

**WATER
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MANUAL**

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Chapter I

History of Water Development in Colorado

"THE HISTORY OF COLORADO IS WRITTEN IN WATER". Outside the Governor's executive office in the State Capitol, an exhibition of murals portrays this dynamic and progressive history. The following chronology provides a brief overview of Colorado's water history prior to statehood.

1000 - 1300

Anasazi Indians of the southwest were the first known people to utilize irrigation practices. Evidence indicates that they built small check dams and diverted water to flood irrigate bean and maize fields. Also, they developed a system of communal water rights.

1830 - 1850

Early trappers and traders also constructed irrigation systems, diverting the waters of the Arkansas River in 1832, the Fountain River in 1841, and out of the Purgatoire River via the Hatcher Ditch in 1847.

1850 - 1870

Families and groups of settlers, whose origins trace back to the Republic of Mexico, established on April 10, 1852, the Peoples Ditch on the Culebra River at San Luis. This ditch is still in use today. Settlers migrating from Europe and the eastern United States established the first irrigation water rights along the South Platte River and its tributaries. Many of these rights predate the Civil War.

Prospectors introduced a new beneficial use of water. Placer and hydraulic mining techniques placed the limited water resources at a premium among the mining camps that rapidly sprang up in the high country. Practices and principles, first tested in the California gold fields, quickly developed into "Colorado's Water Law of the Mountains", and "First in Time, First in Right" became the standard by which water disputes were settled in the Miners Court.

In the San Juan River drainage, water rights on the Ute Indian reservation have an appropriation date of 1868. This is the result of a famous United States Supreme Court case "Winters v. United States (1908)". In this case, the court ruled that when the federal government establishes a reservation of land, there is an implied reservation for water to serve that land.

1870 - 1969

Cattle ranging gave way to cattle ranching and Colorado's agrarian way of life progressed from subsistence farming to an intensive agricultural industry producing a variety of cash crops. Irrigation of the semi-arid plains became of critical importance to Colorado's economy. Transportation of water needed to irrigate farmlands located on the interfluvus or divides, far from a natural water course, usually required the formation of ditch, and later, reservoir companies. These corporations, and the quasi-governmental organizations that were to follow in the next century, were mainly responsible for the construction and development of Colorado water.

As the Colorado Territory approached statehood, farms, ranches, mines and new towns were established and quickly expanded along the piedmont and plains, all vying and contesting for water. The competition for this precious resource at times became violent. It can be fairly stated that more people have died fighting, particularly during the Water Wars of 1874, over water than in fights over gold and mining claims.

In this arena of competition for a very limited resource the lawmakers of the territory looked at past pragmatic experiences in water development, rather than theory, to establish a stable system of water resource allocation and to promote orderly economic progress. A water rights doctrine based on prior appropriation, rather than a system based on riparian water rights, was better suited to a semi-arid region since it based the right to own and utilize a natural resource on usage rather than land ownership. The strong language found in Article XVI, titled "Mining & Irrigation", of the Colorado Constitution emphatically declares that the "water is the property of the people of the State of Colorado" and "the right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied". This has become known as the "Colorado Doctrine". This is a mandate form of water resource allocation, where those applying the resource to a beneficial use receive a protected and vested water right by court decree. Only Colorado maintains a true framework of prior appropriation! Though modified, prior appropriation based on constitutional law is the foundation of water law in Alaska, Arizona, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming. A hybrid system originally based on riparian rights but later converted to an appropriation system, commonly called the "California System", is used in California, Kansas, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Washington.

Further, Article XVI states that "Priority of Appropriation (first in time, first in right) shall give the better right as between those using the water for the same purpose". Also, "water for domestic purposes shall have preference over those claiming for any other purpose, and those using water for agriculture shall have preference over those using the same for manufacturing purposes". Preference does not empower the water user to have seniority or priority over other users. Simply, the preference provision gives the preferred user the power to condemn the water supply of a senior appropriator. In practice however, attempts at condemnation or the forced sale of a water right have been met with staunch opposition so

that it has become a common occurrence for municipalities to purchase the land and water at a very inflated price to obtain the water with condemnation as a trump card.

