

DISTRICT COURT,
WATER DIVISION 4, COLORADO
1200 N. Grand Avenue, Bin A
Montrose, CO 81401

**CONCERNING THE APPLICATION FOR
WATER RIGHTS OF UPPER GUNNISON
RIVER WATER CONSERVANCY
DISTRICT AND THE COLORADO RIVER
WATER CONSERVATION DISTRICT**

in Gunnison, Saguache, Hinsdale and
Montrose Counties.

Filed in the District Court
Water Division 4

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Water Division 4
▲ COURT USE ONLY ▲

OCT 10 2006

Case Number: 03 CW 263

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RULING OF THE REFEREE AND DECREE**

This matter comes before the Referee upon the application of the Upper Gunnison River Water Conservancy District (Upper Gunnison District) and the Colorado River Water Conservation District (River District) (collectively, the Applicants) for approval of a plan for augmentation. The Referee, having made such investigations as are necessary to determine whether the statements in the application are true, and having become fully advised with respect to the subject matter of the application, hereby enters and makes the following findings of fact, conclusions of law and ruling.

FINDINGS OF FACT

1. The Application was filed on December 22, 2003.
2. Timely Statements of Opposition were filed by Glacier Lily Association, Estess Family Limited Partnership, Dolores G. LaVigne and the Colorado Water Conservation Board. No person or entity sought to intervene. The time for filing statements of opposition and motions to intervene has expired.
3. A response of the Division Engineer, Water Division 4, to consultation with the Referee pursuant to § 37-92-302(4), C.R.S. (2005) was filed with the Referee on October 27, 2004 and was served on all parties of record in this matter on November 10, 2004.

4. The United States, by an Assignment of Water Rights from the River District dated January 26, 1962, is the owner of the following water rights recorded in former Colorado Water Districts 62 and 59 and Water Division 4 in Montrose, Colorado, which were made absolute November 13, 1980 in Case No. 80CW156, Water Division 4:

District 62

Structure	Amount	Priority No.
Crystal Reservoir	160,867 af	445
Crystal Power Plant	3,000 cfs	446
Blue Mesa Reservoir	939,204 af	447
Blue Mesa Power Plant	2,500 cfs	448
Morrow Point Reservoir	114,706 af	449
Morrow Point Power Plant	2,500 cfs	450

District 59

Structure	Amount	Priority No.	Diversion Structure No.
Blue Mesa Reservoir	939,204 af	565	38
Blue Mesa Reservoir	2500 cfs	566	39
Morrow Point Reservoir	114,706 af	567	40
Morrow Point Power Plant	2,500 cfs	568	41

(Aspinall Unit Rights).

5. The Aspinall Unit Rights were decreed to the above-described reservoirs and power plants out of the Gunnison River in Case No. 80CW156 for 940,755 acre-feet with a priority date of November 13, 1957 for domestic and municipal, irrigation and stock watering, industrial, hydropower, piscatorial, wildlife, recreation and other purposes.

6. Dam Locations for the Aspinall Unit Rights.

(a) The initial point of survey for Blue Mesa Dam is located at a point on the right abutment being the intersection of the center line of the axis of the dam and of the center line of the outlet works tunnel, whence the SW corner of Section 31, Township 49 North, Range 4 West, N.M.P.M. bears North $78^{\circ}36'44''$ West a distance of 3,207.07 feet.

(b) The initial point of survey for Morrow Point Dam is located at the intersection of the dam axis and of the centerline of the outlet structure whence the S $\frac{1}{4}$ Corner of Section 5, Township 48 North, Range 6 West, N.M.P.M. bears South $40^{\circ}21'16''$ West a distance of 5,668.18 feet.

(c) The initial point of survey for Crystal Dam is located at a point on the left abutment whence the SW Corner of Section 9, Township 49 North, Range 7 West, N.M.P.M. bears South $83^{\circ}35'23''$ West a distance of 13,338 feet.

7. The Upper Gunnison District, by two certain Assignments of Water Rights from the River District dated January 26, 1962, is the owner of conditional water rights recorded in former Colorado Water Districts 28 and 59 and Water Division 4 in Montrose, Colorado, which are described in detail in the Aspinall Subordination Agreement (Upper Gunnison District Rights).

