

WCN-SMcCall
ENV-6.00

To: Interested Individuals, Organizations, and Agencies

Subject: Final Environmental Assessment (EA) on an Agreement Concerning the Administration of Water Pursuant to the Subordination of Wayne N. Aspinall Unit Water Rights within the Upper Gunnison River Basin

Enclosed for your information is the subject final EA. The Agreement discussed in the EA is designed to formalize a long-standing commitment of the United States to allow junior water users within the natural basin of the Gunnison River to develop up to 60,000 acre-feet without interference from the Aspinall Unit in western Colorado.

The final EA has been prepared based on comments received on the draft which was released in December 1999. Reclamation intends to prepare a Finding of No Significant Impact (FONSI) on the Agreement based on the EA and comments received. A draft of the FONSI is also attached.

If you have questions, please call Steve McCall at 970-248-0638.

Sincerely,

Carol DeAngelis
Area Manager

Enclosure

bc:w/encl
Regional Director, Salt Lake City, UT
Attention: UC-700

Regional Solicitors Office, Salt Lake City, UT
Attention: Scott Loveless

Curecanti Field Division
Attention: Don Phillips

WCN-JWright, CDeAngelis, KOzga, EWarner, BUilenberg, SMoyer

(Draft)

United States Department of the Interior
Bureau of Reclamation
Western Colorado Area Office

FINDING OF NO SIGNIFICANT IMPACT
SIGNING OF AN AGREEMENT CONCERNING THE ADMINISTRATION OF WATER
PURSUANT TO THE SUBORDINATION OF WAYNE N. ASPINALL UNIT WATER
RIGHTS WITHIN THE UPPER GUNNISON RIVER BASIN

In accordance with the National Environmental Policy Act of 1969, as amended, and based on the following, the Bureau of Reclamation (Reclamation) has determined that the approval of the subject Agreement concerning administration of water of the Wayne N. Aspinall Unit (Aspinall Unit) will not result in a significant impact on the human environment.

Reclamation constructed the Aspinall Unit in the 1960's and 1970's on the Gunnison River in west central Colorado under the authority of the Colorado River Storage Project Act of April 11, 1956 (Act). The purposes of the Act include regulating flows of the Colorado River to permit the Upper Colorado River Basin States to more fully utilize their allocation of Colorado River water as set forth in the Upper Colorado River Basin Compact. During planning for the Aspinall Unit, there were concerns in Colorado that water rights for the Aspinall Unit would preclude future upstream water developments and uses in the Gunnison Basin. To address these concerns, Reclamation's policy since the early 1960's has been to allow junior water users within the natural basin of the Gunnison River to develop up to 60,000 acre-feet of water without interference from the Aspinall Unit.

A written Agreement is needed to formalize this long-standing commitment implementing the depletion allowance that was made by the United States prior to construction of the Aspinall Unit. Purposes of the Agreement include providing a method of accounting for depletions in the Upper Gunnison Basin and protecting Aspinall Unit water rights and purposes. The proposed action is to execute the Agreement. The alternative of no-action would result in the continuation of the policy to allow junior water users within the basin to develop up to 60,000 acre-feet of water without formalizing past commitments and without a plan on how to manage, track, record, and account for water depletions.

The proposed Agreement includes the following:

- the depletion allowance (up to 60,000 acre-feet) for the Aspinall Unit shall be implemented only pursuant to the Agreement;
- the United States agrees to subordinate the Aspinall Unit's water rights up to 60,000 acre-feet; by subordinating to the junior water rights in the basin upstream, the United States agrees that such in-basin water users may continue to divert when the United States places a call on the Gunnison River under the Aspinall Unit's water rights;
- the depletions against which the United States foregoes its right to call under this

Agreement, shall be charged by the Colorado State Engineer against the annual fills of the Aspinall Unit reservoirs, and/or the exercise of the related direct flow hydropower rights (depending on which of the Aspinall Unit rights are then being exercised);

- the Colorado River Water Conservation District and the Upper Gunnison River Water Conservancy District (Districts) shall monitor and quantify depletions under this Agreement;
- the Aspinall Unit reservoirs cannot be used in exchange or replacement of water or for any other purpose, without the additional approval of the United States; and
- the utilization of water by the water users represented by the Districts shall be subject to the laws of the State of Colorado regarding water use.