Along with the right to divert water, the Colorado Constitution, Article XVI, Section 7, entitles the water user ~~"the right of way across public, private and corporate lands~~ for the construction of ditches, canals and flumes for the purpose of conveying water...upon payment of just compensation."

There are three essential elements of a valid appropriation of water:

- 1) physical INTENT to apply water to beneficial use.
- 2) An actual DIVERSION of water from a natural stream source, and
- 3) the application of the water to a BENEFICIAL USE.

One acquires a right to water by diverting it from its natural source and applying it to some beneficial use or by maintaining an instream beneficial use such as those minimum stream flow rights held by the Colorado Water Conservation Board. The right to appropriate water is a right to use, not a right to speculate merely for profit. Continued beneficial use of the water is required to maintain the right.

Perfection of a water right in Colorado requires that a court decree be obtained. Adjudication confirms a pre-existing beneficial use or the intent to use. The general procedure by which water rights are adjudicated is explained in Chapter Ten.

Waters available for direct diversion were not sufficient to meet the needs of continued economic development. Water users then turned to the construction of reservoirs and the development of transmountain diversions to provide supplemental water. Reservoirs are given a right to fill based on their priority. Originally it was interpreted that they could only fill when waters were not needed for other beneficial purposes. That principle has been overturned by the Colorado State Supreme Court and reservoirs are allowed to fill in accordance with their priorities.

The right to store water, along with the decision rendered by the Colorado Supreme Court in the case of Coffin v. Left Hand Ditch Company, Colo. 443 (1882), was monumental in Colorado's water history. The case involved the diversion of water out of its basin of origin, South St. Vrain Creek, into Left Hand Creek. It was this precedent by which larger transbasin diversion and storage projects such as the Colorado - Big Thompson and the Frying Pan - Arkansas were made viable.

In 1881, the Colorado legislature established the Office of the State Irrigation Engineer, also referred to today as the Colorado Division of Water Resources. The agency's primary responsibility is the administration of the appropriation doctrine by maintaining a list of water rights on each stream in order of priority; again, "first in time, first in right". Water is then

distributed according to the priority. Further, the State Engineer administers interstate compacts and is empowered to promulgate rules and regulations for the use of water from a particular source. He depends upon the Deputy State Engineer, Assistant State Engineers, Division Engineers, and water commissioners to carry out the duties of the agency.

Administratively, the waters of the state are divided into seven divisions which correspond with the state's seven major watersheds, each headed by a Division Engineer. In his employ are Assistant Division Engineers, hydrographers, administrative and clerical personnel, and water commissioners.

Within a short time after gaining statehood in 1879, the legislature authorized the position of Superintendent of Irrigation (water commissioner). Appointed by the governor upon the recommendation of the Board of County Commissioners, the local Superintendent of Irrigation was paid proportionately by the county or counties in which the water district was located. Usually aligned to party politics, a change in the political composition could result in a change of superintendents.

During the depression of the 1930s, many water officials had difficulty getting paid as banks were skeptical of accepting county vouchers. In the mid-1940s, water officials came under State Civil Service as Agricultural Workers. They were paid similar to contract laborers with no taxes or social security deductions. Twenty years later, water commissioners became "true salaried employees" as they are today.

From their inception until 1969, water officials were deputized by the county sheriff and had statutory police powers, including the power to arrest. In the unpublished history, there have been instances when water commissioners in the administration of the water right priorities of their districts, were placed in uncompromising and life-threatening situations. Today, water commissioners are no longer an island of authority concerning water matters. Working in unison with the division engineer, water laws are enforced through orders from the State or Division Engineer with the police powers of the county sheriff or court order being the means of last resort.

As a result of this history and the complex and diversified role of the water commissioner, many water users are unaware of who the local water commissioner's employer is. Therefore, as part of the public relations aspect of being a water commissioner, it is important that the public be informed that the administrative duties and responsibilities are under the auspices of the State Engineer's Office, Division of Water Resources, Department of Natural Resources, State of Colorado.

