

Issues in Mountain Real Estate Transactions

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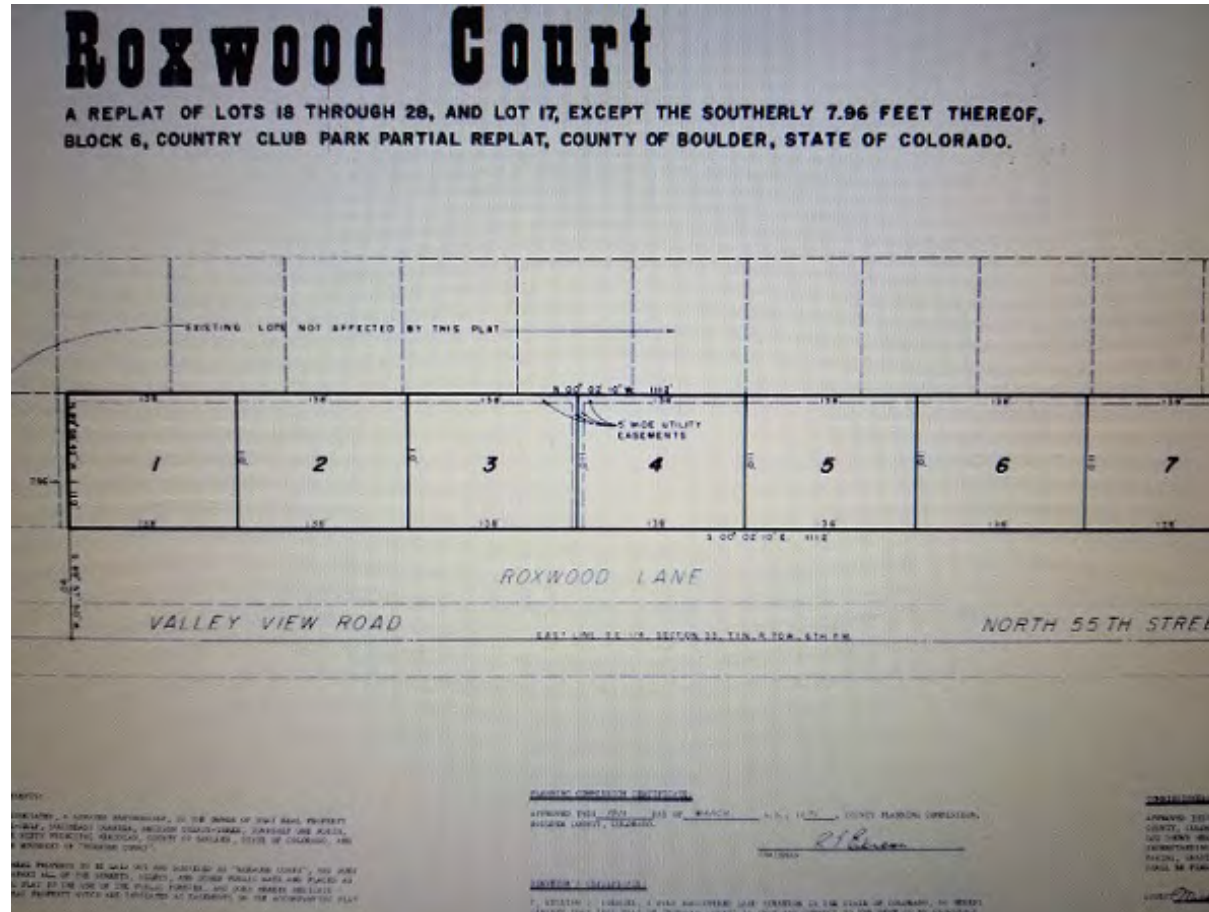
Unique Characteristics of Mountain Properties

- Irregular boundaries
- Uncertain boundaries
- Topography (the ground may not be flat)
- There may be no access to municipal water or sewer
- The property may not be accessible by public road
- Mining Claims
- The property may not have access to gas or electric
- There may be no right to build
- Nearby parcels may have livestock

Typical Legal Description in Municipal Subdivision

LOT 21 BLK 3 NAMASTE PARK

Typical Plat in a Municipal Subdivision



Rectangular lots. There are seldom disputes about where the property line is.