A draft environmental assessment (EA) was prepared in November 1999. Review comments from the public and from agencies and organizations were used to prepare a final EA in February 2000. Comments received are responded to in the final EA. Coordination on the Agreement included consultation with the Fish and Wildlife Service under the Endangered Species Act.

Major comments included the concern that the Agreement would prevent development of Colorado water, would allow Federal control over the appropriation of water, and would hinder or preclude transmountain water diversions to the eastern slope of Colorado. Reclamation believes that the subordination actually facilitates Colorado's development of water and in no way allows Federal control over the state process for appropriation of water. Concerning transmountain diversions, the Agreement does not preclude these. The depletions allowed under this subordination could only occur within the Gunnison River Basin; however, this does not preclude other water sources from being developed or purchased for transmountain diversions.

Additional comments were related to the Endangered Species Act; Reclamation and the Fish and Wildlife Service have agreed that the depletion will be included in the upcoming Endangered Species Act consultation on the overall operation of the Aspinall Unit. Additional comments and responses are included in the final EA.

Conclusions:

Reclamation's practice has been to allow junior water users within the natural basin of the Gunnison River to develop up to 60,000 acre-feet of water without interference from the Aspinall Unit. Under the proposed Agreement, administrative calls could be placed by the Aspinall Unit water rights; but in-basin junior users would be protected up to the depletion amount. In addition, the amount of depletion would be measured and tracked so that the 60,000 acre-feet would not be exceeded. Under the No Action alternative--not signing the Agreement--this practice would continue; however, the practice would not be formalized or monitored. Reclamation has the discretion of signing or not signing the Agreement; but it does not have discretion in allowing the depletion based on Court decisions. Thus the depletion will occur with or without the Agreement.

In terms of environmental consequences, there would be no change in water use or diversion in the Upper Gunnison River Basin as a result of the Agreement. Existing uses would continue and junior rights (up to 60,000 acre-feet) would not be subject to Aspinall Unit calls. Other senior rights, such as the large Gunnison Tunnel and Redlands Diversion rights, could continue to place calls on the entire Gunnison River including both the Aspinall Unit and the Gunnison River Basin juniors protected from Aspinall Unit calls.

Thus the administrative action of executing the Agreement would have no effect on water uses and related environmental resources. Based on this premise, Reclamation also concludes that there is no effect on listed threatened or endangered species that occur in the basin area or downstream. Other resources such as Indian Trust Assets, wetlands, cultural resources, fish and wildlife resources, and others would not be affected. This is not to say that future water use and related development would not have environmental effects; it simply means that these would occur under the existing state water appropriation system independently of execution of the Agreement. If there is a Federal connection (for example Clean Water permit, Forest Service permit, or others), specific NEPA compliance on the water use would still be required.

Based on a review of comments received, analysis of environmental impacts, and coordination with the Fish and Wildlife Service under the Endangered Species Act, Reclamation concludes that execution of the Agreement would not have significant impacts on the quality of the human environment or the natural resources in the project area.

This Finding of No Significant Impact has, therefore, been prepared and is submitted to document environmental review and evaluation of the proposed action in compliance with the National Environmental Policy Act of 1969, as amended.

