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The Color of Local Government: Observations of a Brown Buffalo on Racial Impact Statements in the Movement for Water Justice

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**THE COLOR OF LOCAL GOVERNMENT:
OBSERVATIONS OF A BROWN BUFFALO ON
RACIAL IMPACT STATEMENTS IN THE
MOVEMENT FOR WATER JUSTICE**

Tom I. Romero, II†

ABSTRACT

This Article advocates for the adoption of racial impact statements (“RIS”) in local government decision making, particularly among water utilities. Situated in the larger history of water and climate injustice in Colorado and the arid American West, this Article examines ways that racially minoritized communities engage and contest legal and political water regimes. The Article then explores how water utilities could use RISs in the acquisition, treatment, and delivery of drinking water. If made a part of the everyday work of water utilities, RISs provide a useful tool to center the history and lived experiences of racially minoritized communities battling the many water inequities threatening their homes, schools, and places of work and worship.

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I. “FIREWATER BRINGS OUT THE REAL BROWNNESS OF THIS BUFFALO.”¹

In 2016, health regulators discovered per- and poly-fluoroalkyl substances, also known as “PFAS chemicals,” in the water supplies of Fountain and Security-Widefield, two towns in Colorado. The PFAS levels exceeded the U.S. Environmental Protection Agency’s (“EPA”) recently enacted health advisory limits.² According to the EPA, up until 2002, certain types of PFAS were “most extensively produced and studied” because of their widespread use in “carpets, clothing, [and] fabrics,” as well as paper packaging and non-stick cookware, and many industrial processes over the past 50 years.³ Carbon-fluorine bonds make them resistant to degradation and allow them to persist in the environment and bioaccumulate within living organisms for long periods of time.⁴ Given their extensive use, scientists (perhaps not surprisingly) discovered PFAS extensively in human beings. This has been of contin-

¹ OSCAR ZETA ACOSTA, *THE AUTOBIOGRAPHY OF A BROWN BUFFALO* 36 (1972).

² David S. Cloud, ‘*Our Voices Are Not Being Heard*’: Colorado Town a Test Case for California’s PFAS Victims, L.A. TIMES (Jan. 20, 2020), <https://www.latimes.com/politics/story/2020-01-30/california-pfas-water-contamination-colorado>; Bruce Finely, *Drinking Water in Three Colorado Cities Contaminated with Toxic Chemical Above EPA Limits*, DENVER POST (June 15, 2016), <https://www.denverpost.com/2016/06/15/colorado-widefield-fountain-security-water-chemicals-toxic-epa/>.

³ U.S. ENV’T PROT. AGENCY, FACT SHEET: PFOA & PFOS DRINKING WATER HEALTH ADVISORIES 1 (Nov. 2016), <https://perma.cc/M8K4-KMUJ>; see also U.S. ENV’T PROT. AGENCY, PFAS EXPLAINED, <https://perma.cc/8Y8C-2YS7> (last visited Apr. 27, 2022).

⁴ Monica Neagu et al., *Adverse Outcome Pathway in Immunotoxicity of Perfluoroalkyls.*, 25 CURR. OPIN. TOXICOL. 23, 24 (2021).

uing concern due to their widespread environmental persistence and long-term toxicological effects.⁵

Health regulators, water suppliers, and residents of Fountain and Security-Widefield learned that the PFAS chemicals in the local water supplies came from firefighting foam used for decades to extinguish training-fuel fires at the nearby U.S. Air Force's Peterson Air Force Base.⁶ Unseen, but with a potentially deadly impact, the fire suppressant had entered the drinking water supply. Various news reports indicated at the time that PFAS exposure was connected to low infant birth weight, high cholesterol, certain cancers, liver problems, and other health issues and the EPA even recommended that pregnant women and small children should stop drinking the water coming from their taps.⁷ Not long after the 2016 discovery, residents of South Adams County, a heavily Latinx⁸ community in the northeast Denver metropolitan area, were

⁵ Shan Huang & Peter R. Jaffé, *Defluorination of Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS) by Acidimicrobium sp. Strain A6*, 53 ENVIRON. SCI. TECH. 11410, 11410 (2019) (“Studies indicate that PFOA and PFOS pose considerable threats to the natural environment and human health because of their wide distribution, extraordinary persistence, bioaccumulation tendencies, and potential toxicological effects.”). The U.S. EPA considers PFAS to be “emerging contaminants.” See, e.g., U.S. ENV'T PROT. AGENCY, *Practical Methods to Analyze and Treat Emerging Contaminants (PFAS) in Solid Waste, Landfills, Wastewater/Leachates, Soils, and Groundwater to Protect Human Health and the Environment* (2018) (referencing grant opportunities seeking applications proposing research that generally will lead to better understanding and characterization of the types and quantities of current and historical per- and poly-fluoroalkyl substances (PFAS) and PFAS-containing waste associated with waste disposal, which are defined elsewhere in academic literature as contaminants: (1) that pose “a real or perceived threat to health”; (2) where there is “an incomplete understanding of [the] toxicology”; and (3) there is “lack of regulation at the federal level”). See also Finley, *supra* note 2; Scott Fulton et al., *The Use of PFAS at Industrial and Military Facilities: Technical, Regulatory, and Legal Issues*, 49 ENV'T L. REP. 10109, 10110 (2019).

⁶ Laura Paskus, *When Water Justice is Absent, Communities Speak Up*, WATER EDUC. COLO. (Mar. 23, 2020), <https://perma.cc/8HBK-D88V>. For more information, Northeastern University's PFAS Project Lab has a good collection of resources monitoring these events in the Colorado cities. See generally *PFAS Project Lab*, NORTHEASTERN UNIV., <https://pfasproject.com/> (last visited May 26, 2022) (providing a collection of resources monitoring PFAS contamination in Colorado cities).

⁷ See, e.g., Finley, *supra* note 2; Jack Brownell, *A Closer Look at PFC Contamination in Southern El Paso County*, KRCC (Sept. 28, 2016), <https://perma.cc/V7BV-MDSZ>.

⁸ I have attempted in my own writing to explore how meanings ascribed to racial and ethnic terms are not subject to precise definitions, but rather are themselves constitutive of context, history, and questions of power. See, e.g., Tom I. Romero, II, *¿La Raza Latina?: Multiracial Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the 20th Century*, 37 N. MEX. L. REV. 245, 245 n.3, 246 (2007). For this article, I deploy the most contemporaneous usage of terms, though three merit special explanation. First, I use the term Latinx as an inclusive term that has become much more prevalent in higher education as a way to recognize the intersectionality and power dynamics of sexuality, language, immigration, ethnicity, culture, and phenotype. The history and uses of this

“frustrated and fearful” when Colorado’s public health regulatory agency discovered PFAS chemicals in the water supply.⁹ The community’s complaint was one among many nationwide that had been, or would soon be, lodged against public health agencies, local water utilities, and corporate manufactures of the chemical compound.¹⁰

term vis-à-vis other pan-ethnic terms like Latino/a and Hispanic, as well as its implications are detailed in Cristobal Salinas, Jr. & Adele Lozano, *Mapping and Recontextualizing the Evolution of the Term Latinx: An Environmental Scanning in Higher Education*, 18 J. OF LATINOS AND EDUC. 302 *passim* (2017). There has also been thoughtful pushback against using the term Latinx, though inclusionary values have compelled many, including myself, to embrace the term. See Elizabeth Aranda et al. INTRODUCTION: A NEW MORE INCLUSIVE NAME: THE JOURNAL OF LATINX PSYCHOLOGY, 7 J. LATINX PSYCH. 1, 2-3 (2019). Second, I use the term “minoritized” rather than “minority” to recognize that systemic inequalities and inequities place individuals into a “minority” status rather than a simple counting of who is and who is not represented. It acknowledges that over- and underrepresentation are the product of historically privileged, socially constructed identities. See generally Sylk Sotomayor, *Time to Reconsider the Word Minority in Academic Medicine*, 12 J. BEST PRACT. HEALTH PROF. DIVERS. 72, 73-74 (2019). Third, I use the term people of color rather than “BIPOC.” Gaining popular currency in the wake of the racial violence pandemics of the COVID-era, BIPOC centers two particular racial groups—Black and Indigenous—within the people of color category, while tending to flatten or homogenize the distinct experiences of other non-white groups. Given the centrality of Latinx or Asian Pacific Islander communities, as well as Black and Indigenous in the analysis of this article, people or communities of color is the more precise term. See generally Meero E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115, 131 (2021).

⁹ Bruce Finley, *North Metro Denver Groundwater Contaminated with PFAs is Flowing into a Drinking-Water System that Supplies 50,000 Residents*, DENVER POST (July 12, 2018), <https://perma.cc/MB3K-LPFE>; *QuickFacts: Adams County, Colorado*, U.S. CENSUS BUREAU, <https://perma.cc/K5DV-RF4C> (last visited June 9, 2022); see also *Minutes for the Board of Directors of the South Adams County Water & Sanitation District*, S. ADAMS CNTY. WATER & SANITATION DIST. 3 (Aug. 8, 2018) (discussing elevated PFAS levels). At the time of this discovery, I sat down with the then Executive Director of the Colorado People’s Alliance (COPA), Lizeth Chacón. She informed me that the PFAS levels that were discovered, along with other water concerns that COPA’s Latinx membership had long expressed, compelled the grass-roots organization to launch a water justice campaign. This has since developed into a broader current climate justice focus. See generally *Our Work: Climate Justice*, COLO. PEOPLE’S ALL., <https://perma.cc/SX3W-XLSD> (last visited Jun. 8, 2022).

¹⁰ The dynamics and scope of the complaints are best seen in the variety of litigation brought by exposed individuals, state attorneys general, and water utilities. The most common legal claims include medical monitoring and personal injury based on exposure to PFAS in drinking water, diminished property values due to the presence of PFAS in soil and water wells, and the costs of remediating water and soil where PFAS have been detected. There have also been shareholder actions, alleging failure to disclose material information about potential PFAS liability. See, e.g., *In re 3M Co. Sec. Litig.*, Civ. No. 2:19-cv-15982, at *2-3 (D.N.J. Dec. 12, 2019). Rural water providers brought a class action suit seeking injunctive relief for water testing and data collection. See *City of Millington v. 3M Co.*, No. 2:20-cv-01034 (D.S.C. Mar. 13, 2020). A nationwide class action sought the establishment of a science panel to study PFAS. See *Hardwick v. 3M Co.*, No. 2:18-cv-1185, 2019 WL 4757134, at *1-2 (S.D. Ohio Sept. 30, 2019). A citizen suit sought to abate and enjoin

The discovery of PFAS chemicals in the drinking supply in Denver made evident the dramatic impact of the fire-suppressant chemical compound in the water systems of racially minoritized communities. Research linking PFAS exposure to cancer, liver and kidney damage, high cholesterol, low infant birth weight, immune system disorders, and other ailments¹¹ only showed how environmental toxins could exacerbate pre-existing health inequities in the nation's most vulnerable and segregated communities. In fact, PFAS exposure can also make racially minoritized communities more vulnerable even to *future* environmental hazards. In December 2020, for example, as COVID-19 vaccines were starting to be distributed, scientists announced that high-levels of PFAS exposure could decrease individual immunity and antibody response to vaccinations.¹²

A few years ago, I wrote an article urging Critical Race Theorists and water law and policy practitioners to engage in critical conversation and collaboration around racial disparities in access to, and ownership and distribution of, usable water in the developing and developed worlds.¹³ Invoking Chicana Movement lawyer Oscar “Zeta” Acosta’s activist Brown Buffalo moniker, I argued that decision making in water law and policy needed to incorporate a racial justice lens.¹⁴ As part of a larger conversation catalyzed by the clean water crises gaining national

disposal of PFAS-containing wastes. See *Tenn. Riverkeeper, Inc. v. 3M Co.*, 234 F. Supp. 3d 1153, 1156-57 (N.D. Ala. 2017). Finally, a water utility impacted by the firefighting foam used at the Air Force base that started this article brought suit three years later against the federal government for ongoing costs associated with PFAS contamination and cleanup. See Jakob Rodgers, *Security Water District, Venetucci Farm Sue US Government for Costs of Water Contamination Crisis*, GAZETTE (Jun. 26, 2020), <https://perma.cc/MZ3P-V6Y5>. See generally Edward B. Witte, *PFAS: Why the Hysteria?* IX NATIONAL L. REV. 304, at 3-4 (Oct. 21, 2019), <https://perma.cc/4ZGP-UHYZ> (providing an overview of the legal concerns as well as other representative litigation related to PFAS).

¹¹ See AGENCY FOR TOX. SUBS. & DISEASE REG., DRAFT TOXICOLOGICAL PROFILE FOR PERFLUOROALKYLS 4-15, 25, 633-35 (2018) (Dec. 4, 2018), <https://perma.cc/LKW7-GB8N> (prepared with support of the EPA); see also AGENCY FOR TOX. SUBS. & DISEASE REG., PFAS TOXICOLOGICAL PROFILE KEY MESSAGES 1-2 (2018); see also *Minimal Risk Levels (MRLs) and Environmental Media Evaluation Guides (EMEGs) for PFAS*, AGENCY FOR TOX. SUBS. & DISEASE REG., <https://perma.cc/MHD4-SUST> (last updated Nov. 2018); see also *Our Current Understanding of the Human Health and Environmental Risks of PFAS, PFOA, PFOS AND OTHER PFAS*, U.S. ENV'T. PROT. AGENCY, <https://perma.cc/6LHS-YZK7> (last visited May 6, 2022).

¹² Rebecca Trager, *PFAS Exposure Found to Increase Risk of Severe Covid-19*, CHEMISTRY WORLD (Jan. 13, 2021), <https://perma.cc/H7KR-9YF5>; see Phillippe Grandjean et al., *Severity of COVID-19 at Elevated Exposure to Perfluorinated Alkylates*, PLOS ONE (Dec. 31, 2020), <https://perma.cc/F9NG-HEA4>.

¹³ Tom I. Romero, II, *The Color of Water: Observations of a Brown Buffalo on Water Law and Policy in Ten Stanzas*, 15 DENVER WATER L. REV. 329, 332-34 (2012).

¹⁴ *Id.* at 329-34.

notoriety in places like Flint, Michigan,¹⁵ my article attempted to center water as not only a key part of our understanding of environmental justice, but as perhaps the most important 21st century battleground in the elusive quest for racial justice in the United States.

The immediacy of this conversation was amplified in 2020 as the United States, and indeed the world, was literally and figuratively on fire as the interconnected pandemics of COVID-19, racial violence, and climate change-induced wildfires raged on. These interconnected disasters helped reveal the ways that racial and ethnic minoritized communities disproportionately bore the brunt of economic dislocation,¹⁶ deadly health outcomes,¹⁷ and physical displacement.¹⁸ For many local and state government entities, it also catalyzed a response to be more diverse, equitable, inclusive, and indeed *color-conscious* in service of racial and social equity within future policies and practices.¹⁹

¹⁵ See Paul Mohai, *Environmental Justice and the Flint Water Crisis*, 32 MICH. SOCIOLOGICAL REV. 1, 1 (2018) (“The Flint Water Crisis has received national and international attention.”); see also Michael Muhammad et al., “*I Think That’s All a Lie . . . I Think It’s Genocide: Applying a Critical Race Praxis to Youth Perceptions of Flint Water Contamination*,” 28 ETHNICITY & DISEASE 241, 241-46 (2018) (discussing how a lack of a metal corrosion inhibitor in Flint’s water system resulted in “lead (Pb) leaching from the aging pipes directly into the water supply”).

¹⁶ See BRADLEY L. HARDY & TREVON LOGAN, RACIAL ECONOMIC INEQUALITY AMID THE COVID-19 CRISIS, BROOKINGS 2 (2020).

¹⁷ See Vida Abedi et al., *Racial, Economic and Health Inequality and COVID-19 Infection in the United States*, 8 J. RACIAL ETHNIC HEALTH DISPARITIES 732, 737-739 (2020); Joseph Benitez et al., *Racial and Ethnic Disparities in COVID-19: Evidence from Six Large Cities*, 3 J. OF ECON., RACE, AND POLICY, 243, 243-46, 255-57 (2020); see also RACIAL EQUITY GRP., THE COLOR OF COVID: RACIAL EQUITY RAPID RESPONSE TOOLKIT 5 (2020).

¹⁸ See, e.g., I. Loomis, *Communities of Color Are More Vulnerable to Wildfires*, EOS (Nov. 29, 2018), <https://perma.cc/BL6S-Y2JT>; Mara Kardas-Nelson, *Racial and Economic Divides Extend to Wildfire Smoke*, INVESTIGATE W. (Sept. 21, 2021), <https://perma.cc/THU2-XF6E>; Michelle Ma, *Racial, Ethnic Minorities Face Vulnerability to Wildfires*, U. WASH. NEWS (Nov. 2, 2018), <https://perma.cc/5HXB-7DTX>; Ian P. Davis et al., *The Unequal Vulnerability of Communities of Color to Wildfire*, PLOS ONE (Nov. 2, 2018), <https://perma.cc/CET2-7FBR>; Abené Clayton, *California Fires: Local Groups Fill in Gaps as Black and Latino Communities Are Left to Prepare on Their Own*, GUARDIAN (Sept. 26, 2020), <https://perma.cc/HTF5-NKVG>; Lee Romney, *Poverty and Racism Leave People More Vulnerable to Wildfire Smoke*, KQED (Sept. 4, 2020), <https://perma.cc/A2CB-ZCEC>.

¹⁹ See, e.g., *Statement on George Floyd Tragedy and Protests*, MINN. SEC. OF THE AM. WATER WORKS ASS’N (June 1, 2020), <https://perma.cc/JWA3-KJAS> (“AWWA is committed to engaging our workforce to promote principles of diversity and inclusion to better reflect the communities we serve.”); Harlan Kelly, *Moving the Racial Equity Conservation Forward*, CAL. WATER ENV’T ASS’N (Jan. 12, 2022), <https://perma.cc/E5LA-4TVV> (“I am proud of the SFPUC’s firm commitment to ensuring Diversity, Equity and Inclusion in our workplace. As an organization, the [San Francisco Water Power Sewer] took an important step forward recently with the adoption of a Commission resolution that condemns systemic racism and takes action to promote racial justice.”); Press Release, Kate Greenberg, Comm’r of Agric., Colorado Commissioner of Agriculture Statement on the Killing of George Floyd

This Article takes seriously the commitment of government entities to achieve their aspirational goals to further racial and social equity in substantive ways. Because water utilities interact with customers and citizens every time a person turns on a water tap, it is arguably the most important local government entity shaping disparate and equitable racial outcomes in the United States. For this reason, I specifically advocate that water utilities adopt racial impact statements as part of their decision making.

In order to make this argument, this Article is organized in three subsequent parts. Framed by the words of Oscar “Zeta” Acosta, each section is designed to center and amplify the history, voices, and lived experiences of racially minoritized communities. The Article’s structure also tracks and is informed by three of the four pillars of Critical Environmental Justice detailed by Professor David Naguib Pellow.²⁰

I begin Part II by placing the struggle for water justice in context of the history and contemporary reality of the American West. As Professor Pellow argues, history allows us to “unveil some of the social causes of our ecological crises and perhaps reveal clues as to how things might have unfolded differently and therefore invit[e] interventions for the fu-

(June 4, 2020) <https://perma.cc/W45C-HUN5> (“At the Colorado Department of Agriculture we must do all we can to be a driver of equity for people of color in food and farming and confront the history of institutionalized discrimination, and violence against people of color . . .”); Press Release, Dominion Energy, Dominion Energy Commits \$5 Million to Social Justice, Community Rebuilding Efforts (June 4, 2020), <https://perma.cc/S84R-TU4T> (“Words can evoke empathy, compassion and understanding, but actions truly speak louder. So, we are investing in recovery and reconciliation, and in the vital work of overcoming years of debilitating actions, attitudes and abuses of authority that have traumatized our country.”); Kristi E. Swartz, *A Year After George Floyd Protests, What’s Changed for Utilities?*, ENERGY WIRE (Aug. 9, 2021, 6:17 AM), <https://perma.cc/5RJP-Q793> (discussing a variety of utility companies and their promises regarding racial justice).

²⁰ DAVID NAGUIB PELLOW, WHAT IS CRITICAL ENVIRONMENTAL JUSTICE? 18-30 (2018). Professor Pellow proposes four pillars that should inform future environmental justice activism and scholarship. The first pillar is premised on the importance of “intersection[ality]” and might include a focus on “women, immigrants, LGBTQ[+] persons, people of color, [I]ndigenous peoples, disabled persons, the elderly, children, low-income people, and non-human species.” *Id.* at 19. The second pillar centers geographic or temporal scale in the “production and possible resolution of environmental injustice.” *See id.* at 20. Temporality is both about deeply understanding past systemic inequities across neighborhoods, cities, counties, states, and regions, and imagining future liberatory opportunity. *See id.* at 21-22. The third pillar rests on the premise that social movements, especially those focused on climate justice, are “best off articulating, developing, and supporting practices, relationships, and institutions that *deepen direct democracy*.” *Id.* at 24 (emphasis in original). The fourth pillar articulates “the perspective that excluded, marginalized, and othered populations, beings, and things . . . must be viewed . . . as *indispensable* to our collective futures.” *Id.* at 26 (emphasis in original). This article is directly informed by pillars two, three, and four.

ture.”²¹ The American West is important because its unique characteristics challenge us to think differently about the root causes of water and larger climate inequity across the United States. The law of the American West has been defined by ecological challenges stemming from the geography itself—the intersections of mountains, plains, and desert environments—which in turn engender a unique jurisprudence.²² Part II also highlights the importance of regional histories to understanding the very different trajectories of water and climate justice in a local context. Knowing how the history of systemic and institutional racial inequity connects the intersection of water law and race, moreover, is a prerequisite for a truly just, and effective, racial impact statement. Indeed, it gives us the “wisdom” to thoughtfully act in relation to complex, hard to define, rarely connected, and often ignored patterns and practices of racial inequality.²³

Part III then turns to my Color of Water in Colorado Project. I first describe its primary goals; namely, to uncover the history of water inequity, partner with racial and climate justice groups, and leverage the resources of my university to link these groups with government regulatory agencies in a collaborative partnership. These types of projects and collaborations are what Professor Pellow would describe as a “twenty-first century framework that is nuanced and non-fundamentalist, that is always wary of state power but concedes that there are moments and spaces where states [and institutions like higher education] can be pushed to do work that is supportive of” water justice.²⁴

Building on the trajectory of racial and social inequity surrounding safe drinking water access in the Denver Metropolitan area that I describe in Part II, Part III explores some of the ways that consciousness and understanding of racial inequity has entered the legal, political, and regulatory regimes of water utilities and other government agencies in the state of Colorado. It also identifies some of the local racial justice organizations that raise and center the voices and experiences of racially minoritized communities in civic as well as legal discourse. As key organizations representing the voices and perspectives of racially minoritized communities, these groups are fundamentally important to bringing new leadership, fresh ideas, and a racial justice lens to those water

²¹ *Id.* at 21.

²² Tom I. Romero, II, *Uncertain Waters and Contested Lands: Excavating the Layers of Colorado’s Legal Past*, 73 U. COLO. L. REV. 521, 527-32 (2002).

²³ See Tom I. Romero, II, *The Keyes to Reclaiming the Racial History of the Roberts Court*, 20 MICH. J. RACE & L. 415, 439-40 (2015).

²⁴ See PELLOW, *supra* note 20, at 24.

utilities committed to the type of participatory governance²⁵ necessary to adopt and implement racial impact statements as part of a water utility's politics and practice.

Part IV then explores the role that Racial Impact Statements (“RIS”) can play in embedding racial equity in the everyday practice of water utilities and government agencies. By deliberately being aware of and responsive to the history and lived experiences of racially minoritized communities, RISs provide a direct way for government entities to systemically acknowledge that “people of color are members of our society, are core participants in our social systems, are members in our socioecological systems, and are therefore key to ensuring the continued functioning, sustainability, and resilience of our [democracy], society, and planet.”²⁶ The Section first details the history of Racial Impact Statements (“RIS”) in the criminal justice context, explores similar innovations in state law, and provides some initial observations about how specifically a water utility could use an RIS. As an additional necessary tool for water utilities in continuing best practices, RISs, along or with other color-conscious policies and practices, can provide a powerful platform capable of raising the voices of water justice advocates fighting the multiple firewater threatening their communities.

II. “WISDOM SHOULD BE FREELY AVAILABLE TO ALL . . . WITHOUT SMART-ALECKY IMPEDIMENTS.”²⁷

Water justice is worldwide in its scope. Nevertheless, it is grounded in perspectives that seek to understand “how diverse people see and define justice within a *specific* context, history and time.”²⁸ With this frame in mind, regional understandings about the origins and consequences of water inequity provide not only nuance, but concrete and unique ways of understanding remedies to the water challenges faced by racially minoritized communities.²⁹ Accordingly, this Section examines

²⁵ See generally Jaime Alison Lee, *Turning Participation into Power: A Water Justice Case Study*, 28 GEO. MASON L. REV. 1003 (2021) (explaining the promise and potential pitfalls of participatory governance in a water utility context).

