Colorado Environmental Law Journal

Volume 28
Issue 1 *Winter 2017*

Article 4

1-1-2017

Assured Water Supply Laws In The Western States: The Current State Of Play

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ABSTRACT

Better integration of water and land use planning has become an almost universal rallying cry in areas of water scarcity. A starting point for this integration is the consideration of the availability of water to serve new development in the process of land use approval by a local government. Requirements for subdividers to demonstrate that an adequate water supply is available for a proposed development are common and are known as "assured water supply" laws. This paper reviews such laws in eleven western states, and compares them based on key characteristics in these laws that influence their scope and effectiveness in meeting the goals of consumer protection, sustainable growth, integrated land and water planning, and wise use. Those characteristics include: universal application; review by an independent state expert; minimum size of development regulated; integration into regional water supply plans; and incorporation of water conservation techniques. The discussion highlights differences among the states and recent trends, while acknowledging the tricky balance between local control of land use decisions and prudent water supply planning.

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I. INTRODUCTION

With water scarcity an ever-present concern in the Western United States, increased scrutiny is being directed to the processes through which governmental entities approve new growth and development, which in turn ratchet up water demand. Various estimates of projected water supplies and demand, factoring in the impacts of climate change and population growth, make it clear that the West simply cannot grow in the future in the same manner as in the past.[1] Local decisions approving development are frequently motivated by the prospect of new jobs and amenities, increased tax base, and improvements to existing infrastructure, with only secondary consideration given to the availability of adequate water supplies and, sometimes, none at all. In a nod to Will Rogers' adage, "if you find yourself in a hole, first thing to do is stop digging," more attention is being paid to the land use review processes that approve the creation of new water demand, and more effort made to ensure thorough and informed consideration of water availability and conservation techniques in those processes.

In recent years, many water policy statements and enactments have called for increased connectivity between land use decisions and water availability. The Western Governors' Association's water sustainability reports, the State of Colorado's new water plan, and the California Sustainable Groundwater Management Act are all examples, and there are many more.[2] There is widespread recognition of, and considerable deference to, local control of land use decision-making, but also awareness that states can and should foster sustainable growth policies, "identify water requirements needed for future growth, and develop integrated growth and water supply impact scenarios that can be presented to local decision makers."[3]

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[1] *See, e.g.*, U.S. Dep't Interior: Bureau of Reclamation, Colorado River Basin Water Supply and Demand Study (Dec. 2012); Ellen Hanak, *Water for Growth: California's New Frontier*, Public Pol'y Inst. of Cal. (2005); U.S. Dep't Interior: Bureau of Reclamation, SECURE Water Act Section 9503(c)— Reclamation Climate Change and Water 2016 (Mar. 2016), *available at* http://www.usbr.gov/climate/secure/docs/2016secure/2016SECUREReport.pdf; NATURAL RES. DEFENSE COUNCIL, *Climate Change, Water, and Risk: Current Water Demands Are Not Sustainable* (July 2010), *available at* https://www.nrdc.org/sites/default/files/WaterRisk.pdf.

[2] *See* Water Needs and Strategies for a Sustainable Future, W. Governors' Ass'n 4–6 (June 2006) [hereinafter WGA 2006]; Water Needs and Strategies for a Sustainable Future: Next Steps, W. Governors' Ass'n II–III (June 2008) [hereinafter WGA 2008]; Colorado's Water Plan, Colo. Water Conservation Bd.Ch. 6.3.3 (Nov. 2015); California Sustainable Groundwater Management Act of 2014, Cal. Gov't. Code §§ 65350.5, 65352, 65352.5 (2016).

[3] WGA 2006, *supra* note 2, at 5.

As a fundamental first step in this process, many, but not all, western states have enacted statutes requiring a determination at the local government level of the adequacy of available water supplies to support new development. Such statutes recognize that while land use and development approval decisions are matters of local concern, the adequacy of water for new developments is a matter of statewide concern and essential for the preservation of public health, safety, and welfare and the environment.[4] Statewide interests in consumer protection for home buyers, fostering sustainable growth, ensuring some degree of connection between land use and water supply planning, avoiding unreasonable depletion of shared resources, and, in some cases, encouraging the wise use of water are among the broader goals served by assured water supply requirements.

State statutes that require some demonstration of the sufficiency of the water supplies available to serve new or expanded development are lumped together in this article under the moniker "assured water supply" laws. Such enactments are also referred to as water adequacy requirements and "show me the water" edicts. These nicknames all refer to statewide directives that require evidence of an actual and sufficient water source in order to obtain the land use approval necessary to proceed with development. There are numerous forms these directives can take and innumerable exceptions.

The mere existence of state assured water supply requirements does not guarantee effectiveness in achieving the desired goals. The scope of applicability, the depth of the review, and the integration with the land use decision process are each relevant in examining effectiveness. Previous analyses have suggested a framework for evaluating effectiveness of such laws, and this effort updates and refines that framework.[5]

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[4] *See, e.g.*, WGA 2006, *supra* note 2, at 4; COLO. REV. STAT. § 29-20-301(1)(b) (2016).

[5] This work builds on, and the authors are indebted to, the work of Lincoln Davies, Doug Kenney, Bobbie Klein, and Sarah Bates. This is an evolving field, with advances being made continually, necessitating periodic updates. The insight provided by these authors has been invaluable in providing a framework for evaluating the current state of play. *See generally* Lincoln L. Davies, *Just a Big, "Hot Fuss"? Assessing the Value of Connecting Suburban Sprawl, Land Use, and Water Rights Through Assured Supply Laws*, 34 ECOLOGY L.Q. 1217 (2007) [hereinafter Davies 2007]; Lincoln L. Davies, *East Going West?: The Promise of Assured Supply Laws in Modern Real Estate Development*, 43 J. MARSHALL L. REV. 319 (2010) [hereinafter Davies 2010]; Bobbie Klein & Doug Kenney, GETCHES-WILKINSON CTR., *The Land Use Planning, Water Resources and Climate Change Adaptation Connection: Challenges and Opportunities*, UNIV. OF COLO. LAW SCHOOL: COLO. LAW SCHOLARLY COMMONS (2009); Sarah Bates, "SHOW ME THE WATER" AND BEYOND: EMERGING STRATEGIES TO ASSURE ADEQUATE WATER SUPPLY FOR NEW DEVELOPMENT, AND SOME SUGGESTIONS FOR THE FUTURE, UNIV. OF MONT. CTR. FOR NATURAL RES. & ENVTL. POL'Y (2010) at 1, 4; Sarah Bates, *Bridging the Governance*

The continued pressure on water supplies and anticipated growth in the Western United States suggests that states may want to re-examine their own water supply directives and compare them with those of other states to determine whether modification is warranted or desirable. The focus here on state laws is not intended to suggest that local requirements are absent. It is frequently the case that counties and municipalities also have requirements for scrutiny of a developer's proposed water supply. But because states have primary responsibility for water allocation and administration, they have a critical role to play in the related issues of growth and the use of this scarce resource.[6]

This paper examines the assured water supply laws in eleven western states, to provide a comparison among them and an examination of their effectiveness. First is the presentation of a framework for evaluating the effectiveness of such laws, building on and adding to previous similar analyses. Second, a comparison of the laws of the eleven states is provided through the lens of the evaluative framework previously described. Third, a summary of the assured water supply laws in each state is given. Finally, a conclusion presents lessons gleaned from the review of state laws and comparisons among them, with recommendations for consideration by land planners and state legislators seeking to improve or beef up their existing laws and practices.

II. EVALUATION OF WESTERN STATE ASSURED WATER SUPPLY LAWS

In order to present a useful comparison and evaluation of the widely differing assured water supply laws in the western states, it is beneficial to identify key characteristics in these laws that influence their scope and effectiveness in meeting the goals of consumer protection, sustainable growth, integrated land and water planning, and wise use. Five salient attributes of these laws have previously been suggested for this evaluation.[7] Here we present a refinement of that analytical framework to cap-

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Gap: Strategies to Integrate Water and Land Use Planning, UNIV. OF MONT. CTR. FOR NATURAL RES. & ENVTL. POL'Y, no. 7 (2011).

[6] WGA 2006, *supra* note 2, at 4. The federal government has traditionally deferred substantially to state law on water allocation and administration. *Cal. Or. Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142, 163–64 (1935); Reclamation Act of 1902 § 8, 43 U.S.C. § 383 (2016); Clean Water Act § 101(g), 33 U.S.C. § 1251(g) (2012). Because, however, the federal government has historically played a stronger role in consumer protection and the underwriting of mortgage loans for housing, a larger federal role in ensuring adequate water supplies for residential development, at least for homes with federally backed mortgages, could be possible. Such an incursion into state water policy would likely be strongly resisted by the western states.

[7] Davies 2007, *supra* note 5, at 1279–92. The factors suggested by Davies are: compulsoriness, stringency, universality, granularity, and interconnectedness. These five factors are referred to herein as the "Davies factors."

ture the most essential elements of difference in the existing laws in the western states together with recognition and incorporation of recent refinements. The evaluation criteria used here are:

- Universal
- Uniform Expert Review
- Minimum Size
- Integration
- Conservation

Each criterion is discussed in detail below with examples of various state laws that illustrate its application.

A. Universal

A major factor for evaluating and comparing the effectiveness of an assured supply law is whether the water adequacy determination is required for all new development within the state or only in certain specified areas or circumstances.[8] A greater degree of consumer protection is obviously provided when all development is covered. In addition, exceptions to assured water supply requirements can undermine state and regional sustainability goals because exempted areas may approve development that overwhelms progress made elsewhere. Statewide enactments also ensure that developers cannot go jurisdiction shopping for the land use authority least concerned about adequate water.

Some states, like Arizona, have more stringent assured supply laws in areas where groundwater depletion is of greater concern.[9] In New Mexico, areas within municipalities from which irrigation water rights have been severed are examined for water adequacy, but not subdivisions in other parts of the municipality.[10] In Wyoming, unincorporated areas of counties are covered, but not municipalities.[11]

B. Uniform Expert Review[12]

The overall effectiveness of an assured water supply law will be influenced by the level and type of scrutiny and evaluation of the evidence

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[8] The "minimum size" requirement could be viewed as a component of universality, but is treated here as a separate factor to highlight the different size thresholds in the various states. *See infra* text accompanying notes 16–23.

[9] ARIZ. REV. STAT. § 45-576 (LexisNexis 2016).

[10] N.M. STAT. ANN. § 3-20-9.1 (LexisNexis 2016).

[11] WYO. STAT. ANN. §§ 15-1-510, 18-5-301 (2016).

[12] This factor of "uniform expert review" is similar to the Davies factor of stringency, but is expanded to include the concept of involving a technical expert in the water supply field and providing uniformity to the reviews throughout the state. The Davies "stringency" factor addresses primarily the difference between a review for "paper" water rights or theoretical future supplies versus a water supply determination requiring real proof that physical water will actually be available when the developers say it will be. Davies 2007, *supra* note 5, at 1282.

of water adequacy provided by the developer. A uniform review performed by a technical water expert provides consistent protection of consumers statewide and ensures that developers in different parts of the state and under different jurisdictions are measured with the same yardstick. Uniformity can be enhanced by providing transparent standards or criteria to be used by local governments in the evaluation, such as the examination of the availability of supply during different hydrological cycles, factoring in the potential impacts of climate change and practical assumptions about the length of time that non-renewable supplies will be available. Enlisting the office of the top state water official would seem to be advantageous in terms of providing uniformity, extensive knowledge, and credibility to the decision. The State Engineers or Water Resources agencies in the western states are sometimes engaged to provide this review. On the other side of the spectrum, the local governmental body may make the ultimate water adequacy determination, without a requirement that any technical expert in water resources be consulted.

Several of the states studied enlist state agencies to provide expert review of proposed water supply plans for adequacy, at least in certain circumstances. In Arizona, the Department of Water Resources reviews water supply plans in Active Management Areas based on statutory criteria to issue a Certificate of Assured Water Supply. Nevada similarly engages its Department of Water Resources to review plans for water sufficiency. Colorado counties and all local governments in New Mexico are required to obtain the State Engineer's opinion that a proposed water supply plan is adequate. Montana and Wyoming enlist the assistance of the state Department of Environmental Quality to perform an adequacy review.

Some states have statutory criteria for water adequacy reviews; in others, the responsible state agencies have issued their own guidance. California provides detailed statutory criteria for the review of Urban Water Management plans, looking at the supplies available during normal, single-dry, and multiple-dry years within a 20-year projection, but this review is not required for a development approval.

For ground water supplies, a realistic analysis of the continued availability of water for a particular, relatively lengthy, period of time is prudent and is required in some states. Arizona's law, for instance, demands that there be sufficient water available for 100 years without unduly decreasing the aquifer levels.[13] For non-renewable ground water, Colorado also requires a 100-year supply.[14] In contrast, many states do

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[13] ARIZ. ADMIN. CODE §§ R12-15-704(F), -712(E), -716(B)–(C) (2014).

[14] COLO. REV. STAT. §§ 37-90-103(10.5), (10.7), -107(7)(a) (2016); *see* COLO. DEPT. NAT. RESOURCES DIV. WATER RES., *Guide To Colorado Well Permits, Water Rights, and*

not specify any particular time frame. This may reflect assumptions about the likely source of supplies for new development and its renewable or nonrenewable character.

C. Minimum Size[15]

The minimum number of lots in new subdivisions that triggers coverage by water adequacy laws varies from state to state, with a cluster of states regulating developments with a minimum size in the four to six unit range. Obviously, a smaller minimum sweeps in more development and provides consumer protection to a larger suite of potential home purchasers. While the cost to the developer of providing the information and analysis necessary to secure a determination of adequate water supply is a factor, and may be a very significant burden for smaller subdivisions, it would seem that most, if not all, home buyers are entitled to some assurance of a reliable and sufficient water supply. This consumer protection goal dictates in favor of a relatively low minimum size.

Washington may be the most stringent in requiring each applicant of any building requiring potable water to obtain a permit demonstrating adequate water supply,[16] with Montana also requiring such a demonstration for a subdivision of one or more parcels.[17] Colorado counties must ensure an adequate supply for any division of land into two or more parcels, [18] although the requirements applicable to Colorado cities and towns exempt developments of less than fifty units.[19] Oregon regulates subdivisions of four or more units,[20] with Nevada, New Mexico, and Washington having minimums of five.[21] Wyoming law regulates all subdivisions regardless of size, but allows local governments to exempt developments of five or fewer units.[22] California is the outlier in allowing subdivisions smaller than 500 homes to bypass its assured supply law.[23]

Water Administration (Sept. 2012), http://water.state.co.us/DWRIPub/Documents/wellpermitguide.pdf. Some Colorado localities impose even more stringent requirements, such as one county's mandate that water be available for periods as long as 300 years. *See, e.g.*, EL PASO CNTY., COLO., LAND DEV. CODE § 8.4.7, (Jan. 2015), http://adm.elpasoco.com/Development%20Services/Documents/Land%20Development%20Code%202016/16%20Chapter%208%20-%201-6-15.pdf.

[15] The minimum size factor is identical to the Davies factor of "granularity," but rephrased in a more universally understood term. Davies 2007, *supra* note 5, at 1286–88.

[16] WASH. REV. CODE § 19.27.097(1) (2016).

[17] MONT. CODE ANN. §§ 76-3-103(14)–(15), -104, -622(1)(e), 76-4-102(16) (2015).

[18] COLO. REV. STAT. §§ 30-28-101(10)(a), -133(3)(d), -133(6).

[19] *Id.* § 29-20-103(1)(b).

[20] OR. REV. STAT. §§ 92.010(16)–(17), 92.090(4) (2016).

[21] NEV. REV. STAT. §§ 278.320(1), .330, .360 (2015); N.M. STAT. ANN. §§ 47-6-2(M), (P)–(T), 47-6-11 (2013); WASH. REV. CODE §§ 58.17.020(1), .060, .170.

[22] WYO. STAT. ANN. § 18-5-306(a).

[23] CAL. GOV'T CODE § 66473.7(a)(1) (2016).

D. Integration[24]

The assurance that adequate water supplies will be available for a particular proposed development, while critically important, is only one component of better integration between water and land use planning. In order to move toward more sustainable supplies in the western states, a broader, regional analysis will be necessary, with local decision-making guided by these regional considerations and goals. Analysis of future population projections, anticipated additional development in the water supplier's service area, depletion of regional surface and ground water resources, comparisons of per capita water use, and climate change impacts on available supplies are all factors relevant to wise land and water planning. These broader considerations are generally not factored into the individual water adequacy determinations.

Recognizing that regional, integrated land and water planning is very difficult, and may be viewed as running counter to the highly valued concept of local control, a good step in the right direction is having a connection between regional planning goals and the assured water supply determination for any particular development. The desired outcomes and recommendations concerning water supplies and use in a county comprehensive plan or a state planning document may be factored into the local land use decision process, including the water adequacy analysis. This is what is meant by integration. The existence of integrated water adequacy and broader water planning laws is currently not widespread, but the trend seems to be in this direction, demonstrating recognition that individual, "one-off" adequacy determinations do not provide a complete answer to concerns about regional sustainability.

Arizona and California have the most advanced integration of the assured water supply analysis with regional or statewide water goals. Arizona's Active Management Areas have each established goals for reduction in groundwater use (for example, achieving "safe yield" by a date certain).[25] The amount of water available to each subdivision undergoing an assured water supply determination is calculated consistently with the

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[24] This "integration" evaluation criterion overlaps to some extent with the Davies factor of "interconnectedness," but with a slightly different focus. The Davies interconnectedness factor focuses on the connection with the land use jurisdiction's broader planning processes and conservation initiatives. Davies 2007, *supra* note 5, at 1289–91. "Integration" also relates to the connection to other components of the local government's planning, but focuses specifically on whether a more broadly applicable comprehensive plan or equivalent document sets water use goals that are then implemented in the local land use decision process. The term "integration" is more commonly utilized as a characterization of a tighter relationship between water and land use planning.

[25] ARIZ. REV. STAT. § 45-562 (LexisNexis 2016); *Office of Assured & Adequate Water Supply Program*, ARIZ. DEP'T WATER RES., http://www.azwater.gov/AzDWR/WaterManagement/AAWS/default.htm (last updated June 8, 2016).

applicable management goal pursuant to a detailed and precise methodology set forth in the administrative rules.[26] In California, the Urban Water Management plans required of large municipal suppliers are taken into account in the water supply assessment performed for each development project.[27] The Urban Water Management plan is not necessarily a regional plan, but the new development's water source is at least fit into the context of the overall supplies of the relevant municipal provider. In addition, the California Sustainable Groundwater Management Act now requires that the groundwater sustainability plans to be developed by local agencies over the next four to six years be provided to any city or county proposing to adopt or amend its general (comprehensive) plan, together with a report on the anticipated effect of the new or amended plan on groundwater sustainability.[28]

An example of a nascent integrated assured water supply law comes from the state of Washington. Washington's Growth Management Act requires that covered counties and cities adopt comprehensive plans guided by goals that include protection of the environment and the availability of water.[29] The comprehensive plans must provide for protection of groundwater used for public water supplies.[30] In rural areas, the plans must also protect both surface water and groundwater resources.[31] The subdivision regulations of local land use authorities must implement the provisions of the comprehensive plans.[32] The state's Department of Ecology has issued guidance to assist counties in making adequacy of water supply determinations.[33] While these requirements are designed to foster a more comprehensive and regional look at water supply availability, they appear to require simply that cities and counties ascertain that water is legally, as well as factually, available.[34] Washington does not establish regional water use goals that are implemented through local land use decisions.

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[26] ARIZ. ADMIN. CODE §§ R12-15-721 to -727 (2014).
[27] CAL. WATER CODE § 10910(c)(3) (2016).
[28] CAL. GOV'T CODE § 65352.5(d).
[29] WASH. REV. CODE § 36.70A.020(10) (2016).
[30] *Id.* § 36.70A.070(1).
[31] *Id.* § 36.70A.070(5)(c)(iv).
[32] *Id.* §§ 36.70A.040(3)–(4), 58.17.110; *Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 256 P.3d 1193 (Wash. 2011).
[33] Guidance to Counties for Determining Water Availability When Processing Applications for Subdivisions and Building Permits, WASH. DEP'T ECOLOGY (Oct. 8, 2013), http://www.ecy.wa.gov/programs/wr/wrac/images/pdf/10082013-draft-wateravail-guidance.pdf [hereinafter *Ecology Guidance to Counties*].
[34] *Kittitas*, 256 P.3d at 1210.

