Synopsis of Colorado Water Law

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Preface

This publication that has been popular with our customers since it was first published in 1989. Originally published for use by water commissioners in the field, the book gained popularity with the public for its ease of use and assistance in understanding water law in Colorado.

We are pleased to provide such a useful publication to the public.

Purpose

The purpose of this handbook is to provide water commissioners and the public with information concerning water law in the state of Colorado. This book is not intended to be the final word on any of the subjects discussed herein, nor should it be construed as an alternative to seeking legal advice where necessary.

The Author

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EARLY DEVELOPMENT OF COLORADO WATER LAW

Why do we have the system we have in place today? The history of Colorado water law is a colorful one. From the early irrigation practices of the Anasazi Indians in the Four Corners region between 1100 to 1300 A.D., through the Gold Rush of the 1850s, to the massive storage and transmountain diversion projects presently utilized, many a story can be told of battles, hardships, and successes. These stories offer clues as to the reasons why the system exists in the form it presently does.

Some of the reasons for the development of the system are as follows:

Environment

Early settlers soon realized that Colorado does not receive much precipitation and the precipitation that does accrue, does so in the form of snow in the mountains, which creates overflowing conditions on streams during the spring, with dwindling supplies throughout the rest of the year. Colorado is a semi-arid region, receiving less than 15 inches of rainfall per year on average. Therefore, any water allocation system to be developed had to take the environment into consideration and be different from those utilized in areas that normally receive adequate year-round precipitation.

Mining

After the gold rush of California in the late 1840s, many people in California returned to Colorado to take a stab at striking

it rich in Colorado, and with them, brought ideas used in California to settle arguments over land and eventually water.

Mining is water intensive. Panning for gold did not require much water. A person would sit by the stream and use the water flowing by to find gold. But as technology developed, so did the need for water. Sluice boxes were developed to agitate the debris and shake out the gold, using rushing water and gravity as the cleanser. Hydraulic mining began in which water was dammed at a higher elevation and then released through smaller and smaller pipes to create a powerful stream to cut through rock walls rich with minerals.

With these developments, came disputes over water as persons at the top of streams began to utilize the same water intensive practices. To settle such disputes, Miner's Courts were established as they were in California. Originally created to settle disputes over land ownership, Miner's Court developed the theory that if you were on the land first, it was your land or claim, and those following had no right to it (thus, "*first in time, first in right*"). The system was eventually transferred to water ownership disputes. The first to use the water that was needed, owns that amount of water, and the second one there, gets what is left (if any).

Economic

With little water available from rainfall, water had to be used directly from stream systems. If the only persons allowed to use such water were those next to the stream (riparian), very little land could be utilized for agricultural development. Early in Colorado history, most crops were only grown near streams. However, economic conditions in the east eventually lead to a foreseeable

profit in the growing of cash crops if only more acreage could be developed. Thus, developers began colony settlements such as the Union Colony (Greeley) and the Fort Collins Agricultural Society to foster such acreage production. These companies would build canals from the mainstems of the streams and give a share of the water to a farmer to irrigate fields previously not irrigated (precursors to mutual ditch companies).

During abundant water supply times all was well, but when a drought occurred, and one did during the 1880s, many, including miners and ranchers, found themselves at odds and without water. Violence erupted which became known as the Water Wars of 1874, which eventually resulted in Article XVI of the Colorado Constitution enacted in 1876.

OVERVIEW OF WATER RIGHTS ADMINISTRATION

Priority System in General

The Constitution of the State of Colorado, in Sections 5 and 6 of Article XVI, provides:

Section 5

> Water of streams public property – 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 herein provided.

Section 6

> Diverting unappropriated water - priority of preferred uses – 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 water for the same purposes; but when the waters of any natural stream are not sufficient for the service of all those desiring to 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 preference over those using the same for manufacturing.

Sections 37-82-101 and 37-92-102, C.R.S., specifically mention the same basic appropriation language above. Extensive

case law (laws derived through the courts) has also been devoted to this subject. A brief summation of the priority system follows.

The basic tenant of the Colorado appropriation system to be remembered is *"first in time, first in right."* An appropriation is made when an individual physically takes the water from a stream and transports it to another locale for beneficial use. The first person to appropriate water and apply that water to a beneficial use has the first right to use that water within a particular stream system. The senior, or first appropriator, must then be satisfied before any other junior rights are fulfilled.

For example, there are three water users on a stream system with adjudicated (court approved) water rights totaling 5 cfs (cubic feet per second). The first user (the one with the earliest priority date) has a decree for 2 cfs, the second for 2 cfs, and the third for 1 cfs. When the stream is carrying 5 cfs total, all the rights within this stream system can be fulfilled. However, if the stream is only carrying 3 cfs of water, priority owner number three will not receive any water, priority number two receives half of his or her right, and priority number one receives a full 2 cfs in fulfillment of his or her decree.

The appropriation system is much more complicated than as stated above, but the example describes the basic theory behind the system. Only by diversion and beneficial use can a priority of right be acquired, and in the absence of such, only the first appropriator for a beneficial purpose has a prior right to such diversion. For further information, please see the section herein entitled, "Priority Date and Postponement Doctrine."

General Duties and Authority of the State Engineer, Division Engineers and Water Commissioners

The State Engineer for the State of Colorado receives authority for administering the waters of the state by statute (see Sections 37-80-101 to 37-80-111, and 37-92-301, C.R.S.). The powers given are very broad and by no means are restricted to those listed herein. However, in general, he or she, along with the Division Engineers and staff, are responsible for the administration and distribution of the state's waters, the promulgation of rules and regulations to assist in such administration, the collection and study of data on water supplies (both surface and ground water), the compliance with compact commitments and administration between states, and the enforcement of laws imposed by statute and the courts.

The State Engineer, with approval of the Executive Director of the Department of Natural Resources, appoints one Division Engineer for each of the seven water divisions within the state. Each division follows general river basin lines. The Division Engineers are required to assist in the performance of the State Engineer's duties including all functions specified by statute and judicial law (see Section 37-92-202, C.R.S.). The Division Engineer is responsible for the day-to-day administration of the waters within his or her specified division.

Through the Division Engineer, field offices are created and staffed by Water Commissioners for the various districts that reside within each division (see Section 37-92-202(3), C.R.S.). The Water Commissioners' general duties include hands-on administration of water rights and the collection and recording of data from the field (see Section 37-92-301(1), C.R.S.). While

technically not required under the law, public relations with water users plays a significant role in their duties.

Pursuant to Section 37-81-102, C.R.S., the officials mentioned above are specifically required to ensure that the waters of the state are available for the use and benefit of the people of the state to further growth, enjoyment, prosperity and welfare. In order to carry out their statutory duties, enforcement powers have been instituted to assist in the control of the waters of the state. These authorities are found in Sections 37-81-102, 37-92-502, 37-92-503 and 37-92-504, C.R.S.

Section 37-92-502(6), C.R.S., allows the State Engineer, Division Engineers and their duly authorized staff and assistants, including Water Commissioners, to enter upon private property and inspect the various means or proposed means of diversion, transportation, storage and the uses of the water. This includes both existing and proposed uses or structures.

