

**Attorney General Phil Weiser**  
**Remarks, September 10, 2020**  
**Colorado Water Congress 2020 Summer Conference**

**Policy Perspectives on the Future of the Colorado River Basin**

Thank you for inviting me to speak today. Before reflecting on the challenges facing the Colorado River, I want to begin by discussing the history and purpose of the Colorado Water Congress. As many of you know, the Colorado Water Congress (CWC) was created in 1958 by Governor McNichols and Attorney General Dunbar to help advise State leaders and recommend action on particular water projects.<sup>1</sup> In establishing the CWC, they recognized that water users are diverse, their voices and opinions are many, and the supply isn't all that plentiful.<sup>2</sup> Their purpose in creating the CWC was that, by bringing water users from throughout Colorado together in a smooth-functioning, nonpartisan structure, Colorado could develop better public policies in this area.<sup>3</sup>

The Colorado Water Congress's mission today remains true to its founding spirit. As reflected in the strategic plan, the purpose of the Congress:

“is to provide its membership with a forum for the discussion of water matters and to the end that, where possible, conflicts among water users may be resolved through the medium of mutual discussion of the facts and proposed solutions. It will provide, to the greatest extent possible, information for the membership.”<sup>4</sup>

In Colorado, our spirit of collaborative problem-solving means that discussions based on facts and creative solutions is our true north. For us at the Attorney General's Office, we are wedded to this ethos and invite all CWC members to take us up on the opportunity to raise issues and share concerns.

As an example of the dialogue we welcome, consider the issue around the recent Waters of the United States, or WOTUS, decision. After the EPA and Army Corps of Engineers made its decision, we welcomed a conversation with the CWC about our concerns with that decision. In short, we were concerned that the WOTUS decision undermined the long-lasting protection of water quality called for by the Clean Water Act. In our earlier comments—and in the subsequent litigation—we called for the adherence to the governing Supreme Court decision in this area (*Rapanos v. United States*, 547 U.S. 715 (2006)) and the 2008 Guidance adopted by the second Bush Administration. We came to this position deliberately and after a series of conversations, including the one with the CWC. In our view, the best course for water policy includes the preservation of the agriculture exemption, assurance that states

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<sup>1</sup> <https://www.cowatercongress.org/history.html>

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> <https://web.cowatercongress.org/CWT/EXTERNAL/WCPAGES/WCMEDIA/DOCUMENTS/GOVERNANCE/CWC%20STRATEGIC%20PLAN.PDF>

like Colorado can maintain control of their water, and an appropriate level of water quality protection.

As we think about the challenges facing the Colorado River, we begin with a commitment to collaborative problem-solving and dialogue based on facts. The facts are that the hydrology of the Colorado River Basin today is not what it was historically. And that hydrology is very likely to continue to change in the future, perhaps resulting in water shortages in the Colorado River Basin like we have never before seen. To prepare for those possible shortages, whether with our existing tools or innovative solutions, we can look to examples in the past to guide our thinking.

In 1922, during the middle of Colorado River negotiations, the Supreme Court decided the important case of *Wyoming v. Colorado*, 259 U.S. 419 (1922). In part, the Court held that the rule for allocating Laramie River water between the states was based on priority. According to this ruling, if implemented on the Colorado River, more water would be apportioned to those states where development was already underway, leaving little for those states that had not yet begun to develop available water supplies. For the Upper Basin, this was a blow, forcing a shift in the Upper Basin's strategy for the Compact negotiations.

As Delph Carpenter recognized, under a system of priority allocation, states like Colorado which had yet to develop as rapidly as California, would be left badly exposed with great risk of curtailment. Consequently, Carpenter pushed an interstate compact concept that allowed the Basin States to move away from a strict priority system. Under Carpenter's model, the Upper Basin States would be apportioned a quantity of water that allowed them to develop gradually over time, providing a level of certainty and avoiding lengthy legal battles, but at the same time acknowledging the extensive existing uses occurring in the Lower Basin.

Today, the core challenge we face relates to the uncertainties and risks to our water supply because of dry and highly variable hydrology. To meet this challenge, we need a creative solution akin to that developed by Delph Carpenter. The core of this challenge is that it is difficult to predict how reduced water availability will impact the Basin in general and Colorado in particular as a head waters state.

Earlier this year, the Western Water Assessment released its assessment that the Basin is dry and getting drier. As we in the water community know, climate change is making our work harder and more important than ever, with a substantial warming trend over the past 40 years. Most notably, the period since 2000 has been about 2°F warmer than the 20th-century average, and likely warmer than at any time in the past 2000 years. The consequence, as we are all seeing, is less natural snowpack than ever before.

Recognizing the changing hydrology of the Colorado River, the Basin States embarked on a project of drought-contingency planning. To address the changing hydrology, as well as the rapidly declining reservoir levels in Lake Powell and Lake Mead, we developed the Drought Contingency Plan (DCP) to supplement the 2007 Interim Guidelines. The DCP, as it is called, provide us with a number of tools to use in case the Interim Guidelines are not up to meeting the challenges of declining reservoir levels. The longer-term challenge, of course, is replacing the 2007 Guidelines, which are set to expire in 2025.

