

Colorado Water Rights

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 decreed 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.