Section 37-81-102, C.R.S., allows for a Water Commissioner, Division Engineer, or the State Engineer to seek restraining orders or injunctions, through the Attorney General, to prevent water from being diverted out of the state without specific authority. Section 37-92-502, C.R.S., institutes provisions regarding orders as to waste, diversion and distribution of water. The Division Engineer, through this statute can order the full or partial discontinuance of diversions not being placed to a beneficial use. Full or partial discontinuance of the diversion can also be required by those who have senior vested rights if the diversion is or will cause significant injury to those persons having such senior priorities. Should such orders issued pursuant to Section 502 be disobeyed, the State Engineer and/or the Division Engineer, through the Attorney General, may apply to the water

judge of the particular division within which the violation has occurred for injunctive relief enjoining the person or entity from continuing to violate the violate the order. Should the person be found in violation of the order, he or she could be held responsible for the costs of the proceeding including reasonable attorney fees. Triple the amount of damages may be sought by any person who is injured due to the violation of such order pursuant to Section 37-92-504, C.R.S.

RESPONSIBILITIES OF DITCH OWNERS

Conservation

Pursuant to Section 37-84-107, C.R.S., the owners of ditches must prevent waste. They are required to maintain and keep the embankments of their ditch in general good repair to prevent the water from being wasted, whether on their own property or on the property of others. Also, Section 37-84-108, C.R.S., prevents the running of water in any ditch in excess of that absolutely necessary for the purposes needed. Any person convicted of violating the provisions of these two sections is subject to a fine of not less than one hundred dollars ($100). Enforcement actions for violations of this type would be initiated in the Water Court in which the violation occurred.

Maintenance of Embankments and Tail Ditch

Pursuant to Section 37-84-101, C.R.S., the owners of any ditch shall maintain the embankments of the ditch in such a manner as to prevent the flooding and/or damage to the premises of others. All tail water ditches are to be constructed so as to return the water in the ditch to the stream from which it was taken with as little waste as possible.

Head of Ditch to be Latticed

Sections 37-84-110 and 37-84-111, C.R.S., provide rules and penalties regarding the protection and safety of the public from

accidentally entering a flume, canal or ditch. Pursuant to Section 37-84-110, any person or entity who owns or controls a canal or ditch two feet in width or more, which carries water at a depth of 12 inches or more, and the structure is located in any city with a population of seventy thousand or more, is required to safely and securely lattice or slat the head of any flume or covering of the canal or ditch to prevent persons or animals from accidentally entering the flume or the head thereof, or be carried down the current of the canal or ditch. The structure is to be constructed and maintained at the owner's cost. The penalty for failure to obey this statute is fifty dollars ($50) per day of violation, and such action could be brought in a county court for the district in which the violation occurred.

Headgates, Measuring Flumes and Gage Rods

Section 37-84-112, C.R.S., provides specifications, maintenance requirements and penalties regarding headgates. The owner is required to construct and maintain at the point of intake, a proper headgate of height and strength, with embankments sufficient to control the water at all ordinary stages of flow. If made of wood, the framework of such must be not less than four inches square, and the bottom, sides and gate of such structure shall be at least two inches thick. If made of other materials, the construction shall be of equal strength and durability as approved by the State Engineer. Reservoirs, canals and flumes are also covered hereunder.

No headgate is deemed complete unless suitable locks and fastenings are provided. The keys for such structures are also to be delivered to the Division Engineer for use in the distribution of water. The Division Engineer may deem such locks unnecessary.

All wastegates, measuring flumes, weirs and other devices shall also be kept in good repair and are covered by this statute.

Under Section 37-84-112(2), C.R.S., penalties are provided for the violation of subsection (1) above. If the owner fails or neglects to erect and maintain in good repair the structures mentioned above, the State Engineer or Division Engineer can refuse to deliver any water to the ditch, canal, flume or reservoir. The owner, employee or agent in control of such, must be notified and served in writing ten days prior to such action. Should the owner fail to obey the order of the State Engineer or Division Engineer, that owner is guilty of a misdemeanor, and upon conviction can be fined up to five hundred dollars ($500) per day of violation. The owners of the structures involved herein are also deemed liable for all damages resulting from their neglect or refusal to obey the provisions of this section.

Section 37-84-113, C.R.S., provides measuring flume requirements. The owner of any ditch, canal, or reservoir that transfers water from one natural stream to another, or from a reservoir, ditch or flume to a stream so that water may be diverted from that stream for any purpose, must construct suitable and proper measuring flumes or weirs, equipped with self-registering devices (if required by the State Engineer), to accurately determine the amount and flow of water diverted, carried through, and out of the stream. Should the owner fail to do so, upon five days notice, the owner shall be duly served in writing, and the State Engineer or Division Engineer shall refuse to allow any water to be diverted until the owner makes suitable repairs or modifications.

The State Engineer or Division Engineer also rate all measuring flumes and weirs referred to above, and the original notes of those ratings are held as part of the records of the State

Engineer. The Division Engineer has a copy of these ratings which are used to measure flows to and from the streams involved (see Section 37-84-114, C.R.S.).

Should the owner of a reservoir refuse to maintain a gage rod marked in feet and tenths and one hundredths of a foot at the outlet of a reservoir, the reservoir involved is not entitled to hold any water until such time as the device is properly installed. The Division Engineer may waive this requirement if deemed unnecessary (see Section 37-84-115, C.R.S.).

Pursuant to Section 37-84-116, C.R.S., all headgates, measuring weirs, flumes, and devices used in connection with canals, flumes and ditches or reservoirs for the measuring and delivering of waters, are under the supervision and control at all times of the State Engineer and the Division Engineer of that particular division. This does not mean that a water user is prohibited from reading the gage. However, it does give the State Engineer and Division Engineer the right to examine all structures involved herein. This section also provides that any noncompliance with the provisions regarding the structures involved herein (Sections 37-84-112 to 37-84-117), shall forfeit the right to divert and/or store water while in violation of this statute.

Section 37-84-117, C.R.S., provides requirements for on-stream reservoirs. For a discussion of this subject, please see the section entitled "Reservoirs, Responsibilities of Owners."

Ditches, Flows and Repairs

The owner or persons in control of any canal or ditch used for the purposes of irrigation or carrying water for pay, must keep enough water in the ditch or structure involved to meet the requirements of all persons entitled to the use of the water from that ditch or structure, and no more. If the river or stream that is the source of water is iced up or is too low to carry enough water needed, then the ditch shall carry as much as is practicable subject to the rights and priorities of other streams and sources, and the necessity of cleaning, repairs and maintenance (see Section 37-84-118, C.R.S.).

The owner or person in control of any canal or ditch used for the purposes of irrigation shall maintain the ditch or canal in good repair. The ditch or canal must be able to receive water as of April first of each year, so far as can be accomplished by the exercise of reasonable diligence. All necessary outlets must be in good repair and reasonably placed to distribute the water efficiently (see Section 37-84-119, C.R.S.).

Measurement of Water

The owner or persons controlling canals and ditches must appoint a superintendent to measure the water in the canals and ditches (see Section 37-84-120, C.R.S.).

Should any person refuse to deliver water or interfere with the proper delivery of water to the persons having right to such, that person is guilty of a misdemeanor and can be fined from ten ($10) to one hundred dollars ($100) for each offense. Imprisonment of up to one month can also result along with the

fine. The owner of the ditch is liable for any damages incurred by the persons deprived of the use of the water involved (see Section 37-84-121, C.R.S.).

