An Overview of Environmental Laws Governing Wetlands Development in Telluride, Colorado

A Report for the Sustainable Ecosystems Institute by Melissa Powers

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CONTENTS

I. INTRODUCTION 3

II. FEDERAL LAWS 3

A. Clean Water Act 3
1. Regulation of Wetland Fills Under § 404 4
a. *Permit Approval Process* 4
(1) Practicable Alternatives 5
(2) Mitigation 6
(3) Significant Degradation 7
(4) Public Interest Review 7
(5) EPA Veto Authority 7
b. *Citizen Participation* 8
c. *General Permits* 8
2. § 401 – State Certification 9
3. § 402 - Regulates Discharges of Pollutants from Point Sources 9
a. *§ 402 Permit Approval Process* 10
(1) Substantive Requirements 10
(2) Citizen Participation 12
b. *Stormwater Permit Process* 12
(1) Stormwater Permits 12
(2) Citizen Involvement 13

B. National Environmental Policy Act (NEPA) 13
1. Development of an Environmental Impact Statement versus an Environmental Assessment 13
a. *Contents of an EA* 14
b. *Contents of an EIS* 14
c. *Which NEPA Document Might the Valley Floor Development Require?* 15

2. Citizen Involvement and Challenges to EIS/ EA 15

C. Endangered Species Act 16
1. Federal Agency Requirements 16
2. Private Individuals' Requirements 18

III. STATE LAWS 19
A. State Land Use Restrictions 19

B. State Environmental Policy Act 19

C. State Endangered Species Act 19

D. State Law Of Surface Waters 20
1. Water Adjudication and Administration Procedure 21
a. *Acquisition of a Water Right* 21
b. *Transfer of a Water Right* 22
2. Citizen Involvement 22

E. Colorado Ground Water Law 22
1. Tributary Groundwater 22
2. Nontributary Groundwater 23

IV. SAN MIGUEL COUNTY LAND USE CODE 23

A. Open Space and Agricultural Restrictions 24

B. Wetland Restrictions 24

V. TOWN OF TELLURIDE LAWS 25

A. Telluride's Power Of Eminent Domain 25

B. Telluride's Power to Annex the Valley Floor Property 27
1. Substantive Requirements 28
2. Procedural Requirements 29
3. Conclusion 30

C. Telluride's Land Use Code and Master Plan 30

I. INTRODUCTION

In fall 2000, the Sustainable Ecosystems Institute (SEI) engaged with a group of citizens in Telluride, Colorado, to find a science-based solution to land use and conservation in the San Miguel Headwaters to Valley Floor region.

As the work progressed, many citizens and local groups requested information on environmental policies and laws that might apply to any proposed development on the Valley Floor, particularly where wetlands and fens exist. In response to these requests, SEI produced this public-interest report, which provides an overview of the main federal, state, and local environmental regulations that potentially impact actions on threatened and endangered species, wetlands and fens, or other sensitive habitats.

This report is not intended as legal advice, but rather as an informational report to inform and help in making land use decisions for the Valley Floor. Founded in 1992 and based in Portland, Oregon, SEI is a public-benefit, non-profit organization of independent scientists who help clarify technical and ecological issues so that policy makers can make informed decisions. SEI is non-advisory, does not engage in litigation, and does not make value judgments about natural resource policy.

This report analyzes the various federal, state, county, and local laws that could impact and regulate the development of the Valley Floor property outside Telluride. Since a specific development proposal for the Valley Floor remains to be finalized, much of this report's analysis focuses on the general statutory requirements. As in all areas of law, the facts often determine the outcome of any legal question or dispute. Therefore, while this paper at times attempts to find a "right" answer or to predict a probable outcome, at this point, many of the conclusions are based on factual assumptions and uncertainties. Accordingly, as more information becomes available, relating not only to development plans, but particularly to the ecology of the Valley Floor, interested parties should reapply new information to this report's legal analysis in an attempt to predict the probable effect of the laws on the development.

II. FEDERAL LAWS

Several federal environmental laws could limit the development in the Telluride wetlands. Most important of these is the federal Clean Water Act, which prohibits discharges of pollutants into the waters of the United States without a permit. CWA § 301(a); 33 U.S.C. § 1311(a). The Clean Water Act applies to any person engaging in actions that result in such a discharge, and, therefore, will likely play a significant role in the proposed development. *Id.* The Endangered Species Act and the National Environmental Policy Act could also limit the development, but their provisions apply almost exclusively to federal agencies, and will only be triggered once a federal agency becomes involved in the development permitting process. Nonetheless, the development will probably invoke federal agency involvement and, consequently, be subject to the requirements of all three statutes.

A. Clean Water Act

The Clean Water Act (CWA) regulates discharges of pollutants into waters of the United States. *Id.* "Waters of the United States" include wetlands that are adjacent to and hydrologically connected with navigable waters, but do not include isolated wetlands that do not affect navigable waters. 40 C.F.R. § 230.3(s)(7), (t)[1]; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (upheld definition of waters of the United States as including wetlands adjacent to navigable waters even if they are not inundated or frequently flooded by the navigable water); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 2001 WL 15333 (January 9, 2001) (denying Corps jurisdiction over isolated wetlands).

In Telluride, since the Valley Floor wetlands lie adjacent to the San Miguel River, the CWA will regulate any proposed fill. Further, if a developer seeks permission under the CWA to fill the wetlands, the state of Colorado will have authority to either veto or condition the permit, based on the fill's impact to the San Miguel River's water quality. CWA § 401(a)(1); 33 U.S.C. § 1341(a)(1). Finally, if a developer receives permission to fill the wetlands, she or he will also probably need to obtain permission to discharge pollutants into the San Miguel River (depending upon the proposed waste treatment and construction activities). CWA § 402(a)(1); 33 U.S.C. § 1342(a)(1).

1. Regulation of Wetland Fills Under § 404

Section 404 of the CWA regulates the discharge of dredged or fill material into wetlands. 33 U.S.C. § 1344. Although it technically only prohibits the addition of materials into a wetland, and not the removal of materials from a wetland, federal regulations prohibit unpermitted earth-moving activities that may redeposit dredged material into a wetland and result in wetland destruction.[2] 33 C.F.R. § 323.2(d)(1)(iii). Thus, to comply with

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[1] The regulations define wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. § 230.3(t).

[2] Some developers have tried to remove themselves from wetland regulation by first draining the wetland, and thereby destroying its status as a water of the United States. Since the CWA only prohibits the addition of pollutants into the water, and not removal of water from the wetland, in one sense, this type of activity is perfectly legal. However, recent federal regulations seek to close this loophole by prohibiting de minimis deposits of dredged material that incidentally fall back into the wetlands during wetland draining activities, such as bulldozing drainage ditches. Here, even if a developer sought to engage in this type of evasive action, it appears that she or he would likely fail simply because the topography and hydrology of the land would not make bulldozing effective.

the CWA, the developer must seek a permit to fill the wetlands.

a. *Permit Approval Process*

The United States Army Corps of Engineers (Corps) has primary responsibility for regulating and permitting wetland fills. When a developer decides to fill a wetland that will have significant impacts, s/he must file a permit application with the Corps, describing the wetland fill and the proposed activity. 33 C.F.R. Part 325. In deciding whether to grant the wetland fill, the Corps must follow the Environmental Protection Agency's (EPA) permitting regulations, known as the 404(b)(1) guidelines.[3] *See* 40 C.F.R. Part 230. Specifically, the Corps must 1) determine if practicable alternatives to the fill exist; 2) impose mitigation requirements on the developer; and 3) perform a public interest review. If any of these inquiries reveal that the wetland fill should not proceed, the Corps has authority to either deny or condition the development.

(1) Practicable Alternatives

In evaluating whether to grant a § 404 permit, the Corps must determine if practicable alternatives to the wetland fill exist. Where the proposed activity is not water dependent (such as a wharf or a boat dock), the Corps presumes that practicable alternatives do exist, unless the developer clearly demonstrates otherwise. 40 C.F.R. § 230.10(a)(3). To be practicable, the alternative must be both available to the applicant, considering "cost, technology, and logistics," and capable of fulfilling the basic project purpose. 40 C.F.R. § 230.3(q). The developer has the burden of showing that there are no alternatives to developing in the wetland.[4]

The key to determining if practicable alternatives exist is defining the basic project purpose. 40 C.F.R. § 230.10(a)(3). The Corps must define this, but often lets the developer determine the outer parameters. In determining the basic project purpose, the Corps distinguishes between a necessary component of a project

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[3] Some wetlands receive designation as "Aquatic Resources of National Importance." Despite the lofty title, neither the CWA nor the wetland regulations seems to extend additional protections to these types of wetlands, except that the Corps may, but will not necessarily, more closely evaluate the impacts to the designated wetlands. *See* Fish and Wildlife Service 50 C.F.R. Part 17 Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Conservancy Fairy Shrimp, Longhorn Fairy Shrimp, and the Vernal Pool Tadpole Shrimp; and Threatened Status for the Vernal Pool Fairy Shrimp, 59 Fed. Reg. 48136-01 (Sept. 19, 1994).