8. The Applicants entered into an *Agreement for the Administration of Water Pursuant to the Subordination of Wayne N. Aspinall Unit Water Rights Within the Upper Gunnison River Basin* dated June 1, 2000 with the United States and the Colorado State Engineer (Aspinall Subordination Agreement or Subordination Agreement), in which the United States confirmed its subordination of 60,000 acre feet of the Aspinall Unit Rights to water rights with equal or junior priorities which are exercised for beneficial use within the Gunnison River Basin at points upstream of the Crystal Reservoir Dam.

9. The Subordination Agreement formalizes the commitment made by the United States during the planning of the Aspinall Unit to allow depletion of the Aspinall Unit Rights up to 60,000 acre-feet per year by in-basin water users so that construction of the Aspinall Unit would not interfere with future water development in the Upper Gunnison River Basin.

10. Paragraph 15 of the Subordination Agreement requires the Applicants to obtain an appropriate decree to enable the Colorado State Engineer to effectively administer the agreement in accordance with Colorado law. Applicants' proposed plan for augmentation is intended to comply with that requirement.

11. The Applicants propose a plan for augmentation to permit the subordination of the Aspinall Unit Rights to augment the out-of-priority depletions, as against the Aspinall Unit Rights only, of all water rights with priorities junior or equal to the Aspinall Unit Rights that are exercised for beneficial use within the Gunnison River Basin at points upstream of the Crystal Reservoir Dam. The water rights augmented include existing and future water rights exercised for all decreed beneficial purposes within the Gunnison River Basin through any decreed structure or facility.

12. The River District serves as the designated representative of water users benefitting from the Aspinall Subordination Agreement whose out-of-priority depletions occur downstream of Blue Mesa Dam. The Upper Gunnison District serves as the designated representative of water users benefitting from the Aspinall Subordination Agreement whose out-of-priority depletions occur upstream of Blue Mesa Dam.

13. The United States has agreed to subordinate the Aspinall Unit Rights to up to 10,000 acre-feet of annual water depletions in the Gunnison River Basin drainage between Crystal Dam and Morrow Point Dam, and 10,000 acre-feet of such depletions in the drainage between Blue Mesa Dam and Morrow Point Dam to the water users represented by the River District, and to subordinate the Aspinall Unit Rights to up to 40,000 acre-feet of annual water depletions in the drainage above Blue Mesa Dam to the water users represented by the Upper Gunnison District and to the Upper Gunnison District Rights under the conditions described in the Aspinall Subordination Agreement. By subordinating to the rights of such water users, the United States has agreed that such water users may continue to divert when a call is placed on the Gunnison River by the United States under the Aspinall Unit Rights, subject to the limits of the stated subordination in the separate drainages.

14. The United States has also agreed to subordinate the Aspinall Unit Rights to the Upper Gunnison District Rights in an amount sufficient to provide for a diversion of the full decreed amount of the Upper Gunnison District Rights if water is being diverted under the Upper Gunnison District Rights during a time when there exists a shortage of supply such that the Division Engineer is required to apportion the water available for diversion between the Aspinall Unit Rights and the Upper Gunnison District Rights.

15. The plan was formally memorialized on June 1, 2000, by signing the Aspinall Subordination Agreement.

16. Paragraph 8 of the Aspinall Subordination Agreement requires that, within one year after the date of the Agreement, the Applicants provide to the Bureau of Reclamation and to the Colorado State Engineer and Division 4 Engineer an initial Report listing the names of the diversion or storage structures and priority or administration numbers of the diversions which qualify for subordination of Aspinall Unit Rights under the Agreement, together with an estimate of the total amount of annual diversions and an estimate of the total amount of related annual depletions by the listed structures. The estimates of diversions and depletions contained in the Report must be derived from information compiled by the Division 4 Engineer in the ordinary course of his duties.