The Division Engineer or Water Commissioner can be guilty of a misdemeanor subject to fines and/or imprisonment if they willfully neglect or refuse, after being called upon, to promptly measure water from the source of supply to irrigating canals or ditches in their particular division according to respective priorities (see Section 37-84-122, C.R.S.).

No person can take more water than they are entitled to. If a person or entity finds that they are receiving amounts in excess of those decreed, they must immediately take steps to prevent excess reception. If the person knowingly permits extra water and fails to take immediate corrective steps, that person or entity is liable for the damages incurred by the party aggrieved, including reasonable costs and attorneys fees (see Sections 37-84-124 and 37-84-125, C.R.S.). It should be noted that these two statutes are not to be construed as to prohibit out-of-priority diversions. Also see *Southeastern Colorado Water Conservancy Dist. v. Rich*, 625 P.2d 977 (Colo. 1981).

WELLS AND GROUND WATER

Definition of Ground Water

Ground water as defined by Sections 37-90-103(19) and 37-91-102(7), C.R.S., is "...any water not visible on the surface of the ground under natural conditions" (emphasis added). Ground water as defined by Section 37-92-103(11), C.R.S., and applied for the purposes of the "Water Rights Administration and Determination Act of 1969," is "...that water in the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials, and all other waters hydraulically connected thereto which can influence the rate or direction of movement of the water in that alluvial aquifer or natural stream." The emphasis was added to distinguish between wells and springs. If the structure diverting the water enhances the flow of the spring, the structure is deemed to be a well diverting ground water and, thus, in need of a well permit from the State Engineer's Office.

Section 37-90-103(21)(b), C.R.S., was added to clarify the distinction between a spring and a well, and when a well permit is required. A well does not include a naturally flowing spring where the discharge is captured by installation of a near-surface structure or device of less then ten feet in depth and located at or within fifty feet of the spring's natural discharge point and the water is transported to use by gravity flow or into a separate sump or storage device. To receive this treatment, the owner must obtain a water right for the structure as a spring pursuant to the Water Rights Administration and Determination Act of 1969, Section 37-92-101, et seq., C.R.S.

Definition of a Well

Section 37-90-103(21), C.R.S., defines a well as "...any structure or device used for the purpose or with the effect of obtaining ground water for beneficial use from an aquifer...". Section 37-91- 103(16), C.R.S., defines a well as, "any test hole or other excavation that is drilled, cored, bored, washed, fractured, driven, dug jetted, or otherwise constructed, when the intended use of such excavation is for the location, monitoring, dewatering, observation, diversion, artificial recharge, or acquisition of ground water...".

Historically, many spring structures in existence would have been deemed wells, and in many instances, still are in requirement of a well permit from the State Engineer's Office. However, certain limited excavated spring developments are excluded from the definition of a well and, therefore, excludes that work from requiring a well permit or compliance with the Water Well Construction Rules when the following conditions exist:

1. The structure or device used to capture or concentrate the natural spring discharge must be located at or within fifty (50) feet of such spring.

2. The structure or device used to capture or concentrate the natural spring discharge must be no more than ten (10) feet below ground surface.

3. The owner must adjudicate the structure or device as a spring, which would be subject to administration in priority with all other water rights (it is not exempt from

administration such as residential wells that meet the exemption standards set forth in Section 37-92-602, C.R.S.

If the spring development fails to meet the above conditions, it must be considered a well which withdraws ground water, and all of the laws associated with a well apply. It is not mandatory that a structure or device meeting the above conditions be considered a spring subject to administration in priority. It is the owner's option to either adjudicate the structure as a spring or permit it as a well. If permitted as a well, then the owner must comply with the requirements of the Water Well Construction Rules regarding well construction and variances thereto. If the "well" use is a residential or livestock use exempted pursuant to Section 37-92-602(1), C.R.S., then the "well" would not be subject to curtailment in priority. However, an adjudicated spring used for the same uses would be subject to administration in priority.

Wells and Gravel Pits

Case law (see *The Three Bells Ranch Associates v. Cache La Poudre Water Users Association*, 758 P.2d 164, (Colo. 1988) and *Zigan Sand and Gravel, Inc., v. Cache La Poudre Water Users Association*, 758 P.2d 175 (Colo. 1988)) has expanded the statutory definition of a well to include sand and gravel pits excavated to depths below the water table. These court decisions confirmed that when quarry activities affect water rights, it is necessary for operators to comply not only with Mined Land Reclamation laws, but with all applicable Colorado water regulations as well, including augmentation requirements to the affected stream system and well permits from the State Engineer.

In response to this case law, in 1989, the Colorado Legislature passed what is commonly referred to as Senate Bill 120, which statutorily requires augmentation of gravel pits and obtaining of well permits for these structures (see Sections 37-90-137(11)(a), 37-90-107, 37-80-120(5) and 37-92-305(12)(a), C.R.S.). These statutory additions provide that operators or owners of land being mined and exposing ground water to the atmosphere after December 31, 1980, must apply for a well permit and, if in an over-appropriated stream system, must obtain a court-approved augmentation plan or approved substitute supply plan. Parties who extracted sand and gravel prior to December 31, 1980 and whose operation is no longer in existence since that date, are exempt from the requirements of this law unless such pit is applied to a beneficial use other than what was first intended. (Example: a person applies with the Water Court to use a pre-December 31, 1980 gravel pit in existence for irrigation purposes).

For further information with regard to gravel pit requirements, please contact the Division of Water Resources.

Tributary Ground Water

Tributary ground water is any underground water that is hydraulically connected to a stream system that influences the rate and/or direction of flow on that stream system (see Section 37-92-103(11), C.R.S.). Permits for such diversions are issued under Section 37-90-137(2), C.R.S. Any new ground water diversions that are tributary to over-appropriated stream systems require a court-approved plan for augmentation to offset out-of-priority depletions. See *Bohn v. Kuiper*, 195 Colo. 17, 575 P.2d 402 (1978) and *Fox v. Division Engineer*, 810 P.2d 644 (1991).

Designated Ground Water

Pursuant to Section 37-90-103(6)(a), C.R.S., designated ground water is ground water that generally:

1. Is within the geographic boundaries of a designated ground water basin created by the Ground Water Commission.

2. In its natural course would not be available to and required for the fulfillment of decreed surface water rights.

3. Is in an area that is not adjacent to a continuously flowing natural stream where ground water withdrawals have been the principal source of water for at least 15 years prior to the first hearing on designating that basin.

High capacity designated ground water well permits are issued by the Ground Water Commission in accordance with Sections 37-90-107, 37-90-108 and 37-90-111, C.R.S., and rules adopted by the Commission. The Ground Water Commission consists of twelve members, nine of whom are appointed by the Governor. The Executive Director of the Department of Natural Resources is a voting member, and the State Engineer and the Director of the Water Conservation Board are non-voting members of the Commission.

There are currently eight designated basins in the state, all located on the eastern plains. The Ground Water Commission adopts management standards for granted permits to withdraw ground water in each designated basin based on its unique hydrologic conditions and reviews and changes those standards from time to time. As an example, for the Northern High Plains

Ogallala Aquifer, the current standard for determining whether a new high capacity well permit can be granted is allowing not more than 40 percent aquifer depletions within 100 years using the "Three-Mile Circle" analysis method. There are 13 local ground water management districts within the designated basins that have authority to adopt rules to further manage and administer diversions from existing permitted high capacity wells. After designation of a ground water basin, ground water rights within that basin are confirmed by the Ground Water Commission in the form of final permits.

