CÁMARA
CHILENO BRITÁNICA
DE COMERCIO

Doing Business in Chile
Guide 2025

WATER RIGHTS
(AND REFORMA CÓDIGO DE AGUAS)

Executive Summary

Water rights In Chile are classified as private property. This was a significant shift from the previous notion of water being a common good managed by the state. The 1981 Water Code established that water rights could be bought, sold, and transferred, like real estate.

The Chilean Government, through the National Water Directorate, is responsible for issuing water rights. Allocations are based on a catchment area's water availability and existing demand. Water rights are allocated for many economic and social uses such as agriculture, industry, mining, energy and recreation.

There are two main types of water rights: Concessions give rights to use water for specific purposes, such as irrigation or industrial uses, and are generally granted for an indefinite period but can be revoked if the rights are not used. Licenses allow temporary rights that are often granted for projects that require water use for a limited time.

Climate change has radically reduced annual rainfall in Chile, which now appears among the 20 countries with the highest water stress in the world[1].

Those industries which need to plan ahead and make large investments in water infrastructure, such as the agricultural, hydroelectric, industrial, mining, and sanitary sectors require legal certainty in the management of water resources.

The regulations governing water rights are designed to allow equitable and efficient use of these resources, allowing rational and sustainable water management.

This article provides an overview of water regulations in Chile, contained mainly in the Water Code and its recently enacted reforms, especially Law 21,435 of 2022. It explains the main characteristics of what are known as "individual water rights" and the process for obtaining them from the Water Authority, known as the Dirección General de Agua (DGA). It also describes situations which may lead to the termination of water rights.

It also reviews the administration and distribution of water, which is managed by individuals or organisations established for this purpose, given that the Water Code promotes self-management of hydrological resources.

Finally, some relevant aspects introduced by Law 21,435 of 2022 will be analysed, and some aspects of desalination, including an overview of the bill currently being discussed in Chile's National Congress.

1 https://www.wri.org/insights/highest-water-stressed-countries

WATER RIGHTS

Water rights are mainly regulated by DFL 1,122 of 1981 (referred to from now on as the "Water Code"). There are also other pertinent laws which focus on specific areas related to water rights, such as the Mining Code, which regulates the use of water found during mining activities.

Law No. 21,435 came into force in 2022, after 11 years of legislative process. It brings a major reform to the Water Code, substantially modifying some matters and incorporating new institutions ("Law No. 21,435").

Water rights issues can be complex and time consuming to resolve, and so should be considered early in any project planning by investors and developers. In recent years some foreign investors have found it difficult to secure the water resources needed to develop mining projects, especially in arid northern Chile.

In even more complex scenarios, projects that have been given the all-clear by the regulatory authorities have been criticised and even opposed by local water users and water-user organisations. Any feasibility study in this area should fully investigate the legality and availability of water rights, as well as the social implications that could arise.

MAIN CONSIDERATIONS REGARDING WATER RIGHTS IN CHILE

Legislation has always considered water as part of a special category of asset - a State-Owned Property for Public Use. The name implies that these assets belong to the whole nation, and that everybody is entitled to use them. This entitlement of water rights is enshrined within Law No. 21,435, and consequently water may not be commercialised as a private commodity.

Anyone wishing to obtain access to water needs to obtain what is known as an "individual water right." Individual water rights may be defined as a right in rem over a water resource. It allows temporary use and exploitation of the resource, in accordance with the rules, requirements and limitations prescribed by the Water Code.

The regulations of the Water Code only apply to naturally occurring visible surface and underground water. They do not apply to maritime waters.

An individual water right has the following main characteristics:

- The new individual water right is obtained via a temporary concession granted by the General Water Authority (Dirección General de Aguas - DGA), in accordance with the rules of the Water Code or, in some cases, by the mere ministry of the law.
- They are valid for 30 years, which can be automatically extended, unless the DGA can prove that the resource is not being used efficiently or properly, or that it's use is harming the long-term sustainability or health of the water source.

