POWER minutes --- 25 February 1999 DRAFT

The POWER Steering Committee met in the Atrium of the Main Place at 5:00 PM on February 25, 1999. In attendance were Pete Klingsmith, President; Joe Hersey; John Cope, Paul Vader, Ramon Reed, Scotty Willey; Butch Clark; Mike Peterson, and Power Member Mark Schumacher, President of the Upper Gunnison River Water Conservancy District; and Kathleen Klein, Manager of the Upper Gunnison River Water Conservancy District

The Treasurer's Report was provided by Kathy Lain and summarized by Butch Clark. POWER has a balance of about $16,200 in its account.

Mike Petersen reported that membership was about 140 members with fewer out-of- basin members as a proportion of the total.

Black Canyon — Butch Clark reported that the detailed scientific studies were soon to be distributed to support quantification of a water right by the National Park Service for the Black Canyon of the Gunnison National Monument. U.S. Senator Campbell recently introduced legislation to change the Monument into a Nation Park and to add land to the new Park. At this point language concerning water rights protects the natural values for which quantification is sought.

Election of Members of the Upper Gunnison River Water Conservancy District Board — Butch Clark reported that signatures will be sought on a petition to have an election for the member to represent the Crested Butte district. Independent financial contributions for this effort would be appreciated by those circulating the petition who are mostly members of High Country Citizen's Alliance.

Colorado River Compact Studies ---Pete Klingsmith reported that he will prepare and circulate a response to the recent letters from Peter Evans, Colorado Water Conservation Board and James Lochhead, Upper Colorado River Commissioner regarding POWER's position on utilization of Colorado entitlement to water consumption under the Colorado River Compact and with consideration for commitments to Mexico and Indian Tribes, and with considerations for drought. Pete's work was greatly appreciated.

** Discussion Thoughts: In discussion there was a question about the status of a contract recognizing the 60,000 acre-foot subordination for the Upper Gunnison Basin. Kathleen Klein reported that the contract had been forwarded for approval from the Grand Junction office of the Bureau of Reclamation to its Washington headquarters. Once again the finalization of the Subordination agreement appeared to be drifting away. The initial proposal for quantification of a water right for the Black Canyon made by the National Park Service expresses recognition of the subordination. Perhaps involvement of Colorado's congressional delegation would be appropriate.

Status of Union Park Litigation --- Ramon Reed reported that Arapahoe County has requested more time to submit a brief to the Colorado Supreme Court and to increase the length of its brief. Presently, this brief may be due on April 9th and then opponents will respond. The cost

to proponents is estimated at about $150 thousand and four to six water providers are paying the costs for Arapahoe County.

** Discussion Thoughts: POWER should prepare a newsletter to update members on the Union Park case and Colorado River Compact interpretations. John Cope might do this.

** Return to Discussion of Colorado River Compact: After a year of correspondence, Colorado and Upper Colorado River Basin officials feel POWER is off-base in its interpretation. They particularly feel POWER is expressing thoughts that are contrary to Colorado's interpretation of Compact provisions. POWER asserts there is ambiguity in the provisions and "Law of the River." Until these matters are settled POWER, believes it is prudent to be very cautious in developing (consuming) any more of the state's entitlement. POWER's feels that the major issues in need of consideration are: drought; tribal entitlements to water, ambiguities in language, measurement of mainstream and tributary inflows. POWER does NOT suggest renewed consideration about re-opening the compact negotiations.

POWER's arguments have fallen on angry ears. The argument needs to be made and explained more affirmatively with the right people. We are trying to avoid a head-on collision between Colorado water law and the Colorado River Compact because the Upper Gunnison Basin is likely to be the impact point of that collision. POWER should seek other interpretations of the situation and perhaps invite exponents of differing positions to speak at a public meeting. POWER needs to recognize it has limited resources financially and in terms of access to information when dealing with issues of the Colorado River Compact. The Front Range sees the situation differently than does POWER or water developers on the Western Slope. POWER should be and is taking a statewide perspective. POWER should reject the characterization that it is self-serving on this issue just to prevent transmountain diversions from the Gunnison River Basin. Perhaps, let others deal with the details. However, POWER has access to many details on the "Law of the River", can study them, make an informed independent opinion given what information POWER has available for study, and ask others for critique and suggestions for further study.

** Return to discussion of Basin Wide Planning --- This is expected to be time consuming, at times technical, and requires commitment of POWER members who participate. Likewise, further work on the Colorado River Compact will be time consuming and will require dealing with complex controversial issues. Individual POWER members need to take up these projects.

The POWER Steering meeting adjourned at 7:45 PM

Respectfully Submitted:

Butch Clark,
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POWER
Agenda 3-25-99

1) Meeting to ORDER 5:00 PM
2) Roll call - Membership
   report - Mike P.
3) MINUTES - 2-23-99 - discuss
   60,000 ac ft. SUBORDINATION
4) TREAS REPORT
5) John Cope, PAPER on
   watershed planning
6) John Cope POWER pamphlet
7) Pete Klingsmith - Colo R.
   shortage letter
   Connects - Butch Clark
8) RECOMMENDATIONS REQUESTED
   VACANCIES
9) MISC.