Recommended:

Western Colorado Area Office
Environmental Specialist

Date

Approved:

Western Colorado Area Office
Area Manager

Date

FINAL ENVIRONMENTAL ASSESSMENT

SIGNING OF AN AGREEMENT CONCERNING
THE ADMINISTRATION OF WATER PURSUANT TO THE
SUBORDINATION OF WAYNE N. ASPINALL UNIT WATER
RIGHTS WITHIN THE UPPER GUNNISON RIVER BASIN

Bureau of Reclamation
Grand Junction CO
February 2000

Final Environmental Assessment
Signing of an Agreement for the Administration of Water Pursuant
to the Subordination of Wayne N. Aspinall Unit Water Rights
within the Upper Gunnison River Basin

INTRODUCTION AND PURPOSE AND NEED

Background

The Bureau of Reclamation constructed the Wayne N. Aspinall Unit (Aspinall Unit) in the 1960's and 1970's on the Gunnison River in west central Colorado under the authority of the Colorado River Storage Project Act of April 11, 1956 (Act). The purposes of the Act included regulating flows of the Colorado River to permit the Upper Colorado River Basin States to more fully utilize their allocation of Colorado River water as set forth in the Upper Colorado River Basin Compact.

The Aspinall Unit is located in Gunnison and Montrose Counties, Colorado, along a 40-mile reach of the Gunnison River. It consists of a series of three dams and reservoirs-Blue Mesa, Morrow Point, and Crystal. The Aspinall Unit is operated by Reclamation, while the land and water areas of the reservoirs are managed under contract by the National Park Service as the Curecanti National Recreation Area. Figure 1 shows the location of Aspinall Unit features within the Gunnison River Basin.

The Aspinall Unit's primary storage facility is Blue Mesa Reservoir which has a water storage right for 940,755 acre-feet with an appropriation date of November 13, 1957, and a refill water right of 122,702 acre-feet. During the planning for the Aspinall Unit, there were concerns in Colorado that a storage right of this magnitude would preclude future upstream water developments and uses in the Gunnison Basin. Under Colorado Water Law, the 1957 right could "call out" junior rights (later than 1957), and in effect make these junior water rights ineffective in supplying dependable water.¹

To address these concerns, Reclamation's policy since the early 1960's has been to allow junior water users within the natural basin of the Gunnison River to develop up to 60,000 acre-feet without interference from the Aspinall Unit. The 60,000 acre-feet is a cumulative figure: 40,000 acre-feet of depletions are allowed above Blue Mesa Dam, and another 10,000 acre-feet (each) of depletion are allowed between Blue Mesa Dam and Morrow Point Dam, and between Morrow Point Dam and Crystal Dam.

¹In the Gunnison River Basin as elsewhere in Colorado, senior water right holders can place a "call" on the river—a request to the State Engineer to force water users with junior decrees to cease or diminish their storage or diversions and pass the called amount of water to the downstream senior water right in order to make the senior's water supply "whole."

Because of the small nature of most of the junior water rights, this policy has usually been carried out by Reclamation's practice of simply not placing a "call" on the river when it might otherwise have been entitled to do so, thus allowing junior in-basin users to continue using water.

Purpose, Need and Authority

A written agreement is needed to formalize the long-standing commitment implementing the depletion allowance that was made by the United States prior to construction of the Unit. Purposes of the Agreement include providing a method of accounting for depletions in the Upper Gunnison Basin and protecting Aspinall Unit water rights and purposes. This final environmental assessment (EA) is prepared in compliance with the National Environmental Policy Act (NEPA) of 1969 and related Department of the Interior policies and regulations.

The proposed Agreement is authorized pursuant to the Reclamation Act of 1902 (32 Stat. 388) and all amendatory and supplemental acts, especially the Colorado River Storage Project Act (70 Stat. 105), which authorized the Aspinall Unit. In related litigation, the United States took the position, which the Colorado State Water Court accepted, that Aspinall Unit water rights were intended to be subordinated to certain upper basin users up to specific amounts. In the Matter of the Application for Water Rights of the Board of County Commissioners of the County of Arapaho, in Gunnison County (Case No. 88-CW-178) the United States position prevailed that Congress, based on legislative history (including the Economic Justification Report of 1959 on the Aspinall Unit and its supplement, which were presented to Congress, in order to gain a concession from upstream water users in return for their support of the Aspinall Unit) anticipated depletions of up to 60,000 acre-feet above the Aspinall Unit.²

