

District Court Water Division No. 4 Colorado Court Address: Montrose Combined Court 1200 N. Grand Ave. Montrose, CO 81401	Filed in the District Court Water Division <i>4</i> JAN 08 2009  <b>COURT USE ONLY</b>
<b>CONCERNING THE APPLICATION FOR WATER RIGHTS OF:          THE UNITED STATES OF AMERICA</b>  <b>IN MONTROSE COUNTY.</b>	Case Number: 01 CW 05  Division 4 Courtroom 2
Attorney (Name and Address): David W. Gehlert U.S. Department of Justice Environment & Natural Resources Div. 1961 Stout St., Eighth Floor Denver, CO 80294  Phone Number: (303) 844-1386 E-mail: david.gehlert@usdoj.gov FAX Number: (303) 844-1350	
<b>DECREE QUANTIFYING THE FEDERAL RESERVED WATER RIGHT          FOR BLACK CANYON OF THE GUNNISON NATIONAL PARK</b>	

THIS MATTER comes before the Court for entry of Findings of Fact, Conclusions of Law and Decree on the application for reserved water rights at Black Canyon of the Gunnison National Park. The Court, being fully and sufficiently advised in the premises, hereby makes the following Findings of Fact, Conclusions of Law and Decree.

## FINDINGS OF FACT

1. A properly verified Application was filed in this matter by the United States of America on January 18, 2001. Timely and adequate notice of the Application was given in the manner provided by statute. See C.R.S. § 37-92-302 (2007).
2. The time for filing Statements of Opposition and for seeking leave to intervene has expired.
3. Statements of opposition were filed in this case by the parties listed in **Attachment A** to this decree.
4. Statements of opposition filed by the parties listed in **Attachment B** were withdrawn, subject to review of the final decree by said parties. The parties who signed stipulations for withdrawal have been provided the opportunity to review the final decree and have presented no objections. Parties who did not sign the stipulations have had an opportunity to review the final decree and to participate in this proceeding.
5. The parties listed in **Attachment C** participated in the negotiation of this decree and have approved its content. All parties to this case have had the opportunity to review this decree and have presented no objections.
6. This proceeding has been undertaken to quantify the federal reserved water right for Black Canyon of the Gunnison National Monument recognized in Partial Master-Referee Report Covering All of the Claims of the United States of America, slip op. (Aug. 6, 1976) adopted in relevant part as Findings, Conclusions and Order of the Court With Reference to the Partial Master-Referee's Report Covering All of the Claims of the United States of America and the Proposed Interlocutory Decree (Colo. Dist. Ct., March 6, 1978 and October 2, 1978 Order) ("1978 Decree"). The purposes of the water right were determined in the 1978 Decree, which was appealed in *United States v. Denver*, 656 P.2d 1 (Colo. 1982).
7. *Black Canyon of the Gunnison National Monument* was established by a Presidential Proclamation on March 2, 1933, "for the preservation of the spectacular gorges and additional features of scenic, scientific, and educational interest . . . subject to all valid existing rights." Proclamation No. 2033, 47 Stat. 2558 (March 2, 1933) ("the Proclamation"). The Proclamation was issued pursuant to the Antiquities Act of 1906 which authorizes the President to establish national monuments to protect "objects of historic or scientific interest that are situated on lands owned or controlled by the Government of the United States." 16 U.S.C. § 431.

8. The Proclamation provides that "The Director of the National Park Service, under direction of the Secretary of the Interior, shall have the supervision, management, and control of [the] monument as provided in the act of Congress entitled 'AN ACT to establish a National Park Service, and for other purposes,' approved August 25, 1916 (39 Stat. 535-36), and acts additional thereto or amendatory thereof." The Department of the Interior reorganization plan no. 3 of 1950, 64 Stat. 1262, allows the Secretary to authorize any officer, agency or employee of the Department of the Interior to perform any function of the Secretary.

9. The Monument was subsequently expanded by two Presidential proclamations. Proclamation No. 2286, 52 Stat. 1548 (May 16, 1938); Proclamation No. 2372, 54 Stat. 2669 (Oct. 28, 1939). Certain lands were excluded in 1960. Proclamation 3344 (April 8, 1960). Congress further revised the boundaries in 1984. Pub.L. 98-357, 98 Stat. 297 (July 13, 1984).

