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Southwestern Water Conservation District  
Attn: Steve Wolff, Beth Van Vurst, Board of Directors  
841 E. Second Ave.  
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**Subject: Opposition to removal of Division 7 Exemption in Colorado “Use it or Lose it Statute” and restart of the System Conservation Pilot Program this year**

I am a property and water rights owner in SW Colorado. I write to oppose removal of the Division 7 exemption in CRS § 37-92-305, Colorado’s “Use It or Lose It” statute this year. This exemption is apparently being removed to fully enable Demand Management(DM) and related conservation programs, like the restart of the System Conservation Pilot Program(SCPP), in SW Colorado. I speak only for myself here, I am not a lawyer but have been researching Colorado River issues since October, 2018. I maintain one of the more extensive online document archives on the Law of the River at:

<https://www.varuna.io/LOTR/chron.html>

The relevant statute, CRS § 37-92-305:

*In determining the amount of historical consumptive use for a water right in **division 1, 2, 3, 4, 5, or 6**, the water judge shall not consider any decrease in use resulting from the following:*

...

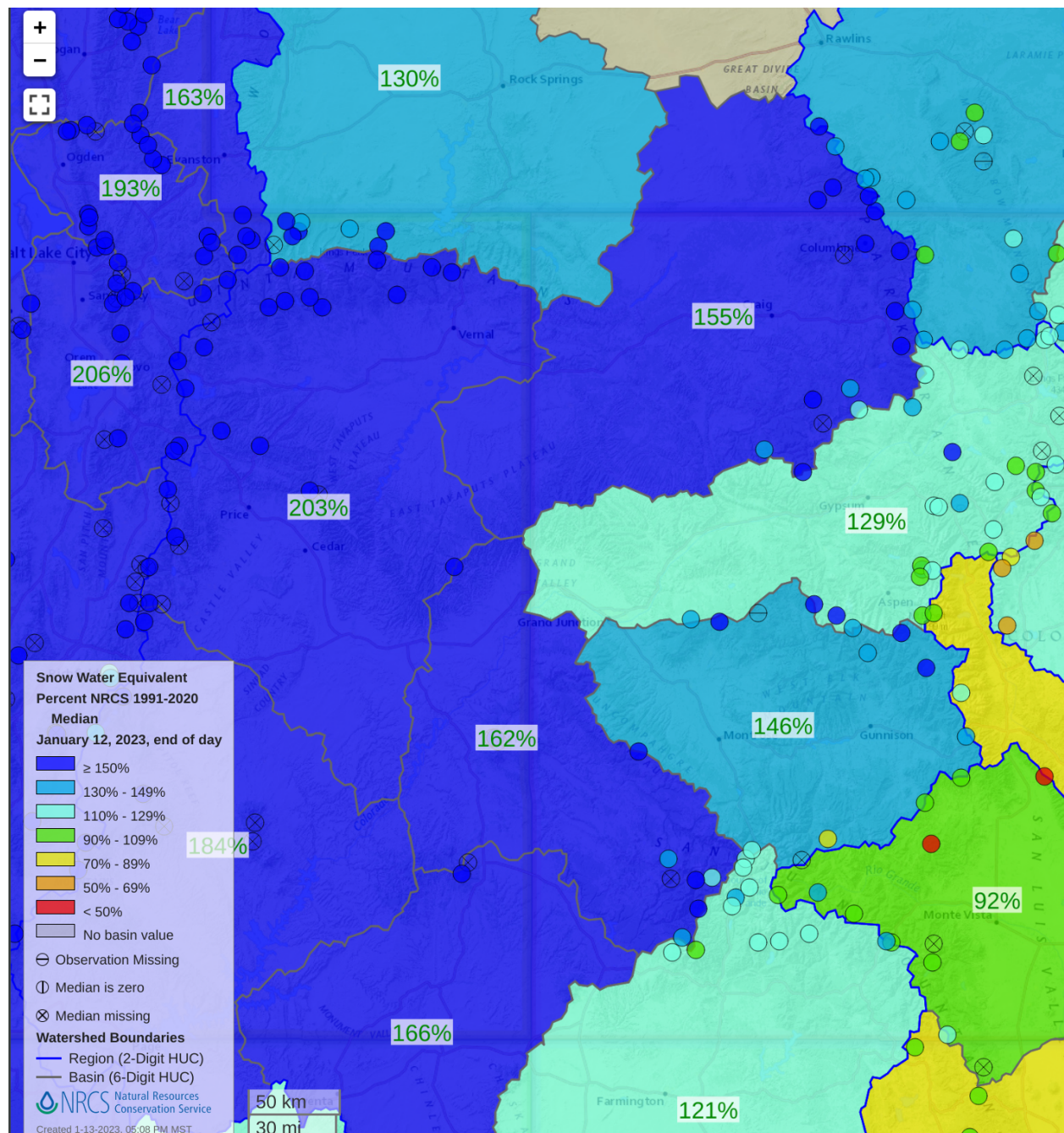
II. The nonuse or decrease in use of the water from the water right by its owner for a maximum of five years in any consecutive ten-year period as a result of participation in:

