

PHIL WEISER
Attorney General

NATALIE HANLON LEH
Chief Deputy Attorney General

SHANNON STEVENSON
Solicitor General

TANJA WHEELER
Associate Chief Deputy Attorney
General



STATE OF COLORADO
DEPARTMENT OF LAW

RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

Office of the Attorney General

October 25, 2023

Ms. Kathy Chandler-Henry
Chair
Colorado River Drought Task Force
VIA ELECTRONIC MAIL: kathy.chandlerhenry@eaglecounty.us

Dear Chair Chandler-Henry:

As an ex officio member of the Colorado Water Conservation Board (“CWCB”) and the State’s attorney charged with representing Colorado water interests in interstate negotiations, developing solutions to manage our State’s water is a top priority. The Colorado Department of Law (“Department”) and I have closely followed the ongoing discussions of the Colorado River Drought Task Force (“Task Force”) as it continues its important work to develop recommendations for state legislation on “programs that address drought in the Colorado [R]iver [B]asin”.¹ I’m very grateful for the Task Force members’ devotion to this important goal, as well as the members of the General Assembly who brought Senate Bill 23-295 to establish the Task Force and guide its important work.

As the Task Force begins to weigh potential legislative recommendations to the General Assembly, the Department would like to submit several concepts for the Task Force’s consideration. I believe each of these concepts pose opportunities in which the State could collaborate with stakeholders throughout Colorado to address ongoing challenges to the Colorado River Basin caused by persistent drought. The following sections describe each concept.

- 1. *Reversion of Present Perfected Water Rights Otherwise Subject to Abandonment.*** Under the Water Right Determination and Administration Act of 1969, the State and division engineers must prepare decennially an abandonment list comprising all the absolute water rights determined to have been abandoned in whole or in part and which previously have not been adjudicated as abandoned.² In an abandonment proceeding, the water court determines whether particular water rights do or do not exist.³ Water rights are usufructuary in nature, and in an abandonment proceeding the use entitlement may be lost to the stream. When this occurs, the property rights adhering to the particular water right no longer exist.⁴ Abandoning water rights that predate the Colorado River Compact could reduce the amount of

¹ COLO. REV. STAT. § 37-98-105(4)(a) (2023).

² COLO. REV. STAT. § 37-92-401(1) (2023).

³ See *Masters Inv. Co. v. Irrigationists Ass’n*, 702 P.2d 268, 271–72 (Colo.1985).

⁴ Cf. *Weibert v. Rothe Bros.*, 618 P.2d 1367, 1371 (1980).

water Colorado can use—especially under any potential compact administration for the Upper Division States—because those rights are not subject to curtailment under the Compact. The Compact recognizes that “present perfected rights to the beneficial use of water of the Colorado River system are unimpaired by this compact.”⁵ Simply abandoning one of these water rights would mean that it no longer exists and would be unavailable for use under any future compact administration in Colorado. The General Assembly could avoid that outcome by declaring that if a present perfected right would otherwise be abandoned, it could instead revert to the State under a legal mechanism akin to escheat.⁶ The General Assembly would also need to authorize the State to use any such water rights as part of a program to shepherd these rights to the state line in order to help the State maintain its compliance with the Colorado River compacts. When not needed for compact compliance, moreover, these water rights could be used by the CWCB for multi-benefit purposes, such as protecting local habitats.

2. ***Wildfire Resilience Program.*** Increased aridification and variability in water supplies increase the risk of wildfires. And when those wildfires occur, they can threaten the already limited water supply, for example, by compromising the quality of the available water. To address this issue, the General Assembly should create additional programs and increase funding to existing programs aimed to proactively manage forests to decrease the severity of wildland fires, protect water infrastructure in the event of wildland fires, and reduce impacts of wildland fires on the quality of Colorado’s water supply.
3. ***Requiring Cooperation Between State Agencies, Concurrent Permit Review, and Timetables for Permitting Water Infrastructure Projects.*** Many water projects must undergo environmental review under the National Environmental Policy Act, receive a biological opinion from the U.S. Fish and Wildlife Service on impacts to endangered species, and obtain a 404 permit from the U.S. Army Corps of Engineers under the Clean Water Act. In addition, 401 certification from the Colorado Department of Public Health and Environment is often necessary. And, in some cases, a state-level fish and wildlife mitigation plan with Colorado Parks and Wildlife and the CWCB can also be required. Some projects, moreover, require permits from local authorities, like land use, zoning, and 1041 permits. Not surprisingly, these federal and state processes can be repetitive, time consuming, and costly. Denver Water’s Gross Reservoir Expansion Project, for example, spent over 15 years in permitting review. The federal government has identified this issue in recent years one needing to be addressed. The 2015 Colorado Water Plan identified permitting reform as a State priority—but since the Water Plan was released, the General Assembly has not acted on this matter. I recommend the Task Force weigh options for *responsible* permitting reform that can streamline permitting and timeframes for water-related projects—options that do not compromise our commitment to responsible development practices and requirements that protect people, communities, and the environment.

⁵ COLO. REV. STAT. § 37-61-101, art. VIII.

⁶ See COLO. REV. STAT. § 15-11-105 (Under estate law “[i]f there is no taker [...] the intestate estate passes to the state of Colorado...”).