[4] However, this burden cannot be that heavy, considering the number of permits to fill wetlands that the Corps regularly grants.

and an incidental feature. As long as the proposed project would be viable without the proposed wetland, and not necessarily maximally profitable, it would fulfill the basic project purpose. *Id.*

Practicability also turns on the cost of developing the project in an upland site as opposed to a wetland site. If a developer can show that building the project in an upland site would be unreasonably expensive, then it has likely shown that the project is not practicable. However, the developer cannot simply define the project in a way to make the upland site development appear unreasonably expensive.

Finally, the practicable alternative must be available. 40 C.F.R. § 230.10(a)(2). However, availability does not mean that the developer must actually own the site. It may be sufficient if the developer can obtain, use, or manage the site. *Id.* The Corps will consider the costs and logistics of using the upland site, and it will make this determination based on conditions that existed at the time the developer entered the market for the proposed project.

If the Corps determines that practicable alternatives do exist, the Corps must undertake an environmental analysis to determine whether any of the alternatives will have a less adverse impact than the proposed project. A practicable alternative that does not involve discharges to wetlands is presumed to have less adverse impacts unless the applicant clearly demonstrates otherwise. 40 C.F.R. § 230.10(a)(3). Unless the applicant overcomes this presumption, the Corps will not grant the fill permit.

(2) Mitigation

If the Corps decides to approve a wetland fill, it must impose mitigation requirements as part of the approval. The guidelines state: "no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse effects of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d). Mitigation has three main requirements, which are listed in order of priority and must be done in sequence: avoidance, minimization, and compensation. An applicant must show that she or he has 1) avoided wetland impacts where practicable; 2) minimized any potential impacts to wetlands; and 3) mitigated or compensated for any remaining, unavoidable impacts resulting from the proposed fill.

The first step, avoidance, involves the "practicable alternative analysis." If a practicable alternative that will have less adverse impacts exists, the Corps may not allow a discharge. 40 C.F.R. § 230.10(a). Minimization, the next step, is closely related to avoidance, but involves a closer look at the specific project features and seeks to control the fill itself or the effects of the fill. 40 C.F.R. §§

230.70-230.77. Examples of minimization include requirements related to the type of fill material, specific disposal site locations, and technological requirements. *Id.*

Finally, compensation requires "appropriate and practicable compensatory mitigation" for all unavoidable adverse impacts which remain after the minimization. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990). Compensation can include restoration of existing degraded wetlands, creation of artificial wetlands, enhancement (or improvement) of an existing wetland, or preservation of high-quality wetlands, with a preference for restoration. *Id.* Although compensation can be either on- or off-site, the regulations establish a preference for on-site compensation. *Id.* They also establish a preference for in-kind compensation; that is, compensation that provides for the same uses that the approved fill will impair or destroy. *Id.* The ultimate goal of compensation is to replace the functions and values that were displaced "to the maximum extent practicable," which usually means that wetland replacement should be done at more than a 1:1 ratio. Compensation is only required to the maximum extent practicable; it is likely that this qualifying language has allowed for the level of wetlands loss that this country has experienced.

(3) Significant Degradation

Regardless of any mitigation, the 404(b)(1) guidelines prohibit the Corps from granting a wetland fill permit if the project would result in significant degradation of the aquatic resource, even if the Corps has found that no practicable alternatives to the wetland fill exist. 40 C.F.R. § 230.1(c) and (d); 230.10(c). The Corps must focus on the entire project (here, the entire development) and not just the actual dredge and fill activity. *Id.* The guidelines also prohibit the Corps from permitting any fill that will violate state water quality standards. 40 C.F.R § 203.10(b)(1). If the town of Telluride can show that the proposed development will significantly degrade the aquatic resource, the Corps may not grant the permit to fill.

(4) Public Interest Review

Even if the Corps determines that a proposed wetland fill will conform to its regulations, the Corps may nonetheless deny a permit if it determines that the fill will not be in the public interest. 33 C.F.R. § 320.4(a). Although the regulations include a presumption that a wetland fill which conforms to the guidelines will be granted, a showing that the wetland fill is not in the public interest will overcome this presumption. As part of its public interest analysis, the Corps must consider more than just the impact of the fill activity. The Corps may consider the effects on water supply and water quality, economics, fish and wildlife values, energy

needs and the general public welfare. 33 C.F.R. § 320.4(a). However, some the Corps may not necessarily deny a fill permit if the denial is based solely on preserving another community's economic welfare. *Mall Properties v. Marsh*, 672 F. Supp. 561 (D. Mass. 1987). The Corps must then balance the value of the wetland fill against the competing harms to the public interest values. The Corps has discretion to determine if the public interest outweighs the private interest in the fill.

(5) EPA Veto Authority

Although the Corps has primary jurisdiction over wetland fills, the United States Environmental Protection Agency (EPA) nonetheless retains authority over Corps 404 decisions. CWA § 404(c); 33 U.S.C. § 1344(c). Specifically, EPA may veto any permit the Corps issues if it determines that issuing the permit will have an unacceptable consequence for municipal water supplies wildlife, fishing areas, and recreation areas. CWA § 404(c); 33 U.S.C. § 1344(c). Indeed, EPA may veto a Corps permit based solely on the Corps' failure to follow guidelines.[5] As long as EPA first consults with the Secretary of the Army, its veto decision is the last agency position regarding the issuance of the permit.

b. *Citizen Participation*

Citizens have the right to participate in Corps permitting decisions. Specifically, the Corps must provide citizens with notice of proposed wetland fills and the opportunity to comment on the permit application. 33 C.F.R. § 325.3. The regulations anticipate that the Corps will provide a written notice and send this notice through the postal service to interested parties. *Id.* at § 325.3(d)(1). The regulations also require the Corps to post notice of the proposed wetland fill in public spaces, such as the post office. *Id.*

Citizens can also request the Corps to send notice of proposed wetland fills directly to them. The contact information for Corps branch that will likely handle any wetland fill in Telluride is: Nick Mezei, United States Army Corps of Engineers, Sacramento District, ATTN: Regulatory Branch, W. Colorado Office, Wayne N. Aspinall Federal Building, 400 Rood Avenue, Room 142, Grand Junction, CO 81501-2563. The phone and fax numbers, respectively, are: (970) 243-1199 and (970) 241-2358.

c. *General Permits*

There is really only one major loophole to the permitting process that could, but likely will

[5] While the EPA may have broad veto authority, it has only vetoed eleven proposed permits, out of an estimated 150,000 permit applications received between 1979 and 1999. Don Elder, Gayle Killam, and Paul Koberstein, The Clean Water Act: An Owner's Manual, 99 (March 1999).

not, impact the issuance of an individual permit in Telluride. The Corps has established a system of general permits, called Nationwide Permits (NWPs), that allow a range of activities for which a dredge and fill permit would otherwise be required. 40 C.F.R. § 230.5(b). The NWPs authorize a number of specific and limited activities, such as maintenance, to go forward without requiring the developer to actually apply for a specific permit.[6] Most general permits are limited to activities that will impact areas less than one acre, but not all general permits are as limited. 33 C.F.R. Part 330. However, the regulations do not prohibit the use of several Nationwide Permits on one site.[7] Although a developer does not normally need to seek approval from the Corps to conduct the activity[8], some NWPs require the developer to notify the Corps prior to conducting the discharge or fill activity.

Generally, NWPs should only allow small, discrete projects — which will not have a net negative impact on wetlands — to go forward. However, where several NWPs combine to allow a number of activities to proceed in the same area, the activities undoubtedly have a cumulative impact on wetlands. Further, unlike individual permits, most NWPs do not require mitigation. Perhaps most importantly, NWPs do not necessarily involve any agency oversight whatsoever and yet account for 85% of all approved wetland fills. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, Brief of Respondent, 21 n. 35 (2000). As a result, NWPs allow mass destruction of wetlands through incremental losses that cumulatively have significant effects.

Based on the facts related to the Telluride situation, it seems extremely unlikely the developer could qualify for a Nationwide Permit. First, the amount of wetlands the developer would impact is significantly larger than the one-acre limit established by most NWPs, particularly for any type of extensive development.[9] Second, the development

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[6] Some of the activities for which the Corps has issued a nationwide permit include: fish and wildlife harvesting activities, oil and gas structures, bank stabilization, minor dredging, maintenance of existing flood control projects, and boat ramps.

[7] Some NWPs specify, however, that a permittee cannot combine certain NWPs with others.