Ralph E. Clark III
519 East Georgia Ave.
Gunnison, Colorado 81230
tel. 970-641-2907

February 25, 1999

P. C. Klingsmith, Chairman
POWER Steering Committee
P. O. Box 1742
Gunnison, Colorado 81230

Dear Pete:

At the POWER meeting today you asked me to suggest a "plan" for conducting watershed planning. This is it. Please share it with POWER members.

A. Any person or organization - from near or far; individual, profit and non-profit, and at whatever governmental level - agrees to meet twice a month to share information on water resources. Those unable to be physically present participate through an internet connection. No decisions would be make by this group. Participants use the information for their own purposes and decision making. The only reason for participation is to share information and gain access to information. Those who contribute and share information will get to receive it; those who do not are welcome to attend the meetings but will not directly receive shared information.

B. A web site for discussion of philosophical issues and practical issues related to water resources will be established and maintained. It is funded by equal contributions from every participant. Each contributor has access. Each contributor can enter comments on topics under discussion - with identification or anonymously. A record of all sessions is kept and shared.

C. POWER's position as a participant --- Water resources of the Colorado River Basin are already over-committed. POWER's position is therefore, "Not one more drop over the mountain - and not one more drop consumed in the Gunnison River Basin" Beyond this, whatever is done with water must be legal and sustainable, and (in accord with POWER's articles of incorporation) be done in a manner that will enhance and improve the recreational and environmental quality of the area.

Respectfully:

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Ralph E. Clark III

Gunnison Basin POWER
People Opposing Water Export Raids

DRAFT

#4

May 14, 1998

Upper Gunnison River Water Conversancy District
275 S. Spruce
Gunnison, CO 81230

Re: *The Application for Water Rights by Arapaho County*
Case No. 88 CW 178 et al.

Ladies and Gentlemen:

You and the others working to prevent Arapaho County, Parker and others from appropriating and moving water from Taylor and Union Park to the Front Range should be congratulated on your success before Judge Brown. It is a great victory.

Permit us, however, to act as a devil's advocate in the case. As pleasing as the decision is to POWER, we believe that it is likely to be reversed by the Supreme Court of Colorado if it is appealed. We believe that attorneys for Arapaho county will strongly urge their clients to appeal. Generally and basically the appeal will probably be based upon many of Judge Brown's findings of fact concerning other persons intentions arising out of his interpretation of documents. The Supreme Court could, if it so desires, make such findings as well as a trial judge. The principal example of what I am speaking of here is the court's decision that the Bureau of Reclamation subordinated or agreed to a depletion allowance for junior water users. This point is the keystone to the judge's decision, vulnerable, we believe, to being set aside by a Supreme Court searching for grounds to do so.

P.O. Box 1742
Gunnison, CO 81230

For this reason, we believe that if this matter is appealed, the river district and other opponents interested in persuading the Supreme Court to confirm the ruling should bring out the following points which were either glossed over by Judge Brown or not raised by him at all. An opportunity to do so arises because the trial judge touched upon all of these matters in his Findings and Decree.

I. Conditional Decrees: Until this very case the Supreme Court of Colorado had held on several occasions that in determining whether any water was available for appropriation, the trial court must take into consideration the effect of valid conditional decrees. We have not done exhaustive research into this question but did hand Mr. Bratton two decisions by the Supreme Court holding the effect and validity of conditional decrees was a matter to be considered. We believe the Supreme Court should be urged to, (1) reverse itself on this point in this case, or (2) specifically overrule the cases in which water conditionally decreed was considered. The Supreme Court does not like to reverse itself. Moreover, the Supreme Court violated a well known legal principal, namely stare decisis arriving at its decision that valid conditional decrees are not to be considered in determining water availability. It is more likely to correct this decree coming before it than to overrule prior decrees of long standing.

II. Judge Brown only gave minimal consideration to the effect on water availability of the existing private instream flow decrees. He mentions at paragraph 152 page 87, of the decree that Arapaho County's efforts at Texas Creek are interfered with because private instream flow rights of 60 c.f.s. exist. In our opinion, much more important is the fact that

Arapaho must allow 450 c.f.s of water to flow through the property on the Taylor River owned by the Cockrell Trust, downstream from the dam. We say this for two reasons:

First: if 450 c.f.s. were permitted to flow past the confluence of Lottis Creek with the Taylor River, plus the water decreed instream on Lottis Creek, any excess flow would probably occur for a relatively short period of time, namely the middle of May to the middle of June and would probably not be of the quantity Arapaho needs. Second: it would require the diverters to build their diversion structures below this point which would immensely increase the cost of their diversion facilities over the cost they would incur if they could divert in Taylor or Union Park.

We would further point out that not only are there instream flows decrees in place on Taylor River, Texas Creek and Lottis Creek but also on Willow Creek, Illinois Creek, the Taylor River above the Taylor Reservoir and perhaps other tributaries of the Taylor River, along with instream flows decrees on Copper Creek and the East River below Emerald Lake and Copper Lake, to the south boundary of the Rocky Mountain Biological Laboratory's property.