Specifically, the Court concluded there was an understanding, in principle, among Reclamation, the Colorado River Water Conservation District (CRWCD), and the Upper Gunnison River Water Conservancy District (District) that Reclamation would allow depletions of 60,000 acre-feet for use within the Gunnison River Basin. Though there is no formal written contract existing among the parties, there is extensive evidence that the parties had the same intent (a meeting of the minds) that Reclamation would subordinate (or allow depletions) of its senior water rights in an amount up to 60,000 acre-feet for the benefit of in-basin development and use

²Brown, Robert A., Water Judge, Findings of Fact, Conclusions of Law, and Judgment & Decree, Application for Water Rights by the Board of County Commissioners for Arapahoe County for the Union Park Reservoir Project, District Court, Water Division No. 4, Colorado, Case No. 88-CW-178, April 6, 1998.

of water by junior appropriators upstream from the Aspinall Unit. The Court further concluded that the conduct and understandings of the parties resulted in a contract, implied if not expressed, and the above identified terms are the essential provisions required to create an enforceable obligation requiring Reclamation to honor its commitments.

Furthermore, Section 14 of the Reclamation Project Act of 1939 (43 U.S.C. 389), is the appropriate vehicle to execute the subordination which Congress anticipated would occur. This section authorizes the Secretary of Interior "...for the purposes of orderly and economical construction or operation and maintenance of any project, to enter into such contracts for the exchange or replacement of water, water rights, or electric energy, or for the adjustment of water rights, as in his judgement are necessary and in the interests of the United States and the project."

PROPOSED ACTION AND ALTERNATIVES

The proposed action is for the United States to execute an Agreement concerning the Administration of Water Pursuant to the Subordination of Wayne N. Aspinall Unit Water Rights within the Upper Gunnison River Basin (Agreement). A draft copy of this Agreement is attached. The Agreement is not a water supply contract or sale; it does not provide water to anyone; it formalizes past commitments and provides a plan on how to manage, track, record and account for water depletions.

The alternative to the proposed action is the No Action alternative, which simply is not signing the Agreement. Under the No Action alternative, Reclamation would have to develop some type of system to track depletions to assure the 60,000 acre-foot allowance was not exceeded. This system could involve individual contracts with water users.

The proposed Agreement provides for the following:

- the depletion allowance (up to 60,000 acre-feet) for the Aspinall Unit shall be implemented only pursuant to the Agreement;
- the United States agrees to subordinate the Aspinall Unit's water rights up to 60,000 acre-feet; by subordinating to the junior water rights in the basin upstream, the United States agrees that such in-basin water users may continue to divert when the United States places a call on the Gunnison River under the Aspinall Unit's water rights;
- the depletions against which the United States foregoes its right to call under this Agreement, shall be charged by the Colorado State Engineer against the annual fills of Aspinall Unit reservoirs, and/or the exercise of the related direct flow hydropower rights (depending on which of the Aspinall Unit rights are then being exercised);

- the CRWCD and the District shall monitor and quantify depletions under this Agreement;
- the Aspinall Unit reservoirs cannot be used in exchange or replacement of water or for any other purpose, without the additional approval of the United States; and
- the utilization of water by the water users represented by the CRWCD and the District shall be subject to the laws of the State of Colorado regarding water use.

DESCRIPTION OF THE ENVIRONMENT AND ENVIRONMENTAL CONSEQUENCES

The Gunnison River Basin above the Aspinall Unit reservoirs includes approximately 4,000 square miles. In addition to the Gunnison River, major streams include the Cimarron River, Taylor River, East River, Tomichi Creek, and the Lake Fork of the Gunnison River.

The Gunnison River originates where the East and Taylor Rivers join at Almont, Colorado in Gunnison County. From that point, the Gunnison flows 25 miles to Blue Mesa Reservoir, the largest and most upstream of the three reservoirs comprising the Aspinall Unit. Blue Mesa Reservoir releases water into Morrow Point Reservoir which discharges into Crystal Reservoir. From Crystal Reservoir, the Gunnison flows approximately 2 miles to the Gunnison Tunnel diversion structure (irrigation diversion for the Uncompahgre Project), located just upstream from the Black Canyon of the Gunnison National Park. From the Gunnison Tunnel through the Park and the Gunnison Gorge, the river flows for 29 miles to the confluence with the North Fork of the Gunnison River. It then travels 75 river miles to its confluence with the Colorado River at Grand Junction.