17. The Applicants requested and received an extension of the one-year reporting deadline. On October 1, 2001, the Applicants provided to the Bureau of Reclamation and to the Colorado State Engineer and Division 4 Engineer an initial Report which complied with the requirements described in paragraph 16 above for the 2000 irrigation year (November 1, 1999 through October 31, 2000) (the 2000 Annual Report).

18. The 2000 Annual Report quantifies the water rights that benefit from the Subordination Agreement during the 2000 irrigation year using the following procedure:

(a) The water rights in the Upper Gunnison River Basin were determined from the water rights tabulation maintained by the Colorado Division of Water Resources (DWR). The tabulation was taken from the Colorado Decision Support System database developed by the DWR. The tabulation report that summarizes the net amount associated with each water right was utilized for the purposes of the report. (The net amount is the net water right amount at a given structure after accounting for transfers between structures and any portion of a water right that was abandoned.) All water rights senior to the Aspinall Unit Rights (administration number 39398.00000) were removed from this list.

(b) The list was then sorted for water rights within the study area which qualify for the subordination of Aspinall Unit Rights under the Subordination Agreement. Next, the Aspinall Unit Rights and any water rights for minimum instream flow or rights for minimum natural lake levels were eliminated from the list. Finally, the conditional water rights that could benefit from the Subordination Agreement, but were not exercised during the 2000 irrigation year, were excluded from the list.

19. The Division Engineer administered the Upper Gunnison Basin as if it were subject to an Aspinall Unit call continuously from November 1, 1999 through October 31, 2000; therefore, all diversions by upstream water rights junior to the Aspinall Unit Rights during that period qualified for the benefits of the Aspinall Subordination Agreement. In the 2000 Annual Report, these diversions were summarized, and the associated depletions were calculated, by the following method and procedures:

(a) The method utilized in the report to determine the diversions and depletions was a function of:

- (i) the structure type;
- (ii) the decreed water right uses; and,
- (iii) the available data.

(b) The procedure used to determine the diversions and depletions for each qualifying water right is described and coded in Table 1 (attached) and is cross-referenced in the column entitled "Method" (column 20) in Appendix A (Column explanation and page 1 of 41 attached). Some water rights have more than one method code because the water right has multiple decreed uses. In these cases, the total diversions and depletions for the right are determined by summing the diversions and depletions associated with each applicable method code shown in the method column. The diversions and depletions calculated using the "codes" shown in the method column are further limited by the decreed water right amounts for those instances where the estimated diversions are greater than the decreed water rights.

(c) The procedures used to determine the diversions and depletions associated with qualifying irrigation water rights was based upon the StateCU computer model developed by the DWR. The diversions for the junior irrigation water rights were taken from the column in the StateCU detailed water budget output file entitled "Diversion by Priority-Junior" and the depletions from the column entitled "Estimated Crop CU-By Water Rights-Junior". The basic engineering assumptions used by the DWR in the StateCU model and supporting data sets were utilized with the exceptions shown in Table 2 (attached). Table 2 also describes the DWR HYDROBASE database version and the StateCU model version utilized in the report.

(d) It should be noted that the StateCU model carries soil moisture storage forward from one year to the next year. The result of this modeling technique is that the consumptive use associated with a given years diversions might not be reported until the following year. For example, water could be diverted in one year and not consumed but placed into soil moisture storage. The soil moisture storage could then be carried forward into the following year and then consumed. In these instances, the diversions would have been reported in the initial year, but the associated consumptive use would not be reported until the following year.

20. Paragraph 9 of the Aspinall Subordination Agreement requires that, following delivery of the initial Report, on or before April 1 of each year, the Applicants shall provide to the Bureau of Reclamation and to the Colorado State Engineer and Division 4 Engineer an Annual Report including an updated listing of the names of the diversion or storage structures and priority or administration numbers of the diversions which qualify for subordination of Aspinall Unit Rights under the Agreement which separately identifies the structures and diversions which have been added to or removed from the listing since the initial Report or previous Annual Report, together with an estimate of the total amount of annual diversions and an estimate of the total amount of related annual depletions by the listed structures. The estimates of diversions and depletions contained in the Annual Report must be derived from information compiled by the Division 4 Engineer in the ordinary course of his duties.

