STATE OF COLORADO

Colorado Water Conservation Board
Department of Natural Resources
721 Centennial Building
1313 Sherman Street
Denver, Colorado 80203
Phone: (303) 866-3441
FAX: (303) 866-4474

Received
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Bill Owens
Governor

Greg E. Walcher
Executive Director, DNR

Peter H. Evans
Acting Director, CWCB

January 25, 1999

Board of Directors
Upper Gunnison River Water Conservancy District
275 S. Spruce
Gunnison, CO 81230

RE: November 18, 1998 letter from Gunnison Basin POWER concerning Colorado River Compact

Dear Board Members:

We have received the letter from the "Gunnison Basin People Opposed to Water Export Raids" (POWER) that you forwarded to us. POWER purports to believe that there is no further water available for use in Colorado under the Colorado River Compact. This conclusion is without foundation. POWER's arguments are based on self-serving misinterpretations of the Compact and an obvious disregard of its provisions and of other laws governing the Colorado River. Because such misinterpretations of the Compact can erode the protections it provides to so many water users throughout the State of Colorado, we appreciate the opportunity to clarify matters.

Interpretation of Article III(b) of the Colorado River Compact

POWER's major argument is based upon an interpretation of Article III(b) of the Compact that is contrary to the plain language of the Compact, its history, and all subsequent interpretations of the Compact. The basic apportionment of the Compact is made in Article III(a), which allocates 7.5 million acre-feet of beneficial consumptive use of water per year to each of the Upper and Lower Basins. POWER argues that Article III(b) "allows the Lower Basin **to call upon** an additional 1,000,000 acre-feet per annum for beneficial consumptive use," (emphasis added), and that, "The Compact does not provide that the Upper Basin States may lay claim to waters flowing into the Colorado River from streams such as the Virgin and the Gila Rivers in Arizona or at other sources below Lee Ferry: therefore these waters may not be counted to make up the amount apportioned to the Lower Basin States under Article III (a) (b) (c) or (d)." POWER's assertions are wrong and incompatible with explicit provisions of the Compact and the laws governing the Colorado River in several significant respects.

First, POWER, in its apparent zeal to prevent transbasin diversions, has ignored a crucial definition set forth in Article II(a) of the Compact: "The term 'Colorado River system' means that portion of the Colorado River **and its tributaries** within the United States of America." (Emphasis added.) The apportionments made in Articles III(a) and (b) are made from the

"Colorado River system," which includes all tributaries, whether in the Lower or Upper Basins. The copy of the Compact attached to POWER's letter unfortunately omitted the opening two articles of the Compact: we attach a complete copy of the Compact for your information.

Second, there is nothing in Article III(b) which gives the Lower Basin "a right to call." The only guarantee of delivery to the Lower Basin is set forth in Article III(d), which -- unlike Article III (a) & (b) -- imposes a specific obligation on the Upper Division States not to deplete flows at a specific point (Lee Ferry) below a specific measure ("an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series").

Accordingly, POWER's major argument is contradictory to the plain language of the Compact. No further analysis should be required. Because representatives of POWER have disregarded repeated efforts to inform them of the plain language of the Compact (see attached February 13, 1998 letter from D. Randolph Seaholm to Peter C. Klingsmith), we are providing additional support from the history and interpretation of the compact which further rebuts POWER's arguments.

First, the minutes of Compact negotiations show that the only delivery obligation intended was that set forth in Article III(d), which was a separate matter from the apportionments made in what became Article III(a) and (b). Discussing Article III(d), Judge Davis, the commissioner for New Mexico, stated, "This is not a division, - we are not dividing the waters, we are guaranteeing water." Minutes of 17th meeting, p. 11. The Upper Basin commissioners originally proposed a guaranteed delivery of 65 million acre-feet in ten years and adamantly refused to increase the amount to 82 million acre-feet, as proposed by the Lower Basin, because "we have already experienced ten years in which it would have been impossible for us to comply." Statement of S.B. Davis, Minutes of 17th meeting, p. 14. POWER's interpretation, which would require a delivery of 85 million acre-feet every ten years, is contrary to the history of the negotiation of the Compact.

