

CHAPTER 11 - WATER RIGHTS

An * in the left margin indicates a change in the statute, rule or text since the last publication of the manual.

The water law of Colorado is based on the doctrine of prior appropriation.

Section 5, Article XVI, of the state constitution reads as follows: "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."

Section 6, Article XVI, of the state constitution says: "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service or all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes."

The declaration of policy in the "Water Right Determination and Administration Act of 1969" provides that "All waters originating in or flowing into this state, whether found on the surface or underground, have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with law. As incident thereto, it shall be the policy of this state to integrate the appropriation, use and administration of underground tributary water to a stream with the use of surface water in such a way as to maximize the beneficial use of all the waters of the state."

From the foregoing it is clear that the ownership of water remains with the public until some person appropriates it. In order that the water be appropriated and a water right secured (surface or underground), it is necessary that the water be diverted from a natural stream and that this water be placed to beneficial use; the right acquired by appropriation is the right to use the water.

It should be noted the state constitution provides a preference in use, placing domestic use first, followed by agricultural use. When a lower preferred use such as agriculture has a prior appropriation, its water can be taken for the higher domestic use only by condemnation, that is, payment must be made as for any other property right.

The usage of water by Colorado residents is subject to prior rights of other states by interstate compacts and U.S. Supreme Court decisions.

By nature a water right consists only of the right to use. A water right is considered real property, and therefore, is subject to the statute of frauds and real property statutes of limitations; it passes as "real property" under a will, it is subject to taxation as real property, and may be mortgaged with or apart from the land where used, and may be proved in a proceeding to quiet title.

The appropriation system of acquiring water rights permits a first user or a priority user to appropriate an entire water flow to the exclusion of junior appropriators.

In Colorado, it is presumed that the parties to a conveyance of land do not intend a water right to pass as an appurtenance of the land if they have not mentioned it in the deed. "The purchaser

can overcome this presumption by extrinsic evidence of intent, such as a statement of the grantor, the price paid, the need of water for reasonable use of the land and so forth." (Bessemer Irrigation Ditch Company versus Wooley, 32 Colorado, 437). If the water right is transferred separately from the land, it must be by deed with all the formalities for the execution of a deed to real property in this state.

The Water Right Determination and Administration Act of 1969 pertains to "tributary waters" which are administered by the state engineer, who is the head of the Colorado Division of Water Resources. The state engineer is required to tabulate all decreed water rights and conditional water rights in order of priority and omit those that are considered abandoned. Provision is made for publication of the tabulation, objections, hearings, and judicial review of the judgment and decree made by the water court. The tabulations will then be periodically updated.

There are six designated ground water basins in eastern Colorado in which the water is not considered tributary and in which practically all the water is derived from wells; these areas are under the jurisdiction of the Colorado Ground Water Commission, a part of the Colorado Division of Water Resources., These areas may also be governed by local ground water management districts.

A permit from the state engineer or the ground water commission is required for construction of any well. Generally, for applications for permits, it must be shown that vested rights of others, including wells and surface rights nearby and far downstream, will not be materially damaged. A permit must be obtained for "exempt" wells; these wells are exempt from administration by the state engineer and adjudication by the water courts. These "exempt" wells are generally small domestic wells, used for fire fighting, and wells not exceeding 15 gallons per minute used for drinking and sanitary facilities in independent commercial businesses.

An important Colorado Supreme Court case, decided in 1983, dealt with the question of whether individuals and corporations may lay claim to the underground non-tributary water just like the surface water. The court stated that the underground non-tributary water can be used for well purposes only and a well permit must first be obtained from the state engineer.

The state engineer must apply a law that insures that the aquifer will not be depleted within 100 years and the applicant for the well permit is the person owning the land.

Thus, developers or corporations who simply lay claim to them cannot tap Colorado's underground water supplies. They must have the consent of the landowner to erect and operate the necessary physical works for the extraction of water and show beneficial use if not in the designated basins.

There are also provisions within the Colorado statutes regarding construction of reservoirs, Title 37-87-101 through 122, C.R.S., livestock water tanks, Title 35-49-101 through 104 C.R.S.; small capacity wells Title 37-90-101 through 141 and Title 37-92-101 through 602 C.R.S.; and various provisions regarding irrigation and conservation districts and companies. Duties and powers of the state engineer, landowners and others are shown within Title 37 C.R.S. There are many other statutes, rules and regulations, court cases, and other laws. Federal, state, and local laws cover water, including quality and pollution standards.

Conveying Water Rights

Often, a broker selling an irrigated farm, raw land or even a rural subdivision, will need to be knowledgeable about associated water rights.