Examining our existing operational guidelines for managing the Colorado River is a big challenge. It is also an opportunity to, as Delph Carpenter did almost 100 years ago, think creatively about how we manage the Colorado River in a manner that provides for water supply certainty and avoids litigation. To be clear, we are always prepared to take any and all steps necessary to protect Colorado's interests, including litigation. But our first plan is to work collaboratively with our fellow Basin States to avoid litigation and look for how we can develop win-win solutions.

The development of the 2007 Interim Guidelines were an important step toward creating flexibility within the Law of the River while still honoring the Colorado River Compact and other applicable laws. Even with these Guidelines, we still face the threat of possible Compact administration in the Upper Basin. In particular, the Upper Basin States have various Compact obligations to ensure flows are not depleted below a certain amount for use by the Lower Basin and Mexico. A failure to meet those obligations could trigger Compact administration for the Upper Basin.

Recognizing the specter of Compact administration begs the question of what, in practice, would this look like for Colorado? I have heard suggestions that Compact administration, if done through simple curtailment, is easy-to-manage and we should welcome the task of undertaking Compact administration. But such suggestions overlook that we have no basis to know what such administration looks like, because it has never happened.

Because the need for Compact administration will be driven by the hydrology in the years leading up to and including the year(s) of administration, there would almost certainly be a lot of uncertainties and risks related to its implementation. As a first order approximation, Compact administration would be achieved by curtailing post-Compact water rights—starting from the most junior rights—until the deficit was paid back. This might sound similar to what many of you experience for intrastate administration in a given water year, which is perhaps why some don't fear, or would even welcome Compact administration. But, unlike the intrastate administration model that is familiar to us, Compact administration is different.

For starters, Compact administration has a statewide impact, spans four major river basins with Colorado River tributaries, and could extend over a period of years. Compact administration is a blunt instrument and could easily create unanticipated and challenging results. Notably, Compact administration through simple curtailment does not have the nuance and flexibility of Colorado's legal and regulatory framework for water rights administration. In Colorado, we have developed a range of tools that allow for flexibility in state water rights administration like conditional water rights, changes to water rights, plans for augmentation, and exchanges. No such tools or other considerations have been developed yet to assist in Compact administration, however. Consequently, any Compact administration in the current regulatory environment will undoubtedly involve lengthy and complicated legal battles as well as uncertainties and significant impacts to all those who rely upon the Colorado River.

If disputes related to Compact administration are decided by litigation, such administration will be decided by decision-makers that do not have knowledge and expertise in water

management. If, for example, we end up with litigation between the States over the nature of Compact administration, it is more likely that the federal government will get involved in managing the Upper Basin. Moreover, during the course of any litigation, while different interests in our state battle against one another, parts of our state would suffer protracted economic and social harm while disputed issues are resolved.

At this time, Compact administration using simple curtailment, is the basic and only way to meet our Compact obligations if the Upper Colorado River Commission determines Compact administration is necessary. But, because of the uncertainties and risks that are likely to result from it, we believe it is important to take advantage of the time we have now, before we are forced into a reactive position with only this one mechanism to meet Compact obligations, to develop strategic and collaborative solutions that would mitigate or avoid the blunt instrument of Compact administration through simple curtailment. To that end, we believe it is important to explore all possible options for meeting our Compact obligations, ideally preventing or reducing the negative impacts that would come from Compact administration.

We are living during a time when we can proactively and collaboratively investigate how to best protect Colorado interests, minimize impacts to water users, and create benefits for all stakeholders while maintaining Compact compliance. This means looking at various Compact mitigation and avoidance alternatives in light of the highly variable hydrology that will continue to affect the Upper Basin. As one important additional option, the Colorado Water Conservation Board is looking at voluntary demand management solutions.

At this point, we don't know whether a demand management program will work for Colorado. But we would be remiss in our obligation to protect Colorado's interests if we did not endeavor to find out. To that end, we will keep working with water users and stakeholders across the State to identify and investigate the viability of other innovative Compact avoidance and mitigation options that provide flexibility and certainty. As we do so, we will look for ways to minimize impacts to water users and communities while allowing us to continue to meet or Compact obligations.

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Compact administration if accomplished by curtailment only is a blunt instrument that is likely to have significant negative impacts statewide and may not be the best option for our state. To address the variable hydrology we are facing, we must expand our approach and develop new solutions, considering Compact avoidance and mitigation options that could be used in conjunction with or in lieu of Compact administration. We all need to come together to engage in the type of honest and constructive dialogue that the Water Congress is known for to develop such options. As this process moves forward, our office will continue working with the State Engineer's Office, Colorado Water Conservation Board, Colorado's Commissioner, and the Interbasin Compact Committee. Thank you all for your engagement in that process.