

# STATE OF COLORADO

## OFFICE OF THE STATE ENGINEER

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## **WRITTEN INSTRUCTION AND ORDER 2007-01** **Instruction and Order Concerning the** **Administration of Subordination Agreements** May 31, 2007

Bill Ritter, Jr.  
Governor

Harris D. Sherman  
Executive Director

Hal D. Simpson, P.E.  
State Engineer

This Instruction and Order of the State Engineer is issued pursuant to the provisions of section 37-92-501(1), C.R.S. (2006). This instruction specifically concerns the administration of subordination agreements between water right holders. This document shall be published on the Division of Water Resources' website.

### **1.0 INTRODUCTION**

This instruction and order is being issued to address the issue of agreements that seek to require the selective administration of a call. Such agreements are referred to as "selective subordinations." A general subordination typically requires senior rights to agree to stand in priority behind all water rights junior to the date to which senior is subordinating. A "selective subordination," by contrast, refers "to the subordination by a senior water user to certain junior water users while, at the same time, the senior user denies such permission to other junior appropriators." Board of County Comm'rs of the County of Arapahoe v. Crystal Creek Homeowners' Ass'n, 14 P.3d 325, 341, FN18 (Colo. 2000). Under a selective subordination, the senior water right holder seeks to allow a junior water right holder to receive water to which an intervening priority has a better right under the prior appropriation system. For example, under such an agreement, a 1910 priority water right holder may agree not to call out a 1920 priority water right but would still seek to call out a 1915 priority water right holder.

Because selective subordinations are contrary to the constitutionally and legislatively-established prior appropriation system, the Division Engineers shall administer selective subordination agreements as general subordination agreements, under which the senior water right agrees to stand in priority behind the junior water right to which it has subordinated, and thus, behind all intervening water rights as well.

Subordination agreements involve rights to use the waters of the state, which waters are owned by the public. The parties to such agreements may not contract in violation of the statutes governing the use of the state's waters, and the law governing such use must be read into every subordination agreement and become part of it. Riverside Reservoir & Land Co. v. Green City Irrigation District, 151 P. 443 (Colo. 1915). Accordingly, the Division Engineers shall read into such agreements those limitations imposed by the prior appropriation system.

### **2.0 PURPOSE**

This instruction and order directs the Division Engineers in their recognition and administration of subordination agreements.

### 3.0 AUTHORITY

This instruction and order is issued pursuant to section 37-92-501. The Division Engineers shall not administer selective subordinations. §§ 37-92-103(12), 37-92-301(3), 37-92-501(1), 37-92-502(2)(a), C.R.S. (2006).

This instruction and order ensures that water rights will be administered according to the prior appropriation doctrine and consistent with the priorities as set by decrees. This instruction and order will not apply to acts of Congress or contrary decrees affirmed by the Colorado Supreme Court.

### 4.0 PROCEDURE FOR ADMINISTRATION OF SUBORDINATION AGREEMENTS

The Division Engineers administer calls pursuant to the priority system, which has generally been described as a "first-in-time, first-in-right" system. Priorities of water rights are determined in accordance with statute. If a 1910 priority water right holder decides not to place a call against a 1920 priority water right holder under an agreement with the 1920 priority water right holder, the Division Engineers will not recognize the 1910 water right call against any water right holder with a water right senior to the 1920 water right. Thus, even if a senior water right holder elects to subordinate to a junior water right holder, that junior water right holder still cannot receive water until any water right holder senior to it has received its decreed appropriation or is satisfied with a lesser volume or flow rate.

General subordinations refer to the subordination by a senior water user to all junior water users or to all junior water users with priorities senior to a certain priority date. Such general subordinations may also be based on a certain volume, flow rate or time period. Because general subordinations still allow for diversions in priority after the subordination, they are not contrary to the constitutionally and legislatively-established prior appropriation system. Thus, the Division Engineers may administer general subordinations.

### 5.0 ADMINISTRATION OF POWER INTERFERENCE AGREEMENTS

This Written Order and Instruction is to be read in concert with the WRITTEN INSTRUCTION AND ORDER 2007-03 Concerning the Administration of Power Interference Contracts

Approved by:

  
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Hal D. Simpson, State Engineer

Date: 5/31/07