III. By far the most important reason the Upper Gunnison Basin as well as the whole state of Colorado has for denying Arapaho's application is the fact that there is no water legally available in the Colorado River and its tributaries to provide Eastern Slope diverters with the water they seek, providing the Upper Basin States comply with their obligation to furnish water to California, Arizona and Nevada. The court in its decision refers to the

Upper Basin States' obligations, at page 13, paragraph 20 c, of its decree to provide water under the 1922 compact to the Lower Basin States.

We believe the judge has not considered at least two additional blocks of water which must be allowed to flow downstream past Lee Ferry in Utah. The plain wording of the Colorado River Compact at Article III, sub-paragraph (a), (b) and (c) should be most carefully considered. Sub-paragraph (a) of the compact mandates the release of 7,500,000 acre feet of water per annum downstream. Sub-paragraph (b) provides that in addition the Lower Basin can increase its beneficial consumptive use of such waters by a million acre feet. We know that officials of the Colorado Water Conservation Board believe that the word "such" in sub-paragraph (b) refers to the water described in paragraph (a). That is a slender reed to rely on when it is considered that the water being discussed is all of "the waters of the Colorado River system;" as provided in Article I of the Compact. Moreover, if the United States has a treaty with Mexico to provide it with Colorado River water, and if there is a shortage both the Upper and the Lower Basin States must supply additional water to alleviate the shortage, of which the Upper Basin has the duty to provide one-half thereof. We think this might amount to an additional charge of 750,000 acre feet per annum.

We understand from Mr. Seaholm of the Colorado Water Board that the Upper Basin States have only met their requirement to furnish 7.5 million acre feet per annum or 75,000,000 acre feet per 10 year period, 10 out of the past 64 years. If our understanding is correct, there has been a deficiency in the amount of water released in 54 of the years

since the treaty became effective. If we add to that deficiency 1,750,000 additional acre feet which the Lower Basin States and Mexico can call upon, although they have not called on it yet, a terribly burdensome deficiency, which might well have to be made up, could be imposed upon the Upper Basin States. If the Upper Basin is ever charged with releasing the full amount of water the Lower Basin States and Mexico are entitled to, plus making up the deficiency, the burden would fall most heavily on the Eastern Slope which totally consumes the amount of water it diverts from the Colorado River.

We feel that negotiations should be entered into between the Gunnison River District and Arapaho County seeking to persuade it to withdraw its application. We suggest that Colorado River Water Conservation District Board be asked to cooperate with the River District in calling a meeting with the Northeast, the Central and the Southeast Colorado Water Conservation Districts, together with the City and County of Denver to apply influence and pressure on Arapaho "not to kick the sleeping dog." If awakened, that dog could tear the pants off Colorado, on both sides of the Continental Divide.

After the discussion contained in the paragraphs just above we considered, we would hope that the Supreme Court would be made cognizant of the impending disaster which would arise if Arapaho County were awarded a decree for the amount it is seeking, and if, indeed, it ever started withdrawing the amount of water it seeks from the Colorado River System.

Sincerely yours,

POWER

by_____

P.C. Klingsmith

Water Counsel

PCK:hjp

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Re: *The Application for Water Rights by Arapaho County*
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Permit us, however, to act as a devil's advocate in the case. As pleasing as the decision is to POWER, we believe that it is likely to be reversed by the Supreme Court of Colorado if it is appealed. We believe that attorneys for Arapaho county will strongly urge their clients to appeal. Generally and basically the appeal will probably be based upon many of Judge Brown's findings of fact concerning other persons intentions arising out of his interpretation of documents. The Supreme Court could, if it so desires, make such findings as well as a trial judge. The principal example of what I am speaking of here is the court's decision that the Bureau of Reclamation subordinated or agreed to a depletion allowance for junior water users for use only within the Upper Gunnison River Basin. This point is the keystone to the judge's decision, vulnerable, we believe, to being set aside by a Supreme Court searching for grounds to do so.

For this reason, we believe that if this matter is appealed, the river district and other opponents interested in persuading the Supreme Court to confirm the ruling should bring out the following points which were either glossed over by Judge Brown or not raised by him at all. An opportunity to do so arises because the trial judge touched upon all of these matters in his Findings and Decree.

