

Address to Colorado Water Congress Convention January 25, 2023

In Colorado, we are used to confronting challenges as opportunities. After all, as Wallace Stegner, the famed Western writer, explained, it's impossible to be pessimistic in the West; it's the native land of hope.

At this very moment, it may feel challenging to be hopeful in the face of our significant water scarcity challenges in Colorado and the West. That scarcity is driven, in part, by increasing demands as populations boom. It's also driven by climate change, which is decreasing snowpack, changing runoff patterns, increasing evaporation, and drying soils.

One challenge we face is that the extent and exact understanding of climate change's impact on water is still largely unknown. That uncertainty, coupled with coexistent unpredictability in rainfall and snowpack, can be destabilizing—making it difficult for farmers, ranchers, and even outdoor recreation companies to plan for the upcoming season or cities and towns to engage in multi-year planning. It is also quite possible that increased variable weather patterns are going to be our new normal, creating considerable pressure for us to create more adaptive and resilient systems for water management.¹

To meet today's challenges, we, as Coloradans, must be innovative and develop new tools and strategies to adapt to water scarcity. To that end, we must continue to build on Colorado's rich history of collaboration within our state to develop and drive adoption of such tools. And, at the same time, we must continue to work with our federal and western state partners and encourage them to do the same.

I. Innovative Tools to Adapt to Scarcity

We have a long history of innovative collaboration in our state. I'm happy to see that tradition carrying on as many of you in this room continue to come up with new ways of adapting to scarcity to meet growing and diversifying demands for water and creating greater resiliency as you do so. Let me discuss just a few examples of the innovative and collaborative work being accomplished by people in this room.

On the conservation front, Denver Water, Aurora Water, and Pueblo Water—along with other municipal providers in California and Nevada—committed to reduce turf grass by 30% in their service areas.² To that end, the Aurora City Council already approved an ordinance limiting the use of cool weather turf in new developments and golf courses. And the General Assembly dedicated \$2 million to incentivize turf grass replacement through the Colorado Water Conservation Board. In terms of our ongoing conservation efforts, this is a valuable start.

In the Rio Grande Basin, water users are beginning to experiment with an intriguing strategy for water conservation—the use of water conservation easements. Like traditional conservation

¹ I previously discussed how resilience needs to be an overarching priority for our water management policies. <https://coag.gov/blog-post/prepared-remarks-resilience-as-a-policy-guide-for-water-management-oct-27-2021>.

² <https://www.denverwater.org/sites/default/files/water-efficiency-mou.pdf>

easements, this arrangement involves a landowner engaging with a local entity, like a land trust, and committing to not exercising water rights associated with a particular parcel of land in an effort to conserve a region's water supply. The idea has real potential and I look forward to learning how others throughout the state can benefit from their lessons and leadership.

With respect to water reuse, the Colorado Department of Public Health & Environment's new primary drinking water regulations will allow water suppliers to take new steps in this area. In particular, the Water Quality Control Commission adopted amendments to the Colorado Drinking Water Regulations that enables water providers to develop direct potable reuse programs. For Colorado, increasing our water reuse programs is a critical step to get more bang from our water buck.

In the water storage category, Greeley is now developing an innovative and impressive initiative to enable greater levels of water storage through its Terry Ranch project. As one article explained, through this project Greeley is "enlarging one of its existing reservoirs" and "city leaders are envisioning [that] the massive groundwater basin" will enable "future growth, drought resilience and climate change adaptation."³ This is a promising project that exemplifies what many have in mind when they talk about the need for greater uses of "smart storage."

I know that many of you are working on even more innovative tools and policies to adapt to scarcity. I am committed to learning more from you all and using my voice to elevate your hard work and creativity. As always, we want to be engaged with you on these important topics.

I also understand that we are likely to see legislation to enable and encourage important adaptive strategies to meet today's water challenges. I and our Department are committed to working with such proposals as well as advocating for funds to meet these challenges. As I have discussed with you before, the State's failure to invest funds in water projects received from the American Rescue Plan Act is one I worry will haunt us given the pressing need for investments called for by the Colorado Water Plan.⁴ To the extent that the General Assembly can redirect such unused funds to water infrastructure, it would be a smart decision.

