

# Colorado

## WATER RIGHTS FACT SHEET

August 15, 2001

### **Water Rights System:**

Colorado water law is based upon the doctrine of prior appropriation or "first in time - first in right", and the priority date is established by the date the water was first put to a beneficial use. Colorado water law is contained in the State Constitution Article XVI sections 5 and 6 and in the Colorado Revised Statutes, sections 37, articles 80 through 92.

### *Responsible Agency:*

There is not a single state agency in Colorado responsible for issuing water rights. Water rights in Colorado are established through a water court system. There are seven water courts, one for each major river basin, which adjudicate water rights throughout the state. Each water court has an appointed water judge and water referee who hear all water related matters within their jurisdiction. The State Engineer administers and distributes the state's waters. The State Engineer is also responsible for issuing and denying permits to construct wells and divert groundwater, but these permits do not constitute rights to groundwater. The Colorado Ground Water Commission (Commision) is a regulatory and an adjudicatory body authorized to manage and control designated groundwater resources. Finally, the Colorado Water Conservation Board (CWCB) oversees conservation and development in the state and is responsible for the state's instream flow program.

### **Application Process:**

Water rights in Colorado are established through a water courts system. Every water right application must go through the water courts, and must be handled by an attorney. Therefore, Colorado has a very large attorney workload relating to water rights.

In order to obtain a right to either surface or groundwater, an application must be filed with one of the seven water courts in the state. A list of applications can be seen in Appendix One. The application must be filed in the division in which the diversion is located. Once an application is filed with the appropriate court, a summary (or the application in full) is published in "the resume" (publication in the resume is considered proper notice to all water rights holders). The resume contains all applications filed with a particular court each month. All applications are also published in a local newspaper.

Upon publication in the resume and paper, a statement of opposition can be filed by any person. Oppositions must be filed within a forty-five day period following publication. Any statement of opposition must outline the reasons why an application should not be granted or should be amended. At the end of the month following the month of publication of the application, the water referee examines the application and the statements of opposition. The referee consults with the division engineer and within thirty days, the engineer files a written report containing the recommendations. This report is sent to the applicant, who must then mail copies to all parties in the case. The referee can then either approve or disapprove (in whole or in part) the application. If no protest is filed before the twentieth day following the mailing of the referee's ruling, the ruling is signed by the judge and entered as a decree of the court.

Protests to the referee's ruling, however, can be filed with the court. If a protest is filed, a hearing is held before the water judge. Applications can also be referred to the water judge directly by the referee and engineer. When a matter goes to the water judge, a trial is set and the case proceeds before the water judge who either grants or denies the water right based upon factual issues in the case and how they relate to statutory and case law criteria. A granted water right is considered a "decreed water right".

Water rights in Colorado (both surface and groundwater) can be either absolute or conditional. An absolute right is water that has been diverted and put to beneficial use. A conditional right is a right that will be developed in the future. A conditional right maintains its priority until the project is complete. In order to maintain a conditional water right, the owner must file an application for a finding of reasonable diligence every six years with the water court. The applicant must prove that he or she has been diligently pursuing completion of the project. Upon completion, the owner of a conditional right may file for an absolute water right, and that absolute water right contains the appropriation date for which the conditional right was awarded.

The time frame to obtain a water right in Colorado varies depending upon the case load of the specific water court.

*Point of Diversion and Change of Use Procedures:*

Appropriations of water are made when an individual physically takes the water from a stream and transports it to another location for beneficial use. The use of water directly from a stream, such as by wildlife or livestock drinking, is considered a diversion in Colorado. A point of diversion is required for all water rights in Colorado except for instream flow. Instream flow rights, however, can only be held by the CWCB.

The point of diversion, location of use, and type of use of a water right can be changed through an application with the appropriate water court. In order to change a water right, the applicant must provide evidence that the change will not injure the vested water rights of other users.