10. Black Canyon of the Gunnison National Monument was made a National Park through the Black Canyon of the Gunnison National Park and Gunnison Gorge National Conservation Area Act of 1999, codified at 16 U.S.C. § 410fff-410fff-10 ("the 1999 Black Canyon Act"). In this Decree, Black Canyon of the Gunnison National Park as well as the predecessor National Monument, will be referred to as "the Park." The boundaries of the Park are shown in **Attachment D**, the map attached hereto and made a part, hereof.

11. On January 18, 2001, the United States filed a Quantification of Reserved Right for Black Canyon of the Gunnison National Park in the Form of an Application to Make Absolute a Conditional Water Right ("Application"). The Application sought this Court's approval of a quantification of the federal reserved water right in the Gunnison River for the Park which included three basic elements: a base flow of 300 c.f.s. applicable throughout the year, a peak flow to be provided between May 1 and June 30 and shoulder flows to be provided between May 1 and July 25. The specific quantity of water claimed for the peak and shoulder flows varied depending on the "the total forecasted unregulated inflow into Blue Mesa Reservoir as of May 1 for the period from April 1 through July 31."

12. Consistent with the requirements of the 1978 Decree, the Application included an attachment which explained the need for the water claimed in terms understandable to the lay public.

13. The Application also included a paragraph explaining that "the United States recognizes that exercising the right to peak flows described in this claim will require careful consideration of numerous factors, including the structural capacity of upstream dams and potential downstream flooding, among other river management issues. Therefore, the Secretary of the Interior will confer with the State of Colorado, the National Park Service, the Bureau of Reclamation, the Western Area Power Administration, the Fish and Wildlife Service and other affected interests in order to ensure that operational decisions to exercise this right are in accord with the best available information and with full consideration of the river management issues noted."

14. The Wayne N. Aspinall Unit of the Colorado River Storage Project ("Aspinall Unit") is a federal reclamation project located approximately two miles upstream of the Park. The Aspinall Unit, originally known as the Curecanti Unit, was authorized by the Colorado River Storage Project Act of 1956 ("CRSPA") 70 Stat. 105 (1956), 43 U.S.C. § 620 et seq. The Aspinall Unit consists of Blue Mesa Dam and Reservoir, Morrow Point Dam and Reservoir and Crystal Dam and Reservoir and is governed by applicable law.

15. Water rights were decreed to the reservoirs and power plants of the Aspinall Unit in Civil Action No. 5590, old Water District 59; Civil Action 5782, old Water District 59; and Civil Action 6981, old Water District 62. The decrees in Civil Action numbers 6981 and 5590 were originally prosecuted by the Colorado River Water Conservation District and assigned to the United States by an Assignment of Water Rights dated January 26, 1962 subject to the terms of said assignment. The decrees were issued for the following beneficial purposes: domestic and municipal, irrigation and stock watering, industrial, development of electrical energy, flood control, piscatorial, wildlife protection and preservation and recreational purposes. Although the decrees provide different and successive priority numbers to the individual features of the various units, each and every unit was declared to be of equal priority and each was awarded the priority date of November 13, 1957.

16. On December 11, 1980, in Case No. 80CW156, the Water Court in and for Water Division 4 entered absolute decrees for the Aspinall Unit as follows:

Crystal Reservoir	30,000 acre-feet
Crystal Power Plant	3,000 c.f.s.
Blue Mesa Reservoir	940,755 acre-feet
(Refill decree for Blue Mesa Reservoir)	122,702 acre-feet
Blue Mesa Power Plant	2,500 c.f.s (originally 3,500 c.f.s.)
Morrow Point Reservoir	119,053 acre-feet
Morrow Point Power Plant	5,450 c.f.s.

17. The United States has been using the full amount of water adjudicated to the Aspinall Unit to capture the flows of the Gunnison River in priority.

18. The water right decreed herein fulfills the purposes of the federal reserved water right for Black Canyon of the Gunnison National Park.

