Colorado River District
Protecting Western Colorado Water Since 1937

MEMORANDUM

November 23, 2018

TO:	**BOARD OF DIRECTORS, CRWCD**
FROM:	**ANDY MUELLER,**
SUBJECT:	**CWCB NOVEMBER 15, 2018 POLICY STATEMENTS ON DEMAND MANAGEMENT AND COMPACT ADMINISTRATION**

Requested Actions:

1. ***Staff recommends that the Board adopt a motion indicating its support for the Demand Management Policy Statement and the Compact Administration Policy Statement contained within the CWCB's November 15, 2018 "Support and Policy Statements Regarding the Colorado River Drought Contingency Plans, Demand Management, and Compact Administration." This statement of support is made with the express understanding that the intent of the CWCB staff and Board that the "roughly proportionate contributions of water" referenced in paragraph six of the Demand Management Policy Statement is intended to be geographically equitable.***

2. ***Staff recommends that the Board indicate its support for the concept of federal legislation which is limited in scope to directing, "the Secretary of the Interior to execute and carry out the provisions of the five interstate agreements as soon as they are executed by the parties" subject to this Board's review and approval of the final proposed legislative language.***

Relevant River District Strategic Plan Initiatives:

4. Colorado River Supplies:
4. B. *The River District will advocate for full protection and preservation of water rights perfected by use prior to the effective date of the 1922 Compact and thereby excluded from curtailment in the event of compact administration.*
4. C. *The River District will continue to study mechanisms, such as a Compact Water Bank and Contingency Planning that include demand management, drought operations of CRSP reservoirs, and water supply augmentation to address the risk of overdevelopment.*
4. D. *The River District will work with the State Engineer's Office and other interested parties to develop an equitable mechanism for potential compact administration.*
5. Transmountain Diversions:
5. B. *The River District will work to ensure that the IBCC Conceptual Framework is honored and fairly implemented.*
6. Agricultural Water Use:

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6. A. *The River District will continue to study the concept of a voluntary and compensated compact water bank in collaboration with other stakeholders to best preserve western Colorado agriculture.*
6. B. *The River District will explore alternative transfer methods that allow agricultural water users to benefit from the value of their water rights without the permanent transfer of the rights, and without adverse impacts to the local communities and the regional economy.*
6. C. *Although the River District recognizes that some reductions in demands of agricultural water rights may be necessary to protect existing water uses in the basin, the District will work to ensure that the burden of demand reduction is shared across all types of water use sectors, and that agricultural water rights, and agriculture itself, are not injured.*
6. D. *The River District will protect the integrity of senior agricultural water rights within Colorado's prior appropriation system, recognizing the potential risks to those rights posed by the constitution's municipal right of condemnation.*
8. Colorado's Water Plan:
8. B. *The River District will work with the, Southwest Water Conservation District, the Southwest Basin Roundtable and the three Basin Roundtables that comprise the District to achieve a consistent West Slope perspective related to contingency planning and compact administration risk matters.*
8. C. *The River District will work with east slope roundtables to enhance east slope understanding of West Slope perspectives while also enhancing West Slope understanding of east slope perspectives.*
8. D. *The River District will work with existing transmountain diverters to set a priority on contingency planning and compact administration risk management in order to provide a high level of protection for all of Colorado's existing Colorado River water uses.*
8. E. *The River District will work to ensure that the IBCC Conceptual Framework is honored and fairly implemented.*

I. Introduction and Background

On November 15, 2018, the CWCB unanimously adopted the attached Support and Policy Statements Regarding Colorado River Drought Contingency Plans, Demand Management and Compact Administration ("CWCB Document"). The CWCB Document contains four distinct sections:

1. A lengthy prefatory statement;
2. A statement of support for the Upper Basin Drought Contingency Plan Documents and accompanying federal legislative efforts;
3. A Demand Management Policy Statement; and
4. A Compact Administration Policy Statement.

