

THE PERILS OF PUDDLE OWNERSHIP

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Evan D. Ela & Joseph W. Norris
Collins Cockrel & Cole, P.C.

Description/Overview

This presentation will identify various liabilities and costs of special district ownership of water structures--reservoirs, recreational ponds, stormwater conveyance structures and detention ponds. Colorado law provides various levels of protection for local government owners under the CGIA and other statutes specifically designed to protect reservoir owners. Conversely, ownership of these structures incurs different liabilities depending on the type of structure--some are exempted from the CGIA and others are covered. In addition, certain regulatory schemes must be followed, including the State Engineer's dam safety and diversion structure requirements, replacement or augmentation plans, and/or regulations governing the reuse of reclaimed water. This presentation will explore the risks of lack of compliance with regulations, such as the EPA's MS4 program, the potential for uninsured tort claims, and ways to reduce such risks.

1. **Initial Thoughts and Considerations.**

- (a) What is the type and purpose for your district's water storage structure?
 - (i) Municipal water supply;
 - (ii) Irrigation supply (i.e. parks/golf course);
 - (iii) Recreational or aesthetic amenity;
 - (iv) Storm water detention/retention;
 - (v) Others, or multiple of the above options...
- (b) Do you want to keep your puddle full?
- (c) What people interact with the structure, and in what type of frequency do they do so?
- (d) Is there scheduled staff monitoring and maintenance, or state agency inspections?

TOPIC 1 – Concerns Related to Water Rights and Decree Obligations

2. **Does Your Structure Have (or Need) a Water Right?**

- (a) Water storage is defined by statute as “the impoundment, possession, and control of water by means of a dam...” C.R.S. § 37-92-103(10.8). Any structure or practice meeting this definition is required to have a water right associated with it

in order to continue storing water. Although this definition is very broad, it has been interpreted many times over.

- (b) **72-Hour Rule.** The State Engineer has for many years employed an unwritten rule that: “Direct water rights may be temporarily detained for up to 72 hours (3 days) in order to allow more efficient or effective beneficial use of the water.” Absent a water storage right, or other authorization, all water captured, including storm water runoff, must be released within 72-hours. This time-period is arbitrary, but might be loosely based on the idea that historically some farmers received irrigation ditch water into temporary storage ponds because the rate of delivery is greater than their desired rate of application to irrigation. It is now applied as a somewhat universal rule by the state water officials on all forms of water detention or retention—municipal storm water management, forebay detention before treatment or hydropower production, and agricultural water management. At the present time, this concept is written as an administrative guideline found in the State Engineer’s General Administration Guidelines for Reservoirs. The rule has not been confirmed by legislation or by the Supreme Court, although it has been unofficially referenced by legislation enacted in 2015, described below.
- (c) **Storm Water Detention/Retention Statute.** Codified by SB15-212, this statute allows storm water detention ponds to operate without the need for a water right if designed to certain specifications. If the structure does not release water within 72-hours (retention), its evaporation and out-of-priority capture must be augmented, and a separate water right is needed for the structure.

3. **Perfecting Conditional Storage Rights.**

- (a) The Colorado Supreme Court issued an opinion in *Upper Yampa Water Conservancy Dist. v. Wolfe*, 255 P.3d 1108 (Colo. 2011), that caused confusion among reservoir owners about how to perfect a conditional water storage right into an absolute right. The questions arising were whether water needed to be released and physically used before the right could be made absolute. And, if decreed for multiple purposes, was a release and use for each individual purpose required for perfecting each decreed beneficial use.
- (b) In SB13-041, the Colorado legislature recognized that the actual fact of storing water is sufficient for perfecting any conditional storage right in the amount captured, possessed, and controlled without the need to prove release and subsequent beneficial use for any decreed purpose. This statute has greatly simplified the perfection process for water storage rights and significantly reduced legal costs and uncertainty for all water users. Water stored for multi-year drought protection can be perfected and conserved without having to demonstrate release and use during an actual drought. In addition, costs related to diligence cases every 6-year period should be reduced significantly in the future.