The commissioners were consistent in their later interpretation of these provisions of the Compact. Herbert Hoover, the Chairman and the federal compact commissioner, responded to a question from Carl Hayden, representative from Arizona, about the use of the term "Colorado River system":

> This term is defined in Article II as covering the entire river and its tributaries in the United States. No other term could be used, as the duty of the commission was to divide all the water of the river. It serves to make it clear that this was what the commission intended to do and prevents any State from contending that, since a certain tributary rises and empties within its boundaries and is therefore not an interstate stream, it may use its waters without reference to the terms of the compact. The plan covers all the

> waters of the river and all its tributaries, and the term referred to leaves that situation beyond doubt.

Extract from Congressional Record, January 30, 1923, pp. 2710-2713, reprinted in The Hoover Dam Documents, H. Doc. No. 717, 80th Cong. 2d Sess. (1948) at A33. Later in the same exchange, Hoover described Article III(d) as meaning that, "The lower basin has the first call on the water up to a total use of 75,000,000 acre-feet each 10 years." Id. at A34. Delph Carpenter, commissioner for Colorado, stated succinctly that, "The compact is satisfied by an aggregate delivery of 75,000,000 acre-feet during any 10-year period." Id. at A79. Hoover also said:

> By the provisions of paragraphs (a) and (b), Article III, the lower basin is entitled to the use of a **total of 8,500,000 acre-feet from the entire Colorado River system, the main river and its tributaries.** All use of water in that basin, including the waters of tributaries entering the river below Lee Ferry, must be included within this quantity. The relation is reciprocal. Water used from these tributaries falls within the 8,500,000 acre-feet quota.

Id. at A35.

Subsequent interpretations of the Compact have agreed that only Article III(d) imposes a delivery obligation, and the Article III(a) & (b) apportionments are to be satisfied from the entire Colorado River **system**, including lower basin tributaries. In Arizona v. California, 373 U.S. 546 (1963), the United States Supreme Court resolved the controversy "over how much water each [Lower Basin] State has a legal right to use out of the waters of the Colorado River and its tributaries." 373 U.S. at 551. The Court determined that Congress had created an apportionment scheme through the Boulder Canyon Project Act: "What Congress was doing in the Project Act was providing for an apportionment among the Lower Basin States **of the water allocated to that basin by the Colorado River Compact.** The Lower Basin, with which Congress was dealing, begins at Lee Ferry, and **it was all the water in the mainstream below Lee Ferry that Congress intended to divide among the [Lower Basin] States.**" 373 U.S. at 591 (emphases added).

The Court ultimately decreed basic apportionments of 4.4 MAF to California, 2.8 MAF to Arizona, and .3 MAF to Nevada -- a total of 7.5 MAF of mainstream water, while leaving the use of tributaries to each state. See Arizona v. California, 376 U.S. 340 (1964). The Court's decision was controlled by the Project Act and did not require interpretation of the Compact. The Court, however, was concerned (as was Congress in the Project Act) with making a comprehensive apportionment among the Lower Basin states. It is inconceivable that such a complete apportionment could be made without dividing up **all** the water to which the Lower Basin was entitled under the Compact, and yet the Court made no mention of any additional delivery obligation of 1 million acre feet, limiting its basic apportionment to what it described as, "the

average annual delivery of water at Lee Ferry **required by the Compact -- 7,500,000 acre-feet....**" 373 U.S. at 558-59 (emphasis added).

The Special Master appointed by the Court in Arizona v. California discussed the Compact in more detail, as background for his ruling. His discussion is well-informed and enlightening, and we have attached a copy of the relevant portion for your information. Of particular note, Arizona made arguments that Article III(b) imposed a delivery burden on the Upper Basin, which the Master unceremoniously rejected:

> Article III(b) cannot be stretched so far. Whatever may account for its segregation as a separate provision of the Compact, there is nothing to suggest that III(b) imposes an affirmative duty on the Upper Basin. Rather, it imposes for the benefit of the Upper Basin, a ceiling on Lower Basin appropriations, albeit that the Lower Basin is privileged to have a higher ceiling than the Upper Basin.

Updating the Hoover Dam Documents, p. VIII-5.

