WHAT EVERY MUNICIPAL ATTORNEY SHOULD KNOW ABOUT WATER LAW:
A Conversational and Annotated Introduction to Some of Colorado's Water Laws

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There are a number of thorough resources regarding Colorado's water laws[2], but there are fewer that are geared towards municipal attorneys. Municipalities find themselves on the front lines of a great many water-related legal issues and need quality legal advice to navigate through these challenges. So, it is incumbent for municipal attorneys to engage in these issues.

For whatever reason, Colorado's water laws can be seen as intimidating, even for accomplished municipal attorneys who deal with equally-challenging legal issues almost every single day. The goal of this paper is to provide a congenial introduction to Colorado's water laws with enough legal citations[3] to allow Colorado's municipal attorneys to dig deeper on their own. Enjoy.

1. *INTRODUCTION:* COME ON IN, THE WATER'S FINE!

1.1. WATER IS FUNDAMENTAL TO MUNICIPALITIES IN OUR ARID STATE.

Water is fundamental to nearly all aspects of life. This is apparent for the farmers and ranchers who, steeped in the land, depend on the water that they have often personally diverted from the stream or pumped from the ground to coax life from the Earth and bring food and goods to market. But this is also true for municipal residents—even if we don't always recognize it through the comforts of modern life.

As city folks, we drink, cook with, and bathe and shower in clean, cheap, treated water diverted from Colorado's streams and aquifers. We then send that water (and whatever else it may contain) down the drain, and ultimately back to the streams (even if we don't think about it). We consume the food grown and goods produced from that water and care about the quality of the water in our taps and streams. We recreate in and along urban and rural streams and reservoirs, including in

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[2] Examples include: VRANESH'S COLORADO WATER LAW (REVISED EDITION), by James N. Corbridge, Jr. and Teresa A. Rice (1999); THE CITIZEN'S GUIDE TO COLORADO WATER LAW, Colorado Foundation for Water Education (4th Ed.), available at: https://issuu.com/cfwe/docs/wl4_r9_web; Colorado's Water Plan available here: https://www.colorado.gov/cowaterplan.
[3] Many of the citations included in this paper are not in full conformance with the Blue Book, which was my own stylistic choice.

floodplains and storm water basins that protect our public and private property from disaster. We have harnessed water to reshape the municipal landscape from the harsh (if beautiful) natural Colorado terrain of prairies, mountains, and deserts, into a softer configuration of yards, parks, landscaping, and urban forests. Water underlies the very existence of municipalities and their missions. It is no surprise that Colorado municipalities have been involved with water and its accompanying legal issues since their beginnings and through the present day.[4]

1.2. MUNICIPAL ATTORNEYS CAN (AND SHOULD) GET INVOLVED.

Colorado's water laws are at times portrayed in the press as incredibly complex, "byzantine", or worse.[5] However, at their core, Colorado's water laws are based on straightforward policies. To be fair, Colorado's water laws can fall victim to insularity and jargon-rich language that can intimidate even experienced attorneys. There has thus been, at times, a tendency to cede legal water-related issues and decision making to the experts (such as specialist water attorneys and engineers).

While expertise is no doubt needed and welcome, the benefits to municipalities of fully understanding these issues and exercising full control over the associated policy and legal decisions should not be underestimated. Conversely, the work of expert water attorneys and engineers will be enhanced by a more engaged and knowledgeable municipal client. This paper will provide an overview of the fundamentals of several key areas of Colorado's water laws, with the aim of increasing the ability and confidence of municipal attorneys to understand and engage in this important area.

This paper presents a brief (and likely incomplete) introduction to several key areas of Colorado's water laws based primarily on the author's views and experience. It is in no way intended to be comprehensive. This paper is meant to provide a point of departure for municipal attorneys, not a destination. All areas, issues, and citations below are mere tips of much larger legal icebergs that should be researched and analyzed before providing any legal advice to clients.

2. *TERMINOLOGY:* WATER ISSUES AREN'T ALWAYS WHAT THEY'RE CALLED.

2.1. LISTENING AND PICKING WATER-WORDS CAREFULLY.

The water community is rife with argot, slang, and patter. Water users often throw around various unique terms like "calls" and "free river." Some of these terms appear foreign, while others contain otherwise common words used in unfamiliar ways. Colorado's water laws also contain their fair

[4] *E.g., Strickler v. City of Colo. Springs*, 16 Colo. 61, 26 P. 313 (1891).
[5] E.g., Jeff Rice, *Peetz runs afoul of Colorado's complex water law: Towns' water well requires augmentation*, by Jeff Rice, JOURNAL-ADVOCATE, (Feb. 15, 2018),, http://www.journal-advocate.com/sterling-local_news/ci_31665397/updated-peetz-runs-afoul-colorados-complex-water-law.

share of acronyms (like "HCU, "RICDs," and the Dr. Suessian "LIRFs").[6] Moreover, the parlance of one group can (and often does) deviate from the *patios* of others, even their neighbors. Many of these colloquialisms are shorthand for specific (often legal) concepts and are useful, but need to be understood for what they truly are. In other words, practicing attorneys need to be prepared to look past specific terminology to understand both what it physically occurring as well as the legal context.

This is an area where legal terminology can provide needed clarity. Colorado's water laws have various terms of art that allow for the precision needed to accurately articulate the legal landscape of a situation and the client's rights, obligations, and risks.

2.2. "WATER LAW" IN THIS OUTLINE IS MORE THAN JUST WATER RIGHTS.

The term "water law" is itself a term that means different things to different people. For some attorneys in Colorado, "water law" narrowly refers to water rights issues, which generally concern the right to divert and use water from streams and aquifers (which is discussed in detail in Section 3 of this paper). This view has some logic to it; where there is not enough water for all desired uses, the right to use water is arguably paramount.[7]

Municipalities, however, interact with water and its legal regimes in many more ways than simply diverting it from the stream for use. The leadership and staff of municipalities thus tend to view "water law" as almost any area of law concerning water. This could pertain to a great number of issues, as water can (and often does) relate to many areas of municipalities. However, we need to draw the line somewhere, so this paper will focus on a few key areas: the rights to divert and use water from streams and aquifers; water quality regulation; storm water runoff and drainage; water infrastructure and distribution systems; and access to streams and reservoirs.

3. *FROM THE SOURCE*: RIGHTS TO DIVERT AND USE WATERS FROM STREAMS AND AQUIFERS.

Rights to divert and use water found in streams and aquifers are fundamentally about allocating a scarce and important resource. Generally, the policy goal is to create certainty in an otherwise unpredictable natural world. This legal area is, at its core, a property-rights allocation scheme, and environmental considerations, such as impacts on fish and wildlife, play little to no role.

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[6] "HCU" is "historical consumptive use," which is the portion of water that was consumed (such as through evaporation) and did not return to the natural stream. "RICDs" are "recreational in-channel diversions," which are a unique type of water right for whitewater parks. C.R.S. §37-92-103(10.3). "LIRFs" are "lawn irrigation return flows," which are the portion of water applied to lawns and urban landscapes that are not consumed and return to the natural stream.

[7] *See, e.g.*, C.R.S. §25-8-104(1) (providing that nothing in the Colorado Water Quality Control Act "shall be interpreted so as to supersede, abrogate, or impair rights to divert water and apply water to beneficial uses"). Of course, you can easily fall into a circular argument about quantity and quality with a water professional, as I personally have, as quality is arguably irrelevant if you have no quantity, though quantity is also perhaps important if it has no quality.

These rights are particularly relevant for municipalities that own and operate water utilities that provide treated water service, as these rights are the legal foundation for diverting water into those systems. For municipalities where water service is provided by special districts, understanding these rights can also be helpful to working with those districts and understanding the challenges they face. Moreover, these rights are also relevant to municipalities who use untreated water from ditches and reservoirs to irrigate parks and open spaces.

3.1. THE UNDERLYING POLICY: SCARCITY AND THE NEED FOR CERTAINTY.

Since before statehood, Colorado has been recognized as a "dry and thirsty land."[8] Precipitation is inconsistent in time and location. Much of the precipitation that does fall comes as snow in the high mountains during the winter when and where crops cannot grow. It then melts and rushes downstream in the spring when demands are often low, and peters out in the late summer, just as crops need additional water before harvest. Streams are few and frequently ephemeral, providing an often unreliable supply. Other water is found in the ground and is a challenge to access. On top of these logistical challenges, the total volume of water in any area of Colorado is generally inadequate to meet all projected long-term demands, or even all daily demands many days of the year currently.

In this water-scarce land, the water-related laws Colorado originally inherited from the eastern United States and England were discarded almost immediately by settlers and later by the courts out of "imperative necessity."[9] Colorado forged its own path, developing its land and water in conjunction with legal doctrines to allocate rights to this scarce and vital resource.[10]

3.2. SHARING INTERSTATE STREAMS AND AQUIFERS: WATER NOT ALLOCATED TO DOWNSTREAM STATES IS AVAILABLE FOR DIVERSION AND USE UNDER COLORADO LAW.

Colorado is a headwaters state. Most of Colorado's streams begin here, often high in the mountains, and flow together and out to our neighboring downstream states. These interstate streams (and aquifers) are relied upon by various states.