[8] 40 C.F.R. § 230.5(b).

[9] Most NWPs have acreage limits of one acre or less. Although some NWPs allow activities without any acreage limits, the developer will probably not engage in these types of development projects. Examples of activities authorized by NWPs that do not include acreage limits are: hydropower developments, oil spill cleanup, surface coal mining, and wildlife management. *See* United States Army Corps of Engineers, Albuquerque District,

activities would probably not qualify for any of the existing NWPs. Although one NWP allows for commercial development, it limits wetland fills to one-half acres. Nonetheless, Telluride citizens should be aware of the existence of Nationwide Permits and should monitor any actions that could indicate the developer's intent to fall within one of the NWPs.

2. § 401 – State Certification

Although the federal government, through the Army Corps of Engineers, has the authority to grant or deny a § 404 permit, the Colorado Department of Public Health and Environment nonetheless retains a type of veto authority over the Corps' decision. CWA § 401; 33 U.S.C. § 1341. Section 401 of the CWA requires that, where a federal agency proposes to grant a permit, it seek approval from the state that the activity will comply with state water quality standards. *Id.* Corps regulations specify that the Corps may not approve any wetland fill permit applications until the state has given its water quality certification. 33 C.F.R. § 325.2(b)(1)(ii). If the state denies the certification, the Corps may not approve the permit and the activity may not proceed. However, if the state fails to act within 60 days on the certification, the Corps may deem it approved and grant the permit. CWA § 401(a)(3); 33 U.S.C. § 1341(a)(3).

3. § 402 - Regulates Discharges of Pollutants from Point Sources

Even if the developer receives a permit to fill the land, he or she may also need a permit to discharge materials into San Miguel River under section 402. 33 U.S.C. § 1342. Section 402 requires dischargers to obtain a National Pollution Discharge Elimination System (NPDES) permit for any discharge into a river from a point source. *Id.* The Clean Water Act defines point source discharge as any addition of a pollutant from a discernable or discrete conveyance, such as a pipe or ditch. CWA § 502(14); 33 U.S.C. § 1362(14). Although § 404 would regulate any discharge of the fill or dredge material, § 402 may regulate any discharge of any other type of pollutant.[10]

There are two contexts in which the developer may need to obtain an NPDES permit, both of which would arise during or after the development has begun. First, if the developer plans to discharge municipal wastes (i.e. sewage) into the San Miguel River, the developer will need a section 402 permit. Second, if the development goes forward, the developer may require a permit for construction runoff under the state's stormwater permit system.[11]

<http://www.spa.usace.army.mil/reg/nnwpsumCo.htm>.

[10] Pollutant is a defined term under the CWA and includes rock, dirt, heat, biological materials, sewage, and many other contaminants. CWA § 502(6); 33 U.S.C. § 1362(6).

[11] While runoff is not a point source discharge, construction discharges may nonetheless be regulated as such, particularly where construction runoff results in a discrete, channeled

a. *§ 402 Permit Approval Process*

To receive an NPDES permit, the developer must submit a permit application to Colorado Department of Public Health and Environment (CDPHE), the state agency charged with implementing the Clean Water Act.[12] The permittee must include extensive information about the facility and the proposed discharges. 40 C.F.R. § 122.21(g)-(l). In particular, the permittee must indicate what pollutants it believes are in the discharge and how much pollution it anticipates it will generate and discharge. 40 C.F.R. § 122.21(g)(7)(i). The permittee must submit its application to the CDPHE at least 180 days prior to the commencement of its proposed discharge. 40 C.F.R. § 122.21(c) and (d). The agency will then draft a proposed permit, publish a notice of the issuance of the draft permit in a local newspaper, and give citizens at least 30 days to comment. 40 C.F.R. § 124.10(c), 124.11. After the agency issues the final permit, either the permittee or the citizens may appeal. 40 C.F.R. § 124.74.

(1) Substantive Requirements

In determining the appropriate permit limits, the CDPHE must consider several factors. First, the agency must comply with any set effluent limits that either the state or the EPA has set for a particular pollutant. 40 C.F.R. § 122.44(d)(1)(iv). EPA has established a set of effluent guidelines for a number of industrial categories that facilities must meet. *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977). Effluent guidelines are meant to reflect what the best available treatment (BAT) technology can achieve in terms of pollution reduction. CWA § 301(b)(2)(A); 33 U.S.C. § 1311(b)(2)(A). New sources (sources for which construction began after the publication of proposed regulations) of pollution must comply with "new source performance standards," which are arguably more stringent than BAT standards. 40 C.F.R. § 122.2, CWA § 306(a)(1); 33 U.S.C. § 1316(a)(1). In short, the agency must consider what level of treatment technology the permittee must use and ensure that this treatment will comply with established effluent guidelines.[13]

Second, even if the CDPHE determines that the facility can achieve the required technology-based effluent limitation, the agency may nonetheless impose more

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conveyance of pollutants into the water.

[12] Although the Clean Water Act is a federal statute, state agencies may administer the statute. CWA § 402(b); 33 U.S.C. § 1342(b).

[13] If no effluent limitations exist, the agency can use "best professional judgment" to establish permit limits. 40 C.F.R. § 125.3(c).

stringent requirements if the existing requirements will not achieve designated water quality standards. 40 C.F.R. § 122.44(d)(1)(iv). Each state establishes water quality standards, which consist of designated uses, numeric and narrative criteria, and an antidegradation policy. CWA § 303(c)(1); 33 U.S.C. § 1313(c)(1). Designated uses are the purposes for which the water body is used, and can include fishing, swimming, recreation, and wildlife uses. CWA § 303(c)(2); 33 U.S.C. § 1313(c)(2). Criteria describe the characteristics of the water body necessary to support the designated uses. CWA § 304(a)(1); 33 U.S.C. § 1314(a)(1). For example, the temperature standard for anadromous salmon in many Oregon rivers is 64 degrees F. Finally, the antidegradation standard sets a limit on how far a state can allow a water body to degrade as a result of pollution. 40 C.F.R. §§ 131.10(g), 131.12. The state agency must impose an effluent limitation that will not violate the applicable water quality standard. 40 C.F.R. § 122.44(d)(1)(i).

For water quality-limited streams (bodies that do not meet the established standards), the state agency should not issue any new permits until it has established a total maximum daily load (TMDL) for the stream. A TMDL estimates the total input of pollution into a stream from all sources that a stream can tolerate without violating water quality standards. CWA § 303(d); 33 U.S.C. § 1313(d). Once the agency has calculated the total input, it allocates this input between point sources and nonpoint sources. United States Environmental Protection Agency, *Technical Support Document for Water Quality-Based Toxics Control* 68 (March 1991). The point sources must not exceed their waste load allocation, or the amount of pollutants they can discharge while not violating water quality standards. *Id.* at 68.

(2) Citizen Participation

As noted above, citizens can provide written (and sometimes oral) comments on any proposed draft permit. 40 C.F.R. § 124.10(c), 124.11. After the agency issues the final permit, citizens may appeal. 40 C.F.R. § 124.74. Many issues may arise in commenting on a draft permit; however, these issues are often river- and state-specific, and exceed the scope of this document. Nonetheless, citizens should be aware of their right to participate in the permitting process. They can also raise the issue of waste disposal during their participation in the zoning, environmental analysis,[14] and wetlands permitting processes.

b. *Stormwater Permit Process*

Although the Clean Water Act does not typically regulate runoff, Congress recognized the

[14] Under the National Environmental Policy Act (NEPA), a federal agency must analyze the environmental effects of the agency's action. The next section discusses this law.

problems associated with stormwater runoff and directed the EPA to establish regulations and issue permits for stormwater discharges "associated with industrial activity." CWA § 402(p); 33 U.S.C. § 1342(p). Stormwater includes "storm water runoff, snow melt runoff and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). To require a stormwater permit, a facility must engage in "industrial activity" in an area associated with industrial activity. *See* 40 C.F.R. § 122.26(b). Industrial activity includes construction activity that results in the disturbance of less than five acres of land, either individually or as part of a larger development or sale. 40 C.F.R. § 122.26(b)(14). Based on this definition, it appears that the developer will need to obtain a stormwater permit.

(1) Stormwater Permits

There are two types of permits applicable to stormwater discharges. The first is a general permit for discharges associated with construction activity. 57 Fed. Reg. 41176, 41236 (Sept. 9, 1992). Under the general permit, the discharger must develop and implement a storm water management or pollution prevention plan. *Id.* Discharges that may adversely affect a species or its critical habitat protected under the Endangered Species Act cannot be authorized under a general permit, and, instead, must be covered pursuant to an individual permit. *Id.* at 41240. Individual permits, the second type of stormwater permits, include specific requirements for construction activities. 40 C.F.R. § 122.26(c)(ii). As part of its permit compliance, the construction operator must identify the receiving water body and provide a description of: 1) the location and the nature of the construction activity; 2) the total area of the site; 3) proposed measures to control discharges during and after the construction; and 4) an estimate of the runoff and the type of material in the discharge. *Id.* Aside from these requirements, the CWA does not seem to limit stormwater discharges at this time.