Arizona apparently regards the III(b) argument as settled by Arizona v. California. In the last decade, the states of the Lower Basin have, for the first time, begun to use water up to the limits of their apportionments from the Colorado River mainstem under Arizona v. California. (Contrary to the implication in POWER's letter, there have not been any historic shortages either to the Lower Basin or to Mexico.) After construction of the Central Arizona Project, however, California could no longer rely on use of Arizona's unused apportionment. Because of that pressure, and unprecedented growth in the Las Vegas area, California and Nevada began seeking ways to increase their reliable supplies from the Colorado. In 1991 the Upper Basin states, in a process initiated by Colorado, began talks aimed at satisfying the Lower Basin needs without violating the compact rights of the other states. These talks are still ongoing. Yet not once in almost eight years has any state or any party in any state in the Lower Basin argued that the Lower Basin has a right to make a III(b) call against the Upper Basin for an additional million acre-feet. To the contrary, all of the discussions have been based on the fact that, as Arizona wrote in a July 31, 1992 discussion paper, "[U]nder the Law of the River, the Lower Basin States receive 7.5 MAF of mainstream Colorado River water annually." P. 15.

Finally, section 602 of the Colorado River Basin Project Act of 1968 (43 U.S.C. § 1552) in a provision painstakingly worked out among all the basin states, sets priorities for releases from and storage in Lake Powell. This provision expressly states that it is promulgated "in order to comply with and carry out the provisions of the Colorado River Compact." Yet it provides for only: (1) releases to satisfy Article III(c) deliveries to Mexico; (2) releases to satisfy Article III(d) deliveries to the lower basin; and (3) storage to ensure that the upper basin can make the first two deliveries in the future. It also provides that water over and above the first three requirements, if there is any, may be released under certain conditions. There is no mention of releases to satisfy any obligation under Article III(b). If such an obligation actually existed, Congress would not

have enacted, and the Lower Basin states would not have consented to, legislation specifying the operation of Lake Powell which completely omitted consideration of such a factor. The fact is that Article III(b) imposes no delivery obligation whatsoever on the Upper Basin or on Lake Powell.

Thus, POWER's primary argument has absolutely no support.

Interpretation of Article III(c) of the Colorado River Compact

POWER also misstates the operation of III(c) regarding satisfaction of the Mexican treaty obligation. First, POWER erroneously suggests that Mexico has been shorted, and states that "representatives of the Colorado Water Conservation Board" have advised "that Mexico has not yet called upon its yearly entitlement." Mexico has consistently received its full entitlement of 1.5 MAF, and sometimes much more, as shown by International Boundary and Water Commission and Bureau of Reclamation documents, which we can provide upon request. No one from the Board would represent or has represented otherwise.

POWER also suggests that the Upper Basin must always provide one-half of the treaty obligation. This is not accurate, as shown by the complete text of Article III(c):

> If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters **of the Colorado River system,** such water shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and **if such surplus shall prove insufficient for this purpose, then** the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper basin shall deliver at Lee Ferry water to supply one-half the deficiency so recognized in addition to that provided in paragraph (d).

Like the other paragraphs of article III, III(d) speaks in terms of the Colorado River system, including Lower Basin tributaries. The Upper Basin obligation to deliver one-half the Mexican treaty obligation only applies if there is no surplus water in the entire Colorado River basin, considering all the Lower Basin tributaries. The total water supply of Lower Basin tributaries has been variously estimated, but is at least 2 MAF. Accordingly, there have been and will be years when the total supply of the Colorado River system is well over the combined apportionments made by the Compact. Because the Lower Basin consumes much more than 1 MAF of water from Lower Basin tributaries (so that total Lower Basin consumptive use consistently exceeds 8.5 MAF), the Upper Basin has taken the position that treaty shortfalls would have to be made up by surplus water from Lower Basin tributaries before any obligation would fall on the Upper Basin.