The CWCB Document was adopted by the Board in large part due to the efforts of the Colorado River District and the Southwestern Water Conservation District ("West Slope Conservation Districts". As you will recall, in September, the West Slope Conservation Districts requested that the CWCB pass a resolution adopting six principles and a commitment to a very public, consensus driven process which would guide this State's efforts to develop and implement a Demand Management program in response to the 19 year long poor hydrologic conditions in the Colorado River Basin. The West Slope Conservation Districts were concerned that the Upper Colorado River Commission ("UCRC") and the state of Colorado were literally racing to approve the agreements and pursue federal legislation which would authorize a non-balanced, non-equalized storage account in Lake Powell and the other CRSPA Initial Storage Reservoirs to be filled by undefined demand management activities in the Upper Basin states ("Storage Account"). Our

District had many concerns regarding the establishment of this Storage Account. Prime among our concerns was that without the adoption of appropriate principles, definitions and/or sideboards, a demand management program could result in significant adverse impacts to West Slope agriculture and communities. This concern was motivated, at least in part, by the potential that a demand management program could result in a disproportionate impact to West Slope communities due to relative imbalance between the economies of the Front Range and the West Slope. In addition, some entities believe that a voluntary/compensated program will not produce sufficient water and that the storage account will need to be filled by mandatory uncompensated curtailment of water rather than voluntary, temporary and compensated reductions in consumptive use. Depending on how it is implemented, a "pre-emptive curtailment" of post compact water rights also could disproportionately impact West Slope agriculture and the families and communities that depend upon it. The District also expressed concerns that such a program cause no injury to other water rights and that it be established in compliance with existing Colorado law including the prior appropriation doctrine. Furthermore, the West Slope Conservation Districts pushed hard for a statement that any Demand Mangement program would not serve to allow for a new transmountain diversion project as aptly expressed in principle four of the conceptual framework in the Colorado Water Plan.

The CWCB Document is the product of a significant drafting effort by staff at the CWCB, attorneys at the Attorney General's office and members of the CWCB Board all of whom received significant input and pressure from stakeholders in the Colorado River including staff and counsel at the West Slope Conservation Districts and trans-mountain diversion operators. The final product goes a long way toward meeting the requests of the River District. As expected in any negotiated document, the CWCB Document does not adopt the exact wording and preferences of the West Slope Conservation Districts. While the specific language of our requested six principles was watered down, the key concepts of the principles remain primarily intact. Additionally, by creating two distinct policies, one addressing Demand Management and one addressing Compact Administration, the CWCB clarified that Demand Management is a voluntary, temporary and compensated effort separate and distinct from administration of water rights to satisfy and/or prevent a compact violation should one ever be declared and that if, and only if, a Demand Management program "is not sufficient to ensure Colorado's compliance with the Colorado River Compact" will the state then turn to an extensive public process to examine and develop alternate measures and/or rules for compact compliance administration with the goal of reaching a general consensus within the state.

II. Concerns

One of the primary areas of concern for the West Slope Conservation Districts is that any Demand Management program not have disproportionate impacts on the West Slope and that water contributed to such a program be produced in rough proportion to the post compact depletions to the Colorado River system from both sides of the continental divide. We did not and do not want to see the West Slope producing all of the water for Colorado's share of an Upper Basin Demand Management Program. This principal is addressed in section 6 of the Demand Management Policy Statement. The language in this statement is not what we had hoped the CWCB would adopt, the CWCB did clarify on the record at the November 15th hearing prior to the CWCB's adoption of

the policy that the intent of the language is that water should be contributed equitably from users from both the west and eastern sides of the continental divide.

We recognize that these policies are far from perfect, we do however believe that they represent a good faith effort by the CWCB at demonstrating leadership and a commitment to many of the policies adopted by our Board. We also recognize that the passage of this policy is just the beginning of our effort to assure that any Demand Management program in the state of Colorado not disproportionately harm the West Slope of Colorado.

