



WATERLAW<sup>®</sup>

PATRICK | MILLER | KROPF | NOTO

Colorado SDA Annual Conference  
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## What Every Water District Should Know About Colorado Water Law

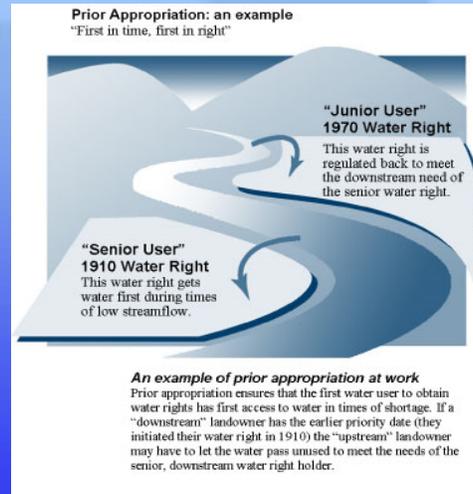
by Scott Miller, Esq.  
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### Overview

1. Colorado Water Law History & Basics
2. Strategic Drought Response & Statutes to Know
3. Hot Topics

## Prior Appropriation Doctrine

- Prior Appropriation Doctrine
  - First in Time, First in Right
- Water allocated exclusively based on priority dates
- Earliest priorities divert all they need (subject to terms in decree)
- Shortages of water are not shared
- “Pure” prior appropriation in CO



## A historical sketch of Colorado water law

- Origins largely from the mining industry
- Assure certainty that a water source would be available based on a right or claim to water having priority over later users.
- The 1866 Mining Act, the 1870 Amendments to the Mining Act and Desert Land Act of 1877 provided that lands patented were subject to prior rights

## A historical sketch of Colorado water law

- Early rejection of the Riparian Doctrine, which holds that landowners adjacent to a stream can make a reasonable use of the water flowing through your land.
  - This policy was ill-suited to Colorado and would have hindered growth, given that climate and geography necessitate transporting water far from a stream to make land productive.
- In 1861 the Territorial Legislature provided that water could be taken from the streams to lands not adjacent to streams.
- In 1872, the Colorado Territorial Supreme Court recognized rights of way (easements), citing custom and necessity, through the lands of others for ditches carrying irrigation water to its place of use. *Yunker v. Nichols*, 1 Colo. 551, 570 (1872)



## A historical sketch of Colorado water law

- In 1876 the Colorado Constitution declared:
  - “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 hereinafter provided.” *Const. of Colo., Art. XVI, Sec. 5.*
  - “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 the water....” *Const. of Colo., Art. XVI, Sec. 6*
  - All persons and corporations shall have the right-of-way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.” *-Const. of Colo., Art. XVI, Sec. 7.*

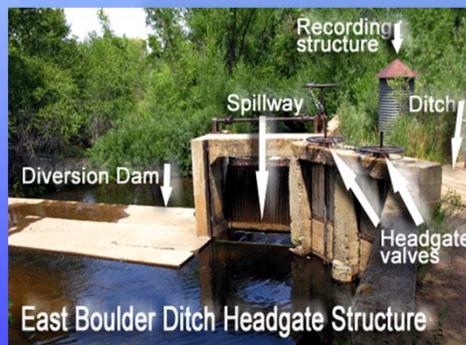
## A historical sketch of Colorado water law

### The Colorado Adjudication System

- Water Right created @ time of application to a beneficial use
- Adjudication Acts of 1879 & 1881 provided for adjudication of irrigation water rights by amount and priority, and for administration of the court's decrees by state water officials.
- The Colorado Water Right Determination and Administration Act of 1969 (C.R.S. § 37-92-101 et seq.)
  - Note: Adjudication of Federal Reserved Rights in CO system
- Groundwater Management Act of 1965 governs the permitting of wells. Sought to integrate groundwater diversions into Colorado's prior appropriation system.

