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GUNNISON RIVER: A LOCAL PERSPECTIVE ON UNION PARK

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I. Introduction.

- A. Any opinions expressed herein are those of the author.
- B. Discussion will focus on the perspective in which the people in the Upper Gunnison Basin view the Union Park Project, touching only lightly on several of the major issues currently being litigated in the Colorado Supreme Court. A decision from that Court is imminent. A brief history of the project is included in this outline primarily for later reference.

II. Major existing water rights in the Upper Gunnison Basin.

- A. Among the most senior water rights in the Upper Gunnison River Basin are those adjudicated to the Uncompahgre Valley Reclamation Project, consisting primarily of the Gunnison Tunnel and the Taylor Park Reservoir.
 - 1. The Gunnison Tunnel diverts immediately downstream of Morrow Point Reservoir and immediately upstream of the Black Canyon National Park and transports water to the Uncompahgre Valley. The Gunnison Tunnel has a decree for 1,300 acre-feet.
 - 2. Taylor Park Reservoir is located on the Taylor River and has a storage decree for 106,000 acre-feet for irrigation. Taylor Park reservoir also has a second fill decree for irrigation, fishery and recreational purposes, both within the reservoir and in the Taylor and Gunnison Rivers between Taylor Park Reservoir and Blue Mesa Reservoir.
- B. The Wayne N. Aspinall Unit of the Colorado River Storage Project (CRSP) consisting of three reservoirs, each with a hydroelectric plant, is located on the Gunnison River immediately downstream of Gunnison.
 - 1. The Colorado River Water Conservation District obtained state decrees for the Aspinall Unit and assigned them to the United States.
 - 2. The Aspinall Unit decrees confirm storage and direct flow rights for domestic and municipal, irrigation and stock watering, industrial, development and production of electrical energy, flood control, piscatorial, wildlife protection and preservation, and recreational uses.
 - 3. Blue Mesa Reservoir is by far the largest reservoir in the Aspinall Unit with a decree for storage of 940,000 acre-feet and a refill decree in excess of 100,000 acre-feet. There are decrees for each power plant.

III. Brief history of Union Park Project.

- A. In 1986, Natural Energy Resources Company (NECO) applied for conditional water rights for the Union Park Project. District Court, Water Division No. 4, Case No. 88CW226.
- B. The Union Park Project included construction of the Union Park Reservoir with a capacity of 900,000 acre feet on Lottis Creek, a tributary to the Taylor River.
- C. Despite the lack of any firm contractual commitments on NECO's part, Colorado River Conservation Dist. v. Vidler Tunnel Water Co., 197 Colo. 413, 417, 594 P.2d 566, 568 (1979), Arapahoe County acquired NECO's interest in the Application in Case No. 88CW226.
- D. The water court dismissed most of the application on the grounds that it was a speculative appropriation. § 37-92-103(3)(a), 15 C.R.S. (1990).
- E. On December 30, 1988, Arapahoe filed an application in Case No. 88CW178 for conditional water rights for the Union Park Project.
 - 1. The United States of America, Upper Gunnison River Water Conservancy District, the Colorado River Water Conservation District, the State of Colorado (several agencies), Crystal Creek Homeowners Association, High Country Citizens' Alliance and numerous other parties filed statements of opposition.
 - 2. In 1989, the water court bifurcated the issues presented for trial and conducted a trial in June, 1991, limited to the issue of the availability of unappropriated water to satisfy the applications, reserving for later the "can and will" issues relating to the practicality and economic feasibility of the project (Phase II).
 - 3. At the conclusion of the 1991 trial, the water court found as a "compromise figure" the average annual yield of unappropriated water for the Union Park Project would not exceed 20,000 acre and dismissed the application after Arapahoe County stipulated that 20,000 acre-feet was inadequate to justify the project. Arapahoe County appealed.
- F. The Colorado Supreme Court reversed in part and remanded holding that the water court's dismissal of the application was based upon an erroneous standard for determining the availability of water. Matter of Board of County Commissioners of County of Arapahoe, 891 P.2d 952 (Colo 1995).

1. The Court held that “the assumption by the water court that all major senior conditional water rights will become absolute and that holders of absolute water rights will divert to the full extent permitted under their decrees excluded water that is available for appropriation under current conditions on the river.” Id. at 958. The Court stated that the assumptions for the determination of water availability are “contrary to experience and are improbable.” Id.
2. The Court further noted that conditional water rights may not be perfected and may be terminated for lack of diligence or by abandonment and that absolute water rights are not in all instances exercised to the full extent permitted by their decrees. Id. “To require an applicant to prove the availability of water based on the assumption that all senior conditional rights will be perfected and that all absolute rights will be utilized in their full decreed amounts is to foreclose recognition of applications for conditional water rights decrees that have every prospect of resulting in completed appropriations within a reasonable time.” Id. at 958-59.
3. The Court, applying the “can and will” statute, C.R.S. § 37-92-305(9)(b), articulated the following standards and applicant must meet to obtain a conditional decree:
 - a. “[A]n applicant must establish that there is a substantial probability that within a reasonable time water can and will be appropriated and put to a beneficial use. Id. at 962.
 - b. “The applicant must prove, as a threshold requirement, that water is available based upon river conditions existing at the time of the application, in priority, in sufficient quantities and on sufficiently frequent occasions, to enable the applicant to complete the appropriation with diligence and within a reasonable time.” Id.
4. The Court continued with the following guidance:
 - a. “When river conditions existing at the time of the application for a conditional water right decree prevent completion of the proposed appropriation, there is no substantial probability that the project will be completed with diligence within a reasonable time.” Id.
 - b. Conditional water rights under which no diversions have been made, or are being made, should not be considered, and absolute water rights should be considered to the extent of historical diversions rather than on the assumption that maximum utilization