These interstate streams are allocated between states under the federal doctrine of equitable apportionment, which is accomplished by agreement as confirmed in a compact[11] or by a United

[8] *Yunker v. Nichols*, 1 Colo. 551, 553 (1872)
[9] *See Coffin v. Land Hand Ditch Co.*, 6 Colo. 443, 447 (1882).
[10] *See also* BOB Crifasi's A LAND MADE FROM WATER: APPROPRIATION AND THE EVOLUTION OF COLORADO'S LANDSCAPE, DITCHES, AND WATER INSTITUTIONS, University Press of Colorado (2016) (giving a detailed historical discussion of water development in the context of Boulder County); GREGGORY J. HOBBS, JR..,. COLORADO WATER LAW: AN HISTORICAL OVERVIEW, 1 U. Denv. Water Law Rev. 1 (1997) (providing a more comprehensive overview that follows the historical development of these doctrines).
[11] *See* Colo. Rev. Stat. Ann. § 37-61-101 to § 37-69-106;Colorado Additional information regarding the compacts and copies of them are available here: http://water.state.co.us/SurfaceWater/Compacts/Pages/default.aspx.

Supreme Court decree.[12] Only the water not owed to downstream states is available for use under Colorado law.[13]

The impact of these compacts and decrees varies greatly by stream. On some streams, such as the Arkansas, Rio Grande, and Republican Rivers, the compacts (and associated litigation) have been a key factor limiting use in Colorado and a driver of intra-Colorado legal developments. On other streams, such as the South Platte River, the compacts have been less restrictive.

3.3. YOU CAN'T OWN WATER: ONLY RIGHTS OF USE CAN BE ACQUIRED.

The State of Colorado's authority to allocate the use of water ultimately comes from the federal government, which once owned substantially all of Colorado's lands.[14] Through certain federal public land and mining legislation in the 1800s, the federal government was adjudged to have severed water from other property interests in the lands now comprising Colorado and consigned the authority over the allocation of the use of water to the states.[15]

All water in Colorado is a public resource, owned by the State.[16] Only the rights to use that water can be acquired.[17] Under this construct, for example, even water held in storage in a reservoir under the control of the reservoir owner, remains in the State's ownership and can only be used pursuant to the reservoir owner's rights of use.[18]

3.4. IT DEPENDS ON THE SOURCE: TYPES OF RIGHTS TO DIVERT AND USE WATER FROM STREAMS AND AQUIFERS.

To the legally untrained eye, all water in streams and aquifers may appear the same. However, closer inspection and research reveals that these waters fall into different legal classifications. Depending on the legal classification of the water involved, different legal regimes apply and determine the types of rights that can be acquired to divert and use that water.

For municipalities, it is important to understand which legal classification (or legal classifications) they find themselves in, as the substance and procedures of the rights they have, or are seeking to acquire or protect, can vary significantly.

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[12] *E.g.*, *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (regarding the North Platte River).
[13] *A Matter of Rules & Regulations Governing Use, Control, & Prot. of Water Rights for Both Surface & Underground Water Located in Rio Grande & Conejos River Basins & their Tributaries*, 674 P.2d 914, 922 (Colo. 1983).
[14] *State v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294, 1304 (Colo. 1983).
[15] *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935) (discussing the Desert Land Act of 1877).
[16] *E.g., Chatfield E. Well Co., Ltd v. Chatfield E. Prop. Owners Ass'n*, 956 P.2d 1260, 1267-68 (Colo. 1998).
[17] *See, e.g., Kobobel v. State*, 249 P.3d 1127, 1134 (Colo. 2011).
[18] *Bijou Irrigation Dist. v. Empire Club*, 804 P.2d 175, 184 (Colo. 1991).

3.4.1. "WATER RIGHTS": RIGHTS TO WATER IN THE NATURAL STREAM.

In many ways, water rights in the natural stream are the bedrock of Colorado's system of water laws. This paper will thus devote a fair amount of itself to these rights. This paper's discussion of the other (and less common) types of rights to divert and use water from streams and aquifers will focus on the differences between water rights in the natural stream and these other types of rights.

3.4.1.1. The Natural Stream Is Broad and Renewable.

The largest classification of water in Colorado—by far—is the natural stream.[19] This is essentially the default classification. The majority of rights to use water from streams *and aquifers* derive the natural stream as the supply and are acquired under the famous prior appropriation doctrine. These rights are, pedantically speaking, the only rights properly called "water rights."[20]

The natural stream is conceptually broad, encompassing both the surface water flowing in a stream as well as all water that contributes to the stream.[21] All ground water in Colorado is presumed to be tributary to the natural stream.[22] Even precipitation has essentially been considered tributary.[23] All other classifications of water are effectively "carve outs" from the natural stream.

The waters of the natural stream are ultimately fed by precipitation; this is a renewable resource. The natural stream consequently tends to be a preferred source of water for municipalities and most other water users due to its sustainable nature.[24]

3.4.1.2. The Nature of Water Rights in the Natural Stream.

A water right in the natural stream is the right to place a certain amount of the waters of the natural stream to beneficial use when the water right is in priority.[25] Water rights are rights of use that are recognized as property rights.[26]

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[19] C.R.S. §37-92-102(1)(b).
[20] C.R.S. §37-92-103(12) (defining "water right").
[21] *See* C.R.S. §37-92-103(13).
[22] *E.g., Safranek v. Town of Limon*, 123 Colo. 330, 228 P.2d 975 (1951).
[23] *See Giffen v. State*, 690 P.2d 1244 (Colo. 1984).
[24] For example, various municipalities and districts in the southeast Denver metropolitan area have historically relied on nonrenewable Denver Basin ground water rights (which are discussed below). In recent years, as the end of the useable life of these supplies has come into the planning horizon, there has been a shift towards renewable supplies. One notable example is the Water Infrastructure and Supply Efficiency (WISE) Partnership, and information on that project is available here: https://southmetrowater.org/wise-partnership/.
[25] C.R.S. §37-92-103(12) (defining "water right"). *See also Kobobel*, 249 P.3d at 1134; *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1147 (Colo. 2001).
[26] *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1377 (Colo. 1982).

Water rights are based on the prior appropriation doctrine, which is enshrined in the Colorado Constitution.[27] The Water Right Determination and Administration Act, C.R.S. 37-92-101 *et seq.* (commonly known as the "1969 Act") contains most of the statutes concerning water rights. Some of the key aspects of water rights in the natural stream are summarized below, with comments towards particular concerns for municipalities.

Priority. Water rights are assigned a priority date.[28] When there is not enough water in the stream to meet all demands (as is frequently the case on most streams on most days), senior water rights holders will place a "call", and State water administration officials curtail water rights in the reverse order of their priority. In other words, the more senior the priority of a water right, the less likely is it to be curtailed and the more reliable it is. This risk of curtailment is inherent to water rights.[29]

On most streams, fairly predictable patterns of calls have emerged so that the reliability of a water right can be predicted (with some degree of certainty) depending on whether a year is wet, average, or (heaven forbid) dry. For municipalities whose citizenry likely expects reliable water at the tap irrespective of climatic conditions or the fact that downstream farmers want to irrigate, priority is extremely significant.

Diversion of Water. A water right has a specific point (or points) of diversion at specific structures. Water is typically diverted out of the natural stream for use, such as diverting water into an irrigation ditch or into a municipal system.[30] However, there are exceptions, and diverting water out of the stream is not a strict legal requirement.[31]

By statute, the State of Colorado, through its Colorado Water Conservation Board, can acquire instream flow water rights and lake level water rights, under which water is left in the stream (or lake) and protected from use by others in order to preserve and improve the natural environment to a reasonable degree.[32] (This is essentially the only area of water rights where environmental considerations are relevant.)

Some municipalities have dedicated water rights to the CWCB for instream flows through town.[33] Also by statute, municipalities (and certain other governments) can acquire "recreational in-channel diversion" water rights, under which water is controlled and used in the stream for recreational purposes, such as whitewater parks.[34]

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[27] Colo. Const. Art. XVI, §§5-6. It is interesting to note that many important senior water rights pre-date the Colorado Constitution, though their validity has nevertheless been confirmed. *See, e.g., Fort Collins Milling & Elevator Co. v. Larimer & Weld Irrigation Co.*, 61 Colo. 45, 156 P. 140 (1915).

[28] The priority date is based on when water was first intended for beneficial use and when the water right was adjudicated. *See* C.R.S. §37-92-306; *S. Adams County Water & Sanitation Dist. v. Broe Land Co.*, 812 P.2d 1161 (Colo. 1991).

[29] *Kobobel*, 249 P.3d at 1134-35.

[30] C.R.S. §37-92-103(7) (defining "diversion" and "divert").

[31] *See City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992) (controlling water within its natural course or location by some structure or device, such as a dam, for a beneficial use may result in a valid appropriation).

[32] C.R.S. §37-92-102(3).

[33] See, for example, the City of Boulder's decree from Case No. 1990CW193, District Court for Water Division 1.

[34] C.R.S. §37-92-102(5)-(6); C.R.S. §37-92-103(10.3); C.R.S. §37-92-305(13).

