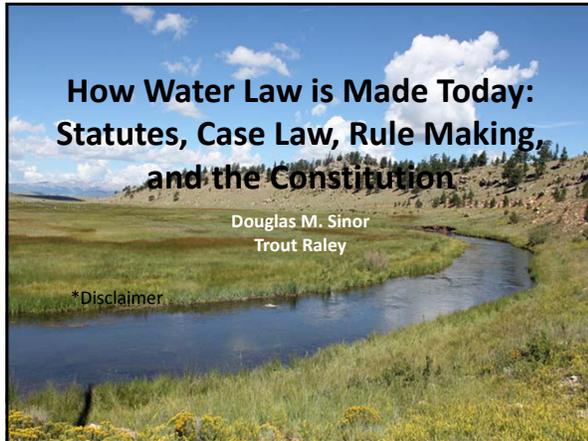


How Water Law is Made Today: Statutes, Case Law, Rule Making, and the Constitution

Douglas M. Sinor
Trout Raley

*Disclaimer



Federal Water Rights Law



- Fed. Gov't left states to determine water rights (every state different)
- Commerce Clause: limits state bans on water exportation
- Property Clause: federal reserved water rights: Lands reserved from the public by fed. gov't: (National Forests, National Parks/Monuments, Indian Reservations); *Winters v. United States*, 207 U.S. 564 (1908)
- Sovereign Immunity: McCarran Amendment 43 U.S.C. § 666: Congress authorized the U.S. to be joined as a party in suits for determination and administration of water rights



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Federal Water Rights Law cont.

- Interstate compacts (9)
- Equitable apportionment decrees by U.S. Supreme Court *Wyoming v. Colorado*, 325 U.S. 599 (1945)
- International treaties



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Sources of State Water Rights Law

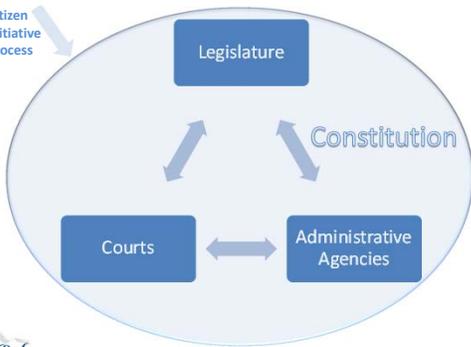
- General Assembly
- Seven Water Courts and Colorado Supreme Court
- Administrative Agencies (e.g., State Engineer, CWCB)
- Constitution



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Colorado State Law cont.

Citizen Initiative Process



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Colorado State Law cont.



Colorado Constitution

Article XVI § 5 & 6:
Public resource, prior appropriation, diversion, beneficial use, anti-speculation

Section 5:

Water of Streams Public Property.

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.

(C.R.S. § 37-82-101 Waters of natural surface streams)



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Colorado Constitution, cont.

Section 6:

Diverting Unappropriated Water Priority Preferred Uses.

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 for the same purpose.



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Colorado Constitution, cont.

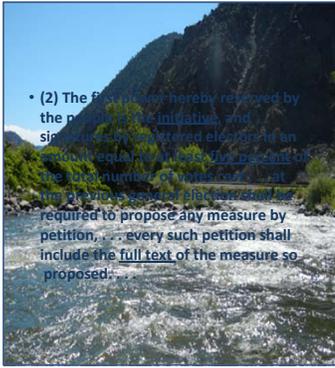
Amending the Const. (Article V)

- (1) The legislative power of the state shall be vested in the general assembly . . . but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly . . .



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Colorado Constitution, cont.

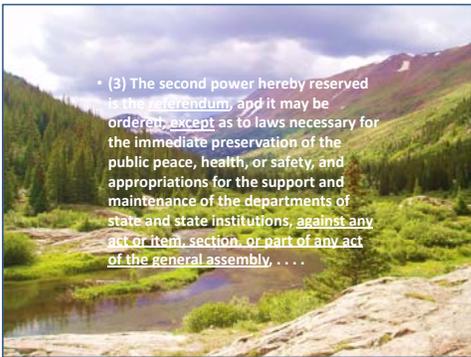


- (2) The first power hereby reserved by the people is the initiative, and signatures by registered electors to an equal total, one the percent of the total number of votes cast, at the place and time specified, are required to propose any measure by petition, . . . every such petition shall include the full text of the measure so proposed. . . .