²⁶ See PELLOW, *supra* note 20, at 27.

²⁷ ACOSTA, *supra* note 1, at 14.

²⁸ Rutgerd Boelens et al., *Introduction: The Multiple Challenges and Layers of Water Justice Struggles*, in WATER JUSTICE 5 (Rutgerd Boelens et al. eds., 2018) (emphasis added).

²⁹ Issues surrounding water justice in the United States are heavily documented through some of the most well-known and high-profile examples, such as Flint and Detroit, Michigan; Newark, New Jersey; and Standing Rock Reservation in North and South Dakota. See MICH. CIV. RTS. COMM’N, THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT 46-56, 60-80 (2017) (grounding national spatial racism patterns in specific events in Flint’s history and development); COTY MONTAG, THE T. MARSHALL INST. AT THE NAACP LEGAL DEF. & EDUC. FUND, WATER/COLOR: A STUDY OF RACE & THE WATER

how the water and climate justice challenges specific to the American West can inform water justice generally, as well as some of the particular challenges faced by water utilities that want to promulgate more equitable policies and practices.

Beyond anchoring water justice within a specific context, the snapshots of water law and environmental racism in the American West that this Section provides are important for three additional reasons. First, it highlights the importance of always connecting water rights to concerns about water quality, which is otherwise masked by current doctrine. Water developers' unyielding fixation on the acquisition of water rights has ultimately limited doctrine and discourse on water inequity to two non-racial binaries—populist versus monopoly and urban versus rural. The central role these binaries play in larger water law and policy reinforces a second reason: namely, the deeply held belief that the Rocky Mountain West has few, if any, of the racial injustice problems gripping other regions of the United States.

Third, the snapshots in this Section illustrate how similar the consequences of water injustice in the Rocky Mountain West are to those burdening racially minoritized communities across the entire United States. Yet, the complexity of racial formation in the Rocky Mountain West—from the forced removal of dozens of tribal nations from their ancestral homelands, to economically fragile reservations and urban settlement to the rise of non-white and non-Black minoritized Latinx and Asian American and Pacific Islander enclaves—means the *origins* of climate and water injustice are different for each group.³⁰ These differ-

AFFORDABILITY CRISIS IN AMERICA'S CITIES 3-9 (2019) (discussing specific links between Black homeownership and water access and detailing case studies in Baltimore and Cleveland); KRISTI PULLEN FEDINICK ET AL., WATERED DOWN JUSTICE 5-10, 26-29 (Christina Swanson & Mary Heglar eds., 2019) (discussing "disproportionate health and environmental hazards" faced by communities of color with spotlights on Flint, Michigan and Newark, New Jersey); Molly Enking, *The Next Flint, ' and America's Problem with Lead in its Water*, GRIST (Aug. 19, 2019), <https://perma.cc/884J-8X68>; DINA GILIO-WHITAKER, AS LONG AS GRASS GROWS: THE INDIGENOUS FIGHT FOR ENVIRONMENTAL JUSTICE, FROM COLONIZATION TO STANDING ROCK 1-13, 83-87 (2019).

³⁰ I often cite to *Keyes v. Denver School Board No. 1*, 413 U.S. 189 (1973) to highlight the complexity of race relations in the larger Rocky Mountain West. In *Keyes*, the Court observed, "though of different origins," the consequences of discrimination are the same for Latinx students experiencing school discrimination when compared to Black students. *Id.* at 198. Some of my past work discusses, at length, the complexity of race in the Rocky Mountain West and how it pertains to civil rights. See Tom I. Romero, II, *Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 SEATTLE J. SOC. JUST. 73, 80-88 (2004) [hereinafter *Our Selma is Here*]; Tom I. Romero, II, *¿La Raza Latina? Multiracial Ambivalence, Color Denial, and the Emergence of a Tri-ethnic Jurisprudence at the End of the Twentieth Century*, 37 N.M. L. REV. 245, 250 (2007); Tom I. Romero, II, *How I Rode the Bus to Be-*

ences are important because they suggest that the remedies and lenses needed to address water inequity should be equally distinct and diverse. As shown below, local histories reveal where the experiences of racially minoritized groups are the same and where they substantially diverge from another. These local and regional histories should therefore inform many racial impact statements because they help to truly reveal the precise generational impacts experienced by each differentially racialized group.

Looking at the region as a whole, and Denver as an even more precise case study, this Section concludes by analyzing how the siloed, technocratic solutions employed by state and local agencies only serve to reinforce racial inequities. In so doing, there has been little opportunity to incorporate the wisdom of the history and contemporary voices of racialized minoritized communities in current and future projects.

a. *The Possessive Investment in Property and Not People*

When I teach water law, I tell my students that the course is not an environmental law class, but rather a property rights class. Rooted in the doctrine of prior appropriation, western water law has turned water into “a commodity that could be bought and sold like coal, timber, or land.”³¹ In my *Color of Water* article, I noted that the doctrine of prior appropriation encompasses four basic principles, which bear repeating here.³²

First, to be legally appropriated, water must be put to a “beneficial” use. However, courts legally recognize “beneficial” as including only uses that fall under domestic consumption, irrigation, municipal uses, industrial uses, power production, and, more recently, recreational activities such as skiing and environmental protection.³³ While “[t]he owner

come a Law Professor at the University of Denver Sturm College of Law: Reflections on Keyes Legacy for the Metropolitan, Post-Racial, and Multiracial 21st Century, 90 DEN. L. REV. 1023, 1047 (2013) [hereinafter *How I Rode the Bus*].

³¹ DONALD J. PISANI, WATER, LAND, AND LAW IN THE WEST: THE LIMITS OF PUBLIC POLICY, 1850–1920 1 (John G. Clark & Hal K. Rothman eds. 1996). Pisani notes that “[p]rior appropriation was not invented in the . . . West” as parts of Massachusetts, New York, and other eastern states adopted a form of the doctrine at the beginning of the nineteenth century. *Id.* Pisani concedes, however, that due to the doctrine of prior appropriation, the American West “was the first part of the country in which water” was turned into a property right. *Id.*

³² Romero, *supra* note 13, at 342-343.

³³ The core idea here is that water is not wasted but put to a productive use that does not harm others. In Colorado, for example, beneficial uses that are legally recognized include instream flows for conservation, commercial, domestic, dust suppression, fire protection, fish and wildlife, flood control, recreational in-channel diversions, industrial, irrigation, mined land reclamation, municipal, nature centers, power generation, recreation, release from storage for boating and fishing flows, snowmaking, and stock watering. See GREGORY

of a water right has a vested right to the quality as well as quantity,”³⁴ there is little consideration in prior appropriation doctrine about how decreed uses will actually impact water quality, in particular water that is ultimately consumed by humans.³⁵ Simply put, if the water decree does not include a specification for some minimum conception of safe drinking water, it is not part of the property right.³⁶

Second, priority of right, not equality, is the guiding principle in times of scarcity or drought.³⁷ In practice, this means that even where thousands of cubic feet per second flow by a family’s farm, they might not be allowed to use the water if a senior user has “called” the river.³⁸

Third, the right to access water is prescribed exclusively by the prior appropriation scheme, and not, for example, grounded in a fundamental human or other substantive right. Accordingly, one’s “ownership” of water is granted by, and limited to, the amount specified by permits or decrees.³⁹ By extension, this principle means that people do not necessarily have an equal or even a minimum right to water; rather, a person’s

J. HOBBS JR., CITIZEN’S GUIDE TO COLORADO WATER LAW, COLO. FOUND. FOR WATER EDUC. 7 (2004).

³⁴ Salt Lake City v. Boundary Springs Water Users Ass’n, 2 Utah 2d 141, 143 (1954).

³⁵ Compare Wilmore v. Chain O’Mines, 44 P.2d 1024, 1025 (Colo. 1934), Thornton v. Denver, 44 P.3d 1019, 1028 (Colo. 2002), and Thornton v. Bijou, 926 P.2d 1, 31-32, 36-43, 47 (Colo. 1996), with Wright v. Best, 19 Cal. 2d 368, 385 (Cal. 1942) (distinguishing “irrigation” versus “domestic and culinary purposes” in examining mine tailing pollution).

³⁶ California, for example, has long recognized residential drinking water and culinary uses of water as the highest beneficial use of water within the state. See CAL. CONST. art. X, § 2; CAL. WATER CODE § 100 (1943); see also CAL. WATER CODE § 106 (codifying Meridian v. San Francisco, 13 Cal. 2d 424, 450 (1939)). Yet, the right is meaningless without the infrastructure or political will. See Camille Pannu, *Bridging the Sage Drinking Water Gap for California’s Rural Poor*, 24 HASTINGS ENV’T L. J. 253, 253 (2018).

³⁷ COLO. REV. STAT. § 37-92-501(2)(e) (“[A]ll rules and regulations shall have as their objective the optimum use of water consistent with preservation of the priority system of water rights.”). However, notions of “fairness” do apply. For instance, Colorado law does not deny water to junior water rights holders if the senior’s “call” does not make a material difference in meeting the water right. See COLO. REV. STAT. §§ 37-92-502(2)(a); see also Dan A. Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881, 883-84 (2000) (arguing that while strict enforcement of the priority system would raise questions about fairness, the actual implementation of the system is not strict and ultimately encourages cooperation).

³⁸ For a classic application of this, see generally Cary v. Cochran, 292 N.W. 239 (Neb. 1940).

³⁹ See Christine A. Klein, *The Constitutional Mythology of Western Water Law*, 14 VA. ENV’T. L.J. 343, 347-48 (1995); see also COLO. CONST. art. XVI, § 5; Strickler v. City of Colo. Springs, 26 P. 313, 316 (Colo. 1891) (holding that “[a] priority to the use of water [for irrigation] is a property right” that may be sold and transferred separately from the land upon which the right arose); City of Denver v. Fulton Irrigating Ditch, Co., 506 P.2d 144, 144-47 (1972) (examining reuse of water in a trans-mountain diversion of Colorado River basin water to the South Platte river basin).

rights are “what they have appropriated, paid for, or otherwise deserved as a water customer.”⁴⁰

Finally, the right to use water in the prior appropriation system is a property right that is alienable on an open market independent from the land in which it flows. Consequently, someone can buy a senior water right and use that water hundreds or thousands of miles away from its natural watercourse, even if the sale of the water results in nearby fallow fields and empty wells.

These four principles have turned the acquisition of a scarce resource into a competition between “participants,” each of whom are incentivized to maximize their share of the property right. The “competition” over water has facilitated two dominant narratives in water law jurisprudence—populist versus monopoly and urban versus rural.

In his pathbreaking study on the “origins” of the western water law in Colorado, David Schorr argued that the doctrine of prior appropriation was a “populist” concept, designed to break up “monopolistic” control of water resources in the arid landscape.⁴¹ According to Schorr, Colorado’s adoption of prior appropriation limited to each person who owned a water rights decree a precise amount one could actually use in accordance with a “beneficial” use. In so doing, it maximized, in the late decades of the 19th century, the number of owners able to possess water, breaking the common law monopoly of riparian fee simple title owners and opening access to all bona fide users.⁴²

In western water law jurisprudence, these “populist” values have been codified in a variety of ways. Most notably, most western water law jurisdictions hold fast to an “anti-speculation” principle in the creation of a water right.⁴³ The Colorado Supreme Court in 2005, for example, stated that “[t]he roots of Colorado water law reside in the agrarian, populist efforts of miners and farmers to resist speculative investment that would corner the water resource to the exclusion of actual users settling into the territory and state.”⁴⁴ Under the anti-speculation principle, if one wants to develop their water right, they could not develop an “in-

⁴⁰ James L. Wescoat, Jr. et al., *Water, Poverty, Equity, and Justice in Colorado: A Pragmatic Approach*, in JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 57, 68 (Kathryn M. Mutz et al. eds., 2002).

⁴¹ See DAVID SCHORR, THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER [hereinafter COLORADO DOCTRINE] 140-41 (2012); David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32 ECOLOGY L.Q. 3, 25, 38 (2005).

⁴² See COLORADO DOCTRINE, *supra* note 41, at 140-141.

⁴³ See *High Plains v. Water Conservancy*, 120 P.3d 710, 716 (Colo. 2005).

⁴⁴ *Id.* at 719 n.3.

terest” in water unless they intended to put that water to “beneficial use” and acted on that intent as quickly and practicably as possible.⁴⁵

Yet, despite these underlying goals theoretically focused on inclusion, the prior appropriation doctrine has been one of exclusion, ultimately limiting ownership, access, and distribution to those with the greatest means. Indeed, over the last ten years in Colorado alone, an acre foot of water has hit a high of nearly \$60,000.⁴⁶ Water’s inflated market value has made it easier for denser, urban and suburban water utilities to buy the water rights of farmers and ranchers, thus drying up farm lands and contributing to the rapid decline of an idyllic lifestyle and set of values.⁴⁷ It therefore has pitted, in both practice and popular media, metropolitan and rural communities against one another in the right to accumulate or protect water as pieces of property portfolios.⁴⁸ The problem is that in so juxtaposing the needs of thirsty metropolises as threatening the lifestyles of water dependent farming communities, it has disassociated these water rights conflicts from many of its most salient social dimensions, including most importantly for purposes of these observations, those of race.

One example of the myopic vision of the urban-rural divide is illustrated in the 2018 Colorado Open Lands report, *What We Lose When We*

⁴⁵ *Denver v. Sheriff*, 105 Colo. 193, 199 (1939) (quoting *Conley v. Dyer*, 43 Colo. 22, 28 (1908)).

⁴⁶ One acre-foot equals about 326,000 gallons, or enough water to cover an acre of land, about the size of a football field, one foot deep. The acquisition and transfer of water rights takes many forms and is seen in water leases, water transfers, and water markets. Colorado has one of the most active water markets and it is one of the few where water price information is readily available. See Thomas C. Brown, *Trends in Water Market Activity and Price in the Western United States*, 42 WATER RES. RSCH. W09402, at 3-4, 7-13 (2006). Buyers and sellers can be municipalities, farming ranching irrigators, environmental protection entities, local, state or federal water management districts or agencies, utilities, developers, and investors. *Id.* at 2. Though water prices are highly volatile and subject to geographic trends and changing climate conditions, the price of water in Colorado’s Big-Thompson Project, as an example, has begun to rise exponentially. See Luke Runyon, *Price of Key Northern Colorado Water Supply Reaches New Peak*, KUNC (May 29, 2018, 8:55 AM), <https://perma.cc/TV7P-9HN6>. One city in Colorado used to require housing developers to pay the city \$31,000 per acre foot required by the project, but it has found that cash-in-lieu fees can no longer keep pace with the cost of water, making developers less likely to undertake housing project developments that do get completed are unaffordable for most people. See Jerd Smith, *Front Range Housing Boom Send Water Prices Soaring*, WATER EDUC. COLO. (May 1, 2019), <https://perma.cc/9BBG-LL8F>.

⁴⁷ See STEVEN P. ERIE, *BEYOND CHINATOWN: THE METROPOLITAN WATER DISTRICT, GROWTH, AND THE ENVIRONMENT IN SOUTHERN CALIFORNIA* 4 (2006).

⁴⁸ See, e.g., Liz Baker, *In Colorado, Farmers and Cities Battle Over Water Rights*, NPR (May 28, 2016, 5:07 PM), <https://perma.cc/CER7-VCS6>.

Buy and Dry.⁴⁹ Focusing on Crowley County, located in the high plains of Southeast Colorado, the report documented the impact that cities such as Colorado Springs, Aurora, and Pueblo (larger municipalities seated outside of Crowley) had on a historically farming-focused community when they purchased 92.5% of the water available for irrigation.⁵⁰ Detailing a series of economic shifts as a result of the property transfers, the report noted that “[m]ain streets in Crowley County are now largely vacant,” and that “46% of the residents and over half the county’s tax revenue” come from privately and publicly run correctional facilities that replaced the farming economy after the county sold its water rights.⁵¹

Notably, in 2010, Crowley County had the highest percentage of incarcerated prisoners to non-incarcerated persons in the nation.⁵² The report accordingly symbolizes a popular but narrow understanding of the threat posed by cities’ acquisition of water rights to the pocketbooks and traditional lifestyles of agriculture-based communities. As is true of this narrative in general, the report’s authors were blind to how the urban-rural water wars ignored the complex reality of race and segregation in the American West. In so doing, the authors effectively wielded the politics of water rights to grow new forms of institutional oppression against racially minoritized communities.

The impact of the urban-rural water narrative has at least two inter-related dimensions. The first dimension consists in the larger ways that rural and urban are popular and political synonyms for white and non-white, respectively, in the United States.⁵³ The familiar narrative of “two Americas”—one diverse, urban based, and growing, and one rural, white, and declining⁵⁴—becomes problematic when “buy and dry” can

⁴⁹ See generally COLO. OPEN LANDS, WHAT WE LOSE WHEN WE BUY AND DRY (2018). Colorado Open Lands is a nonprofit land trust that works primarily with private landowners to place conservation easements on their property.

⁵⁰ *Id.* at 4-7.

⁵¹ *Id.* at 5.

⁵² *Crowley County, Colorado, Uncover Colorado*, CROWLEY COUNTY, COLO., <https://perma.cc/4YT8-M952> (last visited Mar. 30, 2022).

⁵³ Sean Illing, “Rural America” Doesn’t Mean “White America”—Here’s Why That Matters, VOX (Apr. 24, 2017, 10:50 AM), <https://www.vox.com/conversations/2017/4/24/15286624/race-rural-america-trump-politics-media>.

⁵⁴ See *Population Gains and Losses Create Two Americas, and the Difference is Mostly Along Rural Urban Lines*, NC HEALTH NEWS: DAILY YONDER (April 24, 2021), <https://perma.cc/BME7-5QSW>; Jane C. Timm & Gary Brumback, *2020 Census Finds U.S. More Diverse Than Ever as White, Rural America Shrinks*, NBC NEWS (Aug 12, 2021), <https://perma.cc/U6L7-B2YU>; Natalie Musumeci & Madison Hoff, *A Striking US Census Map Shows How Much Rural America Has Shrunk in the Past Decade*, INSIDER (Aug. 12, 2021), <https://perma.cc/2PBA-3KXQ>.

be implicitly framed as a direct threat to “romanticized” notions of a “simpler, better” (read: white) rural America.⁵⁵

The racial reality of rural America is, not surprisingly, much more complex. Rural communities in the United States have been, and continue to be, areas with rich racial diversity with their own forms of racial inequities.⁵⁶ Well into the 20th century, the rural American West experienced a “great migration” of Black sharecroppers⁵⁷ Asian Pacific Islander farmers,⁵⁸ and Latinx laborers, all working on (and sometimes owning) farms and related operations.⁵⁹ Despite their diversity, rural communities, much like urban areas, tended to be highly segregated in housing, property ownership, and economic opportunity.

Consequently, the non-racialized “buy and dry” narrative has a second and perhaps more material dimension: it obscures that the people in rural communities that suffer the most are not white, rural farmers but minoritized individuals trapped in the cycles of mass incarceration. Crowley County again provides an example of how the transfer of water rights away from rural communities ultimately penalizes racially minoritized communities across the urban-rural divide.

Prior to Colorado becoming a state in 1876, the area that is now Crowley County was controlled largely by Cheyenne tribes.⁶⁰ After statehood and the forced resettlement of the Cheyenne tribes to reservations, numerous irrigation projects were initiated to allow farmers to grow flourishing cantaloupe and sugar beet crops.⁶¹ As one local history noted, “German farmers familiar with the beet industry were attracted to the area in large numbers. Japanese and Hispanic laborers recruited to

⁵⁵ See Illing, *supra* note 53; see also Hanna Love & Tracey Hadden Loh, *The ‘Rural-Urban Divide’ Furthers Myths About Race and Poverty—Concealing Effective Policy Solutions*, BROOKINGS: THE AVENUE (Dec. 8, 2020), <https://perma.cc/2QR9-AMWS>.

⁵⁶ Illing, *supra* note 53; see also D.W. Rowlands & Hanna Love, *Mapping Rural America’s Diversity and Demographic Change*, BROOKINGS: THE AVENUE (Sept. 28, 2021), <https://perma.cc/5BML-ZBJC>.

⁵⁷ See ANNA-LISA COX, *THE BONE AND SINEW OF THE LAND: AMERICA’S FORGOTTEN BLACK PIONEERS & THE STRUGGLE FOR EQUALITY* 3-4 (2018).

⁵⁸ See generally MASAKAZU IWATA, *PLANTED IN GOOD SOIL: A HISTORY OF THE ISSEI IN UNITED STATES AGRICULTURE* (1992); DAVID YOO, *GROWING UP NISEI: RACE, GENERATION AND CULTURE AMONG JAPANESE AMERICANS OF CALIFORNIA* (2000); HOWARD DE WITT, *VIOLENCE IN THE FIELDS: CALIFORNIA FILIPINO FARM LABOR UNIONIZATION DURING THE GREAT DEPRESSION* (1980).

⁵⁹ See generally GILBERT G. GONZÁLEZ, *LABOR AND COMMUNITY: MEXICAN CITRUS WORKER VILLAGES IN A SOUTHERN CALIFORNIA COUNTY, 1900-1950* (1994); MARK REISLER, *BY THE SWEAT OF THEIR BROW: MEXICAN IMMIGRANT LABOR IN THE UNITED STATES, 1900-1940* (1976).

⁶⁰ *History of Crowley County*, CROWLEY HERITAGE CTR., <https://perma.cc/QD62-6WA6> (last visited Mar. 30, 2022).

⁶¹ See *id.*

work in the fields and orchards settled here, bought farms and raised families.”⁶²

Though this somewhat serene description of Crowley’s agricultural heyday fails to account for persistent inequalities between the largely white farmers and largely non-white migrant farm laborers that existed at the time,⁶³ it nevertheless reflects a community of relatively “free” persons that lived and worked together. Today, however, Crowley County’s landscape is not one of agriculture, but—as noted above—one characterized largely by mass incarceration. The growth of the “prison-industrial complex” in Crowley County reflects the exponential growth of correctional facilities across the country, particularly in the rural American West and South,⁶⁴ a development tending to further limit opportunities afforded to people of color in already segregated employment and housing markets or push people of color completely out of these communities.⁶⁵

The increasing use of rural spaces to warehouse predominately prisoners of color once water in those communities has been sold serves only to reinforce systemic and institutional racial inequities. This happens because most people of color who live in communities like Crowley do so as segregated prisoners or second-class citizens with none of the rights and privileges of “free” whites.⁶⁶ Thus, the water wars of today, pitting metropolitan against rural, becomes more than just the loss of certain lifestyles in a rapidly urbanizing, water-scarce world. They instead become “dog whistles” reinforcing and reshaping the color lines made and remade by western water law.

⁶² *Id.*

⁶³ Tom I. Romero, II, *Ditches and Desirability: Regulating the Flow and Quality of Immigration Through the Doctrine of Prior Appropriation in the 19th and Early 20th Century American West*, in *BEYOND THE BORDERS OF THE LAW: CRITICAL LEGAL HISTORIES OF THE NORTH AMERICAN WEST* 164 (Katrina Jagodinsky & Pablo Mitchell eds., 2018).

⁶⁴ Jacob Kang-Brown & Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America*, *VERA INST. OF JUST.* 7-15 (2017).

⁶⁵ See John Eason, *Mapping Prison Proliferation: Region, Rurality, Race and Disadvantage in Prison Placement*, 39 *SOC. SCI. RSCH.* 1015, 1015-28 (2010); see also Hannah L. Walker et al., *The Hidden Subsidies of Rural Prisons: Race, Space and the Politics of Cumulative Disadvantage*, 19 *PUNISHMENT & SOC’Y* 393 (2016); Tracey Huling, *Building a Prison Economy in Rural America*, in *FROM INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 2-5 (Marc Mauer & Meda Chesney-Lind eds., 2002); RYAN S. KING ET AL., *SENTENCING PROJECT, BIG PRISONS AND SMALL TOWNS: PRISON ECONOMIES IN RURAL AMERICA* 2-4 (2003).

⁶⁶ An interesting precursor to this contemporary reality occurred in the context of Japanese American internment during World War II. The sudden loss of ethnic Japanese farmers as they were incarcerated in internment camps created a crisis for many rural communities. See, e.g., Yu Tokunaga, *Japanese Internment as an Agricultural Labor Crisis: Wartime Debates Over Food Security Versus Military Necessity*, 101 *S. CAL. Q.*, Feb. 2019, at 79.

b. *Color(blindness) and Patterns of Climate and Water Injustice*

In 1959, Columbia University Professor Allan Nevins authored a fictional conversation among many notable figures from American history in the *New York Times Magazine*.⁶⁷ Reflecting on what the United States might look like in the 1970s, many of Nevins's characters were wary of what the nation would become.⁶⁸ One of Nevins's historical characters, Booker T. Washington, however, reflected a more hopeful tone:

What strikes me most . . . is the remarkable rise in the homogeneity of the population. . . . [T]he line between countryman and city man [is] completely blurred. . . .