- A. A water conservation program, including a pilot program, approved in advance by a water conservation district, water district, water authority, or water conservancy district for lands that are within the entity's jurisdictional boundaries or by a state agency with explicit statutory jurisdiction over water conservation or water rights;**
- B. A water conservation program, including a pilot program, established through formal written action or ordinance by a water district, water authority, or municipality or its municipal water supplier for lands that are within the entity's jurisdictional boundaries;
- C. An approved land fallowing program as provided by law in order to conserve water or to provide water for compact compliance; or**
- D. A water banking program as provided by law.**

I also have serious concerns about the rushed restart of the System Conservation Pilot Program and ask you to discourage participation by SW Colorado water rights holders in that program at

least for this year, especially until the concerns below are properly addressed. The UCRC and CWCB have had 4 years and spent millions of dollars to deal with these problems, they didn't and are instead hastily restarting a deeply flawed program from 2015-2018. In light of the dramatically improved snowpack on the West Slope as of today, restarting this flawed program seems to be exploiting a fading crisis and should be delayed until next year.

### NRCS Snow Water Equivalent percent of median end of day Jan 12



Some of my concerns:

- **Velocity** - The SCPP program restart was unveiled at CRWUA December 14, they immediately issued RFP's and will select participants March 1st. The velocity of this program seems designed to prevent discussion, scrutiny or stakeholder feedback on this complex, politically charged, program. It looks like crisis exploitation to stand up a conservation program this complicated, this quickly, which certain entities want but many don't.

The Southwestern WCD announcement of the intent to remove the Division 7 exemption was in early December and may be voted on this month, with intervening holidays, not enough time for essential consultations, much less a thorough and proper discussion of the complex issues in play here. This same rush was attempted by proponents of this change in 2020 to suppress opposition and debate. That started an entirely unnecessary conflict that grievously damaged SW in general, and me in particular. Southwestern WCD should be informing all stakeholders of major changes like this, bring it to SWBRT and foster spirited but civilized debate to reach the best consensus and policy possible instead of suppressing these vital democratic mechanisms.

- **Consultation** - There are indications NGO's were involved in the creation of this program while there doesn't appear to have been any consultations by the UCRC and CWCB with Southwestern WCD, the Colorado River District or major stakeholders on how this program will work in practice. Your district has a statutory mandate to be involved in programs like this, and involve your stakeholders, from conception. This program appears to be ripe for inequity and abuse in how much money is awarded and water taken, from where. This same epic failure occurred in 2018 with the Drought Contingency plan, now it has become a pattern of abuse by the UCRC and CWCB.
- **NEPA** - Why is a program with potentially large environmental impacts being undertaken with no NEPA process? Probably because NGO's want it, and not to obstruct it.
- **Instream Flow Program Not Lake Powell Crisis Mitigation** - This seems to be more of an Instream Flow augmentation program for environmental benefits and to satisfy NGO's than a program to address the current crisis in Lake Powell. If the crisis in Lake Powell is being exploited to stand up a program primarily for its environmental benefits that is inappropriate. I am most definitely opposed to spending money to dry up fields in my community to send our water rights out of our service area for that purpose.
- **Irrigation Company Article of Incorporation** - My irrigation company has a clause in their Articles of Incorporation that precludes selling water out of our service area except under tight constraints specifically because of past pressures to participate in Instream Flow Loan Programs.
- **Shepherding** - There seems to be no plan to shepherd the conserved water to Lake Powell. Without one, no one will know how much water, if any, makes it to Lake Powell to mitigate the crisis there. Other water users may divert some or all of the water. Colorado's State Engineer currently has no authority to shepherd water past other headgates though that may change soon. If and when there is shepherding it is easier near the stateline than from headwaters which disproportionately targets water rights holders like me..