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Gunnison Basin POWER
People Opposing Water Export Raids

Mike's suggestions

May 14, 1998

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275 S. Spruce
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for use only within the Upper Gunnison River Basin

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Incorporate with memo to Statewide

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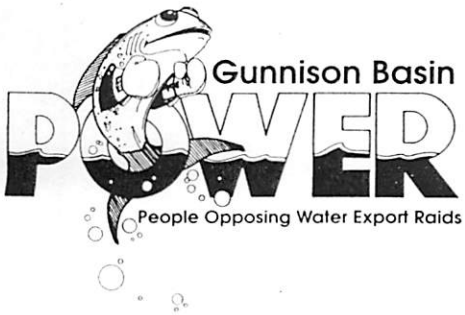

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Permit us, however, to act as a devil's advocate in the case. As pleasing as the decision is to POWER, we believe that it is likely to be reversed by the Supreme Court of Colorado if it is appealed. We believe that attorneys for Arapaho county will strongly urge their clients to appeal. Generally and basically the appeal will probably be based upon many of Judge Brown's findings of fact concerning other persons intentions arising out of his interpretation of documents. The Supreme Court could, if it so desires, make such findings as well as a trial judge. The principal example of what I am speaking of here is the court's decision that the Bureau of Reclamation subordinated or agreed to a depletion allowance for junior water users for use only within the Upper Gunnison River Basin. This point is the keystone to the judge's decision, vulnerable, we believe, to being set aside by a Supreme Court searching for grounds to do so.

For this reason, we believe that if this matter is appealed, the river district and other opponents interested in persuading the Supreme Court to confirm the ruling should bring out the following points which were either glossed over by Judge Brown or not raised by him at all. An opportunity to do so arises because the trial judge touched upon all of these matters in his Findings and Decree.

I. Conditional Decrees: Until this very case the Supreme Court of Colorado had held on several occasions that in determining whether any water was available for appropriation, the trial court must take into consideration the effect of valid conditional decrees. We have not done exhaustive research into this question but did hand Mr. Bratton two decisions by the Supreme Court holding the effect and validity of conditional decrees was a matter to be considered. We believe the Supreme Court should be urged to, (1) reverse itself on this point in this case, or (2) specifically overrule the cases in which water conditionally decreed was considered. The Supreme Court does not like to reverse itself. Moreover, the Supreme Court violated a well known legal principal, namely stare decisis

~~P.O. Box 1742~~
Gunnison, CO 81230

arriving at its decision that valid conditional decrees are not to be considered in determining water availability. It is more likely to correct this decree coming before it than to overrule prior decrees of long standing.

II. Judge Brown only gave minimal consideration to the effect on water availability of the existing private instream flow decrees. He mentions at paragraph 152 page 87, of the decree that Arapaho County's efforts at Texas Creek are interfered with because private instream flow rights of 60 c.f.s. exist. In our opinion, much more important is the fact that Arapaho must allow 265 c.f.s of water to flow through the property on the Taylor River owned by the Cockrell Trust, downstream from the dam. We say this for two reasons:

First: if 265 c.f.s. were permitted to flow past the confluence of Lottis Creek with the Taylor River, plus the 60 c.f.s. decreed instream on Lottis Creek, any excess flow would probably occur for a relatively short period of time, namely the middle of May to the middle of June and would probably not be of the quantity Arapaho needs. Second: it would require the diverters to build their diversion structures below this point which would immensely increase the cost of their diversion facilities over the cost they would incur if they could divert in Taylor or Union Park.

We would further point out that not only are there instream flow decrees in place on Taylor River, Texas Creek and Lottis Creek but also on Willow Creek, Illinois Creek, the Taylor River above the Taylor Reservoir and perhaps other tributaries of the Taylor River, along with instream flows decrees on Copper Creek and the East River below Emerald Lake and Copper Lake, to the south boundary of the Rocky Mountain Biological Laboratory's property.

III. By far the most important reason the Upper Gunnison Basin as well as the whole state of Colorado has for denying Arapaho's application is the fact that there is no water legally available in the Colorado River and its tributaries to provide Eastern Slope diverters with the water they seek, providing the Upper Basin States comply with their obligation to furnish water to California, Arizona and Nevada. The court in its decision refers to the Upper Basin States' obligations, at page 13, paragraph 20 c, of its decree to provide water under the 1922 compact to the Lower Basin States.

We believe the judge has not considered at least two additional blocks of water which must be allowed to flow downstream past Lee Ferry in Utah. The plain wording of the Colorado River Compact at Article III, sub-paragraph (a), (b) and (c) should be most carefully considered. Sub-paragraph (a) of the compact mandates the release of 7,500,000 acre feet of water per annum downstream. Sub-paragraph (b) provides that in addition the Lower Basin can increase its beneficial consumptive use of such waters by a million acre feet. We know that officials of the Colorado Water Conservation Board believe that the word "such" in sub-paragraph (b) refers to the water described in paragraph (a). That is a slender reed to rely on when it is considered that the water being discussed is all of "the waters of the Colorado River system;" as provided in Article I of the Compact. Moreover, if the United States has a treaty with Mexico to provide it with Colorado

River water, and if there is a shortage both the Upper and the Lower Basin States must supply additional water to alleviate the shortage, of which the Upper Basin has the duty to provide one-half thereof. We think this might amount to an additional charge of 750,000 acre feet per annum.

