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## 17th Annual Land Use Conference

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## 17th Annual Land Use Conference

**ROCKY MOUNTAIN LAND USE INSTITUTE****17TH ANNUAL LAND USE CONFERENCE****Denver, Colorado****March 7, 2008**

## INTRODUCTION

Featuring several key players in the recent negotiations of the seven Colorado River basin states, a panel of river law experts described the impetus for December's landmark legal agreement to collaboratively manage the river system into the future – hailed by many as the states' most important since the 1922 Colorado River Compact. The panel, part of the 17th Annual Rocky Mountain Land Use Institute Conference in Denver, Colorado, also detailed the agreement's impact and challenges ahead, and drew a full audience ranging from municipal water managers to conservationists.

## ROUGH WATERS: SEVEN BASIN STATE NEGOTIATIONS

Amy Petri Beard, Editor-in-Chief of the University of Denver Sturm College of Law *Water Law Review*, introduced the panelists: Karen Kwon, Esq., assistant Attorney General, Department of Natural Resources, Colorado Office of Attorney General; Ted Kowalski, Esq., program manager, Colorado Water Conservation Board; and James Davenport, Esq., special counsel, Colorado River Commission of Nevada.

Kowalski, representing the conservation board's Water Supply Protection section, described the historic landscape of drought and dispute, conflict and controversy that makes up the Law of the River, the largely contentious back drop to last year's surprising agreement of cooperation between the river system's seven basin states. He described the basics about how 16.5 million acre feet ("maf") of Colorado River water is divvied up to Upper (Utah, Wyoming, Colorado, New Mexico) and Lower (Arizona, Nevada, California) basin states, as well as to Mexico. Setting the scene for the growing tension between stakeholders in recent years, Kowalski described how hydrologists, armed with better data, now believe there was less water available at the time of the 1922 compact than scientists and negotiators believed, a factor at the core of the states' subsequent standoff during years of contemporary drought. The river was likely running at 13 maf in 1922, far less than the 19 to 20 maf negotiators believed was available to allocate, Kowalski reported. The river system's subsequent hydrologic conditions compounded the allocation problem. As population and water use in the basin increased, the stretch of extreme drought on the Colorado River between 2000 and 2007 constituted the driest eight-year period in the waterway's 100-year historical record, he said.

## REACHING CONSENSUS

Against that backdrop – a lesser-than-expected amount of original core water, increased population and water use, and years of extreme drought – the basin states came together to negotiate what resulted as four elements of river management: rules for shortages, operational rules for the tandem management of the storage reservoirs Lakes Powell and Mead; rules for surplus; and new initiatives for water conservation.

The trigger for the negotiations was an April 18, 2005, letter from the Upper Basin states to then-Secretary of the Interior Gale Norton, said Davenport, who has represented the State of Nevada's water negotiations since 1983. Inflow to Lake Powell had dropped to only 25 percent of average in 2002. The reservoir displayed its vivid and infamous white "bathtub ring" marking previous decades' high water mark. The 2005 letter requested the Secretary release less than the regular amount of water from Lake Powell – 8.23 maf – for the Lower Basin. The request spurred the states into a tense stance of potential multi-state litigation, panelists said. "It's the reason why it got hot," Davenport said. The Upper Basin states considered the annual Lake Powell 8.23 maf delivery a "soft," flexible amount, subject to fluctuation in times of extreme drought. The Lower Basin states regarded it as a hard deliverable. The Secretary responded that such an adjustment to the Lake Powell release was not warranted and instead charged the Department of Interior ("DOI") to coordinate the two reservoirs' operations and develop Lower Basin shortage guidelines. The Secretary's decision "put everyone on the Colorado River system at risk," said Davenport, and caused stakeholders to realize they had to "get to a common table and negotiate."

The DOI launched its process to develop shortage rules. Meanwhile, the states began to negotiate internally to develop a proposal for the Secretary's consideration, Davenport said. The states delivered a proposal in early February 2006, with the Bureau of Reclamation's draft Environmental Impact Statement ("EIS") published later that month, he said. The states signed an agreement in April 2007, and the final EIS and department's Record of Decision ("ROD") was published in December 2007. The agreement, in effect until 2026, includes a provision where the states agree to address future controversies via negotiation, rather than lawsuit.