(2) Citizen Involvement

Provisions for citizen involvement turn on whether the developer applies for a general or individual permit. If the developer qualifies for a general permit, she or he only needs to inform either the Regional EPA office or the Colorado Department of Public Health and Environment that she or he intends to be covered under the general permit. Since citizens had an opportunity to comment on the general permit when EPA issued it, they no longer have an opportunity to comment at this stage. However, if the developer seeks an individual permit, citizens may comment on the individual stormwater permit, as described above in the § 402 NPDES permit analysis.

B. National Environmental Policy Act (NEPA)

The National Environmental Policy Act (NEPA) is a procedural statute that requires federal agencies to assess the environmental impacts of their proposed activity. NEPA § 102; 42 U.S.C. § 4332. NEPA applies to all federal agencies, even when their participation is limited to

granting a permit under a different statute. *Id.* at § 102(2); *Id.* at 4332(2).[15] Accordingly, if the developer seeks an individual permit from the Corps to fill the wetlands, the Corps must prepare a NEPA document to analyze the impacts of the wetland fill. The following section discusses what type of document the Corps would need to prepare.

1. <u>Development of an Environmental Impact Statement versus an Environmental Assessment</u>

There are two types of documents that typically result from a NEPA analysis: an environmental assessment (EA) and an environmental impact statement (EIS). NEPA requires an agency to develop an EIS for "major federal actions significantly affecting the quality of the human environment." NEPA § 102(2)(C); 42 U.S.C. § 4332(2)(C). The regulations implementing NEPA establish three categories of actions that may or may not require an EIS. First, an agency may categorically exclude actions that do not individually or cumulatively have a significant effect on the environment, and may conduct the action without any NEPA analysis whatsoever. 40 C.F.R. §§ 1507.3(b)(2)(ii), 1508.4. Second, the agency can specify actions that will always require EISs and proceed immediately to EIS preparation. *Id.* at § 1501.4(a)(2). Third, for actions that do not necessarily require an EIS, the agency must prepare an EA to determine the impact of the proposed action and whether it needs to prepare an EIS. *Id.* at 1501.4(b), 1508.9. Much litigation and controversy surrounding NEPA involves agency determinations that an action does not require an EIS.

a. *Contents of an EA*

An EA is a concise document designed to provide sufficient evidence and analysis for an agency to determine if an action will significantly affect the environment. *Id.* at § 1508.9(a)(1). At a minimum, an EA must include a discussion of the need for the proposed action, alternatives to the proposed action, and the environmental impacts of both the proposed action and the alternatives. *Id.* at 1508.9(a)(2). If the agency determines, based on the EA, that that action will not significantly affect the environment, the agency issues "a finding of no significant impact" (FONSI). *Id.* at 1501.4(e). The FONSI must include an explanation of why the proposal will not have a significant impact. *Id.* at 1508.13. If an agency issues a FONSI, it does not need to conduct any more environmental analysis. If, on the other hand, the agency determines that there will be a significant environmental impact, the agency must prepare an EIS. *Id.* at §§ 1501.4(d), 1508.3, 1508.11.

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[15] Major federal actions include actions that are regulated by federal agencies. 40 C.F.R. § 1508.18(a). In Telluride, the major federal action would be the proposed issuance of an individual dredge and fill permit. Note that NEPA only applies to the federal government, so NEPA will only be triggered for the § 404 permit, because the state agency administers the other provisions of the CWA.

b. *Contents of an EIS*

An EIS is a tool to assess, rather than justify, environmental impacts of agency decisions. *Id.* at § 1502.2(g). The EIS must discuss the environmental impacts of the proposed action, and any alternatives to the proposal. The environmental impacts discussion should form the "scientific and analytic basis for the comparisons" in the alternatives section. *Id.* at § 1502.16. Specifically, it should compare: the direct and indirect[16] consequences of the proposal and the alternatives; potential conflict with land use plans; effects on the urban, historical and constructed environment; cumulative impacts; and possible mitigation measures. *Id.* The alternatives analysis requires an agency to present the proposal and alternative actions in comparative form so as to give the agency and the public a clear choice. *Id.* at § 1502.14. The agency must "objectively evaluate all reasonable alternatives," and give "substantial treatment" to each alternative. *Id.* at § 1502.14(d). An agency need not consider infeasible alternatives, but it must always consider a no-action alternative. *Id.* at § 1502.14(c); *Tongass Conservation Society v. Cheney*, 924 F.2d 1137 (D.C. Cir. 1991). The agency must also identify its preferred alternative. 40 C.F.R. § 1502.14(e). Since NEPA is a procedural statute and does not mandate any particular outcome, a reasoned analysis by the agency satisfies NEPA's requirements.

c. *Which NEPA Document Might the Valley Floor Development Require?*

At this point, without knowing the nature and extent of the proposed Valley Floor development, it is only possible to speculate about which NEPA document this project would require. First, to trigger NEPA at all, there must be a federal action. Based on the information currently available, it seems likely that the Corps will have to conduct an EIS, if the developer requires an individual fill permit. If, however, the developer somehow fits within the nationwide permit category, the Corps will not have to conduct any NEPA analysis, because the Corps analyzed the effects of the action at the time it issued the general permits.[17] Further, if the owner chooses to sell the property as individual parcels, rather than develop the property as one parcel on his own, any subsequent individual developments may not arise to cause an environmental impact that is significant enough to involve the Corps, and by extension, trigger NEPA.[18]

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[16] Indirect effects can include off-site and regional impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 339, 350 (1989).

[17] The Corps asserts that it does not need to conduct an EIS for the NWP program, because NWPs inherently do not have a significant effect on the environment. However, the Corps does issue EAs for each of the NWPs it authorizes. United States Army Corps of Engineers, <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/nw98fons.htm>

[18] The developer cannot avoid significance simply by breaking the action into small component parts, however. 40 C.F.R. § 1508.27(b)(7). Instead, he would have to abandon the Bavarian

Second, the action must have a significant impact. The regulations implementing NEPA state that significance can vary depending upon the setting of the proposed action viewed from the local, regional, and national perspectives. 40 C.F.R. § 1508.27(a). A particularly controversial action will likely be considered to have a significant impact and require an EIS. *Id.* at 1508.27(b)(4). Significance is also evaluated based on the unique geographical characteristics (including wetlands) affected, the presence of endangered or threatened species, and the cumulative effects of the action. *Id.* at 1508.27(3), (7), and (9). Ultimately, the determination of significance involves a factual assessment that cannot be made until the developer has submitted a proposal for development.

2. Citizen Involvement and Challenges to EIS/ EA

Despite NEPA's procedural nature, citizens can and do play an important part in the development of NEPA documents. Citizens have the right to request and receive NEPA documents. 40 C.F.R. §§ 1502.19, 1506.6. At the EA stage, citizens can submit comments recommending the preparation of a complete EIS by arguing that the proposed action will significantly affect the environment. If citizens provide sufficient documentation showing a significant impact, the agency will more likely perform the EIS. Citizens may also submit comments to an agency's draft EIS. The agency must respond in writing to the comments in the final EIS and explain the reasons for the action it chose. 40 C.F.R. § 1503.4. Citizens can also help define the scope of the EIS review, either by submitting their own proposed alternatives or by presenting evidence that the action may have cumulative impacts. Finally, citizens who participate in the commenting process can challenge the agency's final decision in a federal court.

C. Endangered Species Act

The Endangered Species Act (ESA) has had a profound effect on private and public land use and development. The ESA imposes both substantive and procedural requirements on federal agencies. Substantively, the ESA prohibits all federal agencies from engaging in activities that will jeopardize the existence of listed species or adversely modify their critical habitat. ESA § 7(a)(1) & (2); 16 U.S.C. § 1536(a)(1) & (2). Procedurally, to ensure that federal agency actions will not have this effect, the agencies must consult with either the United States Fish and Wildlife Service (USFWS) or the National Marine Fisheries Service (NMFS) regarding the impacts of their proposed activities on listed species.[19] ESA § 7(b); 16 U.S.C. § 1536(b). Although most of the provisions of the ESA apply only to federal agencies, the ESA nonetheless prohibits private individuals and state and local governments from "taking" endangered species.

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village idea entirely and sell the area in an undeveloped conditon.

[19] NMFS has responsibility for marine species, including anadromous fish. In Telluride agencies would consult with the USFWS.

ESA § 9(a); 16 U.S.C. § 1538(a).[20] These powerful provisions can play a significant role in limiting any proposed development that may affect listed species.