- Previously constituted individual water rights (pre Law No. 21,435) are perpetual, but may be subject to some causes of termination.
- It is protected by constitutional guarantees.
- It is independent from the property on which it flows or on which it is used. Therefore, a person may own the land and another person or entity the water right.
- It is bound to a specific use.
- If the water right has not been used, a patent (a fee) must be paid[2].
- Different uses of the water resource are prioritised. Human consumption, domestic subsistence, and sanitation take priority, both in the granting of individual water rights and in the extent of their use.
- Notwithstanding any indemnification payments that may apply, the holder of a water right can take the necessary actions to exercise their right, such as constituting easements over land required to convey the water. They can also perform, at their own cost, any infrastructure or other works that may be needed.
- Water rights can be subject to agreements allowing the use of the water right (such as lease agreements). They can also be used as collateral for loans or other financial obligations. In this case the water right serves as a guarantee to the lender.

Water rights can be consumptive or non-consumptive. Consumptive water rights allow the holder to totally consume the water, e.g. industrial, potable or agricultural use. Non- consumptive rights are those where water is temporarily used and then returned to natural surface water or ground water, e.g. hydroelectric dams.

A permanent water right entitles a party to take water from the flow of the relevant running water at any time. In contrast, a potential or possible ("eventual") water right only allows the use of water when there is a surplus after all permanent rights have been used.

A right to continuous water supply allows use of the water without interruption for 24 hours per day. Conversely, a non-continuous service only allows a water supply for determined periods, and an alternate water supply right involves the water being shared between two or more people on an alternating basis.

Law No. 21,435 includes the option of in-situ or non-extractive water rights. Non-extractive rights will be granted on request for environmental conservation, for the development of sustainable tourism, and for recreational or sports projects. The Water Code establishes that existing water rights (DAAs - Derechos de Aprovechamiento de Aguas) can be changed to this option.

2 Law No. 21,435 increased the factor that determines the value of the patent for non-use of water use rights, distinguishing between consumptive and non-consumptive. This factor will increase every five years.

An important feature of in-situ or non-extractive water rights is that once they are constituted (or transferred) they will not be subject to annual patents for non-use due to lack of construction of collection and/or restitution works.

There are exceptions to the water rights that are established by law. Some of these exceptions are the following:

- The owner of a property which holds streams or other bodies of running water that start, flow and expire within the same estate without merging with other bodies of water (unless they discharge into the sea) obtains the user right, pursuant to law.
- A mining concession holder has the right to use water found during both exploratory and extractive stages. This right cannot be separated from the mining concession and expires with the concession. These water rights have a special regulation governed by the Dirección General de Agua (DGA) Resolution No. 2,600, dated October 2022.

OBTAINING WATER RIGHTS

In general, a water right can be obtained by applying to the DGA or by buying the water right from an existing owner.

Application to the DGA

An application which complies with the applicable regulations must be submitted to the DGA to start the procedure. Obtaining a water right in this manner is free except for the cost of the administration.

The DGA must grant the water right if the following conditions are met:

- The application and approval process complied with the relevant regulations.
- Third party rights are neither damaged nor impaired.
- The water requested is available.
- That the public interest in the use of water is respected, if applicable.

In the case of underground water, the applicant must own the surface land where the well will be located. Alternatively, a special authorization from the owner must be submitted with the application if the applicant is not the owner. This condition does not apply to surface water applications.

'Availability' is the most difficult condition with which to comply. It refers not only to physical availability, the existence of water, but also to what is called "legal availability". This means that no water right may be granted over and above existing user rights legally recognised or constituted, and that a minimal ecological flow must be respected. The DGA determines whether water is available or not.

Availability of ground water is often the most controversial issue. An applicant is required to carry out pumping tests to demonstrate that appropriate conditions exist and that the requested ground water resources are available. The DGA will review the applicant's tests and its own technical studies to verify that the requested water is available, and that existing water rights will not be affected. Applications for underground water cannot be located within a 200 meters radius from third parties underground water rights.