Persons wishing to obtain a permit for a high capacity well must apply to the Commission. Applications are published, and if objections are filed, an administrative hearing is held to determine if the application can be granted. In the case of a new appropriation of ground water, it must be found that the proposed use of water will not unreasonably impair existing water rights or cause unreasonable waste before a conditional well permit can be issued.

The Ground Water Commission has adopted standards for determining rights to nontributary and not-nontributary ground water in the Denver, Dawson, Arapahoe, and Laramie-Fox Hills aquifers within designated areas that are similar to the standards outside the designated basins. However, its standards for replacement of stream depletions resulting from pumping not-nontributary ground water are different than those outside designated basins.

Nontributary and Not-nontributary Ground Water in the Denver Basin and Statewide

Denver Basin water, the water that occupies the Dawson, Denver, Arapahoe, and Laramie Fox Hills aquifers within specified boundaries, is governed by the Colorado Revised Statutes, the Denver Basin Rules and Regulations and the Statewide Nontributary Rules and Regulations. A system of modified appropriation applies, and the right to divert is based on land ownership or consent to withdraw. The Statewide Nontributary Rules and Regulations also apply to all nontributary water not located in the Denver Basin or a designated ground water basin.

Nontributary ground water, pursuant to Section 37-90-103(10.5), C.R.S., is "ground water, located outside the boundaries of any designated ground water basin in existence on January 1, 1985, the withdrawal of which will not, within 100 years, deplete the flow of a natural stream, ... at a rate greater than one-tenth of one percent of the annual rate of withdrawal." It should be noted that the person applying for water to be designated as nontributary carries the burden of proving that the water is in fact nontributary.

Not-nontributary water is a hybrid of the Denver Basin Rules and Regulations that lies in specific defined boundaries of the Denver Basin. It is defined in Section 37-90-103(10.7), C.R.S., and is "...ground water located within those portions of the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers that are outside the boundaries of any designated ground water basin in existence on January 1, 1985, the withdrawal of which will, within one hundred years, deplete the flow a natural stream, ...at an annual rate of greater than one-tenth of one percent of the annual rate of withdrawal." Specific augmentation requirements apply in order to withdraw ground water designated as such.

The determination of whether nontributary or not-nontributary ground water is available for withdrawal outside designated ground water basins is subject to the provision of Section 37-90-137(4), C.R.S. This statute and the Statewide Nontributary Ground Water Rules generally provide that the amount of water available is that amount of unappropriated water, exclusive of artificial recharge, underlying the land owned by the applicant or underlying land owned by another who has consented to the applicant's withdrawal. The statutes also specify that permits will allow withdrawal of this amount of water on the basis of an aquifer life of one hundred years.

Withdrawal of not-nontributary ground water from the Denver Basin aquifer is contingent on Water Court approval of a plan for augmentation to remedy injury to surface water rights that are affected by surface stream depletions associated with pumping those aquifers. The provisions of Section 37-90-137(9), C.R.S., outline the technical standards for determining the amount and timing of injurious stream depletions that must augmented. In some instances, stream depletions may have to be replaced hundreds of years into the future to protect senior tributary surface water rights.

Small Capacity Wells

Small capacity residential, livestock, and commercial wells in designated basins are not subject to the rules of the Commission. Permits for these types of wells are issued by the State Engineer in accordance with Section 37-90-105, C.R.S. Wells can only be constructed upon issuance of a permit by the State Engineer. Small capacity wells in designated basins are wells that:

1. Do not exceed fifty gallons per minute and used for no more than three single-family dwellings, including normal operations associated with such dwellings, but not including the irrigation of more than one acre of land.

2. Do not exceed fifty gallons per minute and used for watering of livestock on range or pasture.

3. Is one well not exceeding fifty gallons per minute and used in one commercial business. [Note: there are strict definitions as to what constitutes a commercial business under this statute.]

4. Are used exclusively for monitoring and observation purposes (capped and locked).

5. Are used exclusively for fire-fighting purposes (capped and locked).

Many local ground water management districts have adopted rules that further limit the pumping rates, annual withdrawals, or use that can be permitted for small capacity wells. As of August 5, 1998, the State Engineer cannot approve a new small capacity well permit with an annual volume of use in excess of five acre-feet unless the local ground water management district has rules that allow a greater amount. Replacement permits for previously permitted small capacity wells are not subject to this limitation.

Wells that were constructed and used for the above purposes prior to May 8, 1972 but never permitted can still be late-recorded pursuant to Section 37-90-105(4), C.R.S.

A proposed new small capacity well may not be approved if it would to be located in a subdivision approved after June 1, 1972 and the water supply plan for the subdivision was not recommend for approval by the State Engineer, and the cumulative effect of all wells in the subdivision would cause material injury to existing water rights.

Wells that may be for the same use and with the same pumping limitations as describe for small capacity wells, but are issued as a result of a Ground Water Commission approved replacement plan to remedy injury to other water rights, are high capacity wells subject to high capacity well standards.

Exempt Wells

Exempt wells are wells similar to small capacity wells but located outside the boundaries of a designated ground water basin and are governed by Section 37-92-602, C.R.S. Under this statute, certain wells are deemed exempt from curtailment in priority under the Water Rights Determination and Administration Act if they meet the guidelines and presumptions set forth in the statute. The statutes are very specific as to what wells may be deemed exempt and the duties of the State Engineer with regard to issuing well permits for these wells. Wells that may be considered exempt are as follows:

1. Produce fifteen gallons per minute maximum and are used for ordinary household purposes for not more three single-family dwellings, fire protection, watering of poultry, domestic animals, or livestock on farms or ranches, and irrigation of not more than one acre of home gardens and lawns.

2. Produce fifteen gallons per minute maximum and are used for drinking and sanitary facilities in individual commercial businesses.

3. Were in use prior to May 22, 1971, producing a maximum of fifty gallons per minute and used for the purposes described in item 1, above.

4. Are used exclusively for fire-fighting purposes (capped and locked).

5. Are used exclusively for monitoring and observations purposes (capped and locked).

Wells of the type described above can only be constructed upon issuance of a permit by the State Engineer's Office. Exempt well permits are approved in accordance with the statutory guidelines set forth in Section 37-92-602, C.R.S., which generally requires, with some exceptions, that permits not be approved if other water rights would be injured. Wells that may be for the same use and with the same pumping limitations as described for exempt wells, but are issued as a result of Water Court approval of a plan for augmentation or other replacement plan to remedy injury to other water rights, are non-exempt wells subject to non-exempt well standards (see *Kelly Ranch v. Southeastern Colorado Water Conservancy District*, 191 Colo. 65, 550 P.2d 297, (1976).

In certain instances, new exempt well permits can be approved even if there is a potential for injury to other water rights. These types of wells are generally known as presumption wells. Section 37-92-602(3)(b)(II)(A), C.R.S., states that if the well will be the only well on a residential site used solely for ordinary

household purposes in one single-family dwelling not including irrigation, or will be the only well on a tract of 35 acres or more, or will be the only well on a cluster development lot, serving one single-family residence where the ration of water usage in the cluster development does not exceed one acre-foot of annual withdrawals for each thirty-five acres within the development and used for the purposes described in item 1, above, and return flow from the well will be to the same stream system where the well is located, then the well is presumed to be non-injurious to the vested water rights of others the permit may be issued. However, this presumption can be rebutted by evidence showing sufficient material injury will occur, and in this case, the application must be denied.

