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#### A Primer on Colorado Water Law

12/27/2004

By Justice Greg Hobbs, Colorado Supreme Court

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*Editor's note: this article originally appeared in the May-June 2003 (977) issue of Trail & Timberline*

Water scarcity in Colorado is a fact of life. The current drought in Colorado is causing citizens to pay attention, as never before, to one of the most technical areas of law in the state: the statutes and customs governing the distribution of water.

In 2002, Colorado rivers produced only four million acre-feet of water, compared to the historic annual average of sixteen million acre-feet. As a result, last year Colorado had to use six million acre-feet of water it had placed into reservoirs in other years for use in the dry times.

Water is a public resource. Any area of the United States receiving less than forty inches of precipitation annually is considered an "arid region." Since Colorado's annual average precipitation ranges from less than ten inches of moisture on the plains to a little over thirty inches in the mountains, the state certainly qualifies for this category.

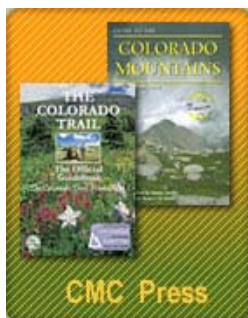
Early in the history of the West, Congress realized that water, a public resource, would have to be managed differently there than in the eastern United States, an area where water was abundant. Colorado became a Territory in 1861. In the Mining Act of 1866, Congress provided that the customs and laws of the states and territories would govern water use within their boundaries.

Colorado chose the "prior appropriation" system as its basic water law for the allocation and administration of surface water and tributary groundwater (water that is connected to the surface stream). The earlier in time a person began appropriating and using water, the more senior the claim to that water is.

## The Colorado Constitution

On admission to the Union in 1876, the people of Colorado adopted a constitution declaring that the water of every natural stream in the state is "the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation." The constitution further guaranteed the right to appropriate unappropriated waters for "beneficial uses." All persons and corporations were empowered, upon payment of just compensation, to obtain a right-of-way across public and private lands of others for the construction of ditches, canals, and flumes for carriage of water to its place of use.

Colorado has an active water market in the purchase and change of water rights, typically from agricultural to municipal use. In 1971, agriculture consumed approximately ninety-two percent of the water used in Colorado. In 2002, agriculture consumed eighty-five percent, municipalities ten percent, and all other uses five percent.



## Water courts

Under Colorado's constitution and laws, water use rights are property rights. They are created by using unappropriated available water for a beneficial purpose; the earlier the date of appropriation, the more valuable the water right. Water rights are enforced in priority during times of short supply. Junior rights are curtailed until senior rights are satisfied.

Through an 1879 law, the courts are responsible for determining the priority dates for water rights. Court decrees identify the location, amount, and type of water use. The decrees include any conditions necessary to protect senior rights against injury. Because water is a public resource, even citizens who do not own water rights are allowed to participate in water court cases. Engineering testimony in water cases can be complex and contradictory, and proponents and opponents of a particular water rights claim can be highly adversarial.

Under a 1969 law, seven water divisions of the district court exist with special jurisdiction over matters concerning major watersheds. The water courts for the divisions are headquartered in Greeley (South Platte), Pueblo (Arkansas), Alamosa (Rio Grande), Montrose (Gunnison), Glenwood Springs (Colorado), Steamboat Springs (Yampa, White, North Platte), and Durango (San Juan, Dolores). The State Engineer, Division Engineer, and local Water Commissioners administer Colorado's water in accordance with water court decrees.

Changes of water rights are decreed by the water courts. Colorado water courts also decree out-of-priority diversions that allow new uses to be made in over-appropriated stream basins if replacement water is provided to the water rights that would otherwise be injured.

Each water court publishes a monthly resume of applications. This is how the citizens of Colorado are informed of pending cases they might wish to monitor or participate in. Appeal from a water court judgment is directly to the Colorado Supreme Court.

## Beneficial uses

All water in Colorado is a public resource. Individuals, businesses, and public agencies may obtain a right to use water for "beneficial purposes." These uses originally included agricultural, domestic, municipal, commercial, and flood control. As the economy and values of Coloradans changed, statutes and court decisions recognized that beneficial use also includes fish and wildlife propagation, nature centers, mined land reclamation, and recreational in-channel diversions by local governments for boating and kayaking.

