

# 9.1

## PROTECTING COLORADO'S COMPACTS AND UPHOLDING COLORADO WATER LAW

### GOAL

**Colorado's Water Plan upholds Colorado's water law system, interstate water compacts and equitable apportionment decrees, and local control structures. Colorado will focus planning efforts on maintaining healthy systems and avoiding a Colorado River Compact deficit, rather than focusing on the State's response to a compact curtailment.**

As Chapter 2 describes, Colorado has an intricate legal and institutional framework, and the institutional setting is the starting point for all other conversations regarding Colorado's water future. Colorado's Water Plan recognizes the prior appropriation doctrine as the foundation of Colorado's water law system, and respects the importance of Colorado's interstate water compacts and other interstate agreements.

Additionally, this plan maintains Colorado's water allocations by respecting the designated roles of the State of Colorado and the federal government regarding water management within Colorado. Colorado's Water Plan continues to support state-based solutions to needs federal agencies have identified in order to best balance water needs in Colorado and ensure that water rights for environmental purposes can be appropriately administered within Colorado's water law. These state and federal partnerships have been successful in several instances, and this plan describes them in more detail below. This plan also recognizes Colorado's history of local control regarding

water development, and will continue to uphold Colorado's commitment to supporting tribal water settlements with the Ute Mountain Ute and Southern Ute Tribes.

Section 9.1 reaffirms Colorado's commitment to these fundamental tenets, while advancing strategies for future water management.

**The State of Colorado Demand will continue to uphold the prior appropriation doctrine.**

Colorado's prior appropriation doctrine is based on language within the Colorado Constitution. The doctrine requires that water be put to beneficial use, and also requires efficient use to ensure the greatest utilization of Colorado's water resources.<sup>1</sup> These concepts are ever-evolving and will need to adjust appropriately. Over time, the doctrine has proven to be remarkably flexible, and this flexibility has been demonstrated by the recognition of new beneficial uses, such as environmental and recreational uses, under the law. While Colorado's Water Plan affirms the prior appropriation doctrine, there is room for improving water management within this allocation system.

Colorado's water court system has often been criticized for being cumbersome and expensive.<sup>2</sup> Several years ago, a report from the Water Court Committee of the Colorado Supreme Court to the Chief Justice made recommendations to improve the efficiency and cost effectiveness of the water court system. The State has implemented most of these recommendations, but the Water Court Committee should assess whether these changes have had the desired effect of making the system more efficient and cost effective. In addition, the standing committee should explore whether additional recommendations could be made in the future.

**The State of Colorado will continue to uphold and maximize the use of Colorado's water entitlements under Colorado's compacts, equitable apportionment decrees, and other interstate agreements.**

For nearly a century, Colorado has led the development and protection of interstate water compacts as a method of allocating water on interstate streams and rivers. Colorado vigorously defended its water allocations when downstream states have alleged compact violations,<sup>3</sup> and has also been steadfast in defending water entitlements allocated to Colorado through equitable apportionment decrees.<sup>4</sup> Colorado's

Water Plan reaffirms Colorado's dedication to protecting its compact and decree entitlements.

Colorado has a litigation account that is available to the CWCB and the Office of the Attorney General for Colorado's defense of its water resources.<sup>5</sup> Importantly, this fund is available to: 1) Support water users whose water supply yield is or may be diminished as a result of conditions imposed, or that may be imposed, including but not limited to bypass flows by any agency of the United States on permits for existing or reconstructed water facilities located on federally owned lands; 2) oppose applications of a federal agency for an instream flow right that is not in compliance with Colorado law; 3) protect Colorado's allocations of water from interstate streams; and 4) ensure the maximum beneficial use of water for present and future generations by addressing important questions of federal law.<sup>6</sup> Colorado should continue to maintain a sufficient balance in this fund to ensure that the State has adequate resources to protect its water resources. In addition, Colorado should make every effort to comply with its compact and decree obligations. While interstate compacts have been a solid foundation upon which water allocation occurs, interstate compacts have also been flexible and are able to address issues in times of drought and other unforeseen circumstances.