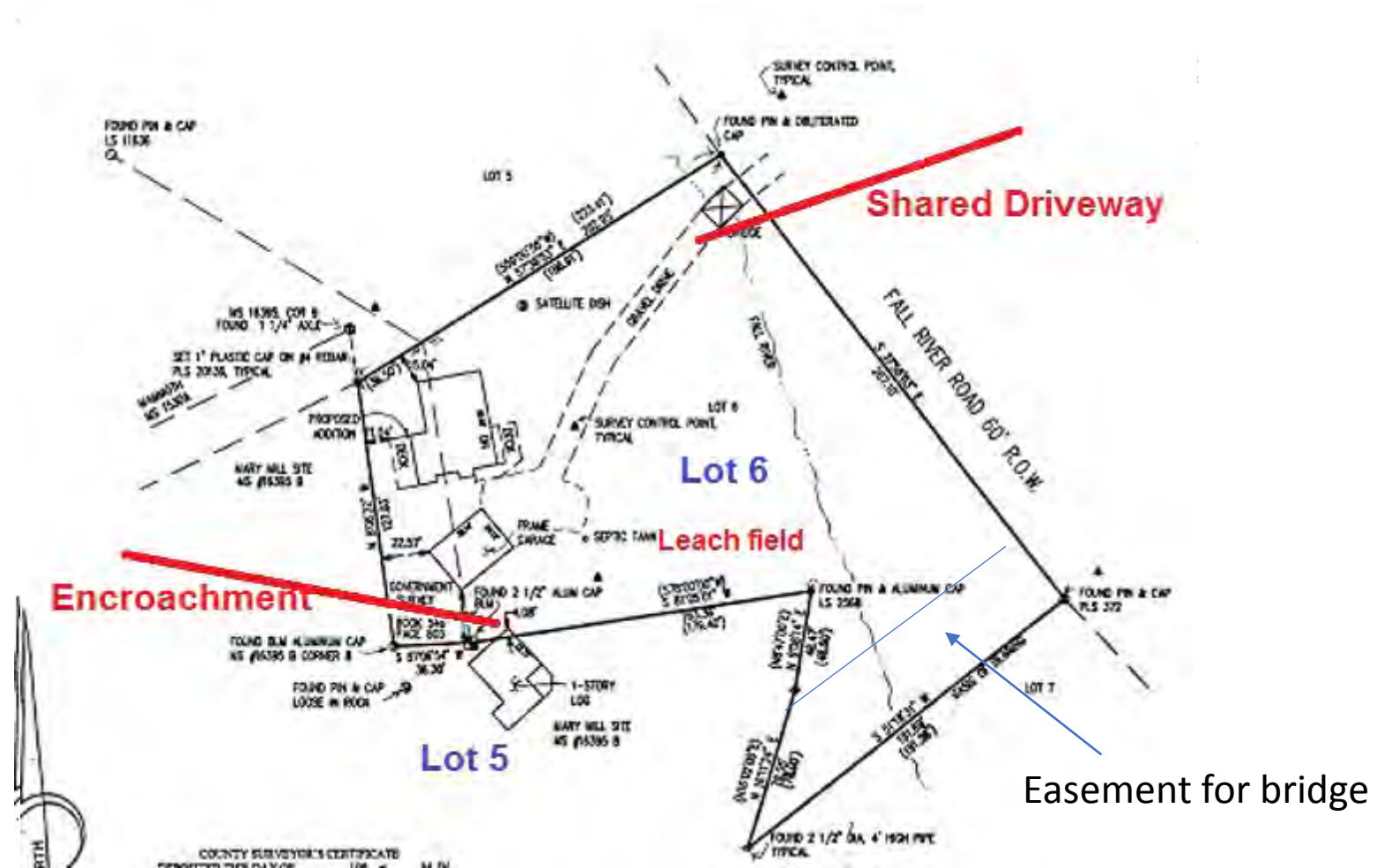
Sample Mountain Property Legal Description