A unique 1973 law passed by the General Assembly allows the Colorado Water Conservation Board (CWCB) to appropriate minimum stream flows and lake levels for the preservation of the natural environment to a reasonable degree. "Instream flow water rights" now exist on 8,000 miles of Colorado streams. Under a 2002 law, the CWCB may also obtain senior water rights to add to the instream flows. The state and division water engineers and local water commissioners enforce the court decrees for the instream flow rights of the Water Conservation Board.

## Progressive conservation

In Colorado's early days, the state and federal public agenda was wholly pro-development. Water was a necessity of human life. It was taken from the streams and used without regard to environmental impact.

There were consequences. Mining districts came and went, leaving forests stripped for mills, housing, and firewood. Silt poured off with the snow melt, plugging ditches and reservoirs. Mining waste and human waste leached into streams, impairing other water uses.

By the close of the nineteenth century, the nation and Colorado began to shift from unmitigated use of natural resources to sustainable management of them. President Teddy Roosevelt and his forester, Gifford Pinchot, pushed to reserve forested lands from being homesteaded and conveyed to private ownership. Making water available to farms, cities, and businesses was a primary reason for the proposed forest reserves.

Fourteen million acres of forest reserves were created in Colorado. Today, thirty-seven percent of

Colorado remains in federal ownership, a heritage of the progressive conservation movement.

## Reservoirs

Storage of water for later use was also a fundamental precept of progressive conservation. In an 1879 report to Congress, pioneering Colorado River runner John Wesley Powell stressed the necessity of public water storage. He also feared that powerful corporate monopolies would control the sale and use of water unless government intervened on behalf of the farmers.

In Colorado, farmers cooperatively established mutual irrigation companies and irrigation districts. The Colorado General Assembly followed with the creation of water conservancy districts and water conservation districts with the power to collect and spend public tax money to develop water for the use of Colorado citizens and business.

Reclamation reservoirs, along with many private and public non-federally financed reservoirs, exist throughout the state. Many cities own their own reservoirs. There are approximately 2,000 reservoirs in Colorado; they have the capacity to store 6.5 million acre-feet of water.

## Interstate water compacts

Colorado is the mother of many rivers. In an average year Colorado rivers produce sixteen million acre-feet of water. But, up to two thirds of this water is legally committed by interstate law to downstream states. Colorado is a party to nine interstate compacts and two equitable apportionment decrees of the United States Supreme Court that allocate water to other states.

The nine interstate compacts are the Colorado River Compact, La Plata River Compact, South Platte River Compact, Arkansas River Compact, Rio Grande River Compact, Republican River Compact, Upper Colorado River Compact, Amended Costilla Creek Compact, and Animas-La Plata Project Compact. The equitable apportionment decrees are Wyoming v. Colorado and Colorado v. New Mexico.

The loss to Wyoming in the 1922 equitable apportionment case convinced Coloradans, notably its chief compact architect, Delph Carpenter, that the law of prior appropriation could not be applied to interstate rivers. Of greatest concern were California's thirst, size, and economic and political strength.

Congress and the states intended the 1922 Colorado River Compact to be a permanent and perpetual division of water between the upper and the lower basin on a beneficial consumptive use basis. The lower basin states—Arizona, California, and Nevada—could proceed with their development, while the Upper Basin states, Colorado, New Mexico, Utah, and Wyoming could utilize their full share at any distant time, when ready. In the meantime, water not utilized in the Upper Basin is available to the Lower Basin under the law.

Colorado is nearing full compact utilization. This has occurred already in regard to the Arkansas and Rio Grande compacts. The Colorado Water Conservation Board estimates that only 400,000 acre-feet of water remains to Colorado for additional use under its Colorado River Compact entitlement.

## Federal reserved water rights

In 1907, the United States Supreme Court determined that the states could not deprive Native Americans of the water reserved to them expressly by Congress—or by implication, when the reservations were established. Reserved water rights also exist to serve the primary purposes of other federal reservations, such as national parks, monuments, and national forests. For example, the Rocky Mountain National Park and the Cache la Poudre Wild and Scenic River have reserved water rights.

## The environment

The Great Depression, World War II, and post-war economic development encouraged the building of large mainstream dams throughout the west for water supply, power production, flood control, and recreation.

