

# Introduction to Colorado Water Law

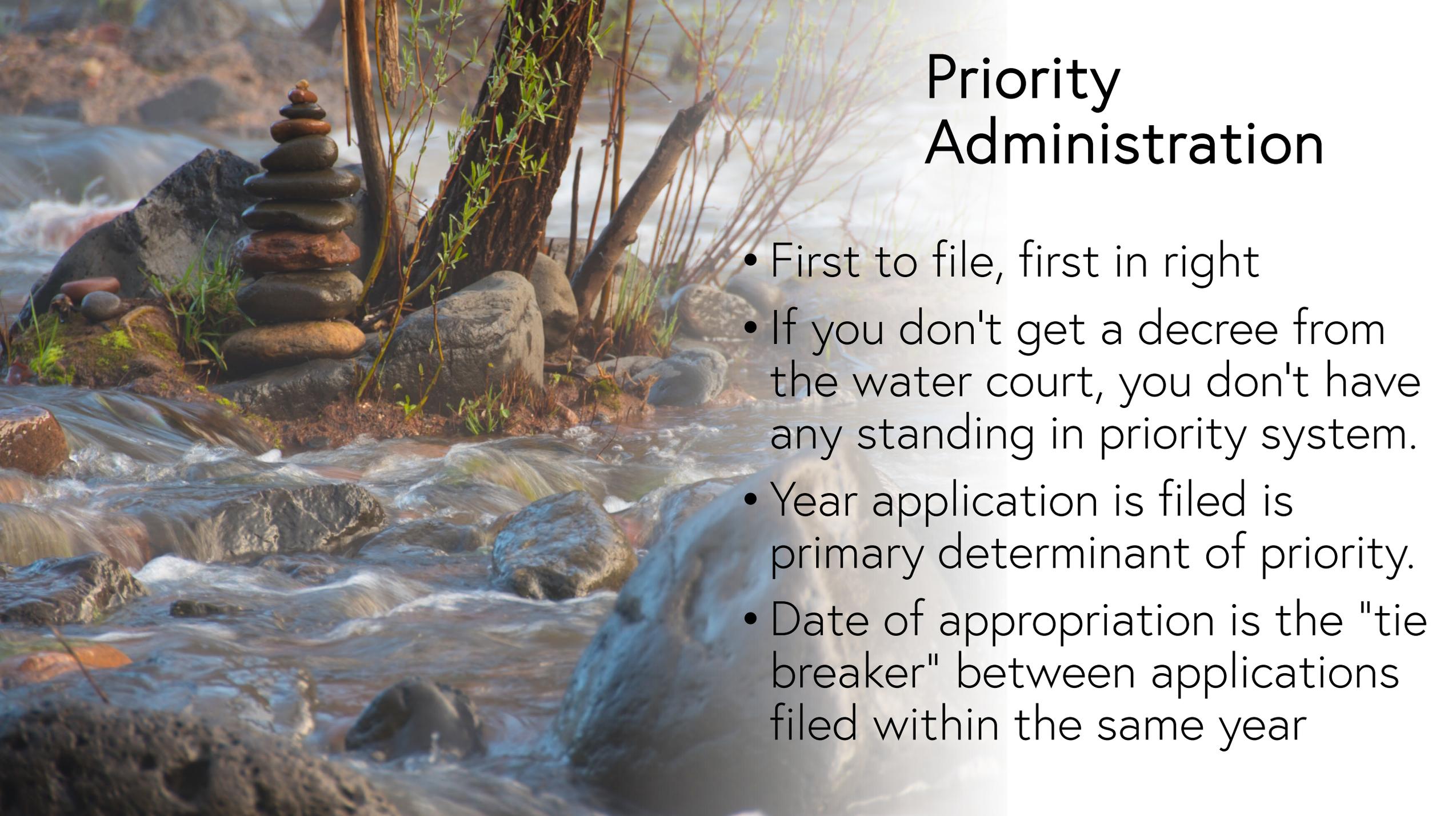
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# Public Ownership

