

Chapter 12: Water Rights[†]

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

* I. Water Allocation Laws and Procedures

All water in natural surface streams and ground water in related aquifers (called tributary ground water) in Colorado is owned by the public and is subject to the doctrine of prior appropriation. Ground water other than tributary ground water is allocated by different rules as described below. There is a rebuttable presumption under Colorado law that all surface water and ground water in Colorado is tributary to a natural surface stream.

A water right is the right to use a portion of the waters of the state. A water right does not represent ownership of the water. It is a right to use a certain amount of water for a particular purpose under the restrictions stated in the court decree or well permit defining the water right.

The doctrine of prior appropriation is adopted and recognized in the Colorado Constitution in Article XVI, Sections 5 and 6. Prior appropriation means that the first user to divert water from a stream and put the water to beneficial use has a prior right to that source of water compared to later users. Under the prior appropriation system, water users do not share the burden of shortages. The prior user is entitled to divert the full amount of water to meet his or her entire water need before the next junior user is allowed to divert any water.

Water is appropriated, and a water right is created, by actions of the person who makes the appropriation. Physical diversion of water from a stream or a tributary aquifer, and application of that water to beneficial use, creates a water right. No further administrative or judicial action is necessary.

Under the prior appropriation system, the value and reliability of a water right is a function of its priority with respect to other water rights on the same stream system. In order to prioritize water rights, Colorado has adopted a statutory system of water right adjudication to determine the date of appropriation and priority of a water right with respect to other water rights. Adjudication means filing an application and proving to the court all of the aspects of a particular water right appropriation. The court then issues a decree that recites the relevant facts proved. The current adjudication statute is called the Water Right Determination and Administration Act of 1969, found at C.R.S. §§ 37-92-101 et seq. Although a water right is created upon application of water to beneficial use, a water right owner is not entitled to have his or her water right administered within the priority system until he or she obtains a decree from a court confirming the water right priority.

Surface water includes all water in rivers, streams, lakes, wetlands and other natural waterways, and diffuse runoff. Ground water that is hydraulically connected to surface water—meaning that the ground water is replenished by surface water percolating into the ground or the ground water seeps into surface water bodies—is considered tributary ground water. Tributary ground water is subject to the doctrine of prior appropriation as a part of the

[†] The commentary portions of this chapter were written by Robert V. Trout. Mr. Trout is a partner at the law firm of Trout, Raley, Montaño, Witwer & Freeman, P.C., which is located in Denver.

surface water body to which it is hydraulically connected. Thus, wells withdrawing water from the South Platte alluvium (the shallow aquifer that is tributary to the South Platte River) are considered tributary to the South Platte River and are subject to senior surface water rights on that river. This means that wells withdrawing water from the South Platte River tributary aquifer may not be able to operate to withdraw water when they are not in priority with respect to senior surface water rights.

A surface water right or tributary ground water right is represented by a decree from a court that confirms the priority date and other important aspects of the water right, including the type of use (irrigation, domestic, commercial, industrial, or other uses), the amount, the time of use, the point of diversion, and the place of use. A water right decree does not usually determine the ownership of a water right. It only states the identity of the claimant of the water right, who is usually but not always the owner. A water right is initially owned by the person or entity that actually diverted the water and applied it to beneficial use.

For administrative purposes, Colorado has been divided into seven water divisions, which are generally co-extensive with the seven major river basins that originate in the state. For instance, the South Platte River Basin is Water Division No. 1 and the Arkansas River Basin is Water Division No. 2. Each division has its own Water Court that has exclusive jurisdiction over all water matters in that division.

Water rights are administered, meaning that they are enforced, by the State Engineer's Office. Each water division has a division engineer's office that administers water rights in that division. Each division engineer supervises a number of water commissioners who are the people that actually tell water users whether they can legally divert water under their water right at any given time. Water commissioners are the local police of the water administration system.

Ground water in Colorado is allocated under several different rules depending upon its physical characteristics. As explained above, tributary ground water is subject to the doctrine of prior appropriation and is administered in conjunction with surface water rights in the river system to which it is tributary.