E. Conservation[35]

Because water scarcity is a way of life in the western United States, state legislatures have in some cases been considering overall mandates or incentives to reduce water use, incorporate water saving features, and provide detailed information on existing uses designed to enable comparisons among jurisdictions or water supplier service areas. The concept of "conservation" takes different forms in different states and regions, but is used here to incorporate equipment or programs designed to reduce water waste and overall consumption. States that have adopted water conservation dictates have done so based on explicit findings that availability of reliable supplies is a statewide concern and that reduction in per capita or per unit usage can be the most economic means of ensuring a sustainable water future.[36] Many such state laws exist independently from the state's assured water supply requirements or local development approval processes. This analysis looks only at those conservation requirements that are integrated into the land use approval process, while recognizing that many beneficial and forward-looking water conservation laws are wholly independent.[37]

Arizona's Groundwater Management Act includes specific requirements for large municipal water suppliers to implement water conservation measures that result in water use efficiency in their service areas.[38] The conservation programs, mandatory within the Active Management Areas, include conservation education, physical equipment, and outdoor watering restrictions, as well as rebates and incentives for the adoption of water efficiency equipment.[39] The review of each proposed subdivision's water supply is evaluated in accordance with these conservation requirements.[40]

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[35] The "conservation" factor is not included in the Davies factors, but is proposed here as reflective of recent trends in state water statutes to address water conservation or wise use on a statewide basis.

[36] *See, e.g.*, 2004 Colo. Sess. Laws Ch. 373, Sec. 1, pp. 1777-78; CAL. WATER CODE §§ 520 to 522 (2016); CAL. CODE REGS. Tit. 23, Div. 3, Ch. 2, §§ 863 to 866 (2016).

[37] *See, e.g.*, COLO. REV. STAT. §§ 6-7.5-101 to -103 (2016) (requirements for indoor WaterSense fixtures); COLO. REV. STAT. §§ 37-60-126(11), 38-33.3-106.5(i) (bans on restrictive covenants prohibiting low water use landscaping) COLO. REV. STAT. §§ 37-97-102, -103(1) (mandatory metering); CAL. WATER CODE §§ 525 to 528 (2016) (mandatory metering). *See also* Cal. Exec. Order B-37-16 (2016), *available at* https://www.gov.ca.gov/docs/5.9.16_Executive_Order.pdf.

[38] ARIZ. REV. STAT. §§ 45-563, -567, -567.01 (LexisNexis 2016); ARIZ. ADMIN. CODE § R12-15-721 (2014); *see also Modified Non-Per Capita Conservation Program*, ARIZ. DEP'T WATER RES., http://www.azwater.gov/AzDWR/WaterManagement/AMAs/ModifiedNon-PerCapita.htm (last updated Mar. 5, 2015).

[39] ARIZ. REV. STAT. §§ 45-567.01; *see also Best Management Practices Applicable to All Service Areas*, ARIZ. DEP'T WATER RES. (Dec. 11, 2008), http://www.azwater.gov/azdwr/WaterManagement/AMAs/documents/BMPsApplicabletoAll.pdf.

[40] ARIZ. ADMIN. CODE § R12-15-721.

New Mexico law requires counties to adopt regulations governing subdivision plats that include requirements for water conservation measures.[41] No more specificity is provided concerning how conservation measures must be considered in the subdivision approval process. Colorado's assured water supply provisions require an applicant for any development permit to provide a description of water conservation and demand management measures, if any, that may be implemented within the development.[42] The statutory language makes it clear that water conservation measures are not mandatory. California has enacted legislation mandating a twenty percent reduction in urban per capita water use on or before December 31, 2020,[43] but this goal does not appear to be explicitly tied into the land use approval process.

F. Other Possible Evaluation Factors

These five factors described above (universal, uniform expert review, minimum size, integration, and conservation) capture most of the significant components and differences in the assured water supply laws in the western states. They are not, however, fully inclusive of the parameters that could be considered in an evaluation of effectiveness. Two other features of such laws may also be relevant and are discussed further. These two factors are not included in the matrix comparison among the states provided in this paper, for the reasons discussed below.

Effect of Inadequacy Determination: While most Western states have some form of compulsory assured water supply law, at least in certain areas, the consequences of failing to prove adequate water supplies may be different. In some states, a failure to demonstrate an adequate water supply is fatal to a development approval.[44] Arizona, for example, requires strict compliance in its Active Management Areas in demonstrating adequate water supply prior to subdivision approval. The Arizona Department of Real Estate will not issue a public report for a development in these areas, which allows the developer to sell lots, without such a demonstration.[45] In other states, however, the governing body of the local jurisdiction may overcome a finding of inadequacy. Wyoming gives local governments discretion to approve a subdivision that has not proven an assured water supply,[46] similar to California,[47] Colorado,[48]

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[41] N.M. STAT. ANN. § 47-6-9(A)(4) (LexisNexis 2016).
[42] COLO. REV. STAT. § 29-20-304(1)– to (2) (2016).
[43] CAL. WATER CODE § 10608.16(a).
[44] *See e.g.*, ARIZ. REV. STAT. § 45-576(C); N.M. STAT. ANN. § 47-6-11(D).
[45] ARIZ. REV. STAT. § 45-576(C).
[46] WYO. STAT. ANN. § 18-5-308(c) (2016) (referring to the board of county commissioners' ability to approve a subdivision notwithstanding an adverse recommendation by the Wyoming Department of Environmental Quality).
[47] CAL. WATER CODE § 10911(a); *see also* CAL. DEP'T WATER RES., *Guidebook for Implementation of Senate Bill 610 and Senate Bill 221 of 2001* 39 (Oct. 8, 2003),

Montana,[49] and Nevada,[50] but disclosure of the adverse decision must be provided to potential home purchasers. The requirement for disclosure is viewed by these states as a suitable substitute for a determination that there is an adequate supply, leaving the final choice to the homebuyer's discretion. As a result, this factor is not included as a distinguishing factor among the state laws in the comparison matrix.

Compulsory. The compulsory nature of an assured water supply law is a factor that has been suggested for evaluation of effectiveness, that is, whether the law mandates an assessment of the availability of sufficient water or merely suggests that consideration of water supply would be a nice idea.[51] Obviously, compulsory requirements are more likely to advance the water goals than a discretionary recommendation that may or may not be followed. The compulsory factor has not been included in this analysis, however, because in all of the western states examined that have assured water supply laws, the laws are compulsory, not simply suggestions. While the assured supply determination may not be required in all areas or circumstances, if it is applicable, it is mandatory. None of the states reviewed here that has an assured water supply law allows it to be discretionarily applied. Thus, the compulsory factor does not provide a mechanism for distinguishing among the different laws or providing a measure of effectiveness.

III. COMPARISON OF STATE ASSURED WATER SUPPLY LAWS

The chart below provides an evaluation of the water adequacy laws of the nine states examined in this paper against the five criteria discussed above. Idaho and Utah are not included because those states do not have laws addressing the determination of water adequacy in the land use approval process for new development.

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http://www.water.ca.gov/pubs/use/sb_610_sb_221_guidebook/guidebook.pdf [hereinafter CAL. DEP'T WATER RES. GUIDEBOOK].

[48] COLO. REV. STAT. § 30-28-136(1)(h)(I).

[49] MONT. CODE ANN. § 76-3-608 (2015).

[50] NEV. REV. STAT. § 278.377(1)(b) (2015).

[51] Davies 2007, *supra* note 5, at 1280–82.

State	Universal	Uniform Expert Review	Minimum Size[52]	Integration	Conservation
Arizona	Yes[53]	Yes	6	Yes[54]	Yes
California	Yes	No[55]	500	Yes	No
Colorado	Yes	County-Yes Local Gov't-No	County-2 Local Gov't-50	No	No
Montana	Yes	Yes[56]	1	No	No
Nevada	Yes	Yes	5	No	No
New Mexico	No[57]	Yes	5	No	Yes
Oregon	Yes	No	4	No	No

[52] Minimum number of lots in a new subdivision that triggers a water adequacy determination.

[53] Arizona requires a water adequacy determination for new development inside its Active Management Areas (AMAs) before lots can be sold. ARIZ. REV. STAT. § 45-576 (2014). Outside of AMAs, a determination as to whether sufficient supply will be available is required, but lots can be sold even if the determination is adverse, with proper disclosure to potential buyers. This disclosure requirement is similar to those applicable in California, Colorado, Montana, Nevada, and Wyoming. *See supra* text accompanying notes 46–50.

[54] Subdivision approval in AMAs requires a demonstration of consistency with the applicable Groundwater Management Plan. ARIZ. REV. STAT. §§ 45-562. Outside of AMAs, the water adequacy determination is made without reference to a regional plan. ARIZ. ADMIN. CODE §§ R12-15-712 to -713 2014).

[55] California has detailed requirements for verification that sufficient water supplies are available to support the proposed subdivision (CAL. GOV'T CODE § 66473.7 (2016)) and for the preparation of water supply assessments by public water systems to support development approvals (CAL. WATER CODE § 10910), but there is no uniform review of either the verification or assessment by an independent agency with expertise.

[56] The Montana Department of Environmental Quality is authorized to review the sufficiency of subdivision water supplies, but can delegate that review authority to qualified local agencies or boards of health under limited circumstances. MONT. CODE ANN. § 76-4-104 (2015).

[57] Development in unincorporated areas of counties in New Mexico are required to demonstrate that water of sufficient quantity will be available. N.M. STAT. ANN. § 47-6-11(D) (2016). Within municipalities, proof of adequate water supply is required only for subdivided land from which appurtenant irrigation water rights have been severed. *Id.* §§ 3-20-9.1, 47-6-11(F)(1) (2016).

Washington	Yes[58]	No[59]	Subdivision-5[60] Bldg. Permit-1	No[61]	No
Wyoming	No[62]	No	6	No	No

IV. SUMMARIES OF STATE ASSURED WATER SUPPLY LAWS

Following are summaries of the laws of eleven western states addressing the assurance that adequate water will be provided for new development. The states included are: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. It should be emphasized that these are summaries and do not delve into the very detailed provisions found in many of the state assured water supply laws. For example, most states have a specific definition of what constitutes a "subdivision" for the purpose of determining when a water adequacy determination is necessary. These definitions are, however, subject to multiple, particularized exceptions, which have not been detailed here. Footnotes provide the references to the statutory provision

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[58] Washington law requires all counties, cities, and towns to make written findings that appropriate provisions have been made for potable water supplies. WASH. REV. CODE § 58.17.110(2) (2016). The additional provisions of the Washington Growth Management Act (GMA), as interpreted by the Washington Supreme Court, are specifically applicable, however, only to those jurisdictions that are required or choose to plan under the GMA, but it is not clear that the water adequacy determinations made by non-GMA covered jurisdictions are allowed to be less rigorous. *See id.* §§ 36.70A.020(10), 36.70A.040, 36.70A.070(1), 58.17.110. *Kittitas Cty. v. E. Wa. Growth Mgmt. Hearings Bd.*, 256 P.3d 1193, 1209–10 (2011). The guidance provided by the Washington Department of Ecology for determining water availability for subdivisions and building permits appears to be directed to all counties and does not distinguish between counties governed by the GMA and those that are not. *Ecology Guidance to Counties*, *supra* note 33.

[59] The *Kittitas* decision makes it clear that local land use authorities are required to make the determination that adequate water is legally and physically available to support the intended use with assistance from the Washington Department of Ecology. *Kittitas*, 256 P.3d at 1210. Ecology's guidelines are designed to assist local governments with the determination of adequacy, but Ecology is not required to be involved in the land use decision process. *Ecology Guidance to Counties*, *supra* note 32.

[60] A city or county that has adopted a comprehensive plan under Washington's Growth Management Act may increase the number of lots governed by the subdivision provisions to a maximum of nine in any urban growth area. WASH. REV. CODE § 58.17.020(6) (2016).

[61] The comprehensive plans of Washington local governments must address protection of availability of water, ground water quality, and the environment, and local subdivision regulations must implement these provisions. The water adequacy determination does not appear, however, to consider regional goals for water use. *See supra* text accompanying notes 29–34.

[62] Subdivisions in unincorporated areas of counties are required to demonstrate the adequacy of the proposed water supply. WYO. STAT. ANN. § 18-5-306(a)(vi) (2015). Cities are not required by state law to perform a water adequacy determination.

defining a subdivision, and these provisions can be examined to identify exceptions if desired.

A note on the concept of "exempt wells" is also in order. Many, but not all, western states provide for certain domestic wells to be exempt from permitting requirements and/or from administration under the priority system governing other water rights.[63] Exempt wells typically have restrictions on flow rates, annual volume of withdrawal, and/or number of dwellings served.[64] Some states allow domestic wells to provide limited outdoor irrigation water or serve a small number of domestic animals.[65] Other states allow exempt wells only in areas that are not considered over-appropriated.[66] This information is well summarized in other publications,[67] and this article does not attempt to address the details of domestic well exemptions.

Collections of exempt wells are, however, sometimes used, or sought to be used, to serve new subdivision development, which can effectively thwart the water adequacy determination otherwise applicable. If each residence in a development of one hundred lots is served by an individual exempt well, the cumulative water quantity implications are significant, the minimum size limitation for a water adequacy review is effectively undermined, and a disincentive for developers to provide a central water system is created. Several states have grappled with circumvention of their assured water supply laws in this manner and have prohibited or limited the use of exempt wells for subdivisions.[68] These efforts are noted in the individual state summaries.

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[63] *See, e.g.*, COLO. REV. STAT. § 37-92-602 (2016); IDAHO CODE §§ 42-227, 42-111 (2016).

[64] *See, e.g.*, ARIZ. REV. STAT. §§ 45-402(8), 45-454 (2014); COLO. REV. STAT. § 37-92-602(1) (2016); NEV. REV. STAT. § 534.180 (2015).

[65] *See, e.g.*, COLO. REV. STAT. § 37-92-602(1)(b) (2016); IDAHO CODE § 42-111 (2015); N.M STAT. ANN. § 72-12-1.1 (2016).

[66] *See, e.g.*, MONT. CODE. ANN. § 85-2-506 (2015); WYO. STAT. ANN. § 41-3-915(a)(i) (2015).

[67] *See*, NAT'L GROUND WATER ASS'N, THE REGULATION OF EXEMPT WELLS IN THE WEST, NGWA INFORMATION BRIEF (July 29, 2015); Jesse J. Richardson, Jr., *Existing Regulation of Exempt Wells in the United States,* 148 J. CONTEMP. WATER RES. & EDUC. 3–9 (Aug. 2012); WATER SYS. COUNCIL, AN ANALYSIS OF REGULATION OF EXEMPT WELLS IN THE WEST: AN OVERVIEW AND STATE-BY-STATE COMPENDIUM, SPECIAL REPORT No. 7 (Jan. 2011).

[68] *See* COLO. REV. STAT. § 37-92-602(3)(b)(III); *Clark Fork Coalition v. Tubbs*, No. BDV-2010-874 (Mont. First Jud. Dist. Ct., Oct. 17, 2014); COMBINED APPROPRIATION GUIDANCE, MONT. DEP'T NATURAL RES. & CONSERVATION (Sept. 18, 2015), *available at* http://dnrc.mt.gov/divisions/water/water-rights/docs/external-ca-10-07-2015-final.pdf; WASH. REV. CODE. § 90.44.050; *Dep't of Ecology v. Campbell & Gwinn*, LLC, 43 P.3d 4 (Wash. 2002).

ARIZONA

The Assured Water Supply Program, which applies to areas of significant groundwater depletion that have been designated as Active Management Areas, and the Adequate Water Supply Program, which applies to all other areas, create Arizona's assured water supply framework. Both programs are discussed below.

Assured Water Supply Program

Brief Description:

Arizona's Assured Water Supply Program was created as part of the 1980 Groundwater Management Act and operates within Arizona's five Active Management Areas (AMAs).[69] AMAs are those areas of the state where significant groundwater depletion has occurred and include portions of Maricopa, Pinal, Pima, Santa Cruz, and Yavapai Counties.[70] Applicants are required to demonstrate an assured water supply that will be physically, legally, and continuously available for the next 100 years before the developer can record plats or sell parcels.[71] The Arizona Department of Real Estate (ADRE) will not issue a public report, which allows the developer to sell lots, without a demonstration of an assured water supply.[72] The developer can demonstrate a 100-year supply by satisfying the requirements to obtain a Certificate of Assured Water Supply or by a written commitment of service from a provider with a Designation of Assured Water Supply—both documents are issued by the Arizona Department of Water Resources (ADWR).[73]

Applies to:

The Assured Water Supply Program applies when a subdivision is being developed,[74] and thus it is driven by the ADRE's definition of a subdivision: "improved or unimproved land or lands divided or proposed to be divided for the purpose of sale or lease, whether immediate or future, into six or more lots, parcels[,] or fractional interests."[75] "This includes residential or commercial subdivisions, stock cooperatives, con-

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[69] *History of Water Management in Arizona*, ARIZ. DEP'T WATER RES., http://www.azwater.gov/AzDWR/PublicInformationOfficer/history.htm (last updated Mar. 27, 2014).

[70] ARIZ. REV. STAT. §§ 45-401 to -403, -411 (LexisNexis 2016); ARIZONA WATER ATLAS, VOL. 8, FIG. 8.0-1, http://www.azwater.gov/AzDWR/StatewidePlanning/WaterAtlas/ActiveManagementAreas/default.htm (last updated Mar. 27, 2014).

[71] ARIZ. REV. STAT. § 45-576(J).

[72] *Id.* § 45-576(C).

[73] Id. § 45-576(A); see Office of Assured & Adequate Water Supply Program, supra note 25.

[74] ARIZ. REV. STAT § 45-576(A).

[75] *Id.* § 32-2101(56)(a); *see also id.* § 32-2181(E)(1) (excluding lots, parcels, or fractional interests thirty-six acres or more in area).

dominiums, and all lands divided or proposed to be divided as part of a common promotional plan (including golf courses, parks, schools, and other amenities)."[76] For the purpose of the Assured Water Supply Program, subdivisions do not include short-term leases (12 months or less) or subdivisions where all parcels are greater than thirty-six acres in size.[77]

Process and Criteria:

The two means for a developer to demonstrate assured water supply are the Certificate of Assured Water Supply ("Certificate") or by a written commitment of service from a provider that has obtained a Designation of Assured Water Supply ("Designation").[78] A Certificate is necessary for subdivided land that is not served by a designated water provider.[79] For a Certificate, applicants must demonstrate all of the following:[80]

> **(1) Physical water availability:** If the proposed source of water is groundwater, the applicant must submit a hydrologic study, which the Director of ADWR then uses to determine the volume of water that will be physically available for the proposed use.[81] The study must consider demands of area users for a 100-year period, and projected water levels after 100 years may not exceed the depth limitations specified in the rules.[82] For proposed surface water supplies, the Arizona administrative regulations prescribe the analysis the Director of ADWR must perform to determine the amount of water available, which differs depending upon the specific source.[83]
>
> **(2) Legal water availability:** Applicants are required to submit evidence that sufficient supplies will be legally available for at least 100 years.[84]
>
> **(3) Continuous water availability:** "Water providers or developers must demonstrate that the water supply is uninterruptible for the 100-year period, or that sufficient back-

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[76] *See Office of Assured & Adequate Water Supply*, *supra* note 25; ARIZ. REV. STAT. § 32-2101(56)(b).

[77] ARIZ. REV. STAT. § 32-2101(56)(c) (also details additional exceptions to the definition of "subdivision").

[78] *Id.* § 45-576(A); *see Office of Assured & Adequate Water Supply*, *supra* note 25.

[79] Ariz. Rev. Stat. § 45-576.

[80] *Id.*; ARIZ. ADMIN. CODE. § R12-15-704(F) (2014); *see Office of Assured & Adequate Water Supply*, *supra* note 2525.

[81] ARIZ. ADMIN. CODE § R12-15-716(B).

[82] *Id.* §§ R12-15-704(F)(3), -716(B)(3).

[83] *Id.* § R12-15-716(E) to (H).