Article XVI § 5 of Colorado Constitution says that water is the property of the public





# Priority Administration

- First to file, first in right
- If you don't get a decree from the water court, you don't have any standing in priority system.
- Year application is filed is primary determinant of priority.
- Date of appropriation is the "tie breaker" between applications filed within the same year

# Postponement Doctrine

- My upstream neighbor has irrigated a field since 1909
- My neighbor has never filed an application with the Water Court
- I diverted water from the same stream to irrigate a field in 2020 and I filed an application in June of that year
- My neighbor filed an application in March 2021



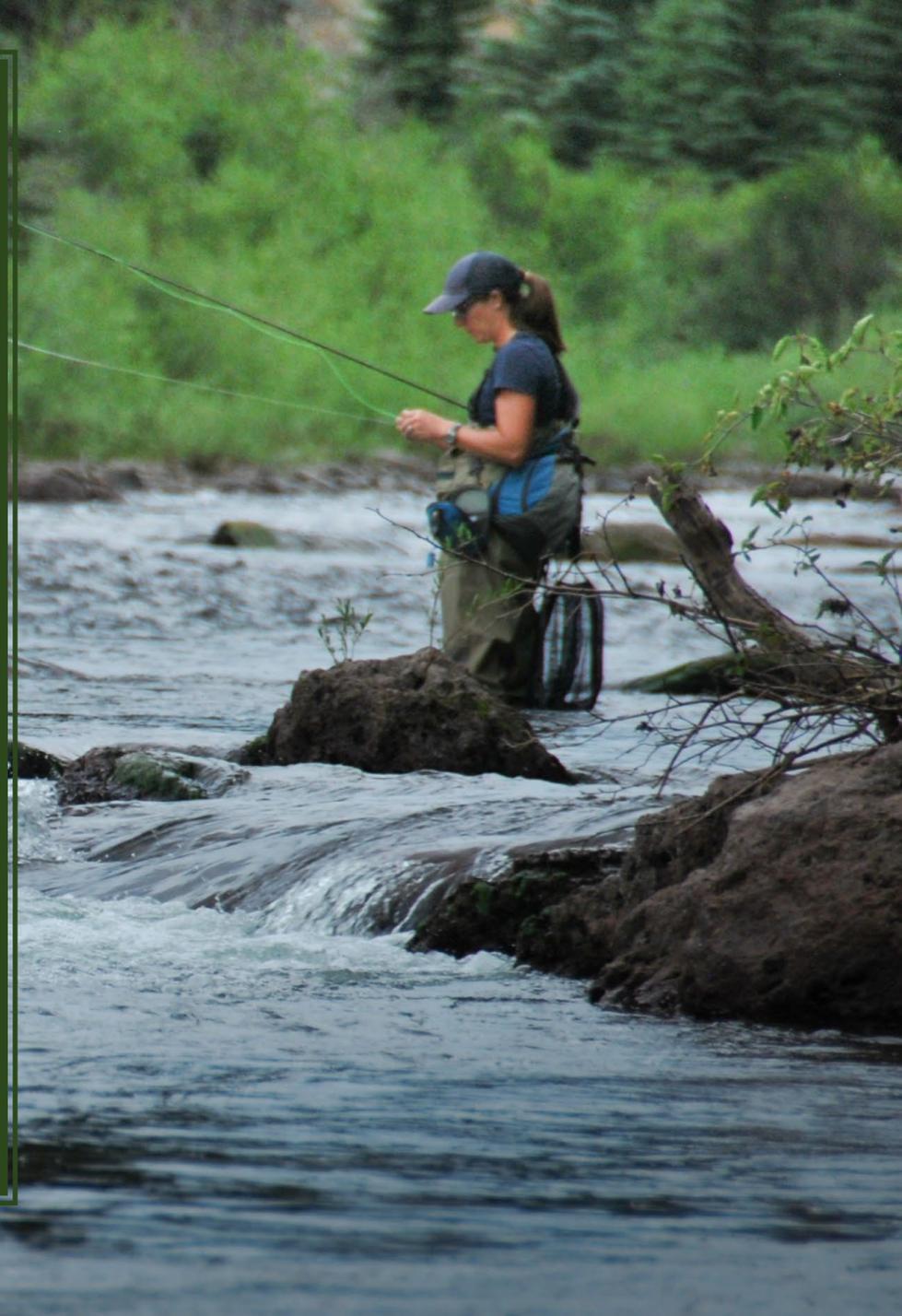
# Postponement Doctrine

- I would have a 2020 adjudication date
- My neighbor would have a 2021 adjudication date
- My water right would be senior to my neighbor's



# Postponement Doctrine

- My neighbor has irrigated since 1909
- I began irrigating from the same stream in 2020
- I filed my application in June 2020
- My neighbor saw my application and filed his own in December 2020
- We'd both have 2020 adjudication dates
- My neighbor's 1909 appropriation date would make him senior



# Conditional vs. Absolute Rights

- Absolute Right requires that water has actually been put to beneficial use
- Conditional Right – don't need to actually divert water, but need to take substantial step with intent to appropriate in the future
- Conditional rights are approved for 6 years: if you don't file an application for diligence or to make absolute they will be cancelled

# Conditional vs. Absolute Rights

- My neighbor has irrigated since 1909, but never filed an application
- I have never diverted water, but
- I walked my property to find a path for the ditch, and
- I hired a surveyor to shoot the grade for the ditch
- I filed an application in June 2020
- My neighbor filed an application in March 2021

# Conditional vs. Absolute Rights

- I would have a 2020 adjudication date
- My neighbor would have a 2021 adjudication date
- My water right would be senior to my neighbor's



It is all tributary



# Types of Water Rights

- Surface rights (ditches or springs)
- Groundwater rights
  - Conventional water wells
  - Pit Wells (any pond that intercepts groundwater)
  - (Nontributary groundwater – Front Range)
- Storage Rights

# Types of Beneficial Use

- Irrigation
