



Summer 2007

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An Overview of Colorado Groundwater Law

by Justice Greg Hobbs, Colorado Supreme Court, for the Geological Society of America

Symposium on Ground Water Mining and Population Growth, October 28-31, 2007, Denver, Colorado

All water within Colorado is a public resource, subject to the creation of use rights according to the applicable constitutional and statutory provisions. There are four classifications of water in Colorado: (1) waters of natural streams, which include surface water and groundwater that is tributary to a natural stream, (2) designated groundwater, (3) nontributary groundwater outside of designated groundwater basins, and (4) nontributary and not-nontributary Denver Basin groundwater of the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers.

Before any well may be drilled for use of any classification of groundwater anywhere in Colorado, the State Engineer must issue a construction permit. Often, people think that issuance of a state engineer well construction permit is the same as the state of Colorado granting a water use right. As the statutes of the General Assembly and cases of the Colorado Supreme Court demonstrate, however, a well construction permit does not amount to establishment of a water right. Like a ditch, a well is a diversion device. To be administered, the water right must be obtained and recognized as the applicable law provides.

Tributary Groundwater

The first classification of water includes groundwater that is tributary to a natural stream. This groundwater is subject to allocation and administration according to Colorado's constitutional prior appropriation doctrine, as implemented by the 1969 Water Right Determination and Administration Act.

Water courts for the seven water divisions in Colorado adjudicate conditional and absolute use rights, changes of water rights, and augmentation plans for tributary groundwater, as with surface water. Appeals from decisions of the seven water courts proceed directly to the Colorado Supreme Court.

Colorado water law contains a presumption that groundwater is tributary unless shown to be otherwise. Under Colorado Supreme Court case law, groundwater is tributary if, in its natural state, it could reach a surface stream within one hundred years.

State administration differs depending on the classification of the groundwater. In 1965, the Colorado General Assembly enacted two separate statutes delineating the fundamental differences between the administration of tributary groundwater and groundwater that has little or no effect on surface streams.

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tary groundwater, actual beneficial use of the water creates the water right. However, to be administered, the water right for a ditch or a well must have a water court decree that sets forth its priority date, location of diversion, rate of diversion, and type of beneficial use. The State Engineer, Division Engineers for the seven water divisions, and local Water Commissioners enforce the water rights for the diversion ditches and wells in order of the adjudicated priority dates of the various water rights in the water division.

In times of short supply, water rights are curtailed in reverse order of priority, junior to senior, in accordance with the decrees of the water court. Out-of-priority diversions are allowed only if a water-court adjudicated augmentation plan, or a State Engineer approved substitute supply plan, is in effect in compliance with statutory requirements to replace depletions to the water supply that would injure decreed water rights. Injury occurs when water that would otherwise be available to fill a water right operating in priority has been intercepted by someone whose decreed appropriation is junior in priority or someone who is diverting without a decree.

Three out of four major river basins of Colorado are over-appropriated, the Platte, the Arkansas, and the Rio Grande. This means that there is essentially no un-appropriated water remaining for appropriation by ditches or wells. Regulation of surface and tributary groundwater diversions in these over-appropriated basins is necessary to protect vested water rights according to their decreed priorities.



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Three Other Classifications of Groundwater

The General Assembly has created three other classifications of groundwater under the 1965 Ground Water Management Act: designated groundwater, nontributary groundwater, and Denver Basin bedrock groundwater. These classifications are for groundwater the legislature has presumed has little or no connection to a natural stream.

Designated Groundwater

The Colorado Ground Water Commission allocates and administers the use of designated groundwater utilizing a modified prior appropriation permit system for the beneficial use of groundwater that has little or no connection to a surface stream (except for designated groundwater in the four Denver Basin aquifers, which is subject to allocation by the Ground Water Commission by permit for beneficial use to overlying landowners at a 1/100ths percent per year pumping rate, as with the rest of the Denver Basin, see below). The purpose of this management program is to permit eco-

nomie development while maintaining reasonable pumping levels, so that the designated basin groundwater will not be mined excessively over the rate of recharge.

The Ground Water Commission has designated eight groundwater basins in Colorado, all of which are located on the high plains of Colorado east of the Continental Divide: Northern High Plains, Southern High Plains, Camp Creek, Upper Crow Creek, Lost Creek, Kiowa Bijou, Upper Black Squirrel Creek, and Upper Big Sandy designated basins. The latter four of these include portions of the Denver Basin.

Under the modified prior appropriation regime for designated groundwater, curtailment based upon an injury allegation is subject to the discretion of the Ground Water Commission and the local Ground Water Management Districts.

Appeals from actions of the Ground

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Water Commission and Ground Water Management Districts go to local Colorado district court groundwater judges, not to the water court judges whose jurisdiction is under the 1969 Act. Appeals from the decisions of the groundwater judges go directly to the Colorado Supreme Court.