Amount. A water right is for a specific amount of water. The amount of a water right is normally expressed as a flow rate (such as cubic feet per second of "cfs") and/or a volume (normally, acre-feet). The amount is constrained by statutes and doctrines that generally limit the amount of a water right to what is required based on actual, current needs.[35] Because municipalities need to plan for future needs and growth, they benefit from a loosening of some of these statutory and doctrinal restrictions, generally allowing them to acquire water rights based on a 50-year planning horizon.[36]

Beneficial Use. A water right is for specific uses. The types of such legally-allowable "beneficial uses" are broad and depend on the facts and circumstances of each case.[37]

The legal language articulating the specific approved uses of water rights have become more specific in recent years. For example, the older water rights of many municipalities often authorize "municipal use." However, numerous more recent water rights authorize "municipal use within municipal boundaries," or "municipal use in the service area of the applicant municipality." This more specific definition effectively acts as a limitation and can constrain a municipality's use of its supplies, especially with more complex exchanges and trades with other water users.

Absolute (Perfected) Rights. Water rights can be absolute or conditional. An absolute water right is one under which water has been used and has become vested.[38] An absolute water right can only be lost through an abandonment proceeding through Water Court following a period of non-use and the intent (actual or implied) to abandon the right.[39] To state the obvious, municipalities should use all of their water rights to avoid these issues.

Conditional Rights. A conditional water right is one under which water has not yet been used.[40] A conditional water right allows a water user to reserve a priority date while completing the work to actually use the water.[41] The owner of the conditional water right must file a new application with the Water Court every six years since the entry of the

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[35] *E.g.*, C.R.S. §37-92-305(9); *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 37-39 (Colo. 1996).
[36] *See Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307 (Colo. 2007).
[37] *See* C.R.S. §37-92-103(4). For instance, exposing tributary ground water to the atmosphere (where some of it will be evaporated) through gravel pit mining and the subsequent reclamation of the pit is a beneficial use. *Three Bells Ranch Assos. v. Cache la Poudre Water Users Ass'n*, 758 P.2d 164 (Colo. 1988). Similarly, the extraction of water in coal-bed methane production is a beneficial use. *Vance v. Wolfe*, 205 P.3d 1165 (Colo. 2009). However, the Colorado Supreme Court has recently announced some limitations to the concept of beneficial use, at least in certain circumstances. *St. Jude's Co. v. Roaring Fork Club, L.L.C.*, 351 P.3d 442 (Colo. 2015) (discussing beneficial use and overturning a decree for a water right for aesthetic, recreation, and piscatorial uses by a private entity). *But see* C.R.S. §37-92- 305(20).
[38] *Purgatoire River Water Conservancy Dist. v. Witte*, 859 P.2d 825, 831 (Colo. 1993).
[39] The abandonment of all or a portion of a water right can occur via a claim filed in Water Court by one party against a water right owner, either in a new case or in connection with another case. *See Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548 (Colo. 2000). Abandonment can also occur through decennial statutory proceedings regarding an abandonment list prepared by the Colorado Division of Water Resources. *See* C.R.S. §37-92-401.
[40] C.R.S. §37-92-103(6).
[41] *See Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 35 (Colo. 197).

water right's last decree. The purpose of the application is to maintain the right by either proving that the water right has been made absolute or that reasonable diligence in the development of the water right has occurred. Failure to file an application or make these showings results in the loss of the conditional right.[42] Careful tracking of these deadlines is vital.

Direct Flow and Storage Rights. Water rights are described as direct flow or storage rights.[43] Direct flow water rights require that the water be placed to a beneficial use immediately.[44] Water storage rights, by contrast, allow water to be diverted and stored for subsequent application to beneficial use.[45] Water rights are generally assumed to be direct flow water rights unless the decree confirming the right authorizes storage.[46] They are both administered together, with their respective priorities determining which right is entitled to divert in times of an inadequate supply.[47] How a municipality's water rights portfolio is spread across direct flow and storage rights can greatly affect how supplies are used and what supplies are needed in the future.

Single Use and Reuse. When water is used, some of it is consumed (such as through evapotranspiration in plants), but much of it remains. This unconsumed portion of water is called "return flows" and is considered to be part of the natural stream and rights to it are acquired as with any water right.[48] Without a legal right to do so, these return flows cannot be reused by the first-using party because downstream water users have a legal right to them.[49] A right to reuse return flows does exist for water imported from other basins and for water rights where this right was specifically claimed and approved in Water Court.[50] Understanding whether a municipality's water rights are reusable (and how they may be reused) is significant to various operations, including potential graywater programs (which are discussed below).[51]

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[42] C.R.S. §37-92-301(4)(a)(I). *See also Town of De Beque v. Enwold*, 199 Colo. 100110, 116100, (1980).
[43] *E.g., Handy Ditch Co. v. Greeley & Loveland Irrigation Co.*, 86 Colo. 197, 200, 280 P. 481, 482 (1929).
[44] In the real world, it can be difficult to place water to beneficial use under a direct flow water right immediately upon diversion. For example, a large ditch may take some time to fill up before water can be delivered to people along the ditch to water their crops. State water administration officials have thus historically allowed water diverted under direct flow water rights to be temporarily detained for up to 72 hours. Administration Protocol: Temporary Detention of Direct Flow Rights: Division One – South Platte River, dated July 1, 2008, available: http://water.state.co.us/DWRDocs/Policy/Pages/SPlatteRBPolicies.aspx. However, this is an administrative interpretation and not a firm rule of law.
[45] *See* GENERAL ADMINISTRATION GUIDELINES FOR RESERVOIRS, Colorado Division of Water Resources, (Oct 2011 amended Feb 2016),, available at: http://water.state.co.us/DWRIPub/Documents/Reservoir%20Administration%20Guidelines.pdf.
[46] *See generally Concerning Application of Busk-Ivanhoe, Inc. v. Busk-Ivanhoe, Inc.*, 386 P.3d 452 (Colo. 2016).
[47] *See People ex rel. Park Reservoir Co. v. Hinderlider*, 98 Colo. 505, 507, 57 P.2d 894, 895 (1936).
[48] *Comstock v. Ramsay*, 55 Colo. 244, 133 P. 1107 (1913).
[49] *Id.* In other words, almost all water in Colorado is already reused. It is just that the entity reusing the water is different than the one that used it the first time.
[50] *See Colorado Water Conservation Bd. v. City of Central*, 125 P.3d 424, 434-35 (Colo. 2005); *Water Supply & Storage Co. v. Curtis*, 733 P.2d 680 (Colo. 1987).
[51] The so-called "graywater bill" was enacted through 2013 Colo. Sess. Laws 1087.

Wells (Including Unlined Gravel Pits). Wells that pump tributary ground water (and unlined gravel pits, which are treated like wells) divert water from the stream's aquifer, which depletes the stream, though the impacts are attenuated over time. As a result, these wells and gravel pits require a Water Court-approved plan that contains terms and conditions to ensure that the use of such wells will not deprive other more senior water rights of their entitlement.[52] Such plans generally require other water rights to be used to offset the depletions from the wells. Municipalities considering wells—or acquiring former gravel pit properties—should understand these obligations and weigh them carefully.

Changes to Water Rights. Water rights can be changed in a number of ways through a Water Court litigation process. Such changes may include changing the point of diversion, the beneficial uses, and adding the right to store and reuse water.[53] The changed water right will retain the original priority date, but the water right can only be changed in a way that does not injure other water rights.[54] This involves a costly and intensive analysis of the historical use of the water right, as well as the imposition of numerous terms and conditions on the future use of the water right.[55] This process entails significant risk and often results in a reduction of the water rights yield, but is (or at least should be) ultimately beneficial if a senior water right can be changed by a municipality.[56]

3.4.2. Water Court: The Procedural Context of Water Rights in the Natural Stream.

To be enforceable, water rights must be confirmed by a court decree.[57] Water right decrees benefit from the finality of *res judicata* (claim and issue preclusion), which provides certainty.[58] This applies, of course, even when there is a legal or factual error in the decree.[59] The water right owner can operate under the legal fiction of the error, as long as the water right is not brought before the Water Court again (such as through a change of water right proceeding).[60]

Water rights were originally confirmed by the district courts in large, periodic stream-wide adjudication proceedings.[61] These older decrees tend to be hundreds of pages and confirm numerous individual water rights, with a page or two devoted to each right.

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[52] *E.g., Fox v. Division Engineer*, 810 P.2d 644 (Colo. 1991); *Bohn v. Kuiper*, 195 Colo. 17, 575 P.2d 402 (1978).
[53] C.R.S. §37-92-103(5).
[54] C.R.S. §37-92-305(3).
[55] *E.g., Boulder County v. Boulder & Weld County Ditch Co.*, 367 P.3d 1179 (Colo. 2016); *Twin Lakes Reservoir & Canal Co. v. City of Aspen*, 568 P.2d 45, 193 Colo. 478 (1977); *City of Thornton v. Clear Creek Water Users Alliance*, 859 P.2d 1348 (Colo. 1993) (Reflecting that for changes to conditional water rights with no historical use, the "contemplated draft" of the right is instead analyzed).1993).
[56] *E.g., Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645 (Colo. 2011).
[57] *E.g., Empire Lodge*, 39 P.3d at 1148.
[58] *See Williams v. Midway Ranches Prop. Owners' Ass'n*, 938 P.2d 515, 525 (Colo. 1997) ("The application of res judicata, including its collateral estoppel component, in appropriate circumstances is important to the stability and reliability of Colorado water rights.").
[59] *E.g. Bd. of Comm'rs of the County of Arapahoe v. Collard*, 827 P.2d 546 (Colo. 1992).
[60] *Ready Mixed Concrete Co. v. Farmers Reservoir & Irrigation Co.*, 115 P.3d 638 (Colo. 2005).
[61] *E.g., Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 98 P. 729, 44 Colo. 214 (1908).