*State Recognized Beneficial Uses:*

Beneficial use in Colorado is statutorily defined as "the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made". Specific uses are not described, but previous categories have included:

Aesthetics and Preservation of Natural Environments Augmentation Commercial Domestic Fire Protection Fishery Geothermal Groundwater Recharge Industrial Irrigation	Livestock Minimum Flow Municipal Power Recreation Silvicultural Snowmaking Wildlife Watering Wildlife Habitat
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## **Groundwater:**

A modified form of prior appropriation governs the establishment and administration of groundwater rights in Colorado. Colorado groundwater use is governed by the Ground Water Management Act of 1965, which was adopted to allow the full economic development of water resources while protecting the rights of senior appropriators. Colorado considers all water within the state to be tributary to a surface stream, unless the water applicant can prove otherwise in water court. The test for establishing a non-tributary source of water is very rigorous. The proposed diversion cannot deplete surface streams more than 1/10 of 1% of the proposed diversion volume in any single year for up to 100 years. When a non-tributary aquifer is established by law, the water in the aquifer is allocated based on the percentage of land owned on the surface above the aquifer. If the applicant cannot establish non-tributary groundwater, then the use of groundwater falls under the prior appropriation system and water rights must be obtained through the court system described above.

In addition to the application process through the courts, groundwater in Colorado is subject to further restrictions administered by the State Engineer. By law, every new well in the state that diverts groundwater must have a well permit. **Exempt Well Permits, however, can be obtained for wells that pump less than 15 gallons per minute. For these wells, the state will give well permits that are exempt from the priority system.** In order to obtain a permit, a person must file an application for approval of a permit with the State Engineer. A permit must be obtained from the state engineer prior to any utilization of groundwater, but the permit does not constitute a water right to the groundwater. A groundwater right can only be obtained through the formal application to a water court. The water court, however, cannot grant a groundwater right until the State Engineer has issued a permit.

In addition to issuing permits, the State Engineer also provides staff assistance and technical support to the Colorado Groundwater Commission. The Commission is responsible for the management of designated basins located primarily in the eastern plains. The Commission's duties are to administer groundwater rights, work towards water conservation, and to protect vested water rights. The commission also establishes pumping levels in the designated basins that will not deplete ground water supplies at an excessive rate. Currently, the Commission has established eight designated basins (Kiowa-Bijou, Southern High Plains, Upper Black Squirrel Creek, Lost Creek, Camp Creek, Upper Big Sandy, Upper Crow Creek, and Northern High Plains). Within each basin, Groundwater Management Districts (GWMDs) can be formed. The GWMDs are authorized to adopt additional rules and regulations to help administer groundwater within their district. There are currently 13 Groundwater Management Districts within the basins.

## **Water Rights:**

A water right in Colorado can be held by any legal entity. In other words, a water right can be held by an individual, group of individuals, organization, corporation, government agency, etc. The only restriction to who can hold a water right concerns instream flow rights which can only be held by the CWCB.

Water rights in Colorado are considered real property and can be bought, sold, and leased to other entities. Although water is considered to be the property of the state, a property right exists in the priority to the use of water. The transfer of a water right requires filing a change of water right application with the appropriate water court. As with a change of use or point of diversion application, the applicant must provide evidence that the transfer will not injure the vested water rights of other users.

A conditional water right can be considered abandoned if the holder fails to show diligence to complete the necessary project. Any water right can be considered abandoned if it is not used for a period of ten years. Abandonment, however, must include the finding of an intent to abandon and, as a result, water rights in Colorado cannot be forfeited without proof of intent.

### **Adjudications:**

Water rights in Colorado are adjudicated by the district water courts. Colorado has a process of individual adjudications where each right is adjudicated as it is approved. There are no general or basin wide adjudications in Colorado.

### *Ongoing Adjudications:*

Colorado does not have any ongoing general adjudications. Each of the seven water courts, however, have ongoing adjudications for all water rights within their jurisdiction.

