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Cynthia F. Covell, Joanne Herlihy, and William A. Paddock, *Fundamentals of Water Law in Colorado: Protecting Water Rights, Use and Quality*

## BOOK NOTES

CYNTHIA F. COVELL, JOANNE HERLIHY, AND WILLIAM A. PADDOCK,  
FUNDAMENTALS OF WATER LAW IN COLORADO: PROTECTING  
WATER RIGHTS, USE AND QUALITY, National Business Institute,  
Inc., Eau Claire, WI (2001); 129pp; \$63.00; 01S0705, softcover.

This book is designed to aid faculty teaching a Continuing Legal Education Course on Colorado Water Law. As such, it is straightforward and easy to understand. *Fundamentals of Water Law in Colorado* is divided into five sections, leading the reader from a description of Colorado's approach to water law to recent cases and statutory amendments.

Section I on *Historical Development of Colorado Water Law* is written by Ms. Herlihy, and reviews the fundamental principles of water law in the state. These include; (1) Colorado follows the prior appropriation system; (2) water rights are property interests and the use of water may be changed; and (3) water rights in Colorado are protected through a variety of legislative and judicial measures. The prior appropriation doctrine (known as "First in Time, First in Right") states that acquisition of a water right takes place through diversion of water and the application of that water to a beneficial use. This right can be lost through non-use or abandonment. The applicability of the doctrine is found in the Colorado Constitution, which guarantees the right to appropriate unappropriated waters and place them to beneficial use. Beneficial use is an evolving standard. The concept is defined broadly, allowing for change over time and providing for optimal use of the state's scarce water resources. Determining the right to use groundwater (as opposed to surface water) begins with a determination as to whether the groundwater is tributary or non-tributary to a body of surface water. Tributary groundwater is allocated through the prior appropriation doctrine as protected by the Colorado Constitution. The right to use non-tributary groundwater is determined by statute. Colorado has seven water divisions, correlating to the seven river basins originating in the state. Each division has a designated Water Court with a presiding water judge. Any change in a water right, other than a change of ownership, must be adjudicated in the proper water court. A right may be acquired or changed in place of use, time, or type of use, as long as the change does not injure other vested water rights. Senior water rights are always protected.

Section II, *Water Rights Acquisition and Protection*, written by Mr. Paddock and Ms. Covell, discusses the nature of the property interest acquired through a water right and protection of that interest. Water rights in tributary water are described by statute as "a right to use in

accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same." A water right may be bought, sold, or transferred separate from the land on which the water is used. Water rights are entitled to protection from any injury incident to changes in other's water rights. Abandonment of a water right consists of the non-use of the right combined with the intent to permanently discontinue its use. Abandonment results in the loss of the water right. Section II includes pointers on evaluating the title and usefulness of a water right, followed by a discussion on when and how to change a water right. Non-use of water leads to the loss of the water right or a reduction in the amount of water allowed under the right. To protect the right, the amount necessary under the right should consistently be diverted and applied to beneficial use. In times of drought, junior rights are curtailed in favor of senior rights.

Section III, *Issues Affecting Water Availability*, written by Ms. Herlihy, addresses federal reserved rights, interstate compacts, instream uses, and access to water. The federal government has a reserved right to water on federal lands reserved from the public domain. This right is to previously unappropriated water, and is for the minimum amount necessary to accomplish the purpose of the federal reservation. State courts have the authority to determine the validity of these federal claims. Compacts between states equitably apportion the right to rivers flowing between the states. The Colorado Water Conservation Board is vested by statute with the power to appropriate water to maintain minimum instream flows. Section III ends with a discussion of the right to access water bodies for recreation or other uses.

Section IV, *Water Quality Regulation – An Overview of State and Federal Water Quality Control Programs*, by Mr. Paddock, takes a brief look at the regulatory controls over water quality. The federal law governing water quality is the Clean Water Act ("CWA"). The CWA uses two basic methods to control discharges into water sources: water quality controls and technology-based controls. Colorado uses the Colorado Water Quality Control Act to implement the requirements of the CWA. The section goes on to describe the various forms of regulation under the CWA and discusses key terms used in this area. Section IV closes with a look at discharge permits issued under the regulatory structure, and discusses whether compliance with a permit by an upstream user is proof that the water returned to the stream flow is acceptable for the needs of a downstream water right holder.

The final section of the book, Section V, *Recent Developments and Decisions*, by Mr. Paddock and Ms. Covell, contains brief descriptions of relevant cases decided in 2000, as well as synopses of legislative changes enacted during the year.

The book is a quick and easy introduction to water law in Colorado. It provides an understanding of the law and concepts at play in the field without overwhelming the reader.

*John P. Wood*