[84] *Id.* §§ R12-15-704(F)(2), -718(A).

up supplies exist for any anticipated shortages."[85] This includes evidence that adequate delivery, storage, and treatment works will be in place.[86]

(4) Financial capability: "Water providers or developers must demonstrate financial capability to construct the water delivery system and any storage or treatment facilities."[87] "Financial capability for developers is typically considered through the local government's subdivision review process."[88]

(5) Water quality: "Proposed sources of water must satisfy existing state water quality standards and any other quality standards applicable to the proposed use after treatment."[89]

(6) Consistency with the management goal: All five AMAs have water management goals related to reduction in groundwater use.[90] The amount of water available to the subdivision is calculated consistently with the management goal for the particular AMA, taking into account the groundwater allowance and extinguishment credits applicable.[91]

(7) Consistency with the management plan: "Each AMA's Groundwater Management Plan prescribes water conservation requirements for municipal water providers."[92] "Water demand associated with proposed subdivisions of more than 50 lots is evaluated in accordance with these conservation requirements."[93]

As an alternative to the developer applying for a Certificate, a written commitment of service from a designated provider will suffice to meet the assured water supply requirement.[94] A water provider offering a written commitment must secure a Designation for the entire service ar-

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[85] *Office of Assured & Adequate Water Supply*, *supra* note 25; ARIZ. ADMIN. CODE § R12-15-717(A).
[86] ARIZ. ADMIN. CODE § R12-15-717(A).
[87] *Office of Assured & Adequate Water Supply*, *supra* note 25; ARIZ. ADMIN. CODE § R12-15-720(A).
[88] *Office of Assured & Adequate Water Supply*, supra note 25.
[89] *Office of Assured & Adequate Water Supply*, *supra* note 25; ARIZ. ADMIN. CODE § R12-15-719(A).
[90] ARIZ. ADMIN. CODE § R12-15-704(F)(7); ARIZ. REV. STAT. § 45-562; *Office of Assured & Adequate Water Supply*, *supra* note 25.
[91] Ariz. Admin. Code § R12-15-722.
[92] *Office of Assured & Adequate Water* Supply, *supra* note 25; ARIZ. ADMIN. CODE § R12-15-704(F)(6); ARIZ. REV. STAT. §§ 45-563, -567, -567.01.
[93] *Office of Assured & Adequate Water Supply*, *supra* note 25; ARIZ. ADMIN. CODE § R12-15-721.
[94] Ariz. Rev. Stat. § 45-576.

ea.[95] A Designation means that the provider has a water supply sufficient to provide a 100-year supply for its current, committed, and projected future demand for the term of the Designation and has met the seven criteria listed above.[96] "The most populous cities within most AMAs have obtained a Designation, thereby satisfying the assured water supply requirements of the majority of new subdivisions without the need for a hydrologic study or obtaining a Certificate."[97]

Who makes the determinations?

The Director of ADWR makes the final determination for a Certificate and Designation.[98] If the Director finds that the application for a Certificate meets the criteria, public notice is posted for two consecutive weeks in a local newspaper.[99] A fifteen-day protest period follows.[100] If no protests are received, a Certificate is issued.[101]

A city, town or county may approve a subdivision plat only if the sub-divider has obtained a Certificate or the sub-divider has obtained a written commitment of service from a provider with a Designation.[102]

The ADRE will not issue a public report, which allows the developer to sell lots, without a demonstration of a Certificate or written commitment of water service for the subdivision from a city, town, or private water company having a Designation of an assured water supply.[103]

Process to Contest Determinations:

Review of the Director of ADWR's decisions is obtained pursuant to the Arizona administrative hearing procedures.[104] The administrative hearing must be conducted in the AMA in which the use is located.[105]

Adequate Water Supply Program

Brief Description:

The Adequate Water Supply Program—first created in 1973—operates outside of the AMAs as a consumer protection measure against the marketing of lots without available water supplies.[106] Similar to the

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[95] *Office of Assured & Adequate Water Supply*, supra note 25.
[96] Ariz. Admin. Code § R12-15-710.
[97] *Office of Assured & Adequate Water Supply, supra* note 25.
[98] Ariz. Rev. Stat. § 45-576(A); Ariz. Admin. Code § R12-15-710.
[99] *Id.* § 45-578.
[100] *Id.* § 45-578(B).
[101] *Id.* § 45-578(D).
[102] *Id.* § 45-576(B).
[103] *Id.* § 45-576(C).
[104] *Id.* §§ 45-578, 45-114, 41-1092.
[105] *Id.* § 45-578(G).
[106] *Id.* § 45-108; *Water Adequacy Program Summary*, ARIZ. DEP'T WATER RES. (NOV. 2001),

Assured Water Supply Program, developers are required to obtain a determination from ADWR concerning the quantity and quality of water available before a subdivision can be approved and before the ADRE will allow any lot sales.[107] A developer can also provide a written commitment of service from a designated provider to meet the adequacy requirement.[108] If the application for a water adequacy determination successfully demonstrates that water of sufficient quality will be physically, legally, and continuously available for the next 100 years and that the developer has the financial capability to construct the necessary facilities, then the ADWR will determine the water supply to be adequate.[109]

If the water supply is determined to be inadequate, the developer may still sell lots, but the inadequacy determination must be disclosed to potential buyers in the public report approved by the ADRE and in all promotional materials.[110] The ADRE is required to advise prospective home buyers on its website to investigate water availability before purchasing real estate and to provide links to the ADWR website showing areas outside of AMAs that have been determined to have adequate or inadequate supplies.[111]

Applies to:

In areas outside of AMAs, prior to the recordation of the plat, the developer of a proposed subdivision, including dry lot subdivisions, must submit plans for the water supply for the subdivision and demonstrate the adequacy of the water supply to meet the needs projected by the developer to ADWR.[112] For the purpose of this requirement, a subdivision has the same definition, a division into six or more lots, as in the Assured Water Supply Program.[113] Developers must obtain a water adequacy determination before the local platting entity (city, town, or county) can approve a final plat.[114] A Water Report is a letter issued to the ADRE by the ADWR for a subdivision stating whether an adequate water supply exists.[115] The requirement is simply that a Water Report be issued, not that it contain a determination that the water supply is adequate.

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http://www.azwater.gov/AzDWR/WaterManagement/AAWS/documents/WADSumm_000.pdf.

[107] ARIZ. REV. STAT. §§ 45-108(A), 32-2183(H).
[108] *Id.* § 45-108(C), (E).
[109] *Id.* § 45-108(B), (I).
[110] *Id.* § 32-2181(F)(2).
[111] *Id.* § 32-2119(A).
[112] *Id.* § 45-108(A).
[113] *Id.* §§ 32-2101(56)(a), 32-2181(E).
[114] *Water Adequacy Program Summary*, Ariz. Dep't Water Res. (Nov. 2001).
[115] ARIZ. ADMIN. CODE § R12-15-701(66).

Both cities and counties are authorized to adopt regulations providing that no final plat for a subdivision will be approved without a 100-year water adequacy determination from ADWR.[116] Those areas ("mandatory adequacy jurisdictions")[117] require a developer to apply for and provide a Water Report demonstrating adequate water supply or a written commitment of service from a provider with a Designation prior to completing the final plat approval process.[118] If a county adopts such a regulation, all the cities and towns within the county must also require a water adequacy determination or commitment from a designated provider before approving a final plat.[119]

Process and Criteria:

The analysis performed by the Director to make the adequacy determination mirrors the first five criteria listed above in the Assured Water Supply Program (physical, legal, and continuous water availability, financial capability, and water quality).[120] Applicants that do not meet all five of the listed criteria will receive a Water Report finding inadequate water supply.[121]

In the alternative, a developer may submit a written commitment of service from a water provider with a Designation.[122] In order to receive a Designation, the water provider must meet all five of the above listed criteria.[123]

Who makes the determinations?

The Director of the ADWR makes the determination for a Water Report demonstrating adequate or inadequate water supply.[124] The Direc-

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[116] ARIZ. REV. STAT. §§ 11-823(A), 9-463.01(O).

[117] *List of Mandatory Adequacy Jurisdictions*, ARIZ. DEP'T WATER RES., http://www.azwater.gov/AzDWR/WaterManagement/AAWS/documents/List_of_Mandatory_Adequacy_Jurisdictions_2-17-09_000.pdf (last visited June 14, 2016).

[118] Office of Assured & Adequate Water Supply Program, supra note 25.

[119] ARIZ. REV. STAT. §§ 45-108(H), 9-463.01(J). Two bills passed by the Arizona state legislature in 2016 would have modified this arrangement. Senate Bill 1268 would have eliminated the applicability of a county-passed mandatory adequacy regulation to cities and towns within the county, but allowed the municipalities to adopt water adequacy requirements if they chose to do so. S.B. 1268, 52d Leg., 2d Reg. Sess. (Ariz. 2016). Senate Bill 1400 would have required county review of a previously adopted water adequacy regulation every five years with an option to rescind it. S.B. 1400, 52d Leg., 2d Reg. Sess. (Ariz. 2016). Both bills were vetoed by Governor Doug Ducey on May 9, 2016.

[120] Ariz. Admin. Code § R12-15-712.

[121] *Id.* § R12-15-713

[122] ARIZ. REV. STAT. § 45-108(E).

[123] *Id.* § 45-108(C), (I).

[124] *Id.* § 45-108(B).

tor also determines whether a water provider meets the criteria for a Designation.[125]

If the subdivision is within a mandatory adequacy jurisdiction, ADWR must publish notice of the application once each week for two consecutive weeks in a newspaper of general circulation in the groundwater basin in which the applicant proposes to use water.[126] The first publication shall occur within fifteen days after the application is determined complete.[127]

A final copy of the Director's Water Report is sent to the ADRE and the city, town, or county responsible for platting the subdivision.[128]

Process to Contest Determinations:

As with the Assured Water Supply Program, review of decisions of the Director of ADWR is obtained pursuant to the Arizona administrative hearing procedures.[129] The administrative hearing must be conducted in the groundwater basin in which the use is located.[130]

Comparing Arizona's Assured Water Supply Laws to Other States:

Arizona has one of the most comprehensive water supply programs addressing both urban growth and rural planning—at least within the AMAs. The Assured Water Supply Program creates a well-defined standard that developers, local governments, and water providers are subject to. The program is designed to be consistent with the detailed management plans and goals in each AMA.

Outside of AMAs, local governments can choose to become "mandatory adequacy jurisdictions" and then have the same requirements as those inside the AMAs. Even if this option is not exercised, a determination as to whether sufficient supply will be available is always required, but lots can be sold even if the determination is adverse, with proper disclosure to potential buyers. This disclosure requirement is similar to those applicable in California, Colorado, Montana, Nevada, and Wyoming. The requirements for continuous, legal, and physical water availability and the review of these criteria by the ADWR provide an objective assessment of water availability and protection to prospective purchasers. Detailed information is available to consumers about the areas in which

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[125] *Id.* §§ 45-108(C), 45-108.01(E).
[126] *Id.* § 45-108.01(A).
[127] *Id.*
[128] *Id.* § 45-108(B).
[129] *Id.* §§ 45-578, 45-114, *see also id.* § 41-1092.
[130] *Id.* § 45-108.01(G).

water adequacy is required and any applicable determination of inadequacy.

CALIFORNIA

California's assured water supply program includes the California Subdivision Map Act, the Urban Water Management Act, Water Code Section 10910, and the Sustainable Groundwater Management Act. Each of these statutes is discussed below.

California Subdivision Map Act

Brief Description:

The California Subdivision Map Act ("Map Act")[131] provides that "regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies."[132] Each local agency must, by ordinance, "regulate and control the initial design and improvement of common interest developments" and subdivisions creating five or more parcels.[133] Tentative maps are required to be filed and approved by the local agency in order to move to the next stage of the subdivision process.[134] For certain large developments, the tentative map must show proof of sufficient water supply from a public water system.[135]

Applies to:

The sufficient water supply requirements of the Map Act apply to any proposed residential development that is more than 500 dwelling units or, for a public water system having fewer than 5,000 service connections, any residential development that would account for an increase of ten percent or more in the number of the public water system's existing service connections.[136] Subdivisions of lesser size or impact are not required to show water supply adequacy.

Process and Criteria:

Sufficient water supply "means the total supplies available during normal, single-dry, and multiple-dry years within a 20-year projection that will meet the projected demand associated with the proposed subdivision, in addition to existing and planned future uses, including, but not limited to, agricultural and industrial uses."[137] Written verification from

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[131] Cal. Gov't Code §§ 66410 to 66499 (West 2016).
[132] *Id.* § 66411.
[133] *Id.* §§ 66411, 66426.
[134] *Id.* §§ 66452.1, 66452.2.
[135] *Id.* § 66473.7(b).
[136] *Id.* § 66473.7(a)(1).
[137] *Id.* § 66473.7(a)(2).

the applicable public water system must be provided.[138] In determining sufficient water supply, all of the following factors must be considered:

> (1) "The availability of water supplies over a historical record of at least 20 years";[139]
>
> (2) "The applicability of an urban water shortage contingency analysis prepared pursuant to [the Urban Water Management Planning Act[140]] that includes actions to be undertaken by the public water system in response to water supply shortages";[141]
>
> (3) The reduction in water supply associated with previous commitments by the public water system;[142] and
>
> (4) "The amount of water that the water supplier can reasonably rely on receiving from other water supply projects, such as conjunctive use, reclaimed water, water conservation, and water transfer."[143]

The written verification must also include a description "of the reasonably foreseeable impacts of the proposed subdivision on the availability of water resources for agricultural and industrial uses within the public water system's service area that are not currently receiving water from the public water system but are utilizing the same sources of water."[144] If the water supply includes groundwater, the public water system must evaluate "the extent to which it or the landowner has the right to extract the additional groundwater needed to supply the proposed subdivision."[145]

The public water system's verification must be supported by substantial evidence.[146] The substantial evidence may include:

> (1) The public water system's most recently adopted urban water management plan.[147]
>
> (2) An assessment of the reliability of its water service to its customers during normal, single dry, and multiple dry water years.[148]

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[138] *Id.* § 66473.7(b)(1).
[139] *Id.* § 66473.7(a)(2)(A).
[140] CAL. WATER CODE § 10632 (West 2015).
[141] CAL. GOV'T CODE § 66473.7(a)(2)(B).
[142] *Id.* § 66473.7(a)(2)(C).
[143] *Id.* § 66473.7(a)(2)(D).
[144] *Id.* § 66473.7(g).
[145] *Id.* § 66473.7(h).
[146] *Id.* § 66473.7(c).
[147] *Id.* § 66473.7(c)(1); *see* CAL. WATER CODE §§ 10620-10645.
[148] CAL. GOV'T CODE §§ 66473.7(c)(1), (c)(3); CAL. WATER CODE § 10635.

> (3) A water supply assessment that was completed pursuant to explicit provisions of the California Water Code addressing the accounting for the project's water demand in the applicable urban water management plan, the supplies available during a twenty-year projection, identification of existing water entitlements, and the historical quantities of water received under those entitlements.[149]

If the written verification from the public water system "relies on projected water supplies that are not currently available," the verification must be based on all of the following to the extent applicable:

> (1) "Written contracts or other proof of valid rights to the identified water supply that identify the terms and conditions under which the water will be available to serve the proposed subdivision";[150]
>
> (2) A capital outlay program adopted by the applicable governing body for financing the delivery of a sufficient water supply;[151]
>
> (3) "Securing of applicable federal, state, and local permits for construction of necessary infrastructure associated with supplying a sufficient water supply"; and[152]
>
> (4) "Any necessary regulatory approvals that are required in order to be able to convey or deliver a sufficient water supply to the subdivision."[153]

If the written verification provided by the applicable public water system indicates that the public water system is unable to provide a sufficient water supply, then the local agency may make a finding that additional water supplies not accounted for by the public water system are, or will be, available prior to completion of the subdivision that will satisfy the sufficient water supply requirements.[154] If no verification is provided by the public water system, "then the local agency may still make a finding that sufficient water supplies are, or will be, available prior to completion of the subdivision."[155] The findings by the local agency must be supported by substantial evidence.[156]

If there is no public water system, the local agency must make a written finding of sufficient water supply based on the same criteria as

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[149] CAL. GOV'T CODE § 66473.7(c)(2); CAL. WATER CODE §§ 10910(c) - (d).
[150] CAL. GOV'T CODE § 66473.7(d)(1).
[151] *Id.* § 66473.7(d)(2).
[152] *Id.* § 66473.7(d)(3).
[153] *Id.* § 66473.7(d)(4).
[154] *Id.* § 66473.7(b)(3).
[155] *Id.* § 66473.7(b)(4).
[156] *Id.* § 66473.7(b)(3) – (4).

specified above and identify the mechanism for providing water to the subdivision.[157] If the tentative map fails to meet the sufficient water supply requirements, it must be disapproved by the local agency.[158]

Who makes the final determination?

The legislative body of a city or county or the advisory agency approves the written verification from the water supplier.[159] An advisory agency is a designated official or an official body charged with the duty of making investigations and reports on the design and improvement of proposed divisions of real property, the imposing of requirements or conditions thereon, or having the authority by local ordinance to approve, conditionally approve, or disapprove maps.[160]

Process to Contest Determinations:

The developer may appeal any action of the advisory agency with respect to a tentative map to the appeal board established by local ordinance or, if there is no appeal board, to the legislative body within ten days after the action is taken.[161] Upon the filing of an appeal, the appeal board or legislative body will set the matter for a hearing to be held within thirty days.[162] The appeal board or legislative body has ten days to render its decision.[163] The subdivider may also appeal the action of the appeal board to the legislative body with basically the same time periods applicable.[164] Interested persons other than the developer are also authorized to appeal.[165] Judicial review is also available.[166]

California Urban Water Management Planning Act and Water Code Section 10910

Brief Description:

The Urban Water Management Planning Act ("UWMP Act")[167] was enacted in 1983 to ensure that urban water suppliers have adequate water supplies for existing and future demands.[168] The Act requires every urban

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[157] *Id.* § 66473.7(e).
[158] *Id.* § 66473.
[159] *Id.* § 66473.7(b)(1).
[160] *Id.* § 66415.
[161] *Id.* § 66452.5(a)(1)–(2).
[162] *Id.* § 66452.5(a)(3).
[163] *Id.*
[164] *Id.* § 66452.5(b).
[165] *Id.* § 66452.5(d).
[166] *See id.* § 66499.37 (providing a ninety-day window to commence the action).
[167] Cal. Water Code §§ 10610-10657. .
[168] *Id.* § 10610.2; *Update on Status of Urban Water Management Plans*, CAL. WATER COMM'N, 1 (Jan. 16, 2013), https://cwc.ca.gov/Documents/2013/01_January/January2013_Agenda_Item_8_UrbanWaterManagementPlans_Final.pdf.

water supplier to submit Urban Water Management Plans ("UWM Plans") to the Department of Water Resources, including information on water supply reliability and water use efficiency measures.[169] The UWM Plans assess current demands and supplies over a twenty-year planning horizon and address methods to ensure reliable and adequate water service to meet the needs of the various categories of customers during normal, single dry, and multiple dry years.[170]

Senate Bill 610, adopted in 2001 as a companion measure to the water sufficiency provisions of the Map Act described above, amended state law to improve the link between information on water supply availability and land use decisions made by cities and counties.[171] Senate Bill 610 amended portions of the UWMP Act, as well as California Water Code Sections 10910 to 10915 on water supply planning, and specified that water assessments must be furnished to local governments for inclusion in any environmental documentation for large projects subject to the California Environmental Quality Act.[172]

Applies to:

The UWMP Act requires every urban water supplier to prepare and adopt a UWM Plan and update it every five years.[173] An urban water supplier can be "either publicly or privately owned, providing water for municipal purposes either directly or indirectly to more than 3,000 customers or supplying more than 3,000 acre-feet of water annually."[174]

Senate Bill 610 and Water Code Sections 10910 *et seq.* govern residential projects consisting of more than 500 dwelling units and certain types of commercial developments.[175] This is similar to the subdivision requirement in the Map Act. Senate Bill 610, however, also applies to a "project" that "would demand an amount of water equivalent to, or greater than, the amount of water required by a 500 dwelling unit project."[176] This could include water intensive projects of less than 500 residential units, depending on how the local agencies define the typical water demand for a 500-unit residential project.

Process and Criteria:

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[169] CAL. WATER CODE §§ 10620(d)(1), 10621(d) – (e), 10631(c).
[170] *Id.* § 10631(a),(c)
[171] CAL. DEP'T WATER RES. GUIDEBOOK, *supra* note 47, at iii..
[172] *Id.*
[173] CAL. WATER CODE §§ 10620(a) to 10621(a).
[174] *Id.* § 10617.
[175] *Id.* § 10912(a).).
[176] *Id.* § 10912(a)(7).