21. On December 18, 2002, the Applicants provided to the Bureau of Reclamation and to the Colorado State Engineer and Division 4 Engineer, an Annual Report that included an updated listing of the names of the diversion or storage structures and priority or administration numbers of

the diversions in the areas represented by the Districts which qualify for subordination of Aspinall Unit Rights under the Subordination Agreement, which separately identified the structures and diversions which were added to or removed from the listing since the 2000 Annual Report (the 2001 Annual Report). The 2001 Annual Report also includes an estimate of the total amount of diversions (in acre-feet) and an estimate of the total amount of related depletions (in acre-feet) by the listed structures made during the 2001 irrigation year (November 1, 2000 through October 31, 2001).

22. On December 22, 2003, the Applicants provided to the Bureau of Reclamation and to the Colorado State Engineer and Division 4 Engineer, an Annual Report that included an updated listing of the names of the diversion or storage structures and priority or administration numbers of the diversions in the areas represented by the Districts which qualify for subordination of Aspinall Unit Rights under the Aspinall Subordination Agreement, which separately identified the structures and diversions which were added to or removed from the listing since the 2001 Annual Report (the 2002 Annual Report). The 2002 Annual Report also includes an estimate of the total amount of diversions (in acre-feet) and an estimate of the total amount of related depletions (in acre-feet) by the listed structures made during the 2002 irrigation year (November 1, 2001 through October 31, 2002).

23. Water rights administration in the Upper Gunnison River Basin during the 2002 irrigation year was significantly different than in the 2000 and 2001 irrigation years because the Gunnison Tunnel formally placed a call on the Gunnison River and the diversions by water rights which qualify for the subordination of the Aspinall Unit Rights under the Subordination Agreement were curtailed as a result of the Gunnison Tunnel call. For the purposes of the 2002 Annual Report, it was estimated that water rights junior to the Aspinall Unit Rights were curtailed as a result of the Gunnison Tunnel call from July 8th until September 27th for a total of 82 days (22% of the year). As a result, in the 2002 irrigation year, the Aspinall Unit Rights were the calling water rights for 283 days (78% of the year). The procedure to determine diversions and depletions by water rights shown in Table 1 in the 2002 Annual Report (attached) is different from the 2000 and 2001 Annual Reports because of the effects of the call from the Gunnison Tunnel.

24. On December 21, 2004, the Applicants provided to the Bureau of Reclamation and to the Colorado State Engineer and Division 4 Engineer, an Annual Report that included an updated listing of the names of the diversion or storage structures and priority or administration numbers of the diversions in the areas represented by the Districts which qualify for subordination of Aspinall Unit Rights under the Aspinall Subordination Agreement, which separately identified the structures and diversions which were added to or removed from the listing since the 2002 Annual Report (the 2003 Annual Report). The 2003 Annual Report also includes an estimate of the total amount of diversions (in acre-feet) and an estimate of the total amount of related depletions (in acre-feet) by the listed structures made during the 2003 irrigation year (November 1, 2002 through October 31, 2003).

25. During the 2003 irrigation year, the Gunnison Tunnel again placed a call on the Gunnison River from July 10th through September 7th for a total of 60 days (16% of the year). As a result, the Aspinall Unit Rights were the calling water rights for 305 days (84% of the year). The procedure to determine diversions and depletions by water rights in the 2003 Annual Report is the same as the 2002 Annual Report, reflecting the effects of the 2003 call from the Gunnison Tunnel.

26. On December 21, 2005, the Applicants provided to the Bureau of Reclamation and to the Colorado State Engineer and Division 4 Engineer, an Annual Report that included an updated listing of the names of the diversion or storage structures and priority or administration numbers of the diversions in the areas represented by the Districts which qualify for subordination of Aspinall Unit Rights under the Aspinall Subordination Agreement, which separately identified the structures and diversions which were added to or removed from the listing since the 2003 Annual Report (the 2004 Annual Report). The 2004 Annual Report also includes an estimate of the total amount of diversions (in acre-feet) and an estimate of the total amount of related depletions (in acre-feet) by the listed structures made during the 2004 irrigation year (November 1, 2003 through October 31, 2004). The total number of water rights included in the 2004 Annual Report which qualify for subordination of Aspinall Unit Rights under the Aspinall Subordination Agreement is 2,481.