The 1969 Act set up a system of "Water Courts", one for each of the seven "Water Divisions", which are generally based on Colorado's larger river basins.[62] Rather than periodic adjudications, the 1969 Act provides for continuous adjudications and cases.

The Water Court is simply a district court with jurisdiction over "water matters" in its Water Division.[63] "Water matters" generally concern rights to use water, and do not concern ownership.[64]

Cases in Water Court are typically initiated by filing an application with the Water Court.[65] Notice of the application is published in the resume, which provides notice to all potentially-affected parties and provides the Water Court with jurisdiction over the case.[66] Anyone may become a party by filing a statement of opposition.[67] These "Opposers" (as they are inelegantly called) can force the applicant to prove its case (or have it thrown out if a *prima facie* case is not met) and can seek to impose terms and conditions to prevent injury to other water rights.[68]

The case is generally handled as litigation under the Colorado Rules of Civil Procedure, as modified by the Uniform Local Rules for All State Water Court Divisions. Cases are typically first referred to the "Water Referee", who is somewhat analogous to a magistrate, for an informal process to allow the parties a chance to discuss and hopefully settle.[69] Cases then return to the Water Judge, when litigation deadlines, obligations, and processes apply. Any appeals from Water Court are made directly to the Colorado Supreme Court.[70]

3.4.2.1. The Varied Cases and Claims of Water Court.

In the 1880s, water rights adjudications began comparatively simple, with certain district courts adjudicating claims for direct flow water rights for irrigation ditches (albeit in massive basin-wide cases).[71] As the years have passed, water development and use has evolved, in part as a reaction to increased population and use of the resource. This has resulted in creativity, a proliferation of water right-related claims, and an increase in their nuances.

One of the most common claims being adjudicated in Water Court in the present day involve changes of water rights, which generally concern moving the use of water from the historical irrigation use to new uses, such as municipal and industrial uses. This is one mechanism by which municipalities can acquire senior water rights for their own uses. Other common claims involve

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[62] C.R.S. §37-92-201. Water Court is more formally known as the District Court. *See* https://www.courts.state.co.us/Courts/Water/Index.cfm
[63] C.R.S. §37-92-203(2).
[64] *See, e.g., V Bar Ranch, LLC v. Cotton*, 233 P.3d 1200, 1205-06 (Colo. 2010).
[65] C.R.S. §37-92-302(1)(a).
[66] *Southern Ute Indian Tribe v. King Consolidated Ditch Co.*, 250 P.3d 1226, 1234-35 (Colo. 2011).
[67] C.R.S. §37-92-302(1)(b).
[68] *Concerning Application for Water Rights of Turkey Canon Ranch Ltd. Liab. Co.*, 937 P.2d 739 (Colo. 1997).
[69] *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 40 (Colo. 1997).
[70] C.R.S. §13-4-102(1)(d).
[71] Adjudication Act of 1879, 879 Colo. Sess. Laws 99-100; Adjudication Act of 1881, 1881 Colo. Sess. Laws 142.

"plans for augmentation"[72] and exchanges, both of which concern schemes allowing water to be diverted at times when it otherwise could not under the prior appropriation system due to a downstream call, provided that replacement water is delivered to the stream to offset those diversions.[73] Many cases often involve numerous claims, resulting in lengthy and complex litigation involving numerous parties.

3.4.2.2. The (Small) Legal Nexus to Water Quality.

Water quality issues are generally not "water matters" and are not litigated in Water Court. Consequently, for example, an argument that a claimed water right would dewater a stream and result in an increase of pollutants or wastewater treatment costs for a municipality is not a cognizable claim in Water Court.[74]

The limited exception to this concerns certain Water Court claims that involve delivering water to the stream as a substitute for other water diverted out of the stream. This is common with plans for augmentation and exchanges. Such water must be of a quality "so as to meet the requirements for which the water of the senior appropriator has normally been used."[75] However, as discussed below, this is generally a less stringent or exacting standard than is generally applied to water quality regulations.[76]

3.4.3. NONTRIBUTARY GROUND WATER RIGHTS.

3.4.3.1. Nontributary Ground Water Is Legally Separate From the Natural Stream and Is Not Renewable.

From the long-term perspective of a geologist, all water is tributary. Even water currently found deep in the bowels of the Earth will ultimately, at some distant time, find its way to the surface and flow in a stream. Of course, this may take millennia, or longer, and is of little use to the practicalities of human life and water management.

Some waters have thus been deemed to be "nontributary", or separate from the natural stream, at least for legal purposes. Such waters are typically referred to as nontributary *ground* water, in part because of the general lack of surface waters that are wholly separate from the stream.[77]

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[72] C.R.S. §37-92-103(9).

[73] *City of Florence v. Bd. of Waterworks of Pueblo*, 793 P.2d 148 (Colo. 1990); *Centennial Water & Sanitation Dist. v. City & County of Broomfield*, 256 P.3d 677 (Colo. 2011).

[74] *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 89-95 (Colo. 1996). *See also, generally In re Concerning Application for Plan for Augmentation of City and County of Denver ex rel. Bd. of Water Comm'rs,*, 44 P.3d 1019 (Colo. 2002) (regarding the nexus between water rights and water quality). *But see* C.R.S. §37-92-305(4)(a)(V).

[75] C.R.S. §37-80-120(3); C.R.S. §37-92-305(5).

[76] One contrary example is the Division 1 Water Court Case No. 1983CW361, where the Water Court found that the use of treated effluent as a substitute supply would injure other water users, even though the effluent was treated and in compliance with the generally more stringent water quality standards.

[77] The main examples of rare surface nontributary water this author is aware of include water rights decreed to certain ditches and reservoirs that the Larimer County District Court ruled to be "non-stream" in the infamous "Coffin Decree" entered in Civil Action 11217 in 1953. While this decree remains valid under *res judicata*, it is widely understood to be (and perhaps, to have been) factually incorrect.

Such waters are thus effectively a finite resource. While these aquifers may be replenished over the coming millennia, for human purposes, their use depletes them forever. For municipalities, these nontributary ground water sources thus have the benefit of not being subject to potential calls from other water users, with the downside of not being sustainable absent artificial recharge (or filling the aquifers with other water).[78]

3.4.3.2. Nontributary Ground Water Rights Predating the Current Legislative Scheme.

The nature of nontributary ground water rights has historically paralleled our knowledge (or lack thereof) of ground water. In some older cases, water was adjudged to be separate from the natural stream based on the evidence in existence at the time, even though it would now probably be found to be tributary.[79]

Rights to such waters were acquired through the same adjudicatory procedures and under the same underlying legal theories as for water rights to the natural stream.[80] Because the water was not considered part of the natural stream, other water users on the stream are deemed to have no legal right to rely on any return flows from that water, and the water can be reused.

3.4.3.3. The Current Legislative Scheme for Nontributary Water.

In 1973, the Colorado Legislature enacted Senate Bill 213, which instituted a new legislative scheme under which nontributary ground water is allocated based on ownership of the overlying land and the amount of withdrawal is based on an assumed 100-year aquifer life.[81] Subsequent enactments further developed this scheme, and it remains in effect today.[82] Rights to nontributary ground water that pre-date the current legislative scheme are protected by *res judicata* where there is a decree, and are protected by a statutory "grandfather" provision.[83]

Nontributary ground water is thus now allocated based on ownership of the overlying land.[84] A landowner has an inchoate right to such ground water, pending a well permit or a Water Court

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[78] *See* C.R.S. §37-90-137(9)(d).

[79] *E.g., In re Nix*, 45 P.2d 176, 96 Colo. 540 (1935). At times, nontributary ground water was also historically referred to as "developed water", generally referring to the fact that it can be available for use only through human development.[79] Also in the category of "developed water" is water imported from other basins.

[80] *E.g., Ripley v. Park Center Land & Water Co.*, 40 Colo. 129, 90 P. 75 (1907); *Matter of Application for Water Rights of Preisser*, 190 Colo. 243, 545 P.2d 711 (1976).

[81] 1973 Colo. Sess. Laws. 1520.

[82] *See, e.g.*, 1985 Colo. Sess. Laws. 1160.

[83] C.R.S. §37-90-137(4). *See also* Rules and Regulations Applying to Well Permits to Withdraw Ground Water Pursuant to Section 37-90-137(4), C.R.S., 2 C.C.R. 402-7.

