

# STATE OF COLORADO

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## **Policy Memorandum 99-2**

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### **Subject: Administration of Power Interference Contracts**

The State and Division Engineers administer power interference contracts in conformance with the Doctrine of Prior Appropriation and Judicial Actions. The administration of agreements to which pay power interference changes to compensate for out-of-priority diversions are handled in the following manner:

The State and Division Engineers administers the river according to priority, as with other types of subordination agreements.

In cases where the contractual agreement involves the senior hydropower water right and the next right in priority, there is no need for an adjudication of the arrangement. The senior water right may elect to forgo diversion, which makes water available to the next junior water right in priority. The Division Engineer will administer the stream system in accordance with the priority system and available water supplies.

When the agreement involves intervening priorities and is undecreed, the Division Engineer will administer the river in accordance with the priority system. This means that the paying right may not be in priority to divert all or any of the amount of water subordinated.\* Therefore, water diversions that are forgone by the senior water right may subsequently be diverted by intervening downstream junior rights. Absent judicial approval, the forgone diversions cannot be protected against diversion by intervening water rights.

When the contracting parties are not the senior and next in line rights, and they wish to assure that the water contracted for will not be taken by the next right in priority, they must obtain a decree approving the exchange, change of water right, or plan for augmentation.\*\* When the power interference contract is incorporated into a decree, the Division Engineer administers the river according to the decree.

In conclusion, priority administration is appropriate for power interference contracts. If the agreement involves an arrangement where the holder of the hydropower right accepts payment not to call for its water, the water not called for under the contractual agreement is available to the next right in priority on the river. In cases where the parties to the agreement are the senior and next in line rights, nothing more is required. If intervening priorities exist between the hydropower right and the paying right, the parties may protect their contractual arrangement by obtaining a court adjudication. If the situation involves a properly decreed exchange, change of water right, or plan for augmentation, the Division Engineer administers priorities according to the decree.

\* Another way to describe this is subordination to one right, means subordination to all rights in priority.

\*\* Adjudicating the practice provides notice, 37-92-302(3)(b), and requires the water court to determine that other rights will not be injured, 37-92-305(3).