Another type of ground water classification, created by the legislature in the Ground Water Management Act of 1965, C.R.S. §§ 37-90-101 et seq., is ground water that is within areas known as designated ground water basins. Designated ground water basins are geographic areas containing ground water that (1) in its natural course would not be available to and required for the fulfillment of decreed surface water rights, or (2) is in areas not adjacent to a continuously flowing natural stream in which ground water withdrawals have constituted the principal water usage for at least 15 years prior to designation of the basin. The basins are created by the Ground Water Commission through a formal hearing and order process. A modified doctrine of prior appropriation is applied in designated ground water basins, meaning that prior appropriation is applied but water levels in aquifers are allowed to decline over time even if this results in senior water rights losing their water supply. Rights to use designated ground water are represented by well permits issued by the Ground Water Commission. Colorado has eight designated ground water basins, which are generally located on the eastern plains.

Ground water may be so physically separated from surface water by impermeable layers or great distances so as to have little or no hydraulic connection with surface water. If such ground water is located outside of a designated ground water basin, and its withdrawal will not within 100 years deplete the flow of a natural stream at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal, it is classified as non-tributary ground

water. By statute, C.R.S. § 37-90-137(4), the right to use non-tributary ground water is generally allocated based on the ownership of the overlying land, rather than the prior appropriation system. The owner of the overlying land may obtain a right to use non-tributary ground water by obtaining a well permit from the State Engineer's Office, or may seek to have the Water Court determine the non-tributary ground water rights before drilling a well. Ground water within the the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers in the area known as the Denver Basin (a kidney shaped area along the Front Range of Colorado between Greeley and Colorado Springs) is presumed to be non-tributary. Non-tributary ground water also occurs in other parts of the state.

The Colorado legislature has also defined a unique category of ground water located outside the boundaries of a designated ground water basin within the Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers in the Denver Basin. Water within this classification is water that would otherwise not meet the definition of non-tributary ground water, and is known as "not non-tributary" ground water. Not non-tributary ground water is also generally allocated on the basis of land ownership. Like non-tributary ground water, the owner of the overlying land may obtain a right to use not non-tributary ground water by obtaining a well permit from the State Engineer's Office or may seek to have the Water Court determine the not non-tributary ground water rights before drilling a well.

To avoid injury to senior surface water rights, the law now requires a judicially approved augmentation plan before junior tributary ground water rights and not non-tributary ground water rights can be pumped and used. An augmentation plan allows a water user to divert water out of priority so long as adequate replacement is made to the affected stream system and water rights in quantities and at times so as to prevent injury to the water rights of others.

Water rights can only be used for the purposes described in the applicable decree or permit and pursuant and subject to all of the other terms and conditions in the applicable decree or permit. For instance, an irrigation water right cannot be used for domestic or industrial purposes. The type, time and place of use, and other aspects of water rights can generally be changed if the change will not injure other water rights. Adjudicated water rights, including rights to non-tributary and not non-tributary ground water, must be changed in a proceeding filed in the applicable Water Court. Designated ground water rights must be changed in a proceeding filed with the Ground Water Commission. The change is usually evidenced by a change of water right decree issued by the Water Court or a changed well permit issued by the Ground Water Commission.

Surface and tributary ground water rights are subject to loss by abandonment. Abandonment occurs when there is a sustained period of non-use of the water right coupled with an intention to abandon. An intention to abandon can be inferred from an unreasonably long period of non-use. Abandonment of a water right can occur without any official court or administrative action or the execution of any document. Thus, when investigating the status of a water right, potential abandonment must always be considered.

* **II. Well Permits**

A well is any structure or device used for the purpose or with the effect of obtaining ground water for beneficial use from an aquifer. A permit issued by the State Engineer's Office is required to construct a well, except in designated ground water basins where the well permit is issued by the Ground Water Commission. The State Engineer's Office maintains records of all well permits issued in the state.

A well permit for tributary ground water can only be issued by the State Engineer's Office if there is unappropriated water available for withdrawal by the proposed well and the vested rights of others will not be materially injured. Because most rivers in Colorado are already over-appropriated (meaning that there is often not enough water to satisfy existing water rights) this standard cannot be met in many areas of Colorado. To allow some low-density development in rural areas, there is a rebuttable presumption of no injury to other water users or existing wells if a proposed well will have a production capacity of less than 15 gallons per minute, and will be either (a) the only well on a residential site located in a subdivision approved before June 1, 1972, and the well will be used solely for ordinary household purposes inside a single-family dwelling and will not be used for irrigation; or (b) the only well on a tract of land of 35 acres or more. These are commonly called "exempt" or "household use only" wells.