- Stockwater
- Domestic
- Municipal
- Power generation
- Fire Control
- Industrial
- Commercial
- Recreation
- Snowmaking
- Augmentation
- Exchange
- 
- Irrigation = 85% of use
- Domestic/Municipal = 10%
- All others combined = 5%

# Quantity: Units of Measure

- Flow Rates:
  - Cubic Feet Per Second
  - Gallons Per Minute
- Volumetric Measures:
  - Acre-feet



# Scope of Water Right is Defined By the Decree

- Type of Use
- Quantity
  - Diversions
  - Depletions
- Timing of Use
- Place of use

# Changing Water Rights

- Can change use, timing, location of use, location of diversion, rate of depletion
- Advantage is that you retain the seniority of your adjudication date
- Have to prevent injury, even to juniors
- Limited to scope of historical use

# Changing Water Rights

- Preventing injury means leaving the stream in the same condition as when you used your original water right.
- New use cannot exceed scope of historical water right
  - Rate of depletion
  - Timing of depletion
  - Location of return flows

# Changing a Water Right Hypothetical

- Ranch Property near Gunnison River
- Springs used for irrigation since 1909
- Want to buy property and set up a guest ranch
- Will require changes in type of use, depletions, change in timing, and change in location of use

# Changing a Water Right Hypothetical

- Change of use:
- From irrigation to domestic and commercial
  - Change will result in change in rate of depletion associated with use
  - Fortunately, the new uses will have a lower rate of depletion than irrigation

# Changing Water Rights Hypothetical

- Change in timing
  - Irrigation only occurred during summer months
  - Domestic and commercial uses will occur year-round
  - Change will be permissible only during the irrigation season
    - diversions under the 1909 priority during the winter would be an expansion of use
  - Will need to file for a 2021 right for use during the winter months, with an augmentation plan using water from Blue Mesa Reservoir

# Changing Water Rights Hypothetical

- Change in location
  - Possible problem with timing of return flows
  - Potential for problem with return flows going to different stream

# Augmentation Plans

“A detailed program... to increase the supply of water available for beneficial use... by the development of new or alternate means or points of diversion, by pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means.....”