Gunnison River water use began in the 19th century with establishment of numerous irrigation and mining water rights by individuals and organizations. There are more than 5,000 direct diversion decrees that have been perfected and are presently in use on the Gunnison River and its tributaries above Delta, Colorado. Significant senior diversions downstream from the Aspinall Unit, established in the early 1900's, include the Gunnison Tunnel of the Uncompahgre Project and the Redlands Diversion, which have a combined diversion capability of approximately 2,000 cubic-feet-per second (cfs).

In addition to water rights for direct diversions, storage rights have been established. These are rights to store available water in a reservoir for later use. The largest single perfected storage decree on the Gunnison River is the decree for Blue Mesa Reservoir. Other water storage facilities, in addition to those of the Aspinall Unit, include numerous smaller reservoirs and several larger Reclamation project reservoirs on Gunnison River tributaries—Taylor Park Reservoir on the Taylor River, Silver Jack Reservoir on Cimarron Creek, Crawford Reservoir fed by the Smith Fork, Paonia Reservoir on Muddy Creek, and Ridgway Reservoir on the Uncompahgre River.

As indicated previously in this EA, Reclamation's practice has been to allow junior water users within the natural basin of the Gunnison River to develop up to 60,000 acre-feet without interference from the Aspinall Unit. Under the proposed Agreement, calls could be placed but in-basin junior uses would be protected up to the depletion amount. In addition, the amount of depletion would be measured and tracked so the 60,000 acre-feet would not be exceeded. Under the No Action alternative—not signing the Agreement—this practice would continue; however the practice would not be formalized or monitored. Reclamation has the discretion of signing or not signing the Agreement; but it does not have the discretion to not allow the depletion based on the 1998 Court decision.

In terms of environmental consequences, there would be no change in water use or diversion in the Upper Gunnison River Basin as a result of the Agreement. Existing uses would continue and junior rights (up to 60,000 acre-feet) would not be subject to Aspinall Unit calls. Other senior rights, such as the large Gunnison Tunnel and Redlands Diversion rights, could continue to place calls on the entire Gunnison River including both the Aspinall Unit and the Gunnison River Basin juniors protected from Aspinall Unit calls.

Thus the administrative action of executing the Agreement would have no effect on water uses and related environmental resources. Based on this premise, Reclamation also concludes that there is no effect on listed threatened or endangered species that occur in the basin area or downstream. Other resources such as Indian Trust Assets, wetlands, cultural resources, fish and wildlife resources, and others would not be affected. This is not to say that future water use and related development would not have environmental effects; it simply means that these would occur under the existing state water appropriation system independently of execution of the Agreement.

If there is a Federal connection for new water uses (for example Clean Water permit, Forest Service permit, or others), specific NEPA compliance on the water use would be required. In-stream flow rights held by the Colorado Water Conservation Board for environmental purposes would continue to protect segments of streams within the basin and instream flow rights could be expanded to other streams in the basin.

CONSULTATION AND COORDINATION

The Agreement itself has been developed in cooperation with the Colorado State Engineer, CRWCD, and the District. The signing of the Agreement has been discussed with the Fish and Wildlife Service (Service) in regard to the Endangered Species Act (ESA). Reclamation has informed the Service of the no effect determination on threatened and endangered species and has agreed with the Service that 1) the 60,000 acre-foot depletion be included in upcoming ESA consultation on the Aspinall Unit, and 2) in the interim, all new Federal actions that deplete water will be consulted on. The ESA consultation, scheduled to occur in 2000 and 2001, will address both the operating patterns of the Aspinall Unit as well as associated depletions.