## Colorado Water Law Primer

- Two General Types of Water Rights:
  - Absolute: perfected, actual use; subject to abandonment for non-use
  - Conditional: future completion; subject to cancellation for failure to file diligence



# Colorado Water Law Primer

## Water Rights

- Types of Water Rights (Cont.):
  - Direct Flow: Well, Ditch, Pipeline, etc. (measured by flow rate)
    - "c.f.s.": 1 cubic foot of water per second = 449 gallons of water per minute
  - Storage: Reservoir, Pond, etc. (measured in volume)
    - "1 acre-foot" = 325,900 g (one foot deep covering one acre)



# Colorado Water Law Primer

## Water Rights

- Types of Water Rights (Cont.):
  - Groundwater rights
    - Tributary Groundwater
    - Non-Tributary Groundwater
    - Designated Groundwater Basins
    - Not Non-Tributary Groundwater - Denver Basin
  - Appropriative Exchange



## Colorado Water Law Primer

### Elements of Appropriation

- Unappropriated water available
- Beneficial Use
- Without Waste
  - Duty of water
  - Means of diversion
- Anti-speculation
- Diversion required



## Instream Flow Rights

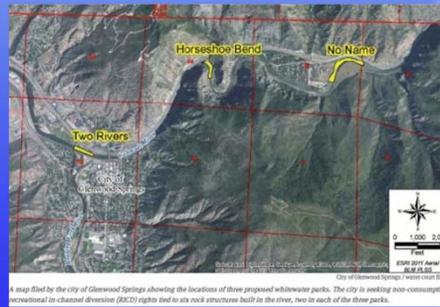
- CWCB instream flows
  - Only CWCB may own/secure
  - Amount: required to preserve or improve the natural environment to a reasonable degree
  - Can change senior irrigation rights to instream flows
  - Can loan/lease to CWCB



## Instream Flow Rights

Recreational In-Channel Diversions “RICDs” C.R.S. § 37-92-103(10.3), § 37-92-102(5), and § 37-92-102(6)

- Only governmental / quasi-gov’t entities may own
- Flow must be diverted, controlled in-channel
- CWCB role = making findings
- Minimum amount necessary for “a reasonable recreation experience”

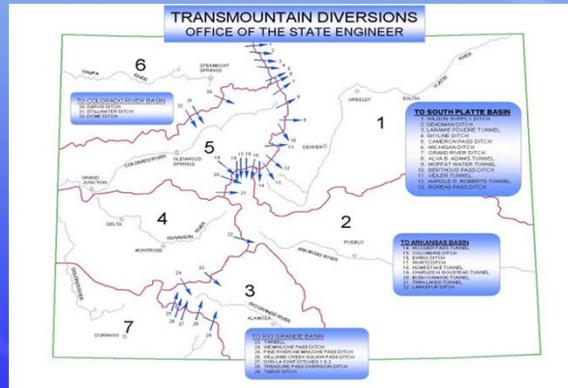


## Colorado Water Law Primer Return Flow

- Water not consumed after initial appropriation that returns to system as wastewater, surface runoff, subsurface percolation, etc.
- Belongs to stream, subject to approp.
- Cannot compel waste, return flow
- Point of discharge can be moved
- But, return flow pattern must be maintained in change case

## Colorado Water Law Primer Imported Water

- Imported (or transmountain) water, non-tributary groundwater (e.g., Denver Basin), and quantified “consumptive use” water can be used & re-used to extinction
- Exception:  
CBT water



## Colorado Water Law Primer Rainwater Harvesting

- Precipitation is subject to prior appropriation
- Exception: residential situation where qualify for exempt well permit
  - Uses of rainwater limited to uses allowed by the exempt well permit

## Colorado Water Law Primer

### Conditional Water Rights

- Intent, Overt acts
- Relation back
- “Can and Will” Requirement
- Reasonable Diligence
- Cancellation - failure to file
- Make absolute

## Pagosa Water & San District Case:

Proof for New Governmental Conditional Right

- What is a reasonable water supply planning period;
- What are the substantiated population projections based on a normal rate of growth for that period;
- What amount of unappropriated water is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the planning period, above its current supply.

## Colorado Water Law Primer Change of Water Rights

- Owner has right to change his/her water right and still maintain its priority, so long as other water rights not injured
  - Historic return flow patterns must be maintained
  - Junior appropriators entitled to maintenance of stream conditions at time of appropriation
- Measure of every water right is its “historic beneficial use” at its decreed location
- One may not alter the historic use or pattern of use of a water right if it would enlarge the use in amount or time

## Colorado Water Law Primer Change of Water Rights (Cont.)

- Potential mitigation requirements for changes and “significant water development activity” greater than 1,000 af per year. C.R.S. § 37-92-103(10.7).
- See C.R.S. § 37-92-305(3.5) & (4.5) for mitigation requirements

## Colorado Water Law Primer

### Change of Conditional Water Rights

- Same rules as for change of absolute
- But, based on “contemplated draft”
  - What would have been diverted?
  - What would have been consumed?
- Is the change so major that it is a new appropriation and does not relate back?

