



# United States Department of the Interior

OFFICE OF THE SOLICITOR

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Memorandum

To: Secretary  
Assistant Secretary for Water and Science  
Assistant Secretary for Fish and Wildlife and Parks

From: Solicitor

Subject: Exercise of the Water Right for Black Canyon of the Gunnison National Park in the Context of Congressional Authorization for the Bureau of Reclamation's Aspinall Unit

## I. Introduction

This memorandum reviews previous Solicitor's Office memoranda regarding the authority of the Department of the Interior ("Department") to exercise the reserved water right for Black Canyon of the Gunnison National Park ("Park") in light of a specific, later-enacted congressional authorization for the Wayne N. Aspinall Unit ("Aspinall Unit") of the Colorado River Storage Project—a series of dams authorized for construction by Congress in 1956 and located immediately above the Park.

The Department has extensively examined the relationship between the exercise of the Park's reserved water right and the operation of the Aspinall Unit. In 2009, then-Solicitor David Bernhardt determined in a memorandum and supporting analysis that the 1956 Colorado River Storage Project Act ("CRSP") required the Secretary of the Interior ("Secretary") to exercise the Park's water right in a manner that does not frustrate the authorized purposes of the Aspinall Unit.<sup>1</sup> In response, and at the recommendation of Solicitor Bernhardt, Secretary Kempthorne instructed the Bureau of Reclamation ("Reclamation") to acknowledge the existence of the Park's water right in the then-pending Environmental Impact Statement ("EIS") for Reclamation's Aspinall Unit Operations, Colorado River Storage Project, Gunnison River,

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<sup>1</sup> Solicitor Bernhardt, U.S. Dep't of the Interior, Memorandum, *Recommendation Regarding Implementation of Final Decree in a Manner That is Fully Consistent with Applicable Federal Law: Exercise of the Water Right for the Black Canyon of the Gunnison National Park in the Context of the Congressional Authorization for the Bureau of Reclamation's Aspinall Unit* (Jan. 14, 2009) (hereinafter, "Bernhardt Memorandum"). This opinion refers to the supporting analysis attached to the Bernhardt Memorandum in Appendix 4 as the "Bernhardt White Paper."

Colorado and to utilize and interpret its authorized purposes in a manner that provides benefits to the Park as long as such operations are within, and do not frustrate, the authorized purposes of the Aspinall Unit.<sup>2</sup>

Three years later, following an internal Solicitor's Office analysis,<sup>3</sup> Solicitor Tompkins determined that the 2009 Bernhardt Memorandum and Bernhardt White Paper were no longer needed due to an agreement between Reclamation and the National Park Service ("NPS") regarding Aspinall Unit operations.<sup>4</sup> In addition, Solicitor Tompkins determined that a portion of the Bernhardt Memorandum as well as the entire Bernhardt White Paper were legally flawed. On this basis, the Tompkins Memorandum withdrew the Bernhardt White Paper, Section III of the Bernhardt Memorandum, and any other part of the Bernhardt Memorandum that relied on the Bernhardt White Paper.<sup>5</sup>

In this memorandum, I first summarize the applicable statutory authorities as well as the prior Departmental memoranda described above. I then conduct a further review of the Tompkins Memorandum and Roth Memorandum and compare them to the Bernhardt Memorandum and Bernhardt White Paper. In this review, I examine the relationship between the water right for the Park and Aspinall Unit operations and supplement the analyses provided in the prior Departmental memoranda where necessary.

Based on my review, I conclude that the Bernhardt Memorandum and Bernhardt White Paper correctly recognize Congress's intent, as expressed in the text of the CRSP and supported by relevant legislative history, that the Park's water right may not be exercised in a manner that frustrates the authorized purposes of the Aspinall Unit. Conversely, the Tompkins Memorandum and the Roth Memorandum misapply applicable statutes and case law and disregard Congress's specific direction to proceed with the Aspinall Unit operations notwithstanding potential impacts to the Park.

For these reasons, more fully described below, I withdraw the Tompkins Memorandum and Roth Memorandum, reinstate the Bernhardt Memorandum and Bernhardt White Paper, and establish the legal position of the Department that exercise of the water right for the Park may not be exercised to the frustration of the Aspinall Unit's operational purposes.

