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Section 5: Common Law of Water Quality in Colorado

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impacts. However, Mr. Edelman emphasized that numerous technological advances for obtaining data and in analytical tools may be used by scientists to improve quantification of impacts in future studies.

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SECTION 5: COMMON LAW OF WATER QUALITY IN COLORADO

Mr. John McCarthy, an attorney with Holme Roberts & Owens LLC, provided a thorough overview of the common law remedies available to persons who believe they have been impacted by or suffered from water pollution. Mr. McCarthy noted that while federal and state statutes have created programs that regulate water quality and provide for civil and criminal penalties and injunctive remedies, these laws do not always provide the appropriate remedy for an individual or other entity adversely impacted by water pollution. Therefore, by applying common law tort causes of action to water quality, remedies become available to redress the harm caused by the pollution of surface and ground water and to the associated real property impacted by such contamination.

Utilizing a hypothetical throughout his discussions, Mr. McCarthy analyzed claims of negligence, negligence per se, trespass, nuisance, ultrahazardous activity, claims against the state, and claims against the federal government. He began with an analysis of negligence claims, noting the elements of negligence and issues of comparative negligence. Some of the remedies that may generally be available under negligence theory are compensatory damages, diminution of value or restoration costs, lost profits, and exemplary damages. He continued by describing negligence per se, noting the elements and that compliance with a statute or regulation will normally defeat negligence per se claim.

Mr. McCarthy also analyzed the common law cause of action for trespass. Under trespass, he described the elements and the differences between continuing and permanent trespass, both of which are available as claims in Colorado. He also discussed the liability of prior property owners or lessee's and the remedies under trespass. In addition, Mr. McCarthy covered the elements, conduct required, and remedies for a nuisance cause of action. He noted that a nuisance action does not require physical intrusion on the plaintiff's property. Therefore, a landowner without water rights may have a nuisance claim for ground water contamination, provided he can demonstrate significant interference with his or her use and enjoyment of the overlying property and measurable damages. He also emphasized that a plaintiff may receive annoyance and discomfort damages under a nuisance claim. Mr. McCarthy included a discussion of ultrahazardous activities, a strict liability claim, under both Colorado appellate and federal courts which apply different scopes and tests for ultrahazardous situations.

Mr. McCarthy concluded with an analysis of claims against the state and federal governments. Except for a few situations, the state of Colorado is generally immune because of the Colorado Governmental Immunity Act. Claims against the federal government are also generally abrogated by sovereign immunity. However, Mr. McCarthy provided a succinct outline of situations where the doctrine of sovereign immunity and remedies may be partially waived.

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SECTION 6: UPDATE ON MICCOSUKEE TRIBE OF INDIANS OF FLORIDA V. SOUTH FLORIDA WATER MANAGEMENT DISTRICT

Mr. Peter D. Nichols, of the law firm Trout, Raley, Montano, Witwer & Freeman, discussed the implications and impacts of Miccosukee Tribe of Indians of Florida v. South Florida Water Management District, 541 U.S. 95 (2004) ("Miccosukee") on Western water law.

In 2004, the United States Supreme Court found in Miccosukee that transfers among meaningfully distinct bodies of water required a National Pollutant Discharge Elimination System ("NPDES") permit under the Clean Water Act ("CWA"). The case is currently on remand for a determination of whether the water bodies at issue are "meaningfully distinct."

Mr. Nichols stated that the imposition of an NPDES permit requirement on transfers of water from one waterbody to another raises complex issues, particularly in the western States. He argued that requiring such permits for engineered transfers is contrary to the plain language of the CWA and Congress' mandate to defer to the states' allocation of water. He stated that in the CWA Congress expressed its clear intent to preserve state water allocations and individual water rights. Mr. Nichols argued that the requirement of an NPDES permit would undermine the principles of prior appropriation and disturb numerous vested water rights. He argued that if required to operate under a permit, many western water users would have no alternative but to curtail their transfers to meet the CWA's water quality standards and anti-degradation requirements, as it would be impractical and cost prohibitive to construct treatment facilities.

Finally, Mr. Nichols stated that Congress created a number of tools in the CWA to address water quality in water transfers while giving states independent authority over water transfers. He argued that by using these tools states can protect both water quality and water rights allocated under state law.

Nora Pincus