The Agreement culminates over 40 years of practices, commitments, and legal decisions. This consultation and coordination has led to the decision that the depletion discussed in the EA will continue with or without an Agreement; however, an Agreement is needed to formalize the practices and facilitate record keeping.

The final EA is being provided to the following groups who expressed an interest in the Agreement. A news release was also mailed indicating the availability of the EA. In addition, the final EA will be provided to other individuals and organizations upon request.

Mailing List for draft EA:

Fish and Wildlife Service, Grand Junction, CO
Forest Service, Gunnison, CO
National Park Service, Gunnison, CO
Western Area Power Administration, Salt Lake City, UT
Colorado Water Conservation Board, Denver, CO
Colorado State Engineer, Montrose, CO
Colorado Division of Wildlife, Gunnison and Montrose, CO
Upper Gunnison River Water Conservancy District, Gunnison, CO
Colorado River Water Conservation District, Glenwood Springs, CO
Uncompahgre Valley Water Users Association, Montrose, CO
Redlands Water and Power Company, Grand Junction, CO
Western States Water Council, Midvale, UT
Environmental Defense Fund, Boulder, CO
High Country Citizens Alliance, Crested Butte, CO
Upper Colorado River Commission, Salt Lake City, UT
WRC Engineering Inc., Denver, CO
Arapahoe County, CO
Gunnison County, CO
Vranesh and Raisch, Boulder, CO
Ralph Clark, Gunnison, CO
A.S. Andrews, Littleton, CO
Gunnison Country Times, Gunnison, CO
Mr. Bruce Driver, Boulder, CO
Dave Miller, Palmer Lake, CO

Comments on the draft EA have been reviewed and major comments are presented below with responses.

General Comment: The Agreement prevents development of Compact water, impacts Colorado's ability to use water, allows Federal control of the appropriation of water, forecloses high elevation storage reservoirs in the Gunnison Basin, and has negative impact on Front Range's ability to make transmountain diversions.

Response: The United States holds absolute water rights for storage and direct flow for the

Aspinall Unit obtained through the legal avenues under Colorado law. At issue is the voluntary subordination of a fixed amount of the United States' water storage rights. In 1963 the United States agreed to subordinate up to 60,000 acre-feet of its storage rights to upstream, in-basin users to prevent the Aspinall Unit's sizeable water rights from effectively cutting off the ability of upstream, in-basin junior water users to appropriate water. Thus the subordination actually facilitates Colorado's development of Compact water and in no way allows Federal control of the State process for appropriation of water. Concerning transmountain diversions to the Front Range and high elevation storage in the Gunnison Basin, the United States, as a matter of principle, does not object to these in the Gunnison or any other basin; but the subordination of the federal water rights to upstream, in-basin users does not relate to these issues. The Agreement does not preclude other water sources from being developed or purchased for transmountain diversions.

General Comment: The Agreement would prevent diversions to the east slope that could support 500,000-1,000,000 people--this loss needs to be addressed as well as the loss of beneficial effects of transmountain diversions on the human environment and the Platte River.

Response: As indicated above, the Agreement does not prevent such diversions nor is it within the authority of the United States or within the policy of the United States to prevent such diversions, and thus the impacts stated are beyond the scope of this EA.

General Comment: It is our understanding that the following applies to the Agreement: There will be approximately 240,000 average acre-feet of marketable yield remaining in the Aspinall Unit after subordination; that Reclamation and the Fish and Wildlife Service agree that this subordination is a preexisting commitment and not a new Federal action requiring consultation under the Endangered Species Act and that any potential use of the 60,000 acre-feet will be included in the consultation that Reclamation has committed to for the Aspinall Unit under the Endangered Species Act; that the Agreement will remain in effect until terminated by the mutual consent of all parties; and that the Agreement is a permanent adjustment to the Aspinall Unit water rights.

Response: The marketable yield from the Aspinall Unit has been estimated at 300,000 acre-feet, including the 60,000 acre-feet of upstream depletion. The Agreement would not change that. However, other issues such as the Endangered Species Act compliance on the Aspinall Unit and the quantification of the reserved water right for the Black Canyon of the Gunnison National Park could affect this yield. The depletion amount will be included in the upcoming consultation on the operation of the Aspinall Unit under the Endangered Species Act.