The very detailed required contents of a UWM Plan are listed in California Water Code sections 10630 to 10635.[177] The following is a general overview of the information required:

> (1) Description of the service area of the supplier, including current and projected population, climate, and other demographic factors affecting the supplier's water management planning with the population estimates provided in five-year increments to twenty years;[178]
>
> (2) The existing and planned sources of water available to the supplier over the same five-year increments, with special provisions governing groundwater supplies;[179]
>
> (3) Description of the reliability of the water supply and vulnerability to seasonal or climatic shortage for average, single dry, and multiple dry water years;[180]
>
> (4) Description of the opportunities for exchanges or transfers of water on a short-term or long-term basis;[181]
>
> (5) Quantification of the past and current water use over the five-year increments;[182]
>
> (6) Description of the supplier's water demand management measures, including water waste prevention ordinances, metering, conservation pricing, public education and outreach, and other measures that have a significant impact on water use as measured in gallons per capita per day;[183]
>
> (7) An urban water shortage contingency analysis;[184]
>
> (8) Information on recycled water and its potential for use as a water source in the service area of the urban water supplier;[185]
>
> (9) Information relating to the quality of existing sources of water available to the supplier over the same five-year increments and the manner in which water quality affects water management strategies and supply reliability; [186]
>
> (10) A comparison of the total water supply sources to total projected water use over the next twenty years[187]

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[177] *See also* CAL. DEP'T WATER RES. GUIDEBOOK, *supra* note 47.
[178] CAL. WATER CODE § 10631(a).).
[179] *Id.* § 10631(b).).
[180] *Id.* § 10631(c).
[181] *Id.* § 10631(d).
[182] *Id.* § 10631(e).
[183] *Id.* § 10631(f)(1)(B).
[184] *Id.* § 10632.
[185] *Id.* § 10633.
[186] *Id.* § 10634.
[187] *Id.* § 10635(a).

The preparation of the UWM Plan must be coordinated with local agencies in the area, including other water suppliers that share a common source, water management agencies, and relevant public agencies.[188]

The city or county considering a proposed development project will identify the public water system that will supply water to the property and obtain or prepare a Water Supply Assessment (WSA).[189] As part of the WSA, the city or county must request each public water system that may supply water to the proposed project to determine whether the projected water demand associated with a proposed project was included as part of the most recently adopted UWM Plan.[190] If the projected water demand associated with the proposed project was accounted for in the most recently adopted UWM Plan, the public water system may incorporate that information in preparing the WSA.[191] If the projected water demand associated with the proposed project was not accounted for in the most recently adopted UWM Plan of the water supplier, or the public water system has no UWM Plan, the WSA must include a discussion with regard to whether the public water system's total projected water supplies available during normal, single dry, and multiple dry water years during a twenty-year projection will meet the projected water demand associated with the proposed project, in addition to the public water system's existing and planned future uses, including agricultural and manufacturing uses.[192]

The following information must be included in a WSA:

> (1) "[A]n identification of any existing water supply entitlements, water rights, or water service contracts relevant to the identified water supply for the proposed project, and a description of the quantities of water received in prior years by the public water system."[193]
>
> (2) "If no water has been received in prior years by the public water system . . . under the existing water supply entitlements water rights, or water service contracts, . . . an identification of the other public water systems or water service contractholders [sic] that receive a water supply or have existing water supply entitlements, water rights, or water service contracts to the same source of water."[194]

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[188] *Id.* § 10620(d)(2).
[189] *Id.* § 10910(b), (d).
[190] *Id.* § 10910(b)(1), (c)(1).
[191] *Id.* § 10910(c)(2).
[192] *Id.* § 10910(c)(3).
[193] *Id.* § 10910(d)(1).
[194] *Id.* § 10910(e).

Additional detailed information is required in the WSA for a proposed project that includes groundwater.[195]

Who makes the determinations?

Urban water suppliers adopt their own plans, but are required to make the plan available for public inspection and hold a public hearing prior to adoption.[196] After the hearing, the plan must be adopted as prepared or as modified after the hearing.[197]

For a WSA, the governing body of each public water system must submit the WSA to the city or county that requested it and the city or county must approve it.[198] If the public water system concludes that its water supplies are, or will be, insufficient, it must provide to the city or county its plans for acquiring additional water supplies, setting forth the measures that are being undertaken to acquire and develop those water supplies.[199] The city or county must determine, based on the entire record, whether projected water supplies will be sufficient to satisfy the demands of the project, in addition to existing and planned future uses.[200] If the city or county determines that water supplies will not be sufficient, the city or county must include that determination in its findings for the project.[201] It appears that a proposed project may proceed forward even when the local agency "determines that water supplies will not be sufficient," but this information will be included in the environmental document prepared for the project and in its findings.[202]

Process to Contest Determinations:

No statutory process is provided to contest a WSA finding that the projected water supply will or will not meet the projected demand.

Sustainable Groundwater Management Act

Brief Description:

For the first time in California history, the Sustainable Groundwater Management Act (SGMA), enacted in 2014, provides for the sustainable management of groundwater basins.[203] The SGMA states that "it is vital that there be close coordination and consultation between California's water supply and management agencies and California's land use ap-

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[195] *Id.* § 10910(f).
[196] *Id.* § 10642.
[197] *Id.*
[198] *Id.* § 10910(g)(1).
[199] *Id.* § 10911(a).
[200] *Id.* § 10911(c).
[201] *Id.* § 10911(a).
[202] *Id.* § 10911(a)–(c); *see also* CAL. DEP'T WATER RES. GUIDEBOOK, *supra* note 47, at 39.
[203] CAL. WATER CODE § 10720.1(a).

proval agencies to ensure adequate water supply and management planning occurs to accommodate projects that will result in increased demands on water supplies or impact water resource management."[204]

SGMA provides a "standardized process for determining the adequacy of existing and planned future water supplies to meet existing and planned future demands on these water supplies and the impact of land use decisions on the management of California's water supply resources."[205] For example, before a legislative body of a city or county takes action to adopt or substantially amend its general plan, a public water system with 3,000 or more service connections must provide the planning agency for the city or county a description of the source(s) of the total water supply currently available to the water supplier by water right or contract, taking into account historical data concerning wet, normal, and dry runoff years.[206] The public water supplier must also provide a description of all proposed additional sources of water supplies, including the estimated dates by which these additional sources should be available and the quantities of additional water supplies that are being proposed.[207] Detailed information on amounts of water provided, customers served, and estimated reductions of total demand based on water use reduction measures must also be provided, together with copies of the supplier's UWM Plan and capital improvement plan.[208]

SGMA also requires the development and implementation of Groundwater Sustainability Plans (GSPs) for medium and high priority basins designated by the Department of Water Resources,[209] and encourages low- and very low-priority basins to be managed pursuant to a GSP as well.[210] There are 127 high and medium priority groundwater basins, which account for approximately ninety-six percent of groundwater use in California.[211] GSPs, when effectively implemented, will achieve sustainability within a groundwater basin within twenty years of the implementation.[212]

Comparing California's Assured Water Supply Laws to Other States:

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[204] CAL. GOV'T CODE § 65352.5(a).
[205] *Id.* § 65352.5(b).
[206] *Id.* § 65352.5(c)(3).
[207] *Id.* § 65352.5(c)(6).
[208] *Id.* §§ 65352.5(c)(1) - (2), (4) - (5), (7) - (8).
[209] CAL. WATER CODE § 10720.7(a).
[210] *Id.* § 10720.7(b).
[211] *Initial Groundwater Basin Prioritization under the SGM Act*, CAL. DEP'T WATER RES., http://www.water.ca.gov/groundwater/sgm/SGM_BasinPriority.cfm (last modified Jan. 15, 2016).
[212] CAL. WATER CODE §§ 10720.7(a), 10727(a), 10727.2(b)(1).

California is perhaps the prototype for integrating its assured water supply program with local land use planning. UWM Plans are very detailed and forward looking planning documents and feed into the WSAs and verification letters required for development approvals for large developments.[213] SGMA requires city and county general plans to consider detailed information about available water supplies, and a GSP must describe the consideration given to any applicable general plans and adopted water resources-related plans within the basin.[214]

California also stands out because it requires water suppliers to describe the vulnerability of water supplies to "seasonal or climatic shortage" in their UWM Plans[215] and mandates an urban water shortage plan in case of an emergency, like drought or natural disaster, in its assured water supply analysis.[216]

California's WSA and water verification requirements are comprehensive, but their efficacy is limited by their application only to very large projects, unlike states such as Arizona[217] and Colorado,[218] which apply water adequacy requirements to much smaller developments. California's water adequacy provisions for subdivisions only apply to projects of 500 units or more and exempt any proposed residential project in an already "urbanized area" previously developed for urban uses, as well as "housing projects that are exclusively for very low and low-income households."[219] A city or county can approve development with insufficient water supply but only if the public water system provides plans for acquiring additional supply[220] or upon a finding that additional water supplies will be available.[221] Further, if the local government determines that the water supplies will be insufficient, that determination must be included in its findings for the project,[222] similar to Arizona,[223] Colorado,[224] and Wyoming.[225]

COLORADO

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[213] *See Id.* §§ 10910 to 10915; *see also* CAL. GOV'T CODE § 66473.7.
[214] CAL. WATER CODE § 10727.2(g).
[215] *Id.* § 10631(c).
[216] *Id.* § 10632.
[217] ARIZ. REV. STAT. § 45-576(A) (LexisNexis 2016).
[218] COLO. REV. STAT. §§ 30-28-101(10), 30-28-136(1)(h) (2016).
[219] CAL. GOV'T CODE § 66473.7(a)(1), (i).
[220] CAL. WATER CODE §10910.
[221] CAL. GOV'T CODE § 66473.7(b)(3).
[222] CAL. WATER CODE § 10911(c).
[223] ARIZ. REV. STAT. § 45-108.
[224] COLO. REV. STAT. § 30-28-136(1)(h)(I).
[225] WYO. STAT. ANN. § 18-5-308(c) (2016).

Colorado's assured water supply program consists of the County Planning and Building Codes,[226] which apply to subdivision approvals by counties, and the Local Government Land Use Control Enabling Act,[227] which applies to development approvals by cities, towns, and counties.

County Planning and Building Codes

Brief Description:

Counties are prohibited from approving any preliminary plan or final plat for a subdivision unless evidence has been provided that a water supply sufficient in quantity, dependability, and quality will be available.[228] An opinion from the Colorado State Engineer concerning the sufficiency of supply is required.[229]

Applies to:

Counties are required to adopt subdivision regulations, and those regulations must require the submittal of evidence on water supply in support of any subdivision application.[230] A "subdivision" is any parcel of land that is divided into two or more parcels or to be used for condominiums, apartments, or any other multiple dwelling units.[231] Specifically excluded from the definition of subdivision is any division of land resulting in parcels of thirty-five acres or more.[232]

Boards of county commissioners may not approve a preliminary plan or final plat unless the subdivider has provided evidence "to establish that definite provision has been made for a water supply that is sufficient in terms of quantity, dependability, and quality to provide an appropriate supply of water for the type of subdivision proposed."[233] A preliminary plan is a "map of a proposed subdivision and specified supporting materials, drawn and submitted in accordance with the requirements of adopted regulations, to permit the evaluation of the proposal prior to detailed engineering and design."[234] A plat is "a map and supporting materials of certain described land prepared in accordance with subdivision regulations as an instrument for recording of real estate interests with the county clerk and recorder."[235]

Criteria:

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[226] COLO. REV. STAT. §§ 30-28-101 to -211 (2016).
[227] *Id.* §§ 29-20-301 to -306.
[228] *Id.* § 30-28-133(6)(a).
[229] *Id.* § 30-28-136(1)(h).
[230] *Id.* § 30-28-133(1), (3)(c)(V), (6)(a).
[231] *Id.* § 30-28-101(10).
[232] *Id.* § 30-28-101(10)(c)(I).
[233] *Id.* § 30-28-133(6)(a).
[234] *Id.* § 30-28-101(6).
[235] *Id.* § 30-28-101(5).

Subdivision regulations adopted by a board of county commissioners must require developers to submit documentation on:

> (1) Estimated total number of gallons per day of water system requirements where a distribution system is proposed;[236]
>
> (2) Estimated construction cost and proposed method of financing of the water distribution system;[237]
>
> (3) Adequate evidence that a water supply that is sufficient in terms of quality, quantity, and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed.[238] Such evidence may include, but is not limited to:
>
> > (a) Evidence of ownership or right of acquisition of or use of existing and proposed water rights;[239]
> >
> > (b) Historic use and estimated yield of claimed water rights;[240]
> >
> > (c) Amenability of existing rights to a change in use;[241]
> >
> > (d) Evidence that public or private water owners can and will supply water to the proposed subdivision stating the amount of water available for use within the subdivision and the feasibility of extending service to that area;[242] and
> >
> > (e) Evidence concerning the potability of the proposed water supply for the subdivision.[243]

Who makes the determinations?

The board of county commissioners makes the final determination for preliminary plans and final plats.[244] Upon receipt of a complete preliminary plan submission, the board of county commissioners must distribute a copy of the preliminary plan to "the state engineer for an opinion regarding material injury likely to occur to decreed water rights by virtue of diversion of water necessary or proposed to be used to supply the proposed subdivision and adequacy of proposed water supply to meet

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[236] *Id.* § 30-28-133(3)(c)(V).
[237] *Id.* § 30-28-133(3)(c)(VII).
[238] *Id.* § 30-28-133(3)(d).
[239] *Id.* § 30-28-133(3)(d)(I).
[240] *Id.* § 30-28-133(3)(d)(II).
[241] *Id.* § 30-28-133(3)(d)(III).
[242] *Id.* § 30-28-133(3)(d)(IV).
[243] *Id.* § 30-28-133(3)(d)(V).
[244] *See id.* § 30-28-133(6).

requirements of the proposed subdivision."[245] If the state engineer finds that material injury will occur or finds inadequacy, he must express that finding in a written opinion to the board of county commissioners.[246] If the subdivision is approved notwithstanding the state engineer's opinion, the developer must furnish a copy of the state engineer's opinion to all potential purchasers prior to the sale unless, in the opinion of the board of county commissioners, the developer has corrected the injury or inadequacy from the state engineer's finding.[247]

Process to Contest Determinations:

A review process is available to appeal local land use decisions to the state courts under the Colorado Court Rules or a declaratory judgment proceeding.[248]

Local Government Land Use Control Enabling Act

Brief Description

The Local Government Land Use Control Enabling Act applies to all local governments, including cities, towns, and counties, and provides authority for the approval of new developments.[249] A local government may not approve development permits unless it makes a determination that the developer has demonstrated that the proposed water supply will be adequate.[250] An adequate supply is defined as one that is "sufficient for the build-out of the proposed development in terms of quality, quantity, dependability, and availability to provide a supply of water for the type of development proposed, and may include reasonable conservation measures and water demand management measures to account for hydrologic variability."[251] Colorado counties are subject to this set of directives as well as those described above in the County Planning statutes.

Applies to:

The water adequacy provisions apply to development permits for any "project that includes a new water use in an amount more than that used by fifty single-family equivalents, or fewer as determined by the local government."[252] A development permit is "any preliminary or final approval of an application for rezoning, planned unit development, con-

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[245] *Id.* § 30-28-136(1)(h)(I).
[246] *Id.*
[247] *Id.*
[248] COLO. R. CIV. P. 106(a)(4) (2016); *see* COLO. REV. STAT. §§ 13-51-101 to -115.
[249] COLO. REV. STAT. §§ 29-20-103(1.5), -104.
[250] *Id.* §§ 29-20-303(1).
[251] *Id.* § 29-20-302(1).
[252] *Id.* § 29-20-103(1)(b).

ditional or special use permit, subdivision, development or site plan, or similar application for new construction."[253]

Process and Criteria:

A developer has three potential options to demonstrate an adequate water supply:

> (1) A developer may submit a report prepared by a registered professional engineer or water supply expert that estimates water supply requirements for the proposed development.[254] The report must include:
>
> (a) "An estimate of the water supply requirements for the proposed development through build-out conditions;
>
> (b) A description of the physical source of water supply that will be used to serve the proposed development;
>
> (c) An estimate of the amount of water yield projected from the proposed water supply under various hydrologic conditions;
>
> (d) Water conservation measures, if any, that may be implemented within the development;
>
> (e) Water demand management measures, if any, that may be implemented within the development to account for hydrologic variability; and
>
> (f) Such other information as may be required by the local government."[255]
>
> (2) "If the development is to be served by a water supply entity, the local government may allow the applicant to submit, in lieu of the report [described above], a letter prepared by a registered professional engineer or by a water supply expert from the water supply entity stating whether the water supply entity is willing to commit and its ability to provide an adequate water supply for the proposed development."[256] The water supply entity's engineer or expert must prepare the letter if so requested by the applicant, and the letter must include the same information as described above for a report.[257]

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[253] *Id.* § 29-20-103(1).
[254] *Id.* § 29-20-304(1).
[255] *Id.* § 29-20-304(1)(a)-(f).
[256] *Id.* § 29-20-304(2).
[257] *Id.*

> A water supply entity is "a municipality, county, special district, water conservancy district, water conservation district, water authority, or other public or private water supply company that supplies, distributes, or otherwise provides water at retail."[258]
>
> (3) "In the alternative, an applicant [is] not . . . required to provide a letter or report . . . if the water for the proposed development is to be provided by a water supply entity that has a water supply plan that:
>
> (a) Has been reviewed and updated, if appropriate, within the previous ten years by the governing board of the water supply entity;
>
> (b) Has a minimum twenty-year planning horizon;
>
> (c) Lists the water conservation measures, if any, that may be implemented within the service area;
>
> (d) Lists the water demand management measures, if any, that may be implemented within the development;
>
> (e) Includes a general description of the water supply entity's water obligations;
>
> (f) Includes a general description of the water supply entity's water supplies; and
>
> (g) Is on file with the local government."[259]

The local government may, but is not required to, request a letter from the state engineer commenting on the documentation described above.[260]

Who makes the determinations?

The local government makes the final determination to approve a development permit.[261] It may not approve an application for a development permit unless "it determines in its sole discretion, after considering the application and all of the information provided, that the applicant has satisfactorily demonstrated that the proposed water supply will be adequate."[262] A local government can make such determination "only once during the development permit approval process unless the water de-

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[258] *Id.* § 29-20-302(2).
[259] *Id.* § 29-20-304(3)(a)-(g).
[260] *Id.* § 29-20-305(1)(b).
[261] *Id.* § 29-20-305(1).
[262] *Id.* § 29-20-303(1).

mands or supply of the specific project are materially changed."[263] The local government has "the discretion to determine the stage in the development permit approval process at which such determination is made."[264]

Process to Contest Determinations:

A review process is available to appeal local land use decisions to the state courts under the Colorado Court Rules or a declaratory judgment proceeding.[265]

Comparing Colorado's Assured Water Supply Laws to Other States:

Colorado, like Arizona and California, imposes comparatively stringent criteria for showing water availability. Local governments, however, have discretion in making the actual final determination as to the adequacy of the water supply,[266] similar to Montana,[267] Nevada,[268] and Wyoming.[269] Further, a local government must make a determination only once during the development permit approval process, and the local government has the discretion to determine the stage in the development permit approval process at which such determination is made.[270] The discrepancies in the requirements between Colorado counties and municipalities are somewhat unusual, in that there are differences in the size of subdivision covered, the requirement for a State Engineer opinion, and the timing of the determination. The minimum threshold of 50 units for a local government adequacy review[271] straddles the spectrum of much lower thresholds in many states[272] and California's much higher level of 500 units.[273] The 50-unit minimum may be a high bar, however, in rural areas where subdivision development of greater numbers is rare.[274]

Colorado has addressed the problem of attempted utilization of multiple exempt wells to serve a subdivision. If a well permit application is filed for an exempt well in a subdivision for which the water supply plan has not been recommended for approval by the State Engineer, the cumu-

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[263] *Id.*
[264] *Id.*
[265] COLO. R. CIV. P. 106(a)(4); COLO. REV. STAT. §§ 13-51-101 to -115.
[266] COLO. REV. STAT. § 29-20-303; *id.* § 30-28-133(6)(a).
[267] MONT. CODE ANN. § 76-3-622(1)(e) (2015).
[268] NEV. REV. STAT. § 278.377(1)(b) (2015).
[269] WYO. STAT. ANN. § 18-5-301 (2016).
[270] COLO. REV. STAT. § 29-20-303.
[271] COLO. REV. STAT. § 29-20-103(1)(b).
[272] *See* Ariz. Rev. Stat. §§ 32-2101(56), -2181(E) (six units); Mont. Code Ann. §§ 76-3-103(14)-(15), -104, 76-4-102(16) (one unit); Nev. Rev. Stat. §§ 278.320(1), .330, .360 (five units); N.M. Stat. Ann. §§ 47-6-2(M), (P-T), 47-6-11 (five units); Or. Rev. Stat. §§ 92.010(16)-(17), 92.090(4) (four units); Wash. Rev. Code §§ 58.17.170, .060, .020(a) (five units); Wyo. Stat. Ann. § 18-5-306(a) (five units).
[273] CAL. WATER CODE § 10912(a)(1).
[274] KLEIN & KENNEY, *supra* note 5, at 8.

lative effect of all wells in the subdivision must be considered in determining material injury.[275]

IDAHO

Idaho has no assured water supply law at the state level, but some local governments require that developers show adequate water rights or an adequate water supply[276] akin to Utah. The Idaho Local Land Use and Planning Act requires, however, all local planning or planning and zoning commissions to conduct a comprehensive planning process designed to prepare, implement, and review and update a comprehensive plan.[277] The comprehensive plan must include an "analysis of the uses of rivers and other waters, . . . watersheds, and shorelines"[278] and an analysis of "water supply."[279] While a comprehensive plan does not require adequate water supply standards, some counties instruct development applicants to demonstrate adequate water supply.[280]

MONTANA

Montana's assured water supply program consists of the Montana Subdivision and Platting Act[281] and the Montana Sanitation In Subdivisions Act.[282]

The Montana Subdivision and Platting Act

Brief Description:

The Montana Subdivision and Platting Act (MSPA) regulates the subdivision of land to promote the public health, safety, and general welfare, provide for adequate water supply, prevent overcrowding, and require development in harmony with the natural environment, among other things.[283] To achieve these goals, the MSPA requires local governments to adopt and provide for the enforcement and administra-

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[275] COLO. REV. STAT. § 37-92-602(3)(b)(III).