#### CONCLUSIONS OF LAW

19. The Court incorporates the Findings of Fact set forth above to the extent they constitute Conclusions of Law.

20. The Application herein is one contemplated by law, and this Court has jurisdiction over the subject matter of this proceeding.

21. The United States has been joined to this proceeding pursuant to the McCarran Amendment, 43 U.S.C. § 666.

22. Timely and adequate notice of the filing and of the contents of the Application herein was given in the manner provided by law. The Court has jurisdiction over all persons and owners of property, including water rights, affected hereby, irrespective of whether or not those persons and owners of property have appeared. See C.R.S. § 37-92-302 (2007).

23. Under the Federal reserved water rights doctrine, and as previously determined by this Court in the 1978 Decree, the United States has reserved instream flow water rights in the Gunnison River within the boundaries of the Park with a priority date of March 2, 1933, to fulfill the purposes of the Park. *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978); *United States v. Denver*, 656 P. 2d 1 (Colo. 1982).

24. The Monument's designation as a National Park neither constituted an express or implied reservation of water for any purpose; nor affected any water rights in existence prior to October 21, 1999, including any water rights held by the United States. The Black Canyon of the Gunnison National Park and Gunnison Gorge National Conservation Area Act of 1999, 16 U.S.C. § 410fff-8(a).

25. The streamflows specified in Paragraph 31.5 of this decree are the result of a negotiated resolution of this case. In order to implement the accommodation of the parties and efficiently allow the streamflow patterns contemplated by Paragraph 31.5, the use of the Aspinall Unit, including its storage and release capacity, may be needed in some years. Such operation of the Aspinall Unit in conjunction with the exercise of the water right decreed herein, is within the scope of the Aspinall Unit's federally authorized purposes and its Colorado Water Court decrees.

26. Nothing in this decree modifies the Aspinall Unit water rights or the federally authorized purposes of the Unit in any way.

27. The United States has demonstrated its entitlement to this decree as a matter of law.

#### **JUDGMENT AND DECREE**

28. The Findings of Fact and Conclusions of Law contained herein are incorporated by reference and made a part of this Decree.

29. This Judgment and Decree constitutes the final adjudication of all claims of the United States for reserved water rights in the mainstem of the Gunnison River for Black Canyon of the Gunnison National Park.

30. Definitions. As used in this decree:

30.1 "Forecasted Inflow" means the **May 1** forecast for the Gunnison River Basin issued by the Colorado Basin River Forecast Center or successor agency, and used by the Bureau of Reclamation for forecasts, of the most probable (50% chance of exceedance) unregulated April 1 through July 31 inflow to Blue Mesa Reservoir. After consultation with the Colorado State Engineer and the Colorado River Water Conservation District, the United States may adopt a different forecast which uses the best scientifically accepted techniques to predict unregulated inflow to Blue Mesa Reservoir, or change the date of the forecast if the timing of peak runoff in the Upper Gunnison Basin changes significantly on a consistent basis.

30.2. Forecasted Inflow to Blue Mesa Reservoir shall be used in Paragraph 32.3 to define year categories as follows:

30.2.1. Dry Year: A year in which the Forecasted Inflow is less than 381,000 acre-feet. This value was defined by a 90% probability of exceedance during the period of record.

30.2.2 Moderately Dry Year: A year in which the Forecasted Inflow is greater than or equal to 381,000 acre-feet but less than 561,000 acre-feet. This value was defined by a 90 to 70% probability of exceedance during the period of record.

30.2.3 Average Dry Year: A year in which the Forecasted Inflow is greater than or equal to 561,000 acre-feet but less than 709,000 acre-feet. This value was defined by a 70 to 50% probability of exceedance during the period of record.

30.2.4 Average Wet Year: A year in which the Forecasted Inflow is greater than or equal to 709,000 acre-feet but less than 871,000 acre-feet. This value was defined by a 50 to 30% probability of exceedance during the period of record.

30.2.5 Moderately Wet Year: A year in which the Forecasted Inflow is greater than or equal to 871,000 acre-feet but less than 1,123,000 acre-feet. This value was defined by a 30 to 10% probability of exceedance during the period of record.

30.2.6 Wet Year: A year in which the Forecasted Inflow is greater than or equal to 1,123,000 acre-feet. This value was defined by a 10% probability of exceedance during the period of record.