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<sup>2</sup> Secretary Kempthorne, U.S. Dep't of the Interior, Memorandum, *Exercise of the Water Right for the Black Canyon of the Gunnison National Park* (Jan. 14, 2009) (hereinafter, "Kempthorne Memorandum").

<sup>3</sup> See Memorandum from Associate Solicitor (Parks and Wildlife), Associate Solicitor (Land and Water Resources), Regional Solicitor (Rocky Mountain Region) to Solicitor, *Black Canyon of the Gunnison National Park Water Right and FEIS for Aspinall Unit Operations* (April 20, 2012). The April 20, 2012 memorandum is hereinafter referred to as the "Roth Memorandum," based on the name of the memorandum's first signatory, Barry Roth, then-Associate Solicitor (Parks and Wildlife).

<sup>4</sup> Solicitor Tompkins, U.S. Dep't of the Interior, Memorandum, *Withdrawal in Part of Previous Solicitor's Office Advice on Interpretation of the Water Right for the Black Canyon of the Gunnison National Park* (April 24, 2012) (hereinafter, "Tompkins Memorandum").

<sup>5</sup> The Tompkins Memorandum also recommended that Deputy Secretary Hayes withdraw the Kempthorne Memorandum to the extent it relied upon the Bernhardt White Paper. Deputy Secretary Hayes concurred with that recommendation.

## II. Background<sup>6</sup>

### A. Early History of the Gunnison River and Uncompahgre Valley

The Gunnison River Basin has provided water to the residents and farmers of the Uncompahgre Valley for over a century. The earliest efforts to utilize the water resources began around 1900, when engineers and hydrologists began exploring the Black Canyon of the Gunnison for a feasible way of transporting water to the nearby arid valleys. Following the passage of the Reclamation Act of 1902 (“Reclamation Act”) and the included authorization of the Uncompahgre Unit<sup>7</sup>, construction began on the Gunnison Tunnel, a nearly six-mile tunnel carved through the side of the Black Canyon. Completed in 1909, the Gunnison Tunnel provides water to the Uncompahgre Valley to this day, and it is a testament to the importance of water resources to the economy of the region.

While the Gunnison Tunnel provided much needed water supplies to the farmers of the Uncompahgre Valley, it did not provide flood control or storage services. As such, the region was still subject to the wild fluctuations of the Gunnison. Without a more reliable source of water, the area could never fully realize its potential. As described below, in order to provide critical water resources, Congress directed the Secretary, acting through Reclamation, to undertake construction of the Aspinall Unit. Since its completion in 1978, the Aspinall Unit has provided water storage, flood control, and energy revenues.

### B. The 1916 National Park Service Organic Act and 1978 Amendment

The 1916 National Park Service Organic Act provides:

The Secretary, acting through the Director of the National Park Service, shall promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.<sup>8</sup>

This statute sets the broad mandate for the NPS with respect to the operation of units within the system. The Organic Act was amended in 1978, providing:

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<sup>6</sup> This background is provided only to provide a general familiarity with the issues and legal authorities addressed later in this memorandum. For a more exhaustive analysis on the history of the Park’s water right and the Aspinall Unit, I refer the reader to the Bernhardt Memorandum and Bernhardt White Paper, *supra* n.1.

<sup>7</sup> The Uncompahgre Project is on the western slope of the Rocky Mountains in west-central Colorado. Project features include Taylor Park Dam and Reservoir, Gunnison Tunnel, seven diversion dams, 128 miles of main canals, 438 miles of laterals, and 216 miles of drains. The systems divert water from the Uncompahgre and Gunnison Rivers to serve over 76,000 acres of project land.

<sup>8</sup> 54 U.S.C. § 100101(a).

Congress reaffirms, declares, and directs that the promotion and regulation of the various System units shall be consistent with and founded in the purpose established by subsection (a), to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress.<sup>9</sup>

Thus, Congress set out the overall management strategy for the National Park System, with the understanding that Congress, at a later date, could establish or amend that general management strategy for any individual park.