A well permit for non-tributary ground water and not non-tributary ground water is issued by the State Engineer's Office based on overlying land ownership. The well permit will only allow withdrawal of 1% of the amount of water calculated to exist in the aquifer underlying the land per year.

* **III. Conveying and Encumbering Water Rights**

Water rights are represented by a number of different documents. Surface water rights, tributary ground water rights, non-tributary ground water rights and not non-tributary ground water rights are usually represented by Water Court decrees. Rights to tributary ground water, non-tributary ground water and not non-tributary ground water may also be represented by well permits. Designated ground water rights are usually represented by well permits. Water rights owned by mutual ditch or reservoir companies (commonly called ditch rights or reservoir rights) are usually represented by shares of stock in the mutual ditch or reservoir company because the company itself usually owns the water rights.

Water rights in all of these forms are conveyed by a deed that should be recorded in the applicable county clerk and recorder's office in the same manner as a land deed. Well permits should also be conveyed by an assignment that is filed with the State Engineer's Office. Shares of stock in a mutual ditch or reservoir company are also conveyed by assignment and other procedures required by the company.

Water rights in all of these forms can also be encumbered by a deed of trust, except that a deed of trust usually may not encumber shares of stock in a mutual ditch or reservoir company. Security interests in shares of stock must be obtained and perfected under the terms of the Colorado Uniform Commercial Code.

Whether a particular deed to land conveys surface or tributary ground water rights depends upon the intention of the grantor, which is determined from the express terms of the deed. Thus, a deed may describe specific water rights that are conveyed. If a deed is silent as to surface or tributary ground water rights, the intentions of the grantor are to be determined by the circumstances, such as whether the water right is or is not incidental to and necessary to the beneficial enjoyment of the land. Where a deed is silent no presumption arises as to the intent of the parties in regard to the transfer of surface or tributary ground water rights. The inclusion of a water right in a deed will not by itself prevent a later determination of abandonment.

The presumption is different with respect to non-tributary ground water. Rights to non-tributary ground water are presumed to pass with the land in a deed and are encumbered by a

deed of trust encumbering the land, unless these rights are explicitly excepted from the deed. A party claiming that the non-tributary ground water was not transferred or encumbered with the land has the burden of proving that fact.

* **IV. Disclosure of Potable Water Source**

On and after January 1, 2008, Colorado law requires that a listing contract, contract of sale, or seller's property disclosure for residential land and residential improvements disclose in bold-faced type the source of potable water for the property, which can be one of the following:

1. Well (in which case a copy of the current well permit, if one is available, is to be provided); or
2. Water provider (in which case the name and other information regarding the water provider is to be provided); or
3. Neither a well nor a water provider (in which case the source of the water is to be provided).

The disclosure statement is also required to state in bold-faced type that some water providers rely, to varying degrees, on nonrenewable water (which is generally considered to be non-tributary and not non-tributary ground water described above), and advise the prospective purchaser that he or she may wish to contact the water provider to determine the long-term sufficiency of that provider's water supplies.

Residential real estate located in incorporated cities and towns is almost always supplied potable water by a water provider (that is often part of the city or town government) such as the Denver Water Board in Denver and the Aurora Water Department in Aurora. Areas located near urban areas, such as areas adjacent to Fort Collins or Loveland, are sometimes supplied potable water by the adjacent municipality and are sometimes served by independent water districts. Some cities and towns are served by independent water districts that are not part of the city or town government.

Municipalities and water districts obtain their water from surface water sources and ground water. Denver, Aurora and other large municipalities usually obtain all or most of their water from surface water rights. These surface water rights could divert water from streams large distances from the municipalities, such as the Colorado River basin in western Colorado for Denver, Aurora and other municipalities. Municipalities and water districts also obtain water from tributary, non-tributary, not non-tributary and designated ground water sources depending on their location.

Residential real estate in rural areas is most often supplied potable water from a well. The well can produce tributary ground water, non-tributary ground water, not non-tributary ground water or designated ground water depending upon the location. Such wells almost never produce water from more than one of these sources. In some cases, particularly in mountainous areas, residential real estate can obtain potable water from a small surface diversion or a spring.