A proposed new exempt well may not be approved if it would to be located in a subdivision approved after June 1, 1972 and the water supply plan for the subdivision was not recommended for approval by the State Engineer, and the cumulative effect of all wells in the subdivision would cause material injury to existing water rights. The presumption of non-injury discussed above would not apply in this instance.

The replacement (relocation) of any existing exempt well requires a permit from the State Engineer. The permit shall be issued only if the well at the new location will not "substantially change" the usage of water that previously existed from the old well. The existing structure must be plugged and abandoned within 90 days, per Section 37-92-602(3)(c), C.R.S.

Wells that were constructed and used for the purposes described in items 1 through 5, above, prior to May 8, 1972 but never permitted, can still be late-recorded pursuant to Section 37-92-602(5), C.R.S.

In Application of Turkey Canon Ranch Ltd., 937 P.2d 739 (Colo. 1997), the Supreme Court held that exempt wells may assert injury to their water rights in Water Court once they have filed for adjudication of those rights in court. However, the priority of these types of rights will not be enforced until such a filing with the court is made. Therefore, it may be wise for individuals with exempt-type wells to apply for a water right to adjudicate their well.

Non-Exempt Wells

Non-exempt wells are wells located outside the boundaries of a designated ground water basin that do not fall within the definitions of exempt wells as discussed in this synopsis. Permits for new or replacement wells, or for the increase or change in use of existing non-exempt wells, are considered by the State Engineer in accordance with the provisions of Section 37-90-137, C.R.S. The general criteria for granting such permits are as follows:

1. The exercise of the requested permit cannot materially injure the vested water rights of others.

2. There is unappropriated ground water available for withdrawal by the proposed well.

3. The proposed well will be more than six hundred (600) feet from any existing well, or one of the following exceptions to this requirement is applicable:

   a. if after a hearing the State Engineer finds that the circumstances in the particular instance so warrant (Section 37-90-137(2)(b)(I));

b. if the State Engineer has individually notified the owners of all wells within six hundred (600) feet and receives no responses within the time specified in the notice (Section 37-90-137(2)(b)(II)(A));

c. if the well is the subject of a Water Court case where the applicant gave individual notice to owners of all wells within six hundred (600) feet ten days prior to filing their application with the court (Section 37-90-137(2)(b)(II)(B)];

d. if the proposed non-exempt well will be serving an individual residential site and the pumping rate is not more than fifteen (15) gallons per minute (Section 37-90-137(2)(b)(III)); and

e. the applicant has obtained and submitted consents from owners of all existing wells within six hundred (600) feet of the proposed well (State Engineer Policy).

In addition to the above standards, see the section in this book concerning nontributary wells, the statutes Sections 37-90-137(4) and (9), and the Statewide Nontributary Rules and Regulations.

Well Permit Expiration Standards, Well Construction - Pump Installation - Beneficial Use of the Water

Expiration standards for well permits vary depending on the statute under which the permit was approved. If the well owner

complies with the requirements, the permit remains valid indefinitely. The standards for each type of permit is summarized as follows:

Designated Ground Water

High Capacity - With the exception of nontributary and not-nontributary ground water wells in designated basins, new wells with high capacity well permits must be constructed within one year. Water applied to beneficial use and evidence of such use must be received by the Commission within three years.

Nontributary and Not-nontributary High Capacity - Wells must be constructed within one year.

Replacement High Capacity - Wells must be constructed within one year.

Small Capacity - Wells must be constructed within two years.

Outside Designated Basins

Non-Exempt - With the exception of nontributary and not-nontributary ground water, all wells, including replacement wells with non-exempt well permits must be constructed, pumping equipment installed, water applied to beneficial use, and evidence of such use received by the State Engineer within one year.

Nontributary and Not-nontributary Non-exempt - Wells must be constructed and notice of well completion received by the State Engineer within one year.

Exempt - Wells must be constructed within two years.

There are provisions for granting extensions of time to complete the above requirements for good cause shown. Requests for extensions of time must be submitted in writing and be received by the Division of Water Resources prior to the expiration date. Generally, high capacity and non-exempt well permits can be granted one, one-year extension. Outside designated basins, nontributary and not-nontributary permits can be granted more than one, one-year extension. Both high capacity and non-exempt extension requests have required filing fees. Small capacity and exempt well permits can be extended for one-year periods upon showing of good cause. Generally, no more than two one-year extensions are granted. There are no fees for extension for small capacity and exempt well permits.

Change and Extension of Use

All changes or extension of use, or change in point of diversion, require that the applicant file an application with the State Engineer or Colorado Ground Water Commission for approval of that change (see Sections 37-90-137 and 37-90-11(g), C.R.S.).

Wells on Lands Owned by Another

Any person who wants to obtain a water right utilizing a well to be constructed on lands owned by another, must show that consent to construct the well has been obtained from the person

whose land it is to be constructed upon, unless eminent domain is used under law (see Section 37-92-304(3.6), C.R.S.).

Geothermal Water Resources

Geothermal resources in Colorado are governed pursuant to Sections 37-90.5-101 to 37-90.5-108, C.R.S. Like most underground water resources, a permit is required from the Division of Water Resources prior to "...exploration, production, or reinjection..." (see Section 37-90.5-106, C.R.S.). All applications for such permits to be granted must not injure the vested water rights of others, be they thermal or non-geothermal rights. All tributary geothermal resources are the property of the public and the use of such is strictly governed by this statute and any rules and regulations promulgated by the State Engineer pursuant to Article 90.5. Rules and regulations governing the use and permitting of geothermal resources were promulgated in 1994 and revised in 2004 and should be consulted for more in-depth information concerning these types of resources and permitting requirements (2 CCR 402-10). Copies of those rules are available from the Records Section of the Division of Water Resources in Denver.

Well Contractors and Pump Installers

Because of the nature of well construction and pump installation and the relationship of such to the public health, pump installation and well construction is governed by Sections 37-91-101 to 37-91-113, C.R.S., with Section 37-91-113 being added in 2003 as a well inspection program. The State Board of Examiners of Water Well Construction and Pump Installation Contractors have numerous duties and responsibilities. The Board is

responsible for the administration of these articles, the promulgation of rules and regulations to enforce these articles, and the general supervision over the construction, installation and abandonment of water wells and pumps. The Board also examines for, denies, approves, revokes, suspends and renews licenses, and conducts hearings upon complaint of violations by a contractor (see Section 37-91-104, C.R.S.).

All persons who engage in this business must obtain a license to conduct such business from the Board. Some of the requirements to obtain such a license include:

1. Must be at least twenty-one years of age.

2. Must be a United States citizen.

3. Have at least two years experience in the field in which he or she seeks a license.

4. Pass a written and oral examination prescribed by the Board. [Note: Should a person fail this test, he or she can reapply for examination after 45 days.]

Also, each well drilling and pump installation rig must be registered with the Board pursuant to Section 37-91-105, C.R.S. For further information on qualifications and rig registration, see Section 37-91-105 and/or contact the Division of Water Resources.