We understand from Mr. Seaholm of the Colorado Water Board that the Upper Basin States have only met their requirement to furnish 7.5 million acre feet per annum or 75,000,000 acre feet per 10 year period, 10 out of the past 64 years. If our understanding is correct, there has been a deficiency in the amount of water released in 54 of the years since the treaty became effective. If we add to that deficiency 1,750,000 additional acre feet which the Lower Basin States and Mexico can call upon, although they have not called on it yet, a terribly burdensome deficiency, which might well have to be made up, could be imposed upon the Upper Basin States. If the Upper Basin is ever charged with releasing the full amount of water the Lower Basin States and Mexico are entitled to, plus making up the deficiency, the burden would fall most heavily on the Eastern Slope which totally consumes the amount of water it diverts from the Colorado River.

~~We suggest that Colorado River Water Conservation District Board be asked to cooperate~~ with the River District in calling a meeting with the Northeast, the Central and the Southeast Colorado Water Conservation Districts, together with the City and County of Denver to persuade Arapohoe to cease its efforts to divert Gunnison River water. If it persists, it will be "kicking a sleeping dog." If awakened, that dog could tear the pants off Colorado, on both sides of the Continental Divide.

After the discussion contained in the paragraphs just above we considered, we would hope that the Supreme Court would be made cognizant of the impending disaster which would arise if Arapaho County were awarded a decree for the amount it is seeking, and if, indeed, it ever started withdrawing the amount of water it seeks from the Colorado River System.

Sincerely yours,

POWER

by P. C. Klingsmith

P.C. Klingsmith
PCK:hjp

Approved by POWER steering committee members as follows:

_____ _____

_____ _____

_____ _____

May 14, 1998

Upper Gunnison River Water Conversancy District
275 S. Spruce
Gunnison, CO 81230

Re: *The Application for Water Rights by Arapaho County*
Case No. 88 CW 178 et al.

Ladies and Gentlemen:

You and the others working to prevent Arapaho County, Parker and others from appropriating and moving water from Taylor and Union Park to the Front Range should be congratulated on your success before Judge Brown. It is a great victory.

Permit us, however, to act as a devil's advocate in the case. As pleasing as the decision is to POWER, we believe that it is likely to be reversed by the Supreme Court of Colorado if it is appealed. We believe that attorneys for Arapaho county will strongly urge their clients to appeal. Generally and basically the appeal will probably be based upon many of Judge Brown's findings of fact concerning other persons intentions arising out of his interpretation of documents. The Supreme Court could, if it so desires, make such findings as well as a trial judge. The principal example of what I am speaking of here is the court's decision that the Bureau of Reclamation subordinated or agreed to a depletion allowance for junior water users for use only within the Upper Gunnison River Basin. This point is the keystone to the judge's decision, vulnerable, we believe, to being set aside by a Supreme Court searching for grounds to do so.

For this reason, we believe that if this matter is appealed, the river district and other opponents interested in persuading the Supreme Court to confirm the ruling should bring out the following points which were either glossed over by Judge Brown or not raised by him at all. An opportunity to do so arises because the trial judge touched upon all of these matters in his Findings and Decree.

I. Conditional Decrees: Until this very case the Supreme Court of Colorado had held on several occasions that in determining whether any water was available for appropriation, the trial court must take into consideration the effect of valid conditional decrees. We have not done exhaustive research into this question but did hand Mr. Bratton two decisions by the Supreme Court holding the effect and validity of conditional decrees was a matter to be considered. We believe the Supreme Court should be urged to, (1) reverse itself on this point in this case, or (2) specifically overrule the cases in which water conditionally decreed was considered. The Supreme Court does not like to reverse itself. Moreover, the Supreme Court violated a well known legal principal, namely stare decisis

arriving at its decision that valid conditional decrees are not to be considered in determining water availability. It is more likely to correct this decree coming before it than to overrule prior decrees of long standing.

II. Judge Brown only gave minimal consideration to the effect on water availability of the existing private instream flow decrees. He mentions at paragraph 152 page 87, of the decree that Arapaho County's efforts at Texas Creek are interfered with because private instream flow rights of 150 c.f.s. exist. In our opinion, much more important is the fact that Arapaho must allow 445 c.f.s of water to flow through the property on the Taylor River owned by the Cockrell Trust, downstream from the dam. We say this for two reasons:

> First: if 445 c.f.s. were permitted to flow past the confluence of Lottis Creek with the Taylor River, plus the 60 c.f.s. decreed instream on Lottis Creek, any excess flow would probably occur for a relatively short period of time, namely the middle of May to the middle of June and would probably not be of the quantity Arapaho needs. Second: it would require the diverters to build their diversion structures below this point which would immensely increase the cost of their diversion facilities over the cost they would incur if they could divert in Taylor or Union Park.

We would further point out that not only are there instream flow decrees in place on Taylor River, Texas Creek and Lottis Creek but also on Willow Creek, Illinois Creek, the Taylor River above the Taylor Reservoir and perhaps other tributaries of the Taylor River, along with instream flows decrees on Copper Creek and the East River below Emerald Lake and Copper Lake, to the south boundary of the Rocky Mountain Biological Laboratory's property.

III. By far the most important reason the Upper Gunnison Basin as well as the whole state of Colorado has for denying Arapaho's application is the fact that there is no water legally available in the Colorado River and its tributaries to provide Eastern Slope diverters with the water they seek, providing the Upper Basin States comply with their obligation to furnish water to California, Arizona and Nevada. The court in its decision refers to the Upper Basin States' obligations, at page 13, paragraph 20 c, of its decree to provide water under the 1922 compact to the Lower Basin States.