1. Federal Agency Requirements

The ESA requires federal agencies to avoid causing jeopardy to a listed species or adverse modification to its critical habitat.[21] ESA § 7(a)(1) & (2); 16 U.S.C. § 1536(a)(1) & (2). To give effect to this requirement, a federal agency must consult with either USFWS or NMFS regarding the impacts of their actions.[22] ESA § 7(b); 16 U.S.C. § 1536(b). The initial stage of consultation requires the action agency (here, the Corps) to determine the scope of the action area and then ask the USFWS if a protected species or species proposed for listing may be present in the action area. ESA § 7(c)(1); 50 C.F.R. §§ 402.02, 402.12. If a proposed species is in the area, the action agency must "confer" with the USFWS, which is a type of informal consultation. ESA § 7(a)(4); 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10. The action agency normally initiates the conference to determine if the action is likely to jeopardize proposed species or its critical habitat. Any USFWS recommendation is only advisory, however. For candidate species, the ESA contains no requirements.

For species listed as threatened or endangered, the ESA requires the action agency to engage in formal consultation. ESA § 7(b), 16 U.S.C. § 1536(b). After the USFWS determines that a species is present in the area, the action agency must prepare a biological assessment, which determines, using the best available science, if the action is

[20] Note that this prohibition does not apply to threatened species or to plants.

[21] The ESA contains three general categories of species: endangered, threatened and unlisted species. An endangered species is "in danger of extinction throughout all or a significant part of its range." 16 U.S.C. § 1532(6). A threatened species is "likely to become an endangered species within the foreseeable future throughout all or a significant part of its range." 16 U.S.C. § 1532(20). Even unlisted species may receive limited procedural protections under the ESA, if the species are either candidates for listing or proposed for listing. Species proposed for listing are any species that the USFWS has proposed in the Federal Register for listing under the ESA. 50 C.F.R. § 402.02. Candidates for listing are species that the USFWS is considering for listing, but has not yet proposed for listing. 50 C.F.R. § 424.02(b). The ESA protects only listed species, not candidates for listing. *Wilson v. Block*, 708 F.2d 735, 750 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983).

[22] ESA § 7 applies to all actions in which there is discretionary federal involvement or control 50 C.F.R. § 402.3. Here, if the developer applies for an individual permit, the Corps must consult with the USFWS prior to issuing a permit.

"likely to affect" the listed species or habitat.[23] ESA §§ 7(a)(2) & (c)(1), 16 U.S.C. § 1536(a)(2) & (c)(1). If the biological assessment determines that the action is not likely to adversely affect listed species or habitat, and the USFWS agrees, the consultation is complete. If the biological assessment reveals a likely effect on listed species or habitat, the agency begins formal consultation. 50 C.F.R. § 402.14.

The USFWS has ninety days after receiving the biological assessment to issue a biological opinion. ESA § 7(b)(1), (3), 16 U.S.C. § 1536(b)(1), (3). The biological opinion must identify the potential effects of the proposed action on the listed species and habitat. If the USFWS determines that the action will not injure the species or adversely modify critical habitat, it issues a "no jeopardy" biological opinion. 50 C.F.R. § 402.14(h). If the USFWS issues a jeopardy biological opinion, it will propose "reasonable and prudent alternatives," implementation of which will avoid jeopardizing the species or adversely modifying its critical habitat. ESA § 7(b)(3), 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.02. Once the USFWS has issued its biological opinion, consultation has ended.

Although the ESA does not require an action agency to implement the biological opinion or the reasonable and prudent alternatives, an agency's failure to do so will expose it to claims that it has violated the substantive requirements of § 7. *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988). Applied in the Telluride context, if the USFWS determined that the Corps' issuance of a wetland fill permit would jeopardize a listed species or its critical habitat, the USFWS would probably direct the Corps to issue the wetland permit with specific conditions. The Corps' failure to impose these conditions, or the developers' failure to implement these decisions, could subject both the Corps and the developer to claims that they are taking listed species. If a court were to agree, it could enjoin the activity from proceeding or assess civil penalties against the private individual.[24]

2. Private Individuals' Requirements

Private citizens do not have to consult with federal agencies; indeed, the ESA provides them with no opportunity to consult even if they wanted to. The ESA does prohibit, however, any action by any person that may result in a take of listed species. ESA §

[23] The ESA requires the USFWS to base its decisions under the ESA on the "best scientific and commercial data available." ESA § 7(c)(1); 16 U.S.C. § 1536(c)(1).

[24] A court has discretion regarding the type of relief it will grant a plaintiff. It may order a private individual to pay civil penalties. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied sub nom*, *Christy v. Lujan*, 490 U.S. 1114 (1989). In a particularly famous case, the United States Supreme Court held that the ESA prohibited the completion of a multi-million dollar federal dam project where the resulting reservoir would destroy an endangered species of fish. *TVA v. Hill*, 437 U.S. 153 (1978).

9(a), 16 U.S.C. § 1538(a)(1). The ESA defines take as "harm, harass, pursue, hunt, shoot, wound [or] kill . . ." ESA § 3(19); 16 U.S.C. § 1532(19). Harm, in turn, includes not only physical harm directly inflicted upon the listed species, but also includes adverse modification of critical habitat that results in death or injury to the listed species. 50 C.F.R. § 17.3(c). While the take prohibition seems to require a showing of actual death, courts have found a take when habitat destruction will cause population decline. *Palila v. Hawaii Dept. of Land & Natural Resources*, 649 F. Supp 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988). However, an attenuated causal connection may not suffice to show the necessary harm for a take.

While harm may be difficult to prove, private individuals may nonetheless receive an incidental take permit (ITP) which allows non-federal parties to take listed species without violating the ESA. ESA § 10(a), 16 U.S.C. § 1539(a). An individual must submit a Habitat Conservation Plan (HCP) to receive an ITP. *Id.*; 50 C.F.R. § 17.22. HCPs basically allow individuals to consult with the USFWS and create development plans for protecting species' habitat and monitoring the species' condition. (Daniel J. Rohlf and Gregory Tolbert, Endangered Species Act Outline in Policy and Legal Aspects of Endangered Species Management, Course Materials 47, 1998). In return for developing these plans, the individuals receive permission to conduct activities, such as logging and development, which may incidentally take listed species within the area covered by the HCP. Many conservationists view HCPs, which can last more than fifty years, as licenses to destroy habitat and species, because under the "no-surprises policy," an HCP will be a shield even if new information reveals either a newly listed species on the property or that the HCP's protections are not successfully protecting the species. *Id.* at 48-49; 63 Fed. Reg. 8859 (1994). Nonetheless, unless the developer engages in the costly and time-consuming development of an HCP, he may be liable for take if his actions destroy or impair endangered species' habitat.

III. STATE LAWS

A. State Land Use Restrictions

Although Colorado has developed state land use restrictions, local land use bodies, both at the town and county level, have taken a much more prominent role in land use decisions as a result of the Local Government Land Use Control Enabling Act. C.R.S. § 29-20-101. This role is limited by state law, which prohibits local governments from applying newly enacted laws to developments after the developers have submitted their application. However, as long as the developer did not apply for a development permit prior to San Miguel County's most recent amendment of its land use code, the local and county laws will apply in full.[25]

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[25] San Miguel County amended its land use code regarding development in wetlands on February 21, 2001. Even if the owner applied for a permit prior to this date, the prior wetland regulations would apply and probably limit the development.

B. State Environmental Policy Act

Colorado does not have a state version of NEPA.

C. State Endangered Species Act

Although Colorado has its own statutes and regulations for listing and protecting endangered and threatened species, they do not afford listed species the same protections as the federal ESA. C.R.S. § 33-2-102. Once listed, all persons are prohibited from taking, possessing, transporting, exporting, or selling the threatened and endangered species. C.R.S. §§ 33-2-105(3) & (4). However, unlike the federal act, the Colorado act does not prohibit destruction of habitat upon which listed species depend. Although the statute provides for establishment of a fund to acquire land, the state statute does not require protection of habitat of listed species. C.R.S. § 33-2-106(1). Also, neither the statute nor the regulations implementing the statute define take to include habitat destruction.[26] Since all of the other prohibitions relate to direct physical harm to the species (through possession, transport, or capture), the word "take" in the regulation is probably limited to direct physical harm.[27] Accordingly, unless someone opposing the development can show that the developer has actually taken ?i.e.??trapped, seized, or

killed)?a listed species, they cannot rely on the state version of the Endangered Species Act to protect the species.[28]

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[26] The Colorado Department of Wildlife is the agency responsible for implementation of state-listed species.