what about less than 1,500,000

Effect of Claims by Indian Tribes

POWER also suggests that reserved water rights claims by tribes along the Colorado River "will predate and supercede most of the water rights existing in Colorado." This is contradicted by several provisions of the Law of the River. First, tribal claims in the Lower Basin are generally "present perfected rights," which, under Article VIII of the Compact, now "shall attach to and be satisfied from" water stored in Lake Mead. Second, paragraph II.B.4 of the Arizona v. California decree provides that "any mainstream water consumptively used within a State shall be charged to its apportionment." Paragraph I.C expressly states that, "Consumptive use from the mainstream within a State shall include all consumptive uses of water of the mainstream, . . . **including**, but not limited, to, consumptive uses made by persons, by agencies of that State, and **by the United States for the benefit of Indian reservations** and other federal establishments within the State." Third, Article VII of the Upper Colorado River Basin Compact similarly provides that, "The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the State in which the use is made. . . " Thus, the only tribal claims which could affect Colorado's compact apportionment are those by tribes within the state: claims by tribes in other states would be satisfied out of those states' apportionments. The claims of the Ute Mountain Utes and the Southern Utes to the Dolores and San Juan River basins were settled pursuant to a 1986 agreement. These two tribes are the only tribes within the state of Colorado.

Unused Apportionment

POWER has asked the Conservancy District to encourage a declaration by the state legislature that there is no unappropriated water available in the Colorado River System. Again, POWER's request not only misinterprets the Law of the River (as stated above), but also disregards the facts. Unlike the Lower Basin states, the Upper Basin states agreed to an apportionment of the upper Colorado River. The Upper Colorado River Basin Compact (approved in 1948) apportions to individual states the Upper Basin's share of the water under the Colorado River Compact. Colorado is entitled to 51.75 percent of that water (after Arizona's 50,000 acre-foot share is subtracted). The U.S. Bureau of Reclamation recently determined that the hydrologic yield of the Upper Basin is 6 million acre-feet, which corresponds to a flow at Lee Ferry of about 14,250,000 acre-feet. (The estimated average virgin or natural flow at Lee Ferry since 1896 is 14,900,000 acre-feet.) Using the Bureau of Reclamation's estimate, Colorado's apportionment allows for approximately 3,079,125 acre-feet of beneficial consumptive use within the state. We believe this is a conservative estimate reasonably derived for water supply reliability purposes.

It is important for each of the seven basin states to observe and live within their compact apportionment in order to provide maximum protection to its water users and to avoid costly litigation and liability issues. We estimate Colorado's current consumptive use of Colorado

River water at approximately 2,300,000 acre-feet on an average annual basis. We also estimate that our existing infrastructure gives Colorado's communities, ranches, farms and businesses the capacity to consume about 2,629,000 acre-feet on an average annual basis. See Final Report, Colorado River Compact Water Development Projection Work Group, November 1995. Comparing these estimates of consumptive use to our estimated Compact apportionment and the total natural, or "virgin," water yield of the Colorado River basin within the State of Colorado (estimated to be 10-11 million acre-feet), we believe Colorado can safely plan on consuming approximately 450,000 acre-feet of additional water from the Colorado River basin.

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Conclusion

We appreciate the opportunity to respond to POWER's arguments. Although POWER's tortuous reasoning does not merit detailed rebuttal, we have nevertheless provided as much information as possible because of the critical importance of proper interpretation of the Colorado River Compact.

The Upper Basin negotiated the Compact precisely because of fears that the Lower Basin States would develop faster than the Upper Basin States like Colorado. See The Hoover Dam Documents at A 92 (Report of Delph Carpenter). The whole purpose of the Compact was to preserve an equitable share of the river for the Upper Basin states:

> The apportionment to the upper territory is perpetual. It is in no manner affected by subsequent development. .... There can be no rivalry or contest of speed in the development of the two basins. Priority of development in the lower basin will give no preference of rights as against the apportionment to the upper basin.

Id. at A80 (report of Delph Carpenter). Yet POWER essentially argues that because of rapid development in California and Las Vegas, Colorado should not "kick the sleeping dog," by developing its full apportionment.

Delph Carpenter's explanation holds true today:

> Broadly speaking, from a Colorado viewpoint, the compact perpetually sets apart and withholds for the benefit of Colorado a preferred right to utilize the waters of the river within this State to the extent of our present and future necessities. It protects our development from adverse claims on account of any great reservoir or other construction on the lower river. It removes all excuses for embargoes upon our future development and leaves us free to develop our territory in the manner and at the times our necessities may require.

The Hoover Dam Documents at A81-A82.