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# Amid drought, a changing climate and population growth, can Colorado's unique water law system survive?

The boat dock in the reservoir sits on dry land due to drought. The reservoir, which is a source of water supply for the state, was only 55 percent full (Colorado Sun)

A Q&A with former Colorado Supreme Court Justice Gregory Hobbs, one of the state's top water experts

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ENVIRONMENT



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Colorado's system governing water use predates the state itself — the oldest water rights in Colorado date to the 1850s. And it is so closely linked to the state that, even when it is used elsewhere, it is often called [the "Colorado Doctrine."](#)

But can it survive perhaps the greatest challenge in its history — a double-whammy of drought and population growth?

To answer that question, The Colorado Sun sat down with retired state Supreme Court Justice Gregory Hobbs, one of Colorado's foremost minds on water law. Hobbs has 45 years of experience practicing water law in Colorado, and he continues to serve as a senior water judge and mediator.

First, some background: This spring, an influential water think tank, the Colorado River Research Group, released a report calling on water wonks to stop using the term "drought" to describe what is happening in the West. Drought implies something temporary, the report argued. But these changes show no sign of being temporary.

"For that, perhaps the best available term is aridification, which describes a period of transition to an increasingly water scarce environment," the group stated [in its report](#).

Meanwhile, the Colorado State Demography Office projects that Colorado will add 3 million people by 2050, bringing the population above 8 million.

This is a worrying prospect for water in Colorado — party to nine interstate water compacts and home to thousands of individual water rights, each meticulously ordered in priority from oldest to youngest. And the strain may already be starting to show.

The fiscal year that ended in June 2017 — the most recent for which data is available — had the most claims and filings in state water court since the similarly parched year of 2012, according to a Colorado Sun analysis. Thornton and Fort Collins are currently [locked in a testy battle](#) over how to move water that Thornton has the rights to out of the Poudre River, lifeblood of Fort Collins. And, according to reporting by Water Education Colorado, a New York hedge fund [has spent millions](#) buying up senior water rights on Colorado's Western Slope — apparently betting on future shortages.

Does Hobbs think the Colorado Doctrine is built to withstand this kind of stress? The following Q&A has been condensed and edited for clarity, readability and brevity. At one point, Rob McCallum, a spokesman for the Colorado Judicial Branch who helped arrange the interview and sat in on it, also chimes in.

Hobbs talks about complicated water compacts and delivery systems as casually as



Former Colorado Supreme Court Justice Gregory Hobbs. (Provided by the Colorado Judicial Branch)

### TAKE BACK

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discussing high school memories with an old friend, and it can be hard to keep up. So there are a few Colorado Water 101 explainers sprinkled in to help out.

**Gregory Hobbs:** The (Colorado River) Compact has really been tested in recent years with sustained drought. But it's working.

**Colorado Sun:** At what point does it break?

**GH:** It doesn't.

**CS:** It can't?

**GH:** No. Not unless one of the states convinces the other six to renegotiate the compact; it's perpetual. ... Congress could try to override it. But I just don't see it happening because Congress agreed to the compact.

So this is the essence of state-federal sovereignty, these nine interstate compacts that Colorado is a part of. The alternative is litigating in the U.S. Supreme Court for an allocation. It's an amazing thing that in this 16-year drought, the target release of 8.25 (million acre-feet per year) out of (Lake) Powell has been met or exceeded.

### **Colorado Water Law 101**

The Colorado River Compact:

- ◆ Signed in 1922.
- ◆ Splits the water from the river between the upper basin states (Colorado, Wyoming, and parts of Utah, New Mexico and Arizona) and the lower basin states (California, Nevada and other parts of Utah, New Mexico and Arizona).
- ◆ Requires the upper basin states to send the lower basin states 75 million acre-feet of water (the amount of water it takes to cover one acre a foot deep) over a rolling 10-year period, or an average of 7.5 million acre-feet per year.
- ◆ Means that, in dry years, the upper basin states get less than the lower basin states, while, in wet years, the upper basin states can store extra water.

**CS:** So how does Colorado deal with predicted shortages in the future?

**GH:** We can only consume a third of the water that Colorado has in any given year because of these interstate compacts. ... Colorado has to deliver water to 18 downstream states and then to the Republic of Mexico.

... This is an eerie kind of average that statistically, statewide, year-in and year-out, good water years, bad water years, normal water years, two-thirds of the water that

Colorado produces goes out of state because of legal requirements. That doesn't sink into people's heads.

... We make as much consumptive use under our priority system that we can. But there's a limit to it. That's why we're a reservoir state. We have over 2,000 reservoirs because we've got to store that snowmelt (in good water years).

**Rob McCallum:** I went up to Steamboat a couple weekends ago. Green Mountain (Reservoir) is just empty. Empty. Empty. Empty.

**GH:** That's what it's for.

... This climate change, climate variability, warming, whatever you call it — the water managers are convinced that something is going on. And they have a harder time than ever because they can't rely just on what happened in the past. You're trying to model what your water availability is going to be, and you have to build in some assumptions, right? So this wetter wet, drier dry is a problem because the (farmers') plants actually need to have water early, up to a month earlier, but their decree may not allow them to (irrigate) until April.

... Every drop of water is actually spoken for. Even in an average year, let alone a dry year.

**CS:** What happens if those reservoirs can't be replenished?

**GH:** Well, the water rights in Colorado will be cut back. ... That's an endemic part of the prior-appropriation system. There will be some years where you don't have water.

### **Prior-appropriation system:**

- ◆ Colorado's unique system for regulating water rights — sometimes referred to as the Colorado Doctrine.