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Colorado Constitution, cont.

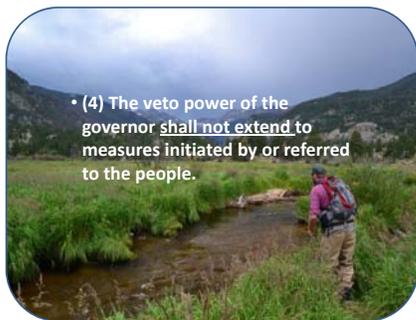


- (3) The second power hereby reserved is the referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health, or safety, and appropriations for the support and maintenance of the departments of state and state institutions, against any act or item, section, or part of any act of the general assembly,



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Colorado Constitution, cont.



- (4) The veto power of the governor shall not extend to measures initiated by or referred to the people.



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Colorado Constitution, cont.
Constitutional Initiatives Related to Water

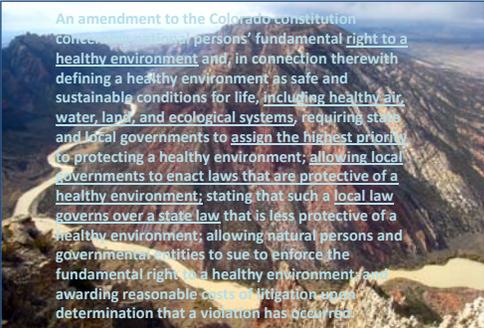
- Public Trust/Protection of natural resources, environment
- Public Trust concept rejected in *People v. Emmert*, 198 Colo. 137 (1979)
- *Mono Lake* opinion (*National Audubon Society v. Superior Court*, 33 Ca.3d 419 (1983))




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Colorado Constitution, cont.
Initiative 63: Right to a Healthy Environment

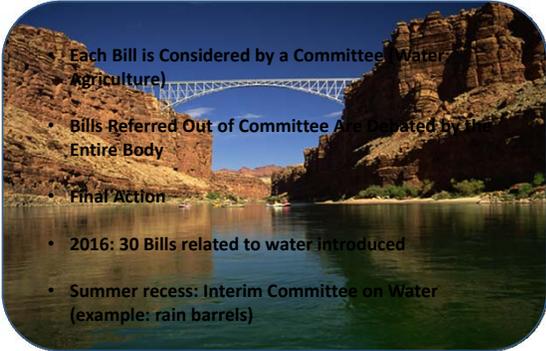
An amendment to the Colorado constitution concerning natural persons' fundamental right to a healthy environment and, in connection therewith defining a healthy environment as safe and sustainable conditions for life, including healthy air, water, land, and ecological systems, requiring state and local governments to assign the highest priority to protecting a healthy environment; allowing local governments to enact laws that are protective of a healthy environment; stating that such a local law governs over a state law that is less protective of a healthy environment; allowing natural persons and governmental entities to sue to enforce the fundamental right to a healthy environment and awarding reasonable costs of litigation upon determination that a violation has occurred.



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Statutes
Legislative process in general

- Each Bill is Considered by a Committee (Water & Agriculture)
- Bills Referred Out of Committee Are Debated by the Entire Body
- Final Action
- 2016: 30 Bills related to water introduced
- Summer recess: Interim Committee on Water (example: rain barrels)



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Statutes, cont.
Colorado Water Congress



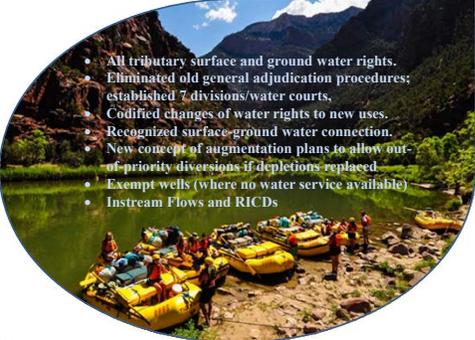
Founded in 1957 to address the diverse uses and stakeholders with a minimal supply of water and bring water users together in a nonpartisan structure.