Beginning at a point on the West line of the Southeast Quarter of the Northeast Quarter of Section 4, Township 1 South, Range 72 West of the 6th P.M. where said West line intersects line 1-4 of Cracker Jack Lode Mining Claim, Survey No. 19548, as recorded March 21, 1916 in Book 385 at Page 65 of the records in the Office of the Clerk and Recorder of Boulder County, Colorado; thence in a Southeasterly direction to a point on line 1-2 of the Blue Bell Lode Mining Claim, Survey No. 19549 as recorded March 21, 1916 in Book 385 at Page 66 of the records in the Office of the Clerk and Recorder of Boulder County, Colorado, and which point bears North 0°00'00" East, 26.70 feet from Corner No. 2 of said Blue Bell Lode Mining Claim; thence,
S 85°40'30" E., 142.05 feet; thence,
S 44°12'54" E., 98.27 feet; thence,
S 84°41'06" E., 149.69 feet; thence,
S 83°01'12" E., 72.39 feet; thence,
S 64°02'42" E., 122.85 feet; thence,
S 53°39'42" E., 96.70 feet; thence,
S 38°07'12" E., 116.94 feet; thence,
S 34°16'42" E., 117.83 feet; thence,
S 33°31'42" E., 73.64 feet; thence,
S 4°28'42" E., 173.65 feet; thence,
S 6°59'54" W., 105.80 feet; thence,
S 4°18'06" E., 116.22 feet; thence,

← Metes and bounds description.
Very difficult to understand
without reference to a survey map.

Continues for 2
pages

Sample Mountain Property Plat



Topography

Steep lots are less expensive. New construction may require pillars and/or retaining walls.



Topography

Applicant may need to seek variance from setback requirements, height limitations, or other building code provisions.

No Municipal Water

If a property is not on city water and the owner wants to build a residence, the owner will need need to prove they have a source of water to obtain a building permit.

Exempt wells are exempt from water rights administration and are not administered under the priority system. There are three types of residential uses:

- Livestock watering only
- Household use only (no outside use)
- Residential use (may include law/garden irrigation and/or domestic animal watering).

The most common exempt well for residential mountain property requires a household use well permit from the State Engineer. Apply on Form GWS-44.

Not on Municipal Sewer

If the property is not on a municipal sewer system, an owner that wants to build will need an Onsite Wastewater Treatment System (OWTS) or Individual Sewage Disposal System (ISDS), commonly septic system.

- Section 25-10-101 et. seq., C.R.S. authorizes the Colorado Dept. of Public Health and Environment (CDPHE) to develop minimum standards, but counties may adopt more stringent standards.
- Permitting is done through the local Board of Health.
- Shared system may be possible if Board of Health approves.

Property May Not Be Accessible by Public Road

Access is important for three reasons:

- There is not much point in owning a parcel if you can't access it.
- Trespass is a crime (18-4-502 et. seq. C.R.S.) and is also actionable.
- The county or municipality will not issue a building permit if the owner does not have legal access.

Ways to Establish Access

- The property fronts a public road (county road or state highway)
- The property is in a platted subdivision accepted by the county that dedicates an easement or right of way to owners over a road that leads to a county road.
- There is a recorded easement over a road that leads to a public road. (An express easement).
- The owner or buyer purchases an express easement.
- Prescriptive easements and similar creatures (requires a lawsuit to obtain a decree that establishes the right).

Easements

Colorado law defines an easement as an interest in property which, though distinct from an ownership interest in the land itself, nevertheless confers on the holder an enforceable right to use the property of another for a specific purpose.

Wright v. Horse Creek Ranches, 697 P.2d 384, 387-388 (Colo. 1985).

Types of Easements

- Express Easements (created by grant or reservation)
- Easements by Way of Necessity
- Easements by Pre-existing use
- Prescriptive Easements
- Easement by Condemnation
- Easement by Estoppel
- R.S. 2477

Filing Suit to Establish an Easement

C.R.C.P. 105(a):

(a) Complete Adjudication of Rights. An action may be brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto, with respect to any real property and for damages, if any, for the withholding of possession. The court in its decree shall grant full and adequate relief so as to completely determine the controversy and enforce the rights of the parties...