[27] The United States Supreme Court has upheld a USFWS regulation that states that "take" under the federal statute may include habitat destruction. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 686 (1995). However, Justice Scalia dissented, noting that "take," when listed with terms like trap, hunt, and kill, means a direct action against the species, and not the type of indirect harm caused by habitat destruction. While Justice Scalia expressed the minority opinion there, his reasoning would likely hold true in the Colorado context, simply because neither the legislature nor the state Department of Wildlife lists habitat destruction as take.

[28] The state law also lacks a requirement that other state agencies consult with the Department of Wildlife prior to engaging in an action that may jeopardize a listed species.

D. State Law Of Surface Waters

Colorado follows the doctrine of prior appropriation in its administration of water rights. The simplest way to view prior appropriation is "first in time, first in right." In other words, in times of water shortages, the first person to have appropriated the water (the senior) is entitled to receive his or her full amount of water before anyone who appropriated water later (the junior). Rather than share the shortages, water users get water on a first-come, first-served basis. In addition to this idea of priority, prior appropriation doctrine has several key components: 1) water must be applied to a beneficial use; 2) failure to use water can result in loss of the right; 3) appropriated water can be applied anywhere, even beyond the basin of origin; and 4) the sale or transfer of water rights requires the transferor to show that the change will not injure other water appropriators.

In Colorado, the right to use water for a beneficial use is guaranteed by the state constitution: "[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied." Colo. Const. art. XVI, § 6. The requirement that water be applied to a beneficial use initially required the water appropriator to divert the water from the stream and apply it on the land. As society became more aware of the effects of water diversions on stream ecosystems, state laws eventually adjusted to allow for instream uses to fall within the definition of beneficial use. Consequently, in Colorado, the state may appropriate waters to provide minimum stream flows. C.R.S. § 37-92-103(4). Other types of beneficial uses allowed in Colorado include power generation, general municipal uses, irrigation, mining, and manufacturing. Colo. Const. art. XVI, § 6; *City and County of Denver v. Sheriff*, 96 P.2d 836 (Colo. 1939).

An appropriator can lose his or her right if the appropriator fails to use the water. There are several ways in which this can happen. First, the appropriator can have failed to ever applied the water to a beneficial use. Since prior appropriation discourages speculation (buying or securing the water right and then holding on to it for later sale or use), failure to beneficially use the water typically results in loss of the right. C.R.S. § 37-92-103(3)(a).[29] Second, the appropriator can abandon its water right. Abandonment is defined as the "termination of a water right in whole or in part as a result of the intent of the owner . . . to discontinue permanently the use of all or a part of the water available." C.R.S. § 37-92-103(2). In other words, failure to use the water does not automatically divest the appropriator with its right, unless the appropriator intends to abandon the right. However, a long period of nonuse of the water right combined with other factors, such as abandonment of the land or failure to repair broken water delivery systems, can suffice to show the necessary intent to abandon. *Southeastern Colorado Water Conservancy Dist. v. Twin Lakes Assoc.*, 770 P.2d 1231 (Colo. 1989). Generally, it is very difficult for a developer to secure a water right at the outset

[29] However, water appropriators may receive conditional water rights based on future needs and projected population growth. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

without a clear plan for almost immediate use of the water; however, it is very difficult for an appropriator to lose the water right once it is secured.

1. Water Adjudication and Administration Procedure

There are two ways in which a developer could acquire sufficient surface water rights. First, the developer could apply for a new permit to divert water. However, it is unlikely that the newly acquired water right would be of much use, because the developer would be a very junior user and could not have a guaranteed and reliable source of water in low water years. Second, the developer could buy a more senior water right and then apply for a transfer of the water right from its previous use. Unlike other states, which resolve water rights disputes administratively, Colorado uses a system of water courts. Applicants for new water rights or transfers submit an application, which a court-appointed referee first reviews. If the applicant disagrees with the referee's determination, the applicant may appeal it to the water court. This section discusses the process of securing or transferring water rights.

a. *Acquisition of a Water Right*

An applicant for a water right must submit an application to a water court.[30] C.R.S. § 37-92-302(1)(a). The application must contain a legal description of the source of the water, the date of the initiation of the appropriation, the amount of water claimed, and a description of the intended water use. *Id.* at § 37-92-302(2)(a). The court clerk then publishes a notice in a newspaper in the affected county, describing the proposed appropriation. *Id.* at § 37-92-302(3)(b). The clerk also directly mails the notice to parties that will be directly affected by the granting of the right and any other persons who request to be on the mailing list. *Id.* at § 37-92-302(3)(c).

Any person can oppose the application by the last day of the second month following the month in which the application is filed. *Id.* at § 37-92-302(1)(b) and (c). The referee then rules on the application and any oppositions. *Id.* at § 37-92-303(1). The referee bases the decision on an investigation regarding the truth of the application, a consultation with the state or division engineers, and occasionally an informal hearing. *Id.* at § 37-92-302(4). The applicant and any opposing parties can seek judicial review of the referee's decision. *Id.* at § 37-92-303(2). At a water court hearing, the judge conducts a de novo review of the referee's finding. *Id.* at § 37-92-304(7). The applicant has the burden of proving that the application is accurate. *Id.* at § 37-92-304(3). Once the judge reaches a decision, the parties may appeal to the supreme court of Colorado. *Id.* at § 13-4-102(1)(d).

b. *Transfer of a Water Right*

[30] Water courts serve seven defined divisions in Colorado, corresponding to the seven major drainage systems in the state. C.R.S. § 37-92-201.

For a transfer, the applicant must follow the same application process as with a new water right, with a few additional requirements. First, the applicant must include with the application a statement of the change or plan and a complete description of all water rights to be changed or established by the plan, a map, and other historical information. *Id.* at § 37-92-302(2)(a). Second, at a water court hearing, the applicant has the burden of showing that the water transfer will not injure any other water user. *Id.* at § 37-92-304(3). This burden is particularly heavy, because a junior can claim injury whenever a proposed transfer will reduce or impact the amount of return flow entering the stream. Colorado law allows courts to grant a conditional transfer, which gives both the applicant and any junior user the opportunity to demonstrate the actual effects of the transfer.

2. Citizen Involvement

Although any person may participate in a water right determination, citizen opposition is limited to complaints regarding the accuracy of the limitation or showing injury to the citizens' own uses. This is because Colorado is the only state that has not incorporated some type of public interest requirement into water rights determinations. *In re Board of County Comm'rs of County of Arapahoe,* 891 P.2d 952, 971-74 (Colo.1995). Therefore, unless a citizen can show lack of a beneficial use or a similar deficiency, the water court will likely not find in the citizens' favor. However, this does not foreclose the strong possibility that a court may nonetheless deny or condition the permit based on likely injury to other water users.

E. Colorado Ground Water Law

Historically, Colorado law viewed groundwater as a separate creature altogether, and therefore, regulated groundwater withdrawals separately from surface water appropriations. The result was that increased groundwater withdrawals through wells eventually affected surface streamflows. After several court debates, Colorado established a complex and somewhat bizarre system of groundwater regulation. Colorado now regulates groundwater as either tributary groundwater, nontributary groundwater, and not nontributary groundwater (a special classification relevant only to four aquifers in the Front Range).

1. Tributary Groundwater

Tributary groundwater is groundwater that is hydrologically connected to surface streams. Where the hydrological connection is somewhat attenuated, Colorado determines tributary status on the amount of time it will take groundwater to reach the surface. Accordingly, groundwater that takes more than one hundred years to reach a surface stream is not tributary. *Kuiper v. Lundvall*, 529 P.2d 1328 (Colo. 1974). However, groundwater that will affect a surface stream within one hundred years is probably tributary. *District 10 Water Users Ass'n v. Barnett*, 599 P.2d 894 (Colo. 1979). Colorado administers tributary groundwater along with surface streams, and therefore, applies the prior appropriation doctrine to tributary groundwater. Consequently, if the Telluride developer wishes to use tributary groundwater for the proposed development, he must follow the steps described above to secure a right to appropriate tributary

groundwater.

In general, most tributary groundwater rights are junior to surface stream appropriations because most wells were not adjudicated until passage of the Water Right Determination and Administration Act of 1969. C.R.S. § 37-92-101 to 602. A senior stream appropriator can require a junior groundwater user to stop groundwater pumping in times of shortage. *Kuiper v. Well Owners Conservation Ass'n*, 490 P.2d 268 (Colo. 1971). Further, juniors cannot usually receive a permit for a groundwater well on an overappropriated stream unless they submit a plan for augmentation, which provides a means for a junior to replace stream waters whenever a shortage exists. James N. Corbrigdge Jr. and Teresa A. Rice, Vranesh's Colorado Water Law 99 (1999). In other words, as with surface appropriations, the junior may not use water if that use will materially injure senior appropriators. *Hall v. Kuiper*, 510 P.2d 329 (Colo. 1973).

