

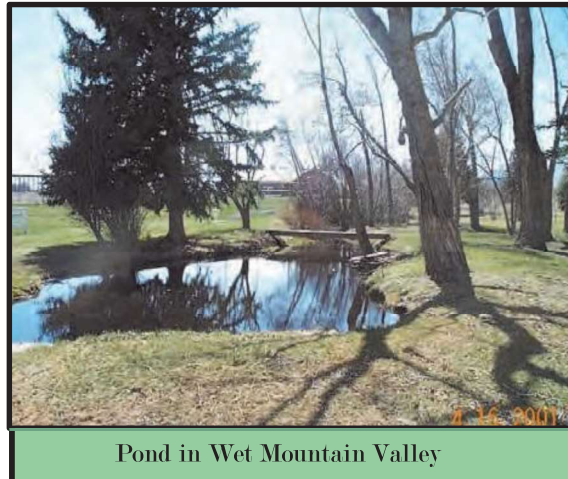
## Can I Build a Fishpond?

You may be thinking how nice it would be to have a little scenic pond stocked with a few fish on your property, and may be wondering how difficult this would be to accomplish. It would be simple enough to get a backhoe on the land, and excavate a depression in the ground, suitable for holding water. Surely creating a little pond couldn't be much of a problem! However, the following issues can arise and must be addressed.

Exposing ground water – When excavating for a pond, there is the possibility of exposing ground water, especially in areas with a shallow water table. If this occurs, by statutory definition, a well has been constructed. A well permit from the State Engineer would be required, and all of the laws associated with well construction and ground water use apply (see section titled, “*Glossary of Terms*” for a definition of *Well* in this guide). If the pond is in an over-appropriated area of the state, a permit would not be issued unless the pond well was operated pursuant to a court-approved plan for augmentation, to offset all depletions caused by evaporative losses of water from the pond, as well as any other consumptive uses of water (see section of this guide titled, “*What is an Augmentation Plan*” for more information on plans for augmentation). Developing plans for augmentation can be difficult and costly, and will normally require the services of a water resource consulting engineer and water attorney.

Storage rights – In order to store water in a pond, a water storage right must be obtained from the water court (see sections of this guide titled, “*Water Rights in Colorado*” and “*How do I Obtain a Water Right?*” for more information). Most of the state's natural surface drainage systems are over-appropriated by senior vested water rights. In simplistic terms, this means that there are more decreed water rights claims

on the system than can be satisfied by the physical amount of water available. Therefore, under the priority system (“first in time, first in right”), when the most senior rights are making a call for water, the most junior rights have to curtail diverting until the calling senior rights are satisfied. A new storage right would be so junior, that in an over-appropriated drainage system,



Pond in Wet Mountain Valley

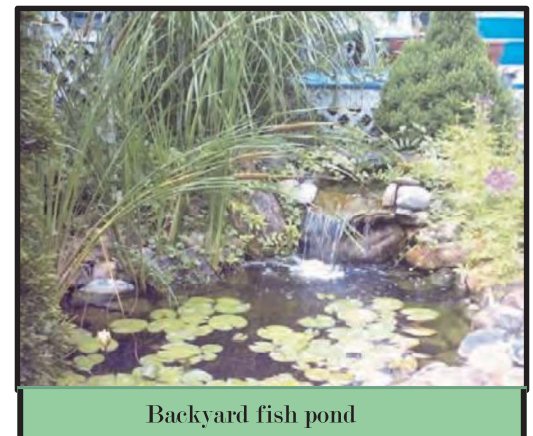
there may be few or no times of the year when water could be legally diverted in priority into the pond. To overcome this problem, a court-approved plan for augmentation would be required. Ponds built on stream channels in over-appropriated areas must be capable of passing all incoming flows, having their water levels regulated, and of being completely drainable. If the pond is determined to be a well, a storage right cannot be granted. If a pond is lined and the liner is approved by the State Engineer, the pond would be allowed to store water and obtain a water right.

Filling ponds with ground water - Filling a pond from a well is not allowed unless the approved uses of the well specifically allow this use. Most wells cannot lawfully be used for pond filling. The well permit should be referred to for specific uses allowed. If there is any question as to the allowed uses from a well, you should contact Ground

Water Information of this office at 303-866-3587 for clarification.