The Ground Water Commission has promulgated rules applicable to the use of designated groundwater.

Nontributary and Denver Basin Groundwater

The General Assembly has provided that the use of nontributary groundwater outside of the designated basins, and the use of groundwater in the four Denver Basin bedrock aquifers, may be made by overlying landowners or those who have the consent of the overlying landowners. This groundwater may be extracted at the rate of 1/100ths percent per year. In contrast to designated groundwater, nontributary water outside of the designated basins and Denver Basin groundwater may be mined regardless of any consideration of recharge.

The overlying landowner, or person acting with the consent of the overlying landowner, may obtain such a use right by drilling a well or obtaining water court adjudication for the amount of water underlying the land (an amendment to the 1969 Act provided water court judges with this jurisdiction for non-tributary and Denver Basin groundwater that is outside of a designated groundwater basin).

The four Denver Basin bedrock aquifers are the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers.

Use of nontributary and Denver Basin groundwater is not subject to curtailment on an injury basis. The State Engineer has promulgated rules for the use of nontributary and Denver Basin groundwater.

Timeline of Colorado Ground Water Law

The following timeline sets forth, in summary form, major events in the establishment of Colorado groundwater law.

Article XVI, Sections 5 and 6 of the

Colorado Constitution declare that the un-appropriated water of every "natural stream" is the property of the public dedicated to the beneficial use of the people of the state by priority of appropriation.

Colorado General Assembly provides that any water right derived from any "natural stream" is subject to court adjudication, 1903 Colo. Sess. Laws, Ch. 130, 297-98.

Colorado Supreme Court confirms that the constitutional term "natural stream" subjects to the rule of prior appropriation all sources of stream supply, including percolating groundwater, that is tributary to a surface stream, German Ditch & Reservoir

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Co., 56 Colo. 252, 270-71 (1914).

Colorado General Assembly provides that all claims to prior appropriation water rights shall be filed within two years; if not, their priorities shall be postponed to those water rights that are adjudicated by the courts, 1919 Colo. Sess. Laws, Ch. 147, 487-96.

Colorado Supreme Court holds that Colorado law includes a presumption that all groundwater is tributary to and subject to appropriation and administration as part of the waters of a surface stream, unless a person proves by clear and satisfactory evidence that the ground water is not tributary, Safranek v. Town of Limon, 123 Colo. 330, 333 (1951).

Colorado General Assembly provides that: (1) all users of ground water must file a statement of use with the state engineer, (2) new wells shall not be drilled without a permit from the state engineer, (3) a well permit "shall not have the effect of granting or conferring a ground water right upon the user," (4) the priority date of a "ground water appropriation shall not be postponed to a time later than its true date of appropriation by failure to adjudicate the right in a surface water adjudication," and (5) the newly-established Ground Water Commission shall identify critical ground water areas that "have approached, reached or exceeded the normal annual rate of replenishment," 1957 Colo. Sess. Laws, Ch. 289, 863-73.

Colorado General Assembly adopts the Ground Water Management Act that: (1) authorizes the Colorado

Ground Water Commission to create designated basins for groundwater that has little or no connection to a surface stream, (2) provides for the Ground Water Commission to allocate and regulate designated groundwater through a permit system on a modified prior appropriation basis for economic development through the maintenance of reasonable pumping levels, (3) authorizes the creation of local groundwater management districts for regulation of designated groundwater, (4) requires all new wells, wherever they may be located in the state, to obtain a construction permit from the state engineer,

and (5) provides that a state engineer well construction permit "shall not have the effect of granting nor conferring a ground water right upon the user," 1965 Colo. Sess. Laws, Ch. 319, 1246-68.

1965 Colorado General Assembly, by a separate act from the Ground Water Management Act, requires State Engineer to administer tributary groundwater in accordance with the doctrine of prior appropriation that is applicable to the distribution of surface water, and adopt rules and

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issue orders necessary to enforce this responsibility, 1965 Colo. Sess. Laws, Ch. 318, 1244-45.

Colorado Supreme Court states that "implicit" in the Colorado Constitution's prior appropriation provisions are the propositions that: (1) "along with *vested rights*, there shall be *maximum utilization* of the water of this state" and (2) administration of water in the second century of prior appropriation law involves how maximum utilization of surface water and tributary groundwater can be integrated into the law of vested rights, Fellhauer v. People, 447 P.2d 989, 995 (Colo. 1968).

Colorado General Assembly adopts the Water Right Determination and Administration Act of 1969 which, among other provisions, states that (1) tributary groundwater and surface water shall be administered according to the doctrine of prior appropriation, in order to maximize beneficial use, (2) vested surface water and tributary groundwater rights shall be protected in order of their decreed priorities, (3) wells that have not obtained adjudication of their priorities have a period of two years in which to file for their original appropriation date and, if not, their priorities shall be postponed to other priorities that have been adjudicated by the courts, and (4) augmentation plans may be decreed to allow out-of-priority diversions that are not subject to state engineer curtailment, if sufficient replacement water is provided to alleviate material injury to adjudicated water rights, 1969 Colo. Sess. Laws, Ch. 373, 1200-1224.