But the great gain is the Negro's. So many have moved into the North and *West*, so many have gotten into industry on the same assembly lines with [W]hites, so many have pushed into business and lately even the professions, that *the color line begins to blur, too*.⁶⁹

Repeating a popular myth, Nevin's conception of Booker T. Washington described an American West that had none of the racial strife, nor deeply imbedded racial mores, seemingly common in other parts of the nation. Instead, the region, as conceived by Washington, ostensibly reflected the nation's realization of its aspiration for civic nationalism⁷⁰ and its pursuit of racial equality and equity. The reality, of course, reflects none of the fiction detailed by Nevins nor many of the most enduring tropes about the American West as a racial utopia.⁷¹

As I illustrate in this Section, when it comes to patterns of environmental harm, the American West's communities of color, like those throughout the nation, directly experienced, and continue to experience, systemic and institutional racism. What follows are brief windows into the colorblind racism shaping the physical landscape and racial geography of environmental injustice in the American West and the complex forces of property, civil rights, environmental, and natural resource and water law at work.

⁶⁷ See Allan Nevins, *The U.S. in 1970—Three Forecasts*, N.Y. TIMES MAG., May 17, 1959, at 25.

⁶⁸ *Id.*

⁶⁹ *Id.* (emphasis added) (internal quotation marks omitted).

⁷⁰ See GARY GERSTLE, AMERICAN CRUCIBLE 44-80 (2017).

⁷¹ In a forthcoming essay, I detail some of the ways that the American West, particularly the Rocky Mountain West, has historically been a site of promise and potential for racial equity and progress. Tom I. Romero, II, *A Brown Buffalo's Observations on Color(Blindness), Legal History, and Racial Justice in the Rocky Mountain West*, 2022 UTAH L. REV. (forthcoming 2022).

Yet, there are several important features of environmental harm that are distinct from harms in other parts of the United States: many (but certainly not all) of the practices were seemingly colorblind on their face; there was no coherent or as clearly *de jure* Jim Crow-type laws as such as in the American South, nor were there ever similarly “clear” distinctions or practices about who counted as white or non-white. Thus, the histories of environmental and water justice in the American West have much to tell us about how we could, and should, rectify racialized, environmental harms in a United States where massive demographic change will only continue to complicate both our understandings of and proscriptions to racial inequity.

This review, accordingly, begins with the larger history of settler-colonialism that displaced native and Indigenous people throughout the north Americas.⁷² As Dina Gilio-Whitaker argues, the “[c]ountless . . . displacements . . . accompanied by wars of annihilation or massacres . . . make the point that environmental disruption via forced displacement constitutes the foundation of what we think of today as Indigenous environmental injustice.”⁷³ Land and resource dispossession fundamentally disrupted Indigenous ways of living and knowing, particularly as they relate to land and water. In so doing, dispossession radically altered the ability of Native peoples “to access life-giving and culture-affirming resources.”⁷⁴ Water development, and particularly the construction of dams, has played a primary role in both land and cultural dispossession. Indeed, as “the environmental impacts of dam projects have resulted either in the displacement of American Indian communities from their traditional lands or dramatic ecosystem changes which reduce or eliminate subsistence livelihoods and the availability of riparian and terrestrial wildlife as food sources.”⁷⁵

⁷² See generally ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES* (2014) (giving a thorough history and detailed description of settler-colonialism in context the United States’s history of racial subordination); JODI A. BYRD, *TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM* (2011); PATRICK WOLFE, *TRACES OF HISTORY: ELEMENTARY STRUCTURES OF RACE* (2016); Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387 (2006); Rosaura Sánchez & Beatrice Pita, *Rethinking Settler Colonialism*, 66 AM. Q. 1039 (2014).

⁷³ GILIO-WHITAKER, *supra* note 29, at 46.

⁷⁴ *Id.* at 39.

⁷⁵ Jerilyn Church et al., *Tribal Water Rights: Exploring Dam Construction in Indian Country*, 43 J. L., MED. & ETHICS 60, 61 (2015); see also GILIO-WHITAKER, *supra* note 29, at 48; Kate A. Berry, *Race for Water? Native Americans, Eurocentrism, and Western Water Policy*, in ENVIRONMENTAL INJUSTICES, POLITICAL STRUGGLES: RACE, CLASS, AND THE ENVIRONMENT 101 (David E. Camacho ed., 1998).

The reality is that through land dispossession, tribes were relocated to seemingly barren and desolate places in the American West,⁷⁶ resulting in a loss of sovereignty over land and resources. Already destabilized by the costs of conflict and resettlement, water law provided an additional destabilizing role when white settlers at or near these reservations claimed water to the exclusion of all other possible claimants, including the tribes. The Supreme Court's 1908 decision in *Winters v. United States* established that treaties "reserve[d]" for tribes enough water to maintain the reservations.⁷⁷ Involving the Fort Belknap Reservation in Northern Montana and the prior appropriation claims of white settlers to the Milk River,⁷⁸ the decision appears to protect Native people from incursions on their "reserved" water rights by both white settlers and the federal government. In practice, however, law and federal Indian policy prevented tribes from developing their water rights and ensured the prioritization of water rights of white settlers and water developers that continues to this very day.⁷⁹ Of the 30 federally recognized tribes in the Colorado River Basin, for instance, 12 tribes still have unresolved water rights claims as of 2020.⁸⁰

The effect of land dispossession and the resulting uncertainty around water rights and other natural resources has had profound impact on economic development for many tribes in the American West. Because Indigenous land is held in trust by the federal government, tribal nations lack complete sovereignty over their land and have limited ability to raise revenue outside of federal support to build necessary water infrastructure. Consider, for instance, the historic "neglect" of the federal government vis-à-vis the Navajo Nation where nearly 40% of its citizens lack access to safe drinking water and are 67 times more likely than non-Indigenous peoples in the United States to live without running wa-

⁷⁶ David Rich Lewis, *Still Native: The Significance of Native Americans in the History of the Twentieth-Century American West*, 24 W. HIST. Q. 203, 207 (1993) ("[Native Americans were] [p]laced on unwanted and apparently worthless reservations in the nineteenth century.").

⁷⁷ *Winters v. United States*, 207 U.S. 564, 577 (1908).

⁷⁸ See Norris Hundley, *The 'Winters' Decision and Indian Water Rights: A Mystery Re-Examined*, 13 W. HIST. Q. 17, 17-42 (1982) (giving the history of the Fort Belknap Reservation and the background of the *Winters* case); David H. Getches, *Indian Water Rights Conflicts in Perspective*, in *INDIAN WATER IN THE NEW WEST* 8 (Thomas R. McGuire et al. eds., 1993).

⁷⁹ Getches, *supra* note 78, at 13-22; see also Michael S. Laird, *The Winters Cloud over the Rockies: Indian Water Rights and the Development of Western Energy Resources*, 7 AM. INDIAN L. REV. 155, 160-164 (1979).

⁸⁰ COLO. RIVER BASIN WATER & TRIBES INITIATIVE, *THE STATUS OF TRIBAL WATER RIGHTS IN THE COLORADO RIVER BASIN*, POLICY BRIEF #4, at 1 (2021).

ter.⁸¹ Experts note that “federal grants are too small, require complicated applications to a myriad of agencies and almost never take into account running costs. Tribal consultation – which is key to crafting tailored solutions – is mostly absent.”⁸² Lack of both political and economic sovereignty has in turn directly contributed to many of these reservation communities having some of the highest rates of poverty, alcoholism, and negative health outcomes in the United States.⁸³

Land dispossession, lack of political as well as economic sovereignty, and their impact on water quality have also been exacerbated by federal support for mining on or near Indigenous land. This has made accessing clean water even more difficult. In southeast Utah, for example, the only currently operational uranium mill in the United States is sited just a few miles away from the reservation of the Ute Mountain Utes.⁸⁴ Built in 1970, the mine “processes waste from the cleanup of other mines to make a uranium concentrate, which is later sold to make fuel rods for nuclear power plants. The leftover waste from the milling process is then stored in containment pods at the mill.”⁸⁵ Long suspected of contaminating the drinking water of the Utes and contributing to dangerous level of air pollution,⁸⁶ the mill was recently sanctioned by the EPA for a Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) violation.⁸⁷ Climate change and COVID-19 only worsen the challenges tribal communities confront in accessing water for their basic survival.⁸⁸

Water injustices faced by Latinx communities have different origins and dimensions than water injustices faced by Indigenous commu-

⁸¹ Nina Lakhani, *Tribes Without Clean Water Demand an End to Decades of US Government Neglect*, GUARDIAN (Apr. 28, 2021), <https://www.theguardian.com/us-news/2021/apr/28/indigenous-americans-drinking-water-navajo-nation>.

⁸² *Id.*

⁸³ SHAWN REGAN, PROP. AND ENV'T RSCH. CTR., UNLOCKING THE WEALTH OF INDIAN NATIONS: OVERCOMING OBSTACLES TO TRIBAL ENERGY DEVELOPMENT 3 (2014); Celia McMichael et al., *An Ill Wind? Climate Change, Migration, and Health*, 120 ENV'T HEALTH PERSP. 646, 649 (2012).

⁸⁴ Sofia Stuart-Rasi, *Native-Led March Protests Possible Contamination from White Mesa Uranium Mill*, KSJD NEWS (Oct. 15, 2021, 2:24 PM), <https://perma.cc/4A2E-FUC6>.

⁸⁵ Kelsey Carolan, *EPA Stops White Mesa Mill from Receiving Toxic Waste from Uranium Sites*, JOURNAL (Dec. 13, 2021, 7:40 AM), <https://perma.cc/XHT3-49VG>; Stuart-Rasi, *supra* note 84.

⁸⁶ Emma Penrod, *The Water Around a Utah Uranium Mill is Growing More Polluted. What Does it Mean for the Nearby Town?*, SALT LAKE TRIB. (Oct. 22, 2018, 2:11 PM), <https://www.sltrib.com/news/environment/2018/10/21/ute-tribal-members-living/>; Mark Richardson, *Utes Fear Uranium Mill is Becoming Radioactive Waste Dump*, PUB. NEWS SERV. (Sept. 30, 2020), <https://perma.cc/QF74-35TG>.

⁸⁷ Carolan, *supra* note 85.

⁸⁸ Lakhani, *supra* note 81.

nities. For Latinx peoples, many historical federal and state laws and courts classified people of Latin American descent as white, or at least did not place them in any explicitly non-white group, such as Black or Indian, making discrimination claims an uphill battle despite “overwhelming [evidence].”⁸⁹ As such, examples of *de jure* “Jim Crow” type discrimination directed at Latinx peoples are fewer and less overt because their categorization was less clearly articulated.⁹⁰ However, alt-

⁸⁹ Neil Foley, *Straddling the Color Line: The Legal Construction of Hispanic Identity in Texas*, in NOT JUST BLACK AND WHITE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON IMMIGRATION, RACE, AND ETHNICITY IN THE UNITED STATES, at 341, 341-42, 347-50, 354 (Nancy Foner & George M. Fredrickson eds. 2004) (noting that by the beginning of World War II, the U.S. Census had officially categorized most Spanish-surnamed Americans as “White”); Thomas A. Guglielmo, *Fighting for Caucasian Rights: Mexicans, Mexican Americans, and the Transnational Struggle for Civil Rights in World War II Texas*, 92 J. AM. HIST. 1212, 1215-16 (2006); Mario T. Garcia, *Mexican Americans and the Politics of Citizenship: The Case of El Paso, 1936*, 59 N.M. HIST. REV. 187, 199-200 (1984) (describing the strong negative reaction of Mexican Americans in El Paso in 1936 to their short-lived legal classification as “colored”); see also George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997) (exploring the various ways that legal actors in judicial opinions have considered Mexican Americans to be white); George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience, 1930-1980*, 27 U.C. DAVIS L. REV. 555, 563-65 (1994) (noting the ways that Mexican American litigants claimed whiteness in public accommodation swimming pool cases); Clare Sheridan, *“Another White Race:” Mexican Americans and the Paradox of Whiteness in Jury Selection*, 21 LAW & HIST. REV. 109 (2003) (examining the various ways that claims to whiteness both benefited and hurt Mexican American litigants in school integration and jury selection cases); Steven H. Wilson, *Brown Over “Other White”:* Mexican Americans’ Legal Arguments and Litigation Strategy in School Desegregation, 21 LAW & HIST. REV. 145 (2003) (arguing that lawyers were pragmatists for their clients in arguing that Mexican Americans were “other Whites” and thus subject to the same legal protections of whites in Jim Crow Texas); Ian F. Haney López, *Race, Ethnicity, Erasure: The Saliency of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997) (detailing the inconsistent racialization of Mexican Americans as white).

⁹⁰ See generally Foley, *supra* note 89, at 341-42, 347-50 (“[O]fficial recognition of [Mexican Americans’] status as [W]hites in state and federal courts was not a guarantee that Anglos would treat them as [W]hites, while their legal status as [W]hites made it difficult for [Mexican Americans] to claim racial discrimination.”); Natalia Molina, *“In a Race All Their Own:” The Quest to Make Mexicans Ineligible for U.S. Citizenship*, 79 PACIFIC HIST. REV. 167 (2010) (detailing efforts by state and private actors to make Mexicans non-white and thus, ineligible for citizenship); NATALIA MOLINA, HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS (2014) (detailing the relationship between racial categorization, citizenship, and the rise of an immigration regime between 1924 and 1965); Tom I. Romero II, *Observations on History, Law, and the Rise of the New Jim Crow in State-Level Immigration Law and Policy for Latinos*, 66 AM. Q. 143 (2014) (arguing that racialized notions of citizenship status served as a proxy to discrimination against Latinx peoples in housing, voting, education, and government entitlement programs). In addition to myself, legal scholars have explored these inconsistent claims and designations to whiteness and non-whiteness in a variety of contexts. See generally LAURA E. GOMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE (2007) (de-

though this theoretically entitled many Spanish-surnamed residents to some or all of the benefits of whiteness—from the ability to naturalize as free white people and to attend “Caucasian” schools to the ability to marry white partners—there were many Latinx people who found that being legally white meant, in practice, very little. The systematic dispossession of Mexicans’ land in the decades following the end of the Mexican American War in 1848,⁹¹ the physical marking of Mexican bodies as they crossed the border (or were denied entry) in the early decades of the 20th century,⁹² their exclusion from white public facilities,⁹³ the intense policing of young men and surveillance of de facto segregated neighborhoods,⁹⁴ and the subsequent denial of equality of educational opportunity⁹⁵ all contributed to the systemic inequality experienced by the Latinx community.⁹⁶

As a matter of environmental inequity and water justice, this manifested itself in familiar ways. In San Antonio, Texas, for example, resi-

tailoring shifting color line of Mexicans in the new racial order of the 19th century United States and territorial New Mexico); Michael Olivas, *COLORED MEN AND HOMBRES AQUI: HERNANDEZ V. TEXAS AND THE EMERGENCE OF MEXICAN AMERICAN LAWYERING* (Michael A. Olivas ed., 2006) (collection of essays exploring tensions around Texas courthouse designation of separate bathrooms for “Color Men” and Latinx “Hombres” and legal Whiteness of Mexicans Americans); IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003) (arguing that “common sense” notions of racism informed activists claims to Chicano as a non-white in the United States’ racial order).

⁹¹ See MARÍA E. MONTOYA, *TRANSLATING PROPERTY: THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840-1900*, at 157-90 (2002); see also Guadalupe T. Lunda, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a “Naked Knife”*, 4 MICH. J. RACE & L. 39, 70-74 (1998) (discussing the dispossession of Chicana/os’ property interests in the American Southwest following the Mexican American war).

⁹² JOHN MCKIERNAN-GONZALEZ, *FEVERED MEASURES: PUBLIC HEALTH AND RACE AT THE TEXAS-MEXICO BORDER, 1848-1942*, 198-235 (2012) (discussing the compulsory vaccination of Mexicans crossing the U.S. border in the early 20th century).

⁹³ See MARTHA MENCHACA, *RECOVERING HISTORY, CONSTRUCTING RACE: THE INDIAN, BLACK, AND WHITE ROOTS OF MEXICAN AMERICANS* 287-90 (2002).

⁹⁴ See generally EDWARD J. ESCOBAR, *RACE, POLICE, AND THE MAKING OF A POLITICAL IDENTITY: MEXICAN AMERICANS AND THE LOS ANGELES POLICE DEPARTMENT, 1900-1945* (1999) (describing the events that led to the “Zoot Suit” riots in Los Angeles in 1943).

⁹⁵ See *Our Selma is Here*, supra note 30, at 75-76.

⁹⁶ Guglielmo, supra note 89, at 1216. As Professor Guglielmo points out, “[n]ot all Mexicans and Mexican Americans experienced this system the same way; gender, class, nationality, skin color, and other factors all mattered.” *Id.*; see generally NEIL FOLEY, *THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE* (1997) (exploring the impact of racial, social, and economic forces in the discriminatory experiences encountered by Mexican Americans from the Civil War to World War II); GEORGE J. SÁNCHEZ, *BECOMING MEXICAN AMERICAN: ETHNICITY, CULTURE AND IDENTITY IN CHICANO LOS ANGELES, 1900-1945* (1993) (detailing the role of citizenship, class, and gender in the ability of Mexicans to become Americans).

dential racial segregation of Mexican-Americans made disparate the deadly impact of a flood in 1921 (later described as the most “devastating in the history of Texas”), which killed at least 80 people, 95% of whom lived in the city’s Latinx West-side.⁹⁷ In a city and a region made and re-made by flooding, the “death and damage . . . were a direct consequence of a series of deliberate . . . decisions to build this city inside a floodplain” where Latinx residents would always be in “harms’ way” as a result of racial stereotypes and political disenfranchisement.⁹⁸ Even after the city constructed the Olmos Dam in 1926 to mitigate the impact of future floods, it did little to address the damage that heavy rains would continue to have on poor, overburdened drainage and bad housing, nor did it address the feeble sanitation that the Latinx residents in San Antonio would continue to experience for several more decades.⁹⁹

Another example of distinct Latinx environmental injustice was visible in the 1960s in San Joaquin Valley of California, where Mexican and Mexican-American farm workers organized a broad-based campaign against pesticide abuse.¹⁰⁰ As part of a racially segregated and subordinated community of seasonal agricultural laborers, Mexican-Americans were directly exposed to deadly toxins found in the pesticides on a daily basis. Lack of regulation, fear of reporting, and the refusal of public health authorities and growers to acknowledge the health consequences of pesticides lead to chronic health conditions and disproportionately high mortality rates.¹⁰¹

Rooted in colonialism, imperialism, and a distinct process of racial minoritization,¹⁰² Asian American and Pacific Islander (“AAPI”) communities have experienced environmental injustice and water inequity in ways both unique from and familiar to the experiences of Indigenous

⁹⁷ CHAR MILLER, WEST SIDE RISING: HOW SAN ANTONIO’S 1921 FLOOD DEVASTATED A CITY AND SPARKED A LATINO ENVIRONMENTAL JUSTICE MOVEMENT 7, 34 (2021). A water engineer for the U.S. Geological Survey who assessed the flood’s impact across Central Texas observed that “[t]he total number of lives lost will never be known, . . . but the best estimates available indicate that at least 224 people were drowned, most of whom were Mexicans who lived in poorly constructed houses, built along the low banks of streams.” *Id.* at 2-3.

⁹⁸ *Id.*, at 13-14.

⁹⁹ *Id.*

¹⁰⁰ LAURA PULIDO, ENVIRONMENTALISM AND ECONOMIC JUSTICE: TWO CHICANO STRUGGLES IN THE SOUTHWEST 57-124 (1996).

¹⁰¹ *Id.* at 72-83.

¹⁰² Adalberto Aguirre & Shoon Lio, *Spaces of Mobilization: The Asian American/Pacific Islander Struggle for Social Justice*, 35 SOC. JUST. 1, 1-4 (2008) (discussing how AAPI communities are portrayed both as “forever foreigners” and “model minorities,” which work together to “render [their] histories invisible”).

and Latinx communities.¹⁰³ To understand these challenges, it is critical to address the concept of “racial triangulation,” which casts Asian Americans as “immutably foreign and unassimilable” and as a threat to white status and interests.¹⁰⁴

Anti-Asian sentiment has long animated water and natural resource development, particularly in the “Western Rivers.”¹⁰⁵ Conversations about the Colorado River Compact, for example, illustrate how white communities greatly feared the control of white “American” water resources by the “menace of Japanese and Chinese competition.”¹⁰⁶ Elmwood Mead, who would come to head the Bureau of Reclamation—perhaps the single entity most responsible for water development and the subsequent settlement of the American West—“perceived industrious, upwardly mobile Japanese to be the greatest menace to American rural life,” and that Japanese agricultural success, “stemmed from ‘ancient, alien instincts’ that would surpass the ‘American individualist [like] child’s play . . . Anglo-Saxons and Mongolians cannot live side by side,’ he argued, ‘and neither will give way to the other without a conflict.’”¹⁰⁷ Indeed, laws in the late-19th and well into the 20th century barring AAPI’s entry, access to citizenship, and legal right to own property only accentuated massive imbalances in water ownership.¹⁰⁸

¹⁰³ See *id.* at 1-4; CAL. LEAGUE OF CONSERVATION VOTERS EDUC. FUND, ASIAN AMERICAN ENVIRONMENTALISTS: AN UNTAPPED POWER FOR CHANGE IN CALIFORNIA 7-8 (2010); Christina Choi, *Why the Environmental Movements Should Stop Ignoring Asian Americans*, NRDC (May 23, 2021), <https://perma.cc/ZR8J-NKN4>.

¹⁰⁴ Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC. 105, 106-108 (1999). A leg in the “triangulation” is the countervailing perception of AAPIs as a “model minority.” *Id.* at 106, 122-24. The challenges that the model minority myth creates for AAPI, which pits AAPI against other non-white racially minoritized groups, is explored in depth by Ellen Wu in *THE COLOR OF SUCCESS: ASIAN AMERICANS AND THE ORIGINS OF THE MODEL MINORITY* (2015).

¹⁰⁵ See Romero, *supra* note 63, at 168-70.

¹⁰⁶ Eric Boime, “Beating Plowshares into Swords”: *The Colorado River Delta, the Yellow Peril, and the Movement for Federal Reclamation, 1901–1928*, 78 PAC. HIST. REV. 27, 51 (2009).

¹⁰⁷ *Id.* at 38-39, 47.

¹⁰⁸ See Romero, *supra* note 63, at 168-175 (discussing the relationship between water laws in the 19th and 20th centuries, immigration, and racial inequality); Tom I. Romero II, *Bridging the Confluence of Immigration and Water Law*, 48 TEX. TECH. L. REV. 779, 780-797, 807-815 (2016) (discussing how the regressive reaction to immigration influenced the development of Western water law); Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 19 B.C. THIRD WORLD L.J. 37, 37-40 (1998) (discussing how bars to citizenship excluded certain Asian immigrants from ownership of real property); Dominique Marangoni-Simonsen, *A Forgotten History: How the Asian American Workforce Cultivated Monterey County’s Agricultural Industry, Despite National Anti-Asian Rhetoric*, 27 HASTINGS ENV’T L.J. 229, 234-244 (2021) (discussing how Chinese and Japanese immigrants were excluded from land rights).

Like other racially minoritized groups in more urban contexts, AAPI communities were often segregated.¹⁰⁹ Living near or in the same neighborhoods as other communities of color, AAPIs shared many of the same experiences of racial discrimination and environmental justice.¹¹⁰ In its groundbreaking 1987 study of toxic waste facilities, the United Church of Christ Commission for Racial Justice found that “half of all Asian/Pacific Islanders and [Indigenous Americans] live in communities with uncontrolled toxic waste sites” and that “[t]hree out of every five Black and [Latinx] Americans live[] in communities with uncontrolled toxic waste sites.”¹¹¹

In her book documenting the mobilization of Filipino and Latinx women activists fighting oil refinery water and air pollution in their communities, Professor Nadia Kim details the countless experiences of mothers of color rushing their children to hospitals for violent coughing or black accumulation in their noses.¹¹² She similarly describes undocumented families having to navigate a health system to treat fibromyalgia, lung disease, cancer, and the daily experiences of children gasping for breath in the dirty air coming from the refineries, who were afraid to drink water in their schools.¹¹³ Empirical research also indicates that AAPIs experience significant health issues, including distinctive cancer mortality rates.¹¹⁴ Yet, unlike many other groups, the scope and underlying causes are not as fully studied.¹¹⁵ Nevertheless the research that does

¹⁰⁹ See William H. Frey, *Neighborhood Segregation Persists for Black, Latino or Hispanic, and Asian Americans*, BROOKINGS (Apr. 6, 2021), <https://perma.cc/53PM-PTYG> (“Even though Asian Americans tend to comprise smaller shares of metropolitan populations, their segregation levels . . . are broadly in the range of Latino or Hispanic residents.”).