[276] *See, e.g.*, Ada Cty., Idaho, Code § 8-6-3(L)(3)(f) (2015); Bonner Cty., Idaho, Code § 12-623(B) (2015).

[277] IDAHO CODE ANN. § 67-6508 (2015).

[278] *Id.* § 67-6508(f).

[279] *Id.* § 67-6508(h).

[280] *See, e.g.*, *Ada County Comprehensive Plan,* Ada Cty. Idaho 7-25 (Nov. 2007), *available at* https://adacounty.id.gov/Portals/0/DVS/PLN/Doc/ADA%20COMP%20PLAN%20COMPLETE.pdf.

[281] MONT. CODE ANN. §§ 76-3-101, -105 (2015).

[282] *Id.* §§ 76-4-101, -135.

[283] *Id.* § 76-3-102.

tion of subdivision regulations that cover the provision of adequate water.[284]

Applies to:

The MSPA applies to a developer who proposes a subdivision of land that creates one or more parcels containing less than 160 acres.[285] The MSPA also applies to "an area, regardless of its size, that provides or will provide multiple spaces for rent or lease on which recreational camping vehicles or mobile homes will be placed."[286] "First minor subdivisions" consisting of five or fewer lots that have not been previously subdivided since July 1, 1973 are not subject to the full scope of requirements applicable to larger subdivisions.[287] The MSPA applies to cities, towns, and counties.[288]

Process and Criteria:

A developer that proposes a subdivision must present a preliminary plat[289] and submit an environmental assessment[290] for local government review. The governing body examines and approves each final subdivision plat once "it conforms to the conditions of approval set forth on the preliminary plat."[291]

For proposed subdivisions that will include new water supply facilities, the preliminary plat must include:

> (a) Description of the proposed subdivision's water supply systems;[292]
>
> (b) Evidence of adequate water availability: (i) obtained from well logs or testing of onsite or nearby wells; (ii) obtained from information contained in published hydrogeological reports; or (iii) as otherwise specified by rules adopted by the Department of Environmental Quality; and[293]
>
> (c) Evidence of sufficient water quality.[294]

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[284] *Id.* § 76-3-501(6).
[285] *Id.* §§ 76-3-103(14), (15), -104.
[286] *Id.* § 76-3-103(15).
[287] *Id.* §§ 76-3-103(9), -609.
[288] *Id.* § 76-3-501.
[289] *Id.* § 76-3-601.
[290] *Id.* § 76-3-504(1)(b). First minor subdivisions need not prepare an environmental assessment but must include a summary of the probable impacts of the proposed subdivision as described above for a major subdivision. *Id.* § 76-3-609(2)(d)(i).
[291] *Id.* § 76-3-611(1)(a).
[292] *Id.* § 76-3-622(1)(b).
[293] *Id.* § 76-3-622(1)(e). The Montana Division of Water Resources is not involved in demonstrating adequate water supply nor are there any requirements that legal water rights be shown to prove adequate water availability. The term "adequate water availability" is not defined in the statutes.
[294] *Id.* § 76-3-622(1)(f).

Governing bodies of local governments are prohibited from requiring water information in addition to that listed above.[295] They are also prohibited from adopting subdivision regulations more stringent than the state requirements for water supplies, unless specific findings are made, after a public hearing, that the local standard or requirement is necessary to protect the public health and environment and is achievable under current technology.[296] The written findings must include information and peer-reviewed scientific studies contained in the record that forms the basis for the governing body's conclusion and the cost to the regulated community.[297]

The environmental assessment for a major subdivision (six or more lots) must include:

> (1) Description of every body or stream of surface water that may be affected by the proposed subdivision, together with available ground water information;[298]
>
> (2) A summary of the probable impacts of the proposed subdivision on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety.[299]
>
> (3) Community impact report containing a statement of anticipated needs of the proposed subdivision for local services, including water facilities;[300] and
>
> (4) Additional relevant and reasonable information related to the applicable regulatory criteria as may be required by the governing body.[301]

A proposed subdivision must be reviewed to determine its impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety.[302] A governing body may conditionally approve or deny a proposed subdivision as a result of the water information provided or public comment received on the water information provided only if the conditional approval

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[295] *Id.* § 76-3-622(3).
[296] *Id.* § 76-3-511(2).
[297] *Id.* § 76-3-511(3).
[298] *Id.* § 76-3-603(1)(a).
[299] *Id.* §§ 76-3-603(1)(b), -608(3)(a).
[300] *Id.* § 76-3-603(1)(c).
[301] *Id.* § 76-3-603(1)(d).
[302] *Id.* § 76-3-608(3)(a). "First minor subdivisions" are not subject to this approval criterion if it proposed in a jurisdictional area that has adopted zoning regulations that address the same criteria. *Id.* § 76-3-609(2)(d)(ii).

or denial is based on existing subdivision, zoning, or other regulations that the governing body has the authority to enforce.[303]

Who makes the final determination?

The governing body of the local governmental entity examines and approves each final subdivision plat.[304] The governing body is "a board of county commissioners or the governing authority of a city or town organized pursuant to law."[305] A public hearing is required,[306] except for a "first minor subdivision."[307]

Process to Contest Determinations:

An applicant for a subdivision can sue the governing body in Montana district court to recover actual damages caused by a final action, decision, or order of the governing body if it is arbitrary or capricious.[308] Any party aggrieved by a decision of the local governing body to approve, conditionally approve, or deny an application and preliminary plat for a proposed subdivision or a final subdivision plat can appeal to the district court in the county in which the property involved is located within 30 days from the date of the written decision.[309]

Montana Sanitation In Subdivisions Act

Brief Description:

The purpose of the Montana Sanitation In Subdivisions Act (MSSA) is "to protect the quality and potability of water for public water supplies and domestic uses and to protect the quality of water for other beneficial uses, including uses relating to agriculture, industry, recreation, and wildlife."[310] The MSSA requires the Montana Department of Environmental Quality (DEQ) to set standards for the review and approval of water systems for subdivisions, including public and private water supplies and individual wells.[311] While primarily aimed at water quality concerns, the MSSA provides that the DEQ rules must require "adequate evidence that a water supply that is sufficient in terms of quality, quantity, and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed."[312]

Applies to:

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[303] *Id.* § 76-3-608(6).
[304] *Id.* § 76-3-611.
[305] *Id.* § 76-3-103(7).
[306] *Id.* § 76-3-605.
[307] *Id.* § 76-3-609(2)(e).
[308] *Id.* § 76-3-625(1).
[309] *Id.* § 76-3-625(2).
[310] *Id.* § 76-4-101.
[311] *Id.* § 76-4-104(2).
[312] *Id.* § 76-4-104(6)(b).

A developer must submit a subdivision application to the DEQ or the local reviewing authority after the developer has already submitted an application under the MSPA.[313] Even subdivisions that are excluded from review under the MSPA are must be reviewed pursuant to the MSSA.[314] However, subdivisions within the jurisdictional areas that have growth policies or within a first-class or second-class municipality for which municipal water will be provided are not subject to review under the MSSA, if the governing body certifies that adequate municipal water facilities will be provided.[315] A first-class municipality includes every city having a population of 10,000 or more, and a second-class municipality includes every city having a population of less than 10,000 and more than 5,000.[316]

The MSSA defines a subdivision as "a division of land . . . that creates one or more parcels containing less than 20 acres . . . in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and includes any resubdivision and any condominium or area, regardless of size, that provides permanent multiple space for recreational camping vehicles or mobile homes."[317]

Process and Criteria:

The DEQ creates the rules that provide for the review of proposed subdivisions.[318] These rules must include delegation of that review to a local department or board of health.[319] Such local agencies are authorized to review subdivision water supplies if they employ a registered sanitarian or registered professional engineer and the DEQ certifies that the agency is competent to conduct the review.[320] The DEQ must adopt "standards and procedures for certification and maintaining certification to ensure that a local department or board of health is competent to review the subdivisions."[321] There are limits, however, on the size of the public water system that can be reviewed locally. Generally only small public systems may be reviewed locally, and only if a delegation of authority from DEQ is requested and granted.[322] DEQ itself must review

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[313] *Id.* § 76-4-125; *see also* MONT. ADMIN. R. 17.36.102 (2016) (requiring a completed application to initiate review of a subdivision).
[314] MONT. CODE ANN. § 76-4-125(2).
[315] *Id.* §§ 76-4-125(2)(d), -127. The certification from the governing body for the municipal facilities does not relieve the developer from the review requirements for a water main extension pursuant to Title 75, Chapter 6, MONT. CODE ANN. *See* MONT. ADMIN. R. 17.38.101.
[316] MONT. CODE ANN. § 7-1-4111(1)–(2).
[317] *Id.* § 76-4-102(16).
[318] *Id.* § 76-4-104(1)–(2).
[319] *Id.* § 76-4-104(3).
[320] *Id.* § 76-4-104(3)(a).
[321] *Id.* § 76-4-104(4).
[322] *Id.* §§ 76-4-104(3)(b), 75-6-121(1).

proposed subdivisions that lie within more than one jurisdictional area and the respective governing bodies are in disagreement concerning approval of or conditions to be imposed on the proposed subdivision and a subdivision where the local department or board of health elects not to be certified.[323]

The DEQ, or the local department or board of health certified to review smaller systems, is referred to as the "reviewing authority."[324]

In pertinent part, the following must be included in the subdivision application:

> (1) Plans and specifications for water supply system;[325]
>
> (2) Evidence that the water source for the proposed subdivision is sufficient in terms of quality, quantity, and dependability;[326]
>
> (3) If ground water is proposed as a water source, the applicant must submit the location of the proposed ground water source and a description of the proposed ground water source, including approximate depth to water bearing zones and lithology of the aquifer;[327] and
>
> (4)Information about water use agreements if water is to be supplied by means other than individual on-site wells.[328]

Subdivision applications are reviewed by DEQ for water quantity and dependability.[329] This review includes analysis of long-term sustainability of the aquifer,[330] proof of legal entitlement to the water supply,[331] and dependability of the water supply and distribution system in accordance with the design standards.[332]

To qualify for the limited exemption from MSSA review allowed for subdivisions receiving supplies from a municipal water facility, the governing body must send a notice of certification to the reviewing authority that a subdivision has been submitted for approval and that adequate municipal facilities will be provided.[333] The notice must be provid-

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[323] *Id.* § 76-4-104(5).
[324] *Id.* § 76-4-102(12).
[325] MONT. ADMIN. R. 17.36.103(1)(b).
[326] *Id.* 17.36.103(1)(f).
[327] *Id.* 17.36.103(1)(g)(i)–(ii).
[328] *Id.* 17.36.103(1)(h).
[329] *Id.* 17.36.330, .332.
[330] *Id.*
[331] *Id.* 17.36.103(1)(s).
[332] *Id.* 17.36.330; MONT. DEP'T OF ENVTL QUAL., Circular DEQ-1, *Standards for Water Works,* Aug. 8, 2014, Circular DEQ-3, *Standards for Small Water Systems*, Aug. 8, 2014.
[333] MONT. CODE ANN. § 76-4-127(1).

ed prior to final plat approval under the MSPA.[334] The notice must include:

> (1) How construction of the water supply systems or extensions will be financed;[335]
>
> (2) Certification that the subdivision is within an area covered by a growth policy or within a first-class or second-class municipality and a copy of the growth policy;[336]
>
> (3) Certification that adequate municipal facilities for the supply of water are available or will be provided;[337] and
>
> (4) If the water supply facilities are not municipally owned, certification from the facility owners that adequate facilities are available.[338]

Who makes the final determination?

The reviewing authority will issue an approval when it is satisfied that adverse impacts to state waters will not occur, the water supply is of adequate quantity, quality, and dependability, and the sewage disposal facility is sufficient in terms of capacity and dependability.[339]

If the reviewing authority denies an application and the applicant resubmits a corrected application within thirty days after the date of the denial letter, the reviewing authority must complete review of the resubmitted application within thirty days after receipt of the resubmitted application.[340] If the review of the resubmitted application is conducted by a certified local department or board of health, the DEQ must make a final decision on the application within ten days after the local reviewing authority completes its review.[341]

The DEQ makes the final decision on the proposed subdivision "after the submission of a complete application and payment of fees to the reviewing authority."[342] If the DEQ approves the subdivision, it issues a certificate of subdivision approval indicating that it has approved the plans and specifications and that the subdivision is not subject to a sanitary restriction.[343]

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[334] *Id.*
[335] *Id.* § 76-4-127(2)(e).
[336] *Id.* § 76-4-127(2)(f).
[337] *Id.* § 76-4-127(2)(h).
[338] *Id.* § 76-4-127(2)(i).
[339] MONT. ADMIN. R. 17.36.110.
[340] MONT. CODE ANN. § 76-4-125(1)(c).
[341] *Id.*
[342] *Id.* § 76-4-125(1)(d).
[343] *Id.*

Process to Contest Determinations:

"Upon a denial of approval of subdivision plans and specifications relating to environmental health facilities, the person who is aggrieved by the denial may request a hearing before the [Montana Board of Environmental Review]. A hearing request must be filed, in writing, within 30 days after receipt of the notice of denial and must state the reason for the request. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, apply . . . ."[344]

Comparing Montana's Assured Water Supply Laws to Other States:

Montana's Sanitation in Subdivisions Act requires an independent review by DEQ in most circumstances to determine water availability, similar to Arizona,[345] Nevada,[346] and New Mexico.[347] Montana's assured supply law applies to smaller subdivisions, thus encompassing more new development.[348]

Recently the Montana District Court for Lewis and Clark County ordered Montana Department of Natural Resources and Conservation (DNRC) to close a loophole in the state's water well permit rules that developers and other large water users were using to avoid the permitting process when drilling individual water wells for new subdivisions.[349] Specifically, developers were using an "exempt-well" loophole to avoid obtaining permits for drilling water wells when converting agricultural lands into subdivisions.[350] The decision orders DNRC to return to a 1987 water right permit rule that governed small wells before a new rule was adopted in 1993 that created an exemption.[351] This is similar to Colorado's law that effectively prohibits use of multiple exempt wells to serve subdivisions.[352]

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[344] *Id.* §§ 76-4-126(1), -102(2).

[345] ARIZ. REV. STAT. §§ 45-576(A), 45-108(B) (LexisNexis 2016); ARIZ. ADMIN. CODE §§ R12-15-710, -712 (2014).

[346] NEV. REV. STAT. § 278.335 (2015).

[347] N.M. STAT. ANN. § 47-6-11(F)(1).

[348] *See* MONT. CODE ANN. § 76-3-103(15) (defining "subdivision" as "a division of land or land so divided that it creates one or more parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section").

[349] *Clark Fork Coal. v. Tubbs et al.*, No. BDV-2010-874 (D. Mont. Oct. 17, 2014).

[350] Press Release, W. Envtl. Law Ctr., Montana Court Orders State to Close Loophole to Protect Water Rights, (Oct. 20, 2014), *available at* http://www.westernlaw.org/article/montana-court-orders-state-close-loophole-protect-water-rights-press-release-102014.

[351] *Combined Appropriation Guidance*, MONT. DEP'T NATURAL RES. & CONSERVATION 1–3, (Sept. 18, 2015) http://dnrc.mt.gov/divisions/water/water-rights/docs/external-ca-10-07-2015-final.pdf.

[352] COLO. REV. STAT. § 37-92-602(3)(b)(III); *see infra* text accompanying note 275.

NEVADA

Nevada has one statute, the Planning and Zoning Law, that addresses assured water supplies.

Planned Unit Development Law

Brief Description:

Nevada's Planning and Zoning Law requires that local subdivision ordinances be adopted by the governing body of every incorporated city and every county.[353] Such ordinances must specify the uses permitted for improvements, mapping, accuracy, engineering, and related subjects, including sufficient water supply.[354] All procedures with respect to the approval or disapproval of a subdivision and its continuing administration must be consistent with the provisions set forth in the Planning and Zoning Law.[355]

Applies to:

For subdivisions of five or more lots, developers must submit a tentative and final map to the planning commission, both of which require consideration of water availability.[356] A tentative map is also required for divisions into large parcels where the parcels are each forty acres or more.[357] A parcel map is required for division of land into four or fewer lots any of which is less than forty acres, which also must address water supply issues.[358] A local governing body may, by ordinance, apply this requirement to a division of land where each proposed lot is at least ten acres.[359] A division of land into lots or parcels each of which is more than 640 acres is exempt from this provision.[360]

Process and Criteria:

A developer is required to submit both a tentative map[361] and a final map[362] for a subdivision of five lots or more. For a tentative map, the planning commission must consider the following, in pertinent part:

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[353] NEV. REV. STAT. § 278.326 (2015).

[354] *Id.* §§ 278.326(1), -.377(1)(a); *see also Subdivision Review*, NEV. DIV. WATER RES., http://water.nv.gov/waterrights/subdivision.cfm (last updated Aug. 6, 2013, 1:36 PM) (discussing fees required for review of subdivision maps and considerations made).

[355] NEV. REV. STAT. §§ 278.010 to -.630.

[356] *Id.* §§ 278.320(1), .330(2), .360(1)(a).

[357] *Id.* § 278.471(1)(b).

[358] *Id.* § 278.461(1).

[359] *Id.* § 278.471(2)(b).

[360] *Id.* §278.471(3); *see also* PLANNER'S GUIDE, NEV. DIV. STATE LANDS USE: LAND USE PLANNING AGENCY 47, http://lands.nv.gov/docs/SLUPA/PlannersGuide.pdf (last visited June 24, 2016) (discussing map requirements) [hereinafter PLANNER'S GUIDE].

[361] NEV. REV. STAT. § 278.330.

[362] *Id.* § 278.360.

> (1) Environmental and health laws and regulations concerning water and air pollution and facilities to supply water;[363]
>
> (2) The availability of water which meets applicable health standards and is sufficient in quantity for the reasonably foreseeable needs of the subdivision;[364]
>
> (3) Availability and accessibility of utilities;[365] and
>
> (4) The recommendations and comments of the Division of Water Resources and the Division of Environmental Protection.[366]

A copy of the tentative map must be forwarded by the planning commission for review to the Division of Water Resources (DWR) and the Division of Environmental Protection (DEP) of the State Department of Conservation and Natural Resources (DCNR).[367] "Each reviewing agency shall, within [fifteen] days after the receipt of the tentative map, file its written comments with the planning commission or the governing body recommending approval, conditional approval or disapproval and stating the reasons therefor."[368]

Within four years of the approval of a tentative map,[369] the developer must submit a final map that includes the following:

> (1) A water meter plan for any subdivision served by a public water system;[370]
>
> (2) A certificate by the DEP or the district board of health acting indicating that the final map is approved concerning the water supply facilities.[371] The district board of health may not issue a certificate unless it has received written verification from the Public Utilities Commission of Nevada (PUC) that the final map has been approved by the PUC with regard to the continuity and adequacy of water supply if the water supply proposed is from an investor-owned utility;[372] and

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[363] *Id.* § 278.349(3)(a).
[364] *Id.* § 278.349(3)(b).
[365] *Id.* § 278.349(3)(c).
[366] *Id.* § 278.349(3)(i).
[367] *Id.* § 278.335(1)(a).
[368] *Id.* § 278.335(5).
[369] *Id.* § 278.360.
[370] *Id.* § 278.385.
[371] *Id.* § 278.377(1)(a).
[372] *Id.* § 278.377(1)(a)(2); *see Water/Wastewater*, STATE NEV. PUB. UTIL. COMM'N, http://puc.nv.gov/Utilities/Water/ (last visited June 24, 2016).

