



MEMORANDUM
APRIL 3, 2018

TO: BOARD OF DIRECTORS
FROM: CHRIS TREESE
SUBJECT: ANNUAL POLICY REVIEW

ACTION:

- **Provide final approval to policies:**
 - Agricultural Water Use
 - Federal Reserved Water Rights
 - Colorado's Prior Appropriation Doctrine
 - Upper Colorado River Recovery Program
- **Review and advise Instream Flow policy** (raised for review Jan. 2018)
- **Consider and advise of any new policies desired**

STRATEGIC INITIATIVE(S):

- **7.D Water Needs/Project Development**
- **6. Agricultural Water Use (all sub-initiatives)**
- **4. Colorado River Supplies (all sub-initiatives)**
- **9.A Water Efficiency and Conservation**

Attached are the four policies eligible for final action at the April meeting. They are presented reflecting the Board's direction at the January quarterly meeting. Changes requested in January are shown in red. Attached are policies:

- Agricultural Water Use
- Federal Reserved Water Rights
- Colorado's Prior Appropriation Doctrine
- Upper Colorado River Recovery Program

Recall that under your process for policy review and adoption, policies must be agenda-ed for at least two quarterly meetings before you take final action. Therefore, these four policies are eligible for final action at the April meeting.

Also attached is the Board's Instream Flow policy. At the January meeting, Director Merritt requested staff review this policy to determine if additions are required to address agricultural return flow concerns. I don't believe any additions or modifications are required. However, it is provided here for Board confirmation or correction of my determination.

As always, this annual policy review is also an opportunity for the Board to consider new or missing policy topics. For a complete list of River District policies, refer to our web site: <http://www.coloradriverdistrict.org/policies/>.

Adopted: 07/28/2015
DRAFT 2: 04/03/2018

Agricultural Water Use

Colorado River Water Conservation District Policy Statements:

Agriculture is a critical component of Western Colorado's economy, environment, and community. The River District supports and promotes Western Colorado agriculture and will partner with agricultural interests to ensure a vibrant agricultural sector in Western Colorado. Moreover, the River District recognizes the considerable value of Western Colorado's agricultural water rights, especially those senior to the Colorado River Compact, and will work to protect and maintain those agricultural rights in the West Slope use and in local ownership.

Accordingly, the River District:

- Supports federal and state legislation directed at increasing overall economic viability for producers of food and fiber,
- Supports legislative and administrative actions protecting pre-Colorado River Compact water rights,
- Will pro-actively pursue avoidance of Colorado River compact administration in the belief that West Slope agriculture will suffer first and greatest from such an event,
- Encourages innovation that adds value for producers and enhances productivity,
- Supports land use policies and programs protective of agricultural lands, water rights, and property values,
- Supports voluntary, cooperative relationships between fish and wildlife agencies and agriculture to realize mutual benefits,
- Supports land and water use decisions that support or enhance West Slope agricultural productivity, Will seek alternatives to involuntary transfer or use of Western Colorado-based water rights to meet municipal demands outside of the West Slope, and
- Will evaluate and consult, as requested, on water efficiency projects and programs to determine potential return flow consequences.

Background & Discussion:

Statewide, agriculture is the majority user of Colorado's water, much of it with senior water rights. For this, Colorado enjoys affordable food and fiber - much of it locally sourced - abundant open space, environmental and recreational river flows, and important employment and other economic benefits.

Agricultural water rights, primarily in Eastern Colorado, have become a primary source of new water supplies for growing Front Range municipalities. While most of the buy-and-dry (and conversion from ag to municipal use) has been on the East Slope to date, the purchase and

conversion of West Slope farm and ranch land and associated water rights for municipal uses is real and must be addressed.

Certain efficiency and conservation measures have unintended consequences, such as reductions in delayed return flows, impacting stream conditions during naturally low flow periods. Other measures may have multiple consequences, some not intuitively obvious or intended, all of which should be considered.