Due to the intricacies of water systems or irrigated farms in Colorado, it is advisable for any licensee in selling an irrigated farm, to inform the proposed purchaser of pertinent information on the water rights. Some suggestions as to the type of information that should be disclosed are as follows:

1. If the irrigation water is delivered by canal, there are several things to be considered:
 - a. The average annual delivery of water under the canal and what months this delivery is normally received. Further, how often, historically, the water is available to land being sold. Not all canals run their water perpetually, with the usage to the shareholder being all the time that water is in the canal. Instead, some run their water in sections, with each section taking a turn for a specified period of continuous use, then moving on to the next section. Others use the call system; water, when available, being called by the user proportionate to their shares.
 - b. The proposed purchaser should also be informed of whether the by-laws of that canal company permit the sale of the water out of and separate from the land or the canal; also, whether the water can be transferred to another point of use within the canal system. The broker selling water rights should be familiar with the instrument of transfer for said water, which may be done by deed, of course, but may also require a transfer of an irrigation company's stock certificate. The amount of any water assessment would also be important.
2. If the farm is irrigated with a well system, the following apply:
 - a. The prospective purchaser should be informed as to whether the well or wells are a part of a river basin, and if so, the purchaser should be informed as to the well's possible restrictive use due to the priority system under said river basin. He or she should also be informed whether the well has been adjudicated (court-approved) in a water court, the date of said adjudication, and the amount allowed to be pumped during any given period of time. And, of course the purchaser should be told what condition the well is in and current production capacity.
 - b. Wells may also be located in a water basin away from a river. Such a basin would be the Ogallala water basin. Here again, the prospective purchaser should be informed as to all the above information, plus the condition of the water table in that particular basin, as some basins have been depleted substantially in recent years. The cost of pumping said wells should be made available to a buyer in these energy-conscious times. The availability of electricity or natural gas should also be investigated thoroughly.

From the foregoing, it should be evident that water law is a complicated subject, and the purpose of this section is to denote a few warning signals for the real estate broker. The broker should make sure of proper conveyance of the right and the validity and value of court decrees and well permits, as well as other matters. The Real Estate Commission has developed an optional use form to assist the broker in gathering data for marketing property with water rights. The *Listing Firm's Well Checklist* was designed to help insure that the seller and the listing broker cover all the bases in gathering data. It is not intended to become a part of a buy/sell contract, but obviously will drive the amount and type of information made available to a buyer. In many

instances, it may be necessary to contact a competent water attorney and geologist and/or knowledgeable water engineers concerning the status of water rights and their transfer.

Water Right Terminology

adjudicated water: the judicial determination of the extent, nature and limitations of an appropriation in a statutory court proceeding.

appropriation: the application of a certain portion of the waters of the state of Colorado to be of beneficial use.

appropriation date: the date defining the priority of right to divert appropriated water in times of limited water supply.

appropriator: A person who applies water to beneficial use so as to obtain a water right.

augmentation: A detailed program to increase the supply of water available for beneficial use in a water basin or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means.

beneficial use: the use of that amount of water that is reasonable and appropriate under reasonable, efficient practices to accomplish, without waste, the purpose for which the appropriation is lawfully made.

consumptive use: The amount of water that is consumed during its beneficial use so that it does not return to the waters of the state of Colorado.

direct flow right: a water right that gives the owner thereof the right to divert water from a specified water source at a specified rate of flow for current use.

historic use: the use to which specified water has previously or historically been put.

junior appropriator: an appropriator whose right to use specified water is subject to a prior or senior right of another appropriator of the same water source.

non-adjudicated right: a water right that has not been submitted to the appropriate court for judicial determination.

point of diversion: the location at which the water is removed from its natural course or location by means of a ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump, or other structure or device.

priority: the seniority, by date, as of which a water right is entitled to use and the relative seniority of a water right in relation to other water rights deriving their supply from a common source.

senior appropriator: an appropriator whose water right has priority over another appropriator having a right to use water from a common water source.

water right: A real property right, either absolute or conditional right to use, in accordance with its priority, a certain portion of the waters of the state of Colorado by reason of the appropriation of such water, as confirmed by a water court or the Ground Water Commission.

SOURCES OF INFORMATION

Rules, regulations and requirements imposed by statute may be obtained from the Colorado Division of Water Resources, at 1313 Sherman St., Room 818, Denver, CO 80203. Their Website is <http://www.water.state.co.us>

For further information, such as helpful publications, etc., the following agencies should be contacted: The Colorado Division of Water Resources; the Colorado Water Conservation Board; Colorado State University, Civil Engineering Department; and the United States Geological Survey, Water Resources Branch, Denver Federal Center.