II. Upholding the rule of law and defending our rights guaranteed by interstate compact

While Coloradans pursue innovative and collaborative solutions, we will also need to be vigilant in guarding against shortcuts and bad solutions. And we must defend the State's interstate compact allocations against overuse by other states.

We need to recognize that scarcity will increase public attention on water. And it might even drive leaders in other states to pursue undeveloped plans in order to score political points. We must resist that urge and continue to work together on regional solutions that address local needs.

³ <https://www.kunc.org/2021-02-15/greeley-sees-its-water-future-in-a-big-underground-bucket>

⁴ <https://coag.gov/blog-post/prepared-remarks-the-imperative-of-investing-in-water-infrastructure-colorado-water-congress-summer-conference-aug-25-2021>. As I noted in those remarks, "water infrastructure projects are both an investment in our future and a direct investment in Colorado communities."

It is important that we not allow politics to drive projects and lead to questionable decisions. In the case of Nebraska's Perkins County Canal plan, we are working to address the misconceptions and fears that are driving that proposal. Notably, the public conversation about the Canal is focused on stopping potential growth in the Denver Metro region and the list of potential projects laid out in the South Platte Basin Implementation Plan.

It merits emphasis that those pushing for the Perkins County Canal have largely ignored three important points. First, their proposal is based on a fundamental misunderstanding of the Basin Implementation Plans, including the South Platte Basin Implementation Plan. As you all appreciate, these plans are not actual plans to build projects, but rather grassroots, locally-driven documents focused on identifying the scope of challenges in specific basins. This means that they outline a long list of potential opportunities for projects water users *might* pursue to meet some of those challenges at some point down the road. Unfortunately, Canal proponents have mischaracterized these lists of options and concepts as project certainties. In practice, only a few of the projects in Basin Implementation Plans are ever built.

Second, most of those concepts identified in the South Platte Basin Implementation Plan involve water conservation and, if planned and built, could increase stream flows on the South Platte that would, colloquially speaking, raise all boats. In short, these plans would benefit Nebraska and Colorado and should be encouraged. To frame this issue otherwise is to make a critical mistake of engaging in zero sum thinking that harms everyone.

Third, and perhaps most importantly, under the South Platte River Compact, Nebraska already agreed to allow Colorado the entire use of the Upper Section of the river.⁵ That Upper Section extends from the headwaters all the way to the western edge of Washington County, Colorado, and includes the entire Denver-metro region.⁶ Any suggestion that development in the Upper Section will take Nebraska's water is plainly incorrect. In short, Nebraska disclaimed all rights to water from the Upper Section, even if Nebraska does build the Perkins County Canal.⁷ Under the Compact, therefore, any concepts listed in the South Platte Implementation Plan that are ultimately constructed in the Upper Section could operate without regard to the impacts on the Perkins County Canal.

Stated simply, the Canal proposal—a major investment of many hundreds of millions of dollars for little to no benefit for Nebraska—is both unwise and unlikely. That's why I don't believe it will ever come to pass. That said, if Nebraska ultimately decides to build this canal, we will ensure that the project is limited to exactly that which was negotiated in 1923 and nothing more. Nebraska cannot use its delay in pursuing the project, for example, to benefit itself—especially if that comes at any cost to Colorado landowners and water users.

If Nebraska were to attempt to advantage itself more than the terms of the Compact provide, we won't hesitate to go to court on that issue—or any other one involving interstate water management issues—to protect Colorado's rights. To that end, in this legislative session, I am already pushing for additional resources for our Interstate Water Unit so we are prepared for any potential litigation

⁵ See Compact, art. VI(2)(b), (3).

⁶ See Compact, art. I.

⁷ Compact, art. VI(2)(b), (3).

that may come our way. For any of you in the audience who might be impacted by the Perkins County Canal or have clients who might be impacted, please don't hesitate to reach out to my office.

The original development of the Colorado River Compact is an inspiring story of Western collaboration and innovative problem-solving. An optimistic Coloradan, Delph Carpenter, was instrumental in forging that agreement, which was a far-sighted framework that protected Colorado's interests and placed limits on what the Lower Basin states—Arizona, California, and Nevada—could expect. As you all appreciate, we are now in a moment in which those states need to start living within their means. At this important moment, we stand ready to work with them, sharing our knowledge and expertise, on the path forward while also defending the well-established rights of Colorado.