30.2.7 The period of record used in the above definitions was 1937 through 1997.

30.2.8 For the purposes of this decree the definitions of this Paragraph 30.2 will not change.

31. Description of the reserved right:

31.1 **Place of Use:** The Gunnison River on lands reserved by Presidential Proclamation on March 2, 1933. (See **Attachment E** for legal description)

31.2 **Source:** Gunnison River

31.3 **Administrative Priority Date:** Antedated to March 2, 1933

31.4 **Purpose of Use:** To fulfill the purposes of the Park as determined in the 1978 Decree, for the instream flow reserved rights herein quantified; the 1978 Decree was appealed in *United States v. Denver*, 656 P.2d 1 (Colo. 1982).

31.5 **Amount:** The amount of water, expressed in cubic feet per second ("c.f.s.") as measured at the Gunnison River below Gunnison Tunnel gage (No. 09128000) reserved to the United States as a direct flow water right for the benefit of the Park is as follows:

31.5.1 During the period January 1 through December 31, the greater of 300 c.f.s. or the quantity set by Paragraphs 31.5.2 or 31.5.3.

31.5.2 During the period May 1 through June 30, one annual Peak Flow of twenty-four hours duration with a mean daily flow in an amount defined by the following formulae:

31.5.2.1 If Forecasted Inflow is 372,000 acre-feet or less, the Peak Flow shall be 482.95 c.f.s. plus 1.44 times the Forecasted Inflow number divided by 1,000, expressed as c.f.s. (By way of illustration, if the Forecasted Inflow for a given year is 100,000 acre-feet, the Peak Flow for that year is  $482.95 + (100,000/1,000) \times 1.44 = 626.95$  c.f.s.).

31.5.2.2 If the Forecasted Inflow is more than 372,000 acre-feet but not more than 715,000 acre-feet, the Peak Flow shall be 15.24 times the Forecasted Inflow number divided by 1,000, expressed as c.f.s., minus 4,651.66 c.f.s. (By way of illustration, if the Forecasted Inflow for a given year is 600,000 acre-feet, the Peak Flow for that year is  $(600,000/1,000) \times 15.24 - 4,651.66 = 4,492.34$  c.f.s.).

31.5.2.3 If the Forecasted Inflow is more than 715,000 acre-feet but not more than 925,000 acre-feet, the Peak Flow shall be 5,449.13 c.f.s. plus 1.15 times the Forecasted Inflow number divided by 1,000, expressed as c.f.s. (By way of illustration, if the Forecasted Inflow for a given year is 800,000 acre-feet, the Peak Flow for that year is  $5,449.13 + (800,000/1,000) \times 1.15 = 6,369.13$  c.f.s.).

31.5.2.4 If the Forecasted Inflow is more than 925,000 acre-feet but not more than 1,001,000 acre-feet, the Peak Flow shall be 14.57 times the Forecasted Inflow number divided by 1,000, expressed as c.f.s., minus 6975.28 c.f.s. (By way of illustration, if the Forecasted Inflow for a given year is 975,000 acre-feet, the Peak Flow for that year is  $(975,000/1,000) \times 14.57 - 6975.28 = 7,230.47$  c.f.s.).

31.5.2.5 If the Forecasted Inflow is more than 1,001,000 acre-feet but not more than 1,050,000 acre-feet, the Peak Flow shall be 70.40 times the Forecasted Inflow number divided by 1,000, expressed as c.f.s., minus 62886.00 c.f.s. (By way of illustration, if the Forecasted Inflow for a given year is 1,025,000 acre-feet, the Peak Flow for that year is  $(1,025,000/1,000) \times 70.40 - 62886.00 = 9,274.00$  c.f.s.).

31.5.2.6 If the Forecasted Inflow is more than 1,050,000 acre-feet, the Peak Flow shall be 10.68 times the Forecasted Inflow number divided by 1,000, expressed as c.f.s., minus 180.00 c.f.s. (By way of illustration, if the Forecasted Inflow for a given year is 1,100,000 acre-feet, the Peak Flow for that year is  $(1,100,000/1,000) \times 10.68 - 180.00 = 11,568$  c.f.s.).