[84] One exception to this is water produced through oil and gas operations. *See* C.R.S. §37-90-137(7). However, such "produced water" issues may have relatively little direct impact on municipalities' water supplies due to the depth of the geological formations. More information is available here: http://water.state.co.us/groundwater/GWAdmin/NontribGW/Pages/default.aspx

decree confirming those rights.[85] Such a right becomes vested upon the issuance of a well permit or a decree.[86] Until that time, those inchoate rights could be altered by the Legislature.[87]

This legislative scheme also set forth a specific and technical definition of nontributary ground water.[88] This standard of proof is difficult to meet from a technical perspective and must also be proven by clear and convincing, or clear and satisfactory evidence.[89]

3.4.4. DESIGNATED BASIN GROUND WATER RIGHTS.

3.4.4.1. Designated Ground Water Is Under a Separate Legislative Scheme.

In 1965, the Colorado Legislature created an entirely different legislative scheme for certain ground water, generally in areas where there is little, if any, surface water.[90] The Colorado Ground Water Commission, a State administrative agency, was created and empowered to create designated ground water basins and to regulate and adjudicate the use of this "designated ground water" in these lands.[91] The eight designated ground water basins that have been created to date are all on the eastern plains, outside of major river valleys. [92]

"Designated ground water" is water in a designated ground water basin that is either:

(1) groundwater which in its natural course would not be available to and required for the fulfillment of decreed surface rights, or

(2) groundwater in areas not adjacent to a continuously flowing natural stream wherein groundwater withdrawals have constituted the principal water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of the basin.[93]

Most designated ground water would be part of the natural stream (and subject to the prior appropriation doctrine described above) had it not been for the Legislature's action. This has led,

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[85] C.R.S. §37-90-137(6).
[86] *Bayou Land Co. v. Talley*, 924 P.2d 136 (Colo. 1996).
[87] *Id.* at 149.
[88] C.R.S. §37-929092-103(10.5) ("'Nontributary groundwater' means that groundwater, located outside the boundaries of any designated groundwater basins in existence on January 1, 1985, the withdrawal of which will not, within one hundred years of continuous withdrawal, deplete the flow of a natural stream … at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal.").
[89] *See Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mngt. Dist.*, 77 P.3d 62, 70 (Colo. 2003); *Safranek v. Town of Limon*, 123 Colo. 330, 334, 228 P.2d 975, 977 (1951).
[90] *See* C.R.S. §§37-90-101 *et seq.* (Colorado Ground Water Management Act).
[91] *See* Colorado Ground Water Commission homepage: http://water.state.co.us/groundwater/CGWC/Pages/default.aspx
[92] A map of the current designated ground water basins are located here: http://water.state.co.us/DWRIPub/DWR%20Maps/DesBasins.pdf
The majority of these basins were created years ago. In the early 2000s, certain parties sought to create new designated basins in the Box Elder Creek basin (east of Brighton) and in northern Larimer County. However, both attempts failed in the face of significant opposition.
[93] C.R.S. §37-90-103(6)(a).

at least indirectly, to litigation concerning water rights in the natural stream that found themselves within a designated basin, thus resulting in a collision of these two legal regimes.[94]

A thoughtful review of the definition of "designated ground water" reveals that it varies in substance from the definition of "nontributary ground water". While some designated ground water is likely not renewable because permitted withdrawals exceed natural and other recharge to the aquifer, some designated ground water may be a sustainable source depending on how the resource is managed. For municipalities in designated ground water basins who rely on certain classifications of water, whether the water is sustainable is key.

3.4.4.2. Rights to Designated Ground Water Are Determined by the Colorado Ground Water Commission.

In the designated basins, rights to use water are represented by well permits (not Water Court decrees). The well permits are adjudicated by the Colorado Ground Water Commission through administrative hearings and procedures.[95] Appeals from the Colorado Ground Water Commission are taken not to the Water Court, but to the district court in the county where the rights for wells are located.[96] A subsequent appeal may be taken to the Colorado Supreme Court.[97]

3.4.4.3. The Nature of Designated Basin Ground Water Rights.

The use of designated basin ground water rights is generally subject to the terms and conditions of the subject well permits. In many ways, this is analogous to how water rights in the natural stream are governed by Water Court decrees. Moreover, many of the key aspects of water rights in natural streams are mirrored in designated ground water rights.

A key difference between water rights in the natural stream and designated basin ground water rights is the significance of priority. Because ground water moves slowly through an aquifer and (perhaps) less predictably than in a flowing stream, curtailing wells with junior rights may not lead to an increase of water at wells with more senior rights, especially if the wells are far apart.

The Colorado Legislature has thus applied a *modified* prior appropriation system to designated ground water.[98] Under this system, the Colorado Ground Water Commission is charged with permitting the full economic development of designated ground water, protecting prior appropriators of designated ground water, and allowing for reasonable depletion of the aquifer.[99] This protection of seniors does not extend to the maintenance of historic water levels. The Commission's powers to curtail the pumping of wells with junior rights for the benefit of seniors is discretionary (unlike water rights in the natural stream, where the curtailment of juniors is

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[94] *Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20 (Colo. 2006); *Gallegos Family Props., LLC v. Colo. Groundwater Comm'n*, 398 P.3d 599, 2017 CO 73 (Colo. 2017); *Jim Hutton Educ. Found.v. Rein*, 2018 CO 38M, 418 P.3d 1156 (2018).
[95] *See Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mngt. Dist.*, 77 P.3d 62 (Colo. 2003).
[96] C R.S. §37-90-115(1)(a).
[97] *E.g., Front Range Resources, LLC v. Colo. Ground Water Comm'n*, 415 P.3d 807, 2018 CO 25 (Colo. 2018)
[98] C.R.S. §37-90-102(1).
[99] *Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 27 (Colo. 2006).

mandatory).[100] This modified prior appropriation system is thus quite different from the situation on the natural stream, and arguably, seniority in a designated ground water basin is less significant than on the natural stream.

3.4.5. DENVER BASIN GROUND WATER RIGHTS.

3.4.5.1. Denver Basin Ground Water Is Under a Separate Legislative Scheme and Is Nonrenewable.

The Denver Basin aquifers comprise a group of four deep circular aquifers (the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers) that generally extend from Greeley to Colorado Springs, and from the Front Range hogbacks to Limon. These aquifers lie one on top of the other, with the deeper ones extending underneath larger geographical areas.

The Colorado Legislature has adopted a group of substantive rules for these aquifers that differ from other ground water.[101] Similar to the situation with designated ground water, at least some of the Denver Basin ground water would be part of the natural stream had it not been for the Legislature's action. In part because of the economic importance of this ground water, the Legislature mandated that the water contained in these aquifers be treated as being less hydraulically connected to the surface streams than it may actually be in fact.[102]

Denver Basin ground water is effectively a finite resource because of the statutes and rules under which is it managed. While these aquifers may be replenished over the coming millennia, for human (and certainly for economic) purposes, their use depletes them forever. Various municipalities and districts, especially in the southeast Denver metro area, have historically relied on this ground water. However, they have been switching to other renewable sources from the natural stream.[103]

3.4.5.2. Denver Basin Ground Water Procedural Context.

The eastern (roughly) half of the Denver Basin aquifers lies in designated ground water basins, while the western half does not. Consequently, the eastern half is within the legal regime of the designated ground water basins and under the jurisdiction of the Colorado Ground Water Commission, while the western half is within the jurisdiction of the Water Court. This is primarily a procedural headache, as the substantive rules for the Denver Basin aquifers are the same in either jurisdiction.

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[100] *Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177, 1188 (Colo. 2000).

[101] Eric Potyondy, Note, *Sustaining the Unsustainable: Development of the Denver Basin Aquifers*, 9 DENVER U. WATER L. REV. 121 (2006).

[102] *Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mngt. Dist.*, 77 P.3d 62, 73 (Colo. 2003). Under these relaxed standards, there is "Denver Basin nontributary ground water" (which likely would be tributary had it not been for the Legislature's action), and "Denver Basin *not nontributary* ground water" (for Denver Basin ground water that does not meet even the relaxed standard for "Denver Basin nontributary ground water"). Although the term "not non tributary" is perhaps a high point for legal drafting, it is no doubt confusing and has been thus duly buried in this footnote.

[103] *See Burlington Ditch Reservoir and Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 654 (Colo. 2011).

3.5. FORMS AND TRANSFERS OF OWNERSHIP OF RIGHTS TO DIVERT AND USE WATER FROM STREAM AND AQUIFERS.

3.5.1. Decree or Permit Ownership.

Water rights in the natural stream are held as a Water Court decree (or decrees) confirming the right. Nontributary ground water rights, designated ground water rights, and Denver Basin ground water rights may be held as decrees or well permits, depending on the specific circumstances of the rights.

Because water rights are real property rights, they must be conveyed by deed (and the other formalities for real property).[104] While nontributary ground water rights, designated ground water rights, and Denver Basin ground water rights can evidenced by a well permit and thus could conceivably be conveyed by assignment, they are frequently also conveyed by deed in association with the land where the well is located. This makes sense, as rights to these wells often requires associated real property rights to access the wells, as well as for related infrastructure, like pipes.

These rights can be conveyed separately, or with the associated land. If the deed for the associated land does not expressly identify the rights, the rights may still have been conveyed based on the grantor's intent.[105] Municipalities looking to acquire water rights should be thoughtful in their title investigations, especially as title insurance generally does not cover title to these rights.

3.5.2. Shares in Mutual Ditch and Reservoir Company.

Many water rights in the natural stream are represented by shares in mutual ditch and reservoir companies, which are special purpose corporations.[106] In this common scenario, the company holds bare legal title to the water rights (and other related interests), and the shareholders own a proportional interest in the company water rights.[107]

Shareholders are entitled to change the use of water rights represented by company shares (and often do).[108] However, companies have a wide ability to impose terms and conditions on the use of the water rights, as well as terms and conditions on changes to the use of the water rights.[109] Municipalities should manage their relationships with companies they own shares in, and monitor the rules the companies may seek to impose.