Protecting "public interest" requires the DGA to safeguard human consumption, sanitation, ecosystem preservation, water availability, aquifer sustainability, and in general all those actions aimed at promoting a balance between efficiency and safety in productive uses.

If the application meets all the technical and legal requirements, the DGA will grant the water right in the form of a resolution which must be registered in the Water Registry of the respective Real Estate Registrar.

Purchase of water rights

To buy a water right, a purchase agreement must be formalised through a public deed. It should contain the details included in the DGA resolution, such as the location coordinates, the flows, the physical condition of the site, and a purchase price, among other relevant matters. Once the transfer is completed, it must be registered in the Water Registry of the respective Real Estate Registrar.

Authorisation of the DGA is also required if a right is purchased to change the location of the source. The DGA will verify that the water rights of third parties will not be affected, and that water is available at the new point of source.

If the water right is to be purchased from a water-user organisation, the buyer must make sure that the seller has no outstanding payments to the organisation, otherwise the purchaser will have to pay these, or the water supply could be cut off or disconnected.

WATER RIGHTS REGISTRATION OBLIGATIONS

Water rights established as of the publication date of Law No. 21,435 are subject to extinction if they are not registered in the Water Property Registry of the relevant Real Estate Registrar by April 6, 2025[3].

Additionally, these water rights must also be registered with the Public Registry of the DGA within the same time frame. Failure to comply with this requirement may result in a fine imposed by the DGA, which will be determined at its discretion

3 This period was originally 18 months but was extended by Law No. 21,586 dated July 13, 2023

and range between 51 and 100 UTM (Monthly Tax Units).

Moreover, in accordance with the provisions of the 15th transitional article of the Water Code, water rights holders have a period of five years from the law's publication to update their water rights registration. This is done by making a notation in the margin of the corresponding Real Estate Registrar with proof of registration in the Public Registry of Water Use Rights. Failure to make this notation will prevent the Real Estate Registrar from recording any transfer of ownership related to the water right.

CAUSES FOR TERMINATION OF WATER RIGHTS

Law No. 21,435 incorporates the following causes of extinction of individual water rights:

- If the water right is not registered in the Water Property Registry of the relevant Real Estate Registrar within the deadlines set by the Water Code (by April 6, 2025), the water rights will automatically expire by operation of law[4].
- If the holder of the water right does not request the DGA to regularize water extracted individually from a natural source within five years from the publication of this law, the request for regularization will no longer be accepted. The only exceptions are requests made by indigenous people and indigenous communities.
- If the required works to collect or effectively return water, as permitted by the water right, are not constructed, the water right may expire. For consumptive use rights, the expiry period is five years, and for non-consumptive use rights, it is ten years. These expiry periods begin to run from the publication of the resolution that first includes the water rights in the list of those subject to patent payment for non-use.

In the latter case, a procedure for eliminating the water right will begin, which contains the following stages:

- DGA resolution containing a list of water rights whose owners have not made effective use of the resource.
- Notification of the resolution mentioned above to the owner of the water right.
- Publication in the Official Gazette of the DGA resolution.
- Granting a period of 30 days from the publication of the DGA resolution for the owner of the right to oppose the extinction procedure.
- The DGA may request clarifications, order visual inspections, request reports or carry out any other evidentiary procedures.
- The DGA must issue a resolution that decides exclusively on whether the extinction of the water right is appropriate.
- Against this resolution, the owner of the water right may present an appeal for reconsideration to the DGA and if

4 This cause of extinction will not be applied to the water rights granted to rural sanitary services; to agricultural communities; to the owners of protected areas who do not use water use rights to maintain the function of ecosystem preservation in said protected areas; and to indigenous people or indigenous communities

necessary, a claim to the respective Court of Appeals.

- If the above appeals are not presented within the legal period or are rejected, the DGA will request the respective Real Estate Registrar to cancel the registration of the water right.
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MANAGEMENT OF WATER RIGHTS

The administration and distribution of water can be managed / operated by individuals or collectives, such as Water Communities (Comunidades de Aguas), Canal Owner Associations (Asociaciones de Canalistas), and Surveillance Boards (Juntas de Vigilancia).