- **Storage Pool** - If the Demand Management storage pool in Lake Powell is not authorized or enabled, at least not at this time, any water that reaches Lake Powell will be released to Lower Basin entities like Central Arizona Project and Southern Nevada Water Authority(SNWA) to reduce their looming shortages, I think this is contrary to the Compact. I ask you to ask the UCRC why exactly this pool is not enabled (i.e. is one or more states opposing it, and if so which ones).
- **The Southern Nevada Water Authority(SNWA) plan** being used as the basis of current negotiations is apparently demanding 1,000,000 af from the Upper Basin THIS YEAR, maybe 500,000 af under DROA from CRSP reservoirs and 500,000 af under SCPP and other programs(i.e. tribal). They are apparently demanding an enormous amount of water to negotiate down to just the huge amount of water they really want and make the huge amount of water seem OK to the UCRC. It is not. They should get what they are entitled to under DROA and no more.
- The **Lower Basin has been overusing their compact entitlement** since the Central Arizona Project(CAP) came on line. By contrast the Upper Basin is foregoing around 3,000,000 million af of our entitlement to the benefit of the Lower Basin, SNWA and CAP and to cover reservoir losses to deliver water to them. **Yet they demand even more.** The refusal by Colorado's Assistant AG to discuss the Upper Basin's unused entitlement at a roundtable meeting in October 2018 is one reason I embarked on this 4 year research and education campaign.
- **Proportionality** - The CWCB Policy on Demand Management(below) requires proportional contributions from the West Slope and Front Range. That requirement seems to have been discarded. This policy and these sideboards seem to have been abandoned because adhering to them is hard, so the UCRC is calling this a pilot program and not a Demand Management program. With \$125 million for up to 700,000 af of water this is a Demand Management program, not a pilot.
- **Article III(a) and VIII Concerns** - I have serious concerns this program doesn't comply with Colorado River Compact Article III(a) and Article VIII which seem to require "**exclusive beneficial consumptive use**" of water from Upper Basin water rights in the Upper Basin. This is especially true if there is no DM Storage Pool so the water will just be released to the Lower Basin. In this 2018 YouTube SNWA's John Entsminger mocks the UCRC and James Eklund for begging the Lower Basin to allow the Upper Basin to Demand Manage ourselves and send our water to the Lower Basin, SNWA specifically:

#### **Gravity Works**

<https://www.youtube.com/watch?v=rC16W3DT0Y4&list=PL8q1QDrFH67WLAJ7pUZlzDeewYZssidPd&index=4&t=2631s>

I think he is referring to the fact the UCRC is ignoring III(a). I ask that a thorough, proper and impartial legal review be conducted of this issue to explain and verify how it's suddenly OK to ignore these articles which are the heart, soul and whole purpose of the Compact, to **keep the Lower Basin from buying or taking Upper Basin water**. How is it suddenly OK for the Department of Interior, water master for the Lower Basin. to buy



water from Upper Basin water rights for the benefit of CAP and SNWA, junior users in the Lower Basin who are facing painful shortages?

#### ARTICLE III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the **exclusive beneficial consumptive use** of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

#### ARTICLE VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

**All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.**

- **Article IV(b) Concerns** - Article IV(b) establishes Ag and Domestic use as the dominant and priority uses for Compact water. This program appears to be embarking on a path to invert these priorities and make Ag subservient to hydropower to preserve Lake Mead and Lake Powell. Yes, it is desirable to defend these reservoirs but you can't take water from Ag water rights, under pressure, to do it:

#### ARTICLE IV

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) **Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.**

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use, and distribution of water.

- **UCRC Canceled SCPP** - The UCRC canceled the original SCPP program in 2018 due to serious and legitimate concerns most of which have not been addressed 4 years later. There is still no storage pool in Powell, there is still no shepherding, there are still unresolved legal issues. The relevant part of that 2018 motion is below.
- **Antispeculation** - When I oppose removing the Division 7 exemption, many reply it's not that big a deal to most water users to have some injury to their rights. Most don't go to water court with change cases. My response is The Division 7 exemption is the one statutory obstacle we have on the books to prevent hedge funds like Water Asset Management, represented by former UCRC commissioner James Eklund, from buying family owned farms in our service area with the intent of selling it to these conservation programs, for profit. The state of Colorado seems to suspect them of speculation and profiteering with these activities and water rights, I'm not qualified to say. WAM's water rights are the "asset" they are managing. They don't want that "asset" damaged by participation in these programs with the Division 7 exemption in place in SW. Participation in these programs is their primary goal at least in the short term.