Shares in mutual ditch companies can be transferred by assignment.[110] However, they can be conveyed by deed as well, all of which can result in title issues.[111] Municipalities looking to

[104]C.R.S. §38-30-102(2).); *Navajo Dev. Co., Inc. v. Sanderson*, 655 P.2d 1374, 1378 (Colo. 1982).
[105] *Kinoshita v. North Denver Bank*, 181 Colo. 183, 188, 508 P.2d 1264, 1267 (1973).
[106] C.R.S. §7-42-101 *et seq*.
[107] *Jacobucci v. Dist. Court*, 541 P.2d 667, 189 Colo. 380 (1975).
[108] *E.g., Wadsworth Ditch Co. v. Brown*, 39 Colo. 57, 88 P. 1060 (1907); *Cache la Poudre Irrigation Co. v. Larimer & Weld Reservoir Co.*, 25 Colo. 144, 53 P. 318 (1898).
[109] *See Fort Lyon Canal Co. v. Catlin Canal Co.*, 642 P.2d 501, 506 (Colo. 1982).
[110] C.R.S. §38-30-102(2)
[111] Austin Hamre, *Title Fight: Avoiding a Water Right Conveyance TKO*, 44 Colo. Law 41 (2015).

acquire shares should be thoughtful in their title investigations and search the company records as well as the county clerk and recorder records. Again, as title insurance does not cover these rights, municipalities must be thorough and proceed with caution.

3.5.3. Contract Rights.

Some rights to use water are, in fact, none of those described above. Numerous entities that own the types of rights to divert and use water from streams and aquifers discussed above have entered into long-term or perpetual contracts to deliver water to others.

For instance, in the early 1900s, ditch companies looking to expand existing ditches frequently acquired the right to do so by agreeing to deliver water to a landowner from the ditch in exchange for the landowners' interests in the ditch.[112] Likewise, a water conservancy district that operates a reservoir may have allotment contracts with those who use the water.

With these "contract rights," it is both the underlying decree or permit and the contract that govern the use of the water: the decree or permit governs how the water can be diverted from stream or aquifer by the right's owner, which the contract governs the ultimate use of the water by the contract holder.[113] For instance, the owner of a contract right cannot change the use of the contract or the underlying water right without the underlying water right owners' permission.

3.6. THE ADMINISTRATION OF RIGHTS TO USE WATER.

The Colorado Division of Water Resources (commonly known as the "State Engineer") administers the rights described above (in addition to other water-related duties) pursuant to their decrees and well permits.[114] Similar to the Water Court system, Colorado is divided into seven Water Divisions, generally based on river basins.[115] Each division is further divided in Water Districts for sub-basins and water sheds, with a Water Commissioner in charge of administration in each district.

Due in part to the sheer number of water users, much of the water administration system relies on the good behavior of water users. However, increasing accounting requirements, especially for municipalities, have helped to verify this good behavior.

The Colorado Division of Water Resources also promulgates rules and regulations, as well as other policies that guide the administration of these rights.[116]

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[112] *See E. Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co.*, 109 P.3d 969, 973 (Colo. 2005).
[113] *Pub. Serv. Co. v. Meadow Island Ditch Co. No. 2*, 132 P.3d 333, 340 (Colo. 2006); *E. Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co.*, 109 P.3d 969, 973 (Colo. 2005).
[114] *See* C.R.S. §37-90-110; C.R.S. §§37-92-501 -503.
[115] C.R.S. §37-92-202.
[116] http://water.state.co.us/Home/Pages/default.aspx

4. *KEEPING IT CLEAN*: WATER QUALITY REGULATION.

Water quality regulation is fundamentally about ensuring health and public safety by managing pollutants and their adverse impacts, including impacts on other water users. Generally, the policy goal is to balance the minimization of those impacts and related costs to varying degrees.

These regulations are particularly relevant for municipalities that own and operate water utilities that provide treated water service and wastewater utilities that provide sewer service. For municipalities where water and wastewater service are provided by special districts, understanding these regulations can be helpful to working with those districts and the challenges they face.

4.1. THE COLORADO WATER QUALITY CONTROL COMMISSION AND DIVISION ARE THE MAIN WATER QUALITY AGENCIES.

Water quality regulation in Colorado arises primarily under the federal Clean Water Act (the majority of which the State of Colorado administers), the federal Safe Drinking Water Act, and the Colorado Water Quality Control Act.[117]

The federal Clean Water Act does several things, including establishing the basic structure for regulating discharges of pollutants into waters of the United States[118] and for surface water quality standards. The federal Clean Water Act concerns water quality for surface water, with the regulation of ground water left for the states. The federal Safe Drinking Water Act provides standards for drinking water quality, regardless of the source.

Through the Colorado Water Quality Control Act, the Legislature created and designated the Colorado Water Quality Control Commission and the Colorado Water Quality Control Division (which are housed in the Colorado Department of Public Health and Environment) as the main agencies to create and implement these regulations.[119] This statute concerns surface and ground water.

The Colorado Water Quality Control Commission is the rulemaking body that establishes designated uses and specific water quality requirements that are tied to those uses.[120] It can, at times, grant temporary modifications to these requirements. The overall intent is to maintain and improve the quality of the State's surface waters and to insure the suitability of surface water for beneficial uses. The Colorado Water Quality Control Division generally administers the various discharge permits and other requirements.

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[117] 33 U.S.C. §1251 *et seq.*; 42 U.S.C. §300F *et seq.*; C.R.S. §25-8-101 *et seq.*

[118] The definition of "waters of the United States" has its own (still-ongoing) legal saga, which involves complex and split United State Supreme Court opinions, rulemaking proceedings, subsequent lawsuits, a change of presidential administrations, and even more lawsuits. *E.g.*, https://www.epa.gov/wotus-rule It is, for better or worse, generally beyond the scope of this paper.

[119] See the Water Quality Control Commission's website: https://www.colorado.gov/pacific/cdphe/wqcc; See also C.R.S. §25-8-202 (regarding the duties of the Commission) and C.R.S. §§25-8-302 (regarding the duties of the Division).

[120] C.R.S. §25-8-201.

4.2. WATER QUALITY REGULATION DOES NOT AFFECT WATER RIGHTS.

The legal regimes governing the rights to divert and use water from streams and aquifers are generally separate from the legal regime for water quality.[121] Moreover, water quality statutes and regulations generally take a back seat to water rights and their legal regime. For instance, nothing in the Colorado Water Quality Control Act is legally allowed to impact water rights or to injure them.[122] In other words, water quality regulations are generally not allowed to prevent or impact the diversion of water and use from streams and aquifers.

This legal dichotomy can be a challenge for municipalities. For example, a district may claim a new diversion and water right in Water Court that would reduce flows in the location where a municipality discharges treated wastewater to the stream. Due to under water quality regulations (in certain circumstances), the municipality is able to use the stream to dilute certain pollutants. This could result in a change in the municipalities wastewater discharge permit, and in upgrades to its treatment plant (costing millions of dollars). However, these regulations could not legally prevent the new diversion, nor could the municipality argue that these costs would injure it and force changes to the proposed diversion. In other words, this legal dichotomy can be positive or negative, depending on what side of the underlying policy (or effluent discharge) a municipality falls on.

4.3. THERE ARE NUMEROUS AND DETAILED REGULATIONS THAT ARE FREQUENTLY UPDATED.

There are numerous regulations promulgated by the Colorado Water Quality Control Commission and administered by the Colorado Water Quality Control Division.[123] These rules are promulgated as administrative rules and regulations.[124] These regulations are colloquially referred to by their number, such as "Regulation 11," which contains the Colorado Primary Drinking Water Regulations that apply to treated potable water.

Many of the regulations set the standards that wastewater must be treated to before it can be discharged to the stream, such as Regulation 31 (The Basic Standards and Methodologies for Surface Water). Other notable regulations include Regulation 84, which regulates the permissible uses of treated wastewater from treatment facilities and Regulation 86, which concerns the use of graywater (which is discussed below).

These regulations are detailed, often prescriptive, and frequently amended and revised through rulemaking proceedings. Amendments and revisions typically follow stakeholder groups and other interactions between the Colorado Water Quality Control Division and regulated entities. In general, these standards evolve as our knowledge of pollutants and other contaminants evolve. Because even small changes in regulations can force significant changes to treatment facilities, it is in municipalities' interest to closely monitor and participate in these proceedings.

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[121] *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 89-95 (Colo. 1996).
[122] C.R.S. §25-8-104.
[123] https://www.colorado.gov/pacific/cdphe/water-quality-control-commission-regulations
[124] *See* C.R.S. §24-4-104.

4.4. LEGAL ACTIONS.

Final actions of the Colorado Water Quality Control Commission and the Colorado Water Quality Control Division are subject to judicial review under the State Administrative Procedure Act in the district court where the "pollution source affected is located."[125] Other water quality legal actions are also, of course, available under criminal, tort, or contract theories.[126]

5. *MOVING IT ALONG*: STORM WATER DRAINAGE.

Storm water regulation is fundamentally about managing precipitation runoff, and the potential changes to runoff patterns and quality as a result of land development. Generally, the policy goal is to allow development without adverse impacts to those downstream.