C.R.S 37-92-103(9)

# Augmentation Plans



My definition: A plan that lets you divert water when you would otherwise be subject to a call by providing a supply of water to offset your out-of-priority depletions

# Augmentation Plans

## Some Common Triggers

- Underground Water Wells (due to delayed impacts)
- Domestic Use (because use must be reliable)
- Fish Ponds
- Gravel Pits that intercept groundwater

# Augmentation Plans

## Three Common Sources of Augmentation Water

- Third Party Reservoirs
- On-site Augmentation Ponds
- Irrigation Dry-Up Credit



# Temporary Substitute Water Supply Plans

- Useful when the depletions will be temporary, or when you need a plan in place within a short time frame
- Three types:
  1. SWSP Tied to an Augmentation Plan (C.R.S. § 37-92-308(4)(a))
  2. Stand-Alone SWSP (C.R.S. § 37-92-308(5)(a))
  3. Gravel Pit SWSP (C.R.S. 37-90-137(11)(a)(I))



# Temporary Substitute Water Supply Plans

1. SWSP Tied to an Augmentation Plan
  - Filed with Division of Water Resources (not water court)
  - 30 Day Public Notice
    - Statewide list, or
    - Opposers in water case
  - 1 Year Term
  - 3 Year Max
    - Extendable in 4<sup>th</sup> and 5<sup>th</sup> year by Division Engineer upon proof of justifiable delay in water court
    - Beyond 5 years requires water court approval



# Temporary Substitute Water Supply Plans

## 2. Stand-Alone SWSP

- Filed with Division of Water Resources (not water court)
- 30 Day Public Notice to Statewide List
- 1 Year Term
- 5 Year Max, no extensions
  - Depletions cannot extend beyond 5 years



