

Delving deeper into ‘anticipatory mandatory curtailment’ in Colorado

By [Brent Gardner-Smith](#) November 22, 2018



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An irrigation ditch on Orchard Mesa in the Grand Valley, bringing water from the Colorado River to orchards and fields. If Colorado fails to send enough water downstream to meet the terms of the Colorado River Compact, could the use of water in ditches such as this be curtailed?

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 still a good subject for discussion.

To set the table, here's how Andy Mueller of the River District described the situation to his board of directors, in an October 5 [memo](#).

He was describing events at the September meeting of the CWCB, in Steamboat.

“Certain water users are calling for the potential implementation of a demand management program which includes uncompensated anticipatory mandatory curtailment of water rights within the state,” Mueller wrote.

“The Front Range representatives affirmed their position that no Colorado Water Conservation Board action was needed, that a voluntary program was a fine goal but that they believed the state needed to roll out a program which includes rules and requirements for mandatory anticipatory curtailment.

“The presentation from the string of Front Range entities confirmed the River District Staff's concerns that major water users in the state would like the Upper Basin demand management pool established quickly with the intent that it be filled with water from a program highly or exclusively dependent upon water contributed via uncompensated, anticipatory, mandatory curtailment of water rights in the Colorado River Basin.”

Muller also said in the memo, “ ... we recognize that the overuse in the Lower Basin, coupled with the continuation of extremely poor hydrology may, in the future cause us all to support or at least be willing to endure an anticipatory mandatory curtailment.”

That raises the question, 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 Compact?



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A headgate on an irrigation ditch on Maroon Creek, a tributary of the Roaring Fork River.

Does the state have the power?

So, first, consider this nugget of state law (CRS 37-80-104): “The state engineer shall make and enforce such regulations with respect to deliveries of water as will enable the state of Colorado to meet its compact commitments.”

And then there is the 1938 U.S. Supreme Court decision, *Hinderlider v. La Plata and Cherry Creek Ditch Co.*, which found that the state pretty much has the authority to do what it takes to meet agreements, or compacts, it has made.

There is a worthwhile explanation of the case, and the decision, in “Vranesh’s Colorado Water Law.”

“Interstate compacts, and the equitable apportioning of water among various states, are necessities, especially in times of water shortage. If interstate allocation is subordinated to individual rights, interstate compacts would be valueless,” Vranesh writes.

“Allocation establishes a state’s right to a given amount of water. The right of an individual to use water in a particular state is thus limited by the physical availability of water minus the amount of water allocated to the state.

“The amount allocated to an upper basin state such as Colorado is that amount of water physically available minus that amount which must be delivered at the state line.

“Any regulation by the state engineer within this limitation, with the goal of maximizing beneficial use is a valid exercise of police power, barring other constitutional complications,” Vranesh concluded.



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The diversion structure for the Maybell Canal on the Yampa River east of Maybell.

Compact commission

Eric Kuhn, the former general manager of the Colorado River District, was familiar with the Hinderlider case, but said he's an engineer, not an attorney.

Attorney or not, Kuhn is still an expert on the 1922 Colorado River Compact, and he pointed to the subsequent 1948 Upper Colorado River Basin Compact as also being relevant to the discussion.

That compact created the Upper Colorado River Commission and gave it the authority to take steps to avoid violating the 1922 compact, including notifying the individual upper basin states if they are close to doing so.

“The purpose of commission is to always be in compliance with the compact,” Kuhn said. “When I read the minutes, they weren't talking about that you go into a hole and then you do a curtailment to catch back up, they were always saying that you take action ahead of time to make sure you are always in compliance.

“They don't use the word ‘pre-compact curtailment’ or anything like that in the record of the commission, but it's pretty clear that the reason the commission exists is that you needed to have somebody that would say ‘we're making the call that we need to curtail in order to not be in violation of the compact.’ And it's the commission that makes that call.”

Today, based on the ten-year running average used as a measure of the upper basin's compliance with the compact, the upper basin looks comfortably in compliance. But Kuhn said the running average is being propped up by the big water year of 2011, and once that falls off the list, things will look different.

