

GENERAL OVERVIEW OF WATER RIGHTS IN CHILE

1. Applicable legislation to Water Rights in Chile.

Chilean water rights are basically ruled by the Political Constitution of the Republic ("**Constitution**"), the Water Code (*Código de Aguas*, "**CA**"), the Decree No. 203 passed by the Ministry of Public Works that approves the Exploitation and Exploration Underground Water Rules, and the Supreme Decree No. 1,220 that approves the Administrative Rule of the Public Water Cadastre (*Catastro Público de Aguas*, "**CPA**").

According to Chilean law, water is a national asset of public use in respect of which private entities and individuals may obtain water rights. Water rights are property rights over the water that entitle the holders extract and use a certain flow of water as established by the General Water Bureau (*Dirección General de Aguas*, "**DGA**"), in the resolution granting the right.

Water rights are property of the holder and are protected by the Constitution (*Constitución Política de la República*, "**CPR**"), and may be subject of alienation and liens in the same way as registered landed properties.

2. Essential characteristics of Water Rights.

According to article 1 of CA, waters are divided into maritime and terrestrial, but CA provisions are only applicable to terrestrial waters that may have a surface or underground nature. For its part, water rights are classified by the CA according to their essential characteristics, which determinates the way to exercise thereof. Therefore, according to the terminology used by the CA, water rights may be consumptive or non consumptive, permanently or eventually exercisable, and continuously, discontinuously or alternately exercisable.

Surface and underground water: surface waters are those that are naturally at man's sight. These may be at the same time, streams, if they drain through natural or artificial channels, or reserves, if they are collected in natural or artificial deposits such as lakes, lagoons, ponds or reservoirs. Underground waters are those that are hidden in the earth and have not been exposed.

Consumptive or non-consumptive rights: consumptive rights are those that authorize the holder to totally consume the water in any activity. On the contrary, non-consumptive rights are those that allow the use of water without consuming, being mandatory to return it to the source in the manner established in the right acquisition or constitution title.

Permanently or eventually exercisable rights: permanently exercisable rights are those that authorize the holder to use the water in the corresponding amount, unless the relevant source of supply does not have a sufficient flow to satisfy all permanent water rights existing in such source, in which case the intake of these water rights ought to be reduce on a pro rata basis. All other rights are eventually exercisable, as they authorize the use of the water only when the source flow has a surplus after supplying all permanently exercisable rights and other eventually exercisable rights previously granted.

Continuously, discontinuously or alternately exercisable rights: continuous water rights authorize the use of water without interruption 24 hours a day, 365 days a year; discontinuous rights are those in which water may be only used during certain periods; and alternatively exercisable rights are those in which the use of the water is distributed among two or more people according to successively shifts.

3. Acquisition of water rights in Chile.

Water rights are originally awarded by the DGA, through a founded resolution, through an administrative procedure in which it must be proven that there is availability of hydro resources and that the new water rights to be constituted shall not affect already existing rights belonging to third parties.

The resolution by the DGA is effective as of the date on which the General Comptrollership of the Republic (*Contraloría General de la República*, "CGR") has acknowledged the constitutionality of said resolution; in other words, when it has been checked that the resolution was passed pursuant to law.

The resolution of the DGA awarding a water right, its constitutionality duly acknowledged by the CGR, must be drawn up as an instrument of public record, which must be registered in the Water Property Registry (*Registro Público de Aguas*, "RPA") of the relevant Real Estate Custodian (*Conservador de Bienes Raíces*, "CBR"). Only as of that registration will the holder or holders of the constitutive resolution (those on behalf of whom the resolution was issued) shall acquire possession of the corresponding water rights.

On other hand, water rights may be object of transference, transmission and acquisition trough statute of limitations according to Civil Code general provisions.

4. Registry at the Public Water Cadastre.

According to article 122 of the CA, "*the General Water Bureau shall keep a Public Water Cadastre that must register all the information relating to them*". On this cadastre, water rights are registered by the holder's remission to the DGA of the registration in the RPA of the CBR of the relevant water right.

