# Appendix B
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The following basic overview of Colorado Water Law is derived primarily from Section 4 of the Statewide Water Supply Initiative (SWSI) Report (Colorado Water Conservation Board [CWCB] 2004).

## Colorado's Prior Appropriation System

As in most arid western states, the allocation of water in Colorado is governed by the doctrine of "prior appropriation," commonly described as "first in time, first in right." Under this doctrine, rights to water are granted upon the appropriation of a certain quantity of water for a beneficial use. The dates of appropriation and adjudication determine the priority of the water right, with the earliest appropriation and adjudication dates establishing the most senior, or superior, right.

The right to use water is a valuable property right that is protected under Colorado law and is rooted in Colorado's Constitution, which establishes that public uses of water in Colorado are subject to the right to appropriate a water right for private use. Like other property rights, vested water rights may not be taken without payment of just compensation, and they may be conveyed separate from the land on which they are used.

As the doctrine of prior appropriation has been interpreted through case law, two major principles regarding the requirement of "beneficial use" and the concept of water as a property right have emerged. First, a water right does not include the right to waste the resource. Second, the right to use water must be sufficiently flexible to accommodate changes of use and the free transferability of water rights in order to allow the maximum use of water.

Interstate compacts and equitable apportionment decrees place additional limitations on water use in Colorado. Interstate compacts critical to the allocation of water in each basin were discussed in Section 1.3.

### The Priority System

The priority system of water allocation is designed to cope with water scarcity. Under the doctrine of prior appropriation, if water is insufficient to meet the needs of all water users, those with senior rights can require full or partial curtailment of diversions by junior water users, such that users with later priorities receive less than their allotted amount of water, or none at all. Essentially, this doctrine protects those who first begin using the water and adjudicate the water right in water court from injury by those whose use and adjudication began later in time. Thus, typically, the more senior the water right, the more valuable it is, particularly in times of drought.

### Beneficial Use

The single most important restriction on the appropriation of water in Colorado is the constitutional requirement that water be placed to a "beneficial use." "Beneficial use" is defined in the Water Right Determination and Administration Act of 1969, Section 37-92-101 et seq. (hereafter 1969 Act) as follows:

> ***Beneficial use is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made[.]***

Beneficial uses allowed under Colorado water law are numerous and include, but are not limited to, commercial, domestic, dust suppression, fire protection, fish and wildlife culture, flood control, recreational in-channel diversions (RICDs), instream flows, industrial, irrigation, mining, municipal, power generation, snowmaking, and stock watering.

The purpose of the beneficial use requirement is to prevent waste, hoarding, and speculation by appropriators, and to encourage the quick and efficient use of the resource. Thus, beneficial use: (1) limits the quantity of water initially allocated under individual water rights; (2) ensures, through administration, that the amount of water used under a water right over time remains limited to the amount actually needed; (3) and conserves water for other uses and users.

### Maximum Utilization

Colorado courts have held that water should be allocated and administered in a way that promotes the "maximum utilization" of the resource. This principle was formulated in reliance on Article XVI, Section 6 of the Colorado Constitution, which states "the right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied." Maximum utilization has been applied by the courts in two ways: (1) to require an efficient means of diversion with the purpose of making more water available to other water users; and (2) to support of the adoption of statutory tools allowing flexible administration, including, for example, augmentation plans, exchanges, and the "futile call doctrine."

Augmentation plans promote maximum utilization by allowing junior appropriators to divert out-of-priority, while protecting seniors from injury by replacing all out-of-priority depletions. Water exchanges also promote maximum utilization. Under an exchange, a substitute supply of water is made available to a downstream senior appropriator and an equal amount of water is then taken at an upstream point of diversion. Like augmentation plans, the "futile call doctrine" also allows junior water users to divert out-of-priority under certain circumstances. Under this doctrine, a junior water user will be curtailed only if such curtailment actually makes water available to a senior water user calling for water.

## Specific Tools for Addressing Water Needs

There are a number of specific tools within the current legal framework of the priority system that can be used to address various water supply needs. These specific tools include those described in the following sections.