31.5.2.7 The calculations in Paragraphs 31.5.2.1 through 31.5.2.6 are shown in graphic form in **Attachment F**.

31.5.2.8 The Secretary shall exercise the Peak Flow component of the water right decreed herein, including any operation of the Aspinall Unit necessary to exercise the Peak Flow component of the water right, with due regard to the efficient use of water.

31.5.3 During the period of May 1 through July 25 and when Paragraph 31.5.2 is not applicable, the streamflow reserved is the quantity set by paragraphs 31.5.3.1 through 31.5.3.4.

31.5.3.1 If the Forecasted Inflow is 561,000 acre-feet or less, or the drought recovery provisions of Paragraph 32.3 are applicable, the flow for the period shall be 300 c.f.s.

31.5.3.2 If the Forecasted Inflow is more than 561,000 acre-feet but not more than 690,000 acre-feet, the flow for the period shall be 2.692 times the Forecasted Inflow number divided by 1,000, expressed as c.f.s, minus 1207.69 c.f.s (By way of illustration, if the Forecasted Inflow for a given year is 600,000 acre-feet, the flow is  $(600,000/1,000) \times 2.692 - 1207.69 = 407.51$  c.f.s.).

31.5.3.3 If the Forecasted Inflow is more than 690,000 acre-feet but not more than 1,000,000 acre-feet, the flow for the period shall be 1.129 times the Forecasted Inflow number divided by 1,000, expressed as c.f.s, minus 129 c.f.s (By way of illustration, if the Forecasted Inflow for a given year is 800,000 acre-feet, the flow is  $(800,000/1,000) \times 1.129 - 129 = 774.2$  c.f.s.).

31.5.3.4 If the Forecasted Inflow is more than 1,000,000 acre-feet, the flow for the period shall be 1000 c.f.s.

31.5.4 The Secretary of the Interior's exercise of this water right is subject to the Secretary's discretion and obligations as defined by applicable law, and the Terms and Conditions set forth in Paragraph 32.

32. Terms and Conditions:

32.1 Reclamation Projects

32.1.1 This decree shall not be exercised to affect operations under the Taylor Park Operation and Storage Exchange Agreement dated August 28, 1975 (Reclamation Contract No. 6-07-01-00027), as supplemented by the Agreement dated April 16, 1990 and Assignment of Water Rights dated March 22, 1993; the Uncompahgre Project's Gunnison Tunnel; the Uncompahgre Project's water stored in Blue Mesa Reservoir and the Dallas Creek Project's Ridgway Reservoir Exchange.

32.2 Prevention of flooding

32.2.1 The magnitude, duration and frequency of high flows through the Park is generally a function of the natural runoff pattern and the operation of the Aspinall Unit. There are unusually wet years in the historical record, however, in which the runoff cannot be, and has not been, completely controlled by the Aspinall Unit in a manner sufficient to prevent downstream flooding.

32.2.2 In order to minimize downstream flooding: (1) the United States shall continue to operate the Aspinall Unit to give the highest priority to flood control, subject to the need to release water in order to maintain the safety and integrity of the Aspinall Unit structures; and (2) this decree shall not be exercised to supersede flood control operations. This provision is intended to protect human health and safety and prevent the loss of property located along the Gunnison River downstream from the Park, including particularly, but without limitation, property in and the inhabitants of Delta County.

32.3 Drought recovery provisions.

32.3.1 In any year classified as Average Dry or Moderately Dry which (1) follows a Dry year or two consecutive years classified as Dry and/or Moderately Dry Years, and (2) in which in the prior year Blue Mesa Reservoir live storage content was at or below 550,000 acre-feet on December 31, the Aspinall Unit shall be allowed to store and retain in storage until later released downstream, the volume of water that is the difference between the Peak Flow determined under Paragraph 31.5.2 and the peak flow obtained by multiplying the streamflow value determined under Paragraph 31.5.2 by the following formula:

$$\frac{[(\text{Actual Apr. through July BM inflow in previous year}) + (\text{May 1 Forecast for Apr. through July BM inflow in current year})]}{[(\text{Max. possible April through July BM Inflow in the previous year category}) + (\text{Max. possible Apr. through July BM inflow in current year category})]}$$

32.3.2 Provided, that as against all water rights other than the Aspinall Unit water rights, the Park's Water Right shall be administered on the basis of the streamflow determined under Paragraph 31.5.