This is a YouTube video from November where Eklund talks at length about the importance of this “Use it or Lose it” statute to them and that their water rights not be damaged by DM participation:

[https://www.youtube.com/watch?v=\\_8z9P-bFHPY&t=3400s](https://www.youtube.com/watch?v=_8z9P-bFHPY&t=3400s)

In a 1996 The Atlantic interview with WAM’s CEO Disque Deane told this story:

*“Deane told me he’d abandoned an effort to buy a distressed New Mexico property in 2014 after hearing about a local gas-station attendant who—opposed to the idea of investors buying up water—refused to fill the cars of workers who were drilling wells on the property.”*

I’ve been playing the role of this gas-station attendant by signaling Eklund, WAM and others like them that they aren’t welcome here. One tool I’ve been using is the Division 7 exemption. I knew of WAM’s activities in Grand Valley in February 2020 when this change was first attempted but couldn’t raise it as a concern since it wasn’t public then and I didn’t want to be accused of “conspiracy theories”.

**I ask you to pick up the gauntlet I’ve dropped, be that gas-station attendant, and discourage WAM from moving into my community and SW as a whole, instead of welcoming it.**

Other parts of Colorado, the Colorado River District and Grand Valley Water Users Association in particular, have encouraged and cheered on these conservation programs. In doing so they seem to have invited WAM to buy large swaths of their land and water, wiping out family owned farms, to their regret.

Keeping the Division 7 exemption is essential to make James Eklund, Water Asset Management and their ilk feel unwelcome here. As everyone says it doesn’t actually prevent temporary participation by ordinary water users in a DM program. A question can be raised as to why the abandonment statute was amended in 2020 to allow permanent DM participation. That implies DM proponents are considering permanent fallowing of some farms and ranches contrary to CWCB’s “temporary” policy.

- **Hedge Funds May be Circumventing Article III(a)** - Since hedge funds like Water Asset Management don’t disclose their investors, it is possible affluent entities in the Lower Basin are pouring money into WAM to buy out water in the Upper Basin and send it to the Lower Basin. If so they are circumventing and breaching Article III(a) and VIII. To insure compact compliance they should be required to disclose and divest Lower Basin investors.
- **Section 603** - In 1968 Wayne Aspinall placed Section 603 in the Colorado Basin Project Act(CRBPA) to protect the Upper Basin and Colorado water rights from over allocation and overuse of the Colorado River in the Lower Basin caused by:
  - removal of the Gila and tributaries from the Compact

- the 1945 Mexico Treaty
- construction of the Central Arizona Project.

In 2005 SNWA and Arizona used litigation threats against USBR and the Upper Basin states to demand releases from Lake Powell be increased to 9 maf to delay shortages they are required to take under the 1968 CRBPA. The UCRC probably should've invoked 603 in response then but didn't, they didn't want to litigate. As a result, Arizona got exactly what they demanded. This is described in detail in this Law Review paper where Arizona's negotiators bragged about the strategy they used against Reclamation and the Upper Colorado River Commission(UCRC):

**From a Colorado River Compact Challenge to the Next Era of Cooperation Among Seven Basin States (2007)**

<https://arizonalawreview.org/schiffer-guenther/>

The reservoirs have now been drained, just as Arizona demanded, we are in an inevitable crisis as a result, SNWA and CAP shortages were mostly delayed until 2022 as they demanded, their shortages now are too little, too late. In my opinion one origin of this crisis was the failure by the UCRC to invoke Section 603 in 2005. Section 603 probably needs to be invoked now before SNWA and CAP take even more Upper Basin water to slake their unquenchable thirst.

**Colorado River Basin Project Act(1968)**

<https://www.varuna.io/LOTR/1968/crbproj.pdf>

82 Stat. 901

Pub. Law 90-537

- 16 -

September 30, 1968

SEC. 603. (a) Rights of the upper basin to the consumptive use of water available to that basin from the Colorado Rive system under the Colorado River Compact shall not be reduced or prejudiced by any use of such water in the lower basin.

