

November 18, 1998

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

The Board of County Commissioners  
The County of Gunnison  
200 East Virginia  
Gunnison, CO 81230

The Board of County Commissioners  
The County of Hinsdale  
Courthouse  
Lake City, CO 81235

The Board of County Commissioners  
The County of Saguache  
Courthouse  
Saguache, CO 81149

Re: WATER AVAILABILITY FOR TRANSMOUNTAIN DIVERSION -  
CONSEQUENCES OF FURTHER TRANSMOUNTAIN DIVERSION

Ladies and Gentlemen:

We have met with the Gunnison River District Board twice to: (1) discuss whether any water remains in the Colorado River System for transmountain diversion after all legal claims against such waters have been met; (2) to persuade it that no unclaimed water is available for transmountain diversion; and (3) to discuss the unfortunate and dire consequences which would occur if more water than that already diverted were to be diverted to the Front Range. In explaining the amount of water available, we have relied upon figures provided us by the State of Colorado Engineer's office as well as the Bureau of Reclamation. Both of these sources basically agree with each other to an acceptable degree. The purpose of this letter is to present our concerns (1) regarding the interactions between the provisions of the Colorado River Compact and transmountain diversion, and (2) to discuss present and future courses of action to alleviate such.

### HISTORY OF THE RIVER

The Colorado River Compact was executed in 1922, and was finally approved by all of the states involved. Arizona, the last signatory, signed it in 1944. In 1963, Glen Canyon Dam was constructed across the Colorado River and began to store water in Lake Powell. All of the waters of the Colorado River above Lee Ferry, AZ, have already been or surely will be claimed with earlier entitlement dates than any water hereafter sought to be diverted to the Front Range of Colorado.

### COLORADO RIVER COMPACT REQUIREMENTS



Replacement to Page 2 of the November 18, 1998 letter

January 4, 1999

The Colorado River Compact imposes certain duties and obligations on the Upper Basin State in favor of the Lower Basin below Lee Ferry. See the attached Exhibit "A": two pages of the Compact with relevant provisions highlighted. Article III (a) apportions to each basin 7,500,000 acre feet of water per annum. By sub-paragraph (b), it allows the Lower Basin to call upon an additional 1,000,000 acre feet per annum for beneficial consumptive use. Under paragraph (c), it provides that Mexico shall have an entitlement to Colorado River System water, determined by treaty to be 1,500,000 acre feet per annum. If there is any shortage in this quantity passing the United States' border, it shall be furnished equally by the Upper and Lower Basins, the Upper Basin's portion measured at Lee Ferry. Finally at paragraph (d) the compact provides that the Upper Basin shall not withhold the water thus causing the flow of water of the Colorado River at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet in a 10 year moving average.

The Compact specifies that the amount of water referred to in Article III (c) and (d) shall be measured at Lee Ferry, but does not specify where the other quantities of water referred to in paragraphs (a) and (b) of said article are to be measured. Considering the entire wording of Article III and IV, we believe a court would rule all of the water required be measured at the Lee Ferry. It does not seem reasonable or feasible the waters mentioned in Article III, would have other measurement points.

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 Gila Rivers in Arizona or at other sources below Lee Ferry, either physically or by being credited therefore. Consequently, we submit these waters belong to the Lower Basin States (and Mexico and the Indian Tribes) and will not be counted to constitute the amount apportioned to the Lower Basin States under Article III (a) and (b).

The Compact is silent as to what penalties will be imposed for any breach. Experience would indicate, however, from the happenings in connection with the Two Forks Dam project and the Arkansas River dispute with Kansas, that the contest would be resolved by Federal referee, at least in the first instance, strongly biased in favor of strict Compact compliance to the Upper Basin's detriment.

## ACTUAL DIVERSIONS AND SHORTAGES

The information available to POWER consists of records furnished by the Department of Natural Resources - Colorado Water Conservation Board, and the United States Department of Interior - Department of Reclamation. Those figures show that at the present time, and under the present entitlement by the Lower Basin States, the historic flow at Lee Ferry has provided some amount more than 7,500,000 acre feet of water to the Lower Basin States each year since 1965. It further shows that, if and when the Lower Basin States place a call under Article III (b), the Compact requirements at Lees Ferry would be met much less frequently. Specifically, during the 46 years between 1953 and 1998, obligations would have been met 39 years; slightly more than 80% of the time. The amount of the annual flows during the short years varies from year to year. The annual shortage in acre feet of water is not insignificant. In addition to the 7,500,000 and 1,000,000 acre feet of





November 18, 1998

Compact obligation to the Lower Basin States, the duty to supply water to Mexico, under its treaty entitlement of 1944, amounts to 1,500,000 acre feet per annum with the Upper and Lower Basin States each providing one half thereof. Thus Upper Basin States must provide up to 750,000 acre feet per annum in case Mexico is shorted and decides to place a call, which call would require the Upper Basin States to furnish a total flow at Lee Ferry of up to 9,250,000 acre feet per annum. We at POWER have been advised by representatives of the Colorado Water Conservation Board that Mexico has not yet called upon its yearly entitlement. Apparently Mexico does not want to jeopardize its relations with the United States during the period of the NAFTA negotiations. It is as sure as most anything in this old world, during these changing times, that Mexico will call upon its entitlement sooner than later. If Mexico's entitlement is considered, shown by column D of figures on "Exhibit B" attached hereto, the Upper Basin States could have fulfilled their compact requirements in only 17 of the past 46 years or slightly more than one third of the time.