The CWCB Document also contains a Statement of Support for the DCP documents and the accompanying federal legislation. As of the writing of this memorandum, we have not yet seen the proposed federal legislation. My communications with Colorado's Commissioner to the UCRC indicates that there is not yet formal proposed legislative language due to the lack of agreement within all seven states (read "Arizona"). Commissioner Eklund indicates that he and others believe that the federal legislative language will be very simple, essentially "direct[ing] the Secretary of the Interior to execute and carry out the provisions of the five interstate agreements as soon as they are executed by the parties." In keeping with our District practices regarding the endorsement of legislation, whether federal or state level, we cannot recommend that this Board endorse the actual federal legislation until we have had chance to review and understand the same, however, it may be helpful for this Board to provide direction to staff and counsel regarding the proposed legislative approach. Additionally, the preamble to the policy statements contain statements that do not directly relate to the policy statements requested by our Board. We believe that it is not appropriate for this District to endorse the language which precedes the policy statements.

III. Communication from Glenn Porzak

On Wednesday afternoon, we received a letter from Glenn Porzak on behalf of his clients at the Eagle River Water and Sanitation District and the Upper Eagle Regional Water Authority ("District and Authority"). A copy of the letter is included with this memorandum. We believe that the letter is the result of the hurried process pursued by the CWCB in pushing for approval of the DCP documents and the endorsing the federal legislation. This hurried process did not allow for enough time for major stakeholders such as the District and Authority to get up to speed on this process or fully engage with River District staff and counsel. That being said, we do not agree with Mr. Porzak's portrayal of the two policies as he expresses concerns in the letter that neither your General Counsel or General Manager share. Mr. Porzak's concerns can be summarized as follows:

1. Paragraph six of the Demand Mangement Policy Statement is "*an obvious effort to protect transmountain diverters*" and he implies that we should therefore reject it.
2. Mr. Porzak also appears to mischaracterize the reason for avoiding a compact violation as solely based upon a fear that all West Slope water rights will be federalized.
3. Mr. Porzak also objects to the portion of the Compact Compliance Policy in which the CWCB commits to collaborate with the Division of Water Resources to develop rules for

compact compliance. He sees this statement, which was the result of this District's direct input, as a threat to our state's prior appropriation doctrine.

These concerns are addressed below:

As this Board is aware, paragraph six only addresses a voluntary, compensated and temporary demand management program which is aimed at protecting all existing uses and some reasonable future development of water in the Colorado River from the impacts and repercussions of a compact call. The key principles intended by paragraph six thus is only that a voluntary program avoid disproportionate impacts (i.e., that the West Slope and transmountain users share in the burden of contributing actual water to the demand management account).

As this Board is well aware, other potential ramifications of allowing a compact call to occur may be the acceleration of the permanent buy and dry of West Slope agriculture. Among the repercussions of a compact violations may be actions by the United States Department of Interior to reduce the delivery and/or operation of water rights held by the federal government for federally operated projects, which include but are not limited to some of the most significant economic drivers on the West Slope, the Uncompahgre Project, the Dolores Project and the Grand Valley Project. The Demand Management Policy Statement and Paragraph Six thus do not apply to or attempt to abrogate the prior appropriation doctrine. It merely outlines a voluntary, cooperative effort to stave off a compact violation which is consistent with this Board's relevant strategic plan goals quoted at the beginning of this memorandum.

With respect to the concern that this policy is not consistent with the prior appropriation system, we do not share that concern. Specifically, paragraph 7 of the policy states that any program shall "Comply with applicable state law. . ." which includes the bedrock principle of prior appropriation. Additionally, both policies adopted by the CWCB are very consistent with this District's policies on the Prior Appropriation doctrine and Colorado River Compacts. I have attached both to this memorandum for your reference and quote relevant portion of the River District's Prior Appropriation Policy Statement here:

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/explanation to the policy:

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.

We therefore recommend that this Board adopt our recommendation as stated above.