# Temporary Substitute Water Supply Plans

3. Gravel Pit SWSP
  - Older statute
  - Two-year terms
  - Indefinite renewals

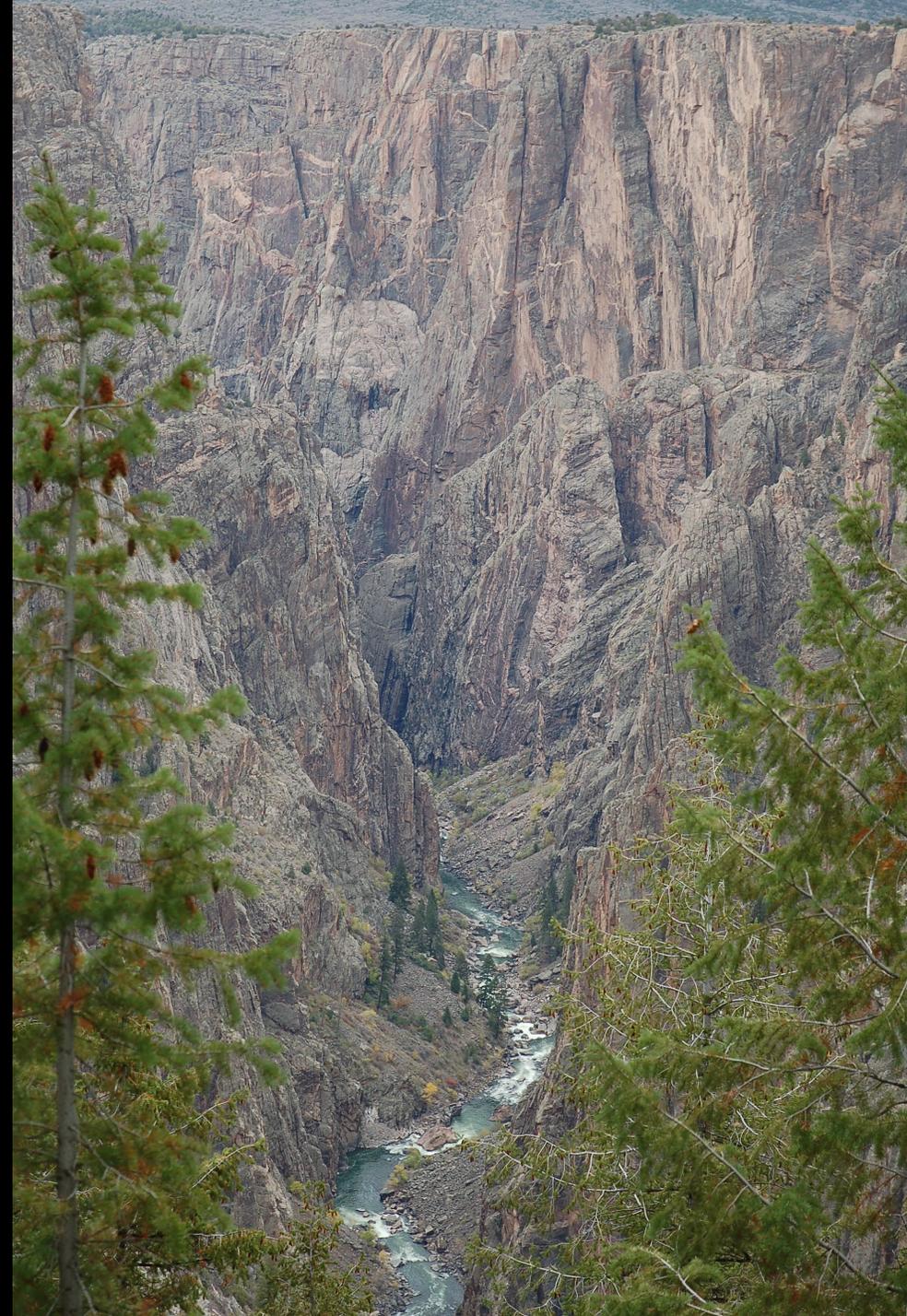
# Abandonment

- Two types:
  - Division Engineer's Decennial Abandonment List (C.R.S. § 37-92-401)
    - Division Engineer prepares a list of potentially abandoned water rights every ten years (July 1 of each "zero" year)
    - By statute, 10 years of nonuse creates presumption of abandonment, but only for purposes of the Decennial Abandonment List
    - Public Notice and process to object.
    - Division Engineer's list sent to Water Court by December 31, of the following year (the "one" year)
    - Water Right owners can oppose abandonment in court



# Abandonment

- Two types:
  - Private Abandonment Action
    - Evidence must show that water user had intent to abandon the water right
    - No specific time limit – fact dependent. (Although 10 year presumption from Decennial process may carry some weight).



