

Colorado water rights issues not as dry as that turkey

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When uttered in regard to the Colorado River Compact, the phrase "anticipatory mandatory curtailment" of water diversions makes Western Slope irrigators shudder.

And while a policy adopted last week by the state might reduce some of the fear and anxiety among irrigators about being forced to someday soon send water downstream, it's also likely to spark lively discussions today on ranchers' tables from Durango to Carbondale to Steamboat.

So in the interest of informing those discussions, we grilled a number of experts on the topic.

The experts included Colorado's state engineer in the Division of Water Resources, Kevin Rein; Colorado's state's representative on the Upper Colorado River Commission, James Eklund; the current and former general managers for the Colorado River District, Andy Mueller and Eric Kuhn; and several water attorneys who do their best work in the shadows.

And we will now translate what we learned for the kid's table, where most of us still sit when it comes to the Colorado River Compact of 1922, or depending on your legal view, 1929.

(Please know we've done our professional best here, as usual, but take this with a ladle of gravy and check with your water attorney in the morning.)

First, does the state of Colorado even have the authority to curtail water

rights, in an anticipatory fashion, so as not to violate the Colorado River

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Compact?

Yes, according to a 1938 U.S. Supreme Court decision, *Hinderlider v. La Plata & Cherry Creek Ditch Co.*, which found, essentially, that the state has the authority to do what it takes to meet agreements, or compacts, it has made.

OK, fine.

Then how might the dreaded anticipatory, mandatory, curtailment happen?

Good question.

It's up to the state engineer, who serves as the state's water referee, to figure that out.

And by the way, he prefers the term "compact administration in the absence of a violation" when discussing the concept.

Will the state engineer use the prior appropriation system, where junior water rights are cut off before senior water rights?

That's not clear.

Prior appropriation is probably what most people expect the state engineer would use to administer an actual violation of the Colorado compact. But even that's no longer, if it ever was, a guarantee, because of the now heavy reliance by Front Range cities on post-compact junior water rights.

So it's not clear what approach might be used to avoid a compact violation in the first place?

No.

As of today there is no specific set of tools, or rules, for the state engineer to use to cut back water rights that technically are not yet in violation of the Colorado River Compact, just because some day they might be, or more

precisely, because the state as a whole might be.

However, many expect that any future anticipatory mandatory curtailment would likely be based, to some degree, on cutting back junior rights over senior rights.

And so it's probably still better to own pre-compact rights (pre-1922 or 1929 rights) than post-compact rights.

(Well, pass the Champagne, and let's watch the game!)

Are you saying then that the state engineer can just cut back on water use however they want to meet the state's compact obligations?

No.

The engineer has the authority to initiate a rule-making process, but they have to go through some sort of public process that includes talking to water users.

In regard to other compacts on other rivers in the state, such as the Rio Grande River, the state engineer has used a stakeholder-driven process that includes submitting proposed rules to water court so others can respond to them.

Now, if you would, consider a relevant portion of the state's new policy, which was adopted by the Colorado Water Conservation Board, the state's water-planning agency, on Nov. 15, at the request, or insistence, of the Colorado River District.

(You can cut it out, slip it next to your paper water right, and pull it out at night for some level of reassurance).

The policy speaks to what the state, via the CWCB, may do someday, if a now still-conceptual "demand management program," designed to be voluntary,

temporary, and compensated, does not end up sending enough water downstream.

"If the quantity of conserved water made available through the demand management strategies described in this policy is not sufficient to ensure Colorado's compliance with the Colorado River Compact, it will be the Board's policy to: encourage and collaborate with the Division of Water Resources to engage in timely and extensive public outreach regarding development of any alternative measures or rules for compact compliance administration to fully inform and seek input from intrastate water rights holders and stakeholders with interests in the Colorado River.

"Such process would be with the goal, but not the requirement, of achieving general consensus within the state, without constraining the Division of Water Resources' lawful administration of water rights in order to meet Colorado's compact obligations."

There are three key clauses to consider in there.

The first is, "the Division of Water Resources' lawful administration of water rights in order to meet Colorado's compact obligations."

Does that not suggest that the state believes it has the authority to take steps to meet its obligations under the compact?

And might you consider that one of those obligations is not to violate the compact in the first place?

The second clause is "alternative measures or rules for compact compliance."

Does that not suggest alternative measures to, say, the prior appropriation system?

And the third is to "seek input from intrastate water rights holders and stakeholders with interests in the Colorado River."

Does not that suggest you?

It does.

So keep boning up.

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