¹¹⁰ See, e.g., LAURA PULIDO, *BLACK, BROWN, YELLOW, AND LEFT: RADICAL ACTIVISM IN LOS ANGELES* 80 (2006).

¹¹¹ UNITED CHURCH OF CHRIST COMM. FOR RACIAL JUST., *TOXIC WASTES AND RACE IN THE UNITED STATES*, at xiv (1987).

¹¹² NADIA Y. KIM, *REFUSING DEATH: IMMIGRANT WOMEN AND THE FIGHT FOR ENVIRONMENTAL JUSTICE IN LA* 145 (2021).

¹¹³ *Id.*

¹¹⁴ See Melissa McCracken et al., *Cancer Incidence, Mortality, and Associated Risk Factors Among Asian Americans of Chinese, Filipino, Vietnamese, Korean, and Japanese Ethnicities*, 57 *CA CANCER J. CLINICIANS* 190, 191 (2007) (“Although Asian Americans and Pacific Islanders have lower incidence and mortality rates from all cancers combined than all other racial/ethnic groups . . . [they] are the only major US racial/ethnic group for which the annual number of deaths from cancer exceeds that for heart disease.”).

¹¹⁵ See Lan N. Doãn et al., *Trends in Clinical Research Including Asian American, Native Hawaiian, and Pacific Islander Participants Funded by the US National Institutes of Health, 1992 to 2018*, *JAMA NETWORK OPEN*, July 2019, at 1-2, 10-12 (2019); Moon S. Chen, Jr. & Betty Lee Hawks, *A Debunking of the Myth of Healthy Asian Americans and Pacific Islanders*, 9 *AM. J. HEALTH PROMOTION* 261, 261 (1995).

exist indicates that climate change, COVID, and anti-Asian hate will only continue to exacerbate inequities.¹¹⁶

The history of institutional and systemic racism in the American West is complex and replete with countless examples of environmental and water inequities. These histories and the injustices experienced by minoritized groups are both seemingly distinct from each other as a matter of law and policy—reflecting different processes of racial minoritization—and similar to those injustices experienced by other communities throughout the United States, including decades of racial segregation and discrimination, government neglect, commercial exploitation, and disparate, devastating health comorbidities. I hope that each snapshot captured above illustrates the different and complex origins facing diverse racially minoritized communities. Settler-colonialism, de facto segregation, and racial-triangulation are critically important frames shaping how policy makers as well as jurists address local and particular environmental harms facing racially minoritized communities. They also remind us, as the next sub-Section will show, that context matters and that colorblind, legally myopic, and solely legalistic or technocratic responses rarely if ever provide substantive remedies to long-standing and deeply entrenched environmental and water inequities.

c. The Fight for Water Justice in the Queen City

This Section is a case study into the long-standing environmental and water harms facing Latinx communities concentrated in the northeast corridors of metropolitan Denver, and the ineffective and often counterproductive policies promulgated by government agencies. As the “queen” city of the region,¹¹⁷ Denver is an especially compelling area to understand climate and water justice due to the complexity of its racial geography, the state’s contribution to the doctrine of prior appropriation and water rights, and because it has a powerful municipal water supplier

¹¹⁶ Amy Yee, *COVID’s Outsize Impact on Asian Americans Is Being Ignored*, SCI. AM. (May 6, 2021), <https://perma.cc/WCQ5-2HWT>; ENV’T PROT. AGENCY, COMMUNITY FACT SHEET: EPA’S CLEAN POWER PLAN, CLIMATE CHANGE AND ASIAN AMERICAN & PACIFIC ISLANDERS 1-2 (2015); Zara Abrams, *The Mental Health Impact of Anti-Asian Racism*, 25 AM. PSYCH. ASSOC.: MONITOR PSYCH. 22 (July 1, 2021).

¹¹⁷ See DORSETT LYLE, *THE QUEEN CITY: A HISTORY OF DENVER passim* (1986) (referring throughout the text to Denver as the “Queen City”). Denver has historically been known as the “Queen City of the Plains” or the “Queen City of the West” because it has been a hub to the agricultural industry of the High Plains and the extractive industries of the Rocky Mountain West. See STEPHEN J. LEONARD & THOMAS J. NOEL, *DENVER: MINING CAMP TO METROPOLIS* 123, 141-142 (1990) (noting that in 1897, British visitor George W. Steevens, observing Denver’s “fledgling parks and shabby attractions” quipped that “the Queen City of the Plains was ‘more plain than queenly.’”).

with the authority to acquire rights to, and impact the distribution of, a stable and relatively clean water supply.¹¹⁸

The story begins in 1878, less than a generation after gold was first discovered at the confluence of the Platte River and Cherry Creek (now the location of downtown Denver),¹¹⁹ when the Argo Smelter was constructed by the Boston and Colorado Smelting Company.¹²⁰ Though it would close in 1909 due to decreases in ore production, the Argo Smelter set into motion heavy-scale industrial development in the area. In 1885, promoter and speculator Edward Holden built a smelter in an area known as Holdeville. Four years later in 1889, the Holdeville site was acquired by prominent Denver bankers who reorganized operation into the Globe Smelter and Refining Company and renamed the area as Globeville.

Not surprisingly for a state that came into being because of a gold and silver rushes, metal smelters emerged as the dominant industry in the city and Globeville, as it was legally known, was the epicenter.¹²¹ In 1899, the Globe Smelter was purchased by the American Smelting and Refining Company (“ASARCO”), which owned the plant for over 100 years, until it declared bankruptcy in 2006.¹²² The smelter processed precious metals like gold and silver, in addition to lead, cadmium, and arsenic.¹²³ ASARCO received high praise for its operation of the plant and the Globe Smelter was considered one of the best and largest smelters in the world.¹²⁴ There were also other smelters in close proximity. One smelter—the Omaha-Grant Smelter—was used to incinerate the city’s trash into the mid-20th century.¹²⁵ Located in the nearby Elyria neighborhood (later named Elyria Swansea, and the current location of

¹¹⁸ See *How I Rode the Bus*, *supra* note 30, at 1033-53; PATRICIA NELSON LIMERICK, *A DITCH IN TIME: THE CITY, THE WEST, AND WATER* 22 (2012).

¹¹⁹ LIMERICK, *supra* note 118, at 22.

¹²⁰ BETH GLANDON, *SURVEY REPORT: GLOBEVILLE NEIGHBORHOOD* 12-13 (2017).

¹²¹ See JEROME C. SMILEY, *HISTORY OF DENVER: WITH OUTLINES OF THE EARLIER HISTORY OF THE ROCKY MOUNTAIN COUNTRY* 556 (1901). The manufacture of mining machinery became Denver’s second most valuable industry. The industry employed hundreds of workers producing products vital to the state’s mining sector, including stamp mills, concentrators, crushers, and other items. In the process, Denver developed a reputation for turning out some of the world’s best mining machinery and shipped it around the world. See JAMES E. FELL, JR., *ORES TO METALS: THE ROCKY MOUNTAIN SMELTING INDUSTRY* 127-28 (Univ. Press of Colo. 2009).

¹²² *Globeville Neighborhood History*, DENVER PUB. LIBR. (Feb. 3, 2022, 11:01 AM), <https://perma.cc/G65V-JAA3>.

¹²³ *Id.*

¹²⁴ *Id.*; *B.J. Currigan Dies*, DENVER POST, Apr. 4, 1905, at 13 (“[T]he smoke stack at the Globe smelter . . . [is] the second tallest in the world.”); See also *Dynamite Shatters Landmark That Reared 152 Feet High*, DENVER POST, Feb. 19, 1922, at 52.

¹²⁵ *Id.*

the Denver Coliseum), the smelter was so prominent that it was included as an image in the City and County of Denver's official seal designed in 1901.¹²⁶

Globeville was located a few miles northeast of Downtown Denver, adjacent to railroads along the banks of the Platte River. A small community quickly developed around the smelter and it was soon platted as Globeville and incorporated in 1891.¹²⁷ Globeville residents turned down offers of annexation to the City and County of Denver several times, but in 1902 the promise of improved amenities, such as access to Denver water, proved sufficiently enticing. Globeville, along with the adjacent Argo, Berkeley, Elyria, Montclair, and Valverde neighborhoods, was annexed by Denver on December 1, 1902.¹²⁸

Into the first decades of the 20th century, Globeville was comprised of eastern European migrants, many of whom worked at the smelter, the neighboring railyards, or the meat packing houses.¹²⁹ Later, after World War II, Latinx and Black migrants also settled in the neighborhood. Though both Latinx and Black people were effectively segregated out of many neighborhoods in the Denver area by way of racially restrictive covenants, a public housing project brought low-income Latinx and Black families to the neighborhood. According to one study, Globeville "almost overnight" became, in the minds of many of its residents, "a less desirable place to live."¹³⁰ Despite a history from its beginning that included the daily stench coming from the smelters or the rancid smells coming from the meat packing houses giving Globeville residents "headaches, sore throats and bouts of nausea,"¹³¹ it was the sudden arrival of people of color that created a crisis for the area's residents.

As happened to communities all over the nation, the construction of the east-west I-70 freeway, and the north-south I-25 thoroughfare cut the neighborhood into four, dramatically destabilizing the neighborhood and

¹²⁶ Tara Bardeen, *Neighborhood Ties: Globeville*, GO PLAY DENVER (Jan. 2, 2017), <https://perma.cc/J27N-8DEG>.

¹²⁷ Paul Marr & Quinn Morris, *People, Poisons, and Pathways: A Case Study of Ecological Fallacy*, in PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON COMPUTER MAPPING IN EPIDEMIOLOGY AND ENVIRONMENTAL HEALTH 275, 275 (Robert T. Aangeenbrug et al. eds., 1995).

¹²⁸ GLANDON, *supra* note 120, at 13.

¹²⁹ *Id.*; see also Daniel F. Doeppers, *The Globeville Neighborhood in Denver*, 57 GEOGRAPHICAL REV. 506, 509 (1967); Natasha Gardener, *Welcome to Globeville*, 5280 (Nov. 2014), <https://perma.cc/64JQ-DAQX>.

¹³⁰ Doeppers, *supra* note 129, at 514.

¹³¹ Gardener, *supra* note 129.

further facilitating the mass exodus of white residents.¹³² Those that remained were overwhelmingly Latinx, and became physically boxed in, “both isolated and choked by nonresidential land uses . . . [including the] smelter to the north, the Valley Highway [I-25] to the west, the railroad yards to the south, and an arterial street lined with several small packing houses and truck depots to the east.”¹³³ Together, these physical obstructions exacerbated the human and environmental impacts of pollution that had always been endemic to the neighborhood.¹³⁴

As early as 1905, people were suspicious of the smelter’s effects on residents of the Globeville neighborhood. One *Denver Post* article titled “Effect of Gases Poison” discussed a lawsuit brought against ASARCO posing questions such as “[i]s there enough poison in the air near the Globe Smelter to depreciate value of property?,” “[i]s there poison enough to have any material effect upon man or beast?,” and “[d]id the fine powder found on the trees of [a nearby property owner] come from the smelter?”¹³⁵ One witness, when asked about the effect of the fumes on the body said: “Well, it is pretty bad. They run down the body, cause paralysis and are liable to poison the system.”¹³⁶

The City of Denver did not seem to care about the pollution. After residents raised concerns that a parcel of land being considered for a public school was swept by acrid “fumes” of the Globe smelter plant, the Denver Public School Board nevertheless decided to place a school in that same location.¹³⁷ The promise of development only highlighted the neglect shown by public officials. Streets remained unpaved, and there was no running water or sewage service as late as the 1920s.¹³⁸ And even when waste-water facilities were put into the neighborhood, they regularly backed up local sewers and overflowed.¹³⁹

Yet, until the Environmental Protection Act was enacted in 1970s, no person, group, or agency appeared to have taken formal legal action

¹³² Irdawati Bay Nalls, *Globeville: The Neighborhood That Shapes the Learning Environment for BFLA Spanish-English Mexican Americans*, 4 INT’L J. ANTHROPOLOGY & ETHNOLOGY 1, 9-10 (2020); see Doeppers, *supra* note 129, at 511-15.

¹³³ Doeppers, *supra* note 129, at 520.

¹³⁴ See *Globeville Neighborhood History*, *supra* note 122; see also Stanley L. Cuba, *A Polish Community in the Urban West: St. Joseph’s Parish in Denver, Colorado*, 36 POLISH AM. STUD. 33, 68 (1979); Doeppers, *supra* note 129, at 522; JOHN A. HARRIS & DOUG WHEELER, DENVER PLAN. & CMTY. DEV., GLOBEVILLE NEIGHBORHOOD PLAN 23 (1989).

¹³⁵ *Effect of Gases Poison*, DENVER POST, Mar. 7, 1905, at 2. The lawsuit was filed after a horse died while staying on property near the smelter.

¹³⁶ *Id.*

¹³⁷ See *School Site Costs Ten Times as Much as Ground Close by*, DENVER POST, Jan. 21, 1923, at 20.

¹³⁸ GLANDON, *supra* note 120, at 13.

¹³⁹ *Globeville Neighborhood History*, *supra* note 122.

confronting the hazards produced by the smelter. In 1974, the Colorado Department of Public Health and Environment's ("CDPHE") Water Quality Control Division collected both water and sediment samples from the plant's industrial drainage ditch and found elevated levels of cadmium, arsenic, lead, and zinc.¹⁴⁰ In 1982, cadmium levels were 60 times the federal limit in the drainage ditch between the plant and a housing project occupied by 290 people.¹⁴¹ Three years later, health department officials found cadmium at 174 parts per billion in shallow wells within a quarter-mile of the smelter.¹⁴² Though Globeville was a part of the City and County of Denver and ostensibly connected to the city's clean, world-class water supply,¹⁴³ many residents continued to draw drinking water from wells that were heavily polluted. For this reason, state health officials expressly told the residents not to drink their well water because of the toxic levels of cadmium.¹⁴⁴

ASARCO faced a handful of lawsuits over the years for its polluting of the water and land. The CDPHE sued ASARCO under the CERCLA in 1983, though the suit was not settled until 1993 when the Globe Smelter site was placed on the Superfund National Priority List.¹⁴⁵ Remedial actions included containing and closing the former neutralization pond and cutting it off from the groundwater, as well as installing a terrace drain to cut off the release of contaminated water from the plant into the floodplain aquifer.¹⁴⁶ ASARCO also built a wastewater plant and a fence to shield neighbors from the industrial drainage ditch, and agreed to pay half a million dollars per year as compensation for the past and future health actions as a result of the smelter pollutants.¹⁴⁷

¹⁴⁰ BARBARA O'GRADY, COLO. DEP'T OF PUB. HEALTH AND ENV'T, FIVE YEAR REVIEW: ASARCO GLOBE SITE 12 (2004).

¹⁴¹ Daniel Jones, *Cadmium Pollutes Globeville Wells*, DENVER POST, Oct. 4, 1985, at 3.

¹⁴² *Id.* The maximum contaminant level for cadmium in Colorado drinking water is set at .005 mg/L, or 5 parts per billion. *See* COLO. CODE REGS. § 1002-11:11.19 (2022).

¹⁴³ The records of the city's water infrastructure are incomplete. At the time that Globeville was annexed into the City and County of Denver, drinking water was privately supplied. Denver purchased and consolidated those private companies in Denver Water in 1918. *See* LIMERICK, *supra* note 118, at 69-81. While residents embraced annexation, many of the promised amenities, such as access to water infrastructure failed to materialize. GLANDON, *supra* note 120, at 13.

¹⁴⁴ Jones, *supra* note 141.

¹⁴⁵ *Asarco Inc. - Globe Plant*, COLO. DEP'T OF PUB. HEALTH & ENV'T, <https://perma.cc/4ZGZ-JRE2> (last visited Nov. 11, 2021); Kevin Beaty, *As a Big Chunk of a Superfund Nears Closing, North Denver Residents Worry Polluted Soils Still Pose a Threat*, DENVERITE (Dec. 10, 2018, 5:40 AM), <https://perma.cc/HP3W-FEL6>.

¹⁴⁶ ASARCO Globe Plant Site Record of Decision, Colo. Dep't of Health, Doc. No. 369537, at 1-2 (Feb. 18, 1993) (setting forth remedial actions).

¹⁴⁷ *Id.* at 10-11, 84-104.

A class-action lawsuit brought by Globeville's Latinx residents was also filed against ASARCO in the early 1990s.¹⁴⁸ The jury found ASARCO liable for negligently disposing arsenic and cadmium. In the largest environmental settlement ever awarded in Colorado at the time, the residents were awarded \$28,125,000 for yard cleanups, reimbursements for decreased property values, and medical monitoring for Globeville residents into the future.¹⁴⁹

In 1993, the Globeville Childhood Metals Study was published, which analyzed the effects of elevated lead, arsenic, and cadmium levels on young Black and Brown children living in Globesville and three comparable neighborhoods.¹⁵⁰ Though the report claimed there was no "statistically significant association between increased blood lead levels and the child's neighborhood or the distance of the child's home from the ASARCO Globe refinery,"¹⁵¹ residents continued to be concerned about the pollution in their neighborhood.

In 2002, the U.S. Department of Health and Human Services' Agency for Toxic Substances and Disease Registry, sent letters to 650 homes in Globeville, where the soils were so toxic that residents could get cancer just from residing there.¹⁵² The agency concluded that 9% of children between the ages of seven months and six years living in the area showed dangerous levels of lead in their blood.¹⁵³ As a result of the efforts of local organizers, the EPA in 2003 removed and replaced the soil from approximately 850 individual properties and agreed to regularly test for lead poisoning in every resident child under the age of six.¹⁵⁴ ASARCO declared bankruptcy in 2006 and shut down operation of the smelter, though issues of pollution continue to today.

Northeast of Globeville, the neighboring municipality of Commerce City was experiencing its own water and environmental justice challenges. First established as a trading post in the 1860s, by the beginning of World War II the area had emerged as a hub of commercial and industrial activity. Polluting petroleum refineries, tow-grain elevators, and manufacturing and freight-hauling were all located in close proximity to residences. In contrast to Globeville, drinking water in Commerce

¹⁴⁸ Marr & Morris, *supra* note 127, at 278; Julie Dugdale, *In A Run-Down Neighborhood, There's Lots of Love*, HIGH COUNTRY NEWS (June 13, 2005), <https://perma.cc/7G49-JDRP>.

¹⁴⁹ See Marr & Morris, *supra* note 127, at 278; Dugdale, *supra* note 148.

¹⁵⁰ See Marr & Morris, *supra* note 127, at 278. One of the neighborhoods was 42% Hispanic and 54% Black, while the others were about 80% Latinx. *Id.*

¹⁵¹ *Id.* at 281.

¹⁵² See *Globeville Neighborhood History*, *supra* note 122.

¹⁵³ *Id.*

¹⁵⁴ See Dugdale, *supra* note 148.

City comes from a water utility whose water portfolio does not rely on Colorado snowpack, but instead mixes groundwater from shallow wells in Commerce City, deep aquifer wells drawing from the Arapahoe aquifer formation, and treated reuse supply from Denver Water.¹⁵⁵ Without the same access to water rights from Colorado's mountains, Commerce City was forced to acquire water rights in the groundwater sitting under and in close proximity to heavy industry in the area. Indeed, Commerce City's water utility continues to rely almost exclusively on shallow wells and eight deep aquifer wells.¹⁵⁶

As early as the 1950s, petroleum refineries in particular posed challenges for Commerce City residents by heavily contaminating the ground and drinking water supply. Residents would regularly report high concentrations of petroleum in water ditches, leading to fears that the water was killing livestock¹⁵⁷ and unsafe for household use.¹⁵⁸ This led to a general understanding among area residents to avoid drinking the tap water altogether.¹⁵⁹

Further exacerbating Commerce City residents' concerns about water pollution was the Rocky Mountain Arsenal that bordered the community to the east. The Arsenal was built in 1942 for the purpose of producing chemical warfare agents for World War II efforts.¹⁶⁰ It additionally served as a place to dispose of mustard gas and several million rounds of mustard-filled shells, and to test fire mortar rounds filled with smoke and high explosives.¹⁶¹ Despite the initial worries by government developers about the lack of water and sewage access for the property,

¹⁵⁵ *The Treatment Process*, SOUTH ADAMS CTY. WATER & SANITATION DIST., <https://perma.cc/26CH-5RMS> (last visited Jun. 9, 2019).

¹⁵⁶ *Id.* Colorado water law makes a distinction between tributary and non-tributary groundwater as a matter of both water rights and regulation. See COLO. REV. STAT. §§ 37-90-103(10.5), -103(10.7) (2018).

¹⁵⁷ Eva Hodges, *Fuel Contaminating Wells in Adams County*, DENVER POST, Aug. 24, 1954, at 19.

¹⁵⁸ Bill Miller, *Water Crisis Strikes Fear Among Residents*, ROCKY MOUNTAIN NEWS, Nov. 12, 1959, at 5; Leonard Larsen, *Secret Probe Begun During '54 in Region of Water Pollution*, DENVER POST, Nov. 13, 1959, at 1; Jesse Tinsley, *Ground Tests Seek Source of Chemical in Water*, ROCKY MOUNTAIN NEWS, Aug. 10, 1985, at 14.

¹⁵⁹ Christopher Smith, *Commerce City Residents Say Water is Undrinkable*, ROCKY MOUNTAIN NEWS, Dec. 6, 1973, at 12 ("The water tastes and smells like gas."); Kathy Gosliner, *70 Residents Attend 'Non-Meeting' on Water Problems*, ROCKY MOUNTAIN NEWS, Dec. 12, 1973, at 102.

¹⁶⁰ *Construction Starts on Huge Arsenal Project Near Denver*, DENVER POST, June 14, 1942, at 1; see Connally E. Mears & Elaine H. Heise, *The Rocky Mountain Arsenal: Groundwater Contamination and Clean-Up Activities*, in UNCOVERING THE HIDDEN RESOURCE: GROUNDWATER LAW, HYDROLOGY, AND POLICY IN THE 1990S (NATL. RES. L. CTR., UNIV. OF COLO. SCH. OF L.), at 1, 1-2 (1992).

¹⁶¹ Mears & Heise, *supra* note 160, at 1.

the Arsenal was built to employ approximately 15,000 people and many lived right next door in Commerce City.¹⁶² By the 1950s, the site was being used for the production of Sarin (military designation “GB”) nerve agent, and continued to fill munitions shells through the late 1960s.¹⁶³ The Arsenal was also used to procure pesticide and herbicide productions by Shell Oil Company, including chlorinated benzenes and DDT, and later came to be used for *disposal* of chemical warfare materials.¹⁶⁴

The impact on the water supply serving Commerce City’s residents was profound. Until 1956, waste products from the site were dumped into unlined artificial reservoirs.¹⁶⁵ Contamination from the toxic waste seeped into the “surficial soils, deeper soils, groundwater, surface water and sediments,” contaminating up to “8 to 13 million cubic yards” of soil.¹⁶⁶ In 1959, health officials discovered chloride in the water system serving Commerce City and neighboring town (currently towns) of Irondale-Hazeltine.¹⁶⁷ Because the contamination had penetrated to a depth of 40 to 50 feet, there were concerns expressed that the contaminants would migrate into the deep well water, impacting more users.¹⁶⁸ Testing showed that 17 of 25 wells in the impacted area exceeded the maximum allowance of 200 ppm chloride, the advisory level at the time. State health officials soon discovered that the primary source was waste discharge from the Rocky Mountain Arsenal, but that “improper treatment of sewage” in Denver was also contributing to the contamination.¹⁶⁹

In order to combat this contamination, Arsenal officials constructed a sealed reservoir and planned to inject waste 12,000 feet into the earth.¹⁷⁰ However, the planned disposal may have had severe adverse consequences. A 1966 report published in *The Mountain Geologist* found that the Arsenal’s disposal wells were likely the cause of a series

¹⁶² *Construction Starts on Huge Arsenal Project*, *supra* note 160; *Chemical Arsenal Will Be Started in Sixty Days*, DENVER POST, May 24, 1942, at 1; *War Workers Trailer Camp is Planned by City Council*, DENVER POST, June 30, 1942, at 18; *Doubt is Raised that Big Thompson Will Get Necessary Priorities*, DENVER POST, September 4, 1942, at 8.

¹⁶³ Mears & Heise, *supra* note 160, at 1.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 2, 17-18.

¹⁶⁶ *Id.*

¹⁶⁷ Bill Miller, *Probe of Water Pollution Ordered*, ROCKY MOUNTAIN NEWS, Nov. 3, 1959, at 32.

¹⁶⁸ *Id.*

¹⁶⁹ See Mark Bearwald, *Adams Water Pollution Laid to U.S. Arsenal*, ROCKY MOUNTAIN NEWS, Nov. 9, 1959, at 62; Bill Miller, *Arsenal Cited as Key Source of Pollution*, ROCKY MOUNTAIN NEWS, Nov. 10, 1959, at 62.