We believe the judge has not considered at least two additional blocks of water which must be allowed to flow downstream past Lee Ferry in Utah. The plain wording of the Colorado River Compact at Article III, sub-paragraph (a), (b) and (c) should be <u>most carefully</u> considered. Sub-paragraph (a) of the compact mandates the release of 7,500,000 acre feet of water per annum downstream. Sub-paragraph (b) provides that <u>in addition</u> the Lower Basin can increase its beneficial consumptive use of such waters by a million acre feet. We know that officials of the Colorado Water Conservation Board believe that the word "such" in sub-paragraph (b) refers to the water described in paragraph (a). That is a slender reed to rely on when it is considered that the water being discussed is all of "the waters of the Colorado River system;" as provided in Article I of the Compact.

Moreover, if the United States has a treaty with Mexico to provide it with Colorado River water, and if there is a shortage both the Upper and the Lower Basin States must supply additional water to alleviate the shortage, of which the Upper Basin has the duty to provide one-half thereof. We think this might amount to an additional charge of 750,000 acre feet per annum.

We understand from Mr. Seaholm of the Colorado Water Board that the Upper Basin States have only met their requirement to furnish 7.5 million acre feet per annum or 75,000,000 acre feet per 10 year period, 10 out of the past 64 years. If our understanding is correct, there has been a deficiency in the amount of water released in 54 of the years since the treaty became effective. If we add to that deficiency 1,750,000 additional acre feet which the Lower Basin States and Mexico can call upon, although they have not called on it yet, a terribly burdensome deficiency, which might well have to be made up, could be imposed upon the Upper Basin States. If the Upper Basin is ever charged with releasing the full amount of water the Lower Basin States and Mexico are entitled to, plus making up the deficiency, the burden would fall most heavily on the Eastern Slope which totally consumes the amount of water it diverts from the Colorado River.

We feel that negotiations should be entered into between the Gunnison River District and Arapaho County seeking to persuade it to withdraw its application. We suggest that Colorado River Water Conservation District Board be asked to cooperate with the River District in calling a meeting with the Northeast, the Central and the Southeast Colorado Water Conservation Districts, together with the City and County of Denver to apply influence and pressure on Arapaho "not to kick the sleeping dog." If awakened, that dog could tear the pants off Colorado, on both sides of the Continental Divide.

After the discussion contained in the paragraphs just above we considered, we would hope that the Supreme Court would be made cognizant of the impending disaster which would arise if Arapaho County were awarded a decree for the amount it is seeking, and if, indeed, it ever started withdrawing the amount of water it seeks from the Colorado River System.

Sincerely yours,

POWER

by_____
P.C. Klingsmith

Water Counsel

PCK:hjp

75,000,000 acre feet per 10 year period, 10 out of the past 64 years. If our understanding is correct, there has been a deficiency in the amount of water released in 54 of the years since the treaty became effective. If we add to that deficiency 1,750,000 additional acre feet which the Lower Basin States and Mexico can call upon, although they have not called on it yet, a terribly burdensome deficiency, which might well have to be made up, could be imposed upon the Upper Basin States. If the Upper Basin is ever charged with releasing the full amount of water that the Lower Basin States and Mexico are entitled to, plus making up the deficiency, the burden would fall most heavily on the Eastern Slope which totally consumes the amount of water it diverts from the Colorado River.

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After the discussion contained in the paragraphs just above be considered, we would hope that the Supreme Court would be made cognizant of the impending disaster which would arise if Arapaho County were awarded a decree for the amount it is seeking, and if, indeed, it ever started withdrawing the amount of water it seeks from the Colorado River System. Specifically, many existing trans-mountain diversion– all subsequent to the date of the compact,-- would be impacted, as well as Western Slope diversion, subsequent to that date, to the extent of their consumptive uses.

Sincerely yours,

POWER

by _____
P.C. Klingsmith, Water Counsel

PCK:hjp

Approved by POWER steering committee members as follows:

_____ _____

_____ _____

_____ _____

II. Judge Brown only gave minimal consideration to the effect on water availability of the existing private instream flow decrees. He mentions at paragraph 152 page 87, of the decree that Arapaho County's efforts at Texas Creek are interfered with because private instream flow rights of 60 c.f.s. exist. In our opinion, much more important is the fact that Arapaho must allow 450 c.f.s of water to flow through the property on the Taylor River owned by the Cockrell Trust, downstream from the dam. We say this for two reasons:

> First: if 450 c.f.s. were permitted to flow past the confluence of Lottis Creek with the Taylor River, plus the water decreed instream on Lottis Creek, any excess flow would probably occur for a relatively short period of time, namely the middle of May to the middle of June and would probably not be of the quantity Arapaho needs. Second: it would require the diverters to build their diversion structures below this point which would immensely increase the cost of their diversion facilities over the cost they would incur if they could divert in Taylor or Union Park.

