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Water Law 101: Understanding the Fundamentals of Water Law

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powerful invasive characteristics as their byssal threads, which they use to attach to substrate and which clog water distribution systems, their destruction of the food chain base in aquatic ecosystems through plankton removal and their excretion of heavy metals, and their prolific propagation, with a single female producing up to one million eggs per year, ten to fifteen percent of which reach maturity. The mussels damage boats, fishing, and beach recreation with a total yearly cost to businesses and communities of over five billion dollars. She then described actions environmental enforcement officials are taking in Colorado, which has infestation problems in Pueblo Reservoir, Tarryall Reservoir, Jumbo Reservoir, and the four Colorado-Big Thompson lakes. Colorado passed the ANS Act (Aquatic Nuisance Species Act) in May 2008, making it "illegal to possess, import, export, ship, transport, release, plant, place, or cause an ANS to be released." Brown ended the presentation describing ongoing statewide monitoring, prevention and law enforcement efforts designed to eradicate and mitigate contamination.

Suzanne Lieberman

UNIVERSITY OF DENVER WATER LAW REVIEW

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WATER LAW 101: UNDERSTANDING THE FUNDAMENTALS OF WATER LAW

Dan Vigil, Assistant Dean and Lecturer, University of Denver Sturm College of Law, presented one of the first sessions of the day on the fundamentals of water law.

Mr. Vigil briefly explained that Colorado follows the doctrine of prior appropriation, where the use of the water need not be near the source of the water itself. He mentioned that the courts previously discussed but ultimately decided against the possibility of Colorado being a hybrid state, where some water owners have prior appropriation rights and some have riparian rights. Mr. Vigil noted that practicing in hybrid states is difficult and many are trying to move away from prior appropriation.

Next, Mr. Vigil explained the doctrine of riparianism, where those who own land abutting a watercourse have the right to use the water. Riparianism gives owners the right to use the water, but only on the land abutting the watercourse, thus it ties water use to the watercourse. Under this doctrine, a landowner owns to the middle of the stream and the land ownership gives the owner the right to use the water.

There are currently 29 riparian states, all of which, in general, have a more abundant water supply than the arid western states.

Mr. Vigil explained that years ago, Colorado needed to adopt a system other than riparianism; a state with a limited number of watercourses provides few opportunities to own rights to the water. So, Colorado adopted the doctrine of prior appropriation, where the use of the water itself was important, not the ownership of land.

In Colorado, Mr. Vigil remarked that the legislature takes up water issues almost every time it meets in an effort to figure out how to bring in more water to deal with its population growth. Colorado only gets to keep one-third of the water originating within its borders because it is a source state for at least 16 other states. Colorado struggles with how to meet the needs of an exploding population when it is unable to increase the annual amount of snow and rain. Mr. Vigil noted the additional challenges imposed by the invasion of destructive insect species and the presence of water consuming plants growing along water banks. Additionally, the agricultural industry and the development of the oil shale industry create additional pressures.

Mr. Vigil explained that all the water in Colorado is fully appropriated, meaning it is all spoken for, before proceeding to describe how water rights owners acquired the right to use the water in the first place. He explained that owners must acquire the water right independent of land ownership. For example, if an owner buys land with a river running through it, the owner would not have any rights to the water based on land ownership. Long ago, an owner only needed to put the water to beneficial use to acquire the water right. Then Mr. Vigil pointed out the doctrine of relation back, which is necessary because it takes a long time to move water. This means that the water rights relate back to when an owner first starts to work on a ditch if it takes the owner a long time to put the water to beneficial use. Before acquiring the water right, the owner would get a conditional decree with the option to renew every six years.

Mr. Vigil explained that water rights, once obtained, are difficult to lose, even though some states recognize that one may lose a water right through forfeiture. While Colorado does not recognize forfeiture, it does recognize abandonment. However, abandonment is difficult to prove because it requires showing the intent to abandon, and it is hard to prove an owner intended to throw away such a valuable right. Mr. Vigil noted that there is a statutory presumption of abandonment after ten years, but it is only a presumption.

Next, Mr. Vigil explained that the Colorado constitution provides the undeniable right to divert the unappropriated water of any natural stream. However, this provision is not as important as it used to be because no available water remains. Now, someone wanting to acquire water rights must purchase them because there are no new sources of water. He explained that a lot of water law today involves helping indi-

viduals through the complicated process of buying and selling water rights.

Mr. Vigil then explained the different impact on water rights during a drought under prior appropriation and riparianism. Riparianism is a community-based system where everyone suffers equally. However, if you have a higher priority under prior appropriation then you will get water before others with a lower priority. Prior appropriation is not a community-based system because some people suffer completely, while others do not suffer at all. Buyers in a prior appropriation state should look to buy water rights with a higher priority.

Next, Mr. Vigil discussed the concept of transferring water rights. Owners can only transfer the water that they used. For example, if an owner applied eight cubic feet of water to the land, but four cubic feet was return flow to the stream, then the owner could only transfer four cubic feet. Transferring water rights is also difficult because transfers are subject to the "no injury" rule, meaning that courts will allow transfers if there are no injuries to other people and anyone who the transfer might affect has a right to complain.

Mr. Vigil noted that the idea of taking water from the stream for use elsewhere provided the premise for Colorado water law. Now courts recognize natural beauty, recreation, and fishing as beneficial purposes; however, this change occurred after there was little water left in the stream. He noted that the legislature is exercising more creativity in order to find ways to keep water in the stream.

Mr. Vigil concluded with a brief discussion of ground water in Colorado. Denver planned ahead by taking water from the western slope and preserving the right while there was still water available. On the eastern plains, there is a large aquifer that the state is mining, meaning that the rate of withdrawal exceeds the rate at which rain and snow replenishes the aquifer. The aquifer is a finite resource that takes 1000 years to replenish. In the rest of Colorado, owners can use ground water on the land directly above the water source at a withdraw rate of one percent per year.

Mr. Vigil noted that there are different systems of administering ground water and that most of the areas outside of Denver rely on aquifer water, whose replenishment is not likely in the near future. Although these areas are working furiously to deal with the scarcity of water in light of a burgeoning population, they are facing an uphill battle because water law does not move quickly.

Susan Summers

CONFLICTS OF INTEREST FOR THE WATER PRACTITIONER: ETHICAL DILEMMAS AND APPROACHES FOR ATTORNEYS

Cynthia Covell, of Covell & Alperstein, P.C., spoke on conflicts of interest in water law practice, focusing on recent changes to the Colorado Rules of Professional Conduct as they relate to the unique situa-