Filing Suit to Establish an Easement

- Quiet title suits frequently name “all other persons claiming an interest in the property” as defendants, and service on them is by publication. See, C.R.C.P. 4(g). (Consider Servicemembers Civil Relief Act).
- It is not mandatory to name every person that may claim an interest. A plaintiff in a quiet title action may omit an interest, or the holder of the interest, because challenging the interest would be futile, the plaintiff did not contemplate the interest, the plaintiff did not know of the interest, or the plaintiff did not care about the interest. *Campbird Colorado Inc., v. Board of County Commissioners*, 215 P.3d 1277 (Colo. App. 2009); *G.P. Anderson, Colorado Quiet Title Actions* § 3.1.7, at 68 (2008). BUT – those not named are not bound by the result. *Ginsberg v. Stanley Aviation Corp.*, 568 P.2d 35 (Colo. 1977).
- Include all viable easement theories in the Complaint. C.R.C.P. 8 states “Relief in the alternative or of several different types may be demanded.” The rule also states, “A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses.” Additionally, “A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both.”

Filing Suit to Establish an Easement

A declaratory judgment is NOT the proper mechanism. In *Argus Real Estate, Inc. v. E-470 Public Highway Authority*, 397 P.3d 215 (Colo. App.2003), the Court explained:

In a declaratory judgment, the court declares the rights of parties “under a deed, ... written contract, or other writings constituting a contract.” Section 13–51–106, C.R.S.2003; see also C.R.C.P. 57. While a document interpreted in a declaratory judgment may affect the title to land, the declaratory judgment does not adjudicate title. In contrast, a quiet title decree adjudicates title to property as between the parties to the action. See *Dynasty, Inc. v. Winter Park Assocs., Inc.*, 5 P.3d 392 (Colo.App.2000).

Easement by Way of Necessity

An implied way of necessity arises when the owner of a parcel of land conveys and grants part thereof to another, which leaves the remainder of the land without ingress or egress, except over the part conveyed. There are three requirements:

- The first requires that the original ownership of the entire tract be held by a single grantor prior to a division thereof.
- The second requires that the necessity existed at the time of the severance.
- The third requirement is that the necessity for the particular right-of-way be great.

Wagner v. Fairlamb, 379 P.2d 165 (Colo. 1963).

Easements by Pre-existing Use

As with easements by way of necessity, the evidence of the grantor's intent arises from common ownership of the dominant and servient estates and necessity for the easement.

Four requirements must be met in order to establish an implied easement by pre-existing use: (1) unity and subsequent separation of title; (2) obvious benefit to the dominant tenement and a burden to the servient tenement which existed at the time of the conveyance; (3) evidence that the common owner used the premises in an altered condition long enough before the conveyance to show that the change was intended to be permanent; and (4) necessity for the easement.

Lee v. School District, 435 P.2d 232 (Colo. 1967)

Prescriptive Easements

An easement by prescription is established when the prescriptive use is: (1) open or notorious; (2) continued without effective interruption for the prescriptive period; and (3) the use was either (a) adverse or (b) pursuant to an attempted, but ineffective grant. *Lobato v. Taylor*, 71 P.3d 938 (2002).

Permissive use is not adverse. *Brown v. Faatz*, 197 P.3d 245 (Colo. App. 2008).

Condemnation of an Easement

Article II, Section 14 of the Colorado Constitution provides a private right to condemn a private “way of necessity” as a remedy of last resort when common law principles would otherwise not provide legal access to landlocked parcels. The process is governed by statute at Section 38-1-102(3).

Don't confuse the “way of necessity” referred to in the Colorado Constitution with an Easement by Necessity.

Easements by Estoppel

Colorado courts have recognized that easements by estoppel exist. *Lobato v. Taylor*,
Supra.

“At best, these decisions dispense instructions to make the following inquiries: (1) whether the party to be estopped acted so as to falsely represent or conceal material facts, or at least conveyed the impression that the facts were different than those which this party later tries to assert; (2) whether the party to be estopped acted with an intention, or expectation, that his or her conduct would be acted on by the other party; and (3) whether the party to be estopped had knowledge (actual or constructive) of the real facts.”

David L. Masters, *A Survey of Colorado Easement Law – Part 1, The Colorado Lawyer*, May 1993.

R.S. 2477

RS 2477 was adopted in 1866. It states, in its entirety, that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

RS 2477 was repealed in 1976 by the Federal Land Management and Policy Act, FLPMA. However, FLPMA clearly stated that all existing RS 2477 rights of way were not affected by the repeal of RS 2477 and remained valid.

The use necessary to establish the road can be very limited, and "if the use be by only one, still it suffices." *Leach v. Manhart*, 77 P.2d 652 (Colo. 1938) However, the road must be established before the government land is withdrawn from the public domain. *Korf v. Itten*, 169 P. 148 (Colo. 1917).