* ***Colorado Revised Statutes 38-35.7-104. Disclosure of potable water source – rules.***

- (1) (a) (I) By January 1, 2008, the real estate commission created in section 12-61-105, C.R.S., shall, by rule, require each listing contract, contract of sale, or seller's property disclosure for residential real property that is subject to the commission's

jurisdiction pursuant to article 61 of title 12, C.R.S., to disclose the source of potable water for the property, which disclosure shall include substantially the following information:

THE SOURCE OF POTABLE WATER FOR THIS REAL ESTATE IS:

- A WELL;**
 A WATER PROVIDER, WHICH CAN BE CONTACTED AS FOLLOWS:

NAME: _____

ADDRESS: _____

WEB SITE: _____

TELEPHONE: _____

- NEITHER A WELL NOR A WATER PROVIDER. THE SOURCE IS [DESCRIBE]:** _____

SOME WATER PROVIDERS RELY, TO VARYING DEGREES, ON NONRENEWABLE GROUND WATER. YOU MAY WISH TO CONTACT YOUR PROVIDER TO DETERMINE THE LONG-TERM SUFFICIENCY OF THE PROVIDER'S WATER SUPPLIES.

- (II) On and after January 1, 2008, each listing contract, contract of sale, or seller's property disclosure for residential real property that is not subject to the real estate commission's jurisdiction pursuant to article 61 of title 12, C.R.S., shall contain a disclosure statement in bold-faced type that is clearly legible in substantially the same form as is specified in subparagraph (I) of this paragraph (a).
- (b) If the disclosure statement required by paragraph (a) of this subsection (1) indicates that the source of potable water is a well, the seller shall also provide with such disclosure a copy of the current well permit if one is available.
- (2) The obligation to provide the disclosure set forth in subsection (1) of this section shall be upon the seller. If the seller complies with this section, the purchaser shall not have any claim under this section for relief against the seller or any person licensed pursuant to article 61 of title 12, C.R.S., for any damages to the purchaser resulting from an alleged inadequacy of the property's source of water. Nothing in this section shall affect any remedy that the purchaser may otherwise have against the seller.
- (3) For purposes of this section, "residential real property" means residential land and residential improvements, as those terms are defined in section 39-1-102, C.R.S., but does not include hotels and motels, as those terms are defined in section 39-1-102, C.R.S.; except that a mobile home and a manufactured home, as those terms are defined in section 39-1-102, C.R.S., shall be deemed to be residential real property only if the mobile home or manufactured home is permanently affixed to a foundation.

*** V. Special Considerations for Irrigated Land**

Often the seller of 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 and irrigated farms in Colorado, it is advisable for the seller of an irrigated farm to be prepared to inform the prospective purchaser of pertinent information on the water rights. Some suggestions as to the type of information that could be disclosed are as follows:

1. If the irrigation water is delivered by a ditch or canal, there are several things to be considered:
 - a. The number of shares of stock in the ditch or reservoir company that serves the farm that are proposed to be sold with the farm, and whether these are all of the shares that were historically used on the farm.

- b. 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 his or her shares.
 - c. The prospective purchaser may also be interested in 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 seller of such water rights should be familiar with the transfer procedures for the particular ditch or reservoir company; which may be by deed, of course, but may also involve the transfer of the ditch or reservoir company's stock certificate. The amount of any assessment on the shares of stock by the ditch or reservoir company would also be important.
2. If the farm is irrigated with wells, the following should be considered:
- a. The prospective purchaser may be interested in whether the wells are tributary, and if so, whether the wells are covered by a court adjudicated augmentation plan, whether the wells have been adjudicated in Water Court, and, if so, the date of adjudication, the priority date, and the amount allowed to be pumped. Of course the prospective purchaser could also be interested in the physical condition of the wells and their current production capacity.
 - b. Irrigation wells may also be located in a designated ground water basin or may produce non-tributary or not non-tributary ground water. Here again, the prospective purchaser could be interested in the above information, plus information on aquifer levels in that particular basin, as aquifers in some basins have been depleted substantially in recent years. The energy supply for the water pumps and the cost of pumping the wells may also be important to a prospective buyer in these energy-conscious times.

VI. Water Conservation and Drought Mitigation

Ed. Note: C.R.S. § 37-60-126 has been moved from Chapter 26: Related Real Estate Laws.

37-60-126. Water conservation and drought mitigation planning – programs – relationship to state assistance for water facilities – guidelines.

