

Mitigating against Drought: Regulatory Hurdles and Opportunities

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Western Drought Forum

How Western Drought Affects Every American

U.S. House of Representatives

Committee on Resources, GOP

May 11, 2022

My name is Kent Holsinger. I am a Colorado native who grew up on our family ranch in North Park. In 2006, I founded Holsinger Law, LLC, a firm that specializes in lands, wildlife and water law. Prior to that I worked as a congressional aide and then as Assistant Director for Water at Colorado's Department of Natural Resources. My work has been recognized in the Wall Street Journal, New York Times and on National Public Radio, among others. A description of irrigation and how calls on the river affect our family ranch appears in David Owen's 2017 book, "Where the Water Goes."

Colorado is an arid state and water is our most precious natural resource. Some 80% of the state's water supplies originate from snowmelt. And 75-80% of Colorado's run-off occurs within a 45-60-day period. In addition, much of Colorado's water does not stay within the state. Of the estimated 16 million acre-feet Colorado's river systems produce each year, 2/3 of this water flows to downstream states. Meanwhile, Colorado's population has grown from 1 million in 1930 to over 5 million today. It could double by 2050.

Colorado is one of only two headwaters states in the nation (the other is Hawaii). No water flows into either state. Without water storage, the effects of flooding and drought would be catastrophic. New and expanded water storage is the best way to meet new and expanding demands and to protect the interstate compacts that apportion water amongst the states.

One acre-foot of water (af) is approximately the size of a baseball diamond one-foot deep. It is said to provide enough water for two families of four for a year. Surface water rights are also measured in cubic feet per second (cfs). Where I grew up, one cfs is approximately enough to irrigate 40 acres of hay meadow.

The Importance of Water Storage

Without water storage, our water would come in a raging spring flood and it would be gone in the summer or fall. Prior to irrigation, and the benefit of irrigation return flows, the South Platte River was used as a wagon road into Denver. From 1812 to 1869, the "Great Platte River Road" was a key route for westward expansion dotted with pony express and stage stations. The river now flows year-round.

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Due to continually increasing demand, Colorado's Front Range requires an estimated additional 630,000 af of water by the year 2030. Water providers have instituted various methods to meet increased demands. These include:

- Conservation
- Reuse of existing or future consumable water supplies
- Buy-up and dry-up of agricultural lands
- New or expanded water supply projects

Population increase is not the only stress on Colorado's water supply. Drought has plagued the West throughout the past decade, thus compounding the issue. Drought is not a new phenomenon in the West. Tree ring records indicate there were four mega-droughts in North America during the past 1,200 years including: the 800s, the mid-1100s, the 1200s and in the late 1500s. These lasted as long as 50 to even 90 years.

With ongoing drought and increase in demand, expanding water storage is a must. Not only will such storage serve to shore up the supply-and-demand gap, it will provide a myriad economic and societal values. Agricultural irrigation and water supply are the obvious benefits of water storage. Water storage projects also create recreational opportunities, wildlife habitat and help recharge aquifers and river basins.

Lake Powell and Lake Mead

Having a birds eye view of Lake Powell and Lake Mead really puts things in perspective. On June 1, 2019, I broke the world speed record for the fastest flight time in category between the highest airport in North America (Leadville, Colorado, elev. 9933.5 ft.) and the lowest (Furnace Creek Airport, elev. -210) in Death Valley, California. My route of flight roughly followed the Colorado River from its headwaters past Lake Powell and to Lake Mead. Author David Owen took a similar flight for his New Yorker article that later inspired his book.

Over thirty million people in seven states rely on water from the Colorado River. Roughly 15% of the nation's crops and 13% of its livestock is raised on the 1.8 million acres of farmland irrigated by the river.²

Lake Powell is the water stored behind Glen Canyon Dam and is important to the Upper Basin States (Colorado, New Mexico, Utah and Wyoming) included in the Colorado River Compact and the Upper Colorado River Compact. "Lake Powell is the Upper Basin's water bank," explains former Colorado State Engineer Harold D. "Hal" Simpson. It stores water in wetter years and builds up its content so that water can be released in drier years allowing the Upper Basin to satisfy its obligations as required by the two compacts. "Colorado is the principal source of water to satisfy the Colorado River Compact's assumed 15.0 million-acre-foot (MAF) of flow per year at the Lee Ferry stream gage below Lake Powell," Simpson added.

² <http://www.crwua.org/colorado-river/uses/agriculture>

Lake Powell is the second largest U.S. water storage facility. It stores 24.32 million af of water for the benefit of the Upper Colorado River Basin states. Glen Canyon dam was dedicated in 1966.³ Lake Powell is not only a recreational gem, it is critical for protecting against drought. The seven Colorado River basin states, along with federal agencies and stakeholders, adopted a “Drought Contingency Plan” for water use from the river.

Lake Mead serves some 20 million people in the lower Colorado River Basin states of Arizona, Nevada and California. At 26.12 million af when full, it is the largest reservoir in the nation in terms of capacity. One of the eight wonders of the world, Lake Mead was formed by the Hoover dam and dedicated on September 30, 1935.

These projects are important for the power they produce as well. 2016 marked the 60th anniversary of the Colorado River Storage Project (CRSP) Act. This landmark federal law authorized the construction of water storage and hydroelectric plants in the Upper Colorado River Basin. Today, CRSP hydropower is one of the most important sources of renewable electricity in the West.