### Water Storage Rights

There are two different types of water rights—direct flow water rights and storage water rights. Direct flow rights allow a water user to divert water for immediate use, while storage rights allow a water user to divert water and store it to make a beneficial use at a later time. Storage rights, like other water rights, are assigned a priority and must be exercised without injury to other water rights. Storage rights are obviously a very important mechanism for ensuring that water supplies will be adequate in times of

drought. Moreover, reservoirs provide year-round water when stream levels drop following the spring snow melt and runoff period each year.

## Conditional Water Rights

A conditional water right is defined in the 1969 Act as "a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is based." Conditional water rights are crucial to large-scale development projects, including most transmountain diversions and storage projects, because they allow an appropriator to secure a priority and protect its investment when water cannot immediately be placed to beneficial use.

## Changes of Water Rights

A change of water rights is another tool that allows water users flexibility to maximize the potential use of water by allowing for the reallocation of water resources to meet changing demands. As described in the 1969 Act, a change of water rights includes "a change in the type, place, or time of use, a change in the point of diversion," and changes in the manner or place of storage. A change of water right will not be allowed unless it is approved by the water court, upon a finding that the change will not cause injury to other water users.

In a change case, the measure of the water right is the amount that was historically consumed (not the amount diverted) under the water right. Thus, only the amount of water that historically has not returned to the stream system under the original decreed use may be changed to a new place or type of use. In addition, in a change of water right proceeding, the applicant must take appropriate steps to not cause injury to other water users by ensuring that historical return flows from the use of the water in amount, timing, and location are maintained. This is required because other water users rely, and are legally entitled to rely, on those return flows to support their appropriation and uses of water.

## Leases of Water

Legislation enacted in 2003 amended C.R.S. §§ 37-80.5-101 to 105 to authorize the State Engineer to create water banks within each water division, and to adopt rules governing their operation. The objective of these changes was to simplify the process for temporary transfers of water rights by eliminating the adjudication proceedings required for a permanent change of water rights. The statute provides that the governing rules shall allow for the "lease, exchange, or loan of stored water within a water division" without the need to submit to any adjudication proceedings. Such arrangements will still be subject to administration by the Division Engineer, within the priority system, to prevent material injury to other water users.

## Augmentation Plans

An augmentation plan allows a water user to divert water out-of-priority from its decreed point of diversion, so long as replacement water is provided to the stream from another source, to make up for any deficit to other water users. An augmentation plan, like a change of water right, must be approved by the water court and is also subject to the "no injury rule." Augmentation plans provide a statutory mechanism for many different types of water users, big and small, to obtain water when and where they need it, by using other sources of water to replace or "augment" the injurious out of priority depletions that result from their water use. In times of scarcity, an augmentation plan allows a water user to continue diverting even under a relatively junior priority, so long as it can provide replacement water to satisfy the needs of downstream seniors.

## Instream Flows

Under the 1969 Act, the CWCB is authorized to appropriate water for "minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree." Appropriations for instream flows may only be made by the CWCB and must be made within the priority system. The CWCB can also acquire water rights for instream flows to preserve or improve the natural environment "by grant purchase, donation, bequest, devise, lease, exchange, or other contractual agreement." By acquiring a water right with an enforceable priority, the state can place environmental concerns on equal footing with agricultural, commercial, municipal, and other uses of water.

In Colorado, recreation is also a recognized beneficial use. Governmental entities can appropriate water solely for the purposes of recreation and boating. In reaction to various claims for recreational in-channel rights, the General Assembly enacted legislation limiting the right to appropriate RICDs to municipal entities for "minimum streamflow as it is diverted, captured, controlled, and placed to beneficial use between specific points defined by physical control structures for a reasonable recreation experience in and on the water."