(b) Nothing in this Act shall be construed so as to impair, conflict with, or otherwise change the duties and powers of the Upper Colorado



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1/3/2023

V 0.6 Updated Jan 13, 2023

- Updated SNOTEL Map to Jan 12
- Hedge Funds May be Circumventing Article III(a)
- Changed Irrigation company bylaws to Articles of Incorporation

**The Galloway Proposal and Colorado Water Law: The Limits of the Doctrine of Prior Appropriation the Doctrine of Prior Appropriation, Landry (1985)**

[https://www.varuna.io/LOTR/1985/Galloway\\_1985.pdf](https://www.varuna.io/LOTR/1985/Galloway_1985.pdf)

**The Galloway Project and the Colorado River Compacts: Will the Compacts Bar Transbasin Water Diversions, Gross (1985)**

[https://www.varuna.io/LOTR/1985/Galloway\\_1985.pdf](https://www.varuna.io/LOTR/1985/Galloway_1985.pdf)

The Compact language suggested territorial use limitations. When Arts. III(a) and II(f)(g) are read together, the “exclusive consumptive use” allowed each Basin in the Compact is limited to the physical territory of the particular basin. Art. III(a) apportioned to each basin the “exclusive beneficial consumptive use” of 7.5 m.a.f./year. Art. II(f)(g) defined the Upper Basin as those named states “within which and from which waters naturally drain into the Colorado River System” above Lee Ferry, and the Lower Basin as those named states below Lee Ferry. Art. VIII further specified territorial use limitations, affirming that “[a]ll rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.” The drafters added this language to the article which dealt with water storage to meet the Lee Ferry delivery obligation, in order to affirm that water stored in the Upper Basin for the benefit of the Lower Basin would be part of the Lower Basin’s apportionment.<sup>41</sup>

The Colorado River Compact appears to forbid the Galloway Project. Essentially, the Compact apportions exclusive use of a quantity of water to the Lower and Upper Basins. Galloway envisions using water apportioned to one Basin in the other. Art. VIII of the Compact expressly precludes Galloway’s arrangement. This Article requires that all rights to beneficial use under the Compact “be satisfied *solely* from the water apportioned to that Basin in which they are situate.”<sup>63</sup> As will be discussed in the remaining sections of this paper, Articles II, III, and IV also preclude Galloway’s arrangement because they limit the use of the water to the territory of the Basin to which the water was apportioned.



## **2018 UCRC Motion Ending First System Conservation Pilot Program**

<http://www.ucrccommission.com/RepDoc/SCPPDocuments/DemandMgmtResolution062018.pdf>

WHEREAS, although the Pilot has helped explore the feasibility of some aspects of demand management programs, it does not provide a means for the Upper Division States to account, store and release conserved water in a way which will help assure full compliance with the Colorado River Compact in times of drought;

WHEREAS, the Commission recognizes that no demand management program is likely to conserve enough water in any single year to sufficiently address the risk of Lake Powell dropping below critical elevations, or help assure full compliance with the Colorado River Compact;

WHEREAS, the Commission believes that any viable demand management program requires the ability to accumulate and store conserved water over multiple years. However, no means for accounting, measuring, conveying or storing water have currently been established. As such, any water that is currently conserved is subject to use by downstream water users or release from existing system storage prior to being needed in response to emergency drought conditions, thereby defeating the intended purposes of any demand management;

WHEREAS, the Commission recognizes that additional administrative, technical, operational, economic and legal considerations must also be investigated to fully inform the feasibility and usefulness of developing a demand management program in the Upper Basin;

WHEREAS, the Commission finds that the Pilot does not allow the Upper Division States to sufficiently investigate storage or the additional administrative, technical, operational, economic and legal considerations necessary to explore the feasibility of demand management as part of its ongoing emergency drought contingency planning efforts; and

WHEREAS, the Commission believes that the Upper Division States, acting through the Commission, must be active participants in the development and implementation of any demand management program in the Upper Basin, and desires to evaluate the lessons learned and build upon the interest gained during the Pilot to inform its continuing investigation of ways to achieve the purposes of demand management.

NOW, THEREFORE, BE IT RESOLVED that the Commission commits to continue to explore the feasibility of developing demand management program(s) within the Upper Basin to protect Lake Powell from reaching critical elevations to help assure full compliance with the Colorado River Compact;

BE IT FURTHER RESOLVED that the Commission will temporarily cease to act as the contracting entity for the Pilot in the Upper Basin after fulfilling its commitments for 2018 in favor of focusing its efforts on investigating outstanding considerations related to demand management;



**COLORADO**  
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John Hickenlooper, Governor  
Bob Randall, DNR Executive Director  
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November 15, 2018

#### **SUPPORT AND POLICY STATEMENTS**

##### **REGARDING COLORADO RIVER DROUGHT CONTINGENCY PLANS, DEMAND MANAGEMENT AND COMPACT ADMINISTRATION**

- (5) Investigate voluntary, temporary, and compensated reductions in consumptive use of waters that otherwise would deplete the flow of the Upper Colorado River System for the specific purpose of helping assure compact compliance. Consistent with the Upper Basin Demand Management Storage agreement, the Board may also join the UCRC and other Upper Basin States in any evaluation of importing of waters from outside the natural Colorado River watershed to augment the Upper Colorado River System for compact compliance purposes.