As presently drafted, the terms of the Agreement would remain in full force until terminated by mutual consent of the parties. Reclamation intends to have this language remain in the Agreement. Concerning a permanent adjustment to the Aspinall Unit water rights, Reclamation has the discretion of signing or not signing the Agreement; but it does not have discretion in allowing the depletion based on Court decisions. An addendum to the water rights for the Aspinall Unit may be needed.

General Comment: The Agreement represents selective subordination which is not allowed by Colorado law.

Response: Findings in District Court, Water Division 4, Case No. 88-CW-178 were that Reclamation's policy in this case is not a selective subordination under the facts of that case.

General Comment: The EA needs alternatives that would protect upstream junior water users not only from Aspinall Unit calls, but also from downstream senior water rights (for example the Redlands senior right, the Gunnison Tunnel, or others).

Response: The need for the Agreement was defined in the draft EA in this manner: "A written agreement is needed to formalize the long-standing commitment implementing the depletion allowance that was made by the United States prior to construction of the Unit." This commitment did not include protection from downstream senior water right calls and an alternative to provide protection from such calls is outside the scope of this EA and was not included in the EA.

General Comment: The Agreement appears to create procedural complexities that could result in water users having to pay the District substantial amounts for administering what has been "hassle free" in the past and at no cost.

Response: A need exists to monitor and account for the amount of depletions as basin water development continues. This service will be provided by the District. The actual cost of this service may be passed on to the benefitting water users.

General Comment: Do the Upper Gunnison Water Conservancy District's existing rights benefit from the depletion allowance? Would the District's development of their rights "use up" the benefits of the subordination leaving little for other water users? How is the second fill right for Taylor Park Reservoir affected?

Response: The District's rights and the Aspinall Unit rights have identical priority dates. In cases where there exists a water supply shortage, both rights would normally experience a proportional shortage. In these cases the District's rights could still utilize water, and a portion of the District's depletion would be counted against the depletion allowance, and thus would benefit. The second fill of Taylor Park would not be affected, but some depletions associated with the second fill could apply against the 60,000 acre-foot depletion allowance.

General Comment: How would any remaining benefits of subordination be allocated?

Response: The allocation would occur under the State of Colorado water right policies and laws and would not involve Reclamation.

General Comment: The NEPA process should not be completed nor the Agreement executed until the appeal process In the Matter of the Application for Water Rights of the Board of County Commissioners of the County of Arapaho, in Gunnison County (Case No. 88CW178) is completed.

Response: During the review period of the draft EA, Arapahoe County requested a stay or other injunctive relief from the Courts to prevent execution of the Agreement. This request was denied by the Courts. Reclamation will continue with the NEPA process and negotiation of the Agreement.

General Comments: A Finding of No Significant Impact (FONSI) is/is not appropriate for this action. A full EIS should be/should not be completed or work on the Agreement stopped indefinitely.

Response: Based on this final EA and on comments received on the draft EA, Reclamation will determine whether a FONSI is appropriate. Reclamation's intent is to complete the Agreement. Reclamation views the Agreement as a way to document understandings on the subordination commitment so that future administrators will not have to piece together how the Aspinall Unit is operated from a piece-meal historical record to facilitate future administration of the limited subordination.

General Comment: A binding commitment is needed concerning consultation under the Endangered Species Act (ESA) for the Aspinall Unit, and a discussion about handling future depletions under the ESA is needed.

Response: Additional wording has been added to the EA on compliance with the ESA. Reclamation intends that the upcoming consultation on the Aspinall Unit will address this depletion along with operation changes of the Aspinall Unit. Future depletions beyond the 60,000 acre-feet, if they occur, would not fall under the Aspinall Unit consultation nor would they be the responsibility of Reclamation unless there was a Reclamation water contract or some other Reclamation connection involved.