- ◆ A simple priority system: The earlier a right was claimed and used, the higher priority it has. Older rights are said to be "senior" to younger ("junior") rights.

- ◆ In drought years, senior rights can "call" for their water, potentially leaving junior rights dry.

- ◆ Allows water rights to be leased and sold.

**CS:** Can the system handle it if there has to be large-scale cutbacks?

**GH:** There's been a one-third reduction in water demand since the 2002-03 drought, and an increase in population. ... There's been a marriage between land use

development and water planning.

...Conservation is setting in, but you can only go so far with it because you've got industry, you've got municipal demands. We're trying to keep agriculture in business because of the value of this irrigated open space.

**CS:** There's been concern about cities buying up farms for the water rights. (This is what those in the water community call "buy and dry.") Is there any sort of protection for agriculture where the state says we're losing too much?

**GH:** No. The farmers own that water. They can decide when and if to sell it. It is a vested property right. Now, you've got to use it without waste. The doctrine is beneficial use, without waste.

**CS:** Are there other options for cities to get more water without buying up farmland?

**GH:** The hardest thing in the world to get anymore is a new storage reservoir. ... So we are living on the work and investment of our ancestors to get through these big droughts. And we're drying up farmland.

Is there a right for the owner of water rights to sell? You betcha. It's been recognized since 1891. ... It's a valuable property right. It's more valuable than the land in an arid region.

And, if the state wants to condemn it, they pay fair market value. We have provisions in the Colorado statutes and constitution that allow municipalities in a drought to condemn for the basic domestic needs of a municipality. Unquestioned. It appears in the cases in the late-1800s.

So the municipalities are always going to get the water. The question is do they get it by capturing more snowmelt or do they get it off the farms?

**CS:** Are there rivers that aren't over-appropriated in Colorado?

**GH:** The Yampa — there's probably water available. There's plenty of controversy, though, because the endangered fishes need some flow. And there are friends of the Yampa that don't want to see any more development up there and certainly don't want to see a transmountain diversion.

Parts of southwest Colorado, there's probably some water there. The Rio Grande, the Arkansas and the Platte are totally over-appropriated. There are more rights than there is water, even in average years. So administration is enforced and in greater force in a drought.

### **Transmountain diversions:**

- ◆ When cities (usually on the Front Range) pull water from one side of the mountains and move it to the other side.
- ◆ About 80 percent of Colorado's water falls and flows on Western Slope, while 90 percent of its population lives on the Eastern Slope.
- ◆ Requires lots of reservoirs to pull off. Some — such as Lake Dillon or Horsetooth Reservoir — hold water being transferred over the mountains. Others — like Green Mountain Reservoir — are designed to backstop Western Slope water supplies in dry years.
- ◆ Colorado has 27 transmountain diversions and 44 total diversions, which move more than 1.6 million acre-feet of water per year, according to Water Education Colorado.

**CS:** Is the Colorado River not over-appropriated?

**GH:** It's a matter of what your assumptions are. There certainly are good water years where you can put (water) in storage. If you want to file for a direct-flow water right on the Colorado River, it's probably spoken for.

... Generally, municipal diversions to the east slope are junior to the senior agriculture rights on the West Slope. The (Colorado River) compact of 1922 grandfathered irrigated water rights that were already in place on the Western Slope. So, ironically, the most valuable water rights are the pre-1922 hay, alfalfa, ranch (rights). The most valuable Colorado water rights are on the West Slope.

**CS:** Is there anything that protects them from being turned into municipal rights? If Grand Junction booms and needs water?

**GH:** They'll buy the water rights.

### **Options for preserving water:**

- ◆ [Instream flow program](#) — Colorado's water rights are usually use-it-or-lose-it. But the Colorado Water Conservation Board is allowed to hold rights that keep water in rivers, in order to preserve stream flows.
- ◆ [Water acquisitions](#) — Water trusts can help facilitate the donation, sale or leasing of water rights to the CWCB. The state currently has about 30 permanent [acquisitions or long-term leases](#), totaling more than 9,000 acre-feet per year.
- ◆ [Conservation easements](#) — Easements protect land or water from development while leaving it in the hands of its private owners.

💧 Tax credits may be available.

**CS:** So what keeps Colorado's growing cities from acquiring every last water right in the state?

**GH:** The price of acquisition is huge.

And, think about these land and water trusts, what are they doing, these nonprofits?

They're buying the land and water, and they're keeping the water on the property. Why are they doing that? Well, there are tax credits. The development potential has been sold off. But there are families that believe in that open-space heritage of Colorado land and water. So we have multiple land and water trusts in the state.

... There are all these nonprofits now who are invested in the Colorado appropriation system and the value of these senior rights kept on the land. There's a whole alliance of families, money and investment that's trying to keep the Colorado we know from becoming the Central Valley of California or the Phoenix area.

What choice does a water-short state have — that has a constitution like ours? Invest, invest, invest. Preserve. Sustain. Conserve. Inspire.

And that's what this water-planning process is: Can we live together?

*This story was updated at 1:15 p.m. on Sept. 12, 2018, to clarify the type of trusts that facilitate water rights donations and to clarify that the water delivered from the upper basin states to the lower basin states per the Colorado River Compact is measured on a 10-year rolling average.*



The boat dock in the community of Heeney sits on dry land due to low water levels at Green Mountain Reservoir on Sept. 9, 2018. The reservoir backstops Western Slope water supplies during a drought. (John Ingold, The Colorado Sun)

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