and the detention period is short.⁴⁵

Federal Water Rights

The federal government also has water rights in Colorado. Some of these were acquired by the same process of appropriation and beneficial use described above. Other rights, known as federal reserved rights, arose from an implied reservation of water when various land withdrawals were made by the federal government. For example, the courts have held that water in an amount necessary to achieve the primary purposes of the withdrawals were reserved impliedly when Indian reservations, public monuments and national forests were created. The date of the withdrawal is considered to be the appropriation date.⁴⁶

All such federal rights must be quantified and adjudicated in the water courts. However, prior to 1952, the federal government was not subject to the jurisdiction of state water courts because of sovereign immunity. In 1953, Congress passed the McCarran Amendment, permitting the federal government to be

joined in general water right adjudications.⁴⁷

This joinder was not actually accomplished in Colorado until the 1970s. Thus, the federal government still is in the process of adjudicating many of its water rights. Because these proceedings are the first in which the federal government could have adjudicated its rights, they will be treated as "original adjudications." Consequently, the federal rights will not be subject to the postponement doctrine discussed above. Accordingly, the federal water rights will become senior to many existing decreed rights.

Conclusion

Colorado water law is an extremely complex subject. Practitioners would be well advised to consult with a water rights specialist before wading in over their heads.

NOTES

1. Colo. Const. Art. XVI, §§ 5 and 6; CRS § 37-92-102(1).
2. Appropriations for minimum stream flows by the Colorado Water Conservation Board can be made without diversion. CRS § 37-92-102(3). See, *Colorado River Water Conservation District v. Colorado Water Conservation Board*, 594 P.2d 570 (Colo. 1979).
3. CRS §§ 37-92-102(1), 37-82-101. See, *State of Colorado v. Southwestern Colorado Water Conservation District*, 671 P.2d 1294 (Colo. 1983).
4. Colo. Const. Art. XVI, § 37; CRS § 37-86-101 *et seq.*
5. See, e.g., *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).
6. See, e.g., *Cline v. Whitten*, 372 P.2d 145 (Colo. 1962); CRS § 37-82-103; *SRJI Venture v. Smith Cattle, Inc.*, 21 Colo.Law. 149 (Jan. 1992) (No. 90SA333, *ann'd* 11/12/91).
7. See, Colo. Const. Art. XVI, § 7; *Black v. Taylor*, 264 P.2d 502 (Colo. 1953); *Town of Sterling v. Pawnee Ditch Extension Co.*, 94 P.339 (Colo. 1908).
8. CRS § 37-92-301(3). See, e.g., *Strickler v. City of Colorado Springs*, 26 P. 313 (Colo. 1891), and *City of Colorado Springs v. Bender*, 366 P.2d 552 (Colo. 1961).
9. See, e.g., *City and County of Denver v. Colorado River Water Conservation District*, 696 P.2d 730 (Colo. 1985).
10. CRS §§ 37-92-306 and 37-92-401(1)(b). See, *South Adams Cty. Water and Sanitation District v. Broe Land Co.*, 812 P.2d 1161 (Colo. 1991).
11. CRS §§ 37-92-102(2)(d) and § 37-92-502(2)(a). See, e.g., *Town of Sterling*, *supra*, note 7.
12. CRS § 37-92-203.
13. CRS § 37-92-201.
14. CRS § 37-92-101 *et seq.*
15. CRS § 37-92-203(1).

16. CRS § 37-92-306. *But see*, CRS § 37-92-306.1.
17. CRS § 37-92-302.
18. *See, Colorado River Water Conservation District, supra*, note 9; CRS § 37-92-401(b).
19. CRS § 37-92-103(12).
20. *See, Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 98 P. 729 (Colo. 1908); *Orchard City Irrigation District v. Whitten*, 361 P.2d 130 (Colo. 1961).
21. *See, e.g., Farmers Highline Canal Co. v. City of Golden*, 272 P.2d 629 (Colo. 1954).
22. CRS §§ 37-92-103(1) and 37-92-402(11). *See, e.g., Southeastern Colorado Water Conservancy District v. Twin Lakes Associates, Inc.*, 770 P.2d 1231 (Colo. 1989), and *Danielson v. Thornton*, 775 P.2d 11 (Colo. 1989).
23. *See, e.g., Colorado River Water Conservation District v. City and County of Denver*, 642 P.2d 510 (Colo. 1982); *City of Aspen v. Colorado River Water Conservation District*, 696 P.2d 758 (Colo. 1985).
24. CRS § 37-92-305(9). *See, e.g., Southwestern Colorado Water Conservancy District v. City of Florence*, 688 P.2d 715 (Colo. 1984).
25. CRS §§ 37-92-301(4) and 37-92-305(7).
26. *See, e.g., CRS § 38-30-102; Navajo Development Co., Inc. v. Sanderson*, 655 P.2d 1374 (Colo. 1982); and *Travelers Insurance Co. v. Janitell Farms, Inc.*, 609 P.2d 1116 (Colo. 1980).
27. CRS §§ 37-92-305(3) and 37-92-103(5). *See, e.g., Weibert v. Rothe Bros., Inc.*, 618 P.2d 1367 (Colo. 1980).
28. *See, e.g., Matter of May*, 756 P.2d 362 (Colo. 1988); *Danielson v. Kerbs Ag., Inc.*, 646 P.2d 363 (Colo. 1982).
29. CRS § 37-92-305(4).
30. CRS §§ 37-83-101 *et seq.*, 37-80-120, 37-92-302(1)(a) and 37-92-305(10).
31. CRS §§ 37-92-103(9), 37-92-305(5) and (8).
32. CRS §§ 37-80-101 *et seq.*, 37-92-301 *et seq.* and 37-92-501 *et seq.*
33. *See, e.g., Southwestern Colorado Water Conservation District, supra*, note 3; CRS § 37-90-103(10.5).
34. *See, Stonewall Estates v. CF&I Steel Corp.*, 592 P.2d 1318 (Colo. 1979).
35. *See, e.g., the State Engineer's South Platte River Rules and Regulations.*
36. CRS § 37-92-602(1).
37. CRS §§ 37-90-137(4) and 37-92-305(11). Rights which were initiated prior to July 6, 1973, are not subject to the one percent limitation—*see*, CRS § 37-90-137(5).
38. CRS § 37-90-137(9)(c).
39. CRS § 37-90-101 *et seq.*
40. CRS § 37-90-137(1) and (2).
41. CRS § 37-92-602(3).
42. *See, Zigan Sand and Gravel, Inc. v. Cache La Poudre Water Users Assoc.*, 758 P.2d 175 (Colo. 1988) and *Three Bells Ranch Assoc. v. Cache La Poudre Water Users Assoc.*, 758 P.2d 164 (Colo. 1988); CRS § 37-90-137(11).
43. CRS § 37-87-101 *et seq.*; *State Engineer's Rules and Regulations for Dam Safety and Dam Construction*, 2 CCR 402-1.
44. *See, e.g., Harvey v. Dyer*, 731 P.2d 777 (Colo.App. 1986); *Hankins v. Barland*, 431 P.2d 1007 (Colo. 1967).
45. CRS § 37-87-122.
46. *See, e.g., U.S. v. City and County of Denver*, 656 P.2d 1 (Colo. 1982); *U.S. v. New Mexico*, 438 U.S. 696 (1978).
47. 43 U.S.C. § 666(a). *See, e.g., U.S. v. District Court for Eagle County*, 401 U.S. 520 (1971); *U.S. v. District Court in and for Water Division No. 5*, 401 U.S. 527 (1971).