¹⁷⁰ See David M. Evans, *The Denver Area Earthquakes and the Rocky Mountain Arsenal Disposal Well*, 3 MOUNTAIN GEOLOGIST 23, 23-25 fig.3 (1966).

of earthquakes in the area.¹⁷¹ Most troubling was the determination that the earthquakes were caused when wells “blew out” and sent poisonous chemicals through the earth and back to the surface.¹⁷²

Though evidence of water contamination was public knowledge, little was done by government agencies, public health authorities, or the polluters themselves over the next few decades.¹⁷³ In response to repeated, concerning reports of water contamination, the common refrain from government authorities was that “there is nothing to worry about.”¹⁷⁴ Dismissing both the concerns of area residents who had long dealt with “foul-smelling, foul-tasting” water, one public official contemptuously declared in a public meeting: “If you don’t like the water, you have the privilege of moving out.”¹⁷⁵

As with Globeville, demographic change transformed the city. According to one recent account, “Commerce City is really a tale of two cities.” To the west and south of the Rocky Mountain Arsenal is the historic, largely Latinx part of the city “where residents have stayed for generations, often passing mortgage-paid homes to children.”¹⁷⁶ Known as the Derby Downtown District, predominantly Latinx families live in close proximity to the oil and gas refineries.¹⁷⁷ Separated by the Rocky Mountain Arsenal, Commerce City’s northeast has new, prototypical suburban development, with newer housing, water infrastructure, and a largely white population miles removed and physically separated from the pollutants and people of color.¹⁷⁸ As one long-term white resident noted about demographic changes particular to the core Demographic Derby district, “there’s a lot of immigrants and our whole school district

¹⁷¹ Evans, *supra* note 170, at 23, 28, 34.

¹⁷² See Evans, *supra* note 170, at 23, 28, 33.

¹⁷³ See generally Jack Carberry, *Arsenal at Denver Is Ready to Meet Gas with Gas*, DENVER POST, Apr. 2, 1943, at 5 (reporting that the chemical warfare service engineers gave assurance that the chemical weapons being manufactured are not “spreading gases”); Norman Draper, *Trace of Cancer-Linked Solvent Found in 2 South Adams Wells*, ROCKY MOUNTAIN NEWS, Jul. 16, 1985, at 9 (reporting that, faced with shutting down a well with higher levels of TCE, the EPA project manager claimed, “[i]t’s not that big of a deal”); Tinsley, *supra* note 158 (“While health department and EPA officials said there is no need for alarm, residents of the area are worried.”); Karen Bowers, *Adams Residents Win Pledge to Clean Up Water*, ROCKY MOUNTAIN NEWS, July 30, 1985, at 8 (“We’ve heard a lot of statistics tonight, and you can’t prove that (TCE) did anything. But you can’t prove it didn’t either.”).

¹⁷⁴ See Larsen, *supra* note 158.

¹⁷⁵ Gosliner, *supra* note 159.

¹⁷⁶ See Dennis Huspeni, *Adams County Becomes Minority Majority, Works to Update Heavy Industry Image*, GAZETTE (Nov. 15, 2021), <https://perma.cc/3DY5-RMKX>.

¹⁷⁷ See Silvia Foster-Frau, *A Colorado County Offers a Glimpse of America’s Future*, WASH. POST (Aug. 13, 2021, 6:00 AM), <https://perma.cc/3RLV-VHBU>.

¹⁷⁸ See *id.*

has changed A lot of people don't welcome that and don't want that."¹⁷⁹

The Latinx neighborhoods surrounding the refineries in south Commerce City are also part of the South Adams County water utility (bordering Denver-Adams County).¹⁸⁰ These same neighborhoods, in which heavy industry was sited, were also where the water utilities' shallow and most contaminated water wells are located.¹⁸¹ It was not until 1985, when Colorado sued both the U.S. Army and the Shell Oil Company, that the first lawsuit was filed to address water and other contamination around the Rocky Mountain Arsenal.¹⁸² By 1987, the Arsenal was listed on the Superfund National Priority List, charging the U.S. Army and Shell with its cleanup.¹⁸³

Despite Superfund designation, the Arsenal continued to be a source of concern when regulators in the early 1990s discovered that the previously disposed-of mustard gas shells containing 6.8 million gallons of toxic waste were leaking.¹⁸⁴ Though officials claimed no toxins escaped into the soil or groundwater, soil samples found extensive contamination from the compounds used to produce mustard gas, among others.¹⁸⁵ The study also found contamination in deep soil, surface soils, groundwater, and surface water,¹⁸⁶ including an extensive groundwater "plume" with varying degrees of contamination that reached all the way to the South Platte River, some 7 miles away.¹⁸⁷

By 1992, the U.S. Army and Shell had spent \$111 million on clean-up projects. By 1994, they had spent an additional \$151 million.¹⁸⁸ These efforts included the construction and improvement of seven groundwater intercept and treatment systems, closure of a two-mile deep well and 350 abandoned wells, removal of 76,000 drums of hazardous salts, and removal of 10.5 million gallons of liquids and 564,000 cubic

¹⁷⁹ *Id.*

¹⁸⁰ *District Information Map*, S. ADAMS WATER & SANITATION DIST. (July 29, 2016), <https://perma.cc/NS9H-8NBA>.

¹⁸¹ See Jerry Dinzes, *Map of Well Hazards with Demographics* (June 2022) (on file with author).

¹⁸² See Neil Westergaard, *Bid for Damages in Pollution Cases 'Jeopardized'*, DENVER POST, Jan. 22, 1985, at 10.

¹⁸³ See *Rocky Mountain Arsenal*, COLO. DEPT. OF PUBLIC HEALTH & ENV'T (Nov. 3, 2021), <https://perma.cc/XYG9-FGRA>.

¹⁸⁴ See Mark Obmascik, *Toxic Leak Reported at Arsenal*, DENVER POST, June 20, 1989, at 13; Means & Heise, *supra* note 160, at 1.

¹⁸⁵ Compare Obmascik, *supra* note 184, with Means & Heise, *supra* note 160, at 1-3.

¹⁸⁶ See Means & Heise, *supra* note 160, at 2.

¹⁸⁷ See *id.* (identifying the plume while clarifying that the contamination in the far reaches of the plume "do[es] not present a health threat").

¹⁸⁸ *Id.* at 3.

yards of soils and sludges.¹⁸⁹ As part of the effort, Congress also passed the Rocky Mountain Arsenal National Wildlife Refuge Act (“RMANWR Act”) in 1992.¹⁹⁰ Among other provisions, the law directed the Secretary of the Army to retain jurisdiction and control over all real property at the Arsenal used for water treatment, the disposition of hazardous substances, and other purposes related to environmental cleanup and remediation. Apart from those sections, the Arsenal’s vast acreage was set to be managed by the Federal Fish and Wildlife Service (“FWS”).¹⁹¹ Colorado led multiple medical monitoring programs for residents in Commerce City, Brighton, Green Valley Ranch, Henderson, and Montebello. Though efforts to clean-up and monitor the groundwater are ongoing, monitoring programs for cancer and birth defects ended in 2009.¹⁹²

The regulation of Commerce City’s refineries, however, has been even more complicated. By 1992, state regulators cited the primary operator of one of the refineries, Continental Oil Company (“Conoco”) for 79 state environmental law violations, including polluting Sand Creek with excessive grease discharges and effluent acidity.¹⁹³ Health officials stated that “the refinery’s effluent violated the state’s pollution limit 37 times” between 1986 and 1992.¹⁹⁴ In 1994, Sierra Club sued the Colorado Refining Company under the Clean Water Act, for discharging toxins into Sand Creek.¹⁹⁵ The lawsuit included studies showing large amounts of petroleum in the groundwater under the refineries.¹⁹⁶

¹⁸⁹ *Id.* at 3-4.

¹⁹⁰ Rocky Mountain Arsenal National Wildlife Refuge Act of 1992, Pub. L. No. 102-402, 106 Stat. 1961 (codified as amended at 16 U.S.C. § 668dd note).

¹⁹¹ An extensive history of the legal and social issues surrounding the Arsenal’s transformation into a wildlife refuge and potential community resource is explored by Rachel Salcido in *The Rocky Mountain Arsenal National Wildlife Refuge: On a Rocky Road to Creating a Community Asset*, 47 J. MARSHALL L. REV. 1401, 1409 (2014).

¹⁹² *Rocky Mountain Arsenal*, COLO. DEPT. OF PUB. HEALTH & ENV’T., <https://perma.cc/D85F-KYBT> (last visited Apr. 23, 2022) (discussing COLO. DEPT. OF PUB. HEALTH & ENV’T., ROCKY MOUNTAIN ARSENAL MED. MONITORING PROGRAM: SURVEILLANCE FOR BIRTH DEFECTS COMPENDIUM (2010), and COLO. DEPT. OF PUB. HEALTH & ENV’T., ROCKY MOUNTAIN ARSENAL MEDICAL MONITORING PROGRAM: SUPPLEMENTAL UPDATE OF CANCER INCIDENCE IN NORTHEAST DENVER RESIDENTS LIVING IN THE VICINITY OF THE ROCK MOUNTAIN ARSENAL 1997-2009 (2013)); U.S. DEP’T OF THE ARMY, ROCKY MOUNTAIN ARSENAL, FINAL FIFTH FIVE-YEAR REVIEW REPORT, at ES-5, ES-6 (2021) (identifying monitoring milestones as late as March and June 2022).

¹⁹³ Mark Obmascik, *Conoco Cited for 79 Environmental Violations*, DENVER POST, Nov. 19, 1992, at 1B.

¹⁹⁴ *Id.*

¹⁹⁵ *Sierra Club v. Colo. Refining Co.*, 852 F. Supp. 1476, 1477 (D. Colo. 1994).

¹⁹⁶ *Id.* at 1479.

In 1997, the EPA brought its own action against Conoco, claiming 78 violations of state hazardous waste laws.¹⁹⁷ The EPA was concerned with Colorado's failure to take "timely and adequate" action in response to the violations.¹⁹⁸ According to the EPA, the state had not taken adequate corrective action against Conoco, which had "allowed a variety of hazardous chemicals including acetone[] and trichloroethylene . . . to get into Commerce City facility's septic tanks and sewer systems," and instead "tried to send it off to Metro (Wastewater District) as non-hazardous waste."¹⁹⁹ In 2001, Conoco installed an underground wall to prevent further toxins from spreading to Sand Creek.²⁰⁰ By 2003, Suncor had fully taken over the Conoco refinery site,²⁰¹ which continues to be a major source of human and environmental harm.²⁰²

In 2018, a new concern emerged when PFAS chemicals were discovered in the groundwater flowing in Commerce City's drinking water supply.²⁰³ No single point or non-point source or industrial activity has been identified as the cause of PFAS chemical contamination in the shallow aquifers beneath Commerce City. Nevertheless, health officials surmised that the draining of fire suppressant systems at oil refineries, chemical waste from manufacturing plants, old landfills, and illegal liq-

¹⁹⁷ Robert Kowalski, *EPA Fines Firms After State Won't Agency Cities*, DENVER POST, Mar. 19, 1997, at A-01.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Sand Creek Cleanup Shows Heart*, DENVER POST, Sept. 13, 2004, at B-07; see Miller, *supra* note 169.

²⁰¹ *Commerce City Refinery*, SUNCOR, <https://perma.cc/WT2J-MV7W> (last visited Mar. 29, 2022).

²⁰² See Bruce Finley, *Suncor Refinery Accident Released 75,600 Pounds of Sulfur Dioxide, 150 Times Daily Limit*, DENVER POST (Oct. 31, 2016), <https://perma.cc/9UGZ-CXAN>; Bruce Finley, *Battle Over Suncor Oil Refinery Intensifies As State Weighs Permit Renewal, Metro Denver Residents Demand Closure*, DENVER POST (May 5, 2021), <https://perma.cc/ETV8-83NW>; Conrad Swanson, *Tighter Regulations for Suncor Refinery on the Way, Colorado Public Health Officials Say*, DENVER POST (Nov. 17, 2021), <https://perma.cc/SH7U-C4VL>; Michael Booth, *Colorado OKs Suncor Refinery's Plan to Fix Violations With \$12 Million in Emergency Shutoff Equipment*, COLO. SUN (May 24, 2021), <https://perma.cc/J7F7-43Y8>; Lucy Haggard, *Six Months After Historic Suncor Settlement, Community Around Commerce City Refinery Still Feels "Exploited"*, COLO. SUN (Sept. 14, 2020), <https://perma.cc/G4WZ-RHVS>; Michael Booth, *Colorado Must Decide "Without Delay" if It Will Renew Long-Delayed Suncor Permits, Judge Rules*, COLO. SUN (Jan. 18, 2022), <https://perma.cc/5AAM-M2VX>.

²⁰³ Bruce Finley, *North Metro Denver Groundwater Contaminated with PFCs Is Flowing into a Drinking-Water System That Supplies 50,000 Residents*, DENVER POST (July 12, 2018), <https://perma.cc/J5L9-NLBG>; *Minutes for the Board of Directors of the South Adams Co. Water & Sanitation District*, S. ADAMS CNTY. WATER & SANITATION DIST. 2 (Aug. 8, 2018), <https://perma.cc/KJT5-4A9J>; Press Release, South Adams Cnty. Water and Sanitation Dist., Perfluorinated Compounds Detected in Water Within the Quebec/1-270 Corridor (July 12, 2018) [hereinafter South Adams Cnty. Press Release].

uid waste dumping were all *likely* contributors. Despite concerns raised by area residents, government officials nevertheless maintained at the time that the district's treatment processes helped ensure that residents' "drinking water is safe."²⁰⁴

As this broad overview of the past patterns and contemporary reality of water injustice has shown, decades-long patterns and practices have amplified the environmental harm experienced by the American West's racially minoritized communities. Often ignored and rarely acknowledged, access to safe drinking water for these communities remains elusive. A primary reason has been the many ways the region's minoritized communities have been silenced, marginalized, and literally and figuratively boxed-in from the substantive connections between the environmental risk and patterns and practices of institutional racial discrimination in housing, health, employment, and governance. To be sure, government agencies with the best access to data, have repeatedly over the course of decades hid behind technical reports, lack of standards or regulatory authority, and provided inconsistent and or unconnected enforcement to prevent meaningful change from happening. The result is a "political Hydra that forestalls activism," because of the "tens of thousands of pages of bureaucratic language [that has] been bundled and re-bundled."²⁰⁵ Nevertheless, as the next two Sections will demonstrate, racially minoritized communities have emerging tools and new opportunities to mobilize and transform these long-standing patterns of water injustice.

III. "I WAS NO LONGER AFRAID OF THE INTELLECTUALS. I KNEW I COULD TELL A BETTER STORY."²⁰⁶

As a Brown Buffalo thinking and working about issues of environmental racism and water injustice in one of the nation's epicenters of water law, I have worked to connect, collaborate, and sometimes collide with key stakeholders through my Color of Colorado Water Law ("CCWL"), a project housed at the University of Denver's Interdiscipli-

²⁰⁴ South Adams Cnty. Press Release, *supra* note 203.

²⁰⁵ Cf. Caroline Tracey, *White Privilege and Gentrification in Denver, America's Favorite City*, GUARDIAN (July 14, 2016), <https://www.theguardian.com/cities/2016/jul/14/white-privilege-gentrification-denver-america-favourite-city>. Although describing a conglomerate of urban renewal projects linked to a massive highway redevelopment project in northeast Denver described later, the sentiment and experience captures the general frustration in the water justice context, as residents try to navigate overlapping laws, jurisdictions, and remedial plans.

²⁰⁶ ACOSTA, *supra* note 1, at 100.

nary Research Institute for the Study of (in)Equality (“IRISE”).²⁰⁷ Rooted in insights from community-engaged research and practice literature, the CCWL identifies and applies best practices that help local and state government authorities and institutions of higher education build effective and sustainable partnerships with underserved communities around water ownership, access, and sustainability. As government agencies across the United States grapple with how to meaningfully integrate environmental justice into existing regulatory laws and guidelines, CCWL’s insights on governance and civic engagement are applicable to a broad array of issues, including proposed developments, infrastructure projects, community safety and policing, access to affordable housing, and educational equity, to name a few.

This Part explores in greater detail community engagement and water justice activism in northeast Denver. I begin this Section by examining the legal and regulatory frameworks shaping water quality and the contemporary water justice movement. These frameworks, from lead pipe and PFAS chemical regulation to the Environmental Justice Act, provide some substantive protections and nascent pathways that can substantively integrate the voices and concerns of Denver’s minoritized communities. As discussed below, by systematically integrating the voices of racially minoritized communities, previously unaddressed questions about the colorblindness of water law in Colorado are starting to be acknowledged by legal and political actors. Lastly, this Part then looks at some community organizations which shape a water and climate justice ethos. Informed by the distinct needs of racially minoritized communities, these organizations are shaping the terms and conditions by which government agencies can bring about greater health, more substantive inclusion, and meaningful equity to the segregated and unequal landscapes of the metropolitan West.

a. Connecting Quantity and Quality Through Equity

In the American West, the ownership, management, and access to water rights has been largely disconnected from the management of water quality. As one report notes, “water *quantity* management primarily rests with state government; water *quality* management is largely directed by the federal government, but with significant implementation by state agencies.”²⁰⁸ In practice this means that water rights and water

²⁰⁷ See *The Color of Water in Colorado*, UNIV. OF DENVER INTERDISC. RSCH INST. FOR THE STUDY OF (IN)EQUALITY, <https://perma.cc/KPD9-QCLN> (last visited Apr. 25, 2022).

²⁰⁸ ADAM SCHEMP, ENV’T L. INST., AT THE CONFLUENCE OF THE CLEAN WATER ACT AND PRIOR APPROPRIATION: THE CHALLENGE AND THE WAYS FORWARD 1 (2013) (emphasis add-

quality “are governed by two distinct legal regimes and implemented by different and sometimes multiple institutions.”²⁰⁹

There are deeply rooted hydrological and human connections between the institutional and systemic inequalities perpetuated against racially minoritized communities and the ownership and ensuing access to water from highly divergent and sometimes polluted water sources. As we saw in the cases of Globeville and Commerce City above, or as the Flint water crisis demonstrates, where and in what ways a water utility builds its water portfolio and its water and treatment infrastructure is a significant issue for the health of a utility’s residents.²¹⁰ We also see these connections in how some states have started to more deliberately design local water law. For example, Virginia recently declared a human right to water making clear that people deserved priority over property.²¹¹ In California in late 2021, the State Water Resources Board passed a resolution that made explicit the link between water and structural racism “in creating inequities in affordability and access to clean and safe water and in the allocation and protection of water resources.”²¹²

As explored in Section II, the connection between water rights and water quality in Colorado and larger Western Water Law is more attenuated than some other states.²¹³ Most water utilities have largely focused their attention on their water rights portfolio, rather than on the quality of water delivered to their customers. The on-going problem of lead in the drinking supply, changes in federal regulations, and more recent lead mitigation efforts by water providers, however, have provided an opportunity for water utilities

The regulation of lead is a good example of how to develop water quality regulations because lead has long been a concern in the drinking water supply of all Americans. From industrial and commercial runoff

ed). To emphasize this fact, the report documents that outside of five states, water rights and water quality are housed in “separate entities.” *Id.* at 4.

²⁰⁹ Robert W. Adler, *Climate Change and the Hegemony of State Water Law*, 29 STAN. ENV’T L.J. 1, 26 (2010).

²¹⁰ See generally MICH. CIV. RTS. COMM’N, *supra* note 29.

²¹¹ See H.R.J. Res. 538, 2021 Gen. Assemb., Special Leg. Sess. (Va. 2021). One proponent of the measure noted that in contrast to California’s human right to water, the Virginia Law “goes beyond California’s as it not only recognizes water access as a human right, but also requires the state to prioritize domestic consumption of water over commercial and industrial uses, mitigate the impact of climate change on freshwater resources, and ensure water service disconnections do not impact the vulnerable populations.” Guest Contributor, *Virginia Aims to Declare Water a Human Right*, VA. HEALTH CATALYST: BLOG (Feb. 3, 2021), <https://perma.cc/4SJZ-49TM>.

²¹² CAL. STATE WATER RES. CONTROL BD., RESOLUTION NO. 2021-0050, at 2 (Nov. 16, 2021), <https://perma.cc/EL6Q-5FNM>.

²¹³ See *supra* notes 35-37 (comparing water law in Colorado and California).

of lead into the drinking water supply to the use of lead pipes in water infrastructure, lead contamination has long been on the minds of regulators, policy makers, and concerned citizens.²¹⁴ In 1991, the EPA first promulgated the lead and copper rule (“LCR”) to address lead contamination in drinking water.²¹⁵ The LCR imposes complex, detailed requirements regulating all aspects of lead and copper in many public water systems.²¹⁶ First, the LCR determines the number of samples that regulated system operators must collect based on the number of people they serve and the frequency with which they sample.²¹⁷ Second, the LCR requires that systems prioritize high-risk sites for monitoring.²¹⁸ High-risk sites are usually single-family homes either containing copper pipes with lead solder and built after 1982, or those supplied by lead service lines (“LSLs”).²¹⁹ A system’s sampling pool must comprise as many high-risk sites as possible, and systems with LSLs must collect 50% of their samples from sites with LSLs.²²⁰ Third, and finally, the LCR determines compliance procedures when a system’s lead and copper action levels are exceeded.²²¹

Under Colorado law, the required responses to elevated lead levels escalate based on how far the lead levels are beyond the limit. First, systems must distribute public education materials to all their customers.²²² Second, water utilities must recommend optimal corrosion control treatment (“OCCT”) to the Colorado Department of Public Health and

²¹⁴ See Richard P. Maas et al., *Reducing Lead Exposure from Drinking Water: Recent History and Current Status*, 120 PUB. HEALTH REP., May-June 2005, at 316-18; Lawrence O. Gostin, *Lead in the Water: A Tale of Social and Environmental Injustice*, 315 JAMA F. 2053, 2053-54 (2016).

²¹⁵ See 72 Fed. Reg. 57,782, 57,784 (Oct. 10, 2007) (promulgated in 40 C.F.R. pt. 23.7) (indicating that under the Safer Drinking Water Act (“SWDA”), the primary enforcement responsibility for the LCR is the state); see also COLO. REV. STAT. § 25-8-202(1); 5 COLO. CODE REGS. §§ 1002-11:11.26, -11:11.54, -11:11.56 (demonstrating that with the exception of amendments in 2009 driven by recent federal rule changes and non-substantive edits in 2014, Colorado’s LCR remains largely unchanged since its initial promulgation).

²¹⁶ See generally 5 COLO. CODE REGS. § 1002-11:11.26 (2021).

²¹⁷ *Id.* § 1002-11:11.26(2)(d), Table 11.26-IV.

²¹⁸ See *id.* § 1002-11.26(2)(a)(i), Table 11.26-I.

²¹⁹ See *id.*

²²⁰ See *id.* § 1002-11:11.26(2)(a)(iii), (v).

²²¹ *Id.* § 1002-11:11.26(2)(b)(i), (d)(v) (indicating that action levels are based on the ninetieth percentile of all sample results, and that the action level for lead is 15 parts per billion (“ppb”).)

²²² See *id.* § 1002-11:11.26(7)(b) (mandating that among other requirements public education materials notify consumers of the elevated lead levels, describe the health effects of lead, and discuss how consumers can reduce their exposure).

Environment's Water Quality Control Division's ("WQCD").²²³ Third, the WQCD either requires additional corrosion control studies, or approves the recommendation, designates it as an OCCT, and requires implementation of the treatment within no more than two years.²²⁴

The LCCR was first applied to the Denver Metropolitan Area's largest and most dominant water distributor, Denver Water, in 1995, but it was not until 2012 that the water utility reported its first lead action level exceedance.²²⁵ The actions undertaken by Denver Water in subsequent years would highlight both the challenges and opportunities of responding as quickly and as affordably as possible to its most vulnerable and racially minoritized communities.

Following their 2012 exceedance, WQCD sent Denver Water a letter outlining most of its requirements under the LCR,²²⁶ yet the WQCD delayed any determination on next steps²²⁷ until the water provider submitted a "corrosion control treatment plan" evaluating its existing treatment and any "potential chemical changes needed to reduce water corrosivity in the drinking water distribution system."²²⁸ While WQCD initially asked Denver Water to take a "phased approach,"²²⁹ later, in March 2014, WQCD required Denver Water to perform further studies to evaluate alternative corrosion control strategies, a determination that was consistent with the water utility's own recommendations.²³⁰

Despite initially being on the same page, for the next six years Denver Water and WQCD disagreed over the course the water utility should take to mitigate its lead exceedance levels. While the utility recommended a pH adjustment as the optimal corrosion control treatment,

²²³ *Id.* § 1002-11:11.26(3)(c)(i), (1)(j) (explaining that OCCT is "treatment that minimizes the lead and copper concentrations at consumers' taps" without violating other provisions of Colorado's drinking water regulations).

²²⁴ *See id.* § 1002-11:11.26(3)(c)(ii), (6)(a) (explaining that while OCCT cannot be LSLs removal and replacement in response to a system's first lead action level exceedance, if systems continue to exceed the lead action level after installing OCCT, they must replace LSLs).