### **C. Establishment of Black Canyon of the Gunnison National Monument and National Park**

In 1933, President Hoover proclaimed the Black Canyon of the Gunnison a National Monument in order to preserve “the spectacular gorges and additional features of scenic, scientific, and educational interest . . . subject to all valid existing rights.”<sup>10</sup> Black Canyon of the Gunnison National Monument (“Monument”) was subsequently expanded by two later Presidential proclamations and reduced by a third.<sup>11</sup> Congress designated the Monument as a national park in 1999, pursuant to the Black Canyon of the Gunnison National Park and Gunnison Gorge National Conservation Area Act of 1999.<sup>12</sup>

### **D. The Colorado River Compacts and 1956 Colorado River Storage Project Act**

The Colorado River Compact of 1922 (“1922 Compact”) apportioned water rights among the seven states<sup>13</sup> located in the Colorado River basin by dividing the basin into the Upper Colorado Basin and the Lower Colorado Basin. The subsequent Upper Colorado River Compact of 1948 (“1948 Compact”) further apportioned the rights granted under the 1922 Compact.<sup>14</sup> The signing of these agreements was the impetus for the development of new reclamation units to exercise those apportioned water rights.

Following the completion of the 1948 Compact, Congress considered how to further develop the water resources of the Colorado River Basin, including the Gunnison River basin. To assist Congress in its deliberations, the Department provided a report containing recommendations for proposed development of the Upper Colorado River Basin.<sup>15</sup> In that report,

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<sup>9</sup> 54 U.S.C. § 100101(b)(2).

<sup>10</sup> Proclamation No. 2033, 47 Stat. 2558 (Mar. 2, 1933).

<sup>11</sup> Proclamation No. 2286, 52 Stat. 1548 (May 16, 1938); Proclamation 2372, 54 Stat. 2669 (Oct. 28, 1939); Proclamation 3344, 74 Stat. C56 (Apr. 8, 1960).

<sup>12</sup> Pub. L. No. 106-76, 113 Stat. 1126.

<sup>13</sup> Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming.

<sup>14</sup> Congress consented to the 1948 Compact in 1949. Act of Apr. 6, 1949, ch. 48, 63 Stat. 31.

<sup>15</sup> Colorado River Storage Project and Participating Projects, H.R. Doc. No. 83-364, 30 (1954).

the NPS concluded that the regulation of the Gunnison River would have impacts to the Monument, and would “drastically alter the historic flows through the Monument.”<sup>16</sup>

Congress weighed these and other impacts against the benefits to the local economy and the nation. Resolving to move ahead with development despite the potential impacts, Congress passed CRSP in 1956.<sup>17</sup> This legislation authorized the Department to build, operate, and maintain specific units of the Colorado River storage project, including the Aspinall Unit (originally named the Curecanti Unit<sup>18</sup>).

CRSP contains precise details regarding the construction and operation of the Aspinall Unit. It stated that the Aspinall Unit “shall be constructed to a height which will impound not less than nine hundred and forty thousand acre-feet of water or will create a reservoir of such greater capacity as can be obtained by a high waterline located at seven thousand five hundred and twenty feet above mean sea level . . . .”<sup>19</sup> In section 7 of CRSP, Congress directed that the “hydroelectric powerplants and transmission lines authorized by this Act . . . shall be operated as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates.”<sup>20</sup> Congress also made clear that the exercise of the authority granted to the Secretary “shall not affect or interfere with . . . the Colorado River Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act . . . and any contract lawfully entered into under said Compacts and Acts.”<sup>21</sup>

### **E. Decree Quantifying the Federal Reserved Water Right for Black Canyon of the Gunnison National Park**

When President Hoover proclaimed the Black Canyon of the Gunnison to be a national monument pursuant to the Antiquities Act of 1906, the application of the *Winters* doctrine meant that a water right was reserved at the same time.<sup>22</sup> This reserved water right was formally recognized by the State of Colorado in a 1978 decree, but the quantity was left undetermined at that time.<sup>23</sup> In 2001, the United States filed an application with the State of Colorado to quantify the reserved water right related to the newly designated Park.<sup>24</sup> On December 31, 2008, the Colorado Water Court approved a Proposed Decree, which had been negotiated among the

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<sup>16</sup> *Id.*

<sup>17</sup> 43 U.S.C. §§ 620–620o.