## Colorado Water Law Primer

- Administration by State Engineer’s Office
  - Carried out by Division Engineers, Water Commissioners
- “Call” scenarios
- Futile Call



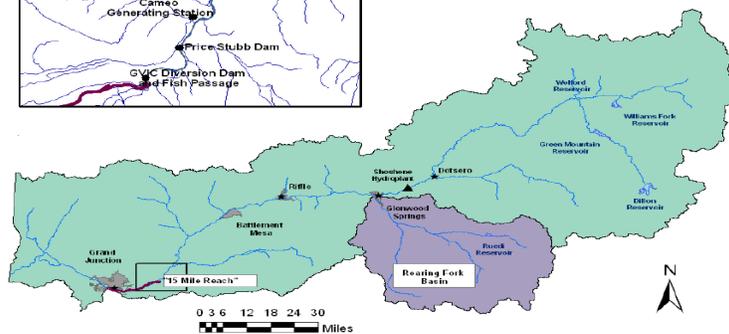
# Colorado Water Law Primer

Call Scenario Cont'd

Appendix B



## Upper Colorado River Basin Major Water Rights



## Colorado Water Law Primer Plans For Augmentation

- Detailed court-approved plan, designed to protect existing water rights by replacing water used in a new project. C.R.S. 37-92-103(9).
- *Central City* case & instream flow reaches' impact on exchanges
  - Instream flow entitled to protection even though it's not "in priority"
  - Curtailed water right takes on new exchange priority

## Colorado Water Law Primer

### Well Permitting - Exempt Wells

- Tract of 35 acres or larger: entitled to well exempt from water administration for up to 3 single-family residences, livestock, fire protection and one acre of lawns and gardens. C.R.S. § 37-92-602.
- Household use only: inside use only, in a subdivision created prior to 1972 or a parcel less than 35 acres that is exempt from the subdivision laws.
- Pre-existing wells: wells prior to 05/22/1971 exempt from permits for up to 50 gpm used for up to 3 single-family residences, livestock, fire protection and one acre of lawns and gardens. *Cautions: Limited by continuous historic uses. Onsite non-evaporative wastewater treatment required.*
- Commercial exempt wells: wells used for drinking and sanitary facilities in individual commercial businesses; lot created pre-'72. No outside use allowed

## Colorado Water Law Primer

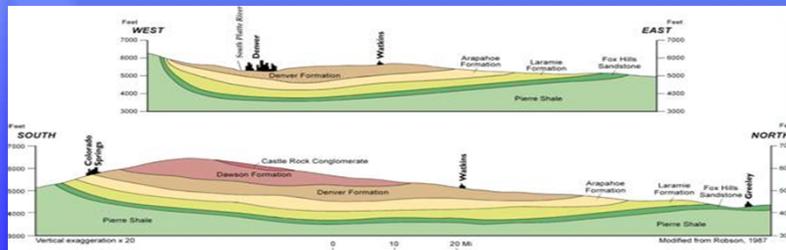
### Well Permitting

- "Fee Wells:"
  - Cannot obtain absent an approved Substitute Supply Plan or Judicially Approved Plan for Augmentation;
  - Must consider delayed impact of well pumping
  - Can be interconnected, used for any beneficial use or amount but limited to 200' rule.
- Wells in Designated Groundwater Basins:
  - Designated groundwater basins are established by the Colorado Ground Water Commission. Located in the Front Range and in Eastern Colorado. Commission has sole jurisdiction over designated groundwater.
    - Within the designated basins there are separate groundwater management districts, which provide recommendations to the Commission on applications, and establish rules.
  - Groundwater in designated basins called "designated groundwater" (groundwater that is essentially not available to surface water rights b/c not tributary)

# Colorado Water Law Primer

## Well Permitting

- Denver Basin Wells:
  - Denver Basin stretches from Greeley to Colorado Springs, and from the foothills to Limon. Must consider delayed impact of well pumping
  - Series of aquifers that are isolated from each other geologically, and how deep you drill will determine which aquifer you are pumping from.
  - Landowner is limited to pumping 1% per year of the amount of water that is determined to be beneath their land in these aquifers.
  - Augmentation requirements are common.