# Well Permits

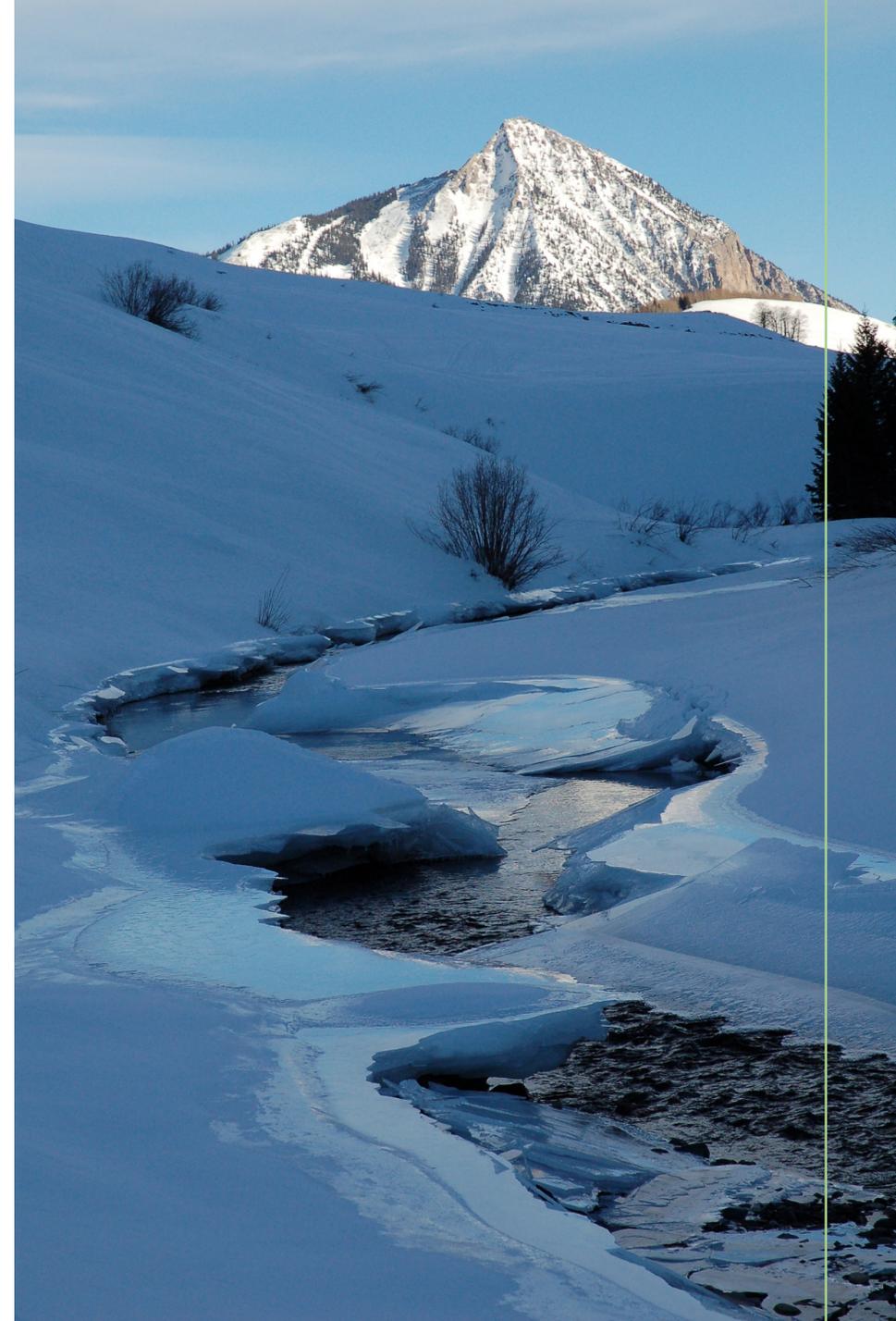
- Separate from Water Court process
- Well permit necessary any time you will intercept groundwater
  - Conventional, cased water well
  - Pit well
- Domestic Exempt Well: Subject to certain requirements, 15 g.p.m. for in-house use, possibly for stockwatering and up to 1 acre of lawn and garden irrigation
- Commercial Exempt Well: Subject to certain requirements, 15 g.p.m. for domestic and sanitary uses in commercial business.