The Board also has enforcement powers pursuant to Sections 37-91-108 and 37-91-112, C.R.S., and can revoke or suspend a license and seek injunctive relief to enjoin persons from violating this article. Fines may also be levied anywhere from $50 to $1,000

for various violations. Revocation, denial, or suspension can occur pursuant to Section 37-91-108, C.R.S., for:

1. Using fraud or deception in applying for a license or in taking the exam.

2. Willfully or negligently violating the provisions of the "Colorado Ground Water Management Act" (see Section 37-90-101, et. seq.).

3. Failure to comply with the basic principles and minimum standards set forth in Section 37- 91-110.

4. Constructing a well or installing pumping equipment without a valid permit

5. Knowingly filing documents with the Division of Water Resources containing untrue or false statements.

6. Using fraud or deception in collecting fees from a person with whom he or she has contracted.

7. Failing to file well completion reports or pump installation reports with the Division of Water Resources.

8. Authorizing persons not employed by him or her to construct a well under his or her license.

9. Failure to obtain eight hours of continuing education on a yearly basis.

Under this article, it is also illegal for any person to represent him or herself as a water well contractor or pump installation

contractor without a valid license, to advertise or issue any sign, card, or other device that indicates he or she is a licensed contractor, to construct a well or install pumping equipment unless he or she is a private driller or directly employed and under the supervision of a licensed contractor, or for any violations of any of the provisions of Article 91. Should such violations occur, monetary and penal penalties may be imposed (see Section 37-91-111, C.R.S.).

Rules and regulations regarding pump installation and well construction have been promulgated by the Board and can be obtained from the Division of Water Resources (2 CCR 402-2 and 2 CCR 402-14). For further information regarding these rules, please contact the Denver office.

SURFACE WATER

Priority Date and Postponement Doctrine

A priority date is established by the time (date) the water was first put to a beneficial use. However, in order to encourage adjudication of water rights, the postponement doctrine was established. Under the postponement doctrine, the date of appropriation controls the relative priority among water right applications filed in the same year. A right filed in any year is junior to all rights filed in the previous year.

Absolute Water Rights

An absolute water right is water that has been diverted and placed to a beneficial use. For a statutory definition of beneficial use, see Section 37- 92-103(4), C.R.S.

Conditional Water Rights

A conditional water right is a means of obtaining a right that will be developed in the future while maintaining its priority until the project is completed. Upon diligent completion of the project, the owner of a conditional right can then go to court and make a filing for an absolute water right, obtaining the appropriation date for which the conditional right was awarded (this is known as relation back).

In order to initiate an appropriation for a conditional right, the future user must show intent to divert the water, place it to

beneficial use, and demonstrate the intent in an open, physical manner. Field surveys are common acts of intent to appropriate. The physical act must be sufficient to put other parties on notice.

Due Diligence Requirements

The owner of a conditional water right is required to file, during the same month every six years, an application for a finding of reasonable diligence in the Water Court of the division in which the water right exists, proving that he or she has been diligently pursuing completion of the project necessary to apply the water involved to a beneficial use. Should a person fail to show diligence, the right itself can be deemed abandoned. See *Town of Debeque v. Enewold*, 199 Colo. 110, 606 P.2d 48 (1980), and Sections 37-92-301(4)(a)(I) and 37-92-601, C.R.S. (1990).

In 1990, the law changed the requirement of filings for due diligence from four years to six years, and Section 37-90-301, C.R.S., was amended to give indications as to what due diligence was. The legislature has stated that diligence "...is the steady application of effort to complete the appropriation in a reasonable expedient and efficient manner under all the facts and circumstances." Also added to the statutes was a law to allow diligence as being applicable if it is a large integrated system, in which case, reasonable diligence shown in one part of the system is diligence for all the water involved in the system. Finally, the legislature stated that current economic conditions beyond the control of the applicant which affect the feasibility of perfecting the water right, or the fact that governmental permits or approvals have not been obtained, cannot be considered with regard to diligence, so long as other facts which show diligence are present.

Change of Water Right

Pursuant to Section 37-92-103(5), C.R.S., a change in water right means "...a change in the type, place, or time of use, a change in point of diversion, a change from a fixed point to an alternate or supplemental points of diversion, a change in the means of diversion, a change in place of storage, a change from direct application to storage and subsequent application, a change from storage and subsequent application to direct application, a change from a fixed place of storage to alternate places of storage, a change from alternate places of storage to a fixed place of storage, or any combination of such changes."

Basically, a change in water right constitutes any change from what was the decreed and/or historic practice (although this should not be construed as to include a change in type of crops irrigated or different irrigation methods). A change in water right can occur regarding both absolute and conditional surface and ground water rights.

It is important to remember that a water right is a property right and, therefore, it can be bought and sold, moved, and put to different uses without limitation so long as that change does not injure the vested rights of others. See *The City of Colorado Springs v. Yust*, 126 Colo. 289, 249 P.2d 151 (1951); *Green v. Chaffe Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962). However, the person who seeks such a change has the burden of proving that the proposed change will not injuriously affect the water rights of others, especially junior appropriators who have come to depend upon the conditions in existence at the time of their respective appropriations. See *Green v. Chaffe Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

Alternate Points of Diversion

Proposed changes in points of diversion are approved based on the same factors involved in approval for any other change in water right. Such a change should be granted if no injury will occur to vested junior water rights, or if a resulting injury can be fully compensated by specific terms and conditions added to the decree. Potential injury to other vested water rights can include return flow problems and enlarged use. Therefore, the right to change the point of diversion, the place of use, and character of use, is limited to the extent of historical, actual use. See *Hallenbeck v. Granby Ditch and Reservoir Co.*, 144 Colo. 485, 357 P.2d 358 (1960). [Note: A change in the point of diversion does not constitute abandonment, and does not affect the priority of the water right.]

Augmentation Plans

Plans for augmentation are specifically defined in Section 37-92-103(9), C.R.S. Basically, a plan for augmentation is a means of increasing the water supply to allow the person diverting water out of priority a way to replace those out-of-priority depletions; i.e., it allows an out-of-priority water right to continue to divert by providing replacement water to senior water rights for that diversion. Pooling of water resources, exchanges of water, substitute supplies of water, and/or the development of new supplies of water may be means of augmentation. However, eradication of plants that use water through a deep root system, such as phreatophytes (cottonwoods, alfalfa, salt cedar), is specifically declared not to be a source of augmentation in Colorado. Also, making the ground impermeable and thereby

increasing runoff, but not the supply of water, is not included in the definition of a plan for augmentation.

It is also important to note that as of the *Zigan Sand and Gravel, Inc., v. Cache La Poudre Water Users Association* decision, the Supreme Court determined that gravel pits must augment to replace all surface evaporative losses, both during and after the mining process. A well permit for the gravel pit is also required pursuant to this decision.

Exchanges

While the statutes are replete with sections that mention the word exchange, no clear definition is available in the statutes. And until recently, little or no case law relevant to the specific definition of an exchange was decided. However, in June of 1990, the Colorado Supreme Court decided the case of *The City of Florence et al. v. The Board of Waterworks of Pueblo*, 793 P.2d 148 (1990). In this case, the court found that "...a proposed or existing water exchange is an independent claim, not subject to the retained jurisdiction provision of Section 304(6), unless it occurs as part of a plan for augmentation." Section 37-92-304(6), C.R.S. (1990), requires that decrees for changes of water rights or plans for augmentation shall include retained jurisdiction for the consideration of injury. Further, the court stated an "...exchange plan is not part of a plan for augmentation..." unless it is part of "...a detailed program to increase the supply of water available for beneficial use in a division."

