



## Written Instruction 2020-01 DWR Position on Making Water Rights Diverted Out of Priority Absolute

### 1.0 INTRODUCTION

This Written Instruction directs the Division Engineers concerning DWR's position on making absolute those water rights that do not divert in priority, but rather divert legally pursuant to procedures prescribed by law to prevent injury. This includes water rights diverted out of priority pursuant to decreed plans for augmentation, exchanges, and administrative approvals.

### 2.0 AUTHORITY

The State Engineer may issue written instructions and orders to the Division Engineers regarding the administration of water rights pursuant to section 37-92-501(1), C.R.S.

### 3.0 BACKGROUND

DWR has historically taken the position that surface water rights must be diverted in priority, or for groundwater rights, that wells' delayed depletions to the stream occur when the water right is in priority, to be made absolute. At the direction of the State Engineer, the Attorney General's Office conducted a complete review of statutory and case law, which included a review of changes in the law since DWR originally formulated a position about making water rights absolute.<sup>1</sup> Based on that review, DWR has developed this Written Instruction.

### 4.0 POSITION

A conditional, tributary water right becomes absolute when a water user applies water to beneficial use in priority, or out of priority pursuant to procedures prescribed by law. Procedures *prescribed by law* include decreed plans for augmentation, decreed exchanges, and administrative approvals, which are described individually below. The statutory support for this position can be found in section 37-92-301,

---

<sup>1</sup> The analysis included consideration of the Colorado Supreme Court's decisions in *Frees v. Tidd* (2015), *Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co.* (2008), and the legislature's creation of 37-92-301(4)(e) in 2013, which broadened allowances for decreeing absolute storage rights.



C.R.S., which allows that a conditional water right can become an absolute water right by reason of the completion of the appropriation. Further, section 37-92-103(3)(a), C.R.S. defines an “appropriation” as the application of a specified portion of the waters of the state to a beneficial use pursuant to procedures *prescribed by law*. Under section 37-92-305(9)(a), C.R.S., an absolute decree for a water right confirms that the waters have been diverted, stored, or otherwise possessed, and controlled and have been applied to a beneficial use.

Recognizing that an appropriation has been lawfully completed out of priority under procedures *prescribed by law* and has been made absolute allows for: (1) confirming priority dates for junior water rights, which provides certainty to water users and allows for proper administration; and (2) reducing the need for ongoing diligence filings with the water court.

### **Augmentation Plans**

One procedure *prescribed by law* is obtaining the water court’s approval of a plan for augmentation to increase the supply of water available for beneficial use. See section 37-92-103(9), C.R.S. Plans for augmentation may provide a mechanism to divert water rights when they would otherwise be curtailed in accordance with the priority system. Therefore, a conditional water right may become an absolute water right by completing the appropriation by applying water to beneficial use under a decreed plan for augmentation.

### **Existing Augmentation Plans Including Diversions without a Priority Date**

Water users may divert out of priority pursuant to plans for augmentation for diversions without decreed water rights. To operate the non-decreed diversions, those plans for augmentation may require replacement to downstream water rights that appropriated water later than the non-decreed diversions, but obtained decreed priority dates, making them senior to the non-decreed diversion. The approach of not obtaining priority dates for diversions avoids additional court filings for diligence or to make water rights absolute. Water users with existing plans for augmentation with non-decreed diversions, may return to the water court to obtain decreed water rights for those diversions. If decreed, those water rights may be considered absolute to the extent water was diverted and beneficially used in compliance with the decreed plan for augmentation. The priority of the water right will be postponed, that is, set according to the year in which the water right application is filed and then ranked according to the date of appropriation. Water users may make an additional water court filing to amend decreed plans for augmentation if necessary for the plan for augmentation to operate considering the newly-decreed priority date of the water right.<sup>2</sup>

### **Exchanges**

Another procedure *prescribed by law* to apply a specified portion of the waters of the state to beneficial use is an exchange. As such, a water right diverted out of priority

---

<sup>2</sup> Note that plans for augmentation are not water rights and do not obtain priority dates.

through a properly-approved exchange may be made absolute. In addition, the exchange is an appropriation of available water in a stream reach, which is a separate right that may be confirmed absolute. A water user may exchange water either through an appropriative right of exchange or through a water exchange project, which may only be decreed as part of a plan for augmentation.<sup>3</sup>

DWR administers at least three types of appropriative rights of exchange, which differ based on the character of the water diverted at the upstream exchange-to point relative to the substitute supply. The following discussion of three types of exchanges is not meant to cover all possible exchange operations or the proper administration of exchanges, but rather to describe considerations for making water rights absolute related to exchanges:

1. Conditional decree for upstream diversion, substitute supply is decreed for augmentation or replacement: A water user diverts under a decreed conditional water right at its decreed point of diversion out of priority by exchange and places the water to beneficial use consistent with the decree for the conditional water right. The exchange was properly approved, injury was prevented, and the conditional water right's appropriation is lawfully completed. The upstream diversion does not take on any characteristics of the substitute supply because the upstream diversion is governed by its decree. The water user may apply to the water court to make both the conditional water right and the exchange right absolute in whole or in part.
2. No decree for upstream diversion, substitute supply is decreed for augmentation or replacement: A water user diverts by exchange for a new beneficial use. This differs from the first type of exchange because there is no decree for the upstream diversion, or the amount diverted may be in excess of any existing decreed amount, in which case, the diversion may supplement a decreed water right. The upstream diversion is not taking on characteristics of the substitute supply, but rather has the characteristics of the intended upstream beneficial use. The water user may apply to the water court for an absolute exchange water right. The water user may also apply for an absolute water right for the upstream diversion. However, if the diversion will only operate by exchange, then there may be no need or purpose to decree another water right priority for the upstream diversion.
3. Upstream diversion matches the character of substitute supply: A water user diverts by exchange with the intent that the diverted water takes on the relevant characteristics of the downstream replacement source.<sup>4</sup> This type of exchange typically occurs with imported water or water with other desirable characteristics, such as the right of reuse and successive use. In this case, the water user intends the diversion at the exchange-to point to take on the

---

<sup>3</sup> See sections 37-83-104 (substitute supply from reservoirs), 37-80-120, 37-92-103(9), and 37-92-305(5), C.R.S.

<sup>4</sup> Note, the upstream diversion cannot match every element of the substitute supply's water right, such as the point of diversion or priority in a different basin of origin.

character of the replacement source, rather than having the character of a water right at the upstream point of diversion. The water user may apply to the water court to make the exchange right absolute. The upstream diversion is not an independent water right to be decreed absolute, as it is diverting water with the character of the substitute supply under the exchange right. If the water right for the substitute supply is a conditional water right, then it may be made absolute upon the completion of its appropriation through the exchange.

### **Administrative Approvals**

Statutes allow the State Engineer to grant administrative approval for out of priority diversions of existing decreed conditional water rights or water rights that are subject of a pending water court application, for a limited set of water use operations. Administrative approvals include exchanges (without a decree) and substitute water supply plans. In order to grant an absolute water right for a diversion pursuant to an administrative approval, the water court must find that the operation occurred with the State Engineer's authorized approval, consistent with all applicable water court decrees, and without injury. For a pending conditional water right requiring the water court's approval of a plan for augmentation, such as a groundwater right with delayed depletions, the conditional water right may only be made absolute based on beneficial use under the decree approving the conditional water right and its plan for augmentation.

## **5.0 INSTRUCTION**

### **Review of Applications to the Water Court**

Division Engineers shall review and consult on applications to the water court to make water rights absolute consistent with the Position described above. To confirm that conditional water rights diverted out of priority are absolute, applicants should show that the claimed appropriation was completed by diverting water and placing it to beneficial use in accordance with procedures *prescribed by law*. Water users may need to supply records or estimates of the amount of water diverted, which for wells, is the amount pumped. The showing should also describe the beneficial use of the water and compliance with terms and conditions of the relevant decree, plan for augmentation, and/or administrative approval. If the Division Engineer confirms this evidence, the Division Engineer shall not object to the application to make the water right absolute.

**Note: For Wells Permitted and Operating Pursuant to Augmentation Plans, the wells may only operate pursuant to the augmentation plan, regardless of a final decree making the groundwater right absolute.**

Non-exempt well permits issued for the use of tributary groundwater rights are issued pursuant to section 37-90-137(2). Under section 37-90-137(2), the State Engineer shall issue a well permit only if "there is unappropriated water available for withdrawal by the proposed well and that the vested water rights of others will not be materially

injured.” Additionally, section 37-92-305(6)(a), directs the State Engineer to issue a well permit if the water court issues a final or a conditional decree (considering DWR’s findings and summary of consultation) that determines that the construction and use of the well will not be injurious. On overappropriated stream systems, decrees that find well operations non-injurious rely on plans for augmentation. Based on the above, a well permit is issued with a condition requiring the well to operate in accordance with the decreed plan for augmentation. When a conditional groundwater right is made absolute, the well can only operate pursuant to the plan for augmentation. If the well does not operate in compliance with its plan for augmentation, the Division Engineer shall proceed with enforcement actions, which may include an order to curtail well pumping.

#### 6.0 CONCLUSION

This Written Instruction is subject to revision by the State Engineer at any time. The staff of the State Engineer’s office and the Division Engineers shall retain their full discretion to consider specific circumstances and may depart from this Written Instruction with the approval of the State Engineer. This Written Instruction is not intended to establish any rule or policy to be relied upon by any person or party outside of DWR in any administrative or judicial proceeding.

Approved by:



---

Kevin G. Rein, Director/State Engineer

Date: July 21, 2020