In working to protect the state's valuable water resources, Colorado recognizes that federal agencies manage federal lands and have a role in managing water resources within the state. At the same time, the State of Colorado has vigorously defended Colorado's water allocation and management system. Colorado will continue to argue for an appropriate balance between state and federal roles in Colorado's water law and water management system. That said, it is important to balance and coordinate the state and federal agency roles and responsibilities in order to remain consistent with their respective authorities and obligations. Federal statutes such as the Wild and Scenic Rivers Act and the ESA may affect the ways in which water users develop Colorado's compact and decree entitlements. The State of Colorado is committed to working with federal agencies to fulfill their legal responsibilities in ways that respect Colorado's compact and decree entitlements, and authorities to administer waters within the state. An example of this type of compromise exists within the Upper Colorado River Endangered Fish Recovery Program, a multi-agency partnership that operates to help protect and recover endangered fish species while allowing water users to continue to develop the State's compact entitlements. The State of Colorado should continue to support such programs and explore ways to develop similar programs when appropriate.

In addition, Colorado's Instream Flow Program is an effective tool used in the Upper Colorado River Wild and Scenic Rivers Act Management Plan. This plan provides protection for flow-related "Outstandingly Remarkable Values" associated with the Upper Colorado River, while respecting the need for water managers to have flexibility in the future. It can also serve as a model for future endeavors in state and federal collaboration.

**The State of Colorado will continue to ensure a proper balance between state and federal roles in Colorado's water law and water management system.**

The State of Colorado has always vigorously defended Colorado's water allocation and management system, and is committed to ensuring that there remains an appropriate balance between federal and state roles in water management. Recently, certain federal agencies' decisions and proposed actions identified the need to improve communication and coordination among state and federal agencies to ensure mutual respect of state and federal roles. Some recent examples include



the USFS’ position on water rights associated with Colorado ski areas; the USFS’ proposed groundwater directive; the BLM’s resource management plans; and USFS’ management plans. In the context of these and other federal water-related issues, Colorado must work proactively with federal agencies to ensure that resource protection needs required by federal law are met in a way that respects water rights decreed and administered by the state. To the extent that bypass flows interfere with and potentially undermine water rights as decreed and administered within the state, Colorado maintains that bypass flows should not be a preferred method for meeting aquatic resource protection objectives on federal lands. Rather, federal agencies and the State should work together, whenever possible, to meet their common water resource objectives.

**The State of Colorado will continue to work within Colorado’s local structure.**

Colorado’s local governments have considerable authority in making water development and management decisions, and counties and municipalities exercise a broad range of powers—explicitly conferred to them by state law—to address the needs of their constituents. The range of local authorities includes broadly authorizing counties and municipalities to balance environmental protection with the need to provide for planned and orderly land use. Counties and municipalities have several tools at their disposal to make this happen, including the ability to create special districts, require master plans for development, assess impact fees to offset new development on existing infrastructure, and exercise 1041 powers, which allow local governments to regulate construction or extensions of major new water and sewage treatment systems. The State of Colorado will work collaboratively with local governments within this existing framework, and Colorado’s Water Plan is a valuable tool for both levels of government in that work. Section 2.3 discusses the local control structure within Colorado in more detail.

**The State of Colorado will support strategies to maximize the use of compact water while actively avoiding a Colorado River Compact deficit.**

All Colorado River system water users have an interest in the security of Colorado’s compact entitlement. Basins using Colorado River system<sup>a</sup> water emphasized the need to protect existing uses, while proposing some

increment of future development. Ongoing interstate discussions, such as those about the Colorado River drought contingency-planning efforts the Upper Division states are developing (which Chapter 2 discusses), will inevitably affect water management within Colorado. These efforts include weather modification, extended reservoir operations (the release of water from upper Colorado River Storage Project reservoirs to protect critical reservoir elevations at Lake Powell), and management of demands to influence Lake Powell elevations. Hydrologic conditions in the face of climate change and increased demands will require Colorado water users to creatively and collaboratively manage the resources at hand. Intrastate efforts will be distinct from, but necessarily informed by, ongoing interstate processes and negotiations.