This case does not forward a concrete definition as to what an exchange is, but it does describe what it is not. An exchange is not necessarily a plan for augmentation unless it is part of "a detailed

program to increase the supply of water available for beneficial use in a division."

For lack of a concrete statutory or judicial definition, the following definition is suggested:

Exchange: A trade of water from one point of diversion to another, completed in such a manner as to prevent injury to the vested water rights of others while promoting the maximum utilization of the water resources of the state, consistent with applicable laws regarding water quality. Such practice can be initiated alone or in concert with others, and can be adjudicated by the courts in accordance with the appropriation doctrine of the state subject, however, to a recognized original priority date if adjudicated with the courts under Section 37-92-302, unless contrary to historic administrative practices.

Substitute Supply Plans

Section 37-92-308, C.R.S., gives the State Engineer the authority to approve temporary operation of a plan for augmentation while the plan is pending approval in Water Court. This interim plan is called a Substitute Water Supply Plan, or SWSP. There are three types of SWSPs designated by the subparagraph of the enacting statute.

A "Paragraph 4 Plan" is the most common, see Section 37-92-308(4). These plans require that an augmentation plan or change in water right case is pending in Water Court. The applicant for an SWSP must notify interested parties so they can comment on the plan. The applicant can send notice to the objectors in Water Court case or, if the deadline for filing a

statement of opposition has not passed, the applicant can provide notice to those who have subscribed to the SWSP Notification List (explained below).

The SWSP Notification List is also used for notice of a pending "Paragraph 5 Plan." Section 37-92-308(5), C.R.S., allows the State Engineer to approve an SWSP that does not have a plan pending before a water judge. Paragraph 5 Plans are submitted when the associated depletions will not exceed five years. The plans may be renewed annually, but for no more than five years. For instance, these plans might be used while a road is being built and water is needed for dust suppression. An augmentation plan in Water Court might take longer to adjudicate than the length of time the water is needed. Without a Water Court application, the plan is not published in the resume and potentially injured parties would not have an opportunity to comment on the plan. For that reason, the law requires the applicant send the plan to each subscriber to the SWSP Notification List.

The SWSP Notification List is maintained by the State Engineer, where interested parties subscribe each year for all notices within a specific water division. Subscription to the Notification List does not ensure notice of every SWSP that is submitted for approval. For instance, the majority of the plans with a corresponding Water Court application (the "Paragraph 4 Plans") have notice to the objectors in the specific case only.

Once notified of an SWSP, the owners of absolute water rights or decreed conditional water rights have thirty days to file comments on the SWSP with the State Engineer. The comments must include any claim of injury, any terms and conditions that should be imposed, and any other information the opposer wishes the State Engineer to consider.

The last type of SWSP is rarely used. Section 37-92-308(7), C.R.S., allows the State Engineer to approve an emergency SWSP for up to ninety (90) days. According to the statute, "'emergency situation' means a situation affecting public health or safety where a substitute water supply plan needs to be implemented more quickly than the other procedures set forth in this section allow." Due to the urgency of these plans, there is no provision for comment.

The process of applying for an SWSP can be awkward. Additional information, including the review form and a general checklist, is available on the DWR website at www.water.state.co.us.

Abandonment

Pursuant to Section 37-92-103(2), C.R.S., abandonment of a water right is defined as "...the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder." (emphasis added). It is very important to note that the intent to abandon is required concurrent with non-use for a water right to be deemed abandoned. See *Beaver Park Water, Inc. v. City of Victor*, 649 P.2d 300 (Colo. 1982).

If a person who is the owner of a conditional water right fails to file a timely application with the Water Court fulfilling the diligence requirements of Section 37-92-601, C.R.S., that conditional water right may be deemed abandoned. Please refer to the section in this book entitled "Due Diligence."

Pursuant to Section 37-92-401, C.R.S., every ten years the Division Engineer will prepare an abandonment list of absolute water rights that the Division Engineer believes may be abandoned in whole or in part. For questions regarding the procedure under this statute, including protest to such findings, refer to Section 37-92-401, C.R.S.

OVERVIEW OF COURT PROCESS AND REQUIREMENTS

The courts have basic requirements for filing documents (applications, statements of opposition, protests to rulings of the referee, applications for reasonable diligence) that must be met in order to meet statutory and judicial requirements. See Section 37-92-302, C.R.S. for specific statutory language regarding this subject. The court requires that all filings (pleadings) be in quadruplicate. A simple way to view this requirement is as an original plus three copies that must be filed with the Water Court.

Applications

Applications for a change of water right, surface water right appropriation, ground water right appropriation, approval of plan for augmentation or exchange, findings of due diligence, etc., are filed as an original plus three with the Water Court in the division in which the diversion or appropriation resides. A fee is required to do so. Pre-printed filing forms are available from the courts.

After the application is filed in Water Court, the application, or a summary thereof, is published in what is known as the resume. The resume contains all applications filed with the court in the particular division for each month. Publication in the resume is considered proper notice to all vested water owners that a water right is being applied for and that it may affect other water rights. To obtain a monthly copy of the resume, contact the Water Clerk for the particular division that you wish to receive. There is a small subscription cost to receive the resume.

After the resume is published, a person has two months to oppose an application which is listed therein. All statements of opposition must be filed in the Water Court by the last working day of the two-month period following publication. An original plus three copies is required. An example follows:

John Doe files an application for a surface water right on December 31, 1998. The application is then published in the January 1999 resume, which lists all cases filed with the particular division for the month of December 1998. Therefore, the due date for filing a statement of opposition to John's application is the last working day in February 1999. Please note that all statements of opposition must be filed with the court no later than the last working day.

Statements of Opposition

A statement of opposition is a document filed with the Water Court that outlines the reasons as to why an application for a water right should not be granted, or why it should only be granted upon certain conditions.

Division Engineer Consultations and Recommendations

Before a ruling is entered regarding an application, the referee becomes fully advised as to the subject matter and validity of the application and statements of opposition. The referee consults with the appropriate Division Engineer, and within thirty (30) days, that engineer must file a written report regarding the consultation. It is important to note that in cases involving wells, the consultation of the Division Engineer, as well as the findings

issued concerning well permit applications, are presumptive on the court, subject to rebuttal by any party (see Section 37-92-305(6)(a), C.R.S.). This report is sent to the applicant who is then required to mail copies of such recommendation to all parties in the case. If such application is re-referred by the referee to the water judge prior to a consultation, the Division Engineer must file a written recommendation within thirty days of the re-referral. The same mailing/notice procedures as outlined above would then apply (see Section 37-92-302(4), C.R.S.).

Protest to the Referee's Ruling

The referee's ruling may approve or disapprove an application in whole or in part, even if no statements of opposition have been filed. A protest to the referee's ruling is a document filed with the court which outlines reasons as to why a party disagrees with the ruling that was entered by the referee. Should a protest be timely filed, the matter is then re-referred to the water judge for a hearing on the matter. Protests must be filed with the court no later that the twentieth day following the mailing of the ruling of the referee by the clerk of the Water Court. [Note: If the twentieth day falls on a Saturday, a Sunday, or a holiday, the document is due in court on the next working day (see Sections 37-92-303 and 37-92-304(2), C.R.S.).]