## THE AGREEMENT

According to the panelists, the agreement seeks to: provide for additional Colorado River Compact development, increase the reliability of the river water supply, avoid legal controversies, reduce Lower Basin shortages, and minimize potential curtailment of uses in the Upper Basin. Kwon said the states considered a number of methods to in-

crease the water in the Colorado River, including the following: vegetative management through activities like removal of tamarisk; an Augmentation Study to investigate the potential of desalinization and import; efforts to modify the weather, such as cloud seeding; and bilateral negotiations with Mexico to better define the United States' delivery requirement to Mexico during periods of shortage.

Important to the Upper Basin, according to panelists, was that the states agreed the Upper Basin could release less than 8.23 maf based on Lake Powell's status – a key issue that circled back to the original request that triggered the negotiations. The agreement allows for managing the two storage reservoirs in tandem, rather than purely in a reactionary, less-effective fashion, according to the panel.

In finalizing the agreement, the states agreed to support the ROD, provided it complied with the states' alternative, the panelists said. The agreement includes an "off ramp" if the ROD did not align with the states' recommendation. Finally, the states agreed to confer each year and at other key junctures to avoid litigation.

#### KEY ISSUES: TRIBUTARY DEVELOPMENT, CONSERVATION, AND MEXICO

Faced with an exploding population and corresponding water need, Nevada had explored further development of its tributaries in recent years via the Virgin River and Muddy River projects, ultimately spending some \$2 billion on efforts that failed to yield new water and that also raised the ire of surrounding states, according to the panelists. As part of the negotiation, Nevada officials agreed to put tributary development on the "back burner," and the parties agreed to support an interim water supply of at least 280,000 acre feet for Nevada, part of which is obtained from the state's funding of the Drop 2 Reservoir, with annual recovery not to exceed 40,000 af, according to Davenport.

In turn, the negotiations and corresponding attention to increased conservation prompted the states to look at other aspects of Nevada's response to extreme population growth during drought, including its program to pay residents for each square foot of lawn removed.

In response to audience questions, Kwon confirmed the agreement does not relate to states' internal methods of water use and does not modify the longstanding Law of the River, instead serving as an administrative agreement to the side. States' willingness to comply with the ROD is similar to that of a contract, she said.

Resolving how the Compact similarly manages water delivery to Mexico during times of drought is key among the next steps for Colorado River stakeholders. The United States' 1944 treaty with Mexico includes language that, during periods of extraordinary drought, river managers will adjust the delivery of water to Mexico proportionate to consumptive use reductions in the United States. Defining what constitutes "extraordinary drought" is "tricky," Kwon said. The states proposed that Mexico accept 16.7% shortage. The Secretary's draft EIS

included language that the U.S. will conduct such negotiations via the Department of State and International Boundary and Water Commission. Also, there are efforts to encourage trans-boundary programs to benefit the entire river basin, she said.

#### NEXT STEPS

As of the conference date, the states were collaborating on an annual operating plan for the year and were somewhat in a wait-and-see posture following the December agreement, Davenport said. Drought remains a critical issue on the minds of all stakeholders, according to the panelists. “We haven’t seen the droughts we really could see,” Kowalski said. Plus, five of the top 10 fastest-growing states are in the Colorado River basin. “You have that extra push and demand on our water supplies,” he said.

Given those two factors, states are increasingly cognizant of water storage. “Is the storage that we have in Colorado and other basin states the appropriate storage, built in the right places?” Kowalski asked.

*Nicole Bonham Colby*

### COLORADO WATER LAW

#### SUPERCONFERENCE

**Denver, Colorado**

**March 14, 2008**

David W. Robbins, a partner at Hill & Robbins, P.C. in Denver, began the morning panel with a discussion on interstate river issues. He started with a detailed look at interstate water compacts by providing an overview, explaining their binding nature and identifying the nine compacts to which Colorado is a signatory. He further explained the “agony and ecstasy” of irrigation wells. According to Robbins, the growth in water wells has threatened compacts. He explained that without controls on the wells, the State’s obligation under these compacts will fail. The water consumption in upstream states, linked to increased well use and improved efficiency, has been a motivation for much litigation. Robbins further explained the current lack of water supply in the Arkansas, Republican and Rio Grande rivers to meet the required apportionments to the States. He touched on possible solutions to increase the flow in these rivers, such as directly adding water to the river just before crossing state boundaries or enacting conservation district statutes. Robbins ended by answering questions from attendees.

Peter Fleming, general counsel for the Colorado River Water Conservation District, Glenwood Springs, followed Robbins with a discussion of the West Slope’s perspective on Colorado river management.