²²⁵ DENVER WATER, LEAD AND COPPER RULE PILOT STUDY: PILOTING OBJECTIVES AND PROTOCOL REPORT 1, 3 (2014) [hereinafter PILOT STUDY]; *see also* Letter from Ron Falco, Safe Drinking Water Program Manager, WQCD to Zeke Campbell, Manager of Water Quality & Env't Compliance, Denver Water (Dec. 21, 2012) (on file with author) [hereinafter Letter from Ron Falco].

²²⁶ Letter from Sharon Williams, Unit Manager, WQCD to Zeke Campbell, Manager of Water Quality & Env't Compliance, Denver Water 1-2 (Sept. 14, 2012) (on file with author).

²²⁷ *See id.* at 2.

²²⁸ Letter from Ron Falco, *supra* note 225, at 1.

²²⁹ *Id.* at 2.

²³⁰ Letter from Ron Falco, Safe Drinking Water Program Manager, WQCD to Zeke Campbell, Dir. of Water Quality & Treatment, Denver Water 1-2 (Mar. 5, 2014) (on file with author).

the WQCD wanted Denver Water to use a phosphate-based inhibitor to achieve lead reductions.²³¹ Denver Water preferred pH adjustment over phosphate because of “current and future disadvantages associated with” phosphate, including adverse environmental impacts.²³² In addition, Denver Water believed that it could implement pH adjustment sooner and more affordably, which could help accelerate LSLs removal.²³³ A number of wastewater facilities and watershed groups also expressed concerns about phosphate treatment, such as increased treatment costs and negative environmental effects.²³⁴ Though a highly technical disagreement, this example illustrates some of the real life implications in both the speed and costs that would be borne by Denver Water users based on seemingly minor decisions made by water utilities.

The back and forth between Denver Water and the WQCD would continue for over a year until March 2018, when WQCD designated phosphate treatment as the preferred optimal corrosion control treatment and required that Denver Water complete installation by March 2020.²³⁵ The utility formally appealed the mandate to the Water Quality Control Commission (“WQCC”),²³⁶ but before the agency could render judgment, Denver Water and WQCD entered a memorandum of understanding (“MOU”). In the MOU, they agreed to a stay of the proceedings while they engaged stakeholders from the drinking water, wastewater, and watershed communities to design a workable solution for the optimal corrosion control treatment.²³⁷ The MOU described separate stakeholder efforts for drinking water and wastewater issues, each of which comprised technical working groups and a larger stakeholder group

²³¹ RYAN WALSH, DENVER WATER, OPTIMAL CORROSION CONTROL TREATMENT REPORT 3 (2017) [hereinafter OCCT REPORT] (featuring WQCD evidence that a phosphate-based inhibitor achieved lead reductions between 6% and 39% greater than pH adjustment).

²³² *Id.*

²³³ *Id.* at 2-4.

²³⁴ See *id.* at App’x 106-15 (containing statements from Littleton/Englewood Wastewater Treatment Plant and Barr Lake and Milton Reservoir Watershed Ass’n); see also Letter from Stephanie Piko, Chair, Cherry Creek Basin Water Quality Auth., to Pat Pfaltzgraff, Dir., WQCD (Mar. 20, 2018) (on file with author); Letter from Ronda Sandquist, Attorney, Brownstein Hyatt Farber Schreck, to Comm’rs, WQCC (Feb. 28, 2018) (on file with author); Letter from Kipp Scott, Water Systems Manager, South Adams Cty. Water and Sanitation Dist., to Ryan Walsh, Eng’g Div., Denver Water (Aug. 23, 2017) (on file with author).

²³⁵ Letter from Ron Falco, Safe Drinking Water Program Manager, WQCD, to Fred Sanchez, Denver Water 1, 3 (Mar. 20, 2018) (on file with author).

²³⁶ Request for Hearing and Stay, *In re* Denver Water (Colo. WQCD Apr. 19, 2018); Order Denying Hearing and Stay, *In re* Denver Water (Colo. WQCD Apr. 30, 2018); Notice of Appeal, *In re* Denver Water (WQCD May 30, 2018).

²³⁷ Memorandum from Denver Water to WQCD 2 (July 18, 2018) (on file with author).

open to the public.²³⁸ WQCC granted the initial stay as well as four extensions from 2019 through early 2020 while the stakeholder efforts proceeded.²³⁹

The objective of the stakeholder process was “to explore whether alternative approaches [to phosphate treatment] might be as or more effective at reducing lead exposure while also reducing the potential adverse impacts associated with [phosphate].”²⁴⁰ The stakeholders explored a variety of issues related to phosphate treatment, including: potential impacts to wastewater treatment plants, watersheds, and drinking water quality; whether alternative methods of reducing phosphorus loading could mitigate Denver Water’s additions of phosphate; and possible impacts to drinking water quality associated with changing between corrosion control treatment methods.²⁴¹ Denver Water focused its efforts on investigating three treatment strategies as alternatives to phosphate treatment: (1) using a lower dose of phosphate; (2) increasing pH adjustment, similar to Denver Water’s original recommendation; and (3) combining pH adjustment with LSLs removal and a filter program.²⁴²

Denver Water’s studies revealed that neither a significantly lower dose of phosphate alone, nor in combination with an increased pH adjustment could achieve lead reductions equivalent to the version of phosphate treatment that WQCD designated as their optimal corrosion control treatment.²⁴³ However, Denver Water concluded that a multifaceted treatment approach could be similarly successful.²⁴⁴ Under this plan, pH adjustment throughout the system and the use of filters in at-risk homes would significantly reduce lead concentrations in the short-term, giving Denver Water the time it needs to implement its permanent solution: removing all LSLs in its system.²⁴⁵

Based on these results, Denver Water conceived a plan for the LRP. This “holistic and permanent lead reduction approach” comprised five main elements: (1) an outreach and education program; (2) an LSLs inventory to help target areas for replacement; (3) a filter program to provide filters to at-risk homes; (4) removal of all LSLs within 15 years;

²³⁸ *Id.* at 3-5.

²³⁹ Order Granting Joint Stipulation for Dismissal Without Prejudice, Designation and Installation of Optimal Corrosion Control Treatment, *In re Denver Water 1-2* (Colo. WQCD Feb. 24, 2020) [hereinafter Order Granting Joint Stipulation].

²⁴⁰ DENVER WATER, LEAD REDUCTION PROGRAM PLAN 21 (2019).

²⁴¹ *See id.* at 23.

²⁴² *Id.*

²⁴³ *Id.* at 24-25.

²⁴⁴ *Id.* at 35-36.

²⁴⁵ *Id.* at 35-36, 39-40.

and (5) pH adjustment for corrosion control.²⁴⁶ The LRP plan also explicitly incorporated health equity and environmental justice principles (“HEEJ”), such as prioritizing areas with the greatest risk of lead exposure for LSL removal, ensuring that outreach materials were available in appropriate languages and formats, and partnering with local, community-based organizations.²⁴⁷

Two rounds of public comments evinced overwhelming community support for Denver Water’s LRP.²⁴⁸ Denver Water then submitted the LRP to the EPA.²⁴⁹ Before the EPA responded, the WQCD approved the LRP on the condition that EPA grant the variance request.²⁵⁰ EPA issued its approval in December 2019, listing all five elements of the LRP as terms and conditions of the variance and adding technical and outreach-based compliance measures, including reports on activities to address HEEJ-related concerns.²⁵¹ The variance became effective on January 1, 2020 and will expire three-and-a-half years from that date.²⁵² At that time, the EPA can grant up to a 12-year extension upon request if Denver Water has complied with the variance and can demonstrate the overall effectiveness of the LRP.²⁵³

These efforts ultimately resolved the issues without adjudication, and WQCD granted the parties’ joint stipulation for dismissal in February 2020.²⁵⁴ In 2020, Denver Water removed 5,287 LSLs, exceeding its annual requirement by more than 800.²⁵⁵ Denver Water also began installing pH adjustments in early 2020, and lead levels were significantly lower in 2020 than in 2019.²⁵⁶ In addition, a survey revealed that 80% of

²⁴⁶ See *id.* at 41.

²⁴⁷ *Id.* at 76-79.

²⁴⁸ DENVER WATER, LEAD REDUCTION PROGRAM PLAN APPENDIX I.A - PUBLIC COMMENT FORM RESPONSES 8 (2019).

²⁴⁹ See Variance Under SDWA § 1415(a)(3), *In re* Denver Water, Colo. 2 (Dec. 16, 2019) [hereinafter Variance Order]. Denver Water submitted this as a request for a variance to the SDWA, as the LRP would not meet the regulatory definition of OCCT. *Id.* The EPA can “grant a variance from any treatment technique requirement” under certain circumstances. *Id.* at 1.

²⁵⁰ Letter from Patrick Pfaltzgraff, Director, WQCD to Nicole Poncelet-Johnson and Denver Water, at 1 (Nov. 15, 2019) (on file with author).

²⁵¹ Variance Order, *supra* note 249, at 2, 9-17, 20.

²⁵² *Id.* at 7, 19.

²⁵³ *Id.* at 2, 18.

²⁵⁴ Order Granting Joint Stipulation, *supra* note 239, at 2.

²⁵⁵ DENVER WATER, DENVER WATER LEAD REDUCTION PLAN ANNUAL REPORT - 2020, 7 (2020).

²⁵⁶ See *id.* at 7, 9 n.1.

customers used the filters Denver Water had distributed for drinking, cooking, and preparing formula for infants.²⁵⁷

Denver Water's report for the first half of 2021 shows that lead levels remain low.²⁵⁸ Also, Denver Water has removed an additional 2,117 LSLs since 2020 and continues to refine its LSLs inventory.²⁵⁹ In addition, Denver Water conducted a bilingual community meeting, held stakeholder advisory meetings, and publicized the LRP through news media and social media.²⁶⁰ Finally, the report summarizes Denver Water's recent activities related to HEEJ issues, which included working with community organizations to promote the LRP among Black, Asian Pacific Islander, and Latinx communities,²⁶¹ holding training and education events for childcare providers,²⁶² and incorporating sociodemographic factors, such as income, minoritized status, and age into its LSLs removal prioritization scheme.²⁶³

The operationalization of the LCR and the specific efforts to engage Denver Water's racially minoritized communities has proved to be an exception, rather than the rule, among the more than 2,000 water utilities serving Colorado's diverse citizenry. In most cases, reporting on lead exceedances is hard to find, and little to no information exists on how many, if any, lead pipes in public water systems have been replaced. There have also been few efforts to engage minoritized communities with any information beyond the broader efforts of state agencies and bureaucrats described below.

Indeed, 2020 was a watershed moment in Colorado. The state legislature passed a series of measures in 2020 and 2021 that center environmental justice in the work of state agencies. Adopted against the backdrop of the world-wide protests against the pandemic of racial violence and related institutional forms of racism and inequality (reflected locally in the protests to the death of Elijah McClain in the summer 2020), these measures are a tangible commitment for public agencies to bring color-consciousness to their work.²⁶⁴

²⁵⁷ The filters were effective, with a ninetieth percentile of 2.4 ppb among samples from filtered homes. *Id.* at 7.

²⁵⁸ See DENVER WATER, DENVER WATER LEAD REDUCTION PROGRAM SEMI-ANNUAL REPORT - S1 2021, at 15 (2021) (listing lead concentration of 1.3 ppb, well below the Lead and Copper Rule 15 ppb action level).

²⁵⁹ *Id.* at 24-25.

²⁶⁰ *Id.* at 49.

²⁶¹ See *id.* at 58-60.

²⁶² *Id.* at 62.

²⁶³ See *id.* at 63.

²⁶⁴ See Sam Tabachink, *Thousands Gather in Aurora to Protest Elijah McClain's Death; Tensions Rise as Evening Falls*, DENVER POST, <https://perma.cc/UW6B-7CDX> (June 27,

The first of these measures required high-polluting facilities—located in close proximity to communities of color—to install fence line monitoring systems capable of measuring dangerous air toxins in real time.²⁶⁵ The measure also required the facilities to promptly make data generated from these systems available to the public and to notify communities when spikes in toxic pollution occur. The second measure created a new “environmental justice and equity branch” within the Department of Transportation to work with disproportionately impacted communities during the development of transportation projects.²⁶⁶

However, the culminating piece of legislation was the Environmental Justice Act (“EJ Act”) signed into law July 2, 2021.²⁶⁷ The Act declares “[a]ll people have the right to breathe clean air, drink clean water, participate freely in decisions that affect their environments, live free of dangerous levels of toxic pollution, experience equal protection provided by environmental policies, and share the benefits of a prosperous and vibrant pollution-free economy.”²⁶⁸ Most prominently, the EJ Act declares that “communities with residents who are *Black, Indigenous, Latino, or people of color* have faced centuries of genocide, environmental racism, and predatory extraction practices,”²⁶⁹ further acknowledging that, in Colorado, such communities have historically been forced to disproportionately bear the burden of the environmental harm resulting from human activity.²⁷⁰

Among its many provisions, the EJ Act has two that are important to highlight. First, the law identifies four specific categories of communities that are “disproportionately impacted.” These are communities (1) where greater than 40% of households are low income;²⁷¹ (2) where more than 40% of households self-identify as racially minoritized; (3) where greater than 40% of households are cost-burdened;²⁷² or (4) that are otherwise identified and approved by a state agency because “[t]he community has a history of environmental racism” or “[t]he community is one where multiple factors, including socioeconomic stressors” and

2020, 11:44 PM); Kenya Evelyn, *Elijah McLain: Police Use Pepper Spray to Disperse Violin Vigil*, GUARDIAN (June 29, 2020, 3:29 PM), <https://perma.cc/MXS6-7689>.

²⁶⁵ H.B. 21-1189, 73d Gen. Assemb., 1st Reg. Sess. (Colo. 2021).

²⁶⁶ S.B. 21-260, 73d Gen. Assemb., 1st Reg. Sess. § 2 (Colo. 2021).

²⁶⁷ H.B. 21-1266, 73d Gen. Assemb., 1st Reg. Sess. (Colo. 2021).

²⁶⁸ *Id.* at § 2(1)(a)(I).

²⁶⁹ *Id.* at § 2(1)(a)(III) (emphasis added).

²⁷⁰ *Id.* at § 2(1)(a)(II).

²⁷¹ “Low income” households are those in which the “median household income is less than or equal to two hundred percent of the federal poverty guideline.” *Id.* at § 3(2)(b)(II).

²⁷² “Cost-burdened” households are those that spend more than 30% of their income on housing. *Id.*

vulnerability, contribute to persistent disparities.²⁷³ Communities are evaluated as census block groups “in accordance with the most recent United States Census.”²⁷⁴ Second, the EJ Act creates an environmental justice Action Task Force and Advisory Board consisting of disproportionately impacted communities, racial justice organizations, and representation from CDPHE.²⁷⁵ The mission of the Task Force is “to propose recommendations to the general assembly regarding practical means of addressing environmental inequities.”²⁷⁶

The Action Task Force also must consider proposing recommendations for a state agency-wide environmental justice strategy and plan to implement it including: (1) recommendations for the creation and implementation of equity analysis into all significant planning, rulemaking, adjudications, and policy decision-making; (2) promulgation of a requirement that agencies prepare an environmental equity analysis for any state action that has the potential to cause negative environmental or public health impacts to a disproportionately impacted community; (3) a potential requirement that any state action that may cause adverse environmental or public health impact to a disproportionately impacted community be avoided or minimized; (4) a potential requirement that permits must be issued and renewed only after an environmental equity analysis determines that the permit or renewal is sufficient to ensure, to a reasonable certainty, that any harm to the health of disproportionately impacted communities is either avoided or minimized; and (5) adoption of a plan that addresses the lack of data sharing between state agencies.²⁷⁷

In addition to the Task Force, an Environmental Justice volunteer Advisory Board was established in 2021 and contains a diverse and impressive collection of racial justice advocates, community members, and equity minded government bureaucrats.²⁷⁸ The Advisory Board is charged with developing a public complaint process for environmental concerns affecting disproportionately impacted communities, making recommendations on adverse environmental effects referred to the state agency, advising on policies and practices for effective community en-

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ COLO. REV. STAT. § 25-1-133 (2021).

²⁷⁶ *Id.* § (d)(2).

²⁷⁷ *Id.* § (3).

²⁷⁸ See *Environmental Justice*, COLO. DEP'T OF PUB. HEALTH & ENV'T, <https://perma.cc/NEW6-YVJN> (last visited April 23, 2022); see also Catie Cheshire, *Environmental Justice Advisory Board Wants Colorado to Lead on Climate Policy*, WESTWORD (Jan. 8, 2022, 5:28 AM), <https://www.westword.com/news/colorado-environmental-justice-climate-policy-13172854>.

gagement, and administering a grant program for the mitigation of environmental harm.²⁷⁹ One of the board members, Dr. David Rojas-Rueda, notes the importance of collecting better and more relevant information on the state's racially minoritized communities: "Data is something that is very relevant to make better decisions, but we don't have all the data that we probably wish to have So there are certain limitations without the evidence and data."²⁸⁰ As part of his work with the board and the CDPHE, Rojas-Rueda "plans to release a map of the state that will show common health outcomes, socioeconomic indicators and environmental exposures at the census-block level for the entire state."²⁸¹ These maps, according to Rojas-Rueda, are a tool that "will help us also to identify where air pollution is more an issue, where water quality is more an issue, where other types of facilities are more an issue."²⁸²

Despite these positive developments, there remains a large question about how the EJ Act will actually apply to water issues impacting the state's racially minoritized communities. One immediate issue concerns the PFAS contamination that opened this article.²⁸³ After four years of community upheaval and advocacy, in 2020 Colorado's Water Quality Control Commission enacted a policy to limit PFAS discharge.²⁸⁴ Additionally, the Colorado General Assembly passed three bills between 2019 and 2020 to address the harms caused by PFAS. Two of the bills created and amended laws to more strictly regulate the use, storage, and distribution of PFAS-containing firefighting foam.²⁸⁵ The third created a takeback program to collect fees from fuel transport and use them to study PFAS in firefighting foam and provide emergency response when incidents arise.²⁸⁶

The CDPHE and the CWQCD are now promising tough new regulation against the Suncor oil refinery in Commerce City,²⁸⁷ and a draft water quality permit renewal for the Suncor Refinery was open for pub-

²⁷⁹ COLO. REV. STAT. § 25-1-134(2) (2021).

²⁸⁰ Cheshire, *supra* note 278.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ See *supra* notes 2-12 and accompanying text.

²⁸⁴ See Sam Brasch, *Colorado Water Officials Create First-Ever Regulations for 'Forever Chemical' PFAS*, CPR NEWS (July 14, 2020, 6:04 PM), <https://perma.cc/82AP-5K6V>.

²⁸⁵ See H.B. 19-1279, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019) (creating laws to further regulate Class B firefighting foam); H.B. 20-1119, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020) (amending H.B. 19-1279 to provide clarity and further regulation).

²⁸⁶ See S.B. 20-218, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020).

²⁸⁷ Michael Booth, *Colorado Issues Tough New Draft Rules on Suncor to Limit Runoff of Dangerous "Forever Chemicals" into Water*, COLO. SUN (Nov. 16, 2021, 9:15 AM), <https://perma.cc/98JE-HJ33>.

lic comment until early 2022.²⁸⁸ The draft permit is significant because it would require, for the first time, that Suncor monitor for PFAS weekly at its process water outfalls, and monthly at its stormwater outfalls.²⁸⁹ More importantly, the permit would limit discharge of PFOA, PFOS, and other PFASs.²⁹⁰ The proposed limits are based on the WQCC's PFAS limits implemented in July 2020.²⁹¹ Put simply, the draft permit is viewed as a win by community members, climate justice activists, and government officials alike.²⁹²

While the draft permit perhaps marks the first major effort by the Colorado government to regulate PFAS discharge at a particular facility, the EJ Act could ultimately result in the state making similar regulations apply more widely.²⁹³ If the environmental justice task force develops recommendations adopted by the state legislature that require environmental equity analysis for effluent discharge permit renewal, the monitoring and regulating of PFAS levels could be mandatory where necessary “to ensure, to a reasonable certainty, that any harm to the health and environment of disproportionately impacted communities” is either avoided or mitigated.²⁹⁴

However, one remaining concern even with PFAS regulation is how the hefty price of remedying water contamination issues frequently falls on racially minoritized communities, even when the polluter responsible can be clearly linked to the environmental harm. Such has been the case for the city of Fountain. While the Air Force provided funding for the treatment facilities necessary to filter the harmful chemicals out of El Paso water supplies, other costs associated with finding alternative water rights and associated infrastructure have primarily fallen on the El Paso communities of Fountain, Security, and Widefield.²⁹⁵

²⁸⁸ *Id.*

²⁸⁹ *See id.*; *Draft Water Quality Permit Renewal: Suncor Refinery*, COLO. DEP'T. PUB. HEALTH & ENV'T. (Nov. 16, 2021), <https://perma.cc/G29W-A9ER> [hereinafter *Draft Water Quality Permit Renewal*].

²⁹⁰ *Draft Water Quality Permit Renewal*, *supra* note 289.

²⁹¹ *Id.* (discussing WQCC's Policy 20-1); *see generally* Colo. Water Quality Control Comm'n, Policy 20-1: Policy for Interpreting the Narrative Water Quality Standards for Per- and Polyfluoroalkyl Substances (PFAS) (July 14, 2020) (to be codified at 5 COLO. CODE REGS. 1002-31 § 31.11(1)(a)(iv), 5 COLO. CODE REGS. 1002-41 § 41.5(A)(1)).

²⁹² Booth, *supra* note 287.

²⁹³ *See* COLO. REV. STAT. § 25-1-133(3) (2021) (providing the Environmental Justice Task Force authority to make state-wide recommendations, including programming and policy decision making).

²⁹⁴ *See id.* § (3)(a)(IV).

²⁹⁵ Cloud, *supra* note 2 (“[T]he Air Force agreed to pay for treatment facilities for all three communities Air Force officials, however, would not agree to reimburse the three communities for the annual cost of operating the plants.”). According to the district manager of Security's Water District “they had to find a new source of water for their customers, a

The military refused to help pay the substantial annual cost needed to operate the treatment facilities, forcing Fountain to “raise water rates by 5.4% in 2016 and 4.3% [in 2017]” so it could purchase water to replace supply from now-shutdown wells.²⁹⁶ Outside of class action litigation, neither the EJ Act nor any recent legislation currently address the issue of cost.

However, one additional potential point of connection in the EJ Act to water justice might be found in the Colorado Water Conservation Board’s (“CWCB”) creation of the Water Equity Task Force in March 2021. As the state agency charged to “conserve, develop, protect and manage Colorado’s water for present and future generations,” CWCB has an important institutional role in balancing and growing water rights for a variety of different users in the state.²⁹⁷ In 2015, the CWCB developed the first comprehensive water plan for the state in order to “preserve our water values of a productive economy, vibrant and sustainable cities, productive agriculture, a strong environment, and a robust recreation industry.”²⁹⁸ However, though CWCB sought broad community-based input, its plan did not address issues of racial disparities or other social inequities, outside of the usual dichotomies found in western water law and policy (e.g. urban versus rural).

The Water Equity Task Force of the CWCB was ostensibly created to “better understand existing equity, diversity and inclusivity challenges related to Colorado water issues” as connected to the state’s larger water planning.²⁹⁹ This group intends to be more proactive in ensuring diverse representation from around the state, including two tribal representatives from Colorado’s two federally recognized tribes, the Ute Mountain Ute and Southern Ute.³⁰⁰ In this vein, an opportunity exists to meaningfully connect larger water rights and water quantity issues with

complicated process which involved the construction of a mile-long pipeline to buy water from Colorado Springs. The cost of the pipeline and the first two years of water set the district back \$6 million.” Dan Boyce, *Despite a \$50M Cleanup, Residents Still Bear the Costs of Peterson AFB’s Water Contamination*, CPR NEWS (July 31, 2019), <https://perma.cc/4E56-2SC4>.

²⁹⁶ Cloud, *supra* note 2.

²⁹⁷ *About Us*, COLO. WATER CONSERVATION BD., <https://perma.cc/2XDR-R3LH> (last visited April 6, 2022).

²⁹⁸ *See About the Water Plan*, COLO. WATER CONSERVATION BD., <https://perma.cc/TN4Z-XP6F> (last visited Apr. 6, 2022); Colo. Exec. Order No. 2013-005 (May 14, 2003).

²⁹⁹ Willow Cozzens et al., *Recommendations to Better Incorporate Diversity, Equity and Inclusion in Colorado Water*, Water Edu. Colo. (June 16, 2021), <https://perma.cc/7YT9-ZU8F>.