2. Nontributary Groundwater

Nontributary groundwater may or may not be hydrologically connected to surface streams. Colorado law defines nontributary groundwater as "the withdrawal of which will not, within one hundred years, deplete the flow of a natural stream . . . at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal." C.R.S. § 37-90-103(10.5). Colorado administers nontributary groundwater through an entirely different system than it administers tributary groundwater and rejects the idea that prior appropriation can apply to nontributary groundwater. C.R.S. § 37-90-102(2). Specifically, land ownership is the source of the right to extract nontributary groundwater, and the amount of water available for withdrawal is based on the quantity of water that underlies the land. *Id.* at § 37-90-137(4)(b)(II). Nonetheless, a person interested in withdrawing nontributary groundwater must apply for a permit prior to constructing a well. *Id.* at § 37-90-137(1). The water court may deny the permit if the withdrawal will materially injure others or if there is no unappropriated water available for withdrawal. *Id.* at 37-90-137(2). The water court may also deny a groundwater permit if it determines that the water is "water of a natural stream." *American Water Development, Inc. (AWDI) v. City of Alamosa*, 874 P.2d 829 (Colo. 1993).

IV. SAN MIGUEL COUNTY LAND USE CODE

San Miguel County's Land Use Code (LUC) will probably play a bigger role than state law in affecting any development on the Valley Floor. Several provisions could apply to the development, depending upon its current use and zoning status. The land is designated as agriculture. Further, the LUC contains specific provisions for development in "Ecologically Sensitive Areas," including wetlands, which can further limit any development. All board decisions regarding land use are subject to judicial review. C. R. S. § 13-51.5-101.

A. Open Space and Agricultural Restrictions

The LUC allows minimal development in areas designated as "open, forest, and agriculture,"

and even less development in lands specifically designated as open space. San Miguel LUC 5-307A. For lands within the forest and agriculture designation, the uses allowed by right include single-family dwellings with footprints of less than 3,000 square feet. *Id.* at 5-307B(I). Larger developments may proceed, but the minimum lot size is 35 acres.[31] *Id.* at 5-307G.I.(a). Areas designated as open space have stricter requirements. Although the LUC allows single-family homes, this allowance only applies to homes built before San Miguel County enacted the LUC and does not allow new construction. *Id.* at 5-314B. Otherwise, the only uses allowed by right in designated open spaces include hiking and maintaining or restoring land to its natural state. *Id.* No subdivisions are allowed in these areas. *Id.* The Telluride Master Plan designates the Valley Floor on either side of the San Miguel River as open space. However, since the development plans are unknown, it is unclear if the development will fall within the portion of the Valley Floor designated as open space. If the development lies beyond the open space boundaries, the restrictions for forestry and agriculture will likely still apply.

B. <u>Wetland Restrictions</u>

The LUC clearly disfavors development in wetlands.[32] San Miguel LUC 2-1401. Nonetheless, development may proceed in wetlands as long as the developer complies with the LUC wetland restrictions. First, the developer must apply to the County Board of Commissioners for a Wetlands Special Use permit. San Miguel LUC 5-2203A. To receive the permit, the developer must show one of the following: 1) the development is required to protect against property loss or damage; 2) the development will improve the wetlands area; or 3) the development is associated with residential purposes.[33] *Id.* In addition, the board may grant a Wetlands Special Use permit only if the developer has proven one of the following: 1) the activity is water-dependent; 2) the activity is necessary to access property; 3) denial of the

[31] Even if San Miguel County's LUC does not prohibit homes on 35-acre lots, the landowner must nonetheless comply with other federal requirements - particularly wetland permitting obligations - before developing property.

[32] San Miguel County also signed a memorandum of understanding with EPA and the Corps emphasizing the importance of wetlands protection in the county. As part of the memorandum, EPA agreed to compile existing information on the wetlands in the area, the county to identify priority areas for wetland protection, and the Corps to work in consultation with the county and EPA to develop policies relating to § 404 permits. Statement of Responsibilities Among the Board of Commissioners of San Miguel County, Colorado, The U.S. Environmental Protection Agency Region VIII, and the U.S. Army Corps of Engineers, Sacramento District, Concerning the Advance Identification of Wetlands in San Miguel County, Colorado.

[33] The LUC notes that the third criterion includes construction of access, utilities, and/ or a home or homes. San Miguel LUC 5-2203A.

permit would result in denying the landowner all practical and economically viable use of the property; 4) the activity is an essential service and cannot be located elsewhere; or 5) for development located exclusively in a wetland buffer zone, that the land use would not adversely affect the wetland. *Id.* at 5-2203B.C. Thus, the law appears to require that the developer meet at least one criterion from each category.

Applied to the Telluride Valley Floor development, it does not appear that the developer could receive a permit to build in the wetlands. First, under the first category, the developer *could* claim the development is for residential purposes. The LUC allows development associated with a home or homes, and it does not necessarily limit development to home construction itself, but also allows construction of access roads and utilities. San Miguel LUC 5-2203A. While this provision seems broad, it does not on its face appear to authorize construction of a complete development that could include a golf course and other amenities. Ultimately, the county commissioners would make that decision. The landowner could probably only satisfy the second category if he could show that denial of a permit would deprive the property of all economic value.[34] He may not be able to make that showing if he could still sell the land in parcels or continue to use the land for grazing. Therefore, at this stage, without additional information provided by the development plans, it appears that the developer could not receive a Special Use Permit for wetlands development.

Even if the developer did meet this initial requirement, the Board of Commissioners must still ensure that the development meets certain additional requirements. Specifically, the Board must determine that the developer has avoided building in wetlands as much as possible, minimized the impacts of the development, and mitigated any harm to the wetlands. *Id.* at 5-2203C.D. & D.E. If the developer satisfies all these criteria, the Board *may* grant a wetlands Special Use permit.

V. TOWN OF TELLURIDE LAWS

A. Telluride's Power Of Eminent Domain

The Town of Telluride may not have the authority to condemn land beyond the town's limits. Colorado law is not clear; however, it appears that Telluride cannot condemn land for the purpose of conservation. Colorado prohibits towns from exercising eminent domain over property outside town boundaries unless specifically authorized.[35] C.R.S. § 38-6-101. While

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[34] The owner could probably not claim that an extensive residential development is water-dependent, necessary to achieve access, or an essential service. As for limiting the development to the buffer area, the landowner may be able to do that, but without the development plans, it is unclear if the development will stay limited to buffer areas.

[35] Cities and towns may condemn property to build or alter a street, land, park, playground, parkway, public square, market, bridge, sewer, tunnel, public building or other public improvement. C.R.S. § 38-6-101. "[E]xcept as specifically authorized by law, no

other statutes provide the necessary authorization in certain circumstances, these circumstances do not appear to apply in this situation. First, both cities and towns may exercise the power of eminent domain, or condemnation, beyond their territorial limits, but only for construction of utilities.[36] C.R.S. § 38-6-122. Since Telluride does not plan to condemn the Valley Floor property to provide utility services, this specific authorization does not apply in this situation.

Second, Colorado law allows cities and counties to condemn land beyond their territorial limits for boulevard, parkway, or park purposes. C.R.S § 38-6-110. While this exception appears to allow the Town of Telluride to condemn the Valley Floor property, two factors counsel against this. One is that this statute mentions only cities and counties, but not towns. Since the Colorado legislature specifically mentions towns in other statutes relating to eminent domain, but does not mention towns in this provision, a court would likely determine that the authorization for extra-territorial condemnation does not extend to towns in this instance. The other factor is that the statute subjects the exercise of eminent domain to the limitations imposed by C.R.S. § 31-25-201(1). *Id.* Section 31-25-201(1), which allows condemnation up to five miles beyond city limits, only mentions cities, and not towns. C.R.S. § 31-25-201(1). Further, the word "city," as used in Title 31, means a municipal corporation with a population of more than two thousand, but not a home-rule city.[37] C.R.S. § 31-1-101(2). In contrast, Telluride, a home-rule town of less than 2000 residents, falls within the definition of "municipality," to which the condemnation authority under § 31-25-201(1) does not apply. *Id.* at § 31-1-101(6). Since the extra-territorial grant of eminent domain under Title 38 tiers specifically to Title 31, a court could readily conclude that the Colorado legislature only
intended to grant cities, and statutory cities specifically, the power to condemn land.[38] Although

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incorporated town shall exercise the power of eminent domain over property outside the town boundaries." *Id.*

[36] "Cities and towns are granted the power of eminent domain both within and beyond their corporate limits, for purposes of building storm or sanitary sewers, septic tanks, disposal works, or electric lines, regulator stations, substations, and related facilities." C.R.S. § 38-6-122. A city is defined as a municipality with a population greater than two thousand people, while a town has a population of two thousand or fewer people. C.R.S. § 31-2-216.

