

WATER CODE REFORM HAS BEEN ENACTED TO LAW

After 11 years of Congressional discussion, Law No. 21,425, which reforms the Water Code (the "Reform") was enacted into law by its publication in the Official Gazette on April 6, 2022.

Water Rights

The Reform reaffirms that water rights are real rights. However, water rights granted post Reform will be limited in time, as the concessions will be granted for 30 years and will be automatically renewed, unless the General Water Bureau ("DGA") sets out that the relevant water right is not being used effectively upon its expiration date or that a renewal could affect the sustainability of the water source.

Furthermore, the Reform added the concept of "public interest" as a requirement for the granting of new water rights.

Additionally, the Reform:

- Sets out that all water rights (even those preexistent to the Reform) are now subject to termination triggered by effective lack of use, with regards to the unused water flow, if their extraction and/or restitution works that allow their effective exercise are not built within 5 years (consumptive water rights) or 10 years (non-consumptive water rights) from their first inclusion in the DGA yearly list of water rights subject to payment of non-use taxes published from January 2023 onwards.
- Sets out a priority or preference for uses of water related to human consumption, basic sanitation, and subsistence, prioritizing them for the granting of water rights and exercise restrictions. Water rights may change their use, with a prior reporting duty, but such change of use is limited with regards to water rights used for human consumption or public health.
- Creates non-extractive water rights for environmental conservation or sustainable, recreational or sport tourism purposes, which would not be subject to the non-use taxes frameworks. Existing water rights may be reconverted to such category.
- Broadens the prohibition for the granting of water rights in glaciers and areas under official biodiversity protection and extends the

This news alert is provided by Carey y Cía. Ltda. for educational and informational purposes only and is not intended and should not be construed as legal advice.

Carey y Cía. Ltda.
Isidora Goyenechea 2800, 43rd Floor.
Las Condes, Santiago, Chile.
www.carey.cl

geographical area of such limitation for wetlands and marshes (vegas, bofedales, pajolanes) in the north of Chile.

- Sets out that water rights granted before the Reform, that are not registered at the Water Property Registry (“WPA”) kept by the relevant Real Estate Registrar (“CBR”) may expire if they are not registered within 18 months from the publication of the Reform in the Official Gazette, with certain exceptions.

Human right to water and sanitation

The Reform recognizes a human right to water and sanitation, setting out that the President of the Republic may create superficial or underground water reserves to be used for subsistence and the DGA may grant water rights for such uses, and provide such water reserves to water utility companies, to secure human consumption and public health.

Non-use taxes

A number of changes are introduced in the system of calculation for non-use taxes: every five years the tax amount will be doubled, indefinitely. Also, the Reform establishes that fee exemptions will exclusively benefit rural drinking water communities or associations, rural water utility companies, some agricultural communities, indigenous people or indigenous communities and non-extractive water rights.

New DGA functions for the redistribution of water

Whenever a water source does not have enough resources to satisfy all existing permanently exercisable water rights, and therefore, the overall granted flows need to be redistributed proportionally among all water rights, the DGA will have redistribution powers, but shall always prioritize human consumption, sanitation and domestic subsistence usages. This shall apply in areas where there is no user organization with distribution powers or where there is more than one organization, and one of them submits a request to DGA.

New DGA functions with regards to scarcity areas declarations

The Reform broadens the mechanism for the declaration of scarcity zones, as it provides DGA with special powers to intervene in the distribution of water and suspend the distribution powers of user organizations in qualified situations of extreme drought. Such

measures may be enacted indefinitely and grant DGA the power to impose redistribution measures to ensure the supply of water for human consumption, sanitation, or domestic subsistence usages, even in areas under the jurisdiction of a user organization.

Special presidential powers

The Reform allows the President of the Republic to grant water rights even if there are water resources available, for the purpose of securing subsistence or conservation usages.

Miner's water

With regards to the miner's waters (water found by mining concessionaries during exploration and mining operations, which may be used without the need of obtaining water rights, for the purposes of their mining concession) the Reform restricts their use exclusively to the mineral exploitation and introduces information and registry duties. Use of miner's water shall not affect the sustainability of the aquifer and its exercise may be limited if the relevant aquifer or third parties' rights are affected.

Underground water regulations

The Reform establishes the obligation to incorporate a user organization within a 1-year term counted from the declaration of a Prohibition Zone or a Restriction Area. Users who do not join such communities will not be authorized by DGA to request the intake point of their water rights.

Also, the Reform introduces an obligation for all owners of water rights located in prohibition or restricted areas to install monitoring systems that report their extraction data to DGA.

Should a "degradation of the aquifer that affects its sustainability", scenario occur, DGA is obligated to temporarily reduce the exercise of underground water rights.

The Reform sets out new requirements for the approval of underground water intake point relocations located in Restriction Areas or Prohibition Zones, as DGA shall verify that the requested relocation will not cause a decrease in the hydrological situation of the aquifer that could affect its sustainability or a serious risk of saline intrusion or affect third parties' rights.

Finally, under the Reform, recharge of aquifers with rainwater will be considered a natural recharge and there is no need of a reporting to DGA to implement it.

Minimum ecological flow

DGA may set out minimum ecological flows not only for new water rights, but also for existing water rights in areas under official biodiversity protection in qualified cases, and whenever an intake point relocation is requested.

Basins resources strategic plans

The Reform creates Strategic Plans of Water Resources that seek the promotion of water security in every water basin. Such plans will be public and must be updated every 10 years.

Regularization proceedings (2nd and 5th transitory articles)

The objective of the regularization's proceedings set out in the 2nd and 5th transitory article of the Water Code is to ensure that unregistered water rights are registered in the relevant WPA.

The Reform establishes a deadline under which these regularization proceedings may only be initiated within 5 years counted from the Reform's publication. Both proceedings shall be brought before DGA only and will not require judicial intervention or intervention by the Agricultural and Livestock Service, as was the case before the Reform. Regarding the procedure of the 2nd transitional article, the Reform introduces a consultation requirement to the relevant user organizations concerning the characteristics and ownership history of the water rights.

Authors: Alberto Cardemil