# Water Court Process

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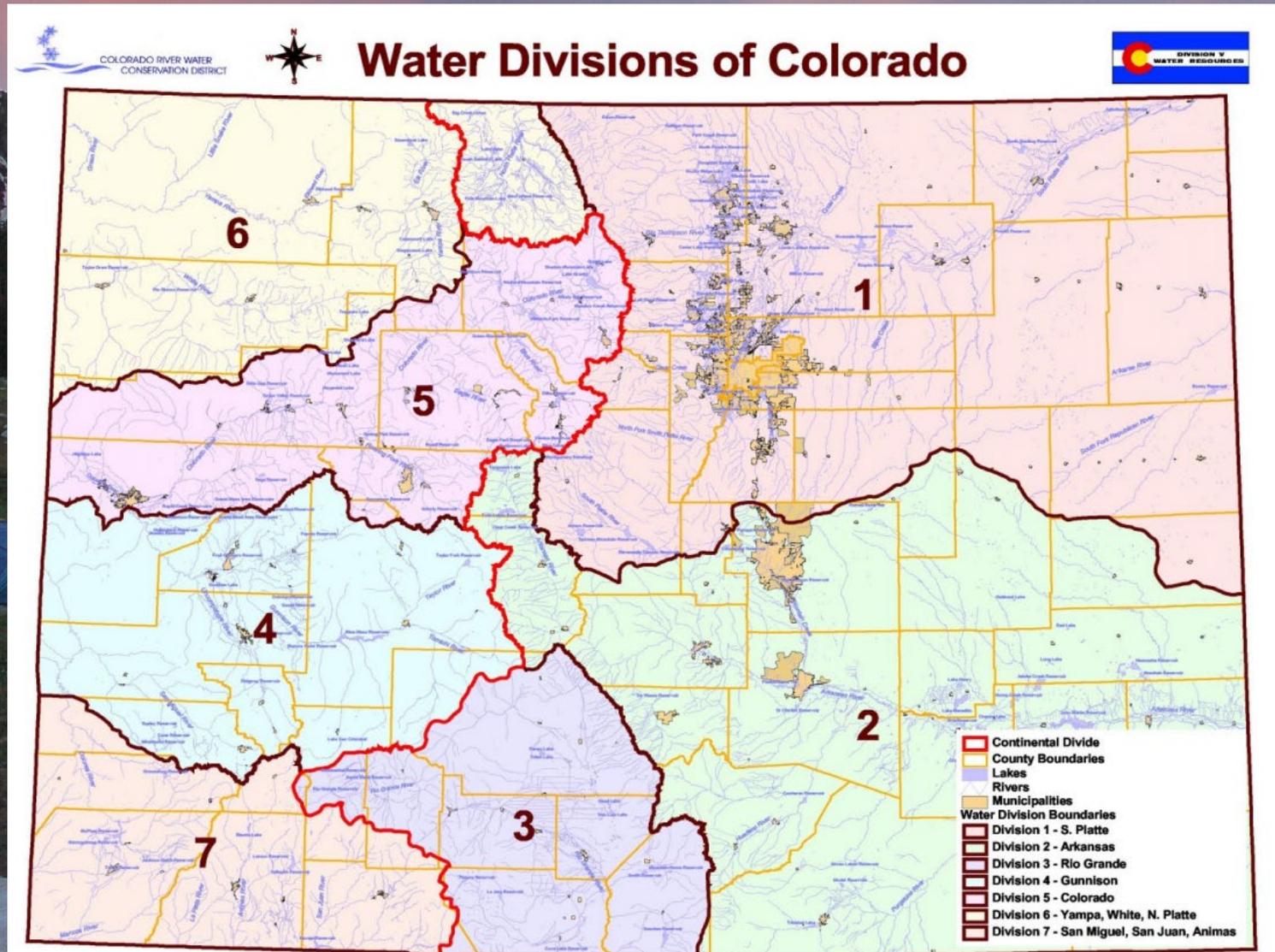
- File application
- Notice published in local paper
- Judge refers case to Referee
- Other water users have until end of second month to file statement of opposition
- Division Engineer meets with Referee to discuss administration of requested water right
- Applicant seeks to address concerns of opposers and Division Engineer
- Opposers sign stipulation or one of the parties asks Referee to re-refer to the Judge
- Once re-referred, cases are set for trial and proceed on a litigation track



# Role of Division of Water Resources

- The Division of Water Resources enforces the law and administers water rights
- Colorado is divided into 7 Water Divisions, based on the State's major water basins.
  - Division 1: Platte River
  - Division 2: Arkansas River
  - Division 3: Rio Grande River
  - Division 4: Gunnison River
  - Division 5: Colorado River
  - Division 6: Yampa, White, N. Platte Rivers
  - Division 7: San Miguel, San Juan, Animas Rivers

# Role of Division of Water Resources



# Role of Division of Water Resources

- Division Engineer runs each Division
- Water Commissioners are on the ground, administering water rights within each District
- Authority only extends to headgate on the natural waterway (with exceptions)



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