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Water Plans in Colorado and Elsewhere: Perspectives From Across the West

WATER PLANS IN COLORADO AND ELSEWHERE: PERSPECTIVES FROM
ACROSS THE WEST

This year's annual University of Denver Water Law Review Symposium focused on Colorado's new State Water Plan ("Colorado Plan"). The third panel of the day included five speakers from different states who presented perspectives on their states' respective water plans. The discussion examined state water plans from Idaho, Wyoming, Texas, and California and applied the lessons learned in those states to Colorado's ongoing water plan drafting process.

The first panelist, Clive Strong, Chief of the Natural Resources Division of the Office of the Attorney General of the State of Idaho, provided an overview of Idaho's history with its water plan and identified ways he believed the plan has helped or hindered natural resource development and conservation in Idaho. Idaho implemented its first state water plan in 1976. This plan resulted from the City of Los Angeles Department of Water and Power's proposal to divert water from Idaho's Snake River through Nevada and into Lake Mead. In response, the Idaho Legislature promptly enacted a constitutional amendment that created the Idaho Water Resource Board as an effort to protect the state's water resources. The amendment empowered the Water Resource Board to develop a comprehensive state water plan.

The Idaho State Water Plan consisted of state-wide policies and basin-specific policies. The Snake River Basin Policy 32 is one example of a basin-specific policy. As Strong indicated, this policy established minimum stream flows for the purpose of allocating water between instream uses and consumptive uses at several locations along the Snake River. In 1986, Idaho revised its state water plan. Some of the revisions included incorporating the Swan Falls Settlement, which resulted from *Idaho Power Company v. State*, 661 P.2d 741 (Idaho 1983). The Swan Falls Settlement balanced the competing needs of hydropower and consumptive uses and provided for a new increase of minimum flows, which decreased the potential for water development from 800,000 acre-feet to 450,000 acre-feet. In 2012, Idaho again revisited its state water plan to update the Snake River Policy and to provide new plans for the future.

Strong concluded with his advice for successful state water plans. Strong emphasized that successful state water plans must have the ability to change. Additionally, Strong mentioned that a state should measure its plan's success by its implementation and not by its planning.

The second panelist, Steve Wolff, Colorado River Coordinator for the Wyoming State Engineer's Office, discussed his experiences and personal perspectives regarding Wyoming's water plan and how Colorado's new water plan could benefit both states. Wyoming divides its water planning between the State Engineer's Office and the Wyoming Water Development Commission ("WWDC"). In 1973, Wyoming completed its Statewide Framework Water Plan, which predicted future demands and listed strategies on how to address future demands.

This plan remained in effect until 1997, when the Wyoming legislature directed the WWDC to conduct a water planning feasibility pilot study with the

assistance of the University of Wyoming and the State Engineer's Office. The legislature intended for this study to build on existing data sets and to maximize public access to the data and the process. The first round of the study consisted of gathering inventory and information. The study began with the Green and Bear River basins and eventually included all seven basins in Wyoming. The first round also developed Basin Advisory Groups ("BAGs"), similar to Colorado's basin roundtables. Wolff explained that these BAGs provided public input to the planning process and helped identify the public's concerns. The state completed the first round in 2007. Wolff explained, however, that the next round—the implementation stage—never happened. Instead, the State decided to repeat the first round to gather more information.

Wolff concluded his presentation with an analysis of the success of Wyoming's state water plan. In Wolff's opinion, the plan successfully developed a comprehensive data set that is accessible to everyone, which created transparency. The plan also successfully developed relationships through the creation of the BAGs. However, Wolff opined that Wyoming's plan failed at the implementation phase. Instead of implementing the plan in 2007, the plan began round one again and continued to gather information and data from the various basins.

The third panelist, Elizabeth Fazio, Director for the Committee on Natural Resources in the Texas House of Representatives, discussed the Texas State Water Plan ("Texas Plan") and the process the State took to pass legislation to finance water development projects over the next fifty years in Texas. Fazio began her presentation with an overview of Texas's future water needs. She displayed projections showing that the population in Texas will almost double by 2060 from 25.3 to 46.3 million people. Additionally, if Texas does nothing to implement a state water plan, models predict a water shortage of 8.3 million acre-feet of water by 2060. Therefore, the need for a successful water plan will grow as the population continues to rise.

The 2012 Texas Plan is the most current state plan. The state plans on a five-year cyclical basis over a fifty-year horizon. The Texas Plan consists of sixteen Regional Water Planning Groups and 562 Water Management Strategies. The State determined the plan's total cost at \$53.1 billion. When the state surveyed local and regional entities as well as water providers, those entities estimated they needed help to finance about \$26.9 billion of the total cost.

Fazio discussed how the state considered financing the Texas Plan. Some ideas included tap fees, water hog fees, electric fees, and one-time capitalization. However, as Fazio discussed, none of these ideas would cover the full \$26.9 billion. Texas then looked into financing the Texas Plan using Texas's "rainy day fund," funded by oil and gas revenue. As Fazio discussed, the plan needed \$2 billion from the rainy day fund. This amount could create a revolving program that would finance the required \$26.9 billion.

