



# Colorado River District

**75 Years**

**Protecting Western Colorado Water**



## MEMORANDUM

JANUARY 5, 2012

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**TO:** BOARD OF DIRECTORS

**FROM:** CHRIS TREESE

**SUBJECT:** POLICY DEVELOPMENT AND REVIEW  
2012 DRAFT POLICIES

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Returning Board members will recall that they established a schedule for annual development and review of the District's water policies. This process started four years ago with a schedule designed to review and reconsider all the policies in every three years. Consistent with the Board's 2004 plan for policy review and adoption, this year the Board is scheduled to re-review the 2009 policies. For a complete list of River District policies, refer to our web site: [http://www.crwcd.org/page\\_9](http://www.crwcd.org/page_9).

Attached are drafts of the following policies for Board consideration:

- Federal Reserved Water Rights, and
- Colorado's Prior Appropriation Doctrine.

Few and only editorial changes are proposed on the attached.

There are only two policies up for triennial consideration this year as the Board deleted Takings and Regulation policies in 2009 as inappropriate for policy statements.

Recall that under your adopted process, policies must be agenda-ed for at least two quarterly meetings before you take final action. We will discuss these and any other subject areas the Board may find missing Wednesday morning.

Adopted July 18, 2006  
Revised and readopted April 21, 2009  
*1<sup>st</sup> Draft: 1/3/2012*

## Federal Water Rights

### Colorado River Water Conservation District Policy Statements:

**The policy of the Colorado River Water Conservation 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. ~~In accordance with the McCarran Amendment and Colorado law, The River District will advocate that the quantification of any reserved rights be the minimum amount essential to preserve the primary purpose of any Congressional or Executive action which creates the federal land designation.~~**

### Background & Discussion:

The “Winters Doctrine” arose from the Supreme Court’s 1908 decision finding an implicit reservation of water rights associated with historical federal designations of lands where water rights were not specified. The Winters Doctrine clearly established the judicial precedent of federal reserved water rights where such rights are necessary to fulfill the purpose of the federal reservation. 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 River District believes that today the McCarran Amendment, adopted by Congress in 1952, appropriately provides for adjudication of federal, reserved water rights in state water courts following the same manner and procedures as other water rights.~~

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 “use which would be necessarily continued through years.” 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)

When Congress passed the McCarran Amendment, it waived its sovereignty with respect to state adjudication and administration of federal water rights claims. The U.S. Congress adopted the McCarran Amendment in 1952 providing for state adjudicatory jurisdiction over federal water claims. ~~THE RIVER DISTRICT BELIEVES THAT TODAY THE MCCARRAN AMENDMENT, ADOPTED BY CONGRESS IN 1952, APPROPRIATELY PROVIDES FOR ADJUDICATION OF FEDERAL, RESERVED WATER RIGHTS IN STATE WATER COURTS FOLLOWING THE~~

Federal Water Rights  
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SAME MANNER AND PROCEDURES AS OTHER WATER RIGHTS. ~~The McCarran Amendment (43 U.S.C. 666(a)) provides in relevant part:~~

~~“Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amendable thereto by reason of sovereignty, and (2) shall be subject to the judgements, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances . . . .”~~

Adopted July 18, 2006.

Revised and re-adopted April 21, 2009

*1<sup>st</sup> Draft: 1/3/2012*

## **Prior Appropriation**

### **Colorado River Water Conservation District Policy Statements:**

**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 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 & Discussion:**

Generally, water 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 ITS 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.”

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

Adopted July 18, 2006.

Revised and Re-adopted April 21, 2009

*1<sup>st</sup> Draft: 1/3/2012*

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 and the 2001 Recreation In-Channel Diversion Act, 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. ~~The mere~~ ~~MERELY~~ THE potential for future curtailment may result in undesirable speculation and ~~completion~~ 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.