And currently, the bigger threat isn't so much the ten-year average, it's that if water levels in Lake Powell fall too much further it will be physically impossible to deliver, through the outlets in the dam, the required amount of water to meet the compact's obligations.

James Eklund, who is an attorney, as well as the former director of the Colorado Water Conservation Board and the state's current representative on the Upper Colorado River Commission, was willing to discuss the issues raised by the prospect of mandatory curtailment on Wednesday, during a stopover en route from Denver to his family's ranch on the lower slopes of the Grand Mesa.

He said that the Hinderlider decision is "one of the most venerable cases in this legal space" and that the common takeaway from the case is that "the Supreme Court said the sovereign state can bind private property owners in its state."

He noted, however, that how people view the force of the decision, or how to respond to it, sometimes turns on a subtle distinction in Colorado water law often overlooked by some water rights owners: a water right is a right to use a set amount of water, not a claim to the water itself.

"The state constitution says the molecules of water are owned by the people of the state of Colorado," Eklund said. "But the right to use the molecules, that's a private property right. That's a use right, not a right to the actual molecules."

With that in mind, Eklund said 'you've got this body of case law that says that the state is pretty empowered to do what it feels is necessary. The question that you bleed right into, however, is the question of 'Well, you can, but should you?' Then it's a policy question.

"You are going to have somebody along each part of the spectrum line up on that. You'll have the really hardcore hawks say 'The state has absolute authority, the court has spoken. The state should go do whatever it can to reduce the risk to the state as a whole, to the economy, and to water users generally.'

"And then you've got the other end of the spectrum that says 'No, no, no, the

state should always be deferential to a private property right and should not make policy that supersedes that,' Eklund said. "And that the Hinderlider line of cases and philosophy is only meant to be deployed in an emergency, catastrophic, threat-to-public-health-and-human-safety situation."



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Inflows to Lake Powell in 2018 were among the lowest since Glen Canyon dam was built, and giant sandbars are visible in the Green and Colorado rivers above the reservoir.

What about the DCP pools?

Notably, Mueller, the current River District general manager, said the district does not fully share the opinion of others when it comes to the state's authority to avoid violating the compact by curtailing water use, especially when it comes to the new pools of water now proposed to be legally created in Lake Powell in order to keep Glen Canyon Dam functioning as intended,

under “drought contingency planning.”

“We would agree that he has compact compliance authority if we are in violation,” Muller said, referring to the state engineer, during an interview after last week’s CWCB meeting in Golden. “And where the difference of opinion may lie within our state still, and frankly, probably will for a long time, is can he curtail water rights in anticipation of a compact violation, and put that water in a pool down in Lake Powell? And we would say, ‘we don’t think that that is a legal right that our state engineer has today.’ I think there are others who think that the state engineer could curtail water in an anticipatory fashion. We would disagree with that.”

Mueller also said “there is a a difference in administering water rights to keep us in compliance with the compact, where that water is flowing down into a river, not into a (new drought contingency) pool. It’s very different to store it in a pool that may someday keep us in compliance. So there are fine distinctions in there that I think lots of lawyers will argue about one day if we get to that point.”

Mueller was willing to put that debate aside, at least for the moment, and openly consider how the state might eventually go about an anticipatory curtailment if it decided to do so.

“It is probably a rule making,” Mueller said. “But I don’t think they can, through rule making, change some inherent rights associated with water rights. So I think it would require, frankly, a state law change, and some may argue that it may even require a constitutional change. It’s not a small matter.”

Mueller added that if “worst-case-scenario hydrology stays really bad, we’ll all be talking about mandatory. We’ll figure out, I hope, in a very public process, what that looks like. Because there are lots of different ways that mandatory could roll out. Unfortunately, there are probably winners and losers in each way.”



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Part of the machinery that controls how much water is diverted out of the Colorado River for use on Orchard Mesa in the Grand Valley. If the state needed to meet its obligations under the Colorado River Compact, it would be up to the state engineer to decide how to curtail water use.

Next question

So how might anticipatory mandatory curtailment happen?

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

And Kevin Rein, the state engineer, 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?

It's not clear.