<sup>a</sup> As defined in the Colorado River Compact of 1922: “that portion of the Colorado River and its tributaries within the United States of America.”




In early drafts of the IBCC Conceptual Framework, the IBCC discussed the concept of a collaborative program to protect existing uses and some increment of statewide future use. The IBCC placed the highest priority on working on a collaborative, programmatic approach to managing consumptive uses moving forward, with the end goal of avoiding a compact deficit. This programmatic approach would ideally involve water banking concepts, although at present this approach has not been sufficiently developed to provide full coverage for protected uses. While water banking may be an important part of the programmatic approach, it will likely be one piece of a multifaceted program.

The programmatic approach involves augmentation and storage management as initial tools, and demand

management as a tool of last resort. Demand management efforts would be based on voluntary, temporary, and compensated reductions in eastern and western slope consumptive use. Willing water users would be temporarily compensated for voluntary reductions of consumptive use, and such reductions in use would be monitored and verified to ensure a benefit to the Colorado River system.

By definition, pre- and post- compact water rights are subject to distinctive levels of risk in a compact curtailment situation, and though the purpose of a collaborative program would be to avoid curtailment entirely, it is important for program participants to recognize the potential impacts of a curtailment on these different types of water rights.

A photograph of a person sitting on a rocky outcrop, looking out over a vast, deep blue reservoir (Lake Powell) surrounded by rugged, reddish-brown desert cliffs and plateaus. The sky is overcast with grey clouds. The person is wearing a light blue t-shirt, dark pants, and a wide-brimmed hat. The water is a deep teal color, and the surrounding landscape is characterized by layered rock formations and some small islands in the distance.

Lake Powell lies across the border between Utah and Arizona. This reservoir serves as the Upper Basin States' "bank account" with regard to the Colorado River Compact.

## ACTIONS

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The following actions will promote continued collaboration among the State of Colorado and federal, state, tribal, and local entities regarding interstate and intrastate water management issues. These actions seek to protect Colorado's compact entitlements while encouraging collaborative solutions to protect existing and future uses within the state.

### **A. The State of Colorado will continue to uphold the prior appropriation doctrine.**

1. The CWCB encourages ongoing efforts to make the water court system more efficient—including the work of the Water Court Committee of the Colorado Supreme Court. CWCB envisions that these efforts will make the prior appropriation doctrine process more efficient and easily navigated, while maintaining the protection of these important private property rights.
2. The IBCC's work on potential legislative solutions suggests that broad stakeholder input is needed to garner support for achieving process improvements through the legislative process. The CWCB will explore potential avenues for broad input on improvements to the water court process, whether through the roundtable and the IBCC process, or other mechanisms.
3. Using broad stakeholder input to garner support, the CWCB will explore potential avenues for achieving process improvements that will make Colorado's existing water law system more agile, effective, and efficient.

### **B. The State of Colorado will continue to uphold Colorado's water entitlements under Colorado's compacts, equitable apportionment decrees, and other interstate agreements.**

1. The CWCB will continue to maintain a sufficient balance in the litigation fund to ensure that the State has adequate resources to protect its water resources.

2. The CWCB and the Division of Water Resources will continue to make every effort to comply with interstate compact and decree obligations.
3. The CWCB will continue to work with federal agencies to ensure that their responsibilities are implemented in a way that respects Colorado's compact and decree entitlements, and respects the State's authorities to administer waters within the state.

### **C. The State of Colorado will continue to ensure a proper balance between state and federal roles in Colorado's water law and water management system.**

1. The CWCB will remain involved in maintaining the balance of state and federal roles within Colorado. As federal procedures and policies are developed and implemented, the State will defend Colorado's water allocation and management system to the extent that proposed federal actions may interfere with and potentially undermine water rights as decreed and administered within the state.

### **D. The State of Colorado will continue to work within Colorado's local structure.**

1. In proposing innovative strategies to meet Colorado's existing and future water needs, the CWCB will continue to work collaboratively with local governments, while recognizing the authority of counties and municipalities in making water development and management decisions.