Driveway Standards

- Counties will require a driveway that meets certain standards. One reason for this is concern for access by emergency vehicles.
- Standards for a shared driveway may be different than those for a driveway that serves a single residence.

Road Maintenance Issues

- Private driveway – owner is responsible for maintenance and plowing.
- Private road used by multiple owners:
 - No agreement among owners
 - Informal agreement among owners
 - Road maintenance associations
 - Incorporated or unincorporated
 - Does CCIOA apply?

Mining Claims

The General Mining Law of 1872 is one of the major statutes that direct the federal government's land management policy. The law grants free access to individuals and corporations to prospect for minerals in public domain lands, and allows them, upon making a discovery, to stake (or "locate") a claim on that deposit.

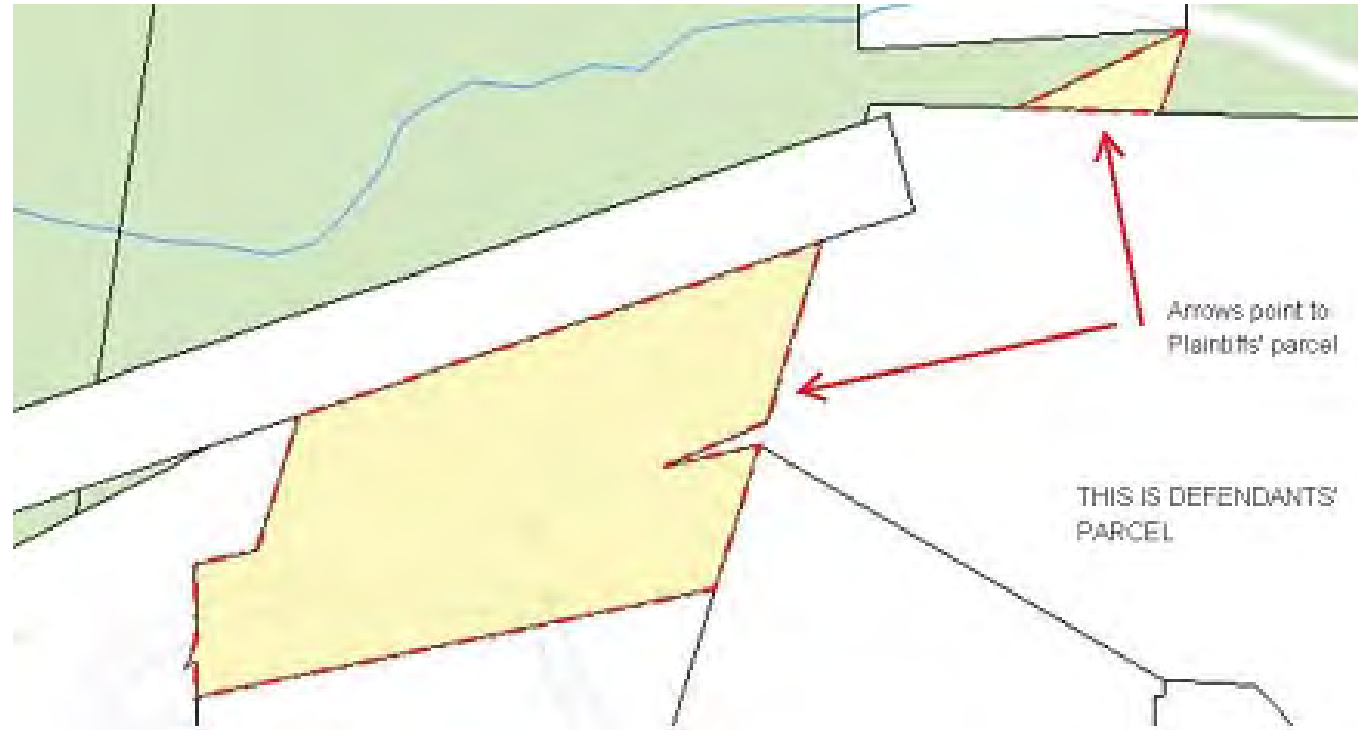
Patented Mining Claims - A patented mining claim is one for which the Federal Government has passed its title to the claimant, making it private land.

Unpatented Mining Claims – The claimant asserts a right to extract minerals, but title does not pass.