Prior appropriation is what most people expect the state engineer would use to administer an actual violation of the Colorado compact.

In a water meeting held by the Grand Valley Water Users Association, in Grand Junction on October 23, Rein told over 200 water users that “If I found out today that our agency needs to administer a compact call tomorrow, then that’s where we go, priority of administration. Then we go through that list of priorities. That’s the way we are going to go. And of course, the pre-compact rights would not be impacted.”

So those are the current rules in place, to be deployed by the state engineer if, in fact, Colorado violates the compact, but many wonder if those rules will stay in place because of the now heavy reliance by Front Range cities on junior, post-compact, water rights.

A strict administration of the priority system could cut off almost all of the transmountain diversions to the Front Range from the Colorado River system, and could prompt the Front Range interests to buy-and-dry land with pre-compact water rights on the Western Slope or prompt the Front Range to seek exceptions to the priority system.

More relevant, perhaps, is that 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 rather, because the state as a whole might be.

“If I’m concerned that in a few years, we might be out of compliance, that’s a personal concern I may have, but I can’t go out and do some administration to build a buffer, to accomplish what they are trying to do through demand management,” Rein said during a short interview after the CWCB had adopted its new policy, in Golden, on Nov. 15.

“Demand management” is a new program the CWCB plans to set up, in order to send water to the new regulatory pools in Lake Powell.

Instead of “anticipatory mandatory curtailment,” or AMC, the state’s demand management program’s mantra is “voluntary, temporary and compensated,”

or VTC, and that's the approach the state says is the best place to start when it comes to sending water down Colorado's rivers.

“Right now, it's the drought management plan,” Rein said. “But if somehow the state engineer is tasked with some focus on that (referring to AMC), it would be through outreach, and a well-contemplated approach that complies with the law. But for right now it appears the drought management plan is the best effort to do that.”

Rein declined to speculate on how an anticipatory mandatory curtailment program would be implemented, other than to re-affirm that it would be the result of a stakeholder-driven process and it would be, again, a “well-contemplated” approach.

Others expect that any anticipatory mandatory curtailment would be based, but perhaps to varying degrees, on cutting back junior rights over senior rights.

“The question is which one is most consistent with the prior appropriation doctrine, while still being most equitable to folks,” Mueller said, during an interview in Golden, of the available options. “And hopefully designed in a way to cause the least economic damage to not only the state as a whole, but to one segment of the state, or one industry, or one region.”

And Eklund, in Glenwood Springs on Wednesday, observed that despite all the unknowns that could come with implementing anticipatory mandatory curtailment, it is likely to be the case that owning pre-compact rights (pre-1922 or 1929) would still be better than owning post-compact rights.

But, as Kuhn said on Wednesday during an interview, “There are not firm guarantees. It's not your water, it's the state's water. And if the state doesn't have a right to that water under an interstate compact, then your place in line, whether it's pre or post compact, well, it's not going away, but there's just going to be nothing there when you get there. If the state doesn't have

any legal right to the water, you have nothing to divert, whether you have pre or post compact rights.”



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An irrigation ditch off the Crystal River used to irrigate fields. Many such ditches have senior, pre-compact water rights, but it's increasingly unclear how much that may matter in a future with less water, and compact obligations for the state to meet.

Free hand?

The state engineer does not have a free hand to change the rules. They have the authority to initiate a rule-making process, but have to go through a public process that includes talking to water users.

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.

Eklund noted that Rein was looking at the issue from a “practical standpoint.”

“He’s looking down the long road of what it would take to produce a rule, and go through a rule-making process that would satisfy people and not just get them all riled up and ticked,” Eklund said. “As he stares down that road, there are multiple obstacles that he will hit. He has to go out and do a real hard listening session, a whole bunch of them, across a number of water divisions. Every basin in the state, with the exception of the N. Platte and the Republican rivers, sees water, in one shape or form, from the Colorado River basin.

“And he would have to adopt a new rule that says, ‘Here is how I’m going to honor the differences and the unique attributes of each of those basins,’ because state law says he has to do that.”