# Colorado Water Law Primer

## Ditch Easements

- Ditch easements exist where ditches or pipelines carry water across a property
  - Can arise by prescription, express grant, acquiescence, etc.
- *Roaring Fork Club* rule:
  - “Accommodation doctrine”
  - Allows a servient estate to alter a ditch easement upon prior written consent from the ditch owner; or, if the ditch owner will not consent, the servient estate can seek a declaratory judgment that the proposed alteration will not:
    - Significantly lessen the easement’s utility
    - Increase the burdens on the easement owner’s use and enjoyment of the easement
    - Frustrate the purpose of the easement

## Colorado Water Law Primer

### Storage Issues

- Irrigation Right  $\neq$  Storage Right (except short term store)
- 1 Fill Per Year Rule - until all junior rights have been satisfied.
  - A “seasonal year” of November 1st to October 31<sup>st</sup> applies, rather than a calendar year.
  - Water carried over in the reservoir after October 31st is charged to the new seasonal year's fill, with the effect of decreasing the amount of water that can be stored during the new seasonal year.
- **Refill Rights – must be explicitly applied for!**  
**Reservoir owner must prove:**
  - 1. water is physically available
  - 2. need for the additional water &
  - 3. can and will use the water

## Colorado Water Law Primer

### Underground Storage – Conjunctive Use

- Conjunctive use – utilizing surface and ground water to maximize the beneficial use and yields of the State's waters
- Underground Storage – benefits:
  - Less evaporation than trad storage
  - Withdrawal of water when needed – drought
  - Emergency supply – peak demands
  - Raises water table – benefit to wells
  - Fewer environmental impacts – less surface footprint

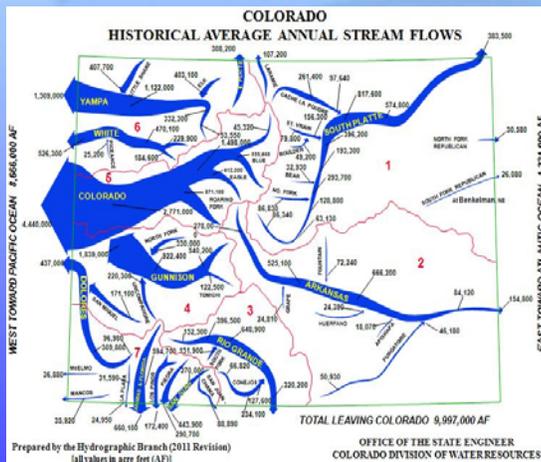
## Colorado Water Law Primer

Establishing a Conditional Use Right in Aquifer Storage, Applicant Must:

1. capture, possess, and control the water to be put into the aquifer;
2. not injure other water use rights, either surface or underground, by appropriating the water for recharge;
3. not injure water use rights, either surface or underground, as a result of recharging the aquifer and storing water in it;
4. show that the aquifer is capable of accommodating the stored water without injuring other water use rights;
5. show that the storage will not tortiously interfere with overlying landowners' use and enjoyment of their property;
6. not physically invade the property of another by activities such as directional drilling, or occupancy by recharge structures or extraction wells, without proceeding under the procedures for eminent domain;
7. have the intent and ability to recapture and use the stored water; and
8. have an accurate means for measuring and accounting for the water stored and extracted from storage in the aquifer.

## Colorado Water Law Primer

Physical Water Availability & Compacts



Headwaters for Several Major Interstate Rivers:

- Colorado
- Arkansas
- S. Platte
- Rio Grande
- San Juan

# Colorado Water Law Primer

Constrained by Legal Water Availability

- Interstate water compact obligations:
  - Colorado River Compact, 1922
  - La Plata River Compact, 1922
  - South Platte River Compact, 1923
  - Rio Grande River Compact, 1938
  - Republican River Compact, 1942
  - Arkansas River Compact, 1948
  - Upper Colorado River Compact, 1948
  - Amended Costilla Compact, 1963
  - Animas-LaPlata Project Compact, 1968
- International Treaties:
  - U.S. – Mexican Water Treaty, 1906;
  - Rio Grande, Colorado and Tijuana Treaty, 1944