General Comment: The cumulative depletion of 60,000 acre-feet does have an environmental impact that needs to be acknowledged in the EA, especially the impact of future depletions. The Fish and Wildlife Service should be consulted on the proposal under the Fish and Wildlife Coordination Act of 1934 and the importance of the administration and protection of instream flow rights in the basin and the filing of new rights should be communicated to the Colorado Water Conservation Board.

Response: The draft and final EA recognize that existing and future depletions that could fall under the Agreement could have substantial impacts on aquatic and other resources. However, these impacts would occur under the existing state water appropriation system independently of execution of the Agreement. If there is a Federal connection (for example Clean Water permit, Forest Service permit, or others), specific NEPA compliance on the water use would be required. Reclamation and the Fish and Wildlife Service are committed to consultation under the ESA for the Aspinall Unit; the 60,000 acre-feet of depletion will be included in this consultation. Until that consultation is completed with a Biological Opinion, all new Federal actions that deplete water will be consulted on. The Fish and Wildlife Service has also reviewed the Agreement and the draft EA.

Reclamation agrees that the administration and protection of existing instream flow rights in the basin is very important to the protection of natural resources and filing of additional new rights may be appropriate on some stream segments. Reclamation has discussed this with the Colorado Water Conservation Board during preparation of the final EA. It is the Board's policy to review water right requests and resumes and to object to those that interfere with instream flow rights. The Board is also working on methods of improving monitoring of instream flow rights. While Reclamation does support and encourage this, the State of Colorado has both the authority and

responsibility to accomplish this.

Comment: Would the increased depletion affect water quality?

Response: Any depletion of water in the upper basin will have a concentrating effect on water quality constituents downstream. This would occur with or without the Agreement.

Comment: What is the effect of the Agreement on the Federal Reserved Right for the Black Canyon of the Gunnison National Park? On downstream Tribal rights?

Response: No downstream senior water right would be affected. Since any reserved right would likely be senior to the Aspinall Unit, unless negotiated to a different date, there should be no effect.

Comment: What is the effect on people with existing Reclamation contracts on augmentation?

Response: These augmentation contracts involve parties acquiring storage water in Blue Mesa Reservoir that can be released to downstream seniors to protect the upstream junior from calls other than from the Aspinall Unit. These augmentation contracts may still be necessary for this type of protection and would remain in place.

Comment: The Agreement indicates that the Upper Gunnison District represents various entities that divert and use water in the Upper Gunnison Basin-the Union Park Water Authority has not given the District authority to represent them. Exclusion of Arapahoe and Union Park Authority from negotiations on the Agreement is derogation of the law.

Response: The Union Park Project centers around storage and transmountain diversion of water. Therefore, Union Park has no bearing on the subordination of Aspinall Unit water rights to in-basin uses. Both Arapahoe and the Union Park Authority are outside of the natural basin of the Gunnison River and not eligible for the subordination according to court decisions.

Comment: The EA did not receive adequate distribution.

Response: In addition to copies mailed out, the availability of the EA was included in news releases.

Comment: The Agreement would formalize a long-standing commitment of the United States to the Upper Gunnison River Basin; in particular, it would preserve an on-the-ground status quo that is critical to agricultural uses, and therefore open-space values.

Response: No response necessary.

Comment: How much of the 60,000 acre-feet is already being depleted? What is the timing for the remainder?

Response: Studies are underway to determine the amount of depletion presently occurring. This highlights the need for a method to quantify and monitor depletions as provided for in the Agreement.

Comment: Why hasn't Reclamation placed calls for the Aspinall Unit previously? What would the impact of such a call be?

Response: The only water users who would have been subject to such a call are the same users that would benefit from the Agreement. Reclamation has committed to allow these users up to 60,000 acre-feet of depletion and a call would have been contrary to this commitment. Also Reclamation has been confident that the amount of depletion has been less than 60,000 acre-feet in the past.

Attachment
Draft Agreement for the
Administration of Water Pursuant to the Subordination
of Wayne N. Aspinall Unit Water Rights within the Upper Gunnison River Basin