As land is developed, much of the permeable surfaces that historically absorbed precipitation (like grass fields) are replaced with a greater percentage of impermeable surfaces (like roofs and concrete). There can be a shift in the timing of runoff from the land, as the impermeable surfaces result in less water being absorbed in the ground (where it will make its way back to the stream slowly) and more water making its way back to the stream along curbs-and-gutters and ditches (where is gets to the stream almost immediately). This can result in damages to downstream properties, localized flooding, and other risks to people and property. These concerns clearly lie at the core of municipalities policy concerns.[127]

5.1. THE PRESERVATION OF HISTORICAL RUNOFF CONDITIONS.

An upstream property owner possesses a "natural easement" over downstream lands for the drainage of surface water flowing in its natural course.[128] The upstream property owner can alter drainage conditions, so long as the water is not sent down in a manner or quantity doing more harm to the downstream land than formerly.[129] Similarly, a natural watercourse may be used as a conduit or outlet for the drainage of lands, at least where the augmented flow will not tax the stream beyond its capacity and cause flooding of adjacent lands.[130] The upstream property owner (as the dominant estate owner) has a right to enter onto downstream property owners (as the servient estate owners) to maintain a drainage ditch.[131]

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[125] C.R.S. §25-8-404. *E.g., Amax, Inc. v. Colo. Water Quality Control Comm'n*, 790 P.2d 879 (Colo. App. 1989).
[126] *See generally People v. Thoro Products Co., Inc.*, 70 P.3d 1188 (Colo. 2003) (re C.R.S. §25-15-101(3)); *Hoery v. United States*, 64 P.3d 214 (2003).
[127] A great general resource on this area is Chapter 2 of the Urban Drainage and Flood Control District Criteria Manual, which is available at https://udfcd.org/.
[128] *Bittersweet Farms, Inc. v. Zimbelman*, 976 P.2d 326, 328 (Colo. App. 1998).
[129] *Hankins v. Borland*, 163 Colo. 575, 580, 431 P.2d 1007, 1010 (1967); *Harvey v. Dyer*, 731 P.2d 777, 780 (Colo. App.1986).
[130] *Ambrosio v. Pearl-Mack Const. Co.*, 351 P.2d 803, 807 (Colo. 1960).
[131] *Shrull v. Rapasardi*, 517 P.2d 860, 33 Colo. App. 148 (1973).

The owners of irrigation ditches are generally not required to accept storm water runoff that is a result of development that occurs after the ditch was constructed but cannot object to drainage from upstream lands that occurred historically.[132] The ditch owner would have a legal claim based upon trespass. The ditch owner would also have a claim as the increased flows will be deposited into the ditch in a manner or quantity to do harm.[133]

As a practical matter, some ditch companies in urban areas may benefit from increased runoff being directed into their ditches, which may offset challenges resulting from changes of water rights and the fact that less water is being diverted into the ditch. Nevertheless, a ditch owner should be consulted before any storm water is directed into a ditch.

5.2. TIMING OF RUNOFF: QUANTITY AND THE NEXUS TO WATER RIGHTS.

One of the major policy goals of storm water management is to slow down urban runoff, which addresses many of the concerns with localized flooding and urban streams leaving their banks. This is frequently accomplished by detaining water temporarily in storm water basins that fill up with storm water during deluges and then release the water back to the stream over time.

A problem arises in that downstream water users rely on water from these storms. Storm water facilities that consume some of the water (such as through evaporation) would reduce the supply to these water users. Even a change in the timing could mean that certain users may not receive water when they would otherwise be entitled to it.

Until recently, these downstream water users had an argument that municipalities (primarily) capturing storm water injured them, and that municipalities could only capture storm water when in priority (which is basically never) or under a Water Court-approved plan under which the municipalities replace the detained storm water.[134]

This issue was addressed through Senate Bill 15-212.[135] This bill codifies certain standards for storm water facilities that mirror what had been the historical practice of such facilities, such as the facilities only being used for storm water and releasing all water with three days.[136] Facilities built before the enactment of Senate Bill 15-212 that are operated in compliance with the standards are deemed to not injure water rights.[137] For facilities built after the enactment of Senate Bill 15-212, operation in compliance with the standards creates a rebuttable presumption of no injury.[138] Municipalities should incorporate these standards into their operations.

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[132] *City of Boulder v. Boulder & White Rock Ditch and Reservoir Co.*, 73 Colo. 426, 216 P. 553 (1923)
[133] *Hankins v. Borland*, 431 P.2d 1007, 1010, 163 Colo. 575, 580 (1967).
[134] This issue was raised, in fact, by State administration officials in the Aspen area in 2013-2014, and appeared to be gaining traction until Senate Bill 2015-212 was passed.
[135] 2015 Colo. Sess. Laws 930.
[136] C.R.S. §37-92-602(8)(b)(I)(B).
[137] C.R.S. §37-92-602(8)(c)(I).
[138] C.R.S. §37-92-602(8)(c)(II).

5.3. URBAN RUNOFF: QUALITY AND MS4 REGULATION.

The water quality regulatory regime focuses, in large part, on specific sources of pollution. However, disperse forms of pollution, such as storm water runoff and drainage from urban areas, is another source of pollution in streams. To address this, the Colorado Water Quality Control Division issues a discharge permit for municipal separate storm sewer systems ("MS4s").[139]

These MS4 permits impose various requirements on the MS4 system's owner, which are frequently municipalities. The Colorado Water Quality Control Division performs periodic audits to ensure compliance with the terms of the MS4 permit.[140]

6. *GETTING IT THERE*: WATER INFRASTRUCTURE AND DISTRIBUTION SYSTEMS.

Water infrastructure and distribution systems and their associated legal issues are fundamentally about conveying water from its source to the places of use, generally with the policy goal of managing costs to sustain the system.

Water infrastructure and distribution systems crisscross the State, from the tunnels that carry water under high mountain wilderness, to the ditch systems that spread like alluvial fans cross the valleys, to the pipes that run down under many municipal streets. These issues are thus relevant for municipalities in a great number of ways.

6.1. DITCH AND RESERVOIR SYSTEMS.

There are a great number of ditch and reservoir systems across Colorado. As cities and towns have grown and continue to expand into lands that were formerly irrigated farm and ranch lands, these ditch and reservoir systems have increasingly become surrounded by and part of the urban and suburban landscape. However, mere change in surrounding land use does not alter the legal rights pertaining to these systems.

Many ditches are located in inconvenient locations for urban development, as ditches tend to follow winding natural topographic features, whereas development tends to impose rigid angles. This can prompt a number of issues.

Wading through these issues can be muddied by a lack of clarity regarding ownership and other rights to the land. While some ditches are located on lands they own in fee, most (or, at least, most portions of most ditches) were not. Although the specific facts for each ditch are unique, a great many were constructed with little to no documentation of the real property rights that were arguably needed to construct them. Most are thus understood to have a prescriptive easement.

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[139] *See* C.R.S. §25-8-801. These permits can be general statewide permits. See https://www.colorado.gov/pacific/cdphe/wq-municipal-ms4-permits.

[140] C.R.S. §25-8-803. See also https://www.colorado.gov/pacific/cdphe/clean-water-municipal-ms4-storm water-compliance-assistance-and-guidance

More specifically, Colorado courts have held that where a ditch has been in existence for "any appreciable time," consent to its original construction is presumed.[141] The historical use-based nature of these poorly-defined easements can complicate matters.

Sometimes, moving a ditch may seem to be a solution. However, ditches cannot be moved unilaterally, though a landowner can seek a declaratory judgment action to have to ditch relocated.[142]

Other times, there is a desire to simply cross the ditch, such as by a pedestrian or motor vehicle bridge. It is standard practice in many places to complete an agreement with the ditch owner as a matter of course. Where a crossing requires modification to the ditch, a crossing agreement is likely required as a legal matter. If the crossing is for a street in a municipality, the municipality is responsible for maintaining the bridge.[143]

The strict legal requirement for such agreements is uncertain however, especially where the crossing is in a location where there is only a prescriptive easement for the ditch and the cross would appear to require modifications to the ditch or alter ditch operations (such as, perhaps, with a small pedestrian bridge). The relatively small amounts charged by ditch owners tend to create an incentive to reach an agreement rather than litigate, though perhaps someday stubbornness will prevail, and additional clarifying case law will result.

For municipalities working in and along ditch and reservoir systems, there is thus a need to look into the specific ownership interests of the area in question, and to deal thoughtfully and strategically with the ditch owner.

6.2. MUNICIPAL SYSTEMS.

6.2.1. FEDERAL AND STATE PERMITTING.

Water projects for municipal systems, from new or expanded reservoirs to pipelines, often trigger the need for federal, state, and local permits and approvals. These required permits and approvals can create a whole set of legal issues.

The most famous (or infamous, depending on your perspective) federal permit is a permit to discharge fill material into the waters of the United States under Section 404 of the federal Clean Water Act ("404 Permit").[144] The 404 Permit process also frequently invokes the requirements of the National Environmental Policy Act ("NEPA"), which requires environmental analyses of the project and their public disclosure.[145] The need for a 404 Permit can be triggered, for example,

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[141] *Leonard v. Buerger*, 130 Colo. 497, 502-03 276 P.2d 986, 989 (1954).
For ditches crossing federal or state-owned lands, an easement, right-of-way, or license is typically acquired from the relevant land management agency. Many reservoirs also rely on prescriptive rights for the lands they inundate. However, it is somewhat more common for the reservoir owner to hold title to the underlying land in fee.
[142] *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001).
[143] C.R.S. §37-84-103.
[144] *See* https://www.epa.gov/cwa-404/clean-water-act-section-404.
[145] *See* https://www.epa.gov/nepa.

when a dam or other structure is placed in a stream, or when wetlands would be filled. Depending on the scope and purpose of the project, a project may qualify for a nationwide 404 Permit, which is essentially a list of certain types of projects that are authorized without further federal action.[146] However, larger projects may require an individual 404 Permit. In these circumstances, alternative projects meeting the purpose and need of the proposed project are analyzed in great detail and only the least environmentally damaging practical alternative can be permitted. Judicial review for the federal agency's final action can be brought in federal district court under the federal Administrative Procedures Act.[147] This cost of this process in time and money has incentivized various water users, including municipalities, to structure their projects in ways to avoid this legal requirement altogether.

