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Stock Watering and Instream Flow – What Does HB 20-1159 Affirm?

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House Bill 20-1159 (C.R.S. 37-92-502(2)(c)), which went into effect September 14, 2020, directs the state engineer of the Colorado Division of Water Resources (DWR) to confirm a claim of an existing beneficial use – including stock watering - if the use or exchange has not been previously confirmed by court order or decree. The new law affirms that Colorado Water Conservation Board's appropriation of water to support instream flow is subject to existing uses and exchanges of water “whether or not previously confirmed by court order or decree.”

To obtain confirmation of an existing stock watering use, a claimant must provide records supporting the claim of use and the date when it was established. The state engineer is required to confirm the extent of the claimed unadjudicated use (or exchange of water) that was in existence on the date of the appropriation of an instream flow right. The confirmation of an existing use is not a water right, however, the law does not require or prohibit a water user from seeking water court confirmation or adjudication of a preexisting use or exchange. In other words, even if you receive confirmation from the state engineer that your un-decreed water use pre-dates an instream flow right, you may decide it is in your best interest to work toward getting a water right decree for the use.



Photo: Doug Monger

Background

The issue of whether un-decreed uses were senior to instream flow rights arose in Routt County during the drought year of 2012. The Division 6 Engineer directed irrigators to stop watering livestock out of irrigation ditches once the irrigation season ended if their water rights did not specify “stock watering” as a decreed use.

The stock watering shutdown order was intended to support instream flow. In 1973, Colorado’s legislature authorized the Colorado Water Conservation Board (CWCB) to appropriate water rights to support instream flows and natural lake levels in order to preserve or improve the natural environment

to a reasonable degree. The CWCB can file for new appropriations or purchase existing water rights, or receive temporary loans of water rights.

Many livestock producers have historically used irrigation ditches and streams to water their livestock, both during and outside of the irrigation season. Often, stock water use was not specified in an irrigation water right decree because the use was considered incidental and the practice was common. The Division of Water Resources (DWR) held that this practice was not allowable outside of the irrigation season if the river was under administration (such as an instream flow call) unless a rancher had a decreed stock water right and the right was senior to the instream flow right.

HB 20-1159 protects a rancher's historical but un-decreed stock watering usage against being called out of priority by junior instream-flow rights (once confirmation of an existing stock watering use has been affirmed by the DWR). However, it does not establish seniority in relation to any water right except an instream flow right. It also does not prevent a junior decreed water right from calling out the confirmed but un-decreed use.

Some questions also remain. The DWR may or may not allow stock watering from irrigation ditches outside the irrigation season, however, other than in Division 3, there is currently no definition of what constitutes an irrigation season. In Division 3 - under C.R.S. 37-92-501(4)(b)(II) - the Division 3 Engineer sets the irrigation season dates each year.

It is not uncommon for ranchers to continue irrigating after a hard frost ends the growing season so that they can fill the soil profile before the ground freezes up. This way, water is already available to pasture grasses at the onset of Spring.

It is also currently unclear whether a water user can pre-emptively request a finding of existing use, or if the determination is made in response to a call by an instream flow right. The DWR is currently working to develop a process document to guide how determinations will be made. Either way, a water user will need to supply the state engineer with records of use, underscoring the value of keeping good records of all types of water use.

In summary,

- There is absolute clarity and law confirming that historic uses which were taking place prior to a filed instream flow are senior to the instream flow right.
- There is not clarity and law that indicates historic livestock water use, if not adjudicated, is senior to any non-ISF right. Thus, a non-decreed livestock watering use can potentially be called out by any non-ISF call, regardless of the date of the calling right.

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