<sup>18</sup> The Curecanti Unit was renamed the Aspinall Unit in 1980 in honor of Rep. Wayne N. Aspinall of Colorado. Act of Oct. 3, 1980, Pub. L. No. 96-375, 94 Stat. 1507.

<sup>19</sup> 43 U.S.C. § 620.

<sup>20</sup> 43 U.S.C. § 620f.

<sup>21</sup> *Id.*

<sup>22</sup> The *Winters* doctrine provides that when the federal government withdraws land from the public domain and reserves it for a federal purpose, the government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citing *Winters v. United States*, 207 U.S. 564 (1908)).

<sup>23</sup> 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., Mar. 6, 1978 Order) (“1978 Decree”).

<sup>24</sup> See generally *In re Application for Water Rights of U.S.*, 101 P.3d 1072, 1076 (Colo. 2004) (discussion of the procedural history of the legal proceedings relating to the Park’s reserved water right).

United States, the State of Colorado, water and power users, county and local municipalities, and representatives of environmental organizations.<sup>25</sup>

The Decree spelled out the rates of flow for base, shoulder, and peak flows for the mainstem Gunnison River within the Park and provided certain limitations on the exercise of the reserved water right. Among the restrictions were limitations due to concerns over downstream flooding and the operations of the Aspinall Unit. The Decree states that the exercise of the water right is subject to the discretion and obligations of the Secretary, including the obligation to comply with certain Endangered Species Act (“ESA”) provisions and the operation of the Aspinall Unit.

#### **F. The 2009 Bernhardt Memorandum**

After obtaining Colorado Water Court-approval of the Decree in late 2008, the Department continued to examine how the water right for the Park should be exercised in the context of congressional authorization for Reclamation’s Aspinall Unit. Shortly after entry of the Decree, Solicitor Bernhardt described the complexity of evaluating the water right for the Park in conjunction with Aspinall Unit operations:

Resolving the issues in dispute and achieving an appropriate resolution of the issues as embodied in the Decree has required . . . an exhaustive and extensive effort to assess and analyze a range of complex – and potentially competing – legal considerations. For example, the National Park Service (NPS) has interpreted its mandates to generally require protection of the natural and hydrological process of the Black Canyon as they existed in 1933. NPS has sought to secure high spring flows that would fully maintain these processes as they had been in their natural condition. In contrast, subsequent statutory mandates authorize and direct the Bureau of Reclamation (Reclamation) to utilize the authorized works of the Aspinall Unit to capture, develop, and manage these very same river flows for a variety of project purposes, including flood control and water storage. Resolution of this issue was made even more complex by the presence of native fish species listed under the Endangered Species Act (ESA) – as well as the designation of critical habitat on the Gunnison River downstream of the Black Canyon.<sup>26</sup>

Although the Decree had only been finalized weeks earlier, Solicitor Bernhardt recognized in January 2009 that the Department needed to immediately address the relationship between the decreed water right for the Park and the legislation pertaining to the Aspinall Unit. At that time, Reclamation was conducting a National Environmental Policy Act (“NEPA”) analysis of the potential environmental impacts of operating the Aspinall Unit to meet its ESA

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<sup>25</sup> *Concerning the Application for Water Rights of the United States of America*, Minute Order, December 31, 2008 (Colo. Water Court, Div. 4) (“2008 Decree”).

<sup>26</sup> Bernhardt Memorandum at 1-2.

obligations and assist in the recovery of listed native fish. During this process, NPS had commented that Reclamation “must include the reserved water right in its impact analysis under NEPA as a senior water right with a priority date of 1933.”<sup>27</sup> Reclamation, for its part, had requested “guidance on the relationship between the exercise of the reserved right for the Park and the operations of the Aspinall Unit and how this relationship should be addressed in the upcoming NEPA document.”<sup>28</sup> In addition, as Solicitor Bernhardt understood, the Department faced potential water supply constraints in the context of Aspinall Unit operations and exercise of the water right for the Park.<sup>29</sup>