Colorado General Assembly provides that non-tributary ground water outside of designated ground water basins shall be subject to state engineer well construction permits and rules that provide for overlying landowners, or those acting with the consent of overlying landowners, to use this type of groundwater which underlies their lands on the basis of a "minimum useful life of one hundred years," 1973 Colo. Sess. Laws, Ch. 441, 1520.

Colorado Supreme Court holds that the "tributary character" of water that "takes over a century to reach the stream" is "de minimus" and is "not part of a surface stream" as contemplated by the Colorado Constitution's prior appropriation provisions, Kuiper v. Lundvall, 187 Colo. 40, 44 (1974).

1977 Colorado General Assembly repeals legislation it had enacted in 1974, 1974 Colo. Sess. Laws, Ch. 111, 440-42. that had allowed the State Engineer to approve temporary augmentation plans while the water court was adjudicating applications for augmentation plans, 1977 Colo. Sess.

Laws, Ch. 483, 1702-04.

Colorado Supreme Court holds that: (1) designated groundwater and nontributary ground water are not subject to the prior appropriation provisions of the Colorado Constitution, and the General Assembly may use its plenary authority to decide how these public waters shall be allocated and administered, and (2) the 1969 Act applies only to surface water and tributary groundwater, State v. Southwestern Colorado Water Conservation District, 671 P.2d 1294 (1983). The General Assembly responds promptly with legislation that (1) recognizes and enforces prior water court decrees adjudicating nontributary groundwater outside of designated basins and (2) allows the water courts to adjudicate to overlying landowners the right to extract nontributary groundwater outside of designated basins under their lands, 1983 Colo. Sess. Laws, Ch. 516, 2079-80.

1985 Colorado General Assembly provides that nontributary and nontributary groundwater in the

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Denver Basin bedrock aquifers of the Dawson, Denver, Arapahoe, and Laramie-Fox Hills formations shall be allocated to overlying landowners, or those acting with the consent of the overlying landowners, to be extracted at a rate of no more than 1/100ths percent per year, 1985 Colo. Sess. Laws, Ch. 285, 1160-69.

General Assembly clarifies that the Ground Water Commission, when issuing permits for the beneficial use of designated groundwater in the four Denver Basin aquifers, shall allocate this water on the same basis as provided in the 1985 act for non-designated portions of the Denver Basin, namely "upon the basis of ownership of overlying land" and "an aquifer life of one hundred years," 1988 Colo. Sess. Laws, Ch. 258, 1238.

Colorado Supreme Court holds that all water within Colorado constitute a public resource consisting of: (1) waters of the natural stream, which includes surface water and groundwater that is tributary to the natural stream, (2) designated groundwater, (3) nontributary groundwater outside of designated groundwater basins, and (4) nontributary and not-nontributary Denver Basin groundwater of the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers, Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss, 993 P.2d 1177, 1182 (Colo. 2000).

2001 Colorado Supreme Court holds that through the 1969 Act (1) the General Assembly created a new statutory authorization for water

uses that, when decreed, are not subject to curtailment by priority administration, (2) this statutory authorization is for out-of-priority diversions for beneficial use that operate under the terms of decreed augmentation plans, (3) plans for augmentation allow diversions of water out-of-priority while ensuring the protection of senior water rights through a replacement water supply that offsets injurious out-of-priority depletions, and (4) injurious depletions not adequately replaced shall result in curtailment of the out-of-priority diversions. Empire Lodge Homeowners' Association v. Moyer, 39 P.3d 1139, 1150 (Colo. 2001).

2002 Colorado General Assembly (1) authorizes State Engineer to approve substitute supply plans for out-of-priority tributary groundwater diversions under limited circumstances while augmentation plan applications are pending in the water court, and (2) approves the Arkansas river basin amended rules governing the diversion and use of tributary groundwater in that basin, 2002 Colo. Sess. Laws, Ch. 151, 459-64.

2003 Colorado Supreme Court holds that proposed State Engineer 2002 South Platte Basin rules allowing out of priority diversions under replacement plans, in the absence of an augmentation plan application pending in water court, were contrary to statute and in excess of his authority, Simpson v. Bijou Irrigation Co., 69 P.3d 50, 67 (Colo. 2003).

2004 Colorado General Assembly allows South Platte tributary groundwater wells to operate out-of-priority under State Engineer approved substitute supply plans, with provisos that (1) augmentation plan applications must be filed in Division No. 1 Water Court by December 31, 2005, and (2) wells not included in an adjudicated augmentation plan or State Engineer approved substitute supply plan shall be "continuously curtailed" from operating out of priority, 2004 Colo. Sess. Laws, Ch. 316, 1205.

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