At the same time, magnificent canyons and free-flowing rivers were lost. American wild lands shrank dramatically. Citizens of the West and of the rest of the nation awoke to the need for preservation. A reservoir that would have flooded Echo Park in the Colorado-Utah Dinosaur Park country was halted after a fierce national debate spearheaded by the Sierra Club.

Negotiation between water and environmental interests and federal agencies led to designation of the Poudre as a Wild and Scenic River in 1986, passage of the 1993 Colorado Wilderness Act, and the North Saint Vrain Protection Act in 1996. Colorado is cooperating with Utah, Wyoming, New Mexico, Nebraska, and the United States to conserve the endangered fishes of the Colorado River and the endangered birds of the Platte River.

Cooperation was notably absent when Denver attempted to obtain a dredge and fill permit under the Clean Water Act to construct the Two Forks dam. Many Coloradans, inside and outside of Denver, fought its construction. Historical conflicts between the east slope and the west slope re-emerged. While it did attempt to reach agreements with those opposing Two Forks, the Water Board found few allies for a project desired mainly by suburban cities and districts. In 1989, the Environmental Protection Agency vetoed the dam under a provision requiring a permit to deposit fill material in the streams.

Despite the Two Forks veto, growth has occurred exponentially in the Denver metropolitan area. Denver suburbs have turned to the use of deep exhaustible Denver Basin bedrock water and the purchase of farm water.

The Denver Basin bedrock water is not subject to Colorado prior appropriation law because it does not belong to a natural stream subject to the state constitution's water provisions. By act of the Colorado legislature, this deep underground water can be pumped by overlying landowners at the rate of one percent per year, assuming a one hundred-year life of this non-renewable groundwater. But, in parts of the Denver Basin, wells are already going dry. The farmers and cities of the eastern plains largely depend upon the Ogallala aquifer, which is regulated by the Colorado Ground Water Commission and local management districts.

## Colorado's water future

As the history of Colorado demonstrates, beneficial use and preservation are the two chambers of our western hearts, the two lobes of our brains. Our state and federal public land, land use, water, and environmental laws mirror these fundamental principles. Land use decisions will be instrumental in determining the look and feel of Colorado.

Local citizens will react to proposed diversions that threaten their economic livelihood and love for their home place. Conservation of animals, birds, and plants must be addressed. It is not possible to build a new water project without extensive public consultation and study of alternatives, including not building the project.

As Colorado approaches the day when it will be forced to live within its interstate apportioned water share, resource management will become even more necessary. Efficient means of diversion and storage, beneficial use without waste, and recognition of all purposes that Coloradans value have always been fundamental precepts of Colorado water law.

Water supply planners will be required to examine all options: among them conservation, exchange, ground water recharge, joint use projects, conjunctive use of ground water and surface water, out of priority diversions through decreed augmentation plans, and the sale and purchase of water rights for use within the state.

Use of local water resources for local purposes will be the primary focus. Yet, Coloradans know that the state must share its water and financial resources as a whole. Eighty percent of the water supplies arise on the western slope. Over eighty percent of the population currently resides on the eastern slope. Rural areas throughout the state are experiencing significant population increase and will require municipal and recreation water supplies.

The farmland of Colorado is economically productive and beautiful to behold. Whether farms should be dried up to serve cities is a critical question for Colorado. Water rights are valuable property rights. The voluntary creation of farmland trusts and open space covenants, together

with payment for the water rights through private and public funds, is an alternative for keeping water on the ground it has irrigated historically.

As Colorado struggles to live within its interstate apportioned share, water management will become even more necessary. Conservation will be indispensable. Efficient means of diversion and storage, beneficial use without waste, and recognition of all purposes that Coloradans value have always been fundamental precepts of Colorado water law. Now they are vital. The era of their fuller implementation is upon us. P

Before he was appointed to the Colorado Supreme Court in 1996, Justice Hobbs practiced water and environmental law for twenty-five years.

The Colorado Foundation for Water Education has published the Citizen's Guide to Colorado Water Law, which Justice Hobbs authored. It is available through Karla Brown, Executive Director, at (303) 377-4433, [karlab@cfwe.org](mailto:karlab@cfwe.org), [www.cfwe.org](http://www.cfwe.org).

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