In order to clarify the Department’s legal responsibilities, Solicitor Bernhardt submitted a memorandum to Secretary Kempthorne containing his recommendations for operating Aspinall Unit given the recently quantified downstream water right for the Park. Solicitor Bernhardt’s memorandum also recommended “implementation principles . . . that, if adopted, should help ensure that future implementation of the Decree is undertaken in a manner that is fully consistent with all applicable federal laws.”<sup>30</sup> The Bernhardt Memorandum recommended as follows:

Applying the foregoing analysis and principles and turning to the upcoming Reclamation environmental impact statement, it is my recommendation that the existence of the downstream water right and associated priority of the [Park] should be clearly acknowledged in the EIS. Further, Reclamation should reflect that it will strive to meet the purposes of the Final Decree incidental to its normal operations but should also articulate that it is not required to implement, analyze, or change operations under the provisions of the Final Decree if doing so will frustrate the authorized purposes of the Aspinall Unit.<sup>31</sup>

### **G. The 2009 Bernhardt White Paper**

Solicitor Bernhardt attached a white paper to the Bernhardt Memorandum that contained a detailed analysis on “the exercise of the water right in years where there is insufficient water to meet both the needs of the [Park] and the authorized purposes [of the Aspinall Unit].”<sup>32</sup> As the

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<sup>27</sup> See *id.* at 6 (citing Jan. 2008 NPS memorandum (“It is inappropriate to exclude this water right and associated priority from your analysis. Failure to include the [Park’s] water right . . . will lead to misrepresentation and misinterpretation of the true effects of alternative reservoir releases upstream and downstream of the Aspinall Unit.”)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 4 (“[W]e anticipate that there will be years where neither Aspinall Unit operations nor ESA-related flow releases will provide sufficient water to allow for the water rights established under the Decree to be fully exercised.”).

<sup>30</sup> *Id.* at 7 (“[T]he Department may not implement the terms of the Decree or its priority date in such a manner that would frustrate the authorized purposes of the Aspinall Unit, as such implementation would violate federal law and, accordingly, the express terms of the Decree.”).

<sup>31</sup> *Id.* Responding to Solicitor Bernhardt’s advice, Secretary Kempthorne incorporated similar implementation directives in the Kempthorne Memorandum.

<sup>32</sup> Bernhardt White Paper at 12. The Bernhardt Memorandum also provided the Decree and letters between the Solicitor’s Office and Department of Justice as attachments.

Bernhardt White Paper explained, a full legal review was needed to prepare the Department for proper implementation of the Decree.<sup>33</sup>

The Bernhardt White Paper provided a comprehensive examination of the statutes and legislative history applicable to the Park and the Aspinall Unit, while also looking to case law, Department of Justice memoranda, and other applicable authorities to guide implementation of the Decree and appropriately address the relationship between exercise of the Park's water right and Aspinall Unit operations. Solicitor Bernhardt summarized his findings as follows:

. . . [U]pon careful examination of the relevant statutes, it is clear that through enactment of CRSP, Congress specifically provided for the water resources of the Gunnison River to be developed for all of the purposes enumerated in the CRSP. Comparing this direct and specific authorization with the broad and general language in the Proclamation itself and the Organic Act and its 1978 Amendment, we must give meaning to the specific direction of Congress to develop these resources. Moreover, the legislative history of CRSP supports our analysis of the legislative language as it is clear that Congress was repeatedly made aware of the potential changes to the Black Canyon that could occur if the CRSP were to be enacted. Armed with this information, Congress still made the decision to develop the water resources of the Gunnison River. Consequently . . . the water right for the Park is not to be exercised in a manner that frustrates the authorized purposes of the Aspinall Unit.<sup>34</sup>

#### **H. The 2012 Tompkins Memorandum and Roth Memorandum**

In 2012, following completion of Reclamation's Final EIS for Aspinall Unit operations, the Office of the Solicitor reviewed the Bernhardt White Paper and Bernhardt Memorandum.

First, in the Roth Memorandum, two associate solicitors and a regional solicitor assessed the Bernhardt White Paper. As an initial matter, the Roth Memorandum concluded that the Bernhardt White Paper was no longer necessary due to an intervening agreement between Reclamation and the NPS concerning exercise of the [Park's] water right and Aspinall Unit operations.<sup>35</sup> The Reclamation-NPS agreement provided, *inter alia*, that the water right for the

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<sup>33</sup> Bernhardt White Paper at 12 ("Just as the development of the Decree required careful balancing of the obligations to the [Park] as well as the Aspinall Unit operations, implementation of the Decree will also require a careful balancing of these considerations.").