4. **Measurement and Recording Devices.**

- (a) Typical Decree language: “To the extent not already in place, Applicant shall install and maintain such measuring and recording devices or other structures as may be required by the Division Engineer.”
- (b) The State/Division Engineer have shown increased interest in requiring telemetry and electronic recording devices that they can access remotely (particularly with respect to on-channel reservoirs). However, a staff gauge to manually measure the elevation of storage (along with a calibrated stage-capacity curve) is oftentimes enough to satisfy the requirement to measure and record storage contents in a reservoir or pond.

5. **Water Rights Accounting.**

- (a) In general, the State Engineer’s Administration Guidelines for Reservoirs contains a detailed and thorough explanation of the water storage measurement and accounting requirements. However, it is important to understand that these Guidelines do not have the force of law. Some of the concepts contained within the Guidelines are derived from statute or prior Supreme Court decisions, while others are simply “guidelines” formed internally by the State Engineer. Some of these Guidelines are even currently being challenged in court.
- (b) From a practical standpoint, accounting for water storage can be a difficult task. Complex spreadsheets are formulated to track multiple types of water and water rights within a storage vessel and require monthly, weekly, or even daily monitoring. This can be a difficult task for even the most sophisticated special districts and usually requires input from outside engineering consultants.

6. **Evaporative Losses.**

- (a) Evaporation and other incidental losses of stored water occurs to some degree at every reservoir. The water rights decree or accounting method are likely to include specific references to evaporation. However, it is important to differentiate between the two types of reservoirs and the resulting scenarios for handling evaporative losses.
 - (i) First, for off-stream reservoirs, any water diverted in-priority and stored in the structure will experience losses. These losses will typically be subtracted directly from the accounts of each water storage right in the structure on a pro-rata basis.
 - (ii) Second, for on-stream reservoirs, there is a second type of evaporation to consider which is typically referred to as an out-of-priority depletion.
 - (iii) Because the structure is on a fixed stream system there is no way to cease diversions to storage when the water rights associated with that structure are out-of-priority. So, water will continue to pass-through the structure

which has created a widened spot in the previously existing river (and a corresponding additional amount of evaporative loss). Any added out-of-priority evaporative loss caused by construction of an on-stream reservoir must be augmented or replaced and will likely be accounted for in a water replacement plan known as a plan for augmentation.

TOPIC 2 – Statutory and Regulatory Compliance

7. **Dam Safety and Permitting.**

- (a) The State Engineer is required to review and approve plans and specifications for all Jurisdictional Dams before construction. Jurisdictional Dams are those with a height greater than 10-feet to the spillway crest, creating a reservoir with more than 100 acre-feet of water, or covering more than 20 acres at the high waterline.
- (b) In addition to the pre-construction plan review, the State Engineer can inspect any existing dam (regardless of its size) in relation to overseeing the safe storage level of water behind any dam.
- (c) High and significant hazard dams are also required to prepare and maintain an Emergency Action Plan (“EAP”) that is approved by the State Engineer. An EAP is a formal document identifying potential emergency conditions and pre-planned actions to prevent failure of the dam, reduce potential for loss of life, and minimize property damage.

8. **EPA MS4 Program.** Typically storm water management is dealt with at the municipal/county level, but a Special District can be implicated if it operates or maintains what is statutorily referred to as a “*separate storm sewer system.*” A separate storm sewer system is defined by Federal law as any type of system of conveyances discharging storm water into “Waters of the U.S.” Because the definition is written so broadly, Special Districts can technically be considered included within the scope of this Federal regulation. Although this program has been historically only enforced against larger municipalities and counties, there is the possibility that this issue could come to the forefront for special districts in the coming years. The regulation generally requires a permit issued by the EPA/CDPHE and implementation of best management practices, including public education, discharge detection and elimination, and regular reporting.

9. **Others?** There are many numerous regulations that apply based on site-specific conditions, and can seem to be countless when considering construction of a new reservoir or storage structure.

TOPIC 3 – Operational and Water Quality Concerns

10. **Water Quality Concerns.** Each reservoir will have different characteristics of water quality based upon the local variables. Particularly if the water is being used for municipal water supply or if recreational activities are allowed, water quality should be regularly monitored and tested.