Colorado has historically, and is currently, experiencing periods of severe, sustained droughts. The River District, in cooperation with producers and other interests, is exploring voluntary, compensated mechanisms for the temporary use of senior agricultural water rights to meet critical water supply needs to prevent or to mitigate the impacts of compact administration under the 1922 and 1948 Colorado River compacts. The River District believes that these pro-active explorations are critical to the long-term protection and sustainability of agriculture and agricultural water rights in Western Colorado. Without some alternative mechanism, we foresee municipalities and water speculators pursuing buy-and-dry strategies on the West Slope to protect or mitigate against the consequences of Compact curtailment. Moreover, it must be remembered that municipalities in Colorado have the powers of eminent domain.

Adopted July 18, 2006
Revised and readopted April 21, 2009
Revised and readopted April 17, 2012
Revised and readopted April 15, 2015
DRAFT 2, April 3, 2018

Federal Water Rights

Colorado River Water Conservation District Policy Statements:

The policy of the Colorado River Water Conservation District (Colorado River District) is that when the Congress or the President creates special federal land designations, such designations must clearly and explicitly specify and quantify the minimum amount, if any, of water necessary to fulfill the purpose of the land reservation. The Colorado River District will advocate that the quantification of any reserved rights be the minimum amount essential to preserve the primary purpose of the Congressional or Executive action that creates the federal land designation.

Background & Discussion:

The “Winters Doctrine” arose from the Supreme Court’s 1908 decision in *Winters v. United States*, 207 U.S. 564 (1908). The Winters Doctrine stands for the proposition that when the federal government makes a reservation of land, it necessarily and impliedly reserves (and exempts from appropriation under state law) sufficient water to meet the needs of the land reservation.

The dispute in the Winters’ case involved conflicts between claims to water by American Indian Tribes on the Fort Belknap Indian Reservation in Montana and appropriation claims made under state law by settlers in the Milk River basin. The U.S. Supreme Court held that the Indian treaty establishing the reservation impliedly reserved sufficient water of the Milk River for tribal use which would be necessarily continued indefinitely. The court found that without water the reservation would be worthless and the purpose of the reservation would be destroyed.

The Supreme Court later clarified that when the federal government makes any reservation of land (not just an Indian reservation) it impliedly reserves only that amount of water sufficient to fulfill the purpose of the reservation, no more. *Cappaert v. United States*, 426 U.S. 128 (1978)

The U.S. Congress adopted the McCarran Amendment in 1952 (43 U.S.C. 666) providing for state adjudicatory and administrative jurisdiction over federal water claims, both reserved rights and in-priority appropriations. The River District believes that the McCarran Amendment appropriately provides for adjudication of federal, reserved water rights in state water courts following the same manner and procedures as for other water rights.

Adopted July 18, 2006
Revised and readopted April 21, 2009
Revised and readopted April 17, 2012
Readopted April 15, 2015
DRAFT 2, April 3, 2018

Prior Appropriation

Colorado River Water Conservation District Policy Statement:

The Colorado River Water Conservation District supports Colorado's system of prior appropriation as a fair and orderly system for allocating Colorado's scarce water resources. Moreover, Colorado's prior appropriation system has been proven to be both successful and flexible in addressing the public's changing demands, beneficial uses, and values regarding Colorado water resources (e.g., instream flow and recreation in-channel diversion water rights). Additional flexibility and adaptation of the prior appropriation doctrine may be warranted to ensure the equitable allocation of Colorado's remaining Colorado River Compact entitlement among the river's sub-basins within Colorado and to equitably allocate water uses in the event of interstate compact administration.

Background:

Water often does not naturally exist in sufficient quantities where and when it is needed to sustain human settlement and enterprise in Colorado. As a scarce resource, the demand for which exceeds its supply, water in Colorado requires a system of allocation and enforcement to meet the needs of Colorado's citizens and the natural environment, both current and future.