of the decreed amount is the amount used.” Id.

- G. The water court conducted a second trial on water availability in October, 1997.
1. The water court heard expert testimony from Arapahoe County’s and Opposers’ experts. The water court rejected Arapahoe County’s modeling results, primarily because the legal assumptions which Arapahoe County’s expert made to govern the analysis were not valid.
 - a. All of the experts agreed that the two most important legal assumptions in determining water availability were the subordination of the Aspinall Unit water rights, and the manner in which the Taylor Park Reservoir second fill water right is treated in the analysis.
 - b. Arapahoe’s expert made the legal assumption that unlimited subordination of the Aspinall Unit’s water right was available to the Union Park Project. Consequently, Arapahoe County’s expert modeled the Aspinall Unit water rights as the most junior in the basin.
 - c. Arapahoe County’s model also assumed that subordination of 220,000 to 240,000 acre-feet per year was available to the Union Park Project.
 - d. Arapahoe County’s model, based on arguments previously rejected by the water court and the Colorado Supreme Court, also treated the Taylor Park second fill right in a manner inconsistent with the accounting conditions in the decree.
 2. After considering the constraints imposed by senior absolute water rights in the Gunnison River, and the variation in Opposers’ models, the water court adopted the amount of 15,000 acre-feet as an average annual amount of water available to the Union Park Project. It is significant that, in the fifteen year study period, water was available in only four years and that 83% of the total amount available occurred in one year.
- H. On July 28, 1998, the Arapahoe County Commissioners approved a motion directing its legal staff to proceed with the appeal of the water court’s decision, subject to the conditions that the Arapahoe County Water and Wastewater Authority assume “the role presently filled by Arapahoe County and acting as transitional sponsor,” and that “[a]ll costs associated with this action will be paid by the water providers involved and ultimately by the new authority.”

- I. Arapahoe County appealed.
 - J. The appeal is now being prosecuted by Union Park Water Authority (UPWA).
 - K. A decision by the Colorado Supreme Court is imminent.
- IV. Gunnison Basin perspective on the more significant issues raised on appeal.
- A. Whether Section 7 of the Colorado River Storage Project Act (CRSPA), 43 U.S.C. § 620f, applies intrastate allowing the Aspinall Unit to call the Union Park Project.
 - 1. See Appendix A for text of Section 7. The water court ruled that “that the plain meaning of 43 U.S.C. § 620f does require BUREC to subordinate any call for hydropower uses to domestic and agricultural demands; but the Court further concludes that the subordination contemplated by the statute has *interstate* application only. (Emphasis in original).
 - 2. UPWA argues that plain meaning of Section 7 prohibits a call by the Aspinall Unit hydropower rights against Union Park.
 - 3. Opposers argue that reading Section 7 in its entirety, in the context of CRSPA’s statutory scheme and in *pari materia* with other components of the Law of the River, the plain meaning of § 620f supports the water court’s conclusion. Section 7 expressly requires consideration of both the Colorado River Compact and the Upper Colorado River Basin Compact and prohibits conflict with their provisions. Both Compacts explicitly state that they are intended to apply interstate only and are not intended to govern allocation of water within the borders of any Upper Basin state.
 - B. Whether CRSP Reservoirs are subordinate to junior Colorado water rights.
 - 1. UPWA argues that Section 3 of CRSPA, 43 U.S.C. §620b (Appendix B), requires subordination of the Aspinall Unit water rights to its Union Park Project.
 - 2. Opposers argue that UPWA reads the section selectively and that Section 3 in its entirety describes project authorizations, not subordination of water right priorities.
 - C. Whether the Bureau of Reclamation’s policy of subordination of Aspinall Unit Water Rights to 60,000 acre-feet of upstream consumptive uses is limited to “in

basin” uses and requires a written contract with the United States.