<sup>34</sup> *Id.* at 14.

<sup>35</sup> Roth Memorandum at 4 ("With the understanding between these two agencies that is being memorialized in the FEIS, as well as the resulting Record of Decision, there is an agreement between Reclamation and the Park Service. Thus, the need for the White Paper no longer exists."). For the purposes of this opinion, "agreement" refers to the "statement [that] was agreed would be included in the FEIS," hereinafter described as the "Reclamation-NPS Agreement." *Id.* at 3.

Park “is a downstream water right senior to the Aspinall Unit, and Reclamation will meet the water right when it is exercised.”<sup>36</sup>

Turning to the merits of Solicitor Bernhardt’s prior analysis, the Roth Memorandum faulted the Bernhardt White Paper for its purported assignment to Reclamation of the “sole authority to exercise . . . discretion” with regard to Aspinall Unit operations.<sup>37</sup> The Roth Memorandum also critiqued the Bernhardt White Paper for supposedly failing to address “the broad discretion vested in the Secretary to interpret the meaning of authorized purposes and to implement them in a way that provides benefits to the Park as well as Reclamation’s water and power users” as well as section 8 of the Reclamation Act.<sup>38</sup> Based on this analysis, the Roth Memorandum concluded that “there is no need for the White Paper” and recommended to Solicitor Tompkins that “appropriate steps be taken to withdraw the White Paper in order to avoid any confusion.”<sup>39</sup>

Second, in the Tompkins Memorandum, Solicitor Tompkins withdrew the Bernhardt White Paper, citing the analysis provided in the Roth Memorandum.<sup>40</sup> In addition, the Tompkins Memorandum determined that Section III of the Bernhardt Memorandum (“Implementation of the Decree: Current Issues and Recommendation”) was “flawed to the extent it relies upon the analysis of the White Paper” and was “no longer necessary given the completion of their FEIS.”<sup>41</sup> The Tompkins Memorandum withdrew Section III of the Bernhardt Memorandum as well as “any other part of the Bernhardt Memorandum” to the extent it rested on the Bernhardt White Paper.<sup>42</sup>

### **III. Analysis**

#### **A. Withdrawal of the Bernhardt Memorandum and Bernhardt White Paper Based on the Intervening Reclamation-NPS Agreement Was Not Warranted.**

The Tompkins Memorandum determined initially that the 2012 Reclamation-NPS Agreement on Aspinall Unit operations made the Bernhardt White Paper and Bernhardt

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<sup>36</sup> *Id.* (quoting Aspinall Unit Operations, Final Environmental Impact Statement, Wayne N. Aspinall Unit, Colorado River Storage Project, Gunnison River, Vol. I at ES-6 (Feb. 2012)).

<sup>37</sup> Roth Memorandum at 5.

<sup>38</sup> *Id.* at 5-6.

<sup>39</sup> *Id.* at 7.

<sup>40</sup> Tompkins Memorandum at 2-3.

<sup>41</sup> *Id.* at 3.

<sup>42</sup> *Id.* The Tompkins Memorandum also advised that the Kempthorne Memorandum “should not be interpreted as adopting the legal opinion set forth in Section III of the Bernhardt Memorandum or the White Paper,” while recommending the withdrawal of any portion of the Kempthorne Memorandum that relied on the White Paper. *Id.* Deputy Secretary Hayes concurred in the Tompkins Memorandum’s withdrawal recommendation. *See id.* I am not aware of any material factual developments relating to the Park’s water right and Aspinall Unit operations following release in 2012 of the Final EIS for Aspinall Unit operations and the Tompkins Memorandum. I have confirmed this understanding with the Associate Solicitor for Water Resources and with the Assistant Regional Solicitor for the Rocky Mountain Region, but note also that the lack of material factual developments has no bearing on the merits of the Tompkins Memorandum and Roth Memorandum, reviewed herein.

