

1-1-2011

Inter-Basin Coordination

Jessica Lin

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

Custom Citation

Jessica Lin, Conference Report, Inter-Basin Coordination, 14 U. Denv. Water L. Rev. 440 (2011).

This Conference Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

section of the site contains spreadsheets listing all the current bills and the various stages of the process each bill was in. Mr. Kemper discussed four bills. Two bills the SAC opposed dealt with increased costs to water rights owners (HB-1165) and reduced access to ditches (HB-1289). The SAC is tracking two bills as well; one concerns endangered species of fish (SB-203 or HB-1177) on the Western slope and the other involves funding for water projects (SB-226).

The presentation took a different tone as Mr. Kemper concluded his lecture on the CWC and invited his audience to analyze the impact of water on the society in which they live. He showed drought patterns and current drought conditions in the continental United States with special focus on Colorado. Mr. Kemper discussed the greatest challenge with water, which is to maintain low water prices for consumers and sufficient reserves while simultaneously reducing demand through innovative conservation and accommodating an ever-growing population. This challenge, he explained, was for the next generation of professionals to solve. And with those words, he opened the door to the many law students in attendance, and invited them to play a role in the future of Colorado water.

Sean Carnahan

INTER-BASIN COORDINATION

Ted Kowalski, Chief of the Interstate and Federal Section at the Colorado Water Conservation Board (CWCB), and Peter Fleming, General Counsel at the Colorado River Water Conservation District, discussed coordination among the Colorado River basins.

Kowalski's presentation focused on the interbasin coordination across state lines and with Mexico. He began by giving an overview of how various compacts allocated the Colorado River. First, he mentioned that the Colorado River Compact of 1922 established the upper and lower basins. The Boulder Canyon Project Act further established lower-basin allocations in 1928, while the Upper Colorado Basin Compact established the upper-basin allocations in 1948. A treaty with Mexico in 1944 further allocated a portion of the Colorado River. In sum, the Colorado River allocates up to 17.5 million acre-feet (maf) of water, with 7.5 maf going to the Upper Basin, 8.5 maf to the Lower Basin, and 1.5 maf to Mexico. Kowalski mentioned that it is important to note there is approximately 15 maf of average annual runoff. Therefore, the Colorado River is over allocated.

Kowalski next discussed the benefits of interstate compacts for water allocation. First, the compacts could serve Colorado because negotiated compacts are better than equitable apportionment. He explained that because downstream states such as California and Nevada are developing at a faster pace, Colorado would lose out in the race to appropriate senior water rights based on its development. Another benefit of negotiated compacts is that they allow states to

draft the terms, rather than turning the decisions over to the Supreme Court or special masters. Interstate compacts are also less costly and require less time to negotiate compared to interstate litigation over water rights. Finally, interstate compacts can provide certainty for both upstream and downstream states. Kowalski then highlighted provisions under Article III of the Colorado River Compact of 1922 in detail and noted that the Mexican treaty obligation is a potential source of interstate litigation.

Kowalski went on to talk about recent hydrology and stated that the period between the years 2000 and 2010 has been the driest eleven-year period in the one hundred-year historical record. Last year, Lake Mead dropped to an elevation of 1,082 feet. This is significant because an elevation of 1,075 feet marks the start of water shortages in the lower basin. While this creates a lot of concern in lower basin states, Kowalski noted that it is critical to point out the situation may not necessarily be a hydrologic driven emergency but an emergency driven by use and overuse in the lower basin states. He also stated that of the 8.23 maf released each year, the lower basin states receives 7.5 maf. However, taking into account evaporation and other tributary uses, the allocation exceeds 8.23 maf and is closer to 10 or even 10.5 maf. As a result, it is likely that the elevation at Lake Mead will continue to drop.

Next, Fleming talked about interbasin coordination within the state of Colorado. He gave three examples of situations where risk and uncertainty in the use of water present opportunities for conflict but also opportunities for cooperation.

He began with a discussion of the West Slope's mediation with Denver Water. He noted that several circumstances gave rise to conflict in this case, especially the pending litigation on Denver's Blue River System. The Blue River System includes the Dillon Reservoir and Roberts Tunnel, and the problem stems from the fact that a portion of Roberts Tunnel remains conditional. Fleming explained that this means Denver has not used the full capacity of the tunnel and, therefore, has to file for diligence to show that it is thoroughly developing that water right. The decree for this water right contains some conditions. One of the most critical conditions is that Denver cannot use that water anywhere except in the Denver metropolitan area. The decree defines the "Denver metropolitan area" as areas that are reasonably integrated with the city and county of Denver. Fleming pointed out that the definition is ambiguous at best, and the West Slope entities and Denver Water have yet to agree on the scope of the water service area. In addition, while this litigation was pending, Denver proposed to enlarge its Moffat Project by requesting water from the Frasier River to be put in the Gross Reservoir. In response, a large group of the West Slope entities decided to make a joint proposal to Denver Water. It took one and a half years just to put together a proposal. The parties have since opted to negotiate with the assistance of a mediator and have made more progress. Fleming expects a public roll-out of the agreement at the end of April.

However, he notes that there would still be a lot of phases to implement before the agreement can go forward.

Next, Fleming talked about a proposed alternative management plan for the wild and scenic process in the Upper Colorado River. The Wild and Scenic Act tasks the Bureau of Land Management (BLM) with the responsibility to determine land and rivers that are eligible for designation under the act and are, therefore, entitled to a higher level of protection. An eligibility report for designation determined that eighty-five miles of Colorado's rivers are eligible. Fleming noted that if a BLM suitability analysis finds the rivers to be suitable for protection, it would begin to implement protective measures for managing these resources. This creates uncertainty among upstream stakeholders because they are unsure of the kinds of impacts on their present and future operations. The uncertainty incentivized these stakeholders to create the Stakeholder Group Alternative Management Plan. This plan is currently under way with hopes of obtaining formal approval in the near future. The goal of the plan is to balance a permanent protection of resources with certainty for stakeholders, water project yield, and flexibility for water users. To achieve this balance, the plan proposed the following: CWCB instream flow, delivery of water to downstream demands, cooperative measures of water providers, and creation of resource guides.

Finally, Fleming discussed the Colorado River Compact Curtailment Water Bank (Curtailment Plan). Fleming explained that there is tremendous uncertainty surrounding the lower basin states' possible curtailment of Colorado and other upper basin states' use of post-compact water rights. The purpose of the curtailment would be to satisfy the upper basin states' development limitation commitment under the Colorado River Compact of 1922. Fleming pointed out that almost all transmountain diversions are post-compact water rights. Therefore, in the event of a curtailment order, transmountain diversions would be cut off because they are junior to rights under the 1922 compact. This event would cause significant disruptions to the economy and daily lives. The goal of the Curtailment Plan is, therefore, to develop Colorado's remaining compact entitlement while minimizing risk, avoiding compact curtailment, and preserving Colorado's pre-compact rights.

Jessica Lin