Colorado's prior appropriation doctrine is enshrined in the state's constitution, which states in relevant part:

Section 5. Water of streams public property: The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided," and

Section 6. Diverting unappropriated water - priority preferred uses: The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

(Colorado Constitution, Article XVI)

Additionally, a rich body of law, both legislative and judicial, has evolved to address the state's need for an orderly and transparent system of water administration and the embodiment of the prior appropriation doctrine as that system.

Prior Appropriation, Page 2

Adopted July 18, 2006

Revised and readopted April 21, 2009

Revised and readopted April 17, 2012

Revised January 2, 2015

DRAFT ~~12~~, ~~January 2~~April 3, 2018

Colorado's prior appropriation doctrine has proven its ability to adapt to the changing needs and values of the state regarding its scarce water resources. Notable among recent adaptations of Colorado's water allocation system are the 1972 Instream Flow Act (C.R.S. 37-92-102) and the 2001 Recreation In-Channel Diversion Act (C.R.S. 37-92-103(10.1) & (10.3)), both of which were adopted in a manner consistent with and incorporated into the prior appropriation system.

The 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact provide that under certain circumstances, Colorado may be required to curtail water uses within the Colorado River basin to comply with interstate compact administration. The strict application of the prior appropriation doctrine in the event of compact administration could result in extreme hardship and economic disruption throughout the state. Merely the potential for future curtailment may result in undesirable speculation and competition for firm water supplies as Colorado moves closer to its full compact entitlement. Therefore, limited and targeted future adaptation of the prior appropriation doctrine may be necessary in order to equitably allocate the state's remaining Colorado River entitlement and to equitably address the curtailment of water uses that may be necessary to comply with the 1922 and 1948 compacts.

Upper Colorado River Recovery Program

Colorado River Water Conservation District Policy Statements:

The Colorado River Water Conservation District (Colorado River District) supports the Upper Colorado River Endangered Fish Recovery Program (Recovery Program) and its dual purpose of recovering fish species listed as endangered while allowing historical water use and water development to continue consistent with state law and Colorado's entitlements under the Colorado River Compacts.

The Colorado River District, as an active participant in the Recovery Program, will advocate to:

- **Accomplish recovery with less than existing flows in the Colorado River and its tributaries to allow for additional consumptive use development on the West Slope in accordance with Colorado's compact water entitlements;**
- **Include nonnative elimination and control, habitat modification and restoration, and stocking of endangered fishes among the Recovery Program's priorities;**
- **Ensure that the burden of the Recovery Program's implementation, operation, and compliance is equitably distributed on all power and water users, including transmountain diverters;**
- **Remove any risk of allegations that impacts from water depletions endanger, threaten or take the fish or harm their habitat and protect against the potential for adverse incidental take of the species or adverse modifications of their habitat;**
- **Consider inclusion of water quality protections for the listed fishes within the Recovery Program's purpose and mission;**
- **Ensure that if a Programmatic Biological Opinion (PBO) or individual project's Section 7 consultation requires actions that address water quality, then the Colorado River District will advocate that the recovery program assume the responsibility, including adequate funding, for addressing the required water quality-related actions; and**
- **Ensure that the Recovery Program assumes the full responsibility for the successful completion of the Program's recovery implementation elements.**

Any permanent reallocation of waters from "compensatory storage reservoirs" (i.e., Green Mountain Reservoir and Ruedi Reservoir) must occur only with the approval of the Colorado River District and other West Slope beneficiaries of those projects.

Additionally, the U.S. Bureau of Reclamation should timely issue water contracts from federal facilities, relying on the Recovery Program to implement all necessary, reasonable

Revised and readopted 4/17/13

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and prudent measures to offset any identified impacts to the listed fish species.

Background & Discussion:

The Recovery Program was created to "provide for recovery of the endangered fish species, consistent with federal law and all applicable state laws and systems for water resource development and use." (Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin, September 29, 1987) Since its inception in 1987, the Recovery Program has successfully protected the interests of present and future Western Slope water users and the right of Colorado River water users within the state to fully utilize Colorado's entitlement under the Colorado River Compacts of 1922 and 1948.