## The Colorado River Basin



7 states—1400 miles

Principal Source for:  
33 million people  
1/3 of Nation's  
GDP

Division a Marvel of  
Compromise &  
Source of Stress

Source: Map  
Dept. of the Interior

## Fixed Entitlements to the Colorado

### The *Law of the River*

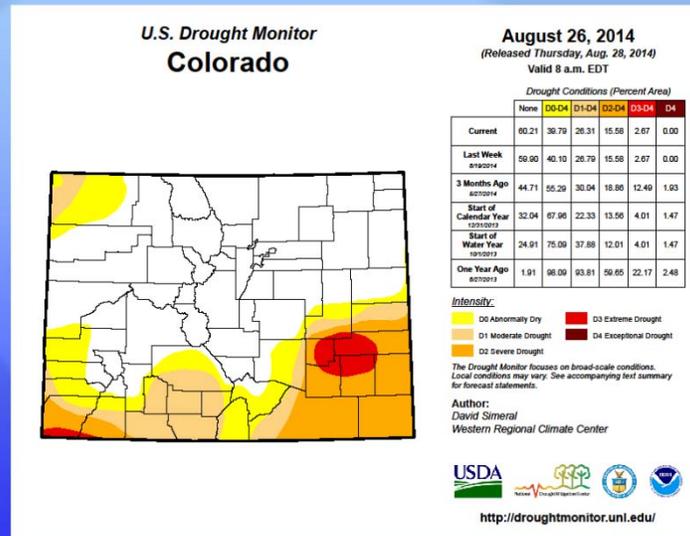
- Colorado River Compact 1922
  - 7.5 million acre-feet (maf) each to Upper & Lower Basin @ Lee's Ferry
- Boulder Canyon Project Act 1928:
  - AZ: 2.8 maf
  - CA: 4.4 maf
  - NV: 0.3 maf
- Upper Colorado River Compact 1948:
  - CO: 51.75%
  - UT: 23%
  - NM: 11.25%
  - WY: 14%
- Mexico-US Treaty 1948:
  - 1.5 maf to Mexico @ Morelos
- AZ v. CA (1964 & 1979):
  - Tribal Rights and Tributaries

## Colorado River Compact

### Legal water availability

- Colorado River Compact – how much left to develop in-state?
- Colorado River Compact “call” scenario

# Strategic Drought Response



# Strategic Drought Response

Several Statutes to Know:

1. Substitute Water Supply Plans - C.R.S. § 37-92-308
2. Interruptible Water Supply Agreements - C.R.S. § 37-92-309
3. Water Exchanges - C.R.S. §§ 37-80-120(2), 37-83-104 to 106, 37-88-109(2), and 37-92-501.
4. Ag / Urban Water Leasing Pilot Program - C.R.S. § 37-60-115(8)

## Statutes to Know

### Substitute Water Supply Plans C.R.S. § 37-92-308

- Allows diversions under a new water right, or under a junior water right that otherwise would be out-of-priority, by providing a “substitute supply” of water from another source.
- The goal is to allow diversion while keeping the stream “whole” for senior water rights users.
- A temporary measure to use while waiting for water court to approve a more permanent augmentation plan.
- Timing.
- Emergency need, public health and safety (37-92-308(7)).

## Statutes to Know

### Interruptible Water Supply Agreements C.R.S. § 37-92-309

- Temporary, long-term, or permanent arrangements typically between agricultural water rights holders & municipal providers.
- Agreements to temporarily lease water *without* a court adjudication and a change decree.
- SEO may approve ISAs so long as they are not triggered more than three times in a 10-year period.

## Statutes to Know

Water Exchanges C.R.S. § § 37-80-120(2), 37-83-104 to 106, 37-88-109(2), 37-92-501

- Provide water to affected senior calling water rights so that junior water rights can take the same amount of water upstream.
- Has its own priority and works when other junior water rights are out of priority.
- Can be administratively approved.

## Statutes to Know

Ag / Urban Water Leasing Pilot Program  
C.R.S. § 37-60-115(8)

- Authorizes up to 10 projects, with no more than 3 Projects in any one of the major river basins (S. Platte; Arkansas; Rio Grande; and the Colorado.)
- Each project may last up to 10 years in duration and must demonstrate the practice of:
  - (I) Fallowing agricultural irrigation land; and
  - (II) Leasing the associated water rights for temporary municipal use.
- Arkansas Valley Super Ditch, 1<sup>st</sup> Application



## Hot Topics

1. Proposed WOTUS Rule
2. Public Trust Doctrine
3. Colorado Water Plan
4. Hydraulic Fracturing Water
5. Bureau of Reclamation & Marijuana

### The newly proposed “waters of the U.S.” (WOTUS) rule

- Statutory language of the CWA limits jurisdiction to navigable waters, defined therein as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).
- After originally construing the CWA to cover only waters that were navigable-in-fact, the agencies expanded the regulatory definition of WOTUS until a regulations were challenged in court.

## The U.S. Supreme Court weighs in on WOTUS

*Rapanos v. United States*, 547 U.S. 715 (2006)

- Provides a muddled understanding of what constitutes WOTUS.
- “Significant nexus” test.
  - Wetlands that, “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable,’” possess the requisite nexus to be considered as navigable for the purposes of the CWA.
  - Justice Kennedy held that the CWA covered intermittent waters, specifically discussing conditions in the western United States.