There is another potential call upon the Colorado River that would seriously affect Colorado and the Upper Basin States. The Compact at Article VII provides that nothing in the Compact shall be construed as affecting the obligation of the United States to the Indian tribes. There are several tribes which could make a claim to the waters of the Colorado River. The Colorado Supreme Court has indicated in connection with its ruling regarding the reserve water rights of the United States, that the Indians' water rights will be quantified and established. Such rights will predate and supercede most of the water rights existing in Colorado. It is certainly not possible at this time to say what the effect of the Indian claims will amount to, but one can almost be sure it will not be de-minimus. The existence of the Indian claims alone makes further transmountain diversion speculative.

### COLORADO'S HISTORY OF DISAPPOINTMENTS

Colorado has battled with its downstream neighbors on several occasions concerning its shorting them of water due them under interstate compacts. Specifically, it has been involved in litigation with Wyoming, Nebraska, Kansas, Texas and New Mexico. In each and every dispute, Colorado has lost. The penalty for not complying has varied from case to case. In the current suit with Kansas, which was the latest fiasco, Colorado will probably be required to make up the determined water shortage and pay Kansas for the damages it has incurred. Colorado was warned 90 years ago this would happen. What happens when Colorado is required to terminate water rights to which its citizens have become accustomed to using is indeed traumatic and damaging.

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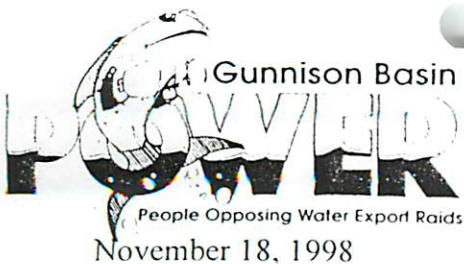
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## WATER REQUIREMENTS IN THE LOWER BASIN STATES

Can any informed person believe that California, particularly the Los Angeles region, will not want to use an additional 1,000,000 acre feet per annum? An automobile trip through that area will disclose that retirement and business communities are popping up like cacti in the desert. We recently noticed an item in a newspaper during October 1998 which indicates that Las Vegas, Nevada will receive title to 27,000 surrounding acres of dry land from the Government. That amounts to over 42 square miles of land, a large portion of which Las Vegas intends to subdivide and sell for residential purposes. Las Vegas is sorely pressed for enough water to satisfy existing residential, business and commercial needs. To ask whether it could use additional water out of the 1,000,000 acre feet apportioned the Lower Basin States in Article III (b), is to ask a question which needs no answer.

## POWER'S RECOMMENDATIONS

We recommend that the Upper Gunnison River Water Conservancy District and the Counties of Gunnison, Saguache and Hinsdale jointly seek to terminate future Front Range efforts to divert additional water from the Colorado River System. Perhaps the best plan would be to try to obtain the agreement of large water users such as Denver, Colorado Springs, Northeastern, Central and the South East Water Conservation Districts that they will no longer seek to divert additional waters, and that they will oppose any further Front Range diverter's efforts to do so. It is probably too late in the game to call the Colorado Supreme Court's attention to the fact (in the present suit with Arapahoe County,) that considering the implications of the Compact, there is no undecreed water available for trans-mountain diversion in the Colorado River System, although the advice from the attorneys opposing the Arapahoe case needs to be sought on this point.

Perhaps the most reasonable way of obtaining a halt to further transmountain diversions would be through legislative action. The Constitution of Colorado provides at Article XVI, Sections 5 and 6, that the unappropriated waters of every stream in Colorado are the property of the public and dedicated to the use of the People of Colorado, and that the right to divert unappropriated waters should never be denied. If the argument presented in this paper holds water, there is no unappropriated water in the Colorado River System and the General Assembly would be justified in so declaring. Such justification would be to: (1) prevent huge sums of money being spent to divert water which would not be available for diversion considering the Compact, to (2) prevent the construction of houses and creation of businesses in the belief that water existed whereas in fact it did not, and to (3) avoid economic hardship and social disruption which will follow the seemingly endless efforts on the part of the Eastern Slope water users to take water from the Colorado River System. Most importantly, (4) any action Colorado users take which would




November 18, 1998

further decrease water flows to the Lower Basin States and Mexico would likely cause them to end their consent to water shortages and require the Upper States to deliver each year and in total all the water the Compact allots them. We in Colorado should not kick the sleeping dog by increasing Lower Basin water shortages. We think the time has come for the water using entities in Gunnison, Saguache and Hinsdale Counties to band together to present a united front to set in place a permanent injunction or prohibition of any further efforts to divert water from the Colorado River System in Colorado, out of the basin.

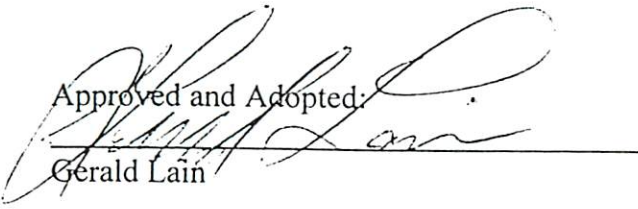
Finally, (5) we should on a stepped up basis, continue our efforts to educate people on the Front Range of the need to discourage and terminate further transmountain diversion.


Sincerely yours,

POWER

  
P.C. Klingsmith, Chairman  
Power Steering Committee

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