Impounding water above the natural ground surface – The property owner who wants to excavate a small pond may be thinking that the excavated material could easily be mounded up to form a dam with the intent to impound water behind it. Impounding of water above the natural ground surface constitutes the creation of a dam, and opens up a whole new array of issues. There are specific statutes that address the construction of jurisdictional and non-jurisdictional dams, livestock water tanks, and erosion control dams. For more information on this subject, please refer to the website of the Division of Water Resources' Dam Safety Branch at <http://www.water.state.co.us/damsafety/dams.asp> or contact the branch by telephone at 303-866-3581.

In summary, there are a number of issues that must be addressed with regard to building a fishpond. Therefore, it is imperative that these issues are addressed prior to construction. Ponds that are out of compliance with state statutes and rules and regulations are subject to orders being issued by the State Engineer to drain the pond or other measures taken to bring the structure into compliance with state law.



Backyard fish pond

## Water Rights in Colorado

Water rights in Colorado are unique compared to parts of the eastern United States. The use of water in this state and other western states is governed by what is known as the prior appropriation system. This system of water allocation controls who uses how much water, the types of uses allowed, and when those waters can be used.

A simplified way to explain this system is often referred to as the priority system or "first in time, first in right." An appropriation is made when an individual physically takes water from a stream or well (when legally available) and puts that water to some type of beneficial use. The first person to appropriate water and apply that water to use has the first right to that water within a particular stream system. This person, after receiving a court decree verifying their priority status, then becomes the senior water right holder and that water right must be satisfied before any other water rights are filled.

For example, three water users exist on a stream system with adjudicated (court approved) water rights totaling five cfs (cubic feet per second). The user with the earliest priority date has a decree for two cfs, the second priority has a right for two cfs, and the third priority right has a decree for one cfs

of water. When the stream is carrying five cfs of water or more, all of the rights on this stream can be fulfilled. However, when the stream is carrying only three cfs of water, priority number three will not receive any water, with priority number two receiving only half of their right. Priority number one will receive their full amount of two cfs under this scenario. This process of allocating water to various water users is traditionally referred to as water rights administration, and is the responsibility of the Division of Water Resources.



Diversion Structure on Crystal Creek

Of course, the appropriation system is much more complicated than this. Some priorities on major stream systems in Colorado date back to the

1850's, and most of the stream systems have been over-appropriated, meaning that at some or all times of the year, a call for water by a senior appropriator is not being satisfied since the 1890's. The example above does, however, describe the basic theory behind the system.

How does this affect you? Practically speaking, it means that in most river drainages, a person cannot obtain an underground water right or non-exempt well without a plan for augmentation that replaces the depletions associated with that diversion. Surface water appropriations may still be allowed if they can be physically shut off when a senior water right is calling for water. Domestic surface water rights (ditches or pipelines), that do not have augmentation or sources of water replacement, are discouraged in over-appropriated basins. To do so would place the rights of existing water users on a stream system in competition with new housing developments that need a reliable source of water to meet their daily household needs. For the most part, only small residential and livestock wells are exempt from water rights administration that meet strict criteria set forth by the legislature and are allowed to be drilled without providing for protection to senior water rights.

## How Do I Obtain a Water Right?

In Colorado, the process for obtaining a water right is complex, oftentimes requiring a water lawyer and/or water resource engineer to assist in the process. This guideline is provided to give you a general idea of the process. It is not intended to replace professional legal or engineering advice. In most cases, it is recommended that you seek the assistance of an attorney.

In order to initiate an appropriation in Colorado, the user must first show an intent to divert water, put the water to beneficial use, and demonstrate the intent to divert in an open, physical manner. The physical act must be sufficient to put other parties on notice. Oftentimes, field surveys, posting at

the diversion point, or filing for a well permit application can be considered sufficient physical notice of the intent to appropriate.

After this has been accomplished, it is advised to file a water right application with the water court in the river basin in which the diversion or proposed diversion exists to verify your place in line within the priority system. Forms for water rights applications can be obtained from Bradford Publishing, located in Denver, from the specific water court, or from the website <http://www.courts.state.co.us/Courts/Water>. The fees for filing applications or opposition in the court can be found on this web page.