## Proposed WOTUS Rule

- The agencies (Corps & EPA) issued “guidance” opinions in 2003 and 2008, then sought to issue new guidance in 2011 to further clarify *Rapanos*, but were told by certain federal courts to undertake formal notice-and-comment rulemaking
- March 25, 2014 agencies published the proposed rule for comment. Comment period extended from July 21 to October 20, 2014.

## Assessing the science underpinning the WOTUS rule

- The EPA maintains that the rule is grounded in the latest peer-reviewed science regarding the connectivity of streams and wetlands to navigable waters downstream. The Science Advisory Board (SAB) has posted a series of draft reports on the Connectivity Study online.
- Critics counter that the Study is of limited value because it fails to correlate the science with the law, including Justice Kennedy's "significant nexus" test.
- SAB review to be complete in the fall, but probably not be before the end of the public comment period.

## The WOTUS rule & Ditches in Colorado

Two types of ditches are exempt under the rule:

"[1] ditches that are excavated wholly in uplands, drain only uplands or non-jurisdictional waters, and have less than perennial (i.e., permanent) flow; and

[2] ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, impoundment, or the territorial seas. Other ditches, if they meet the rule's definition of 'tributary,' would continue to be 'waters of the United States' – a point of much controversy with some stakeholders."

## The WOTUS rule & regulation of ditches in Colorado

1. How many ditches in Colorado are entirely upland, and don't start in riparian areas?
2. How many ditches in Colorado don't contribute or return flow to the stream via a tail ditch?



## Public Trust Doctrine Initiatives

- Initiative 103
  - Sought to add a new section to Article XVI of the Colorado Constitution that would establish the public trust doctrine for the state's natural resources. Its provisions would ***declare Colorado's environment as common property and impose fiduciary obligations*** on the state government to defend such property
  - Kept off the ballot due to a technicality.
  - Proponents vow it will be back on ballot in 2016

## Public Trust = “nuclear bomb”

Public Trust initiatives “propose to drop what amounts to a **nuclear bomb** on Colorado water rights and land rights. Masquerading as a measure to protect the public, [the initiative] contains surreptitious measures that would strip members of the public, cities, farms, and families throughout this state of their most valuable economic interests.”



Justice Hobbs' Dissent in No. 12SA8 -- In the Matter of the Title, Ballot Title and Submission Clause for 2011-2012 #3

## Colorado Water Plan (CWP)

- May 2013, Executive Order directing the CWCB to produce a state water plan
- May 2014, Governor signed SB14-115 into law requiring legislative approval
- July 2014, All BIPs Published
- Dec 2014, Draft CWP due
- Dec 2015, Final CWP due





## Fracking Water

- Hydraulic fracturing is process of high pressure injection of “fluids” (99.5% water and sand, and rest chemicals) into the rock producing formation
- Occurs 5,000-8,000 feet underground
- Fracking uses approx. 14,000 acre feet of water
  - less than 0.1% of state water use (source: CO Div of Wat Res)
- Water quality main concerns
- Active market for water sales for fracking operations

Sector	2010 Use (Acre-Feet/Yr) <sup>4</sup>	Percent of State Total
<b>Total</b>	<b>16,359,700</b>	
Agriculture	13,981,100	85.5%
Municipal and Industrial	1,218,600	7.4%
Total All Others	1,160,000	7.1%
Breakdown of "All Others"		
<b>Total All Others</b>	<b>1,160,000</b>	
Recreation	923,100	5.64%
Large Industry	136,000	0.83%
Thermoelectric Power Generation	76,600	0.47%
<i>Hydraulic Fracturing</i>	13,900	0.08%
Snowmaking	5,300	0.03%
Coal, Natural Gas, Uranium, and Solar Development	5,100	0.03%
Oil Shale Development	0	0.00%

Source: CDWR, CWCB, and CO Oil & Gas Commission

## Bureau of Reclamation & Marijuana

- 5/16/14 USBR issued a temporary policy clarifying that it will operate federal water projects consistent with the Controlled Substances Act and that it will not approve the use of federal projects to store and deliver water for grows operations authorized under state law.
- Not an enforcement agency - response limited to documenting & reporting to the DOJ.
- Still unclear whether this policy will be applied to water districts and other contract holders who then sub-contract their water to marijuana cultivators for exchange or augmentations purposes.



### Questions?

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