State Affairs Committee: members from all professions



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Statutes, cont.
1969 Water Right Determination and Administration Act



- All tributary surface and ground water rights.
- Eliminated old general adjudication procedures; established 7 divisions/water courts.
- Codified changes of water rights to new uses.
- Recognized surface-ground water connection.
- New concept of augmentation plans to allow out-of-priority diversions if depletions replaced.
- Exempt wells (where no water service available)
- Instream Flows and RICDs



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Statutes, cont.
1965 Ground Water Management Act



- Nontributary ground water [statutory definition (C.R.S. § 37-90-103(10-5)]
- Denver Basin nontributary ground water [nontributary ground water (C.R.S. 37-90-103(10-5) excluding land ownership)]
- Ground Water within Designated Ground Water Basins [statutory def. -103(6)(c)] Ground Water Commission
 - [allocated based on modified prior appropriation system that recognizes depletion of resource is necessary to allow economic development of finite resource] [Eastern Plains]
- State Engineer [statutory] [well permits]



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Statutes, cont.
TRENDS



- Ground water connection and wells
- Easing water court burdens/transaction costs
 - changes of water rights
 - rotational leasing
 - protection from re-litigation
 - promote storage
- Environmental/ instream uses

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Courts

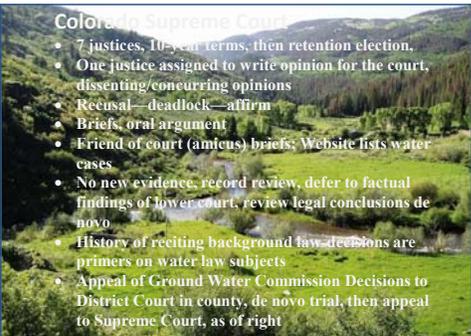


Water Court

- Water courts (unique) Seven divisions.
- Jurisdiction: (tributary and non-tributary water outside of designated basins)
- Judges, referees-role of District Engineer in referee-consultation process, consent decrees
- Water courts adjudicate water rights, right to use water in accordance with its priority
- Do not determine ownership, do not "grant" water rights- Constitution
- Direct appeal to Colorado Supreme Court as of right (no cert. petition)

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Courts, cont.



Colorado Supreme Court

- 7 justices, 10-year terms, then retention election.
- One justice assigned to write opinion for the court, dissenting/concurring opinions
- Recusal—deadlock—affirm
- Briefs, oral argument
- Friend of court (amicus) briefs; Website lists water cases
- No new evidence, record review, defer to factual findings of lower court, review legal conclusions de novo
- History of reciting background law—decisions are primers on water law subjects
- Appeal of Ground Water Commission Decisions to District Court in county, de novo trial, then appeal to Supreme Court, as of right

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Courts, cont.



TRENDS

- Anti-speculation; emphasis on diversion for beneficial use to prevent hoarding
- Reluctance to recognize instream/environmental uses and public trust concepts
- Strict no-injury requirements for changes of water rights/augmentation plans
- Presumption that ground water is tributary; higher standard of proof for non-trib.
- Protection of existing designated ground water basins

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Administrative / Executive

State Engineer, Division Engineers, Water Commissioners

- Rulemaking (CCR)
 - Division Rules; Compact Rules
 - SEO Rules related to well permits and ground water (Denver Basin and non-trib. Rules)
- Administrative
 - Curtailment
 - Futile call determination C.R.S. 37-92-502
 - Abandonment lists for each Division
 - Water rights tabulation
- Quasi-adjudicatory
 - Well permit decisions
 - Consultation with referee and may participate as party




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Administrative / Executive, cont.

Ground Water Commission and Local Ground Water Management Districts




- Designated Ground Water within Designated Basins
- Commission determines ground water rights; SEO issues well permits confirming rights
- Rules regarding determination of rights within designated basins CCR
- Hearings for contested water rights
- Hearing Officer Initial Decision, Commission review, appeal to Dist. Ct. (new trial), Supreme Ct.
- Local Ground Water Management Districts: regulating and conserving ground water resource
- Local District Rules (exportation, replacement plans, well spacing, etc.)

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Administrative / Executive, cont.
Colorado Water Conservation Board (CWCB)

- Appropriate Instream Flow/Natural Lake rights
- Review Recreational In-channel Diversions (RICD)
- Policy: State Water Plan
- C.R.S. 37-92-102; -103



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Questions?



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