1. The supplemental report mandated by Congress in Section 1 of CRSPA, 43 U.S.C 620(1) as a condition precedent to the construction of the Aspinall Unit showed that the Aspinall Unit was economically justified with 60,000 acre-feet of depletions upstream of the Aspinall Unit. This fact, along with the proposed Upper Gunnison Project, led to the so-called “subordination” of 60,000 acre-feet of the water rights decreed to the Aspinall Unit to upstream consumptive uses.
2. Arapahoe County claimed that the subordination applied to the Union Park Project. The water court disagreed, ruling that the subordination applied to in-basin uses only and that a contract with the United States was required to benefit from the subordination.
3. On appeal, UPWA argues that it has the legal right to the Bureau of Reclamation’s subordination without a written contract but cites no legal authority for that proposition. Also, UPWA argues that because the subordination is solely for the benefit of in-basin users, it is a selective subordination and is unenforceable. Further, that the remedy for an unenforceable subordination is to make the Aspinall Unit water rights the most junior rights in the basin.
4. Opposers argue that the water court’s findings concerning the subordination policy of the Bureau of Reclamation is a factual determination supported by substantial credible evidence. There is also substantial legal authority that the BOR cannot dispose of water without a written contract.

V. The Local Perspective on Union Park Project is that the citizens of the Upper Gunnison Basin are strongly opposed to the project.

- A. Citizens of the Gunnison Basin refer to the water flowing in the Gunnison River and its tributaries as “our water.”
- B. Opposition to the Union Park Project is likely to continue even if Appellants prevail in the Colorado Supreme Court. Prevailing means that there is or may be water available and entitles UPWA to:
 1. Come back to water court to try again to prove how much depending on what the Supreme Court holds; and ultimately
 2. To attempt to prove that there is a substantial probability that they “can

and will” be able to complete the project and put the claimed water to beneficial use within a reasonable time.

- C. If the Union Park Project ever progresses beyond the water availability phase to “Phase II,” the economic, technical and regulatory feasibility of the project will be put to rigorous proof.
- D. Even if the UPWA is successful in getting conditional water rights for the Union Park Project, opposition will continue in the regulatory and land use arenas with vigorous opposition. Many permits and approvals will be required from local, state and federal agencies, for example:
 - 1. Bureau of Reclamation and Uncompahgre Valley Water Users Association’s approval of the use of Taylor Park Reservoir as a forebay for a pumping plant.
 - 2. Use of Taylor Park Reservoir as a forebay is probably a “major operational change” in the reservoir which would require federal approval (possibly an Act of Congress) under the provisions of the Water Supply Act of 1958, 43 U.S.C. § 390b(d).
 - 3. Forest Service Special Use Permits.
 - 4. Corps of Engineers Section 404 permits.
 - 5. Gunnison County permits.
- E. Construction of the project will create major socioeconomic impacts in Gunnison County.
- F. All of the federal permitting processes are subject to public scrutiny and comment through the individual permit regulations as well as through the National Environmental Policy Act (NEPA) review process.
- G. All of the federal permitting processes and the NEPA process are subject to judicial review in the federal courts.
- H. No state legislation authorizing and funding the Union Park Project or a similar project will obviate the federal approvals required.
- I. The feasibility of the project is questionable.
- J. No cost estimates or feasibility studies by engineers and other specialists

competent to deal with water projects of this size and complexity exist.

K. Do the taxpayers and rate payers in Arapahoe County know of or support the Union Park Project?

VI. Conclusion: The Union Park Project has a "long row to hoe."

APPENDIX A

UNITED STATES CODE ANNOTATED TITLE 43. PUBLIC LANDS CHAPTER 12B--COLORADO RIVER STORAGE PROJECT

Current through P.L. 106-20, approved 4-9-99

§ 620f. Powerplant operations.

The hydroelectric powerplants and transmission lines authorized by this chapter to be constructed, operated, and maintained by the Secretary shall be operated in conjunction with other Federal powerplants, present and potential, so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates, but in the exercise of the authority hereby granted he shall not affect or interfere with the operation of the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act [43 U.S.C.A. § 617 *et seq.*], the Boulder Canyon Project Adjustment Act [43 U.S.C.A. § 618 *et seq.*], and any contract lawfully entered into under said Compacts and Acts. Subject to the provisions of the Colorado River Compact, neither the impounding nor the use of water for the generation of power and energy at the plants of the Colorado River storage project shall preclude or impair the appropriation of water for domestic or agricultural purposes pursuant to applicable State law.

APPENDIX B

UNITED STATES CODE ANNOTATED TITLE 43. PUBLIC LANDS CHAPTER 12B--COLORADO RIVER STORAGE PROJECT

Current through P.L. 105-4, approved 3-3-97

§ 620b. Congressional intent; additional undesignated projects not precluded; construction not authorized within national park or monument

It is not the intention of Congress, in authorizing only those projects designated in section 620 of this title, and in authorizing priority in planning only those additional projects designated in section 620a of this title, to limit, restrict, or otherwise interfere with such comprehensive development as will provide for the consumptive use by States of the Upper Colorado River Basin of waters, the use of which is apportioned to the Upper Colorado River Basin by the Colorado River Compact and to each State thereof by the Upper Colorado River Basin Compact, nor to preclude consideration and authorization by the Congress of additional projects under the allocations in the compacts as additional needs are indicated. It is the intention of Congress that no dam or reservoir constructed under the authorization of this chapter shall be within any national park or monument.