

The Law of Anti-Speculation

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Chad Wallace, Senior Assistant Attorney General

Basic Tenants of Colorado Water Law

- (1) All waters within Colorado belong to the public.
- (2) Use rights to water may be obtained pursuant to applicable laws.
- (3) Use rights are perfected property rights when the appropriator places the water to actual beneficial use.

High Plains A & M LLC v. Southeastern Colo. Water Conservancy Dist., 120 P.3d 710, 717 (Colo. 2005).

Statutory Law

Water right §37-92-103(12), C.R.S. Right to use in priority water of the state because of its appropriation.

Appropriation §37-92-103(3), C.R.S. Application of a specified portion of water of the state to beneficial use. But, no appropriation shall occur based upon speculative sale or transfer to other persons.

Evidence of Speculation §37-92-103(3), C.R.S. (1) No legally vested interest or a reasonable expectation of getting an interest in lands to be served. Exception for Governmental agency and agent for person benefited. (2) No specific plan and intent to divert, store, or control water for a specific use.

Beneficial use §37-92-103(4), C.R.S. Use of amount of water that is reasonable and without waste for the purpose of the appropriation.

Rotational Crop Management Contract §37-92-103(10.6), C.R.S. Change rights to a new use by foregoing irrigation of some lands.

Conditional Water Right §37-92-103(6), C.R.S. Right to perfect a water right with a certain priority upon completion of the appropriation with reasonable diligence. Must show “can and will.” §37-92-305(9), C.R.S. Show reasonable diligence to complete appropriation. §37-92-301(4), C.R.S.

Change of water right §37-92-103(5), C.R.S. Change is time, place, type of use, changes to points of diversion or storage. Applies to both absolute and conditional rights. Section 37-92-305, C.R.S. governs the standards for a change of water right, rotational crop management contract, and a plan for augmentation and for appropriations of water rights.

Case Law

Several cases have interpreted anti-speculation regarding an appropriation of conditional rights.

Thornton v. Bijou Irrigation Dist., 926 P.2d 1 (Colo. 1996)(Allowing projected use beyond current municipal boundaries.)

Pagosa Area Water and Sanitation Dist. v. Trout Unlimited, 170 p.3d 307 (Colo. 2007)(Neither private nor governmental agency may obtain a right to use a portion of the public's water unless it establishes intent to make a non-speculative appropriation.)(Private entity must have contractual commitments for any appropriation not planned for its own use.)(Governmental agency has flexibility under "great and growing cities" doctrine.)

Upper Yampa Water Conservancy Dist. v. Dequine Family LLC, 249 P.3d 794 (Colo. 2011)(Governmental entities have exception to anti-speculation by showing (1) reasonable water supply planning period, (2) substantiated growth projections, (3) amount of available unappropriated water reasonably necessary, above its current water supply.) (No appropriation can be based on sale or transfer, notwithstanding a contract, in the absence of a specific plan and intent for application to beneficial use.)

Vermillion Ranch Ltd. Part. v. Raftopoulos Brothers, 307 P.3d 1056 (Colo. 2013)(Applicant must show intent not based on speculative sale or transfer and that it can and will complete appropriation.)

Anti-speculation also applies to a change of an absolute water right. *High Plains A & M LLC v. Southeastern Colo. Water Conservancy Dist.*, 120 P.3d 710 (Colo. 2005) (Holding §37-92-103(3), C.R.S. applies to a change of water right because the absolute decree is reopened by virtue of a change application; therefore, the change applicant must show a legally vested interest in the area served and a specific plan to use water for specific purposes.)

Administrative Authority

Some uses are allowed by statute without adjudicating a water right or change of right in court. These uses are temporary. Some require identification of users: SWSP, IWSA.

Water Banks §37-80.5-101, C.R.S.

Rules by State Engineer. Administered by water conservancy or water conservation districts.

Substitute Water Supply Plans §37-92-308, C.R.S.

Addresses lagged depletions caused by wells and temporary replacement sources. Division 2 rules confirmed. Circumscribed conditions for use in Division 1.

Interruptible Water Supply Agreements §37-92-309, C.R.S.

Between two or more water users.