### **Instream Flows:**

In 1973, Colorado adopted legislation that recognized the maintenance of instream flows as a beneficial use of water. This legislation said that instream flow could be used "to preserve the natural environment to a reasonable degree", and it removed the requirement of a diversion to appropriate water. This established Colorado's instream flow program, and the CWCB has the exclusive responsibility for the protection of instream flows. In 1986, the instream flow legislation was amended to authorize the CWCB to acquire water rights for instream flows by methods other than appropriation. The CWCB is now allowed to acquire senior water rights through lease, purchase, or donation.

The CWCB is the only entity that may hold instream flow rights. It can apply for new appropriations through the state water courts. In order to do this, the board must ensure that a natural environment exists and will be preserved by the water available for appropriation and it must analyze the extent of the benefits of the water. The public has an opportunity to review and comment on the recommendations. The board then submits an application to the state water court. If granted the priority date for the instream right becomes the application date.

In addition to new appropriations, the CWCB can acquire water rights from other entities for instream flow. An existing consumptive right can be obtained by the board (through purchase, lease, or donation) and changed to an instream flow right. The CWCB is required to request recommendations for instream flow from the state Division of Wildlife, the Division of Parks and Outdoor Recreation, and from the U.S. Departments of Agriculture and Interior.

### *Recognized Beneficial Uses for Instream Flow:*

Instream flows in Colorado must be used to preserve the natural environment. Although the law authorizes a wide range of uses for instream flow, to date, the CWCB has acted only to protect streams that support fisheries.

### *Holdership of Instream Flow Water Rights:*

The CWCB is the only entity that can hold an instream flow right. Other entities, however, can acquire an existing right and transfer it to the board for instream flow.

### *Quantification Requirements and Procedures:*

In order to quantify an instream flow water right, the CWCB requires a multiple cross-section survey using the R2Cross methodology, averaging the survey results, and providing a written quantification recommendation to the board.

### **BLM Specific Information:**

A water right applicant in Colorado does not have to have an approved right-of-way from the BLM in order to obtain an approved application. The BLM can challenge the applicant on land access issues in water court, and they can argue in court that the applicant does not have land access. If the applicant cannot prove that land access is available, the water court will dismiss the case.

The BLM is required to pay filing fees in Colorado. Filing fees are \$45 for opposition, \$91 for water rights application, and \$150 for change of water right. In addition, the BLM must pay to have an application published in a local newspaper. This cost can range from \$30 to \$900, depending upon the size of the water right application and the number of newspapers.

Besides Colorado's instream flow program, the BLM can deny or condition rights-of-way in order to protect instream flows. The BLM establishes agreements with the owners of water diversions and reservoirs to protect stream flows. In addition, the BLM can designate areas as "Areas of Critical Environmental Concern" which makes the process for opposing water usage applications easier.

With regard to federal reserved water rights, the BLM has no designated Wild and Scenic Rivers in Colorado. Several rivers on BLM land have been studied and determined to be suitable, but no designations have been made. The BLM has some designated wilderness areas in Colorado, but the legislation that created them expressly stated that no reserved water rights were created. The BLM has completed the adjudication of all of its Public Water Reserves and holds approximately 1,400.

The BLM has an excellent relationship with the Colorado state government on water rights issues. However, the BLM is very disappointed with the implementation of the state's instream flow program. The legislation that authorizes the program is very broad, and enables the CWCB to protect a wide range of water-dependent values. The CWCB to date, however, has acted only to protect cold-water fisheries, and in a few cases, warm water fisheries and riparian values (but only when the CWCB was placed under extreme pressure to do so). Colorado's Governor Owens is appointing increasingly conservative members to the board, meaning that the BLM's disappointment with the board is likely to increase.

### **Official Contact:**

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### **Appendix One: Types of Applications**

- \* Application for surface water right
- \* Application for ground water right
- \* Motion to Intervene - A legal motion
- \* Application for change in water right
- \* Application for approval of plan for augmentation
- \* Statement of Opposition - A legal motion