(Editor note: The following is a portion (section (11)) of Part 126 applicable to covenant controlled communities)

- (11) (a) Any section of a restrictive covenant that prohibits or limits xeriscape, prohibits or limits the installation or use of drought-tolerant vegetative landscapes, or requires cultivated vegetation to consist exclusively or primarily of turf grass is hereby declared contrary to public policy and, on that basis, that section of the covenant shall be unenforceable.
- (b) As used in this subsection (11):
 - (I) “Executive board policy or practice” includes any additional procedural step or burden, financial or otherwise, placed on a unit owner who seeks approval for a landscaping change by the executive board of a unit owners’ association, as

defined in section 38-33.3-103, C.R.S., and not included in the existing declaration or bylaws of the association. An “executive board policy or practice” includes, without limitation, the requirement of:

- (A) An architect’s stamp;
 - (B) Pre-approval by an architect or landscape architect retained by the executive board;
 - (C) An analysis of water usage under the proposed new landscape plan or a history of water usage under the unit owner’s existing landscape plan; and
 - (D) The adoption of a landscaping change fee.
- (II) “Restrictive covenant” means any covenant, restriction, bylaw, executive board policy or practice, or condition applicable to real property for the purpose of controlling land use, but does not include any covenant, restriction, or condition imposed on such real property by any governmental entity.
- (III) “Turf grass” means continuous plant coverage consisting of hybridized grasses that, when regularly mowed, form a dense growth of leaf blades and roots.
- (IV) “Xeriscape” means the application of the principles of landscape planning and design, soil analysis and improvement, appropriate plant selection, limitation of turf area, use of mulches, irrigation efficiency, and appropriate maintenance that results in water use efficiency and water-saving practices.
- (c) Nothing in this subsection (11) shall preclude the executive board of a common interest community from taking enforcement action against a unit owner who allows his or her existing landscaping to die; except that:
- (I) Such enforcement action shall be suspended during a period of water use restrictions declared by the jurisdiction in which the common interest community is located, in which case the unit owner shall comply with any watering restrictions imposed by the water provider for the common interest community;
 - (II) Enforcement shall be consistent within the community and not arbitrary or capricious; and
 - (III) Once the drought emergency is lifted, the unit owner shall be allowed a reasonable and practical opportunity, as defined by the association’s executive board, with consideration of applicable local growing seasons or practical limitations, to reseed and revive turf grass before being required to replace it with new sod.

* VII. Conclusion

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, geologist and/or water engineer concerning the status of water rights and their transfer.

* **VIII. Water Right Terminology**

Absolute water right: A term often used to describe a water right under which water has been fully diverted and applied to beneficial use so that the water right is no longer a conditional water right, to distinguish it from a conditional water right.

Acre-foot: Volumetric measurement of water used for quantifying reservoir storage capacity and historic consumptive use and for other purposes. This is the amount of water that will cover an acre of land at a depth of one foot, or 325,851 gallons of water.

Adjudication: The judicial determination of the extent, nature and limitations of a water right appropriation in a statutory court proceeding.

Appropriation: The application of a certain portion of the waters of the state of Colorado to a 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.

Aquifer: A subsurface water-bearing geological structure capable of storing and yielding water to streams, springs, or wells.

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 reasonably efficient practices to accomplish, without waste, the purpose for which the appropriation is lawfully made.

Conditional water right: A right to perfect a water right with a certain priority upon the completion, with reasonable diligence, of the appropriation upon which such water right is to be based.

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.

Cubic foot per second (cfs): Measurement of flow rate of water in a running stream, a ditch or canal, or a pipeline. Water flowing at one cfs will deliver 448.8 gallons per minute or 648,000 gallons per day. One cfs flowing for 24 hours equals 1.983 acre-feet of water.

Direct flow water 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 a specified water right 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 or unadjudicated water right: A water right that has not been submitted to the appropriate court for adjudication. An unadjudicated water right is junior in priority to all water rights from the same source that have been adjudicated.

Point of diversion: The location at which 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 divert water 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.

Storage water right: A water right that gives the owner thereof the right to divert and store water from a specified water source in a specified volumetric amount for current or future use.

Water right: A real property right, either absolute or conditional, 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 decree or a Ground Water Commission well permit.

SOURCES OF INFORMATION

Rules, regulations and statutes may be obtained from the Colorado Division of Water Resources, at 1313 Sherman St., Room 818, Denver, CO 80203. Its 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.