



**MEMORANDUM**  
**JULY 5, 2018**

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**TO:** BOARD OF DIRECTORS

**FROM:** CHRIS TREESE

**SUBJECT:** ANNUAL POLICY REVIEW

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**ACTION:**

- *Provide final review and approval to policies:*
  - Colorado's Prior Appropriation Doctrine and
  - Instream Flow policy
- *Consider and advise of any new policies desired*

**STRATEGIC INITIATIVE(S):**

- *7.D Water Needs/Project Development*
  - *4. Colorado River Supplies (all sub-initiatives)*
  - *9.A Water Efficiency and Conservation*
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Attached are two policies eligible for final action at the July quarterly meeting. They are presented reflecting the Board's direction at the April meeting. Changes requested in April are shown in blue. Attached are policies addressing:

- Colorado's Prior Appropriation Doctrine and
- Instream Flow.

The Board voted unanimously to approve the Prior Appropriation policy in April. However, following the affirmative vote, directors requested staff develop language addressing potential water shepherding for compact compliance purposes. Accordingly, I'm returning the Prior Appropriation policy for further 2018 consideration with suggested language. FYI, consistent with Board motion, the Prior Appropriation policy as adopted in April is posted as a "Revised and readopted" policy. Any July changes will be quickly incorporated.

At the January meeting, Director Merritt requested staff review the Instream Flow policy to determine if additions are required to address agricultural return flow concerns. I suggested in April that no additions or modifications were required. The Board seemed to accept this recommendation. However, directors raised other concerns in April and requested additional language in the background section elaborating on the need for protection of future water development opportunities. Suggested language is included in the attached draft.

Directors also suggesting language encouraging the CWCB to adopt more specific (limiting) language defining "aquatic environment." "Aquatic environment" is not used in the instream

flow statute; it is in your adopted policy. My suggested edits revise your existing policy adhering to the term “natural environment,” as it is used in statute.

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 two policies are eligible for final action at the July meeting.

As always, the 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.coloradoriverdistrict.org/policies/>.

Adopted July 18, 2006  
Revised and readopted April 21, 2009  
Revised and readopted April 17, 2012  
Readopted April 15, 2015  
Revised and readopted April 17, 2018  
Redraft #1, July 5, 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 **and to ensure water rights (including conserved consumptive use) are equitably administered** 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

## **Prior Appropriation, Page 2**

Adopted July 18, 2006

Revised and readopted April 21, 2009

Revised and readopted April 17, 2012

Revised January 2, 2015

Revised and readopted, July 17, 2018

[Redraft #1, July 5, 2018](#)

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need for an orderly and transparent system of water administration and the embodiment of the prior appropriation doctrine as that system.

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.

Adopted 7/20/2016

Draft 1, 7/17/2018

## **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~~-natural 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 natural 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~~ it is incumbent on the CWCB to protect reasonably foreseeable future water development opportunities when deciding whether to file and the quantification of any instream flow rights.