Ground or subterranean water

Regulation on standards for the exploration and exploitation of ground / subterranean water is regulated by the Water Law, Regulation DGA Nº 425 of 2008 and Decree 203 of 2013

Exploration for ground water

Generally, in Chile any person can explore for ground water, but before starting an exploration concession or permit must be requested from the DGA.

If the DGA grants the permit, it will also give the holder exclusivity to explore the stipulated area and preference to request the right to water found during the term of the permit, and for up to three months thereafter.

The DGA determines the validity of the term of the permit, which cannot exceed two years. After this period, new applications to explore the area can be made.

Exploitation/use of ground water

In Chile, as a rule, a person who wants to use ground water must request the relevant right from the DGA.

The applicant must establish a zone around the extraction point. This zone, which extends 200m, protects the right by preventing new wells from being dug within the area. It should be noted that if the applicant is not the owner of the land where the water is to be obtained, the authorisation of the owner is required.

OTHER RELEVANT ASPECTS INCORPORATED BY LAW NO. 21,435

Regularization procedure

The purpose of this procedure is for individuals or legal entities to apply to the DGA for the regularization of water already being extracted from a natural source. The aim of the procedure is to register the use of water as a right in rem in the name of the applicant, as they are registered in the name of another person or because they are not registered at all.

Users must prove at least five years of uninterrupted use of the water, counted backwards from the effective date of the 1981 Water Code, i.e. before October 29, 1976. In addition, the applicant must prove the use of the water is not clandestine or using violence, and without recognizing the dominion of others.

Perfectioning procedure

On July 13, 2023, Law No. 21,586 was published in the Official Gazette, which contains changes to Law No. 21,435 and the Water Code.

One of the key amendments to the regulation is the introduction of a new administrative procedure, overseen by the DGA, to ensure the correct details of each water right are held on record. This procedure, known as the "procedimiento de perfeccionamiento," is crucial because without completing this process, it is not possible to include the respective water right in the Public Water Cadaster. Ensuring proper registration is essential for the formal recognition and enforcement of the water right.

The required details are:

i. Name of the owner
ii. Location of the source (Álveo)
iii. Relevant Province in which the catchment and discharge are located
iv. Flow rate
v. Consumptive or non-consumptive use.
vi. Permanent or eventual exercise
vii. Continuous, discontinuous, or alternating exercise (where the right is shared, and turns are taken to exercise it).

Prior to the entry into force of Law No. 21,586, this procedure was considered by civil courts, but the reform established that the procedure was of an administrative nature and that it would be processed by the DGA. Once the DGA has granted the final resolution that "perfects" the title, it will proceed to register the right in the Public Water Cadaster within fifteen working days. Likewise, the owner will require the respective Real Estate Registrar to record the corresponding registration in the Public Water Cadaster.

Regulation of groundwater in restriction areas and prohibition zones

In response to the climate and hydrological crisis currently being experienced in Chile, there have been some legal modifications aimed at improving the management and conservation of water resources. These modifications include the identification of restricted areas and prohibition zones. The intent is to enhance the management of groundwater extraction by coordinating relationships and limitations among users sharing the same aquifer.

On one hand, there are Restriction Areas, which may be declared by the DGA either ex officio or at the request of users who benefit from such areas. Restriction areas are designated when there is a risk of significant depletion of a specific aquifer or a threat to its sustainability, potentially endangering the existing water rights of third parties who depend on it.

In this regard, declaring a restriction area prohibits the DGA from granting new definitive water rights in the concerned aquifer. However, provisional water rights may be granted under certain conditions, which include:

- Existing rights of third parties established before the declaration of the restriction zone must not be affected.
- The sustainability of the aquifer, whether partially or entirely, must not be compromised.
- A technical availability report must be issued, considering community feedback from the area.