³⁰⁰ *Colorado Establishes Water Equity Task Force*, COLO. WATER CONSERVATION BD. (Mar. 12, 2021), <https://perma.cc/G55P-YLAP>.

those of water quality and safe drinking water supply infrastructure as part of the 2022 (revised) Colorado Water Plan.

b. Towards Justice

Organizers in Denver's northeast neighborhoods, including Globeville and Commerce City, have long mobilized residents to address environmental injustice and systemic patterns of inequity impacting their communities. As early as the 1940s, police were called to a city council meeting to silence opposition by nearly 600 Northeast Denver protesters who rallied to challenge the construction of an interstate highway that would eventually split the community in two.³⁰¹

Residents have also mobilized around water justice. In 1991, 576 current and former residents of Globeville filed a class action lawsuit against ASARCO.³⁰² As detailed above, a jury found ASARCO liable for negligently disposing arsenic and cadmium. The residents were awarded \$28,125,000, and ASARCO was ordered to do additional remedial work.³⁰³ In 1993, the Sierra Club sued the Colorado Refining Co. under the Clean Water Act for discharging toxins into Sand Creek.³⁰⁴ The lawsuit included studies showing how in 1978, large amounts of petroleum products were found in the groundwater under the facility caused by past oil leakages and spills from both refineries.³⁰⁵

Today, community advocacy more intentionally connects socioeconomic and climate injustice. As part of a clear, overarching racial justice agenda, organizations directly link climate justice to educational, health, housing, employment, and civil rights efforts—something that has not been well-articulated in previous community-based advocacy efforts. What follows is a brief overview of emerging contemporary grassroots organizations that center water and water-related issues (such as food insecurity and health inequity) as part of larger racial justice efforts.

(i) Colorado People's Alliance

In 2015, the Colorado People's Alliance ("COPA") was formed as the result of a merger between two previously separate Denver environmental/socio-economic justice groups known as Rights for all Peo-

³⁰¹ See Carol McKinley, *The Promise of an Interstate Highway Through Denver in the 1960s Tore Apart Community*, DENVER GAZETTE (Jan. 10, 2021), <https://perma.cc/EJ8P-HMGJ>.

³⁰² MARR & MORRIS, *supra* note 127, at 278.

³⁰³ *Id.*

³⁰⁴ *Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476, 1477-80 (D. Colo. 1994).

³⁰⁵ See *id.* at 1479.

ple (“RAP”) and Colorado Progressive Coalition (“CPC”).³⁰⁶ RAP was founded in 1995 by a group of attorneys and activists in response to anti-immigrant attitudes in Colorado, and CPC was founded in 1996 to organize for progressive change in Colorado.³⁰⁷ Over the years, both CPC and RAP tackled issues in “immigrant rights, health care access, transportation access, payday-lending reform, minimum wage, [and] police accountability.”³⁰⁸ COPA’s mission, in turn, is to “build[] power to improve the lives of all Coloradans through leadership development, organizing and alliance building.”³⁰⁹

Water justice emerged as a major concern of COPA’s constituency after COPA knocked on over 1,613 doors in 2017 to gather data about neighborhood concerns in Commerce City and Montbello.³¹⁰ Community members shared worries about their drinking water and 49% of those surveyed reported water issues.³¹¹ This led COPA to begin working with its community on solutions to increase access to safe drinking water.³¹² The fruits of those efforts include COPA’s successful attempt to lobby for, and secure the passage of, clean air and water bills.³¹³ Currently, COPA is collaborating with the Color of Water in Colorado Project to map the impact of lead in the state’s public school and daycare water systems.³¹⁴

(ii) Cultivando

Another community-led organization fighting for climate justice in Northeast Denver is Cultivando. It was established in 1998 and is 100% Latinx lead.³¹⁵ Cultivando is a leadership and advocacy organization that

³⁰⁶ See *Mission, History, and Partners*, COLO. PEOPLE’S ALL., <https://perma.cc/KP88-BQFB> (last visited Apr. 14, 2022).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ COLO. PEOPLE’S ALL., 2017 Annual Report 3 (2017).

³¹¹ *Id.*

³¹² *Id.*

³¹³ See *Climate Justice*, COLO. PEOPLE’S ALL., <https://perma.cc/7VZ9-Q89S> (last visited Apr. 26, 2022); *The THRIVE Agenda*, GREEN NEW DEAL NETWORK, <https://perma.cc/8KAS-6MBC> (last visited Apr. 26, 2022); see also H.B. 20-1143, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020) (increasing the daily violation fines on corporate polluters contaminating Northeast Denver’s air and water and requiring polluting corporations to send notifications to the community when their emissions lead to dangerous air quality levels); S.B. 20-204, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020) (increasing funding for the Colorado Department of Health and Environment (“CDPHE”) to assess air quality data).

³¹⁴ *The Color of Water in Colorado*, INTERDISC. RSCH. INST. FOR THE STUDY OF (IN)EQUALITY, <https://operations.du.edu/irise/color-water-colorado> (last visited Jul. 4, 2022).

³¹⁵ Alanna Romans, *March 2019 Partner Spotlight of the Month: Cultivando!*, URB. LAND CONSERVANCY (Mar. 29, 2019), <https://perma.cc/XK8H-P4QQ>.

works within the northeast Denver metropolitan area, primarily in Commerce City and Adams County.³¹⁶ The organization builds strong leaders and advocates on many climate justice issues, including healthy food options, food insecurity, access to outdoor recreational facilities, and clean air.³¹⁷

Part of Cultivando's mission is to train the community to have a more proactive role in local governance. Under its "Promotora" program, Cultivando develops community members to have a culturally relevant and defined influence on local systems and policy changes. Olga Gonzalez, Executive Director at Cultivando, stated that Cultivando specifically employs this community-led approach because: "We believe that our community members are leaders, and that they do have a voice . . . [and] we ensure their voices are heard and that community members who are most directly impacted by disparities are at those tables where their voice needs to be heard."³¹⁸

In one example of its impact, the state granted Cultivando \$1.7 million as part of a settlement with Suncor to help "resolve several violations of air-pollution regulations dating back to 2017."³¹⁹ Part of the settlement money was reserved for community programming and there Gonzales noted the importance of surfacing the stories and concerns directly from the area's Latinx residents: "You hear stories from community members that say their children had headaches, and problems

³¹⁶ *Id.*; see Foster-Frau, *supra* note 177 (noting that Olga Gonzalez and Cultivando's work in Adams County has been cited as a "glimpse of America's [racial] future").

³¹⁷ See generally *Programs*, CULTIVANDO, <https://perma.cc/3GAD-R2WL> (last visited Apr. 26, 2022). Cultivando has been a leader in promoting clean air policy and programs for Northeast Denver residents. Cultivando's A.I.R.E. (Air Quality Investigation and Research for Equity) is a "yearlong, community-based research project" to monitor poor air quality in the Commerce City, Globeville, Elyria-Swansea communities. This program involves home based air monitoring and health surveys, designed to provide Cultivando with necessary information "to bring awareness, education, unity, and action . . . due to toxic air pollution from Suncor." *Cultivando A.I.R.E.*, CULTIVANDO, <https://perma.cc/E4JP-X3SU> (last visited Apr. 26, 2022). Cultivando was also awarded \$1.7 million in grant money for their development and implementation of a plan to place air monitors around the Suncor refinery after Northeast Denver Citizens settled with Suncor in 2020 for violations of air pollution regulations. See Sloan Dickey, *Community Environmental Group Selected to Monitor Suncor Oil Refinery with \$1.7 Million Grant*, DENVER7, <https://www.thedenverchannel.com/news/local-news/community-environmental-group-selected-to-monitor-suncor-oil-refinery-with-1-7-million-grant> (last updated Apr. 23, 2021, 1:16 AM). Some of the data collection for this work is being done in partnership with the University of Denver Sturm College of Law's Environmental Clinic.

³¹⁸ Romans, *supra* note 315.

³¹⁹ Foster-Frau, *supra* note 177, at 5. In her article, Foster-Frau notes "one instance that still haunts local memory . . . [was when] the refinery emitted a billowing orange cloud that settled like fine mist on top of cars and homes," though Suncor later claimed the cloud was harmless. *Id.*

breathing, and frequent nose bleeds, and some have developed cancer. They are wondering now if that's tied to what's coming out of Sun-cor.”³²⁰

(iii) Colorado People's Action, the Growhaus, and Project Voyce

Other grassroots organizations have also worked to link the politics of water and climate justice to local governance. Colorado People's Action (“CPA”) was founded by Executive Director Lizeth Chacon in 2016. Colorado People's Action focuses on movement politics and identifies their main goal as “building power by mobilizing voters, electing our own people to office, holding elected officials and corporations accountable, and working to put people before profit.”³²¹ In 2019, CPA launched large-scale texting and digital voter outreach programs specifically for communities of color in the Adams, Arapahoe, and Denver counties to help increase engagement in ballot-based issues.³²² This year, CPA is actively working with the Color of Water in Colorado Project, plumbers unions, and community residents to provide lead filters in public schools and day care centers.³²³

Ultimately, water and climate justice organizations in Denver's northeast metropolitan area are bringing a racial equity lens to water law, policy, and water governance across Colorado. As part of a larger movement across the state, region, and nation, communities of color have centered clean water and air in the civil rights agenda impacting their neighborhoods, schools, and workplaces. With varying degrees of success, legislation and litigation has provided some degree of relief.³²⁴ Yet, as communities of color increasingly become more engaged in the politics of local water governance, new tools are needed to soberly confront and meaningfully address long standing patterns and practices of institutional racism and social inequity in the daily conditions in which water users live, work, learn, and play.

³²⁰ *See id.*

³²¹ *Mission*, COLO. PEOPLE'S ACTION, <https://perma.cc/AG62-PMUZ> (last visited Apr. 26, 2022).

³²² *See* 2020 CPA ANNUAL REPORT, COLO. PEOPLE'S ACTION 3 (2020); *see also* 2021 *City Council Elections*, COLO. PEOPLE'S ACTION, <https://perma.cc/PX5L-ZNXY> (last visited Apr. 26, 2022).

³²³ *See generally* Conrad Swanson, *Colorado Schools Don't Have to Replace Plumbing to Avoid Lead in Drinking Water, Lawmakers Say*, DENVER POST, (Feb. 7, 2022), <https://perma.cc/25EP-8BXV>; Press Release, Nat'l Res. Def. Council and Colo. People's All., CO Advocates Call for Action on Lead in Schools (Jan. 13, 2022), <https://perma.cc/46MP-VKHB>.

³²⁴ *See supra* Part II-C.

IV. “ANY IDIOT THAT SEES ONLY THE OBVIOUS IS BLIND.”³²⁵

In 2004, the American Bar Association’s (“ABA”) Justice Kennedy Commission recommended to the ABA’s House of Delegates that state, territorial, and federal governments “strive to eliminate actual and perceived racial and ethnic bias in the criminal justice system” by requiring the legislature to “conduct racial and ethnic disparity impact analyses, evaluate the potential disparate effects on racial and ethnic groups of existing statutes and proposed legislation, and propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process.”³²⁶ Part of a larger project of criminal justice reform, racial impact statements (“RIS”) were conceived initially as a way to address racial disparities in the criminal justice system.³²⁷ Versions of RISs have since been adopted by state and local governments across the nation to address not only racial injustice in the criminal justice system,³²⁸ but also in response to a wide range of issues, including transportation,³²⁹ land use,³³⁰ and even general “policy development and budgeting.”³³¹

This final Section of the Article first explores the doctrinal origins of racial impact statements in the struggle for racial justice. As discussed below, equal protection and related civil rights law and jurisprudence has become increasingly ineffectual and largely color-blind, creating an opportunity for state and local level color-conscious approaches which can better address systemic and institutionalized practices of racial ine-

³²⁵ ACOSTA, *supra* note 1, at 199.

³²⁶ REPORT WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES, AM. BAR ASS’N JUST. KENNEDY COMM’N, at iv (2004).

³²⁷ See MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 25-26 (1995) (discussing racial impact statements as a policy solution to racial disparities in criminal punishment); Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, CRIM. JUST. MAG., Winter 2009, at 1, 1-2 (2009) (“Iowa Governor Chet Culver in April 2008 made history by signing into law the nation’s first piece of legislation to require policy makers to prepare racial impact statements for proposed legislation that affects sentencing, probation, or parole policies.”).

³²⁸ Nicole D. Porter, *Racial Impact Statements*, SENTENCING PROJECT (June 16, 2021), <https://perma.cc/U4AE-JVZD> (documenting adopted and proposed state-level racial impact statement legislation in the criminal justice context).

³²⁹ See U.S. DEP’T OF TRANSP., FED. TRANSIT ADMIN., FTA C 4702.1B, TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS, at Chap. 1-6 - 1-10, IV-10 - IV21 (2012).

³³⁰ See N.Y.C. Local Law 78-2021 (2021); David Brand, *Council Votes to Make Racial Impact Studies Part of NYC Land Use Process*, CITYLIMITS (June 18, 2021), <https://perma.cc/5GME-CSDM>.

³³¹ Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: Advancing Racial Equity Through Highway Reconstruction, 73 VAND. L. REV. 1259, 1325 (2020) (discussing the Seattle Racial and Social Justice Initiative (“RSJI”).

quality. This Section will then turn towards detailing the ways that racial impact statements work in practice. Analogous to a fiscal or environmental impact statement, racial impact statements provide decision makers with real-time and actionable data on the specific ways that current or proposed policies and practices can create, exacerbate, or begin to dismantle racial inequities for the constituents they serve. I conclude this Section by highlighting how water utilities could benefit in adopting racial impact statements as a tool in their acquisition, development, and evaluation of their water portfolio and related infrastructure in service of a diverse water citizenry.

a. Working Around the Colorblind Constitution

I have previously written about the tension between color-blindness and color-consciousness in the school integration battles of the 1960s and 1970s.³³² In response to a series of lawsuits, each aiming to use “disproportionate impact” as a standard for finding unconstitutional various discriminatory practices and policies related to employment³³³ housing,³³⁴ and criminal punishment,³³⁵ the United States Supreme Court was unwilling, under the Equal Protection Clause of the Fourteenth Amendment, to outlaw legislation, policies, and practices “designed to serve neutral ends,” even if evidence existed that those statutes might benefit or burden one race more than another.³³⁶ According to the

³³² See generally *How I Rode the Bus*, *supra* note 30.

³³³ *Washington v. Davis*, 426 U.S. 229, 232-33, 237-42 (1976).

³³⁴ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254, 258-260, 264-66 (1977).

³³⁵ *McCleskey v. Kemp*, 481 U.S. 279, 286-87, 297-99 (1987) (rejecting petitioner’s claim that Georgia’s death penalty system, which executed Black people at much higher rates than white people, was unconstitutional because of this disparity). As part of his case, McCleskey had proffered a statistical study indicating that Black defendants who killed white victims were more likely than any other sub-population in Georgia to receive the death penalty. *Id.* According to Justice Powell, “McCleskey must prove that the decision makers in his case acted with discriminatory purpose.” *Id.* at 292. However, the Charging and Sentencing Study that McCleskey relied on (also known as the “Baldus study,” for David Baldus, Charles Pulaski, and George Woodworth) looked only at the imposition of capital sentences. *Id.* at 286-87. A more recent study by University of Denver Professors Scott Phillips and Justin Marceau expands on the original Baldus study to determine how many of those defendants sentenced to death were ultimately executed. Scott Phillips & Justin Marceau, *Whom the State Kills*, 56 HARV. C.R.-C.L. LAW REV. 601, 602-603 (2020). The analysis shows that Black defendants convicted of killing a white victim were substantially more likely to be put to death than those convicted of killing a Black victim. *Id.*

³³⁶ *Washington*, 426 U.S. at 248. In *Arlington Heights*, the Court rejected the respondent’s claim that the city’s “refusal to rezone carried a racially discriminatory effects” and constituted unlawful discrimination by virtue of such effects because “proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” See 429 U.S. at 268.

Court, “[t]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”³³⁷ Rejecting racial disparities that resulted as a matter of government acts as inconsequential absent discriminatory intent, the Court required most future constitutional analysis to be effectively color-blind.³³⁸

Nevertheless, the Supreme Court has indicated that legislative bodies and government actors are in a better and a more constitutionally appropriate position to consider and evaluate the impact of racial disparities. According to the Court, elected representatives of the people are “constituted to respond to the will and consequently the moral values of the people” and for this reason, they are in the best position to “evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.”³³⁹ Taking this call seriously, criminal justice reform advocates in the 1990s and early 2000s focused their efforts in lobbying state legislatures to respond directly to racial disparities existing in their criminal justice regimes.³⁴⁰

³³⁷ *Washington*, 426 U.S. at 240.

³³⁸ Though the Supreme Court carved out a narrow disparate impact and color-conscious exception in housing policy and practices, it was rooted in the Thirteenth Amendment and largely reached private practices that had greater adverse impacts on one protected group than on another. See *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977). Housing-related disparate impact claims were allowed by all 11 federal courts of appeals under the Fair Housing Act (“FHA”), albeit with different criteria for determining when a neutral policy violates the FHA. See *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49-50 (1st Cir. 2000); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988), *judgment aff’d*, 488 U.S. 15 (1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149-50 (3d Cir. 1977); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988-89 (4th Cir. 1984); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm’n*, 508 F.3d 366, 374 (6th Cir. 2007); *Charleston Hous. Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729, 740-41 (8th Cir. 2005); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988); *Graoch Assocs. #33, Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Jackson v. Okaloosa Cnty., Fla.*, 21 F.3d 1531, 1543 (11th Cir. 1994). The U.S. Court of Appeals for the District of Columbia (D.C. Circuit) has never ruled on the issue. In 2015, the United States Supreme Court affirmed that the FHA prohibits private housing-related decisions that have a discriminatory effect on a protected class while providing a three-step burden shifting test to determine when a violation has occurred. *Tex. Dep’t of Hous. Cmty. Aff. v. Inclusive Communities Project*, 576 U.S. 519, 2517-23 (2015).

³³⁹ *McCleskey*, 481 U.S. at 319 (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting) and *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)); see also *Washington*, 426 U.S. at 248 (observing that the rules affecting disparate impact “should await legislative prescription”); *Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (“The calculus of effects, the manner in which a particular law reverberates in a society is a legislative and not a judicial responsibility.”).

³⁴⁰ See, e.g., MAUER & HULING, *supra* note 327, at 25-26; Mauer, *supra* note 327, at 1-2; see generally Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted*

One of the most prominent and successful proposals articulated by the criminal justice reform advocates was the racial impact statement (“RIS”). Arguing that governments had long been conducting impact statements to anticipate the fiscal and environmental consequences of development, advocates argued that impact statements “are now widely viewed as responsible mechanisms of government.”³⁴¹ It was not, therefore, a radical leap for these advocates to encourage lawmakers to examine the racial effects of criminal justice policy and consider alternative means of promoting public safety.³⁴² Advocates also argued that RISs have since “offer[ed] the possibility of deliberation on potential racial effects prior to, *not after*, the implementation of policy initiatives.”³⁴³

In practice, RISs in the criminal justice context have been conducted by sentencing commissions, by departments of corrections, or by government budget offices.³⁴⁴ Such governmental bodies typically consider racial disparities in one of two ways: “proportional disparity” or “population disparity.”³⁴⁵ Proportional disparity looks at the *share* of racially minoritized individuals in a given sub-population (e.g., the number of people incarcerated for a specific offense), and considers any potential changes to that share by the proposed legislation.³⁴⁶ Population disparity looks at the *rates* of incarceration for racially minoritized communities in the aggregate and considers changes to those rates by the proposed legislation.³⁴⁷ RISs, accordingly, focus on the precise impact of policy on racially minoritized individuals or communities, thereby facilitating “a broader conversation among policymakers and their constituents regarding proposed policies and their implications.”³⁴⁸

A handful of U.S. states have introduced RISs for the purposes of criminal justice reform. Iowa’s House File 2393,³⁴⁹ for example, amended sections of the Iowa Code that outlined the requirements for correc-

Sentencing Disparities, 5 OHIO ST. J. CRIM. L. 19, 31–32 (2007) [hereinafter *Racial Impact Statements as a Means*].

³⁴¹ Mauer, *supra* note 327, at 1.

³⁴² *Racial Impact Statements as a Means*, *supra* note 340, at 31–32.

³⁴³ *Id.* at 33 (emphasis added) (arguing that the guiding principles for racial impact statements in the context of criminal justice are the reduction of unnecessary racial disparities in incarceration and the promotion of public safety).

³⁴⁴ *Id.* at 35–36.

³⁴⁵ *See id.* at 37–38.

³⁴⁶ *Id.* at 37.

³⁴⁷ *Id.* at 37–38.

³⁴⁸ *Id.*; see also William Kennedy et al., *Putting Race Back on the Table: Racial Impact Statements*, 47 J. POVERTY L. & POL’Y 154, 157–61 (2013) (“Racial impact statements may take many forms; there is no one ‘right’ model.”).

³⁴⁹ See H. File 2393, 82d Gen. Assemb., 2d Reg. Session (Iowa 2008).

tional impact statements³⁵⁰ and grant applications.³⁵¹ Both sections now require for any sentencing or parole legislation the preparation of “minority impact statements” containing information about “[any] disproportionate or unique impact of proposed policies or programs on minority persons,” defined to “include individuals who are women, persons with a disability, Blacks, Latinos, Asians or Pacific Islanders, American Indians, and Alaskan Native Americans.”³⁵²

Connecticut became the second state to authorize RISs to the legislative process. Section 2-24b of the Connecticut General Statutes sets forth the conditions by which any member of the Connecticut General Assembly may request a “racial and ethnic impact statement” to be prepared for “certain bills and amendments.”³⁵³ When the impact statement legislation was first introduced in 2008, the statements were required for bills and amendments that could have any effect on “the pretrial or sentenced population of the correctional facilities in [Connecticut],” subject to recommendations by the joint standing committee of the General Assembly on judiciary.³⁵⁴ In 2018, the law was changed to require an opt-in requirement to any bills, not just those concerning pretrial and sentencing, alongside a provision handing the recommendation decision to “the joint standing committee of the General Assembly having cognizance of matters relating to government administration.”³⁵⁵

In 2014, Oregon became the third state to adopt an RIS when it passed Senate Bill 463, a bill that established a framework very similar to Iowa’s racial impact statement legislation, with virtually the same definition of “minority persons,”³⁵⁶ and with a scope encompassing both

³⁵⁰ IOWA CODE § 2.56; see H. File 2393, 82d Gen. Assemb., 2d Reg. Sess. § 1 (Iowa 2008).

³⁵¹ IOWA CODE § 8.11; see H. File 2393, 82d Gen. Assemb., 2d Reg. Sess. § 2 (Iowa 2008).

³⁵² IOWA CODE §§ 8.11(1)(a), (2)(b). A 2015 review by the *Associated Press* found that Iowa’s racial impact statement legislation appeared “to be having a modest effect, helping to defeat some legislation that could have exacerbated disparities and providing a smoother path to passage for measures deemed neutral or beneficial to minorities.” Ryan J. Foley, *Racial-Impact Law Has Modest Effect in Iowa*, DES MOINES REGISTER (Jan. 21, 2015), <https://perma.cc/KPA9-M3BT>. After 61 impact statements were issued in Iowa from 2009 to 2015, “only six out of 26 bills seen as having a disproportionate effect on minorities passed both chambers and became law. Meanwhile, bills that were rated as having no effect or a positive effect on minority incarceration rates were nearly twice as likely to pass. 14 out of 35 such proposals became law.” *Id.*

³⁵³ CONN. GEN. STAT. § 2-24b(a).

³⁵⁴ H.B. 5933, 2008 Gen. Assemb., Reg. Sess. § 5 (Conn. 2008).

³⁵⁵ S.B. 256, 2008 Gen. Assemb., Reg. Sess. § 1(b) (Conn. 2018).

³⁵⁶ Compare S.B. 463, 2013 Leg. Assemb., Reg. Sess. § 4(5)(a) (Or. 2013) (“Minority persons’ includes individuals who are women, persons with disabilities, African-Americans, Hispanics, Asians or Pacific Islanders, American Indians and Alaskan Natives.”) with H. File

criminal justice populations and grant applicants.³⁵⁷ However, unlike Iowa's requirement that the impact of legislation be assessed for *all* correctional impact statements, Oregon's bill uses the same method that Connecticut adopted in 2018, requiring members of the Legislative Assembly to obtain racial and ethnic impact statements on request rather than as an automatic requirement.³⁵⁸

In the past decade, and increasingly over the past couple of years, states across the country have proposed similar RIS legislation.³⁵⁹ One of the more recent bills, New Jersey's 2018 Senate Bill No. 677, includes a substantial preamble outlining the consequences of the disparities in the American criminal justice system, along with a series of stark statistics particular to New Jersey.³⁶⁰ Like Iowa, the final version of the bill requires the automatic preparation of "a racial and ethnic community criminal justice and public safety impact statement" for legislation "that would affect pretrial detention, sentencing, probation, or parole poli-

2393, 82d Gen. Assemb., 2d Reg. Sess. § 3 (Iowa 2008). ("Minority persons' includes individuals who are women, persons with a disability, Blacks, Latinos, Asians or Pacific Islanders, American Indians, and Alaskan Native Americans.").