## New Appropriations

Making a new appropriation is always an option for water planning. Although some river basins are currently over-appropriated, in every basin there are usually a few days a year in which a free river condition exists and all rights can divert. Thus, while a 2010 priority is a very junior right, and will probably not have a reliable supply of water during the periods of high senior demands, it may still be possible to divert water under such a right at peak flow times. In addition, one could use an augmentation plan in conjunction with a very junior right to obtain a stable water supply.

To make an appropriation, one must have a specific intent to divert water for a beneficial use and perform a physical act in furtherance of that intent. However, no appropriation can be made when "the proposed appropriation is based on the speculative sale or transfer of the appropriative rights." This anti-speculation doctrine prevents individuals or entities from acquiring water rights solely to sell to others.

## Groundwater Rights

In Colorado, there are four different types of groundwater:

- Tributary groundwater
- Nontributary groundwater
- Not nontributary groundwater
- Designated groundwater

The classification in which the groundwater falls determines how the water is allocated. Tributary groundwater is water that is hydrologically connected to a surface stream. In Colorado, all groundwater is presumed to be tributary to a surface stream. In the early 1900s, Colorado courts held that tributary groundwater is subject to the prior appropriation system based, in part, on the fact that wells that intercept tributary groundwater actually deplete the stream flow to the detriment of senior surface appropriators.

Nontributary groundwater is statutorily defined as that groundwater, outside the boundaries of a designated basin, "the withdrawal of which will not, within one hundred years, deplete the flow of a natural stream ... at an annual rate greater than one-tenth of one percent of the annual rate of

withdrawal." The General Assembly has recognized that nontributary groundwater is a finite resource and has specifically declared that "such water shall be allocated...upon the basis of ownership of overlying land. The annual withdrawal of this type of groundwater is further limited in accordance with a 100-year aquifer life.

Not nontributary groundwater is groundwater located within one of the Denver Basin aquifers (the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers in the Denver Basin, which extends roughly from Fort Collins to Colorado Springs and from the foothills eastward), but outside the boundaries of a designated basin, the "withdrawal of which will, within one hundred years, deplete the flow of a natural stream...at an annual rate of greater than one-tenth of one percent." Not nontributary groundwater is also allocated on the basis of land ownership.

Designated groundwater is groundwater that would not be available to fulfill surface rights or groundwater that has been the principal water supply for the area for at least 15 years and is not adjacent to a naturally flowing stream. Designated groundwater exists within designated groundwater basins, which are established by the Ground Water Commission when evidence becomes available that groundwater within a specific geographic area meets the above noted criteria. Each designated groundwater basin is administered according to a modified prior appropriation system.

## Reuse

Colorado law generally provides for one use of water by the original appropriator. The water that is not consumed by an appropriator's first use is returned to the stream system, either as surface run-off or through subsurface infiltration. Junior appropriators, who are entitled to have stream conditions as they exist at the time of their appropriation, rely on these return flows to fulfill their decreed rights.

However, water that is brought into a watershed from a source unconnected with the receiving system is termed "foreign" water and may be reused by its owner. Foreign water includes nontributary groundwater introduced into a surface stream as well as water imported from an unconnected stream system ("transmountain water"). Importers of foreign water enjoy rights of reuse that native water appropriators do not have. Such water is deemed "fully consumable" and can be used and reused to extinction so long as the user maintains dominion and control over the water. Dominion and control in this context refers to the intent to recapture or reuse such water, and is not lost when a municipal provider delivers water to a customer's tap or when consumers use such water to irrigate lawns.

In addition, agricultural water rights that are changed to municipal use may also generate fully consumable water that can be used to extinction. This is because the applicant in a change of use proceeding may take credit for, and reuse, the historical consumptive use (CU) associated with the prior decreed use. Under this scenario, the amount of water attributable to the historical CU of the senior water right may be used and reused to extinction.

## Conservation Activities

Conservation practices associated with both municipal and agricultural uses can be an important tool in meeting long-term water supply needs. Demand reduction is an important component of water planning. To the extent that conservation practices are reliable, and/or permanent in nature, such practices can reduce the overall demand for water and thereby reduce any shortfall in supply.

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