In Fazio's opinion, the issues with the Texas Plan came not from the implementation of the plan but from the financing and development of the plan. Even with \$2 billion from the rainy day fund, the Texas Plan needed entities to implement and develop projects. Fazio emphasized the importance of creating incentives by lowering interest rates, providing deferred loans, or providing longer repayment terms. These incentives would help create a dynamic and

innovative revolving State Water Program. The Texas water plan uses the two billion dollars from the rainy day fund to issues debt at the local and state levels to finance the incentives.

In her presentation, Fazio emphasized the importance of local control to the Texas Plan's success. Localities fund and build the projects at a local level and, therefore, it is important that the localities have control of the projects.

The fourth panelist, David Aladjem, Partner at Downey Brand, LLP in Sacramento, discussed California's State Water Plan ("California Plan") and how Colorado could learn from California's experience with its own water plan. Aladjem began his presentation by discussing the evolution of the California Plan. He focused on five different important ways that the plan has evolved since 1957. As Aladjem explained, the plan has moved (i) from a project-focused plan to a sustainability-based plan, (ii) from a centralized plan to a localized plan, (iii) from a practical approach to a theoretical approach, (iv) from an engineering focus to a political focus, and (v) from the central guiding document for state water policy to a peripheral document. As Aladjem argued, the California Plan is no longer the centerpiece in California, and most of these five evolutionary changes have weakened the success of the plan.

Aladjem concluded with some questions Colorado should consider for its own state water plan. For example, what is the plan's purpose? Who controls the plan? Who resolves differences among stakeholders? How does the plan direct actions? And is there any accountability? Answering these questions early on, Aladjem suggested, could help Colorado implement a successful state water plan.

The final panelist, Sarah Klahn, Managing Partner at White & Jankowski, LLP in Denver, provided a Colorado-based perspective on the new Colorado Plan in the context of water ecology, water rights, and water law. Klahn provided a practitioner's perspective on how the Colorado Plan would affect her clients, whether they are large municipalities or small agricultural users. Klahn argued that Colorado does not currently need a state water plan. She contrasted the implementation of California and Idaho's plans to Colorado's. California and Idaho's plans arose out of a water crisis or incident in each state. Klahn argued, however, that while Colorado faces gaps in supply and already visible adverse effects from climate change, there is currently no water crisis in Colorado that would necessitate a water plan.

Klahn discussed her concerns regarding the impact that the Colorado Plan could have on Colorado's prior appropriation system. Relatedly, Klahn worried that if the state decides who has the highest and best use of water, the Colorado Plan effectively will lead to a public trust doctrine—a doctrine the Colorado Supreme Court has rejected. Klahn also questioned how the Colorado Plan will make decisions in a way that does not disadvantage people's private property interests.

Klahn provided several reasons that the implementation of a Colorado Plan may be premature. For example, Klahn suggested that the Colorado Plan will potentially hinder municipalities' ability to obtain new water supplies in the absence of new projects. Many municipalities currently find additional water supplies through water rights transfers from irrigated agriculture. Klahn discussed that one of the Colorado Plan's goals—to reduce the rate of

agriculture-urban water transfers, or “buy and dry”—would remove this process as a viable option. Additionally, Klahn worried that the Colorado Plan will undermine local and regional decision-making, which will be problematic for small cities and industries. She also questioned how the Colorado Plan intends to convert the basin roundtables’ recommendations to the state level without taking away local control. Finally, Klahn questioned whether the state as a whole is in the position to do more than provide financing for a state water plan.

In sum, the panelists provided an interesting and stimulating discussion on the differences of state water plans in several western states. Their discussion highlighted the major successes and failures of different state water plans and how Colorado could learn from these plans in implementing its own state water plan.

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ROCKY MOUNTAIN LAND USE INSTITUTE ANNUAL CONFERENCE 2014: MOVING BEYOND RECESSION, WHAT’S NEXT?

WATER SUPPLY CHALLENGES AND SOLUTION FOR THE ROCKY MOUNTAIN WEST

Denver, CO March 12-14, 2014

On the final day of the Rocky Mountain Land Use Institute’s 2014 Conference, a panel of water professionals greeted an audience of land use planners. Titled “Water Supply Challenges and Solutions for the Rocky Mountain West,” the conversation that emerged called for a movement from the days of diverting water through pipes to engaging in critical dialogue about water in the public forum

The panel included three speakers, each with a nuanced expertise underlying his perspective of the future of water in the West. Grady Gammage, attorney at Gammage & Burnham and Senior Research Fellow at Arizona State University’s Morrison Institute, presented his research on the Central Arizona Project and the diversion of Colorado River water to make Phoenix and agricultural land in Arizona possible. James Eklund, Director of the Colorado Water Conservation Board, discussed his efforts to garner community input for an in-progress draft of the Colorado Water Plan. Jim Lochhead, CEO of Denver Water, closed the panel with broad commentary on the paradigm shift occurring around water and Denver Water’s collaborative approach to planning for the future.

Despite the panelists’ respective interests in research in Arizona, policy in the state of Colorado, and pragmatics in Denver specifically, each lamented the historical and present state of water politics and called for strengthened relationships between the different players at the water-planning table. Under the broad umbrella of “water supply challenges and solutions,” the speakers pointed to the particular problem of adversity between agricultural and municipal water users, and the creation of more integrated and cooperative community relationships required to reach a solution.