4. ***Authorizing Temporary Conservation Easements for Water Rights.*** While not nearly as relevant and valuable to the Colorado River as other basins, conservation easements can play a critical role in protecting our natural resources, even if not strictly used for Compact compliance purposes. The Rio Grande Water Conservation District, for example, has begun enrolling groundwater rights into conservation easements.⁷ Those easements ensure that groundwater stays in the aquifer and cannot be moved out of the basin. Under existing law, however, conservation easements are permanent.⁸ Once a groundwater right (or a portion of it) is retired, it cannot be used again, and, thus, creates some of the same primary and secondary impacts of “buy-and-dry.” Some of those impacts might be avoided if groundwater rights could be *partially and temporarily* enrolled in a conservation easement. For example, if a farmer only requires 80 percent of their water right in one year, they could enroll the remainder of the right in a temporary conservation easement for that year and be compensated for leaving 20 percent of that right in the aquifer. In subsequent years, the farmer could use 100 percent of the right or choose to enroll a different percentage of the right in a temporary conservation easement.

5. ***Funding Investments in Fulfilling the Colorado Water Plan.*** In recent years, the Department urged the General Assembly to make a significant transfer in federal recovery funds towards water infrastructure projects called for in the Colorado Water Plan.⁹ In recent sessions, significant strides were made at the Capitol to devote resources to water. Given the importance of this priority to our State’s long-term economic viability, the State should continue these important investments—and build further upon them. I recommend the Task Force consider such a recommendation urging the General Assembly to make a major fiscal investment to fund water infrastructure and programs called for in the 2015 Colorado Water Plan. One potential option, for example, is to direct unused federal stimulus funds for this purpose. As I have explained, such an investment is critical to ensuring that Colorado protects our water quality and enables effective and adaptable management of water in our era of variable weather and a changing climate.¹⁰

6. ***Innovative Projects Pilot Program.*** With continued drought, it will be important to pursue innovative policies that promote and ensure a vibrant agricultural economy in Colorado. Such policies could include programs that allow wise use of water by, for example, protecting it from evaporation or encouraging more water efficient crops. I encourage the Task Force to consider a temporary, voluntary, and compensated program—one crafted in partnership with agricultural interests—to fund innovative water conservation and efficiency measures. The pilot program could include, for

⁷ *Groundwater Conservation Easement: A New Way to Manage Rio Grande*, ALAMOSA CITIZEN (Dec. 18, 2022), available at <https://www.alamosacitizen.com/groundwater-conservation-easement-a-new-way-to-manage-rio-grande/>.

⁸ COLO. REV. STAT. § 38-30.5-103 (3) (“A conservation easement in gross shall be perpetual unless otherwise stated in the instrument creating it.”).

⁹ Letter from Att’y. Gen. Phil Weiser to the Colo. Gen. Assemb. (Nov. 1, 2021); Letter from Att’y. Gen. Phil Weiser to the Colo. Gen. Assemb. (May 24, 2021).

¹⁰ Philip Weiser, Colo. Att’y. Gen., Address at the Colorado Water Convention (Jan. 25, 2023) available at <https://coag.gov/blog-post/prepared-remarks-attorney-general-phil-weiser-to-colorado-water-congress-convention-jan-25-2023/>.

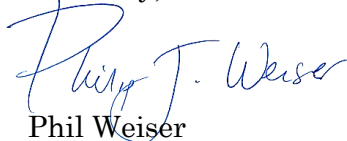
example, resources to support projects such as conversions for farm opportunities to try less water-intensive crops and other measures to use water more efficiently (say, protecting water from evaporation). To be successful, both a water conservation program and a water efficiency program would require significant flexibility to spur innovation as well as a significant financial investment by the General Assembly.

- 7. *Developing and Supporting Smart Technologies for Water Management.*** Related to more efficient strategies for managing water, as well as innovative conservation strategies, is the opportunity to invest in and develop smart technologies for water management. The development of such technologies—including widespread use of sensors and data analytics to evaluate how water is being used and what adaptive strategies are most effective—is an opportunity for Colorado. Water innovation technologies will be increasingly important, and Colorado should be a leader in this area, including with public-private partnerships like those used effectively to bolster our position in cybersecurity.

- 8. *Driving More Effective Potable Re-use Strategies.*** Colorado’s ability to use water previously used for other purposes is important to explore and implement. The Colorado Water Plan includes Direct Potable Reuse (“DPR”) as one of the strategies to address projected gaps in water supply and demand. Reusing water that has already been diverted can make existing municipal supplies go even farther. I urge the Task Force to support funding that advances the science of DPR and fosters programs that educate and engage others about the potential DPR holds for the State’s future.

I am most grateful for your devotion and many hours of work on the Task Force. Your time and efforts are very appreciated—I truly believe that this body can develop a set of ideas to prepare Colorado to best manage and preserve our limited water resources. My staff and I stand ready to work with you. Thank you.

Sincerely,



Phil Weiser
Attorney General

cc: Members, Colorado River Drought Task Force
Speaker Julie McCluskie, Colorado House of Representatives
Representative Marc Catlin, Colorado House of Representatives
Senator Dylan Roberts, Colorado Senate
Senator Perry Will, Colorado Senate
Ms. Kate Greenberg, Commissioner, Department of Agriculture
Mr. Dan Gibbs, Executive Director, Department of Natural Resources
Ms. Lauren Ris, Director, Colorado Water Conservation Board
Ms. Becky Mitchell, Commissioner, Upper Colorado River Commission
Mr. Scott Steinbrecher, Deputy Attorney General, Department of Law
Mr. Kurt Morrison, Deputy Attorney General, Department of Law
Mr. Jefferey Riester, Senior Assistant Attorney General/Director of Legislative Affairs