- (a) Some reservoirs in Colorado have specially enacted control regulations to limit specific forms of pollution in their tributary watersheds, usually nutrient loading from individual septic systems and wastewater treatment plants.
 - (b) In addition, the competing uses for storage water have differing water quality needs. The most widely discussed conflict is between recreation and water supply uses. For example, e-coli at swim beaches and excess nutrients and TOC in water supply reservoirs cause significant public health and safety concerns.
11. **Infrastructure Maintenance.** Just as with any public infrastructure, deferred maintenance can catch up with its owner. Bodies of water are no different in that the infrastructure supporting the reservoir or pond will need regular inspections, upkeep, repair, and replacement eventually. Consider the long-term lifespan of each aspect of your structure including inflow ditches, outlet works, pumps, measurement devices, access facilities, aerators, and even the dam itself and then consider what costs will be to replace these. Your District's capital budget can (and should) include these long-term replacement costs so you can build up a reserve of funds for these potentially large-ticket items in the future.
12. **Sediment Build-up and Dredging.** All size reservoirs, particularly on-stream reservoirs, collect sediment and might need dredging from time to time to maintain the designed capacity. Dredging is not required as a function of the water right, but it might be a reasonable capital expense if it regains storage capacity at a lower cost than building or acquiring new storage capacity. A bathymetric survey at 30-year or other suitable intervals is recommended.

TOPIC 4 – Liability for Injuries at Bodies of Water

13. **Premises Liability and Negligence.**
- (a) Colorado's Premises Liability Act, C.R.S. § 13-21-115, creates the sole tort (negligence) liability action for injuries caused by property conditions. Under this statute, the owner or operator of a reservoir site or other body of water can be held liable for injuries occurring at a pond or reservoir. As a special district, the Colorado Governmental Immunity Act provides a complete bar against any claims for injury which lie in tort or could lie in tort unless they have been specifically waived by statute. C.R.S. § 24-10-106(1).
 - (b) Listed statutory waivers of governmental immunity are contained in C.R.S. § 24-10-106. Most importantly relating to bodies of water, governmental immunity can be waived for a condition that: (1) exists in a public facility; (2) constitutes an unreasonable risk to the health/safety of the public; (3) is known to exist (or should have been known by exercise of reasonable case); and (4) is proximately caused by the negligent act of the public entity constructing or maintaining the facility. If a court does find a valid waiver, damages will still capped to the statutory limits under the CGIA which is typically the limit of liability insurance carried by special districts. If you have any specific concerns, you should check

with your insurance provider to ensure the specific types of coverage would fall within your policy.

- (c) As a recent example out of Indiana, an appellate court found a Park and Recreation Department not liable for a swimmer in a county-owned lake who contracted an amoebic infection after swimming in the lake. *Daviess-Martin County Joint Parks & Recreation Dept. v. Estate of Abel by Abel*, 2017 WL 2628443 (Ind. App. 2017). Because the amoebic infection was not reasonably foreseeable by the Park and Recreation Department, there was no duty for the Department to treat the water or protect swimmers against this rare condition. A special district is unlikely to be held liable under a negligence theory unless it knew of or reasonably should have known of a potential harm and failed to protect the public against that harm.
- (d) The protection of the CGIA is not universal and all special districts should ensure that the water storage site is safe and any recreational activities are limited to those allowed by its policies.

14. **Managing Recreational Activities.**

- (a) We recommend that special districts take time to consider and have a clear policy with respect to recreational activities at or on any body of water.
- (b) Be sure to carefully consider what type of recreational activities will be allowed and what impacts those uses will have on your reservoir. For example, at some water supply reservoirs, any form of body-contact recreation is prohibited due to water quality and costs of treatment concerns.
- (c) Also note that going through the effort to study what uses are allowed and the potential impacts should have the effect of decreasing liability exposure. If a study of allowable uses and resulting recreation or use policy did not assess a possible situation which later results in injury or damage, a district would have a very good defense against claims that the situation was, in fact, reasonably foreseeable and therefore create liability under a negligence or premises liability theory.