Over a hundred years after water was first appropriated, ground water laws were codified. Ground water was not managed or allocated by the state simply because so little was known about it, particularly its interrelationship and interdependence with surface sources. Prior to 1957, no permit was required to construct a well. Wells which diverted non-tributary water were not subject to the jurisdiction of the district courts nor to administration by the State Engineer. Tributary well owners were governed by prior

appropriation among themselves, in accordance with Supreme Court cases, but were not required to adjudicate their water right and obtain a decree. At that time surface and ground water were not administered as an integrated unit.

As quantitative principles of ground water movement were understood, rules and regulations to protect prior appropriations soon followed. The Colorado Ground Water Law, enacted in 1957, required from the State Engineer a permit as a prerequisite to drilling a new well and obtaining a new ground water right. It also made provisions for the registration of existing wells. Further, the Act called for the establishment of a Ground Water Commission which was directed to designate districts where the rate of withdrawal from an aquifer exceeds the rate of recharge. The State Engineer was not to grant permits for new wells in such districts. Certain relatively small wells such as those for livestock and domestic uses were exempted from the Colorado Ground Water Act.

In 1965, the Colorado legislature enacted the Colorado Ground Water Management Act (see Section 37-90-101 through 37-90-141, CRS 1973 and 1988 supplement) which pertained primarily to designated ground water basins. The act supports protection of prior appropriation, subject to modification, to permit full economic development (maximum utilization) in a ground water basin. Prior appropriators are not entitled to maintenance of historic water levels and the commission is empowered to establish reasonable pumping levels. This act provides for the formation of management districts which are empowered to regulate the spacing of wells and set limits of production to minimize the lowering of water tables. The districts also prohibit the exporting of its ground water beyond its boundaries.

Also in 1965, the legislature directed the State Engineer to "administer the laws of the state relative to the distribution of the surface waters of the state including the underground waters tributary thereto in accordance with the right of prior appropriation ...". From this, through integrated administration of surface and ground water (also known as Conjunctive Use), junior right holders appropriating water (i.e., tributary wells) in such a manner as to injure the vested rights of a senior appropriator were subject to an injunction by the State Engineer through the attorney general. A presumption of lack of material injury extended to wells in existence prior to this act.

The administration of the law, as well as its constitutionality, was challenged three years later in the Colorado Supreme Court. In *Fellhauer v. People*, 167 Colo. 320, 447 P. 2d 986 (1968), the court ruled that the regulation of tributary wells in order to protect senior surface rights is constitutional. In addition, the court directed the State Engineer to promulgate reasonable rules, regulations and standards that would maximize the beneficial use of ground water while preventing material injury to senior water users. Here the court made a strong statement emphasizing the need to make maximum utilization of the waters of the state while protecting vested rights.

1969 - Present

Since the Water Right Determination and Administration Act of 1969, surface and ground water rights are administered together, as an integrated unit. Ground water rights must be adjudicated in order to protect their priority. At the time of enactment, existing wells were given until July 1, 1972 to apply for a water right. The act also allowed for "Plans of Augmentation" which allow a well to divert while mitigating material injury to a senior by adding water to the system.

Pursuant to the act, the State Engineer promulgated rules and regulations for the use of surface water and tributary wells in the South Platte, Arkansas and Rio Grande basins. In 1972, the Colorado legislature adopted House Bill 1042 and Senate Bill 35 (see Section 37-90-602, CRS 1973 and 1988 supplement). This companion legislation pertains to wells for exempt uses and requests that the State Engineer make comments concerning water availability to assist counties and planning commissions concerning subdivisions of lands into parcels smaller than 35 acres.

During the 1980s the Office of the State Engineer and the legislature have addressed non-tributary ground water and dam safety. Both topics are examined in detail in other chapters.

In summation, it is from this historic, constitutional and legal perspective that water commissioners carry out their duties and responsibilities. The following story from the "Ouray County Plain Dealer" illustrates how important water users consider their district water commissioner and deputies. At the turn of the century the founding fathers of Ouray had just completed construction of a city hall and library. This building looks like Philadelphia's Independence Hall. Thomas Walsh of Camp Bird fame provided his name and the money for the second floor library, but the town was short of funds to complete the first floor offices. At a meeting of the city council it was voted that the first office to be completed should be that of the Water Commissioner.