³⁵⁷ S.B. 463, 2013 Leg. Assemb., Reg. Sess. §§ 1, 3, 4 (Or. 2013).

³⁵⁸ *See id.* at § 1(2).

³⁵⁹ *See, e.g.*, A.B. 752, 2013-2014 Leg. (Wis. 2013) (requiring a racial impact statement for "any bill that creates a new crime, modifies an existing crime, or modifies the penalty for an existing crime"); S.B. 538, 2013-2014 Leg. (Wis. 2013) (requiring the same); S.B. 237, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (concerning the preparation of a racial impact statement for certain bills); Bobby Caina Calvan, *Florida Legislators to Consider Racial Impact of Proposals*, ASSOCIATED PRESS (July 11, 2019), <https://apnews.com/article/8d5f12b583074985b1bb7096c6c6c215> (describing a new partnership between the Florida legislature and Florida State University, years after state legislators had proposed measures to allow members of the legislature to request racial and ethnic impact statements); S.B. 45, 2019 Gen. Assemb. (Ky. 2019) (amending Kentucky statutes to "require racial and ethnic community criminal justice and public safety impact statements for certain legislation and administrative regulations"); S.F. 96, 91st Leg. (Minn. 2019) (empowering the state's Sentencing Guidelines commission to conduct screening on legislation that may "affect the racial composition of the criminal offender population"); H. Con. Res. 51, Reg. Sess. (Miss. 2019) (outlining conditions for the attachment of "racial and ethnic disparity impact statements" to legislation that "creates a public offense, significantly changes an existing public offense or the penalty for an existing offense, or changes existing sentencing, parole, or probation procedures"); A.B. A03422, 2021-2022 Leg. (N.Y. 2021) (amending the legislative law to require racial and ethnic impact statements on "legislation that will change the correction/penal laws, child welfare laws, and/or social service laws"); S.B. 253, 57th Leg., 1st Sess. (Okla. 2019) (requiring a racial impact statement for any bill that would "create a new offense, significantly change an existing offense, change the penalty for an existing offense, or change existing sentencing, parole, or probation procedures"); H.B. 2547, 101st Gen. Assemb. (Ill. 2020) (providing for statements with a "reliable estimate of the anticipated impact on those racial and ethnic minorities" that could possibly be disparately impacted by new bills).

³⁶⁰ S.B. 677, 217th Leg., Reg. Sess. § 1 (N.J. 2016).

cies.”³⁶¹ Differences among states accordingly include whether RISs are automatically conducted as part of the normal legislative process or need to be specifically requested by legislatures, and whether it should apply to legislation that addresses only specific parts of or the entire criminal process.

Unsurprisingly, the framework to implement RISs is not, and need not be, limited to criminal justice policy and practice.³⁶² “Occupational health impact statements” have been used to enable employees to comparatively evaluate the health risks of different jobs.³⁶³ Indeed, health impact statements have been used by federal authorities to help state and local governments integrate public health into policy- and decision-making processes.³⁶⁴ As applied, they institutionalize a practice that uses “scientific data, professional expertise, and stakeholder input to identify and evaluate public-health consequences of proposals and suggests actions that could be taken to minimize adverse health impacts and optimize beneficial ones,” as described in a 2011 report by the National Research Council.³⁶⁵ That same report found health impact statements to be an effective tool “because of [their] applicability to a broad array of policies, programs, plans, and projects; [their] consideration of adverse and beneficial health effects; [their] ability to consider and incorporate various types of evidence; and [their] engagement of communities and stakeholders in a deliberative process.”³⁶⁶

Building upon both environmental and health impact statements are community impact statements. Used since the late 1990s in the siting of or expansion of toxic facilities, community impact statements sometimes require—as part of the permitting process—“an assessment of the chemicals, attendant health and environmental risks, proximity to residential communities, demographics of the targeted communities, and the

³⁶¹ *Id.* at § 2.

³⁶² See, e.g., SUSAN S. FAINSTEIN, *THE JUST CITY* 165-66 (2010) (calling on policy makers to “to make a kind of *justice impact statement* when choosing particular strategies” in the context of urban planning) (emphasis added); Edward G. Goetz et al., *Whiteness and Urban Planning*, 86 J. AM. PLAN. ASS’N 142, 150 (2020); VAISHNAVI HARIPRASAD ET AL., COLO. DEP’T OF PUB. HEALTH & ENV’T OFF. OF HEALTH EQUITY, *AN EQUITY ACTION GUIDE: CREATING THRIVING COMMUNITIES IN COLORADO* 47 (2018).

³⁶³ *Occupational Health Risks and the Workers Right to Know*, 90 YALE L.J. 1792, 1808 (1981).

³⁶⁴ See *Health Impact Statements*, CTRS. FOR DISEASE CONTROL AND PREVENTION: HEALTHY PLACES, <https://perma.cc/JHK8-VDJF> (last updated Sept. 19, 2016) (discussing the scope and use of health impact statements).

³⁶⁵ NAT’L RSCH. COUNCIL BD. ON ENV’T STUD. AND TOXICOLOGY, *IMPROVING HEALTH IN THE UNITED STATES: THE ROLE OF HEALTH IMPACT ASSESSMENT* 3, 130-163 (2011).

³⁶⁶ *Id.* at 5.

applicant's record of compliance must be considered."³⁶⁷ They theoretically allow an area's residents to be involved in planning and decision-making from the very beginning, rather than post facto, and are used by several local governments.³⁶⁸

In Colorado, the state legislature has taken some initial steps toward adopting a racial impact statement. Beginning in 2019, legislative council staff must now prepare "demographic notes" on certain legislative bills.³⁶⁹ The purpose of these notes are to provide "available data to outline the potential effects of a legislative measure on disparities within the state"³⁷⁰ not only in the criminal justice context, but in legislation that affects "economic, employment, health, education, [and] public safety."³⁷¹ Like racial impact statements in Oregon, Connecticut, and Iowa, Colorado's "demographic notes" are not required unless requested by legislators.

As part of the legislative process prior to the adoption of the "demographic notes" option, the Colorado Legislative Council Staff prepared a sample note for an anticipated House Bill that proposed to limit the ability of employers to ask job applicants about any criminal history during the early stages of the hiring process.³⁷² While the sample note indicated that that Black and Latinx males are more likely to have a criminal record and more likely to be unemployed than the general population, the note also pointed to research indicating that this kind of legislation may "reduce[] the likelihood that employers [will] call back or hire young [B]lack and Latino men" if their criminal history is not known.³⁷³ By calling attention to potential outcomes, the note allows

³⁶⁷ Diane Schwartz, *Environmental Racism: Using Legal and Social Means to Achieve Environmental Justice*, 12 J. ENV'T L. & LITIG. 409, 431 (1997).

³⁶⁸ For an assessment of community impact statements, see Sara Pirk, *Expanding Public Participation in Environmental Justice: Methods, Legislation, Litigation and Beyond*, 17 J. ENV'T L. & LITIG. 207, 235 (2002) and Charles Isaacs, *Environmental Justice in Little Village: A Case for Reforming Chicago's Zoning Law*, 15 NW. J. L. & SOC. POL'Y 357, 398 (2020). Examples of community impact statements include A.B. A03381, 2019-2020 Leg. (N.Y. 2019) (as introduced in the State Assembly), S.B. 635, 2019 Leg., Reg. Sess. § 5B-2A-6 (W. Va. 2019); S.B. 1497, 1997 Gen. Assemb., Reg. Sess. (Tenn. 1997).

³⁶⁹ See H.B. 19-1184, 72d Gen. Assemb, 1st Reg. Sess. (Colo. 2019).

³⁷⁰ COLO. REV. STAT. § 2-2-322.5(1)(a).

³⁷¹ *Id.* at § 2-2-322.5(b). The demographic notes are intended to address not only disparities in race and ethnicity, but also in "sex, gender identity, sexual orientation, disability, geography, or any other relevant characteristic for which data are available." *Id.* (emphasis added).

³⁷² Sample Demographic Note provided by Elizabeth Ramey, PhD, Principal Economist for the Legislative Council Staff (on file with the author).

³⁷³ CHRISTINA STACY & MYCHAL COHEN, *URB. INST., BAN THE BOX AND RACIAL DISCRIMINATION: A REVIEW OF THE EVIDENCE AND POLICY RECOMMENDATIONS 1* (2017).

legislators to have academic research and other data that allows them to assess the disparate impact of the legislation.³⁷⁴

The critical innovation of a *racial* impact statement, as opposed to a health or community impact statement or Colorado's "demographic note," is that it centers *race* as the primary framework in which to structure the analysis. Justice Sandra Day O'Connor's observation at the start of the 21st century that "race unfortunately still matters" in the United States³⁷⁵ continues to ring true, especially given the racial reckonings of 2020³⁷⁶ and their predictable backlash.³⁷⁷ Because so much race scholarship is premised on the idea that race is culturally and socially contingent,³⁷⁸ understanding *how* race matters necessarily requires each RIS to deploy the appropriate framework (e.g. settler-colonialism, colorblindness, racial triangulation) to fully evaluate whether a policy or practice will perpetuate historical and on-going patterns of systemic and institutional racism experienced by racially minoritized communities.

In practice, an RIS using a framework of settler-colonialism, for example, should frame its analysis within a "logic of elimination," manifested as genocidal violence, forced removal, relocation and confinement to reservations, and coerced assimilation.³⁷⁹ An RIS focusing on a particular police reform should note how settler-colonial logics treated Indigenous people as "lawless savages" who are "racialized as incompetent to be fully sovereign,"³⁸⁰ a consequence of which is Indigenous

³⁷⁴ House Bill 19-1184 was signed by Governor Jared Polis on May 23, 2019, providing for the preparation of up to twenty demographic notes starting with the 2020 legislative session. H.B. 19-1184, 72d Gen. Assemb. 1st Reg. Sess. (Colo. 2019).

³⁷⁵ *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

³⁷⁶ See Laura Putnam et al., *The Floyd Protests Are the Broadest in U.S. History—And Are Spreading to White, Small-Town America*, WASH. POST (June 6, 2020), <https://perma.cc/95EM-4M74>; Adam Sewer, *The New Reconstruction*, ATLANTIC (Oct. 2020), <https://perma.cc/7LJ9-DJHL>; Lola E. Peters, Opinion, *Sustaining Anti-Racism After a Summer of Protests for Black Lives*, CROSSCUT (Oct. 15, 2020), <https://perma.cc/HFW8-RJ4C>.

³⁷⁷ See Ibram X. Kendi, *The Mantra of White Supremacy*, ATLANTIC (Nov. 30, 2021), <https://perma.cc/FZ35-2YFD>; Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory*, BROOKINGS: FIXGOV (Nov. 2021), <https://perma.cc/2U7T-93SH>; Jon Wiener, *The Predictable Backlash to Critical Race Theory: A Q & A With Kimberlé Crenshaw*, NATION (July 5, 2021), <https://www.thenation.com/article/politics/critical-race-kimberle-crenshaw/>.

³⁷⁸ See, e.g., Elise Bodie, *Racial Territoriality*, 58 UCLA L. REV. 401, 446-52 (2010).

³⁷⁹ See Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 387-88, 391-92, 396, 399-401 (2006).

³⁸⁰ ANDREA SMITH, *Indigeneity, Settler Colonialism, White Supremacy, in RACIAL FORMATION IN THE TWENTY-FIRST CENTURY* 66, 77-78 (2012).

peoples being killed in police encounters at a higher rate than any other racially minoritized group.³⁸¹

Or in evaluating funding for water infrastructure in Indigenous communities, an RIS using a settler-colonialist framework should note how Indigenous communities previously decimated by the imposition of diseases brought by settlers such as measles, whooping cough, smallpox, and influenza, continue to suffer disproportionately from COVID-19.³⁸² Such impacts have been made even worse as Indigenous peoples brutally dispossessed of traditional lands and forcibly removed to unproductive lands that became contaminated by heavy metals and industrial waste.³⁸³ Combined with long-standing institutional neglect for investment in plumbing systems on reservations or in urban Indigenous communities, an RIS would necessarily have to grapple with the devastating health disparities of not having access to a clean and safe water supply.³⁸⁴ And perhaps most importantly, an RIS using a settler-colonial framework evaluating water infrastructure also must address water's non-material and non-tangible cultural and community centered dimensions. For almost every tribe, "[f]rom the Navajo (To' ei 'iina até) to the Hopi (Paatuwaquatsi) to the Standing Rock Sioux Tribe (Mní Wičóni), these Tribes view water as sacred and recognize that 'water is life.'"³⁸⁵

Water utilities therefore can use racial impact statements in a variety of ways. They can measure baseline contaminant exposure levels that can take into account the differential racial impact of settler-colonial practices, color-blind racism such as zoning, or laws that facilitate the exploitation of immigrant labor in the employment and housing markets. Water utilities can use such data to assess the sources of their respective water portfolios, the build-out and maintenance of its infrastructure and water delivery systems, and in their evaluation of rates, budget, and fiscal authority to grow not only safe and world-class, but inclusive and equitable drinking water supplies.

In each case, water utilities should explore and understand similarities and differences among non-white racialized groups to address ongoing barriers to effective and equitable governance. Whether inequity re-

³⁸¹ Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN (Nov. 13, 2017), <https://perma.cc/UG6R-KDMM>.

³⁸² See John Blake, *Native Americans Were Already Decimated by a Virus: They're Scared It Could Happen Again*, CNN (Apr. 14, 2020), <https://perma.cc/77RF-YM4R>; Michael Gracey & Malcolm King, *Indigenous Health Part 1: Determinants and Disease Patterns*, 374 LANCET 65, 65 (2009).

³⁸³ Gracey & King, *supra* note 382, at 66.

³⁸⁴ Heather Tanana et al., *Water Is Life: Law, Systemic Racism, and Security in Indian Country*, 19 HEALTH SEC. 78, 78-81 (2021); Gracey & King, *supra* note 382, at 65, 67

³⁸⁵ Tanana et al., *supra* note 384, at 79.

sults from language barriers, access to stable jobs, adequate housing, or a distrust of government based upon past historical practice or recent experience, a water utility serious about addressing racial inequity should see its end users as “citizens” with a right to “[e]qual access” to clean water, and not just customers.³⁸⁶ Because the vast majority of those in the United States receive from publicly owned water utilities that are incorporated as some form of local government,³⁸⁷ it theoretically has a duty to provide water to every person in its jurisdiction irrespective of legal or social categories.³⁸⁸ As a result, meaningful and inclusive community input and participation can provide ideas for culturally appropriate initiatives, pathways to more inclusive governance, and programming to address the different ways that water rights, infrastructure, and quality might be experienced by different racially minoritized communities, and the overall rights and responsibilities everyone has as a water user and consumer in their communities.³⁸⁹

Of course, the challenge of any racial impact statement or (or fiscal or environmental impact statement) is that it can be ignored or mini-

³⁸⁶ See Azadeh Shahshahani & Kathryn Madison, *No Papers? You Can't Have Water: A Critique of Localities' Denial of Utilities to Undocumented Immigrants*, 31 EMORY INT'L L. REV. 505, 514-21 (2017) (discussing strategies for challenging policies that discriminate against noncitizens based on access to a Social Security number); *id.* at 508 n.13 (discussing how states and localities are prohibited from regulating immigration or punishing noncitizens for their status); *supra* notes 31-36 and accompanying text (discussing how water rights in Colorado are based on quantifiable property rights). I use “citizen” broadly to draw attention to the body of scholarship highlighting substantive “community control” and engagement of racially minoritized communities with local governments who themselves have long participated in institutional and systematic exclusion of these same communities from the decision-making process. See generally K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679 (2020); M. Adams & Max Rameau, *Black Community Control over Police*, 2016 WIS. L. REV. 515 (2016); K. Sabeel Rahman, *DEMOCRACY AGAINST DOMINATION* (2017); Richard Schragger, *Is a Progressive City Possible? Reviving Urban Liberalism for the Twenty-First Century*, 7 HARV. L. & POL'Y REV. 231 (2013).

³⁸⁷ George C. Hormsy & Mildred E. Warner, *Does Public Ownership of Utilities Matter for Local Government Water Policies*, 64 UTILS. POL'Y, June 2020, at 1, 3 (“Publicly owned water utilities serve 87 percent of customers in the United States.”).

³⁸⁸ There is not a lot of research examining the precise legal obligations of public water utilities. The research that does exist suggests that public ownership of water includes “a broader set of values, beyond just cost efficiency.” *Id.* at 6. I would argue that this is the result of the public codes setting up a public water utilities authority. In addition, as Shahshahani and Madison point out, “[t]he federal government has the sole authority to regulate immigration,” and attempts by localities to limit access to housing (which is defined to include access to residential utilities) based on legal status have been found unlawful. Shahshahani & Madison, *supra* note 386, at 508 n.13, 515.

³⁸⁹ See K. Sabeel Rahman, *Infrastructural Exclusion and the Fight for the City: Power, Democracy, and the Case of America's Water Crisis*, 53 HARV. C.R.-C.L. L. REV. 533, 547-60 (2018); see e.g., S.B. 635, 2019 Leg., Reg. Sess. (W. Va. 2019).

mized in a variety of ways. Instructive here is the recent experience in the implementation of the Denver Department of Environmental Health's Impact Statement ("HIA"). Developed as a planning tool in 2014,³⁹⁰ the HIA was applied to the Globeville and neighboring northeast Denver neighborhoods as the city and state developed in earnest its plans to reconstruct Interstate 70, intended to improve city gateway corridors and the South Platte River greenway, and redevelop the National Western Stock Show complex.³⁹¹ Though the Department solicited input from the residents as part of its reporting and analysis, many of the most consequential recommendations advocated by the community were ignored. Against the community's wishes, the city and state continued with their plan to construct a double highway footprint that exacerbates noise and air pollution; gave noise variances allowing for around-the-clock construction;³⁹² disturbed historic pollution sites where excess dirty water was to be dumped into the South Platte;³⁹³ and routed drainage projects through Superfund sites³⁹⁴ that had the potential to exacerbate the risk of flooding in minoritized neighborhoods.³⁹⁵

Because impact statements are effectively non-binding disclosure documents, the real challenge is perhaps summed up best by Denver Councilwoman Candi CdeBaca. An outsider and racially progressive candidate when she was elected to council in 2019, Councilwoman CdeBaca represents a healthy skepticism of government engagement with racially minoritized communities.³⁹⁶ "Having participated in several of the I-70 meetings . . . I got to see firsthand how community input really just meant show up, complain, and we're going to do the opposite

³⁹⁰ See DENVER DEP'T OF ENV'T HEALTH, HOW NEIGHBORHOOD PLANNING AFFECTS HEALTH IN GLOBEVILLE AND ELYRIA SWANSEA 5, 9 (2014) ("[The 2014] Health Impact Assessment for the Globeville and Elyria Swansea Neighborhood Plans is the first such HIA to be conducted under this City directive.").

³⁹¹ *Id.* at 5-11; see THE GREENWAY FOUND., *North Denver Cornerstone Collaborative* (Nov. 2, 2021), <https://perma.cc/Y6Y5-4SYB>; see also NAT'L W. CTR., *Citizen Advisory Committee*, (Nov. 1, 2021), <https://perma.cc/Q9BP-D2AS>.

³⁹² See Sabrina Sideris, *Participation Without Power: A Critical Discourse Analysis of Community Meetings in North Denver*, 3 J. PUB. SCHOLARSHIP EDUC. 74, 78 (2021). While various attempts to engage the community were attempted, almost all failed to get widespread community buy-in. *Id.* at 77, 87-88.

³⁹³ Michael Booth, *Making Noise in Globeville and Elyria-Swansea*, COLO. TR. (Sept. 12, 2018), <https://perma.cc/69VJ-LWQK>.

³⁹⁴ *Id.*

³⁹⁵ Letter from Friends & Neighbors of N. Denver Env't Just. Communities, Letter to Sec'y, U.S. Dep't of Transp., (Apr. 15, 2021).

³⁹⁶ See Alex Burness, *People Are Calling Candi CdeBaca a Communist, She'd Rather Be Called an Anarchist*, COLO. INDEP. (June 21, 2019), <https://perma.cc/2RHM-H8WA>; Hanna Metzger, *Councilwoman Candi CdeBaca on Being from and for the People of District 9*, DENVER GAZETTE (May 24, 2021), <https://perma.cc/FE9F-TTCF>.

of what you're asking."³⁹⁷ Her criticisms and skepticism are real and should not be ignored. Local government, particularly water utilities, need to overcome decades of inertia, and policies and practices that limit transparency of the policymaking process to racially minoritized communities. A racial impact statement is not a total solution, but it is one tool that can help to restore that trust. In the hands of local water justice activists, it provides a means to hold water utilities publicly accountable to their constituents—and to provide safe and clean drinking water. A racial impact statement provides community stakeholders and advocates an opportunity to issue “warning[s]” to water utilities that “litigation may follow” if they contain to ignore the most obvious and disparate impacts of their decision making.³⁹⁸

V. CONCLUSION: RACIAL IMPACT STATEMENTS AND BROWN BUFFALO JUSTICE BLUE

As a Brown Buffalo, I have long advocated for understanding the blue line of water development and water delivery as an issue of racial inequity. It is not lost on me that in this particular moment, a “blue line” has become a larger symbol of racial backlash to the types of racial justice advocacy and much more precise understanding of the history and impact of racism in our institutional, social, and everyday policy and practices.³⁹⁹ Recent efforts to ban Critical Race Theory and curricula designed to address systemic and institutional racism are merely the latest attempt to marginalize and silence the history, experiences, and voices of the nation’s racially minoritized communities.⁴⁰⁰

Racial impact statements and related efforts to address systemic and institutional racism in government practice is part and parcel of these larger debates. When Chief Justice John Roberts of the United States Supreme Court infamously concluded that “[t]he way to stop dis-

³⁹⁷ Arielle Milkman, *Why Participatory Planning Fails (and How to Fix it)*, NEXT CITY (Apr. 28, 2021), <https://perma.cc/BP3Y-USSH>.

³⁹⁸ See Kennedy et al. *supra* note 348, at 161.

³⁹⁹ See Tovia Smith, *Thin Blue Line Flags Stir Controversy in Massachusetts Coastal Community*, NPR (July 21, 2020, 5:11 AM), <https://perma.cc/9PHB-A4GS>; Maurice Chammah & Cary Aspinwall, *The Short, Fraught History of the ‘Thin Blue Line’ American Flag*, MARSHALL PROJECT (June 8, 2020), <https://perma.cc/R2Q2-R55W>.

⁴⁰⁰ See Anthony Conwright, *Today’s It’s Critical Race Theory. 200 Years Ago It Was Abolitionist Literature*, MOTHERJONES (Sept.-Oct. 2021), <https://www.motherjones.com/politics/2021/07/critical-race-theory-slave-abolition-school-literature/>; see also Mary Harris, *This Isn’t The First “Critical Race Theory Backlash,”* SLATE (July 6, 2021, 1:23 PM), <https://perma.cc/73F5-JRXQ>; Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack*, EDUC. WK. (May 18, 2021), <https://perma.cc/PZP4-UULB>.

crimination on the basis of race is to stop discriminating on the basis of race,”⁴⁰¹ he was not just speaking to a particular government practice or policy. Rather, he was voicing a broader understanding of history, values, politics, and law that has long ignored and failed to come to grips with racial disparities. From the wider history of environmental inequity in the American West to long standing pollution experienced by one city’s most vulnerable communities, race has shaped profoundly different outcomes. Particularly when it comes to the quality of the water one drinks, the water portfolio one holds, or the power one has in governance, the blue line creates, informs, and shapes the complex color lines of every American locality.

During oral arguments in the same case resulting in Justice Robert’s infamous declaration, then-justice Ruth Bader Ginsburg made a very simple observation: “It’s very hard for me to see how you can have a racial objective but a nonracial means to get there.”⁴⁰² In other words, if governments recognize and acknowledge that racial disparity exists, there is no color-blind tool capable of addressing such harm. Indeed, continuing to be color-blind serves only to further embed and amplify racial differences without any real or meaningful change taking place. The 2020 nationwide protests against systemic and institutional racism reflected widespread and long-standing frustration to address head-on the consequence of racial disparity.

Racial impact statements, as representative of larger color-conscious tools available to policy makers, provide a pathways to larger societal objectives. As one of Critical Race Theory’s own founding mothers has argued, “[w]e need to pay attention to what has happened in this country and how what has happened is continuing to create differential outcomes, so that we can become the democratic republic we say we are We believe in the promises of equality, and we know we can get there if we confront and talk honestly about inequality.”⁴⁰³ Inclusive governance and racial equity demand that we all become Brown Buffaloes in government and municipal water practices.

⁴⁰¹ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

⁴⁰² See Alicia Mundy, *Aggressive Questions from Court in Seattle Case*, SEATTLE TIMES, (Dec. 5, 2006, 11:43 AM), <https://perma.cc/5EYR-MW3A>.

⁴⁰³ *What is Critical Race Theory, and Why is Everyone Talking About It*, COLUM. L. SCH. NEWS (July 1, 2021), <https://perma.cc/FZA8-VRGQ>.