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We believe the judge has not considered at least two additional blocks of water which must be allowed to flow downstream past Lee Ferry in Utah. The plain wording of the Colorado River Compact at Article III, sub-paragraph (a), (b) and (c) should be <u>most carefully</u> considered. Sub-paragraph (a) of the compact mandates the release of 7,500,000 acre feet of water per annum downstream. Sub-paragraph (b) provides that <u>in addition</u> the Lower Basin can increase its beneficial consumptive use of such waters by a million acre feet. We know that officials of the Colorado Water Conservation Board believe that the word "such" in sub-paragraph (b) refers to the water described in paragraph (a). That is a slender reed to rely on when it is considered that the water being discussed is all of "the waters of the Colorado River system;" as provided in Article I of the Compact. Moreover, if the United States has a treaty with Mexico to provide it with Colorado River water, and if there is a shortage both the Upper and the Lower Basin States must supply additional water to alleviate the shortage, of which the Upper Basin has the duty to provide one-half thereof. We think this might amount to an additional charge of 750,000 acre feet per annum.

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River water, and if there is a shortage both the Upper and the Lower Basin States must supply additional water to alleviate the shortage, of which the Upper Basin has the duty to provide one-half thereof. We think this might amount to an additional charge of 750,000 acre feet per annum.

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this needs further spelling out.

that

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After the discussion contained in the paragraphs just above ~~we~~ have been be considered, we would hope that the Supreme Court would be made cognizant of the impending disaster which would arise if Arapaho County were awarded a decree for the amount it is seeking, and if, indeed, it ever started withdrawing the amount of water it seeks from the Colorado River System.

add a sentence to clarify & state?

Sincerely yours,

POWER

by P.C. Klingsmith

P.C. Klingsmith

Water Counsel

PCK:hjp

approved by POWER steering committee members as follows:

December 18, 1995

DRAFT

L. Richard Bratton, Esq.
Bratton & McClow, L.L.C.
232 W. Tomichi Avenue
Suite 202
Gunnison, CO 81230

Re: Bureau of Reclamation - Curecanti Project

Dear Dick:

This letter is in response to your letter to *POWER*, November 3, 1995. *POWER* has completed it's examination of the documents which were furnished by you. We would like to first comment on your general remarks at the beginning and ending of your letter.

First, the documents certainly helped *POWER* to understand the 600,000 acre foot subordination concept as well as the agreement by the Bureau of Reclamation (BOR) to release sufficient water to satisfy downstream calls to protect the Upper Gunnison Basin water users in junior decrees. Those records, however, did not diminish POWER's long held beliefs that the promises did exist and were relied upon by the people of Gunnison County, and that said promises should be enforced.

Second, we believe that the papers you furnished, and other papers which must exist, would substantiate *POWER's* position, that promises were made to people of the Upper Gunnison Basin which should be enforced. We believe that the UGRWCD and yourself should immediately commence the implementation of these agreements (and terminate your unfounded opposition to this action) and require the Bureau to comply with it's obligation to the people of this community. It is difficult for *POWER* to understand what more important issues you have in mind that would take precedence over requiring the BOR to honor it's promises. What are the **real water issues** more important to the community which you refer to. Surely not the 3 and 5

year agreements that allow the people of the community to benefit from water stored in Blue Mesa Reservoir. Perhaps if you could explain in detail to *POWER* what these issues are, it would help *POWER* to support the Board in it's efforts to support the people of this community. We do not by this mean to indicate that the Board is not dealing with important issues, but surely none can be more important than those under discussion here.

We will now deal in the order raised by you, the six issues contained in your letter.

1. The BOR did indeed want to erect a much larger dam than the "small" dam now in existence. It's initial plan was for a dam that would contain 2,500,000 acre feet of water or approximately one and a half times as big as the present reservoir. We will not argue engineering facts with you, but suffice to say this would have backed the water up to the south part of Gunnison, and the Adams-Wilson ranch would have been inundated. (See resolution of the Gunnison Watershed Conservation Committee relative to Currecanti Dam by E.L. Dutcher dated April 19, 1951.) The Montrose Water Committee recognizes the accuracy of the Gunnison Watershed Conservation Committee statement. At the first meeting of the Policy and Review Committee - Gunnison River Storage of December 14, 1951, it was confirmed that Plan A was the Bureau of Reclamation's study which provided for a dam 2,500,000 acre feet, Plan B of 1,935,000 acre feet, and Plan C (the small dam) 947,000 acre feet of water. In a letter from E.L. Dutcher to Judge Stone of March 24, 1952, several references are made to the 2,500,000 acre feet reservoir proposed by the BOR. In a letter from Judge Stone to Mr. Dutcher, a reference was made to the proposed 2,500,000 acre foot reservoir. This does not sound as though there was "never serious consideration given to the plans for a dam that would have flooded the town". On the contrary the big dam was certainly a worry to Mr. Dutcher and other people were concerned about the creation of the Currecanti Reservoir. The Gunnison Review Committee met on March 3, 1952, and we believe the document reviewed by that committee on February 23, 1952, would also shed light on the plan of the BOR in this regard. Please furnish that to us as it is in your possession and particularly "Plan E" thereof.