32.3.3 This Court finds that the United States' forbearance of its right to call the full streamflow amounts as against the Aspinall Unit water rights under the conditions of this paragraph is not a selective subordination.

32.4 Fisheries and Endangered Species Act requirements.

32.4.1 The Secretary's exercise of this water right shall be with due regard for the fishery within the Gunnison River. The Secretary shall consult with the Colorado Division of Wildlife regarding the exercise of this right consistent with this decree.

32.4.2 Contemporaneous with the negotiated resolution of this decree, the United States has been engaged in analysis pursuant to the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA") regarding operation of the Aspinall Unit pursuant to the Endangered Species Act, and anticipates that the Secretary will issue a Record of Decision ("ROD").

32.4.3 The Secretary's exercise of this water right shall be with due regard for, and shall be coordinated with, requirements of the Endangered Species Act.

32.4.4 To the extent practicable, this right shall be exercised so that the timing of the Peak Flow is coordinated with releases made pursuant to the ROD to achieve a single peak flow, subject to 32.2.2. It may be necessary in some years to de-synchronize the Peak Flow from the peak runoff of the North Fork of the Gunnison River to reduce the potential for downstream flooding.

32.4.5 The Court shall exercise limited continuing jurisdiction in this case as set forth in this paragraph. The Court's continuing jurisdiction may be invoked only (1) upon a motion filed by a party to this case pursuant to C.R.C.P. 60(b)(5) no later than 90 days following issuance of a ROD, and (2) only if such motion asserts, and the Court finds, that, due to the provisions of the decree herein: the ROD does not include the implementation of a Programmatic Biological Opinion that (a) covers existing depletions in the Gunnison River Basin from federal and non-federal water uses plus reasonably foreseeable future in-basin depletions of approximately 45,000 acre-feet (the future in-basin depletions are anticipated to be 22,200 acre-feet in the Gunnison River Basin above Crystal Reservoir, 4,000 acre-feet in the North Fork Gunnison River Basin, and 17,000 acre-feet in the Uncompahgre River Basin); and (b) contains a finding of no jeopardy to the listed species and a finding of no adverse modification of critical habitat, or contains a reasonable and prudent alternative to offset identified impacts. Upon invocation of the Court's continuing jurisdiction, the Court may award such relief as it deems appropriate. The description of the ROD and its contents apply only to the provisions of this paragraph. This paragraph does not limit the Secretary's discretion in formulating the ROD.

### 32.5 Agreements governing implementation of the water right

32.5.1 The United States shall subordinate the Black Canyon Right to all water rights with adjudicated priorities that are senior to the Aspinall Unit Rights. The Black Canyon Right is subordinated by this paragraph to all water rights assigned an administration number less than 39398.00000 in the tabulation of water rights for Water Division 4 dated July 1, 2006 (the "Senior Rights").

32.5.2 In determining whether a future change in the place of use of a Senior Right from within the Upper Gunnison River Basin to outside of the Basin, or a future change of a Senior Right that would facilitate the use of any other Upper Gunnison River Basin water right outside of the Basin, would injuriously affect other water rights under § 37-92-305(3), C.R.S. (2006) and in imposing terms and conditions to prevent injury under § 37-92-305(4)(a), C.R.S. (2006) the referee or water judge shall evaluate the historical use of that Senior Right without the benefit of the subordination described in Paragraph 32.5.1 above. The State and Division Engineers shall not be required to file a statement of opposition or otherwise appear in a change of water right case for the purpose of enforcing the terms of this paragraph.