27. Paragraph 9 of the Aspinall Subordination Agreement was amended by an Agreement dated January 13, 2006 to require that the Applicants provide the Annual Report by December 31 of the next calendar year following the reporting irrigation year.

28. The locations of the authorized points of diversion and places of use for water rights whose depletions are being augmented by this plan for augmentation have been, and will continue to be, defined in the Annual Reports delivered by the Applicants to Bureau of Reclamation and to the Colorado State Engineer and Division 4 Engineer; provided, however, that the terms of the Aspinall Subordination Agreement and this Decree ultimately define the water rights that qualify for the benefits of the subordination of Aspinall Unit Rights and in the event of a conflict between the Annual Reports and this Decree, this Decree shall control, even if a water right has been omitted from the Annual Report or its depletions have been inaccurately reported therein.

29. In the event that a water right entitled to the benefits of the Aspinall Subordination Agreement under the terms of the Agreement or this Decree is omitted from an Annual Report, or its depletions have been inaccurately reported therein, Applicants shall correct such omission or inaccuracy in the next Annual Report and shall notify the State Engineer and Division 4 Engineer of the correction within a reasonable time after receipt of information supporting the need for such correction.

30. The method and procedures used in the Annual Reports to determine the diversions and depletions for each water right qualifying for subordination of Aspinall Unit Rights under the

Subordination Agreement are consistent with the requirements of the Subordination Agreement and are an appropriate accounting for the Applicants' plan for augmentation. Notwithstanding the foregoing, the parties to the Subordination Agreement may agree to modify or improve the methods and procedures used in the reports, so long as any such modified or improved methods and procedures remain consistent with the requirements of the Subordination Agreement and this Decree.

CONCLUSIONS OF LAW

31. Timely and adequate notice of the pendency of this proceeding *in rem* was given in the manner required by law. This Court has jurisdiction over the subject matter of this proceeding and over all who have standing to appear as parties, whether they have appeared or not.

32. The plan for augmentation proposed by the Applicants is an appropriate decree that will enable the Colorado State Engineer to effectively administer the Aspinall Subordination Agreement in accordance with Colorado law.

33. The United States' acceding to depletions to the Aspinall Unit Rights by in-basin water rights equal or junior in priority to the Aspinall Unit Rights is equivalent to having such junior rights provide replacement water necessary to meet the lawful requirements of the Aspinall Unit Rights at the time and location and to the extent the Aspinall Unit would be deprived of its lawful entitlement by the junior rights' diversions. Thus, the plan for augmentation proposed by the Applicants is sufficient to permit continuation of diversions by in-basin water rights of equal or junior priority when curtailment would otherwise be required to meet a call by the Aspinall Unit Rights.

34. The plan for augmentation proposed by the Applicants, in which the depletion allowance provided by the Aspinall Subordination Agreement serves to augment the out-of-priority depletions, as against the Aspinall Unit Rights only, of all water rights with priorities junior or equal to the Aspinall Unit Rights that are exercised for beneficial use within that portion of the Gunnison River Basin that is located upstream of the Crystal Reservoir Dam will not injuriously affect the owner of or persons entitled to use water under vested water rights or decreed conditional water rights. Therefore, pursuant to §37-92-305(3) C.R.S. (2005), the Applicants are entitled to a decree approving the plan for augmentation described herein.

RULING

IT IS HEREBY RULED AND ORDERED:

35. The foregoing Findings of Fact and Conclusions of Law are incorporated into and form a part of this decree, as if fully set forth herein at this point.

36. The facts alleged in the application are true.

37. The Application for approval of the plan for augmentation described in this decree is APPROVED.

38. The depletions against which the United States foregoes its right to call under the Aspinall Subordination Agreement shall be charged by the Division Engineer against the annual fills of the reservoirs of the Aspinall Unit, or the exercise of the related direct flow hydropower rights (depending on which of the Aspinall Unit Rights are then being exercised) up to the amounts specified in paragraph 13.

