

Shepherding Compact Security
water under Colorado law,
what are the issues?

Larry MacDonnell

Our definition of shepherding

- moving specified quantities of already-appropriated water to a specific point downstream of its original place of use or storage without diminishment by other appropriators

Appropriated water

- Water historically diverted or stored and used under a decreed water right.
- Point of diversion/place of storage
- Purpose and place of use
- Diversion rate/storage quantity

Water for shepherding

- Solely for Compact security use and only in amounts determined to be necessary
- Voluntary and compensated
- Consumptive use water
- Short-term or temporary

May require a change of use

- Depending on location of use and attributes of original water right
- Clarify that the use retains its original priority and cannot be taken by other appropriators
- If needed, important to have timely and efficient process suitable to the purpose

Beneficial use

- Is this proposed use “beneficial” under Colorado water law? Nontraditional use.
- Water court and Ground Water Commission have recognized the use of adjudicated water for “compact compliance” purposes (in the Republican River basin)

Export statute

- Requires review and approval for appropriation of water in Colorado for use out-of-state
- Arguably since the use of water benefits Colorado, directing it out of state isn't an export

State Engineer's Compact Rule Power

- “make and enforce such regulations with respect to deliveries of water as will enable the state of Colorado to meet its compact commitments”
- potentially usable by the SE to set out the procedures that will be used to administer and shepherd this type of water

Upper Colorado River Commission

- Established under the Upper Colorado River Basin Compact
- Authorized to make findings about responses in Upper Basin to shortfall in Lee Ferry flow obligation
- Well positioned to orchestrate proactive avoidance response among the four states involving shepherding

Other considerations

- Ensuring that the water can pass to Lake Powell without diminishment by users in other states
- Determining appropriate management of this water in Lake Powell

The challenges

- Agreeing to proactive management
- Locating acceptable sources of water and making the water available for shepherding
- Reaching agreement on the legal framework in Colorado that will enable shepherding of water
- Reaching agreement in the Upper Basin on a strategy
- Reaching agreement in the basin on this strategy