Asked why the state hasn’t already developed such a plan, Eklund said “it’s such a painful process that you don’t do something like that unless you have to. It’s like going in for elective surgery, ‘I’ll do it when my knee is hurting so bad that I can’t walk any more and then I’ll go in and do the surgery.’”

Also of note here is how Karen Kwon, first assistant attorney general of Colorado, described how the state might be forced to move from voluntary to mandatory compliance, in her remarks to the CWCB board in Golden on Nov. 15.

“While demand management activities would be intended to try and avoid that situation, and provide a proactive mechanism for Colorado to be going forward, there is no guarantee that demand management will work to the level that we need it to to completely avoid curtailment,” Kwon said.

“Whether it is because hydrology persists and gets worse immediately and we’re not ready to stand up a demand management program, or that there is not enough money to fund a demand management program, or there is not enough interest in participation, whatever it is, there are lots reasons why we might not have a full operational demand management in the appropriate time.”

Kwon then drew the distinction between actually violating the compact, and working to avoid doing so.

“If we are in compact violation, the Division of Water Resources has to act,” Kwon said. “Outside of a compact violation, there is a situation where people are concerned that the Division of Water Resources is going to act in a vacuum. I have every assurance that is not going to be the case. We would have an open process going forward.”



A map of Colorado showing the urban areas of the state in red.

Divided state?

The ongoing situation, driven by poor hydrology, has opened up a new chasm between water interests on the Western Slope and those on the Front Range.

On Nov. 15, after the CWCB meeting, Mueller of the River District, which is charged with protecting Western Slope water, said “We do talk a lot with the

Front Range. This isn't going to come out of left field. But we want our water users on the West Slope to know that these are the issues that are being talked about. Because it is their water rights that people are talking about."

And in an interview in September, Jim Lochhead, the CEO of Denver Water and the president of the Front Range Water Council, shared his thoughts on the relationship between a voluntary and a mandatory effort to send water to Lake Powell.

"I think that what we need to do is just proceed step by step," he said. "The first step is to finalize the drought contingency planning. The next step is to create the demand management pool in Lake Powell, because without that it doesn't matter what we do. And the third step is to work on a program where, if needed, we can use voluntary, temporary, compensated means to put water in that pool."

But, beyond those steps, Lochhead said that "Colorado River compact compliance" is a "state responsibility."

"If we're in trouble from a compact standpoint, the state is going to have to exercise its authority," Lochhead said. "I also don't think that by not talking about mandatory curtailment we can pretend the problem will go away. We need to be thinking about it, and we need to be thinking about it proactively."

And Bennett Raley, the general counsel for the Northern Water Conservancy District, told the CWCB directors in September that mandatory curtailment may be necessary in Colorado.

"If the drought continues, there are two paths," he said. "If there is an infinite source of money, then voluntary works. Great, we're all happy. If the drought continues and there is not an infinite source of money, then the state will go to mandatory. The Supreme Court will ensure that, sooner or later, it's not a question."



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The Weaver Ditch, as it winds through Sopris Park in Carbondale.

State policy

Given all of the above, it's worth considering a relevant portion of the state's new [policy](#).

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.”

It would seem there are three key clauses of note in that section of the state’s policy.

The first is, “the Division of Water Resources’ lawful administration of water rights in order to meet Colorado’s compact obligations,” which could cover a lot of ground.

The second is “alternative measures or rules for compact compliance,” as in, perhaps, alternatives to prior appropriation.

And the third is to “seek input from intrastate water rights holders and stakeholders with interests in the Colorado River,” which suggests that irrigators may want to keep researching the possibilities so they can offer quality input.

Related stories:

[“Colorado voices support for regional drought contingency plans,”](#) Nov. 16, 2018;

[Western Slope wants limits on water sent to Lake Powell in response to drought,](#) Oct. 30, 2018;

[Colorado River District wants state policy on potential water-use cutbacks,](#) Oct. 18, 2018;

[Colorado River District leaders to discuss mandatory water cutbacks,](#) Oct. 16, 2018;

[Mandatory curtailment of water rights in Colorado raised as possibility](#), Sept. 20, 2018; and

[Colorado River district GM unveils manifesto on water-use reductions](#), Sept. 18, 2018.

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