

Not a promise to protect from downstream calls

What really is the Blue Mesa subordination?

by Laura Anderson

"This isn't a greased skid. There are going to be obstacles all along the way."

—Upper Gunnison attorney John McClow

When the Blue Mesa Reservoir was built in the early 1960s, exactly what kind of protection for Upper Gunnison Basin water development did the United States offer? Many have talked about a 60,000-acre-foot subordination. Is there such a thing? And if so, what does it mean? These questions have been debated in recent months as the Upper Basin attempts to maintain its historic water use in the face of possible curtailment from downstream senior water users.

Attorney John McClow shed some light on this complex issue at a work session of the Upper Gunnison River Water Conservancy District January

9. In McClow's opinion, a 60,000-acre-foot subordination exists. But it cannot be used to protect the Upper Basin from senior downstream water users.

According to McClow, this is how subordination works:

The U.S. government has a 1957 water right to fill the three reservoirs in the Aspinall Unit: Blue Mesa, Crystal and Morrow Point. Usually under Colorado water law, this would mean that anyone with a water right after 1957 would not be assured of their water unless the reservoirs could also be filled. That might result in junior rights holders often being denied water

rights would be met before the Aspinall Unit's right.

McClow emphasized that the subordination does not give anyone the right to store water in the Aspinall Unit, nor does it protect the Upper Basin from curtailment by water users downstream who have senior rights. He emphasized that the subordination would be of no help to someone in the Upper Gunnison Basin with a 1970 water right if the Gunnison Tunnel, a downstream water user with a 1905 right, placed a call.

Why 60,000 acre-feet?

Apparently the 60,000 figure first surfaced in economic justification for the Aspinall Unit published by the De-

"The 60,000 acre-feet was not in the form of a promise. Subordination relates to specific uses - it is project or facility specific. It's misleading to say there was a promise."

— Dick Bratton

partment of the Interior before the three reservoirs were built. The government decided that the Aspinall Unit would make economic sense even if there was an additional 60,000 acre-foot of upstream depletion that took priority over the project. An acre-foot is the amount of water needed to cover an acre of land one foot deep.

Upper Gunnison attorney Dick Bratton, who was also the attorney for the district when Blue Mesa was built, cleared up a misunderstanding in the basin when he emphasized that there was never a signed contract between the United States and the Gunnison

"Arapahoe County could be included," Knox added. He explained that to act otherwise might be considered "punitive. The water belongs to the whole state," he said.

Contracts take priority

But there may be some possible ways to control who actually takes advantage of the subordination. Knox commented that if water rights holders have contracts with the Bureau, these would be administered first.

Judge Robert Brown gave some attention to the subordination and the importance of contracts in rulings he made on the Union Park case in 1990 and 1991. According to McClow, Brown said that the Bureau could subordinate but only if it entered into a contract with those who would benefit.

"Arapahoe was trying to claim the 60,000 acre-feet as part of the unappropriated water [in the basin it could divert]," rancher and lawyer Ken Spann explained. Judge Brown said, "Show me your subordination agreement with the Bureau and then we'll talk about whether that could be part of your claim."

Whether Brown's decision mandating contracts would apply to all subordination is debatable. The Department of Justice interpreted Brown's decision to be acceptable in determining how much water would be available for the Union Park Project, but would not agree that it bound the Bureau of Reclamation in its operation of the Aspinall Unit.

Board member Ramon Reed asked whether contracts then allow selective subordination.

Knox answered that contracts and