The declaration of a Restriction Zone must be decreed by the DGA, and by operation of law, will lead to the establishment of an Underground Water Community (CASUB).

On the other hand, the DGA may declare Prohibition Zones through a founded resolution aimed at protecting the aquifer. Once a Prohibition Zone is declared, the DGA is prohibited from granting new provisional or definitive water rights, and a CASUB will automatically be established by operation of law.

In both cases all users within the affected area or zone must organize themselves into a CASUB within one year. Failure to do so will result in the DGA being unable to authorize any changes in water extraction points for those users who did not participate in its formation.

For the control, monitoring, and oversight of these areas, holders of water rights granted in restriction or prohibition zones must install flow and volume measurement systems, groundwater level control systems, and an information transmission system. They are responsible for transmitting the collected information to the DGA. The manner of compliance with these obligations will be detailed according to the location and conditions of the water source and the specific water right. Finally, failure to comply with these measures may result in sanctions as established in Article 173.

Miner's Waters

Miner's waters is a concept regulated in both the Mining Code and the Water Code. Currently, their treatment, scope, and applicability are outlined in the new Article 56 bis of the Water Code and Exempt Resolution 2,600.

Article 56 bis defines miner's waters as those found by mining concessionaires during exploration and mining operations. These waters may be used by mining concessionaires to the extent necessary for their operations and must be reported to the DGA for registration (the "Miner's Waters"). This obligation to report, it´s procedures and dates to regulate the Miner´s waters are established in Exempt Resolution 2600 ("Res. No. 2600"). The Res. No. 2600 elaborates and clarifies concepts from Article 56 bis of the Water Code.

Regarding the processing and delivery of information about Miner's Waters, the Res. No. 2600 establishes the following:

- The obligation to report these waters must be fulfilled within 90 calendar days from their discovery. For Miner's Waters currently being used, the reporting deadline was set before July 6, 2023.
- The information should include (i) the location, (ii) volume per unit of time of the captured waters, and (iii) the activities justifying the need to use these waters.
- Upon receiving this information, the DGA may request clarifications or additional details necessary for its decision, providing a deadline for compliance.
- After receiving the information, the DGA must issue a technical report within 90 calendar days, which may be extended once. This report may restrict the use of the waters if it affects aquifer sustainability and/or third-party rights. The report must consider the respective environmental assessment.

DESALINIZATION

In Chile, there is currently no specific regulation regarding the use of desalinated water. Nevertheless, seawater desalination has positioned itself as a viable option to improve water security issues in the face of the country's climate, ecological and severe drought crisis. Due to the lack of regulation, seawater desalination is currently governed by the general rules of maritime concessions.

Currently, more than 22 desalination plants are operating in Chile, each with a capacity exceeding 20 litres per second. Seawater desalination has experienced an average annual growth rate of 22% over the past 10 years. Of the total freshwater produced, 80% is consumed by the mining industry, while only two plants nationwide are dedicated to human consumption and sanitation, specifically for producing drinking water[5]. Additionally, projections for water use in the mining sector predict that by 2033, 71% of the water used will come from seawater, with only 29% sourced from continental water.

In this context, in 2018, the Bill on the Use of Seawater for Desalination (hereinafter, the "Bill") was submitted to the National Congress. The Bill, in principle, has the following pillars:

5 According to the first national registry of desalination plants and projects in Chile, carried out by the Mining Council of Chile, the Chilean Desalination Association (ACADES) and the Scientific Committee on Climate Change (C4).

- A new framework is established, declaring waters produced through desalination as a national public good.
- Creation of a National Desalination Strategy to establish priorities for the use of seawater and the installation of desalination plants.
- The use of desalinated water will be prioritized for human consumption, domestic use, sanitation, and maintaining ecological flows.
- Incorporation of desalination plants into the environmental evaluation system. The DGA will be involved in the process of granting permits and supervising desalination activities.

The Bill has already been in process for 6 years of processing, and the Government has put urgency to the project to achieve its approval by 2025.