Large reservoir projects must also receive a water quality certification from the State of Colorado under Section 401 of the federal Clean Water Act, which has been delegated to the State of Colorado.[148] They must also receive a fish and wildlife mitigation plan from the State of Colorado.[149]

An affected county may also require a permit for a project under its "1041 Regulations" for certain activities of state interest that the county has identified.[150] In recent years, these have become another tool to attack or seek to modify projects to address a number of project impacts, such as environmental ones.

An interesting aspect of these permitting processes is that they contradict, at least somewhat, the underlying policy of Colorado that environmental factors and water quality are irrelevant to the rights to divert and use the water of the natural stream. The permitting processes discussed above can (and often do) focus and even turn on these non-water right considerations, such as environmental impacts. This can effectively block the use of a water right by not allowing the construction of necessary infrastructure. For municipalities pursuing or considering pursuing these types of projects, it is important to build in the time, costs, and legal uncertainties of these processes into their planning.

6.2.2. TREATED WATER DISTRIBUTION SYSTEM.

Most municipal treated water distribution systems are and continue to be constructed over decades. For the most part, the construction of these systems is completed under real property principles and pursuant to a municipality's city code and policies.

The length of the build out of the system can lead to inconsistencies as personnel and practices change and evolve. For instance, water and wastewater mains may have historically been allowed through backyards between lots, but are not preferred to be located in the right-of-way. These historical legacies often present unique challenges that require balancing existing rights with the

[146] *See* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/
[147] *See* 5 U.S.C. §500 -505.
[148] See Colorado Water Quality Control Commission Regulation 82 (401 Certification Regulation), available: https://www.colorado.gov/pacific/cdphe/water-quality-control-commission-regulations
[149] C.R.S. §37-60-122.2.
[150] *See* C.R.S. §24-65.1-101; *City & County of Denver v. Bd. of County Comm'rs of Grand County*, 782 P.2d 753 (Colo. 1989).; https://www.colorado.gov/pacific/dola/1041-regulations

preferences (and police and other powers) of the municipality. These and other challenges often prompt a need to update a municipality's city code and policies, which can force a consideration of the benefits and drawbacks of being prescriptive, versus allowing for flexibility.

6.2.3. GRAYWATER.

In recent years, there has been an increased interest and focus on water conservation.[151] One area of focus has been "graywater," which is wastewater from homes and businesses that is collected onsite from certain fixtures (not toilets[152]), before being mixed with other wastewater, and then used a second time onsite.[153] Currently, graywater can legally only come from discharges from bathroom and laundry room sinks, bathtubs, showers, and laundry machines, but does not include the wastewater from toilets, urinals, kitchen sinks, dishwashers, or nonlaundry utility sinks.[154] Graywater use must be authorized by the local municipality or county.[155] The City and County of Denver has authorized graywater use,[156] but few others have.

Graywater intuitively makes sense, especially to anyone with brown patches on their lawn who read their water bill and then let the water out of a full tub following their kids' nightly bath. However, water used in the home picks up various contaminants that must be treated to some degree before pouring it on the grass. This leads to the need for new piping and treatment and the associated economic costs. Legally, it also means that water is arguably being reused, which could be a problem if the municipality does not have reusable water rights, or the type of water rights accounting that may be needed for these operations.

7. *LET'S HAVE SOME FUN*: ACCESS TO STREAMS AND RESERVOIRS FOR RECREATION.

Access to streams and reservoirs for recreation are fundamentally about the property right of allowing people to use the surface of these waters, generally with the deep policy goal of respecting real property rights and not interfering with water rights.

For municipalities looking to leverage existing water structures for its citizens, these laws can be significant.

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[151] Water conservation is itself a fascinating and nuanced topic which is beyond the scope of this paper.
[152] Water from toilets is commonly known by the more ominous term "blackwater."
[153] C.R.S. §25-8-103(8.3); Colorado Water Quality Control Regulation 86, available at: https://www.colorado.gov/pacific/sites/default/files/86_2015%2812%29.pdf.
[154] Regulation 86.8(14).
[155] C.R.S. §25-8-205(g)(I); 2013 Colo. Sess. Laws 1087.
[156] https://www.denvergov.org/content/denvergov/en/environmental-health/environmental-quality/water-quality/Graywater.html

7.1. ACCESS RIGHTS TO STREAMS MUST BE ACQUIRED SEPARATELY.

Colorado's streams flow across a patchwork of land ownership. These picturesque streams are inviting to anglers, boaters, hikers, and basically anyone with a soul. However, it can be jarring, especially with larger streams, to learn that public access is not guaranteed.

Colorado's streams are widely recognized to be non-navigable.[157] The land underlying non-navigable streams in Colorado is the subject of private ownership and is vested in the owners of the adjoining lands.[158] This ownership of land includes the right to exclude the public.

Some other states, like Wyoming, have modified this rule.[159] However, Colorado has not.[160] This issue has periodically arisen as from time to time, but to date has not resulted in any substantive change to the law.[161] Municipalities that desire to create recreational opportunities along streams must thus work within this legal context and acquire real property rights in and along streams.

7.2. RECREATIONAL RIGHTS TO THE SURFACE OF RESERVOIRS ARE CONTROLLED BY THE RESERVOIR OPERATOR, BUT EVERYONE'S RIGHTS NEED TO BE EVALUATED.

Colorado is home to a great many reservoirs, which offer recreational opportunities. In simple scenarios, the person or entity that owns the underlying land also operates the storage of water in the reservoir. However, some reservoirs overlie various parcels of land with different owners. In these circumstances, the various specific rights of the parties must be carefully evaluated.

The mere ownership of the underlying land does not include the right to use the overlying reservoir water for recreational purposes.[162] The reservoir operator has a right to control the storage of water and to exclude others from using the surface of the reservoir for recreational purposes.[163] However, the extent to which the reservoir operator can allow recreation on the surface of the reservoir depends on what the reservoir operator's rights are. For instance, if the reservoir operator only has an easement for water storage over another's lands, the reservoir operator may not have

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[157] *People v. Emmert*, 597 P.2d 1025, 198 Colo. 137 (1979) (citing *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220 (1912)).
[158] *People v. Emmert*, 597 P.2d 1025, 1027, 198 Colo. 137, 140 (1979) (citing *More v. Johnson*, 193 Colo. 489, 568 P.2d 437 (1977); *Hartman v. Tresise*, 36 Colo. 146, 84 P. 685 (1906); *Hanlon v. Hobson*, 24 Colo. 284, 51 P. 433 (1897)).
[159] *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961).
[160] There is an often-cited letter, dated August 31, 1983, from Duane Woodard, Colorado Attorney General, to Hamlet J. Barry III, Acting Executive Director to Colorado's Department of Natural Resources, proposing a different interpretation of the law that would allow boaters to cross private property on streams as long as they do not touch the bed or banks. However, this letter does not overturn the leading case of *People v. Emmert*, 597 P.2d 1025, 198 Colo. 137 (1979) is has not been ruled upon by the courts.
[161] E.g., https://www.hcn.org/issues/208/10649 ; https://www.coloradoindependent.com/2010/05/13/boating-bill-swamped-by-controversy-may-lead-to-summer-of-river-conflict/ ; https://www.hcn.org/articles/opinion-colorado-says-fishing-next-to-private-land-is-trespassing Case No. 2018CV277 in the United States District Court for the District of Colorado is the most recent such case, which was voluntarily dismissed by the plaintiff without having the substantive issues addressed.
[162] *Bijou Irrigation Dist. v. Empire Club*, 804 P.2d 175, 183 (Colo. 1991)
[163] *Bijou Irrigation Dist. v. Empire Club*, 804 P.2d 175, 183-85 (Colo. 1991).

the right to grant a recreational lease over that portion of the reservoir. Yes, this can get complicated.

For municipalities seeking to acquire recreational rights on reservoirs, the place to begin is the reservoir operator, which is often a ditch or reservoir company. Land ownership under and around reservoirs can be imprecise and contains flaws, so all land ownership rights should be carefully evaluated.

8. *SO NOW WHAT*: TAKE THE PLUNGE AND GET INVOLVED.

8.1. EACH MUNICIPALITY HAS A UNIQUE SYSTEM, RIGHTS, AND ISSUES: LEARN YOURS.

Colorado is a vast landscape, with shortgrass prairies, high mountains, and deserts. Colorado's municipalities are thus scattered across different landscapes. The water development of each locale has varied based on any number of factors, resulting in a great variety of water systems. Each municipality thus has its own situation that differs from all others.

Learning about the physical and legal setup of your municipality's system is the first step towards providing meaningful legal advice. How do you do this? Well, though it maybe counterintuitive in the modern day, the best approach may be talking face to face. Water folks are a passionate bunch and can and do want to talk to about these issues—just look at the length of this paper!

8.2. STAY INVOLVED.

Even after you attain fluency in the basics of your system, staying up to speed on new developments within and outside of your municipality is vital to identifying and dealing with risk proactively. But don't fret, Colorado's water laws reflect the dynamism of Colorado and its society. By staying engaged, neither you nor your client will be disappointed.