(3) A certificate by the DWR, showing that the final map is approved concerning water quantity.[373] In order to provide the required certificate, the DWR will review the following:

(a) Whether there is sufficient water for the subdivision;

(b) Whether the water is for the correct manner of use;

(c) Whether the subdivision is within the correct place of use and if not, is there an expansion of the service area pending;

(d) Verify surface water rights versus groundwater;

(e) Check for decreed water;

(f) Verify water agreements between purveyors;

(g) Check for drought factors;

(h) Verify PUC water use duties dependent on lot size; and

(i) Whether a relinquishment of water rights is required for domestic well subdivisions.[374]

A parcel map for some divisions of land into four or fewer lots must also include a certificate from the DWR indicating that the map is approved as to the quantity of water available for use.[375] Such a certificate is required if:

(1) Any parcel included in the map

(a) Is within a groundwater basin designated by the State Engineer as depleted and an order requiring approval of the parcel map has been issued;[376] and

(b) Will be served by a domestic well;[377] and

(2) The dedication of a right to appropriate water to ensure a sufficient supply of water is not required by an applicable local ordinance.[378]

Apparently, some developers attempted multiple uses of the less stringent parcel map process in order to evade the subdivision require-

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[373] NEV. REV. STAT. § 278.377(1)(b).

[374] *Subdivision Review*, STATE NEV. DIV. WATER RES., http://water.nv.gov/waterrights/subdivision.cfm (last updated Aug. 6, 2013, 1:36 PM).

[375] NEV. REV. STAT. § 278.461(2).

[376] *Id.* §§ 278.461(2)(a)(1), 534.120(1).

[377] *Id.* § 278.461(2)(a)(2).

[378] *Id.* § 278.461(2)(b).

ments.[379] In an effort to preclude such evasion of the subdivision requirements through "subsequent parceling," the Nevada Legislature made additional provisions for subsequent parcel maps. For a subsequent parcel map with respect to a single parcel or a contiguous tract of land under the same ownership, the planning commission may require any reasonable improvement, but not more than would be required for a subdivision.[380] Further, a governing body may consider the criteria set forth for a tentative map "in determining whether to approve, conditionally approve, or disapprove a second or subsequent parcel map for land that has been divided by a parcel map which was recorded within the [five] years immediately preceding the acceptance of the second or subsequent parcel map as a complete application."[381]

A division of land into large parcels (forty acres or more) requires a tentative map[382] and final map,[383] but neither requires proof of adequate water supply.

Who makes the final determination?

All cities with a population of 25,000 or more and all counties with a population of 45,000 or more are required to create a planning commission.[384] In cities and counties below the population threshold, the governing body may either create a planning commission or perform all the functions and have all of the powers that would otherwise be granted to and be performed by the planning commission.[385]

The local governing body or planning commission makes the final determination for tentative maps,[386] final maps,[387] and parcel maps.[388]

Process to Contest Determination:

The governing body of each city and county is required to adopt by ordinance a procedure for any aggrieved person to appeal decisions of the planning commission to the governing body.[389] Any person aggrieved by the decision of the governing body may seek judicial review of, and

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[379] NEV. LEGISLATIVE COUNSEL BUREAU, SUBDIVISION OF LANDS: BULLETIN NO. 93-10, at 8–9 (Sept. 1992), *available at* https://www.leg.state.nv.us/Division/Research/Publications/InterimReports/1993/Bulletin93-10.pdf.

[380] NEV. REV. STAT. § 278.462(3).

[381] *Id.* § 278.464(6); *see also* PLANNER'S GUIDE, *supra* note 359, at 56–57 (discussing the considerations for determining action on a parcel map).

[382] NEV. REV. STAT. § 278.4713.

[383] *Id.* § § § 278.472.

[384] *Id.* § 278.030(1).

[385] *Id.* § 278.030(2).

[386] *Id.* § § § 278.349(1).

[387] *Id.* § 278.380(1).

[388] *Id.* § 278.464.

[389] *Id.* § 278.3195(1).

recovery of damages caused by, any final action, decision, or order through an appeal to the district court of the proper county.[390]

Comparing Nevada's Assured Water Supply Laws to Other States:

Nevada appears to have a broad assured water supply law, factoring in not only water supply but also "[e]nvironmental and health laws and regulations concerning water and air pollution, the disposal of solid waste, facilities to supply water, community or public sewage disposal . . . individual systems for sewage disposal [and the] availability of water which meets applicable health standards and is sufficient in quantity for the reasonably foreseeable needs of the subdivision."[391] Akin to Arizona and Colorado, Nevada relies on state water officials for the assessment of whether water will be available.[392] However, the law does not reference a particular timeframe of water availability.[393] This is in contrast to Arizona's requirements for an uninterruptible supply for the 100-year period or the existence of sufficient backup supplies for any anticipated shortages.[394] Nevada's law applies to subdivisions of five or more lots, unlike Colorado's threshold of over fifty units[395] and California's 500 units.[396]

NEW MEXICO

New Mexico's assured water supply program is governed by the New Mexico Subdivision Act for counties and Planning and Platting statute for municipalities.

Subdivision Act

Brief Description:

The New Mexico Subdivision Act[397] ("Subdivision Act") requires the board of county commissioners ("Commissioners" or "Commission") of each county to regulate subdivisions within the county's boundaries.[398] The Commissioners must adopt regulations setting forth the county's requirements for preliminary and final subdivision plats, quantifying the maximum annual water requirements of subdivisions, assessing water availability to meet the maximum annual water requirements of subdivisions, implementing water conservation measures, and establishing

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[390] *Id.* §§ 278.3195(4), -.0235.
[391] *Id.* § 278.349(3)(a)–(b); Davies 2010, *supra* note 5, at 340.
[392] NEV. REV. STAT. § 278.377(1)(b) (2015).
[393] *Id.*
[394] ARIZ. ADMIN. CODE R12-15-717 (2014).
[395] COLO. REV. STAT. § 29-20-103(1)(b) (2016).
[396] CAL. WATER CODE §10912(a)(1) (West 2016).
[397] N.M. STAT. ANN. § 47-6-1 to -29 (2016).
[398] *Id.* § 47-6-9(A).

standards for water of an acceptable quality for human consumption and for protecting the water supply from contamination.[399] Prior to adopting, amending or repealing any such regulation, the Commission must consult with representatives of the State Engineer's Office about matters within his or her expertise.[400] The State Engineer must give consideration to the conditions peculiar to that county and submit written guidelines to the Commission for its consideration in formulating the subdivision regulations.[401]

Applies to:

The Subdivision Act applies to a developer that proposes to sell, lease, or convey land in a subdivision that is not within the boundary of a municipality.[402] A subdivision is "the division of a surface area of land, including land within a previously approved subdivision, into two or more parcels for the purpose of sale, lease or other conveyance or for building development."[403]

There are five types of subdivisions:

> **(1) Type-one** subdivision is any subdivision containing five hundred or more parcels, any one of which is less than ten acres in size;
>
> **(2) Type-two** subdivision is any subdivision containing twenty-five to four hundred ninety-nine parcels, any one of which is less than ten acres in size;
>
> **(3) Type-three** subdivision is any subdivision containing twenty-four or less parcels, any one of which is less than ten acres in size;
>
> **(4) Type-four** subdivision is any subdivision containing twenty-five or more parcels, each of which is ten acres or more in size; and
>
> **(5) Type-five** subdivision is any subdivision containing twenty-four or less parcels, each of which is ten acres or more in size. [404]

Process and Criteria:

Developers must submit a preliminary plat for type-one, type-two, type-four, and certain type-three subdivisions.[405] In part, a preliminary plat must contain documentation of the following:

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[399] *Id.*
[400] *Id.* § 47-6-10(A).
[401] *Id.*
[402] *Id.* §§ 47-6-8, 3-20-5(A)(1).
[403] *Id.* § 47-6-2(M).
[404] *Id.* § 47-6-2(P)–(T).

> (1) "[W]ater sufficient in quantity to fulfill the maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses";[406] and
>
> (2) "[W]ater of an acceptable quality for human consumption and measures to protect the water supply from contamination."[407]

The Commissioners may not approve the preliminary plat unless the subdivider reasonably demonstrates that the above requirements can be fulfilled.[408] In making that determination, the Commissioners must request an opinion from the State Engineer.[409] If the State Engineer provides an adverse opinion, the subdivider has the burden of showing that the opinion is incorrect.[410]

The final plat must be prepared in accordance with the approved or conditionally approved preliminary plat.[411] For a subdivision containing ten or more parcels, any one of which is two acres or less in size, the developer must provide proof of a service commitment from a water provider and an opinion from the State Engineer that the developer can furnish water sufficient in quantity to fulfill the maximum water requirements of the subdivision or provide a permit obtained from the State Engineer for the subdivision water use.[412] In acting on the permit application, the State Engineer must determine "whether the amount of water permitted is sufficient in quantity to fulfill the maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses."[413] Such subdivisions may not rely on individual domestic wells.[414]

For a subdivision of land from which irrigation water rights appurtenant to the land have been severed, the subdivider must either:

> (1) Provide proof of a service commitment from a water provider and an opinion from the state engineer that the subdivider can furnish water sufficient in quantity to fulfill the

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[405] *Id.* § 47-6-11(A). Type-three subdivisions containing five or fewer parcels of land are governed by more summary review procedures. *Id.* § 47-6-11(I). For these small type-three subdivisions and all type-five subdivisions, no specific water sufficiency examination or opinion from the State Engineer is required. *Id.* § 47-6-11(I)–(K).

[406] *Id.* § 47-6-11(B)(1).

[407] *Id.* § 47-6-11(B)(2).

[408] *Id.* § 47-6-11(D). The Commissioners are also required to determine whether the subdivider can fulfill the proposals in the disclosure statement required by N.M. STAT. ANN. § 47-6-17. *See infra* text accompanying notes 418–421.

[409] *Id.* § 47-6-11(F)(1).

[410] *Id.* § 47-6-11(H)(3).

[411] *Id.* § 47-6-11.3(A).

[412] *Id.* § 47-6-11.2.

[413] *Id.*

[414] *Id.* §§ 47-6-11.2, 72-12-1.1.

> maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses; or
>
> (2) Acquire sufficient water rights through a permit issued by the state engineer for subdivision water use.[415]

The New Mexico State Engineer's Office developed a guidance manual that informs developers and public officials as to how the State Engineer's review of water supply for subdivisions will be conducted.[416] The guidance manual covers the protocol for review of subdivision proposals, water demand analysis, and water right requirements and limitations.[417]

Prior to selling, leasing or otherwise conveying any land in a subdivision with five or more parcels, the developer must disclose in writing such information as the Commissioners require to allow a prospective purchaser to make an informed decision, including:

> (1) "[A] statement describing the maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses, and describing the availability of water to meet the maximum annual water requirements";[418]
>
> (2) "[A] statement describing the quality of water in the subdivision available for human consumption";[419]
>
> (3) "[A] description of the means of water delivery within the subdivision";[420] and
>
> (4) "[T]he average depth of water within the subdivision if water is available only from subterranean sources."[421]

As part of the preliminary plat approval for type-one, type-two, type-four, and larger type-three subdivisions, the Commissioners must determine whether the subdivider can fulfill the proposals in the above-mentioned disclosure statement.[422] The same determination must be made by the Commissioners before approving a final plat for small type-three and type-five subdivisions.[423]

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[415] *Id.* § 47-6-11.4.
[416] BRIAN C. WILSON, WATER CONSERVATION AND QUANTIFICATION OF WATER DEMANDS IN SUBDIVISIONS, NEW MEXICO STATE ENGINEER OFFICE, TECHNICAL REPORT 48 (May 1996), *available at* http://www.ose.state.nm.us/WUC/PDF/TechReport-048.PDF.
[417] *Id.* at 4–7, 20–28, 32–36.
[418] *Id.* § 47-6-17(B)(11), (C).
[419] *Id.* § 47-6-17(B)(12), (C).
[420] *Id.* § 47-6-17(B)(15), (C).
[421] *Id.* § 47-6-17(B)(16), (C).
[422] *Id.* § 47-6-11(A), (C)(1).
[423] *Id.* §§ 47-6-11(I)(1), (J)(1).

If, at the time of approval of the final plat, any public improvements have not been completed by the developer as required, the Commissioners must, as a condition precedent to the approval of the final plat, require the developer to enter into an agreement with the county upon mutually agreeable terms to thereafter complete the improvements at the developer's expense.[424]

Who makes the final determination?

The Commissioners make the final determination for preliminary and final plats.[425] The Commissioners must weigh the opinion of the State Engineer on the sufficiency of the water supply in determining whether to approve the preliminary plat at a public hearing.[426] The Commissioners may not deny a final plat if they have previously approved a preliminary plat for the proposed subdivision and find that the final plat is in substantial compliance with the previously approved preliminary plat.[427] Denial of a final plat must be accompanied by a finding identifying the requirements that have not been met.[428]

Special provisions allow Indian nations, tribes or pueblos with a historical, cultural or resource tie with the county to request notification of proposed development in the county.[429] The county commissioners are required to request an opinion from such nations, tribes or pueblos as to whether the developer can meet the requirements of the preliminary plat, including the sufficiency of the water supply.[430] If the opinion of the nation, tribe or pueblo is adverse, the developer is notified and provided an opportunity to respond, and a public hearing is required.[431] In a case in which the adverse opinion concerns water quantity issues, if the State Engineer' Office disagrees, it must submit its own response to the county.[432]

The Commissioners of a county with a population of greater than 300,000 may "delegate the authority to review and approve preliminary and final plats to a county administrative officer or to the planning commission."[433]

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[424] *Id.* § 47-6-11.3(C).
[425] *Id.* §§ 47-6-11(D), -11.3(B).
[426] *Id.* § 47-6-11(G).
[427] *Id.* § 47-6-11.3(B).
[428] *Id.*
[429] *Id.* § 47-6-11(F)(5).
[430] *Id.*
[431] *Id.* § 47-6-11(H).
[432] *Id.* § 47-6-11(H)(3); Telephone interview by Anne Castle with John Longworth, Office of the New Mexico State Engineer (July 21, 2016) (notes on file with authors).
[433] N.M. STAT. ANN. § 47-6-9(D).

Process to Contest Determination:

A party who is or may be adversely affected by a decision of a delegate of the Commissioners can appeal the delegate's decision to the Commissioners.[434] A party who is or may be adversely affected by a decision of the Commissioners may appeal to the district court pursuant to state Administrative Procedure Act provisions.[435]

Municipal Planning and Platting Statute

Brief Description:

The Planning and Platting Statute[436] ("Planning Statute") governs the regulation of subdivisions within the boundaries of a municipality.[437] The Planning Statute requires proof of adequate water supply for proposed subdivisions from which irrigation water rights appurtenant to the land have been severed,[438] but does not provide for assessment of the adequacy of water supply in other situations.[439]

Applies To:

The planning authority is required to adopt regulations governing the subdivision of land within the municipality, subject to approval by the governing body.[440] These regulations may address the extent and manner in which water facilities are installed,[441] but are not required to address water adequacy issues. The municipality's planning and platting jurisdiction is extended three to five miles beyond the actual municipal boundaries, depending upon the population of the municipality and its proximity to other cities.[442] In these extended jurisdiction areas, approval of a plat of a subdivision must secure the approval of both the board of county commissioners and the planning authority of the municipality.[443] Every person who desires to create a subdivision within this boundary must furnish a plat of the proposed subdivision, prepared by a registered, licensed surveyor of New Mexico.[444]

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[434] *Id.* § 47-6-15(A).
[435] *Id.* §§ 47-6-15(B), 39-3-1.1.
[436] *Id.* §§ 3-19-1 to -20-16.
[437] *Id.* § 3-19-6.
[438] *Id.* § 3-20-9.1(A).
[439] *Id.* § 3-20-9.1(B).
[440] *Id.* § 3-19-6(A).
[441] *Id.* § 3-19-6(B)(5)(b).
[442] *Id.* § 3-19-5(A). Class A counties with populations of more than 300,000 do not have this extraterritorial planning and platting jurisdiction, which affects only the City of Albuquerque.
[443] *Id.* § 3-20-9. To accomplish the concurrent jurisdiction and approval, the municipality and the county may enter into an agreement that provides for zoning and subdivision approval in the extraterritorial area. *Id.* §§ 3-21-3(A), 3-21-3.1.
[444] *Id.* § 3-20-2.

For areas within the corporate boundaries of the municipality, a subdivision is "the division of land into two or more parts by platting or by metes and bounds description into tracts."[445] For areas of land outside of the municipal boundary but within the municipal extraterritorial jurisdiction, a subdivision is "the division of land into two or more parts by platting or by metes and bounds description into tracts of less than five acres in any one calendar year."[446]

Process and Criteria:

"Before a plat of any subdivision within the jurisdiction of a municipality is filed in the office of the county clerk, the plat [must] be submitted to the planning authority of the municipality having jurisdiction for approval."[447] For a subdivision of land from which irrigation water rights appurtenant to the land have been severed, the subdivider must either:

(1) Provide proof of a service commitment from a water provider and an opinion from the state engineer that the subdivider can furnish water sufficient in quantity to fulfill the maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses; or
(2) Acquire sufficient water rights through a permit issued by the state engineer for subdivision water use.[448]

A final plat for a subdivision cannot be approved unless one of the two above alternatives has been fulfilled.[449]

"In acting on the permit application, the state engineer shall determine whether the amount of water permitted is sufficient in quantity to fulfill the maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses."[450] The approval authority cannot approve the final plat based on the use of water from any permit issued for a domestic well.[451] Note that these procedures apply only to lands from which appurtenant water rights have been severed and not to other lands within the municipality's jurisdiction. There appear to be no specific water adequacy or water service requirements in state law for other types of land within municipal boundaries.

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[445] *Id.* § 3-20-1(A)(1).
[446] *Id.* § 3-20-1(A)(2).
[447] *Id.* § 3-20-7(A).
[448] *Id.* §§ 3-20-9.1, 47-6-11(F)(1).
[449] *Id.* § 3-20-9.1(A).
[450] Id.
[451] *Id.* §§ 3-20-9.1(A), 72-12-1.1; *see also* N.M. CODE R. §§ 19.27.5 to 19.27.5.18 (2016) (discussing requirements for use of public groundwater).

Some municipalities, however, address water supply adequacy by requiring proposed developments to request water availability statements from the local utility, such as in Albuquerque[452] and Rio Rancho.[453] Additionally, the City of Santa Fe utilizes a Water Right Transfer Program as one method of acquiring water rights to ensure adequate water supplies for new developments.[454] The program "links development to water by requiring that projects with new water demand either purchase water conserved by customers . . . or by acquiring water rights and transferring them to the City."[455]

Who Makes the Final Determination?

For a subdivision within the jurisdiction of a municipality, the planning authority of the municipality approves or disapproves a plat.[456] "The reason for a disapproval of a plat [must] be entered upon the recordings of the planning authority."[457]

As stated above, a subdivision within the platting jurisdiction of both a county and municipality must secure the approval of both the Commissioners and the planning authority of the municipality.[458]

Process to Contest Determination:

"Any person in interest dissatisfied with an order or determination of the planning commission, after review of the order or determination by the governing body of the municipality, may commence an appeal in the district court pursuant to" state Administrative Procedure Act provisions.[459]

Comparing New Mexico's Assured Water Supply Laws to Other States:

New Mexico's assured water supply requirements are mandatory for counties, but only required for municipal development on land from

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[452] *See Availability Statements*, ALBUQUERQUE BERNALILLO CTY. WATER UTIL. AUTH. http://www.abcwua.org/Availability_Statements.aspx (last visited July 21, 2016).