2. We would not ____ the wording of the first sentence of paragraph 2 as you have stated them. We would simply state that without the consent and approval of the people of the Upper Gunnison River Basin, the Colorado River Water Conservation District would not have lent it's approval to the project. Without it, the Colorado Water Conservation Board would not have approved it. Without the approval of that board, Colorado's representatives in Congress would not have approved it and without their approval Congress would have never approved the Currecanti project. "Political forces throughout the state" supported the project because the Gunnison community supported it. It is a disservice to many people in the 40's, 50's, and 60's who worked on this project to imply that their efforts were not immensely important. It would appear that a great block of Mr. Dutcher's time was spent on blocking the large dam and in providing that the people of this community would be protected if the small dam was built. See the letter to Mr. Dutcher dated April 9, 1951 by the Colorado River Water Conservation District in which it was stated that "finally, I hope that, no matter what their decision may be on their own particular problems that committee will give their consent to the storage project of the general proposition", On April 14, 1951, Mr. Dutcher commented that Mr. Merrill's argument was not very impressive with the local people as they were not close enough to the overall water picture. Mr. Dutcher seem to think that the feeling of the local people was important. See also official comments and recommendations of the State of Colorado and the Colorado River Storage Project, page 3 and page 8. There was a Policy Review Committee - Gunnison River Storage met on September 28, 1951. This committee had a major task of ascertaining whether a plan could be worked out for storage on the Gunnison River which will preserve the best water development in Colorado. The approval of this committee was sought so that the project could go forward. Mr. Dutcher certainly believed that the approval of the Gunnison people was necessary for the project to go forward as shown by his letter of March 24, 1952 to Judge Stone. He stated that the approval of the Gunnison Committee must be predicated on the premise that there will not be any material changes in the size and location of the dam, capacity of the reservoir, and such had to be approved by the committee. If the approval of the people of the Upper Gunnison Valley was not necessary, Mr.

Dutcher was certainly misinformed and certainly did a lot of work which was unnecessary. On April 15, 1952, Mr. Dutcher, in a letter to Judge Stone even went so far as to say that the report should be approved by him, " I will be in a position to approve it and I sincerely trust that the amendments can be made without another meeting". Was Mr. Dutcher foolishly assuming authority that he did not have? Whatever you may think of Mr. Dutcher, he was no fool. In a letter to Mr. Bratton himself on March 15, 1962, Mr. Bernard, who was chairman of the Colorado River Water Conservancy District, stated that the Secretary of the Interior agreed that negotiations should be carried forward with the people of the Gunnison Basin concerning the effect of which subordination of the Currecanti rights in the consumptive use requirement and project for this area. Please consider the implications of this statement in connection with your position that the state was not required to obtain "permission" from our local community to build the Aspinell Unit.

Let us now consider what agreements were made to the people of the Gunnison Basin to protect the upper basin decree from a call by the lower basin senior water users.

3. On March 3, 1952, Mr. Dutcher indicated that Gunnison Watershed Conservation Committee of which he was a chairman, would approve the construction of the reservoir provided that the waters of the Taylor Park Reservoir were transferred to the people of this district. What the people of this community originally wanted was 106,000 acre feet of downstream protection by acquiring the Taylor Reservior which they later gave up in consideration of a 60,000 acre foot protection out of the Currecanti Reservoir. The transfer of the Taylor River rights was discontinued, (See letter of April 15, 1952 of Mr. Dutcher to Judge Stone). Mr. Bernard, above referred to, in a letter to Mr. Porter dated July 29, 1957, confirmed that one of the purposes of the Currecanti Reservoir would be to permit upper Gunnison people to store water in the Currecanti Reservoir to be released to downstream demands senior to certain junior decreed rights along the upper reach of the Gunnison River. Mr. Bernard stated, "Water stored in the Currecanti Reservoir would be released when these demands are met, and these friendly existing rights can unavail themselves of the amount of water flowing in their various sources of supply." There was a combined report of the

secretary-engineer and counsel of the Colorado River Water Conservation District dated July 21, 1959. In that report on page 3 it is stated that the Currecanti Project will serve to provide water for other beneficial uses within the Gunnison Basin itself. Specifically, "water impounded in these reservoirs can be made available to supply the demands of the decrees of the Uncompadre Project to the Gunnison Tunnel. Thus, the burden on the stream above the Blue Mesa Reservoir will be relieved; and water, which now must be released to bypass to meet these demands, will be available for diversion in Gunnison County under existing decrees, and may be utilized for irrigation and other purposes, by ~~using~~ exchange for stored water in the Blue Mesa Reservoir". The statement would imply that there was indeed an agreement with the people of the Upper Gunnison River to downstream protection against the early calls. For the Upper Gunnison River Water Conservancy District and yourself to imply and state that no such agreement existed would be to badly misinform the people of Gunnison as to what they were entitled to and what they should now wish for.

the water was to be furnished "in exchange", or in other words, "for free".