RESERVOIRS

Right to Store Water

Pursuant to Section 37-87-101, C.R.S., the right to store water for later use is recognized as a beneficial use of water under the Colorado Constitution. The structure must be operated in such a manner as to not cause material injury to other water users.

On-stream Reservoirs

On-stream reservoirs are governed in part by Section 37-84-117, C.R.S. Survey requirements for on-stream reservoirs are covered thereunder and must be filed and approved by the State Engineer, along with requirements for gage rods and measuring devices. Releases from such reservoirs can be ordered by the State Engineer to prevent evaporative losses in excess of those that were in existence prior to the creation of the reservoir to insure delivery to the vested on-stream rights of others.

Erosion Control Dams

Erosion control dams are governed pursuant to Section 37-87-122, C.R.S. These types of structures may be constructed on water courses which have been determined by the State Engineer to be normally dry (which is dry more than 80 percent of the time). Structures of this type cannot exceed fifteen feet from the bottom of the channel to the bottom of the spillway and cannot exceed ten acre-feet at the emergency spillway level. The height of the dam is measured vertically from the lowest point of the

upstream toe to the crest of the dam in contrast to those measured vertically from the centerline pursuant to Section 37-87-105, C.R.S. [Note: Erosion control dams can be constructed larger than specified under Section 37-87-122, C.R.S., however, it then will be evaluated and must be constructed pursuant to Section 37-87-105, C.R.S.]

Erosion control reservoirs may be constructed with a capacity in excess of two acre-feet if an ungated outlet conduit large enough to pass stored water in excess of two acre-feet within 36 hours, but not less than twelve inches. For forms, specifications and further information, please contact the Division Engineer or the Dam Safety Branch of the Division of Water Resources in Denver.

Livestock Watering Tanks

Livestock water tanks are covered under the "Livestock Water Tank Act of Colorado" Sections 35-49-101 to 35-49-116, C.R.S. These structures include all reservoirs built after April 17, 1941 on watercourses which the State Engineer has determined to be "normally dry" and having a capacity of not more than ten acre-feet and a vertical height not exceeding fifteen-feet from the bottom of the channel to the bottom of the spillway. Again, as with erosion control dams, the height is measured from the lowest point of the upstream toe to the crest of the spillway. No livestock water tanks can be used for irrigation purposes.

Pursuant to Section 35-49-106, C.R.S., if a person desires to construct a dam for such an impoundment, an application must be submitted to the State Engineer for approval. Those forms are available at the Division Engineer's office or the Denver office.

After review and approval by the State Engineer, and upon completion of construction, the State Engineer may inspect the water tank and within ten days after receiving notice of completion or within ten days after inspection, shall approve or disapprove of the structure (see Section 35-49-108, C.R.S.).

Upon certification of the stock water tank by the State Engineer, a priority of right is established chronologically by number upon the normally dry streambed.

As with erosion control dams, if the proposed reservoir has a capacity and dimension over that allowed pursuant to statute, the plans will be evaluated pursuant to Section 37-87-105, C.R.S. For forms, specifications and further information, please contact the Division Engineer or the Dam Safety Branch of the Division of Water Resources.

Release of Water from Reservoirs

The owners of reservoirs are required to give sufficient notice to the Division Engineer as to when they will release water into a natural stream (see Section 37-87-103, C.R.S.).

Liability of Owners

Liability for reservoir owners is covered under Section 37-87-104, C.R.S. The statute concerning liability is very complex. For further information regarding its interpretation, please contact the Division Engineer or the Dam Safety Branch of the State Engineer's Office. In general, the owner of a reservoir is not liable for personal injury or property damage caused by the

failure or partial failure of the structure unless negligence on their part can be proven.

Safety Inspections

The cost of inspections for dams and reservoirs was repealed during the 1990 legislative session (see Section 37-87-106, C.R.S.). However, dam safety inspections shall be made on all dams within the state by qualified personnel as often as the State Engineer deems it necessary to determine the amount of water that can be safely stored within the structure (see Section 37-87-107, C.R.S.). Inspections are not required for livestock watering tanks.

All dams within the state are within the State Engineer's authority to inspect as often as he may deem necessary to determine the amount of water that can be safely stored (see Section 37-87-107, C.R.S.). It is unlawful for any person to store water in excess of the amount determined to be safe by the State Engineer. If amounts are stored in excess of those deemed safe, the Division Engineer or the State Engineer can close the inlets and obtain help from any person he or she deems necessary to do so (see Section 37-87-108, C.R.S.). Costs for such enforcement are the burden of the owner and may be recovered in a civil lawsuit.

Under Section 37-87-109, C.R.S., upon complaint being made by a person living or having property below a structure that would be in danger if flood occurred due to the dam breaking, it is the duty of the State Engineer to examine the structure immediately. Should the complaint be frivolous, the person making such complaint is liable for expenses and mileage. If the structure is unsafe, the owners are liable for the costs.

Any action of the State Engineer under Section 37-87-110, C.R.S., is subject to review in District Court upon complaint (see Section 37-87-112, C.R.S.).

Approval of Plans for Reservoirs and "Non-jurisdictional" Dams

All dams within the State of Colorado are under the jurisdiction for inspection by the State Engineer (see Section 37-87-107, C.R.S.). Not all dams, however, must be approved by the State Engineer prior to construction. Only dams with the following dimensions must receive State Engineer approval prior to construction:

1. Reservoirs in excess of one hundred acre-feet storage capacity;

2. Reservoirs with a surface area at the high water line in excess of twenty acres across; or

3. Reservoirs whose height exceed ten feet measured vertically from the elevation of the lowest point of the natural surface of the ground, where that point occurs along the longitudinal centerline of the dam, up to the flow line crest of the spillway of the dam.

The plans for these structures must be submitted to the State Engineer and must meet the requirements set forth by him (see Section 37-87-105, C.R.S.). All alterations, modifications, repairs or enlargement of a reservoir or dam that may effect the safety of the structure must provide prior written notice and subsequent approval by the State Engineer and receive approval by the State

Engineer (see Section 37-87-105(4), C.R.S.). General maintenance and repair is not included under this law. For further information, please see the Rules and Regulations for Dam Safety and Dam Construction (2 CCR 402-1).

CONVERSION TABLE

Conversion Table				
cfs	1.00	1.38	1.66	2.23
af/yr.	724	1000	1200	1620
af/mo.	60	83	100	135
gpm	449	619	745	1000

Cubic feet per second = (cfs)
Acre-feet per year = (af/yr.)
Acre-feet per month = (af/mo.)
Gallons per minute = (gpm)

1 cfs =	646,300 gals. per day
	449 gpm
In 24 hours =	1.983 acre-feet
In 30 days =	59.5 acre-feet
Per year =	724.0 acre-feet
1 gpm =	1,440 gals. per day
	0.0022 cfs

1 acre foot =	0.504 cfs per day
	0.326 million gals.
	43,560 cubic feet
	325,900 gallons
1 cubic foot =	7.48 gallons
	62.4 lbs. of water
1 million gallons =	3.07 acre-feet

FEES

Because of the numerous types of fees and constantly changing nature of fees for various items, please see the Division of Water Resources' website at www.water.state.co.us, or contact our Record's Section at 303-866-3447

PUBLICATIONS

Various publications are available for purchase at the Division of Water Resources. New publications are constantly being published. To view a listing of those publications please see our website at www.water.state.co.us.

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