[453] Because portions of the City of Rio Rancho, New Mexico, extend into Bernallilo County, parts of the city must comply with the availability statement requirements in Albuquerque. *Id.* For other parts of Rio Rancho, approval for a building permit will not be allowed without a letter of availability from the city's Utility Operations Division. *Development Process Manual*, I-9 Construction-Permitting Buildings, CITY OF RIO RANCHO, N.M. (DEC. 4, 2009), http://www.rrnm.gov/DocumentCenter/Home/View/5865.

[454] *Water Rights Acquisitions*, CITY OF SANTA FE, N.M., http://www.santafenm.gov/water_rights (last visited July 21, 2016).

[455] *Id.*

[456] N.M. STAT. ANN. § 3-20-7(A), (E).

[457] *Id.* § 3-20-7(E).

[458] *Id.* § 3-20-9.

[459] *Id.* §§ 3-19-8, 39-3-1.1.

which irrigation water rights have been severed,[460] similar to the disparate requirements for different types of areas in Arizona[461] and Wyoming.[462] New Mexico requires local governments to consult with the State Engineer's office to confirm adequate water supply prior to approval,[463] similar to the procedures for counties in Colorado.[464] New Mexico requires state oversight for water supplies of subdivisions containing ten or more parcels and mandates the State Engineer's confirmation of adequate water supply prior to the local government's approval.[465] There is a gap, however, for land within municipal boundaries that did not have appurtenant irrigation water rights—most likely based on an assumption that a municipal water provider will be available to serve the subdivision.

OREGON

Oregon's assured water supply framework is primarily found in the Subdivision and Partitions Statute.[466] The Oregon Department of Land Conservation and Development has also prescribed requirements for local land use regulations governing water facilities and development outside of urban growth boundaries that relate tangentially to the availability of service from a water system.[467]

Subdivision and Partitions Statute

Brief Description:

The Subdivision and Partitions Statute provides that the governing body of a county or a city must, by regulation or ordinance, adopt standards and procedures to facilitate adequate provision of water supply for subdivision development and certain partitions of land.[468]

Applies to:

A person proposing a subdivision or certain partitions of land must submit an application in writing to the county or city having jurisdiction

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[460] *Id.* § 3-20-9.1(A). New Mexico provides municipalities, counties, and certain other community-based water suppliers with a maximum forty-year planning period when applying for a change of place or purpose of use on a water right pursuant to a water development plan. *Id.* § 72-1-9(B).

[461] ARIZ. REV. STAT. §§ 45-576(J), 32-2181(F)(2) (2016); *see Office of Assured & Adequate Water Supply Program*, *supra* note 25.

[462] WYO. STAT. ANN. §§ 18-5-301, 15-1-510 (2016).

[463] N.M. STAT. ANN. §§ 47-6-11(B), (F), 47-6-11.2, 3-20-9.1.

[464] COLO. REV. STAT. § 30-28-136(1)(h) (2015).

[465] N.M. STAT. ANN. § 47-6-11.2.

[466] OR. REV. STAT. ch. 92 (2016).

[467] OR. ADMIN. R. §§ 660.011.0000 – 0065 (2016).

[468] OR. REV. STAT. § 92.044(1)(a), (1)(b)(E).

for plat approval.[469] The plat approval is dependent on receipt and acceptance of satisfactory information concerning the proposed water supply.[470]

A subdivision is land divided to create four or more lots within a calendar year.[471] Partitioning land means "dividing land to create not more than three parcels of land within a calendar year."[472] Partitions of land in exclusive farm use zones and all subdivisions are required to provide adequate water supply information.[473]

Process and Criteria:

A plat for a subdivision will not be approved if the city or county has not received and accepted the following information:

> (1) "A certification by a city-owned domestic water supply system or by the owner of a privately owned domestic water supply system, subject to regulation by the Public Utility Commission of Oregon, that water will be available to the lot line of each and every lot depicted in the proposed subdivision plat";[474]
>
> (2) "A bond, irrevocable letter of credit, contract or other assurance by the subdivider to the city or county that a domestic water supply system will be installed by or on behalf of the subdivider to the lot line of each and every lot depicted in the proposed subdivision plat" with the amount of any such assurance determined by a registered professional engineer;[475] or
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> (3) In lieu of the above requirements, "a statement that no domestic water supply facility will be provided to the purchaser of any lot depicted in the proposed subdivision plat, even though a domestic water supply source may exist."[476] A copy of this statement must be filed with the Real Estate Commissioner and included in any public report made for the subdivision, or, if no public report is required, the subdivider must deliver a copy of the statement to each prospective purchaser.[477]

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[469] *Id.* § 92.040(1).
[470] *Id.* § 92.090(4).
[471] *Id.* § 92.010(16)–(17).
[472] *Id.* § 92.010(9).
[473] *Id.* §§ 92.044(1)(b)(E), 215.203(1).
[474] *Id.* § 92.090(4)(a).
[475] *Id.* § 92.090(4)(b).
[476] *Id.* § 92.090(4)(c).
[477] *Id.*

Who makes the final determination?

The governing body of the city or county makes the final determination for plats of subdivisions and partitions.[478] If a county has not adopted regulations for subdivision and partition control, land within six miles outside of the corporate limits of a city is under the jurisdiction of the city for the purpose of giving approval of plans, maps and plats of subdivisions and partitions, unless otherwise provided in an urban growth area management agreement between the city and county.[479]

Process to Contest Determination:

All appeals go through the Land Use Board of Appeals (LUBA), which has exclusive jurisdiction to review any land use decision or limited land use decision of a local government.[480]

Department of Land Conservation and Development Regulations:

In accordance with statewide planning goals adopted by the Department of Land Conservation and Development, public facility plans are required for water systems for use by local governments in preparing, adopting, amending, and implementing their comprehensive plans.[481] Land use controls and ordinances are recommended as methods of achieving desired types and levels of public water facilities and services.[482] Land use regulations applicable outside of urban growth boundaries and unincorporated community boundaries must not allow increases in the density of development as a result of availability of service from a water system or the presence of a water system.[483]

Comparing Oregon's Assured Water Supply Laws to Other States:

Oregon, similarly to Nevada[484] and Wyoming,[485] leaves the regulation of adequate water supply for subdivision development largely to the

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[478] *Id.* § 92.042.

[479] *Id.* § 92.042(1).

[480] *Id.* § 197.825; *Crist v. City of Beaverton,* 922 P.2d 1253, 1253–54 (Or. Ct. App. 1996); *State ex rel. Moore v. City of Fairview*, 13 P.3d 1031, 1034 (Or. Ct. App. 2000) (holding that "errors in land use decisions and in the decision-making process are redressable exclusively through the LUBA appeal mechanism"); *see also* OR. REV. STAT. § 197.015(12) (defining "limited land use decision"); OR. LAND USE BD. APPEALS, http://www.oregon.gov/LUBA/pages/index.aspx (last visited June 28, 2016) (providing LUBA information and resources).

[481] OR. REV. STAT. § 197.225; OR. ADMIN. R. §§ 660.011.0010, .0015.

[482] *Oregon Statewide Planning Goals & Guidelines, Goal 11 – Public Facilities and Services,* OR. DEP'T OF LAND CONSERVATION & DEV., *available at* https://www.oregon.gov/LCD/docs/goals/goal11.pdf (last visited July 8, 2016).

[483] OR. ADMIN. R. § 660.011.0065(2).

[484] NEV. REV. STAT. § 278.380(1) (2015).

[485] WYO. STAT. ANN. § 18-5-308 (2016).

local governments.[486] However, Oregon requires certification by a domestic water supply system that "water will be available to the lot line of each and every lot depicted in the proposed subdivision plat,"[487] akin to Washington's requirement for a letter from a water purveyor or water permit from the Department of Ecology[488] and California's verification letter requirement.[489]

Oregon's most recent water strategy document notes a concern that "local land use decision makers need more information about groundwater availability at specific locations, as well as the long-term ability of local aquifers to yield water, when making decisions about appropriate locations for development, particularly in rural areas."[490] "Land use decision makers also need better information about the cumulative impacts of development on water quantity and quality.[491]

UTAH

Utah does not have an assured water supply law. Utah's Land Use, Development, and Management Act (LUDMA) authorizes and governs land use and zoning regulation by cities and counties and establishes mandatory requirements that local governments must follow. There are two versions: one for municipalities[492] and another for counties.[493] The two acts are nearly identical with only a few differences. Some local governments have enacted regulations requiring demonstration of adequate water supplies.[494]

In 2015, HB 15-323 amended LUDMA to require counties to develop resource management plans "to provide for the protection, conservation, development, and managed use of resources that are critical to the health, safety, and welfare of the citizens of the county and of the state."[495] Each county's plan must focus on core resources, which include water rights and water quality and hydrology irrigation, agriculture, water rights, ditches and canals, water quality and hydrology, wetlands, and

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[486] OR. REV. STAT. § 92.044(1)(a), (b)(E).
[487] *Id.* § 92.090(4)(a).
[488] WASH. REV. CODE § 19.27.097(1) (2016).
[489] CAL. GOV'T CODE § 66473.7(b)(1) (2016).
[490] OR. WATER RES. DEP'T, *Oregon's Integrated Water Resources Strategy* 62 (Aug. 2012), *available at* https://www.oregon.gov/owrd/LAW/docs/IWRS_Final_2.pdf.
[491] *Id.*
[492] UTAH CODE ANN. §§ 10-9a-101 to -803 (LexisNexis 2016).
[493] *Id.* §§ 17-27a-101 to -901.
[494] *See, e.g.*, WASATCH CNTY. CODE § 16.21.12 (2002) (declaring that no building permit may be issued until the proposed source of water supply has been approved); SALT LAKE VALLEY BD. HEALTH, INDIVIDUAL WATER SYS. REG. 4.1 (2006).
[495] Resource Management Planning by Local Governments, H.B. 323, 61st Leg., Reg. Sess. (Utah 2015); UTAH CODE ANN. § 17-27a-401.

riparian areas, among others.[496] For each core resource, the plan must establish findings pertaining to the item; establish clearly defined objectives; and outline general policies and guidelines on how the objectives described are to be accomplished.[497] There is no adequate water supply requirement associated with the plan.

WASHINGTON

Washington's assured water supply program is governed by the Growth Management Act[498], the Subdivision Statute,[499] and the State Building Code[500]. Because the three statutes are interrelated, they are addressed together below.

Brief Description:

Under the Growth Management Act (GMA), cities and counties must manage growth by identifying and protecting critical areas and natural resource lands.[501] Counties with populations of 50,000 or more or those that have experienced rapid growth, and the cities within them, must also designate urban growth areas[502] and prepare comprehensive plans ("Plans").[503] Counties not meeting the above criteria may nevertheless choose to be governed by the comprehensive planning provisions, and the cities within the county will then also be bound.[504] One of the goals of these Plans is to protect the environment and the availability of water.[505] A Plan must "provide for protection of the quality and quantity of groundwater used for public water supplies."[506] For land not designated for urban growth, agriculture, forest, or mineral resources, the Plan must protect the rural character of the area by protecting both surface water and groundwater resources.[507] The Plans must be implemented through the local government's development or subdivision regulations.[508]

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[496] UTAH CODE ANN. § 17-27a-401(3)(b).
[497] *Id.* § 17-27a-401(3)(c)(i) - (iii).
[498] WASH. REV. CODE §§ 36.70A.010 to .904 (2016).
[499] *Id.* §§ 58.17.010 to .920.
[500] *Id.* §§ 19.27.010 to .540.
[501] *Id.* §§ 36.70A.170(1), .060(2).
[502] *Id.* §§ 36.70A.110(1), .040(1).
[503] *Id.* § 36.70A.040(3).
[504] *Id.* § 36.70A.040(2)(a).
[505] *Id.* § 36.70A.020(10).
[506] *Id.* § 36.70A.070(1).
[507] *Id.* § 36.70A.070(5)(c)(iv).
[508] *Id.* § 36.70A.040(3), (4); *Kittitas Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 256 P.3d 1193, 1198–99 (Wash. 2011).

One of the purposes of the Subdivision statute is to facilitate appropriate provision for potable water supplies.[509] Proposed subdivisions are examined to assure conformance to the general purposes of the city or county's Plan.[510] A proposed subdivision will not be approved unless appropriate provisions are made for potable water supplies.[511] In addition, under the State Building Code, a city or county is required to verify the existence of an adequate water supply for a building that requires potable water.[512]

In the decision of the Washington Supreme Court in *Kittitas County v. Eastern Washington Growth Management Hearings Board*, the Court held that counties are required by the GMA to regulate land use in a manner consistent with the laws regarding protection of water resources, with assistance from the Department of Ecology ("Ecology").[513] The Court concluded that in implementing the State Building Code and Subdivision Statute, counties must ascertain that water is legally available, and not just physically or factually available, before they can approve applications for subdivisions and building permits.[514] Ecology has developed guidance for counties in making adequacy of water supply determinations when they process applications for subdivisions and building permits.[515] A recent Washington Supreme Court decision makes clear that counties must delve deeply into the legal availability of water to support a building permit, including determining whether permit-exempt wells would impair senior water rights such as instream flows.[516]

Applies to:

Under the GMA, as interpreted in *Kittitas* and further explained in Ecology's guidance, it appears that in cities, towns, and counties that have adopted a Plan, applicants for a proposed subdivision or short subdivision must show that adequate potable water is available in order to obtain preliminary plat, final plat, and short plat approval.[517] A subdivision is "the division or redivision of land into five or more lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or transfer of

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[509] WASH REV. CODE § 58.17.110(2).
[510] *Id.* §§ 36.70B.030(1), 58.17.100.
[511] *Id.* § 58.17.110(2).
[512] *Id.* § 19.27.097(1).
[513] *Kittitas*, 256 P.3d at 1209–10.
[514] *Id.* at 1210. The *Kittitas* decision involved a county, but the same logic would apply to cities and towns governed by the GMA.
[515] *Ecology Guidance to Counties*, *supra* note 33. Although the guidance is directed at counties, it is presumably applicable to cities and towns governed by the GMA.
[516] *Whatcom County v. W. Wash. Growth Mgmt H'rgs Bd.*, No. 91475-3, 2016 Wash. LEXIS 1133 (Oct. 6, 2016) ("*Hirst*").
[517] *Kittitas*, 256 P.3d at 1209–10; *Ecology Guidance to Counties*, *supra* note 33; WASH. REV. CODE §§ 58.17.060, .100, .110, .170.

ownership."[518] A short subdivision is "the division or redivision of land into four or fewer lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or transfer of ownership."[519] However, the legislative authority of any county governed by the GMA that has adopted a comprehensive plan and development regulations "may by ordinance increase the number of lots, tracts, or parcels to be regulated as short subdivisions to a maximum of nine in any urban growth area."[520] Cities and towns may also increase the number to a maximum of nine.[521] Lots in a subdivision cannot be sold until final plat approval is obtained and the plat is recorded with the county auditor.[522]

An "applicant for a building permit of a building necessitating potable water [must] provide evidence of an adequate water supply for the intended use of the building."[523] Within counties not required or not choosing to have a Plan, the county and the state may mutually determine those areas in the county in which the requirements of adequate water supply will not apply for a building permit.[524]

Process and Criteria:

Plans adopted under the GMA are required to consider and address water resource issues in land use planning[525] and subdivisions must be consistent with and implement the Plans.[526] For a subdivision and short subdivision, a finding is required that appropriate provisions have been made for potable water supplies before the subdivision can be approved.[527] "An applicant can make a showing that adequate water is legally available to support the intended use by providing a letter from a purveyor stating a commitment to serve water, through evidence that the applicant holds a water right permit, certificate, or statement of water right claim authorizing the water use, or by providing evidence of a lawful permit-exempt source of groundwater."[528] Each preliminary plat must be accompanied by a recommendation for approval or disapproval by the

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[518] WASH. REV. CODE § 58.17.020(1).
[519] *Id.* § 58.17.020(6).
[520] *Id.*
[521] *Id.*
[522] *Id.* § 58.17.200.
[523] *Id.* § 19.27.097(1).
[524] *Id.* § 19.27.097(2).
[525] WASH. REV. CODE § 36.70A.020(10) (Plan goals include: "Protect the environment . . . including water quality[] and the availability of water."); *Id.* § 36.70A.070(1) (specifying that the Plan "shall provide for protection of the quality and quantity of groundwater used for public water supplies"); *Id.* § 36.70A.070(5)(c)(iv) (requiring that the Plan include measures to protect surface water and groundwater resources).
[526] *Id.* § 36.70A.040(3), (4); *Kittitas*, 256 P.3d at 1198–99.
[527] WASH. REV. CODE §§ 58.17.110(1), .060.
[528] *Ecology Guidance to Counties*, *supra* note 33, at 2–3.

agency supplying water as to the adequacy of the proposed means of water supply.[529]

For a building permit, evidence of an adequate water supply for the intended use of the building may be in the form of one of the following: a water right permit from Ecology authorizing sufficient water for the proposed building,[530] a certificate or statement of water right claim,[531] a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply.[532] But an application for a water right permit is not sufficient proof of an adequate water supply.[533]

Ecology has issued guidelines specific to determinations of water availability for new buildings.[534] Individual residential dwelling water supplies are considered adequate if they can supply 400 gallons per day of potable water for building use, including limited irrigation.[535]

"[T]he county or city may impose conditions on building permits requiring connection to an existing public water system where the existing system is willing and able to provide safe and reliable potable water to the applicant with reasonable economy and efficiency."[536] Within counties not required or not choosing to adopt a Plan, the county and the state may mutually determine those areas in the county in which the building permit adequate water supply requirements do not apply.[537]

The ability of subdivision and building permit applicants to rely on "permit-exempt wells" is limited and becoming almost non-existent.[538] A well permit exemption allows certain users of small quantities of ground water—most commonly, single residential well owners—to construct wells and develop their water supplies without first obtaining a water right permit from Ecology.[539] Such wells are not exempt, however, from administration in priority, which could be a significant problem for resi-

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[529] WASH. REV. CODE § 58.17.150(1).
[530] *Id.* § 19.27.097.
[531] *Ecology Guidance to Counties*, *supra* note 33, at 3.
[532] WASH. REV. CODE § 19.27.097(1).
[533] *Id.*
[534] GUIDELINES FOR DETERMINING WATER AVAILABILITY FOR NEW BUILDINGS, ECOLOGY PUBLICATION 93-27, WASH. DEP'T ECOLOGY, (Apr. 1993), *available at* http://www.ecy.wa.gov/programs/wr/wrac/images/pdf/9327.pdf.
[535] *Id.* at 3.
[536] WASH. REV. CODE § 19.27.097(1).
[537] *Id.* § 19.27.097(2).
[538] *Ecology Guidance to Counties*, *supra* note 33, at 3–4.
[539] WASH. REV. CODE § 90.44.050 (providing that the withdrawal of groundwater in an amount not exceeding 5,000 gallons per day for stock-watering purposes, for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, for single or group domestic uses, or for an industrial purpose does not require a permit from Ecology).

dential property.[540] Case law has made it clear that subdivisions cannot rely on multiple exempt wells, unless the total pumping from all such wells is less than 5,000 gallons per day.[541]

In addition, a county governed by the GMA is required to determine whether a proposed supply from a permit-exempt well would interfere with existing senior water rights, including instream flow rights held by Ecology.[542] Such counties may not rely on Ecology's "inaction in failing to close a basin" nor on its determination that a basin need not be closed to permit-exempt appropriations as a basis for presuming that water is legally available.[543] Even in basins in which Ecology allows for permit-exempt wells, if there is evidence that instream flows are not being met, it is the county's responsibility to determine water availability by examining the impact that the exempt well would have on minimum instream flows.[544] Ecology has provided detailed guidance for determining water availability for the purpose of subdivision approval or building permits, including those based on permit-exempt wells,[545] but this 2008 guidance does not address the county's responsibility to examine independently the impact of permit-exempt wells on instream flow or other senior rights.[546]

Who makes the final determination?