The Recovery Program has successfully served as the reasonable and prudent alternative offsetting impacts to the endangered fishes and adverse modification to their habitat for existing and future water depletions. The Recovery Program has served as the mitigation for depletion impacts for more than 2.1 million acre-feet of historical and new water depletions within the River District. Measures necessary to accomplish recovery of the fish are the responsibility of the Recovery Program and its participants, not individual water users seeking Section 7 consultations under the Endangered Species Act. As such, the Recovery Program has served as a vital regulatory shield at substantial cost savings to individual Colorado water users.

The Recovery Program has implemented actions necessary to achieve the recovery goals established by the U.S. Fish & Wildlife Service (USFWS) for each of the listed species. Additionally, the Program serves as the reasonable and prudent measure relied upon by the USFWS in its development of basin-specific PBOs by implementing specific recovery actions to offset water use and development activities.

Funding of the Recovery Program has been principally through Congressional appropriations (Reclamation's budget), Colorado River Storage Projects (CRSP) power revenues, and state contributions to the Recovery Program, consistent with the Recovery Program's organic agreement.

The Recovery Program currently relies, in part, upon normal operations and releases from compensatory storage ~~projects-reservoirs (i.e., releases from Green Mountain Reservoir and Ruedi Reservoir)~~ to achieve recommended flows ~~(i.e., releases from Green Mountain Reservoir and Ruedi Reservoir)~~. As such, the Recovery Program represents a substantial compromise by West Slope water users on the historical bargains that mitigate transmountain diversions. This compromise ~~should-must~~ be recognized ~~within the state~~ and ~~the risk of~~ any such future compromises must be minimized ~~and-or~~ eliminated as ~~growth on the Western Slope increases the demand for water and reliance on these compensatory storage projects~~ both reservoirs are fully contracted.

Adopted 7/20/2016

Instream Flows

Colorado River Water Conservation District Policy Statements:

The Colorado River District recognizes and supports the environmental and human benefits of flowing rivers and streams. The values and benefits of instream flows, however, must be balanced with the need for consumptive water uses in an arid West.

The Colorado River District supports Colorado's instream flow program as a means of protecting the aquatic environment. The River District supports the Colorado Water Conservation Board's (CWCB) exclusive authority to appropriate instream flow water rights that balance protection of the natural environment with the activities of mankind. The River District likewise supports other mechanisms that benefit the aquatic environment that are consistent with the Prior Appropriation Doctrine.

The District may oppose individual CWCB instream flow appropriations or donations when they exceed the amount reasonably necessary for the protection of the environment or do not sufficiently accommodate other existing or potential water uses. An instream flow right should not be granted if it would materially impair the ability to fully develop for beneficial use Colorado's entitlements under the Compacts of 1922 and 1948 nor should it exceed the amount of water reasonably necessary for the protection of the environment to a reasonable degree.

On a case-by-case basis, the District may advocate for inundation of all or portions of instream flow rights to accommodate new or expanded water storage, consistent with the state's policy of maximum utilization.

Background & Discussion:

The River District was created to protect the many beneficial (consumptive and non-consumptive) uses of Colorado River basin waters. The River District's mission is to protect and manage our scarce water resources for present and future uses and enjoyment.

Since 1973 and the inception of the Colorado instream flow program, the CWCB has appropriated instream flow water rights on more than 1,600 stream segments covering more than 9,250 miles of stream and 480 natural lakes in Colorado. While extensive, there are many waterways that do not have a CWCB instream flow water right. Most of the existing instream water rights are limited to cold water streams and rivers.

Conflicts and impacts have occurred as a result of instream flow appropriations, especially when instream flow rights are located on the lower reaches of streams and river; accordingly, special consideration should be given to appropriations near state lines.