32.5.3. The Aspinall Subordination Agreement as decreed in Case No. 03CW263, Water Division 4, represents an existing, non-discretionary commitment by the United States to operate the Aspinall Unit so as to allow the depletions authorized in Case No. 03CW263 to the Gunnison River in the drainages above Crystal Dam, Morrow Point Dam, and Blue Mesa Dam. In furtherance of this existing commitment, the depletions to the Gunnison River that are authorized by the Aspinall Subordination Agreement shall be entitled to continue when a call is placed on the Gunnison River by the United States under the Black Canyon Right, subject to the separate drainage limitations set forth in the Agreement. This Court finds that the United States' forbearance of its right to call specifically noted above is not a selective subordination because (1) doing so gives effect to the commitment made by the United States in the Aspinall Subordination Agreement as recognized by the Colorado Supreme Court in *Board of County Commissioners of the County of Arapahoe v. Crystal Creek Homeowners Association*, 14 P. 3d 325 (Colo. 2000); and (2) in administering this decree, as a matter of state law, the State and Division Engineers shall continue to account for up to 60,000 acre-feet of water that is necessary to implement the augmentation plan that is the subject of the decree in Case No. 03CW263, Water Division 4, as the first 60,000 acre-feet of water attributable to the Aspinall Unit Water Rights, regardless of the temporal relationship between the depletions that benefit from the decree in Case No. 03CW263 and the call for water by the Black Canyon Right.

32.5.4. Some Parties have interpreted the tabulation of water rights for Water Division 4, dated July 1, 2006, to assign administrative number 39398 to individual plans for augmentation. For the purposes of this Decree, any attribution of an administrative number to individual plans for augmentation in the Water Division 4 Tabulation dated July, 1 2006, or any future tabulation, does not assign an administrative priority to the plan for augmentation. For the purposes of this Decree, any such attribution is purely for reference to the water right used for replacement purposes in the augmentation plan, and such attribution is not intended to assign an administrative priority to a plan for augmentation nor to the actual water right or water use that is augmented. Accordingly, any such attribution of administrative numbers shall not affect whether the water right or water use is entitled to the protections of Paragraphs 32.5.1, 32.5.2, or 32.5.3 of this Decree.

32.5.5. The provisions of Paragraphs 32.5.1, 32.5.2, 32.5.3, and 32.5.4 of this Decree do not include a selective subordination and therefore nothing in these provisions is intended to require the State and Division Engineers to administer a selective subordination. Nothing in this Decree constitutes any admission by any party as to the legality of selective subordination, or shall be used as precedent in any other case regarding any party's position on selective subordination.

32.5.6. In the event that the subordination of the Black Canyon Right in paragraphs 32.5.1 and 32.5.3 are deemed unenforceable for any reason, then no subordination pursuant to the unenforceable provisions shall occur. In that event, if administration of a call on the Gunnison River by the Black Canyon Right would result in curtailment in whole or part of a water right which would have been permitted to divert water as a result of the subordination in paragraphs 32.5.1 or 32.5.3, water shall be released without charge from the Aspinall Unit to the extent necessary to replace depletions sufficient to permit diversions by said water right in amounts that would have been permitted under the subordination. This paragraph does not change any water rights of the Aspinall Unit or decree a plan for augmentation or exchange.

33. This Decree was entered pursuant to agreement of the parties to address their interests and concerns and resolves them finally in this matter. However, because the issues decided herein have not been litigated by the parties, the parties shall not be collaterally estopped from asserting any factual and/or legal issues in any other cases not involving these water rights. This Decree shall not be used, considered, or cited as precedent in any other case except and only to the extent that the rights decreed herein are at issue.

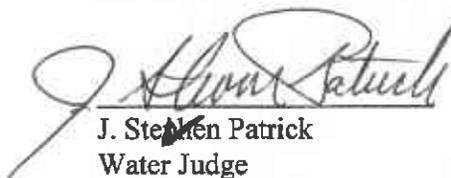
34. The reserved water right decreed herein is subject to, and capable of, administration by the Colorado State Engineer. The United States shall keep such records as the Division Engineer may request for administration of this water right.

35. The water clerk shall serve a copy of this Decree upon the parties, the Division Engineer, Water Division No. 4, and the State Engineer.

36. The Court shall exercise limited continuing jurisdiction over this Decree solely as specified in Paragraph 32.4.5.

Done this 8 day of January, 2009, *nunc pro tunc 12/31/08*

BY THE COURT:

  
J. Stephen Patrick  
Water Judge

E-filed A Copy of this Document to  
all parties in this case.

Dated 12/31/08  
*Dale Cooper*  
Water Clerk