For a subdivision, preliminary plat review is a quasi-judicial process that involves an initial review and hearing by the city or county planning commission or agency if one exists, which then makes a recommendation to the city council or board of county commissioners or county council.[547] A city or county may not approve a preliminary plat unless the city council, board of county commissioners or county council, or hearing examiner, as the case may be, makes written findings regarding certain matters, including the appropriate provision of potable water supplies.[548]

Final plat approval must be made by the legislative body.[549] The legislative body must find that the subdivision conforms to all the terms of the preliminary plat approval and that the subdivision meets the re-

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[540] *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 43 P.3d 4, 11–12 (Wash. 2002)
[541] *Id.* at 12–13.
[542] *Hirst*, *supra* note 515, 2016 Wash. LEXIS at 15-16, 26-43.
[543] *Id.* at 29-38, 48-49, n. 13.
[544] *Id.* at 48-49.
[545] *Ecology Guidance to Counties*, *supra* note 33.
[546] *Id*; see also, Understanding the Whatcom County vs. Hirst, Futurewise, et al. Decision, http://www.ecy.wa.gov/programs/wr/nwro/hirst.html (last updated Nov. 14, 2016).
[547] WASH REV. CODE § 58.17.100.
[548] *Id.* §§ 58.17.060, .110.
[549] *Id.* § 58.17.170(1).

quirements of applicable state laws and local ordinances, final approval can be granted.[550]

No process is set out in state law for approval of short subdivisions. Cities and counties are required to adopt by ordinance their own regulations and procedures that provide for "summary approval" of short subdivisions through an administrative process.[551] To approve a short subdivision, the administrative personnel assigned to review short subdivision applications must make written findings regarding certain matters, including the appropriate provision of potable water supplies.[552]

The county or city approves building permits through its building department.[553]

Process to Contest Determination:

Any decision approving or disapproving any subdivision plat is reviewable under the Land Use Petition Act (LUPA).[554] LUPA establishes "uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review."[555] Any person or entity may seek judicial review in the superior court of a land use decision including a determination on an "application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used."[556]

Comparing Washington's Assured Water Supply Laws to Other States:

Washington is the only state that requires consideration of the availability of adequate potable water at both the subdivision approval and building permit stage.[557] While the examination of water availability in the subdivision process only applies in cities and counties governed by a Plan under the GMA, twenty-nine out of Washington's thirty-nine counties are either required to have a Plan or have elected to do so, which thereby requires the cities within those counties to also adopt a Plan.[558] These cities and counties represent approximately 95 percent of the

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[550] *Id.*
[551] *Id.* § 58.17.060(1).
[552] *Id.* §§ 58.17.060(1), 58.17.110.
[553] *Id.* §§ 19.27.050, 19.27.097.
[554] *Id.* §§ 58.17.180, 36.70C.005 to .900.
[555] *Id.* § 36.70C.010.
[556] *Id.* §§ 36.70C.020(2)(a), 36.70C.030.
[557] Id. §§ 58.17.110(1), 19.27.097(1).
[558] *Growth Management Act – County Map*, WASH. DEP'T COMMERCE (Nov. 2013), http://www.commerce.wa.gov/Documents/Mandated-to-Plan-GMA.pdf.

state's population.[559] Similar to California's newly required Groundwater Sustainability Plans,[560] Washington requires that each Plan must be coordinated and consistent with the Plans adopted by other counties or cities with which it has, in part, common borders or related regional issues.[561] Also, Washington requires a letter from a water purveyor or water permit from Ecology,[562] akin to California's verification letter requirement.[563] Similar to Colorado and Montana, Washington has prohibited developers from relying on "permit-exempt wells" for a subdivision where the total withdrawal would exceed 5,000 gallons per day.[564]

WYOMING

Wyoming's assured water supply program is governed by its Planning and Zoning Statute and the Water Quality Rules and Regulations.[565] Because these two sets of requirements are interrelated, they are discussed together below.

Brief Description:

The regulation of the subdivision of land covers unincorporated areas in each county, and control is vested in the board of county commissioners of the county in which the land is located.[566] A developer must demonstrate the adequacy and safety of the proposed water supply system.[567] Cities have the ability to approve subdivision plats within a municipality, but there is no adequate water supply determination required by state law.[568] Zoning regulations for cities must "facilitate adequate provisions for . . . water,"[569] but there is no requirement that this consideration factor into subdivision or development review.

Counties are required to obtain review of the adequacy of the proposed water supply system by the Wyoming Department of Environmen-

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[559] *Comprehensive Planning/Growth Management*, MUN. RESEARCH & SERVS. CTR. http://mrsc.org/Home/Explore-Topics/Planning/General-Planning-and-Growth-Management/Comprehensive-Planning-Growth-Management.aspx (last modified Jan. 8, 2016).

[560] CAL. WATER CODE § 10727.2(g) (West 2016).

[561] WASH. REV. CODE § 36.70A.100.

[562] *Id.* § 19.27.097(1).

[563] CAL. GOV'T CODE § 66473.7(b)(1).

[564] WASH. REV. CODE § 90.44.050.

[565] WYO. STAT. ANN. § 18-5-301 to -318 (2016); tit. 20, ch. 23 WYO. CODE R. §§ 1–9 (LexisNexis2016).

[566] WYO. STAT. ANN. § 18-5-301.

[567] *Id.* § 18-5-306(a)(vi).

[568] *Id.* § 15-1-510.

[569] *Id.* § 15-1-601(d)(i)(G).

tal Quality (DEQ).[570] The DEQ has adopted specific standards for demonstrating the adequacy of different types of water supplies.[571]

Applies to:

A person must obtain a subdivision permit prior to selling land, recording a plat, or commencing construction of a subdivision within a county.[572] A subdivision is "the creation or division of a lot, tract, parcel or other unit of land for the immediate or future purpose of sale, building development or redevelopment, for residential, recreational, industrial, commercial or public uses."[573] There is no minimum number of lots for which a subdivision permit is required, although the board of county commissioners may exempt subdivisions of land into five or fewer units from the submittal requirements dealing with water rights appurtenant to the land to be subdivided of the subdivision permit application process.[574] Large acreage subdivisions may also be exempted from the water adequacy requirements described below.[575] Counties may elect to exempt subdivisions creating parcels thirty-five acres or larger in size, but can also require such subdivisions to provide a study evaluating the water supply system proposed and the adequacy and safety of the system.[576] Parcels created before July 1, 2008 and divided into not more than ten parcels of 140 acres or less in size, provided that each new or remaining parcel is no less than thirty-five acres, are entirely exempt from the water adequacy provisions.[577]

Process and Criteria:

A study evaluating the water supply system proposed for the subdivision and the adequacy of the system must be submitted as part of a subdivision permit application.[578] The study must identify the type of water supply system proposed to serve the subdivision and the entity or entities responsible for the design, construction, operation, and maintenance of the proposed facility.[579] A report demonstrating the adequacy and safety of the proposed water supply system must be submitted with the study, and must address the following:

> (1) For all water supply systems except individual on-lot wells:

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[570] *Id.* § 18-5-306(c).
[571] WYO. CODE R. § 8.
[572] WYO. STAT. ANN. § 18-5-304.
[573] *Id.* § 18-5-302(a)(vii).
[574] *Id.* § 18-5-306(a)(xi).
[575] *Id.* § 18-5-316(a).
[576] *Id.* § 18-5-316(a)(iii)(A)–(B).
[577] *Id.* § 18-5-316(a).
[578] *Id.* § 18-5-306(a)(vi).
[579] *Id.* § 18-5-306(a)(vi)(A).

(a) The estimated total number of gallons per day for the subdivision water supply system;

(b) Documentation that the proposed water supply system will be compatible with and not adversely affected by the sewage system proposed for the subdivision or any other sources of pollution within a reasonable distance;

(c) List of all surface and groundwater rights which will be used or which will likely be affected, including state engineer application and permit numbers and description of expected effects identified by the study;

(d) Plans for the mitigation of water right conflicts which will likely result from the use of water within the proposed subdivision, as identified by the study, unless such conflicts are deemed not to exist to the satisfaction of the board;

(e) When connecting to an existing water supply system, the report must also contain documentation that public or private water suppliers can and will supply water to the proposed subdivision, stating the amount of water available for use within the subdivision and the feasibility of extending service to that area and documentation concerning the potability of the proposed water supply for the subdivision.

(f) Where a centralized water supply system is proposed containing a new source of water supply to be developed, the report must demonstrate that the water supply system is sufficient in terms of quality, quantity and dependability and will be available to ensure an adequate water supply system for the type of subdivision proposed.[580] The report must include a narrative summary of:

(i) If the water supply system source is derived from groundwater, the geologic setting of the water supply system source and the area of influence such as nearby communities, sources of pollution, surface water bodies and aquifers described by a Wyoming registered professional geologist;

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[580] *Id.* § 18-5-306(a)(vi)(B)(VI).

(ii) The quantity, quality and source of the water to be used including proposed and existing surface and groundwater facilities and their locations.

(iii) Where the proposed water supply system for the subdivision is from a groundwater source, a written report demonstrating that the proposed source is sufficient in terms of quality, quantity and dependability for the type of subdivision proposed;

(iv) A delineation of primary sources of water, secondary sources and occasional or seasonal sources;

(v) Graphic location of all water supply sources including wells, raw water intakes, treatment facilities, treated water storage facilities and ponds;

(vi) Documentation of all data sources on the occurrence and availability of surface and groundwater;

(vii) Historic stream flows and well levels;

(viii) Senior water rights;

(ix) Flood damage and flood protection; and

(x) Impact of and protection from supply shortages.[581]

(2) Where individual on-lot wells are proposed as the water supply system, the report must include:

(a) The estimated total number of gallons per day for the subdivision;

(b) Information relative to the potential availability and quality of groundwater proposed within the subdivision which may consist of new data, existing data on other working wells in the area, or other data, including drilling logs, from a test well drilled within the proposed subdivision indicating soil types, depth, quantity and quality of water produced in the test well;

(c) Documentation that the proposed water supply system will be compatible with and not ad-

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[581] *Id.* § 18-5-306(a)(vi)(B).

> versely affected by the sewage system proposed for the subdivision or any other source of pollution within a reasonable distance;
>
> (d) List of all surface and groundwater rights which will be used or which will likely be affected, including State Engineer application and permit numbers, and description of expected effects identified by the study; and
>
> (e) Plans for the mitigation of water right conflicts which will likely result from the use of water within the proposed subdivision, as identified by the study, unless such conflicts are deemed not to exist to the satisfaction of the board.[582]

With respect to any water rights appurtenant to the land to be subdivided, the subdivider must provide information on the intended disposition of the water rights backed up by documentation submitted to the State Engineer.[583] Notifications to nearby irrigation districts, other appropriators, and prospective purchasers concerning the intended disposition are also required.[584]

In cases where individual on-lot wells are proposed, the words "NO PROPOSED CENTRAL WATER SUPPLY SYSTEM," in bold capital letters must appear on all offers, contracts, agreements, and plats relating to the subdivision.[585]

The requirements for submittal in the Water Quality Rules and Regulations parallel those in the Subdivision statute.[586] The following additional information is required:

> (1) Identification of the type of water supply system proposed to serve the subdivision and identification of the entity or entities responsible for the design, construction, operation and maintenance of the proposed facility;
>
> (2) For all applications, not just those proposing individual on-lot wells, a list of all surface and groundwater rights which will be used or which may be affected, including state engineer application and permit numbers and description of expected effects; and

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[582] *Id.* § 18-5-306(a)(vi)(C).
[583] *Id.* § 18-5-306(a)(xi)(A).
[584] *Id.* § 18-5-306(a)(xi)(B)–(E).
[585] *Id.* §§ 18-5-306(a)(vi)(D), -316(a)(iii)(B)(I).
[586] WYO. CODE R. § 8.

> (3) Certification by the owner of the water distribution and treatment facilities that the system can and will provide adequate service to the proposed subdivision.[587]

Subdivision permit applications are provided to the DEQ for review of the safety and adequacy of the proposed water supply system.[588] The DEQ may request assistance from the State Engineer or the Wyoming water development office in preparing its review.[589]

The DEQ will issue an adverse or non-adverse recommendation for the water system and file its written comments.[590] If the DEQ issues a non-adverse recommendation, the board of county commissioners can accept or reject it. If a subdivision application is approved by the board notwithstanding an adverse recommendation by DEQ, the subdivider must furnish to all potential purchasers a copy of DEQ's recommendation prior to sale unless the board finds that the inadequacy has been corrected.[591] The DEQ can also delegate to the county its authority to review and approve the safety and adequacy of the water supply system if it is satisfied that a qualified reviewer will be employed and that the review will be no less stringent than that of DEQ.[592]

Who makes the final determinations?

The board of county commissioners can establish a planning and zoning commission, which can be authorized to receive and evaluate applications for subdivision permits.[593] If so authorized by the board of county commissioners, the planning and zoning commission must receive the materials required and submit a copy of the application to the DEQ for review.[594] The planning and zoning commission must make findings and recommendations to the board of county commissioners concerning an application within forty-five days from the date the DEQ submits its recommendation to the planning and zoning commission or from the date when the recommendation is due if no recommendation is made, whichever is earlier.[595] "If no action is taken by the planning and

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[587] *Id.*
[588] WYO. STAT. ANN. § 18-5-306(c).
[589] *Id.* § 18-5-306(c)(i).
[590] *Id.* § 18-5-306(c)(iii); *see also DEQ Subdivision Application Review Flow Chart*, WYO. DEP'T ENVTL. QUALITY: SUBDIVISION REV. http://sgirt.webfactional.com/media/uploads/wqd/www/2013-1114_wqd-www-subdiv_flow_chart.pdf (last visited June 30, 2016) (providing a DEQ subdivision application review flow chart).
[591] WYO. STAT. ANN. § 18-5-308(c).
[592] *Id.* § 18-5-306(c)(ii); WYO. CODE R. § 9.
[593] WYO. STAT. ANN. §§ 18-5-201 to 18-5-307.
[594] *Id.* § 18-5-307.
[595] *Id.*

zoning commission within that time[,] the plat is deemed to be approved by the planning and zoning commission."[596]

The board of county commissioners makes the final determination on an application for a subdivision permit or ruling.[597] "If any part of the subdivision lies within one mile of the boundaries of an incorporated city or town[,] the approval of the governing body of the city or town must also be obtained."[598]

Process to Contest Determination:

A person aggrieved by the action of the board of county commissioners may seek judicial review in accordance with the Wyoming Administrative Procedures Act and the Wyoming Rules of Civil Procedure.[599]

Comparing Wyoming's Assured Water Supply Laws to Other States:

Wyoming's Subdivision Statute provides detailed requirements for the determination of water supply adequacy made by counties. The additional review and approval by the DEQ gives additional protection, and the DEQ may also engage the State Engineer for further reliability.[600] Notice of an inadequate water supply determination must be provided to all potential purchasers,[601] akin to Arizona's inadequate water report for developments outside of the Active Management Areas,[602] California's insufficient determination included in its findings for the project,[603] and Colorado's requirement of providing a copy of the State Engineer's adverse opinion.[604] Wyoming's assured water supply program only applies, however, to unincorporated areas in each county,[605] and no state statutes provide specific protection to municipal areas. Some municipalities have adopted their own water adequacy provisions.[606]

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[596] *Id.*
[597] *Id.* § 18-5-308(a).
[598] *Id.* § 18-5-308(b).
[599] *Id.* § 18-5-312 ("The provisions of this article are enforceable by all appropriate legal remedies including but not limited to injunctive relief or a writ of mandamus."); *Id.* §§ 16-3-101 to -115; WYO. R. CIV. P.
[600] WYO. STAT. ANN. § 18-5-306(c).
[601] *Id.* § 18-5-308(c).
[602] ARIZ. REV. STAT. § 45-108 (LexisNexis 2016).
[603] CAL. WATER CODE § 10911(c) (West 2016).
[604] COLO. REV. STAT. § 30-28-136(1)(h)(I) (2015).
[605] WYO. STAT. ANN. § 18-5-301.
[606] *See, e.g.*, CITY OF LANDER, WYO., SUBDIVISION RULES AND REGS. § 7 (2003), *available at* http://landerwyoming.org/wp-content/uploads/2011/12/SUBDIVID2.pdf; RIVERTON, WYO., MUN. CODE § 16.16.100 (2016), *available at* http://qcode.us/codes/riverton/?view=desktop&topic=16-16_16-16_16_100.

V. CONCLUSION

Assured water supply laws are evolving to contend with increasing water scarcity, creeping urbanization, population growth, and climate change impacts on water. Water managers and land planners both are recognizing that it is desirable to provide protection to home buyers by ensuring that an adequate water supply will be available to serve new development. In the past, very little contact, much less meaningful coordination, occurred between land planning agencies and municipal water suppliers, sometimes even when these agencies were part of the same local governmental entity. Some state laws are moving in the direction of encouraging such coordination to ensure that land use approvals are made with a complete understanding of the availability of water supplies, but this is not universal by any measure.

Local control over land use decisions is a jealously guarded right. It is also true, however, that development approvals made by local governmental bodies impact regional and even statewide water availability. Ground water aquifers that serve multiple counties may be affected. Pressure on local supplies may increase motivation to purchase and dry-up agricultural land in nearby areas, or contribute to the necessity for large water development projects that impact other regions. Planning for an uncertain water future can rarely be confined to a local level; state resources and expertise are essential. State governments, therefore, have a responsibility to ensure that local land use decision-making appropriately takes water availability into account.

Certain desirable characteristics have emerged from this detailed comparison of laws in the western states. Universal applicability of the requirement for a water adequacy determination is one such characteristic. Over-appropriated areas may warrant more stringent requirements, but omitting some areas entirely from a water adequacy review leaves a category of home buyers without protection. Although it may be assumed that developments within municipalities will have adequate water service provided by a municipal supplier, this is simply not always the case. A municipal provider's overall water portfolio should be reviewed to determine its ability to support the proposed new development (and other development anticipated in the applicable comprehensive plan). In addition, for development within a municipality that will not be served by an existing municipal provider, the water supply plan should be reviewed for adequacy under the same procedures as are used for unincorporated areas in a county.

Water systems and the legal structure in which they operate are complex machines. Making a determination that an adequate supply will be available requires specialized technical and legal knowledge. Relying

on a board of county commissioners or a city council to understand a proposed water supply plan and determine that it is adequate assumes expertise not normally found in those governing bodies. But the western states do have state administrative departments or divisions with the required expertise. Better consumer protection would be achieved if the appropriate administrative agency were involved in the land use approval process for the purpose of providing an opinion on the adequacy of the proposed water supply.

The minimize size of development for which a water adequacy determination is required results from balancing the desire for consumer protection with the burden on the developer to provide the needed information and prove up the availability of sufficient water to serve the development. Many states have resolved this question with a minimum size in the four to six unit range. Because a reliable water supply is fundamental to a viable residence, it would seem that a relatively small minimum size is appropriate and that the provision of assurance that needed supplies will be available is a reasonable cost of doing business to a developer.

Even a straightforward and comprehensive assured water supply statute simply ensures that each new development is reviewed independently. This review will most likely not include consideration of other anticipated growth in the area, the overall pressure on available supplies, the impacts of removing agricultural water rights from the land, declines in aquifer levels, or regional goals for water sustainability. These factors may be part of regional or multi-governmental comprehensive plans and, if so, should be factored into the water adequacy determination process. Otherwise, one-off approvals of individual developments can undermine any attempt at regional sustainability. Some states, like Arizona, and to a more limited extent, California and Washington, are moving in this direction. Their experiences should be observed and the lessons learned taken into account in other states.

Each of the western states examined here anticipates water shortages, at least in some regional areas. To avoid significant loss of agricultural land and productivity, water conservation plays a key role. As stated in comments to Colorado's recently published state water plan, "every community can do better on water conservation and efficiency via locally determined measures such as . . . enhanced building codes and water sensitive land use planning."[607] But there is little direction or guidance at the

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[607] Comments on DRAFT COLORADO WATER PLAN from Boulder County, City and County of Denver, City and County of Broomfield, Eagle County, Grand County, Pitkin County, and Summit County, Item #67, Input Received Between Mar. 5 and May 1,

state level concerning the types of conservation measures that local land use approval agencies should consider requiring of new development, or which measures generate the most water savings. This is an area of evolution, as seen in Arizona[608] and New Mexico,[609] and other states should follow suit. Different measures may be appropriate and effective in different areas, but states could provide a menu of different types of conservation techniques for incorporation into land use approvals.

Incorporation of long-term water availability considerations into land use approvals for new development is essential for overall sustainability. Although local control over land use decision-making is a given, much better integration with water supply planning is required to ensure that development approvals are not provided in a vacuum and local impacts are not allowed to overwhelm careful planning for the future by regional and state water agencies. The techniques adopted by various western states and the trends noted in this paper are instructive and can be considered for incorporation into law or regulation in other areas.

2015, *available at* https://www.colorado.gov/pacific/cowaterplan/record-input-received-date.

[608] ARIZ. REV. STAT. §§ 45-563, -567, -567.01.

[609] N.M. STAT. ANN. § 47-6-9(A)(4).