Gunnison Basin POWER
People Opposing Water Export Raids

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.

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

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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 <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

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Water Counsel

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