[37] In Colorado, cities and towns can choose to adopt a "home rule charter," in which case the cities and towns become home-rule municipalities. Otherwise, the municipalities operate according statutory guidelines, and are known as statutory municipalities. *See* C.R.S. § 31-1-201.

[38] While Telluride may believe that this reading undoes the purpose of adopting home-rule authority, the Colorado Constitution appears to also support a narrow reading. When a town

this reading narrowly construes the power of eminent domain, the statute authorizing condemnation allows extraterritorial condemnation only when "specifically authorized," and such specific authorization does not exist here.

Colorado case law supports this narrow reading. *See City of Aurora v. Commerce Group Corp.*, 694 P.2d 382 (Colo. Ct. App. 1984). In *City of Aurora*, the city had condemned six miles of stream fishing rights as part of a cooperative mitigation agreement with the state's Department of Natural Resources. *Id.* at 384. Aurora had entered into the agreement in order to get approval for construction of a reservoir, and the agreement required Aurora to obtain a fishing easement and stream rights for at least ninety-nine years. *Id.* Aurora chose to satisfy its obligations under this agreement by condemning property approximately 130 miles from Aurora. *Id.* In finding that Aurora lacked the authority to condemn this property, the court first noted that Colorado law presumes that a local government lacks authority for eminent domain absent an express grant of that authority. *Id.* at 385. The court next found that, although a state statute gives cities the right to acquire, sell, own, exchange, or operate lands beyond city limits, that statute does not grant explicitly grant the power of eminent domain, and therefore, did not authorize Aurora's actions. *Id.*; citing C.R.S. § 29-7-101(1)(a). Further, in analyzing the statutory provision described above, the court found that Aurora's acquisition did not fall into any of the exceptions listed in the statute. *Id.* at 386. Consequently, the court determined that Aurora had no authority to condemn the property rights.

Not only does the *City of Aurora* represent a limitation on a city's power to exercise the power of eminent domain beyond five miles, it seems to signal a tendency to narrowly read any grant of eminent domain. Since the court focused on the need for an express grant of extraterritorial authority, and no express grant exists, Telluride probably cannot withstand a challenge to its use of eminent domain.

B. <u>Telluride's Power to Annex the Valley Floor Property</u>

Colorado law allows municipalities to annex land according to the Municipal Annexation Act.[39] C.R.S. § 31-12-101. However, the Annexation Act imposes several requirements upon

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or city decides to adopt a home-rule charter, the charter and ordinances adopted pursuant to the charter supersede any state laws that conflict with the home-rule charter, but only within the territorial limits and jurisdiction of the town or city. Co. Const. Art. 20, § 6, para. 2. Here, the territorial and jurisdictional limits of Telluride do not appear to extend to the Valley Floor property. If, however, Telluride does have jurisdiction over the Valley Floor property, then it probably can condemn the property under its home-rule authority.

[39] Annexation is the acquisition or legal incorporation of land by a nation, state, or municipality. Black's Law Dictionary 57 (1991).

municipalities intending to annex any land. Unless the town of Telluride can apply with these requirements, the town lacks authority to annex the Valley Floor property.

1. Substantive Requirements

At the outset, to annex the Valley Floor property, the town government must determine that the Valley Floor area fits within the statute's eligibility requirements. For property to be eligible for annexation, at least one-sixth of the property's perimeter must be contiguous to the municipality seeking to annex the property. C.R.S. § 31-12-104(1)(a). The statute stresses the importance of this contiguity requirement and prohibits annexations of non-contiguous lands. *Id.* at § 31-12-104(2)(c). Next, the town government must find that a "community of interest" exists between the property proposed for annexation (hereinafter "annex property") and the municipality, the annex property is urban or will be urbanized in the near future, and the annex property can be integrated within the municipality. *Id.* at § 31-12-104(1)(b). The statute presumes the annex property will fall within these latter eligibility requirements if it satisfies the contiguity requirement. *Id.* However, a person contesting the annexation can overcome this presumption if two of the following conditions exist: 1) less than 50 percent of the adult residents of the annex property use the town's services[40] and less than 25 percent of the adults work in the annexing town;[41] 2) at least half of the land is agricultural, and the landowner intents to keep the land agricultural for at least five years; and 3) the annexing town cannot practicably extend urban services (including utilities) to the annex property. *Id.* at § 31-12-104(1)(b)(I-III).

At least one-sixth of the property's perimeter is contiguous to the Town of Telluride, and it appears that none of the three exceptions described above applies to the property. The first exception probably does not apply since there are currently no residents of the Valley Floor property. The second exception also probably does not apply because the current owner would have to express, under oath, an intention to keep the land in agricultural use for at least five years. Since the owner has already expressed a clear intention to develop the property for commercial uses, any contradictory statements would probably have little credibility in a court of law. Finally, since the Valley Floor area already lies within Telluride's service area, Telluride can overcome the third exception. Accordingly, it appears that the Valley Floor property is eligible for annexation.

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[40] These services are recreational, civic, social, religious, industrial, and commercial.

[41] This does not apply if the annex property does not have any adult residents. C.R.S. § 31-12-104(1)(b)(I).

However, even if a property is eligible for annexation, the Municipal Annexation Act nonetheless imposes several restrictions on municipal annexations. First, the town may not divide a tract of land into separate parts without the owner's written consent. *Id.* at § 31-12-105(a). Second, the town may not annex property for which another municipality has already begun annexation proceedings. *Id.* at § 31-12-105(c). Third, an annexation may not extend a municipal boundary by more than three miles. *Id.* at § 31-12-105(e). Fourth, and most importantly, a municipality may not annex property of twenty acres or more without the written consent of the owner unless the annex property lies entirely within the outer boundaries of the annexing municipality.[42] *Id.* at § 31-12-105(b). This fourth limitation seems to kill the idea of annexation entirely. The Valley Floor property clearly does not lie within the outer boundaries of Telluride's jurisdiction, and therefore, the town.cannot annex the property without the owner's consent.

2. Procedural Requirements

If, despite this last limitation, annexation remains possible, Telluride must comply with various procedural obligations to annex the Valley Floor property. First, the town must set a hearing and provide notice of the hearing to the general public. *Id.* at § 31-12-108. Any person may attend the hearing and provide comments regarding the annexation. *Id.* at § 31-12-109. Next, the town must provide an impact report describing the boundaries of the annexation and the proposed land use pattern in the annexed land. *Id.* at § 31-12-108.5. In certain circumstances, the town government may make the determination regarding annexation; otherwise, the government must hold an annexation election that gives citizens the right to decide whether or not to annex the land. *Id.* at §§ 31-12-107, 31-12-112.

If the government or the electorate approves annexation, any landowner or citizen in the annex property may challenge the decision. First, the party must file a motion for reconsideration within ten days of the ordinance approving the annexation. *Id.* at § 31-12-116(2)(a)(II). The party may then seek judicial review of the annexation. *Id.* at § 31-12-116(1)(a). The court must determine if the town has exceeded its jurisdiction or abused its discretion to annex the property. *Id.* at § 31-12-116(3). If the court finds the town did not have or properly use its authority to annex property, the court must declare the annexation void. *Id.* at § 31-12-117. Interestingly, however, acts taken pursuant to the annexation, such as subdivision construction and tax levies, do not themselves become void. *Id.*

3. Conclusion

[42] The property value, combined with any buildings and improvements, must exceed $200,000. This property likely does.

Telluride may not have the authority to annex the Valley Floor property without the owner's consent. The Municipal Annexation Act clearly requires that a municipality obtain an owner's consent to annex land of 20 acres or more, if the land lies beyond the outer boundaries of the municipality. *Id.* at § 31-12-105(1)(b). Unless more information reveals that Telluride's municipal boundaries extend into the Valley Floor property, the town probably cannot unilaterally move to annex the property. Further, the Valley Floor property may not even be eligible for annexation. It is unclear if the Municipal Annexation Act even grants authority to a municipality for annexations designed to prevent development. Therefore, based on the facts currently available, it appears that Telluride cannot annex the Valley Floor property.

C. Telluride's Land Use Code and Master Plan

Telluride's land use code does not apply directly to any land beyond its jurisdictional boundaries. Indeed, Telluride limits its land use provisions to areas within the town's domain. Although San Miguel County has stipulated that Telluride's Master Plan will govern both the town and the county's approach to development in unincorporated parts of the town, the Master Plan does not contain specific requirements or substantive provisions. Accordingly, San Miguel County's Land Use Code governs the requirements applicable to any development along the Valley Floor, but outside the town boundaries. Further, San Miguel County has agreed that it will not approve any new urban development or modifications within the area covered by the Telluride Master Plan if the subject property is eligible for annexation. Consequently, if the developer were to apply for a land use permit, the County could delay any authorization or, as discussed above, deny or condition the permit based on the substantive provisions of the LUC.

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