39. If water is being diverted under the Upper Gunnison District Rights during a time when there exists a shortage of supply such that the Division Engineer is required, because of identical priority dates, to apportion the water available for diversion between the Aspinall Unit Rights and the Upper Gunnison District Rights, the United States shall subordinate the Aspinall Unit Rights to the Upper Gunnison District Rights in an amount sufficient to provide for a diversion of the full decreed amount of the Upper Gunnison District Rights under which diversions are being made. Proportional depletions attributable to diversions having equal priority to the Aspinall Unit Rights which would otherwise be called out by Aspinall Unit Rights but are made by the Upper Gunnison District Rights pursuant to this paragraph 39 are included within, and not in addition to, subordination of the Aspinall Unit Rights to up to 40,000 acre-feet of annual water depletions in the drainage above Blue Mesa Dam.

40. Water consumptively used under water rights benefitting from the Aspinall Subordination Agreement and used within the Gunnison River Basin through evapotranspiration, reservoir evaporation, irrigation, industrial, domestic and other beneficial uses shall be appropriate uses of the depletion allowance provided by the Aspinall Subordination Agreement. Water that is diverted and ultimately returns to the stream and then is available for use pursuant to the Aspinall Unit Rights shall not be considered a depletion and, therefore, not a use of the depletion allowance.

41. Water rights used in the Upper Gunnison River Basin that do not cause a depletion to the stream system because their actual and decreed beneficial use is non-consumptive (for example, and without limitation, non-consumptive pass through charged to the refill right decreed in Case No. 86CW203, minimum instream flow rights held by the Colorado Water Conservation Board, recreational in-channel diversions, and the water rights adjudicated in Case Nos. W-1441, W-1446, W-1985, W-1986, W-1987, W-1991, W-1992, W-2692, and W-2700), are entitled to place a call as against junior upstream consumptive rights, including junior upstream consumptive rights that benefit from the Aspinall Subordination Agreement. See *Colorado Water Conservation Board v. City of Central*, 125 P.3d 424 (Colo. 2005).

42. Subordination of Aspinall Unit Rights pursuant to the Aspinall Subordination Agreement shall be applicable only to water rights with priorities junior or equal to the Aspinall Unit Rights which are exercised for beneficial use within the Upper Gunnison River Basin, and shall not

in any way be construed as affecting the relationship or relative priorities of any of those rights or other water rights within the Basin.

43. All water rights that qualify for the benefits of the Aspinall Subordination Agreement shall be deemed to be exercising their own adjudicated priorities, including appropriative rights of exchange and water rights that divert pursuant to a decreed plan for augmentation, for the purpose of their administration relative to water rights and appropriations other than the Aspinall Unit Rights. The plan for augmentation decreed herein does not provide for the replacement of out-of-priority depletions of such water rights as against any water rights other than the Aspinall Unit Rights.

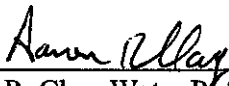
44. The estimates of diversions and related depletions for the structures listed in the Annual Reports are prepared solely for the purpose of accounting for the depletion allowance according to the terms of the Aspinall Subordination Agreement and shall not affect the amount of diversions or depletions that may lawfully be made by such structures under the water rights decreed thereto.

45. The Applicants shall notify this Court of any change in mailing address.

46. This decree shall be filed with the water clerk and a copy shall be filed with the State Engineer and Division Engineer, Water Division No. 4.

47. Pursuant to § 37-92-304(6), C.R.S. (2005), this court retains jurisdiction over this application for reconsideration of the question of injury to the vested rights of others for a period of three years from and after the date that this ruling becomes the decree of this court.

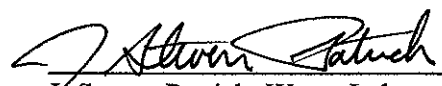
Dated this 18 day of Sept, 2006.



Aaron R. Clay, Water Referee

No protest was filed to this matter. The foregoing ruling is confirmed and approved and is made the Judgment and Decree of this Court.

Dated this 10th day of October, 2006.



J. Steven Patrick, Water Judge