Patented Mining Claims

- The maximum size for a lode claim is 1,500 feet long and 600 feet wide. This is why you see many long rectangular parcels.
- When there are overlapping mining claims, you must look to the original patent to determine superior rights.
- A mining claim that is one property (per the assessor) may consist of several parcels, and this may create access issues.

Patented Mining Claims



Unpatented Mining Claims

Title Exceptions, Schedule B, Part II. You will often see an exception like this:

6. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) Minerals of whatsoever kind, subsurface and surface substances, in, on, under and that may be produced from the Land, together with all rights, privileges, and immunities relating thereto, whether or not the matters excepted under (a), (b) or (c) are shown by the Public Records or listed in Schedule B.

Some title companies will delete this exception if mining is unlikely, especially if the parties use that company for the closing.

Lack of Access to Gas or Electric

- If natural gas is not available, residents rely on propane.
- In sales transactions, it is common to pro-rate the amount of propane remaining at closing.
- Check to see if a permit is required for solar.

Is There a Right to Build?

- In 1972, Senate Bill 35 became law. It is codified at Section 30-28-101, et. seq., C.R.S. It requires an approval process for subdivisions that create lots smaller than 35 acres.
- If there is no compliance, the county won't issue a building permit.
- If an owner wants to subdivide a parcel into lots smaller than 35 acres, the county may require more infrastructure such as paved roads, sewer, water taps, etc.

Is There a Right to Build?

A property is a legal parcel when:

1. It is a full lot within a platted subdivision; OR
2. It is a parcel that was approved by an exemption from platting;
OR
3. It is at least 35 acres, OR
4. The land was divided by deed executed before May 5, 1972.

Jefferson County Planning and Zoning Division, Mountain Living Checklist.

Is There a Right to Build?

Do not rely on Assessor's maps to determine whether a parcel is legal to build on. Mountain topography was not always considered when older subdivision plats were drawn. Roads, structures, and fences were not always built where planned, setbacks from property lines were not always respected. It is best to get a survey (not an ILC) and check with adjacent owners to see if they agree.

Is There a Right to Build?

Is the property in a flood plain? That could result in the denial of a building permit or requiring the applicant to take additional steps.

Nearby Parcels May Have Livestock

Colorado is a “fence out” state. Section 35-46-102(2), C.R.S., provides:

Whenever any person stocks land, not enclosed by a lawful fence, on which such person has a lawful right to pasture or forage livestock, with a greater number of livestock than such land can properly support or water and any of such livestock pasture, forage, or water on the lands of another person, in order to obtain the proper amount of pasture, forage, or water or whenever any person stocks with livestock land on which such person has no lawful right to pasture or forage livestock and such livestock pasture, forage, or water on such land or on other land on which such person has no right to pasture or forage livestock, he shall be deemed a trespasser and shall be liable in damages and subject to injunction.

About Mark

Mark Cohen has 35 years of experience as a lawyer, including twenty-one years in Nederland, CO (elevation 8,236 feet).

Mark earned a B.A. in Economics at Whitman College and earned his law degree at the University of Colorado in Boulder. He earned an LL.M. Agricultural and Food Law from the University of Arkansas, where he also taught advanced legal writing. His diverse legal career includes service as an Air Force JAG, a Special Assistant U.S. Attorney, a prosecutor, a municipal judge for Boulder, six years on the Advisory Board of *The Colorado Lawyer* (including one as chairperson), and service on the Executive Board of the Colorado Municipal League.

Mark wrote six articles in the Am.Jur. *Proof of Facts* series, including the seminal article on piercing the corporate veil. He has written numerous articles and book reviews for *The Colorado Lawyer*. His satirical article, *How to Draft a Bad Contract*, first published in *The Colorado Lawyer*, was praised by Harvard Professor Steven Pinker as “simply brilliant,” and was reprinted in several other journals.

Mark wrote two mysteries published by Time Warner, and his first mystery, *The Fractal Murders*, became a Book Sense® mystery pick and was a finalist for the Colorado Book of the Year.

Mark’s practice focuses on business and real estate matters, corporate veil litigation, drafting and reviewing legal documents, and litigating disputes arising out of poorly drafted documents.

Mark holds a black belt in karate and serves on the board of directors of a non-profit that offers training in personal safety, violence prevention, and appropriate dating relationships.