- 
- (6) Prioritize avoidance of disproportionate negative economic or environmental impacts to any single subbasin or region within Colorado while protecting the legal rights of water rights holders. The Board will work with water rights holders and stakeholders to assess the feasibility of and promote mechanisms for obtaining roughly proportionate contributions of water consumptively used from the Colorado River System to a Demand Management program over a given timeframe from participants on each side of the Continental Divide.
- (7) Comply with applicable state law, including, but not limited to, the requirement that no action related to demand management cause material injury to other water rights holders.
- (8) Consider and be fully informed by the input and considerations of water rights holders and stakeholders potentially impacted by application of demand management strategies within Colorado, and institute a public review process for any such proposed demand management program.
- (9) Work with Colorado's Commissioner to the Upper Colorado River Commission to cooperate with the other Upper Division States of Wyoming, Utah, and New Mexico, as well as the Department of the Interior, to investigate and potentially develop a regional demand management program that considers and incorporates Colorado's demand management approach, and to ensure that water conserved within Colorado under any demand management program is not diverted and consumptively used by any other state.

This is **Memo 13** from CWCB staff for the September 2018 CWCB meeting where the Demand Management policy (aka DM sideboards) were demanded by Colorado River District(Andy Mueller) and Southwestern WCD(Bruce Whitehead). Contrary to claims made at the Feb 2020 SWCD board meeting, the Division 7 change to the “Use it or Lose it” change case and abandonment statutes then was to insure no injury due to DM program participation. The abandonment statute was amended in 2020.  
[https://www.varuna.io/LOTR/2018/CWCB\\_DCP\\_Memo\\_13\\_2018.pdf](https://www.varuna.io/LOTR/2018/CWCB_DCP_Memo_13_2018.pdf)

and suggestions regarding demand management as the program continues to be explored throughout the Upper Basin and within Colorado.

Sustainability of the Colorado River system is in the interest of the entire state. If a demand management program is determined to be feasible, the parameters for its operation must be set forth in a cooperative process that allows for stakeholder input, while recognizing the interaction between interstate and intrastate efforts.

To date, interest in the DCPs and the concept of a potential demand management program, its limits, operations, application, etc., has been significant. Stakeholders have currently identified a number of potential cautions, considerations and guidelines for the state to consider or adopt before developing and implementing any demand management program in Colorado. The water users have currently considered these and other issues as necessary sideboards to effectively protect and promote the interests of Colorado water users and communities throughout the state. These key issues currently include, but are not limited to:

- Whether the program would be limited to “temporary, voluntary, and compensated” conservation activities or be expanded to include something more;
- Identifying the source of funding for a temporary, voluntary, compensated demand management program;
- Whether the program would be used to help assure continued compliance with the Colorado River Compact or something more;
- How any demand management program would operate to share the benefits and burdens associated, so as to avoid any one sector or geographic area shouldering a disproportionate and negative burden by participating in the program;
- How to avoid water speculation as a result of the program;
- How the program could be operated consistent with Colorado law, including but not limited to: avoiding injury to other water users, shepherding water to designated storage facilities, assuring that participation in the program will not constitute non-use for purposes of change cases or abandonment proceedings, etc.;
- Identifying the roles and authorities regarding the interplay between interstate discussions and negotiations on the Colorado River and the intrastate conversations and considerations of Colorado water users regarding demand management; and
- Understanding the extent to which the state would engage and work in tandem with stakeholders on rules for compact administration before considering a pivot from temporary, voluntary, and compensated demand management to something more akin to mandatory curtailment.

#### **Staff recommendation**

Staff recommends that the Board take testimony from the public regarding demand management. Staff recommends the Board consider, in consultation with the State Engineer, adopting a position that sets forth the Board’s approach for determining how evaluation, exploration, and development of any demand management program in Colorado will proceed. The intent of this position and direction to staff will be to appropriately capture and address both current and future input regarding demand management as it evolves. Staff will be