Water Storage Promotes Comity among the States

Colorado is a party to no fewer than 14 interstate compacts and U.S. Supreme Court decrees on water. The rights to interstate waters have been resolved through interstate compacts and equitable apportionment decrees. Article 1, Section 10 of the U.S. Constitution authorized interstate compacts negotiated between the states and ratified by the state legislatures and the U.S. Congress. Much like treaties between the states, the compacts resolved water allocation issues for millions of people in the West. For example, the states of Colorado, Wyoming, Utah, and New Mexico hold sacrosanct the protections in place in the Colorado River Compact of 1923 and the Upper Colorado River Compact of 1948. Water storage in Lake Powell and Lake Mead helps keep the peace between these states.

By contrast, there is little significant water storage on the South Platte River in Colorado. Currently, Colorado and Nebraska are at loggerheads about rights to the South Platte to the extent Nebraska has proposed building infrastructure within Colorado to divert water out of state.

Hurdles to Water Storage and Conservation

Unfortunately, federal permitting, red tape and environmental litigation have hindered construction, expansion and even operation of our existing reservoirs. The National Environmental Policy Act (NEPA) process alone can take many years at a cost of \$1-\$2 million per year or more. Project delays are even more costly to Colorado water providers and those

³ https://en.wikipedia.org/wiki/Lake_Powell

that rely upon them. As a result, the buy-up and dry-up of irrigated land has become the go-to water source for growing municipalities. In turn, conversion of agricultural water supplies, along with the loss of our agricultural heritage and the ability to produce food and fiber, has become commonplace.

Expanding our existing storage and building smart new storage is the best way to mitigate against flooding and drought and protect our sources of food, fiber and power. But regulatory red tape stands in the way. As an example, expanding Chatfield Reservoir in the Denver area by only 20,000 af took decades. Mitigation costs alone at this expansion amount to \$119 million. Denver Water and Northern Water have spent decades and tens of millions of dollars trying to enlarge and build new smart water storage—to no avail as of yet.

Water storage in the West is hamstrung by environmental restrictions in the name of sediment transport, beach-building and vegetation management for species listed under the Endangered Species Act (ESA). This impacts not only water storage for agriculture and drinking water but critical hydroelectric power.

For instance, environmental restrictions on Colorado's largest reservoir (the Aspinall Unit) currently call for releases of 4,772 af in a single day and so-called shoulder flows of roughly 50,000 af from May 1 through July 25. This equates to the domestic needs of some 110,000 families or enough water to irrigate roughly 30,000 acres. These requirements and impacts are even more dramatic in wetter years.

Environmental litigation often drives this problem and costs taxpayers millions and millions of dollars. Since 1990, two groups, Center for Biological Diversity and WildEarth Guardians (formerly Forest Guardians and Sinapu), have filed well over 1,300 lawsuits. Most of which were against the Dep't of the Interior and USDA and most of which raised ESA issues. These lawsuits do nothing for conservation or wildlife but perpetuate a never-ending cycle of filing suit and collecting taxpayer-funded attorney fees.

Federal Threats to Water

For over 150 years, Congress has deferred to the States in matters related to the appropriation and administration of water. In 1952, Congress recognized the primacy of western states' interests in passage of the McCarran Amendment. 43 U.S.C. § 666; *see also City and County of Denver*, 656 P.2d at 9. But implementation of the ESA and, more recently, the Clean Water Act threaten this balance.

The EPA and the Army Corps of Engineers proposed to greatly expand the scope of their jurisdiction under the federal Clean Water Act. This so-called Waters of the United States (WOTUS) rule would consider practically every dry arroyo or isolated wetland a "water of the U.S." subject to federal jurisdiction. It is an unprecedented water grab and would dramatically impact the ability to irrigate, construct roads, reservoirs, pipelines, powerlines or other facilities.

Activities that require federal permits, licenses or authorizations (such as a 404 permit under the Clean Water Act) require consultation with the U.S. Fish and Wildlife Service under Section 7 of the ESA. This can result in significant delays and costly project modifications. For example, surveys may be required for some listed species that are not present for significant months out of the year. And existing federal permits, licenses or authorizations could be subject to re-initiation of consultation upon new listings or information. Finally, some actions on public or private lands could be construed to “take” listed species or their habitat under Section 9 of the ESA.

Conclusion

NEPA, the ESA and WOTUS create a perfect regulatory storm that hinders operation, construction and enlargement of critically needed water storage in the West. To combat drought, Congress and the Biden Administration could:

- Streamline permitting for the enlargement of existing water storage;
- During times of drought, remove operational restrictions so existing reservoirs can capture and conserve spring floodwaters for later use;
- Remove perverse incentives under the ESA for environmental groups to litigate at the taxpayers’ expense; and
- Convene the Endangered Species Act Committee to exempt water storage and irrigation from prohibitions on “take” under the ESA during times of drought.

As an example, Colorado has an extensive process in place to vet water needs and projects through its Colorado Water Conservation Board, Basin Roundtables, and the Interbasin Compact Committee. Congress could streamline permitting for water projects that have been vetted through these means.

My world-record flight celebrated not only the natural beauty of our western landscape, but the importance of the natural resources that are critical to our food, fiber, energy and light. Thanks to the best technology and the toughest environmental laws in the world, we can celebrate not only the beauty and history of these lands but the bountiful resources they produce.