Although water rights possession is acquired through their registration in the RPA, registration at the Public Water Cadastre enables the holder to submit different proceedings before the DGA and other State Agencies. In this regard, second section of article 33 of the Public Water Cadastre establishes that: *“the General Water Bureau will not receive any application relative to the mentioned water rights, such as those presented in order to obtain authorizations for the construction, modification, changes or unification of intake points, referred in article 151 and following of the CA; or to obtain a water supply source transfer, referred in article 158 and following of the CA; or to obtain the authorization for water rights exercise transfer, referred in article 163 of the same Code; or in general, any application relating the right, including the presentations referred in article 132 and following of the CA, unless the interested exhibit an authorized copy of the relevant registration on the Public Water Cadastre”.*

In the same vein, the seventh section of article 122 of the CA establishes the obligation for the holders to register the water rights in the public register of water rights of the Public Water Cadastre. In respect of non registered rights on such register, *“it is not possible to initiate any act regarding them before the General Water Bureau neither the Superintendency of Sanitary Services”.*

5. **Rights and obligations or duties associated to water rights.**

➤ **Right and obligation to obtain necessary easements for water rights exercise.**

According to article 25 of the CA, *“water rights involve, by law, the ability to impose all the necessary easements for their exercise, notwithstanding the relevant compensations”.*

Thus, water rights holder may establish on its behalf a pipeline easement, for example, in order to conduct the waters that has the right to use from his intake point to the place

where they will be used and, afterwards if applicable, to the point where those waters should be discharged.

➤ **Minimum ecological flow.**

According to the first section of article 129 bis 1 of the Law No. 20.2017 of 2005, that introduces modifications to the CA ("**Law 20.017**"), notes that *"granting water rights, the General Water Bureau should veil for natures preservation and environmental protection, establishing on that purpose a minimum ecological flow, that will only affect new granted water rights, and should also consider the relevant natural conditions for each surface source"*.

Minimul ecological flow is established on the granting resolution of the water right and, therefore, should be respected by the holder.

➤ **Other obligations.**

According to article 149 of the CA, water rights granting resolutions of the DGA may establish *"other technical specifications related with the special nature of the relevant right and the modalities that affect them, in order to preserve the environment or protect third parties rights"*.

A pertinent example is that a specified water flow must be left free permanently to run on the water course, in order to preserve the ecological equilibrium of the area.

6. Payment of fee for non use of a water right.

Law 20.017 introduced modifications to the CA, establishing, among other matters, the duty of payment of an annual public fee for those water rights that their holders have not

been constructed their intake and discharge works. These water rights will be affected to a payment in proportion of the non used part or their relevant flows.

According to the final section of the new article 123 bis 9 of the CA, intake works are understood as:

- a. Surface waters: those which entitles to incorporate the waters to channels and other water works, even when such works are temporary and periodically renewed.
- b. Underground waters: those which allows their exposure.

For every water right, the fee calculation is variable and depends on factors such as if their use is consumptive or not, if their exercise is permanent or eventual, and also their geographical location. The result of the fee calculation must be expressed in Monthly Tax Units (*Unidades Tributarias Mensuales*, “**UTM**”).

The fee's payment, according to article 129 bis 7 of the CA, will be done every year in the month of March, regarding the water rights that have not been used totally or partially in the immediately previous calendar year, in which case the DGA shall publish the resolution that contains the listing of the water rights subjected to this obligation, in the corresponding proportions, individualizing the right and its owner.

The publication will be done yearly, every January 15th, or the first immediate business day if the actual one was holiday, in the Official Journal; also in a prominent manner in a newspaper of the relevant province, and if there is none, in a newspaper of the relevant Capital's Region, considering this publication as a sufficient notification.

The nonpayment of the fee may provoke an auction procedure of the relevant water right.