As we all know, the Colorado River basin faces historic drought that, coupled with overuse by the Lower Basin, stretches the limits of the system and the existing agreements that all of the States agreed to. Finding solutions will require innovation and collaboration from each State along with a recognition of our shared vulnerabilities and opportunities.

Colorado, together with the other Upper Division States, recognizes that we must be part of the solution in the Colorado River Basin, even though much of the pressure on the systems are not due to Colorado's actions and rather stem from irresponsible practices elsewhere. Our system of water rights administration and the Upper Basin Compact provide the framework to do just that. Between the reservoir releases under the Drought Resilience Operations Agreement and the intrastate administration of water rights based on legal and physical availability, the Upper Division States are doing more than their share to reduce consumption and prop up Lake Mead. We must recognize that these reductions and contributions are on the backs of water users in Colorado, New Mexico, Utah, and Wyoming. None of them have received any compensation for these efforts.

I want to acknowledge the great work of Becky Mitchell and her team, including the alternate Colorado River Commissioners, John McClow and Dave Robbins. They have worked very hard and effectively, along with the talented lawyers from my office, led by First Assistant Attorney General Lain Leoniak, towards a consensus framework agreement alternative to the Supplement EIS for the 2007 Interim Guidelines. They are indeed now in the process of working together with the Upper and Lower Division States as well as Reclamation Leadership to find a collaborative solution to the crisis we face in the basin.

It is critical that the Lower Basin States take seriously the scarcity we face. I am discouraged that they again put in full water orders just this year as pre-compact rights are shut down across the Upper Basin. One might suggest this is a version of a familiar and appropriate pun—denial is not just a river in Egypt. To that end, as I've said before: “The era of the Lower Basin States taking as much water as they wanted—up to 10 million acre-feet when they're only allocated 7.5—is over.” If the Lower Basin cannot or will not step up to offer real solutions to cut uses and live within its allocation, then we will not be afraid to litigate to defend our rights under the Law of the River.

As we approach the challenges of water scarcity, we must not compromise the commitments made to our tribal partners. To that end, we must take steps to make sure the tribes water rights in Colorado are respected and that the Tribes receive the funds necessary to use their allocated rights. I am committed to using my voice to ensure that the Tribal Nations are treated in accordance with existing agreements and in recognition of the historical mistreatment they have endured.

In the Colorado River Basin, the Tribal Nations must be included in negotiations for post-2026 reservoir operations, and there are considerations we must be mindful of now, both in terms of procedure and substance. As those negotiations proceed, we must recognize that there is a significant amount of water flowing into Lake Powell that is an unused Upper Basin tribal apportionment. We must be prepared for when the Tribes fully develop their apportionments – for what that means across the basin and at the major reservoirs.

Colorado—unlike some other southwestern states—has finalized water rights settlements with both the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe. But our work doesn't stop there. We must work to ensure they have access to federal infrastructure dollars to construct projects that they need in order to use that water. They stand ready to utilize that water, but the lack of funding has prevented them from doing so. The federal government has now promised billions of dollars to assist in building infrastructure projects. We are committed to ensuring that the Ute Mountain Ute Tribe and the Southern Ute Indian Tribe receive adequate funding to build their projects and utilize the water essential to them.

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Let me close by appreciating the important role of the Colorado Water Congress. This organization was founded in partnership with the Colorado Attorney General's Office, recognizing the importance of convening a range of stakeholders to work together on one of Colorado's top priorities. I appreciate the regular opportunities to engage with you all, and I always find that the conversations here are crucial to our work.

In closing, let me reflect with you on my visit here last winter, when Wyoming Attorney General Bridget Hill joined me to discuss the importance of respectful dialogue even when we disagree. I believe deeply in that principle. To drive our work forward in the Department to advance this principle, we sponsored the Unify Colorado Challenge, which brought together Coloradans from different backgrounds for respectful dialogue, and we created a documentary based on this project that could be useful in civic education.⁸ As we continue this work, I will keep the Colorado Water Congress in mind as a model of effective collaboration and respectful dialogue. Thank you all for your important work.

⁸ <https://coag.gov/ginsburgscalina>