Special District Association (SDA) Annual Conference

Colorado Water Law 101 and Hot Topics: A Primer and Update for Special Districts

By: Scott Miller, Esq.
miller@waterlaw.com
Overview

1. Colorado Water Law
   • Prior Appropriation
   • Water Courts
2. Changes & Transfers
3. Exchanges & Augmentation Plans
4. Groundwater
5. Storage
6. Trans-mountain diversions
7. And other Hot Topics…
Colorado Water Law

• Water law = rules governing allocation of public resource for beneficial uses or purposes
• Provides basis to resolve disputes between water users, especially in times of scarcity
• “Usufructuary” – use, not absolute ownership
Prior Appropriation

• “First in Time, First in Right”

• History
  – Developed from mining camps and the need to use water away from its source
Prior Appropriation

- Water allocated based on priority dates
- Earliest priorities divert all they need (subject to terms in permit/decree)
- Shortages of water are not shared
- “Pure” prior appropriation in CO

Prior Appropriation: an example
“First in time, first in right”

“Senior User”
1910 Water Right
This water right gets water first during times of low streamflow.

“Junior User”
1970 Water Right
This water right is regulated back to meet the downstream need of the senior water right.

An example of prior appropriation at work
Prior appropriation ensures that the first water user to obtain water rights has first access to water in times of shortage. If a “downstream” landowner has the earlier priority date (they initiated their water right in 1910) the “upstream” landowner may have to let the water pass unused to meet the needs of the senior, downstream water right holder.
Prior Appropriation

- Elements of a valid appropriation
  - Intent
    - Conditional Water Rights
  - Diversion
    - Except Instream flows, RICD’s
  - Beneficial Use
Prior Appropriation

- Conditional Water Rights
  - Intent + Overt acts
  - Anti Speculation – e.g. Muni water
  - Must complete with reas diligence
- Return to Water Court every 6 years
  - If make “absolute,” priority relates back to original filing
- Cancellation for failure to file diligence
Prior Appropriation

• *Diversion element*
  
  – *Exceptions:*
    • CWCB Instream Flow Appropriations
    • *Recreational In Channel Diversions* ("RICD’s")
Prior Appropriation

• *Beneficial Use element:*

  – “Beneficial use means 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.” C.R.S. § 37-92-103(4)

• Prior to this decision, trend was expanding definition of beneficial use
• Ruling categorically excludes recreational, aesthetic, and piscatorial uses as beneficial in a flow though manner
• Raises questions with many existing decrees, conditional decrees up for diligence, & other water uses
Water Court System and Adjudications

- Unique system
- Water court decisions appealable directly to Colorado Supreme Court
Water Court Process

• Application
• Publication
• Opposition
• Summary of Consultation
• Ruling/Decree
Prior Appropriation

• Priority
• Postponement
  Doctrine
• Call scenario
• Futile call
• Free River
Prior Appropriation

- Loss of Water Rights
  - Abandonment
    - Non-use
    - Intent
  - Adverse Possession
- C.R.S. § 37-92-401
  - Abandonment List
Changes and Transfers

• Changes of Water Rights
• Types of Changes
• Prevention of Injury
Exchanges and Aug Plans

• Exchange: Water user diverts out of priority water upstream and “exchanges” or replaces an equivalent amount of water from a downstream source to satisfy the senior calling right.

• Plan 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).
Groundwater

- General hydrology
- Extraction of groundwater
Groundwater

• Type of Groundwater Rights
  – Tributary Groundwater
  – Non-Tributary Groundwater
    • Denver Basin
      • Not Non-Tributary - Denver Basin
  – Designated Groundwater Basins
Well Permitting

• 1965 Groundwater Management Act
  – All new wells must have permit
  – Permits issued by State Engineer’s Office
    • Exception: Colo GW Commission for desig GW
  – In general, will deny unless Aug Plan to prevent injury, or unless exempt

• Exempt well permits

• Pond wells, gravel pits – expose GW to evap
Storage

- Storage
  - Sep Decree must be obtained
  - Irrigation Right ≠ Storage Right (except short term)
  - One fill rule
  - Carryover storage
  - Accounting
Transmountain Diversions

• Imported or Foreign Water – treated differently
  – Can be used to “extinction”

• Major Transmountain Diversions
  – West Slope to East Slope
  – Grand Valley

Water Users Assoc., v.
Busk-Ivanhoe, Inc.,
2014SA303
Figure 7. Major Trans-Basin Diversions

Transmountain Diversions

The outfall of the Bousted Tunnel, which delivers water from the Roaring Fork and Fryingpan rivers to the East Slope.
Transmountain Diversions

The diversion dam across the main stem of the upper Roaring Fork River. The dam diverts water toward the Independence Pass tunnel and the East Slope.
Transmountain Diversions

The east end of the Independence Pass tunnel, bringing water from the headwaters of the Roaring Fork River to the East Slope.
Federal and Indian Water Rights

- *Winters* doctrine
  - Reserved Rights
- McCarran Amendment
Ditch/Pipeline Easement Law

• Creation
• Rights of Ditch Owners (Parcel One)
• Obligations of the servient estate (Parcel Two)
Water Supply Planning

Colorado Water Plan – Chapter 6, etc.

1. Scenario planning
2. Developing Alternative Water Supply Portfolios
3. Developing an Adaptive Water Management Plan
4. Developed Goals for each basin
5. Regional Plans
Water Supply Planning

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

- 1922 agreement
- Allocates water from Colorado River System among 7 States
Fixed Entitlements to the Colorado

The Law of the River – relevant extracts:

- **1922 Colorado River Compact**
  - 7.5 million acre-feet (maf) each to Upper & Lower Basin at Lee’s Ferry (theoretically)

- **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:**
  - 1.5maf to Mexico at Morelos

- **AZ v. CA (1964 & 1979):**
  - Tribal Rights and Tributaries
The Colorado River

- Moving Forward Phase I Report
- Pilot System Conservation Program
Colorado Water Plan

- Second draft released July 15
- Comments were due by September 17
- Transmountain Diversions
Colorado Water Plan

The seven principles for TMD’s in the draft conceptual framework:

1. East Slope water providers are not looking for firm yield from a new transmountain diversion (TMD) and the project proponent would accept hydrologic risk for that project.

2. A new TMD would be used conjunctively with East Slope supplies, such as interruptible supply agreements, Denver basin aquifer resources, carry-over storage, terminal storage, drought restriction savings, and other non-West Slope water sources.

3. In order to manage when a new TMD would be able to divert, triggers are needed.

4. A collaborative program that protects against involuntary curtailment is needed for existing uses and some reasonable increment of future development in the Colorado River System, but it will not cover a new TMD.

5. Future West Slope needs should be accommodated as part of a new TMD project.

6. Colorado will continue its commitment to improve conservation and reuse.

7. Environmental resiliency and recreational needs must be addressed both before and conjunctively with a new TMD.
Storm Water Regulations

- WQCD Storm Water Program
- SB 15-212
Rainwater Harvesting

• Rainfall collection (still mostly illegal)
  – HB 15-1259
WOTUS ("Waters of the U.S.")

• Statutory language of the Clean Water Act 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 regulations were challenged in court.
The U.S. Supreme Court weighs in on WOTUS


- Provides a confusing 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.
WOTUS ("Waters of the U.S.")

- Final Rule published on June 29, 2015
- Immediate resistance
- Rule was scheduled to become effective on August 28, 2015
- *North Dakota et al. v. EPA*
  - Injunction ordered on August 27 ‘15
  - Rule not effective in CO
Questions?

Scott Miller, Esq.
Patrick, Miller & Noto P.C.
miller@waterlaw.com