Memorandum unnecessary and withdrew them, at least in part, on that basis.<sup>43</sup> I review this threshold determination below and conclude that the withdrawal of the Bernhardt White Paper and Bernhardt Memorandum based on the Reclamation-NPS Agreement was not warranted, for two reasons.<sup>44</sup>

First, the Reclamation-NPS Agreement contradicted the then-binding Kempthorne Memorandum and was an illegitimate exercise of the agencies' delegated authority. Reclamation and NPS entered into the Agreement no later than February 27, 2012, more than one month prior to the issuance of the Tompkins Memorandum and the withdrawal of the Kempthorne Memorandum.<sup>45</sup> Thus, at the time the agencies reached their Agreement, the Kempthorne Memorandum was still in effect, including its express directive that Reclamation explain in the Aspinall Unit EIS that the Black Canyon water right "is capable of being enforced consistent with the provisions of the Decree against all appropriators *other than the Aspinall Unit as specified in the Decree itself*."<sup>46</sup>

In contrast to the Kempthorne Memorandum's clear directive, the Reclamation-NPS Agreement fails to explain the unique status of the Aspinall Unit relative to the Park's water right.<sup>47</sup> Instead, the Agreement provides that Reclamation "will meet the water right when it is exercised," without qualification.<sup>48</sup> Whereas the Kempthorne Memorandum instructed Reclamation to detail the limits of the Park's water right, the Agreement limits only Reclamation and suggests that the Park's water right could be exercised without any constraints.<sup>49</sup> In short, nothing in the Reclamation-NPS Agreement describes how the Black Canyon water right could be exercised "against all other appropriators other than the Aspinall Unit," as the then-binding Kempthorne Memorandum required.<sup>50</sup>

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<sup>43</sup> The Tompkins Memorandum withdrew Section III of the Bernhardt Memorandum as well as "any other part of the Bernhardt Memorandum [that] rests on the analysis in the White Paper." In my opinion, the Bernhardt Memorandum in its entirety followed the analysis in the Bernhardt White Paper. Accordingly, I treat the Tompkins Memorandum as having withdrawn the entire Bernhardt Memorandum.

<sup>44</sup> I recognize that Solicitor Tompkins may have independently displaced the Bernhardt Memorandum and Bernhardt White Paper by adopting the legal analysis in the Roth Memorandum. While I review the analysis in the Roth Memorandum *infra* at 13-17, I cannot overlook the decision in the Tompkins Memorandum to withdraw the Bernhardt Memorandum and the Bernhardt White Paper on the sole basis of the Reclamation-NPS Agreement.

<sup>45</sup> See Tompkins Memorandum at 2.

<sup>46</sup> Kempthorne Memorandum at 3 (emphasis added).

<sup>47</sup> Notably, Reclamation's Draft EIS *did* conform to the Kempthorne Memorandum. See DEIS (Jan. 2009) (noting the Park's water right "will be exercised so that it is coordinated with implementation of the preferred alternative to achieve a single peak flow, *subject to Aspinall Unit authorized purposes*") (emphasis added).

<sup>48</sup> Aspinall Unit FEIS, Volume I at ES-6 (emphasis added).

<sup>49</sup> The Roth Memorandum observed that the goal of the Reclamation-NPS Agreement was to make clear that "once the Secretary . . . determines the extent to which he will exercise the Park's water right in any given year, Reclamation, in accordance with state procedures, the terms of the Decree, and Reclamation law will operate the project to meet the senior downstream water right for the Park." Roth Memorandum at 4.

<sup>50</sup> See Kempthorne Memorandum at 3. The Tompkins Memorandum and Roth Memorandum observe that the Office of the Solicitor worked with Reclamation and NPS to address "the manner in which the Park's water right was described." See, e.g., Tompkins Memorandum at 2. However, I am aware of no authority that displaced the binding Kempthorne Memorandum until Deputy Secretary Hayes concurred in the Tompkins Memorandum on April 24, 2012, well after the agencies entered into their Agreement in the FEIS that was released on February 27, 2012. I have conferred with the Associate Solicitor for Water Resources, the Associate Solicitor for Parks and Wildlife, and the Assistant Regional Solicitor for the Rocky Mountain Region to confirm this understanding.

Second, even assuming its propriety, the Reclamation-NPS Agreement did not make the Bernhardt White Paper and Bernhardt Memorandum unnecessary. As against the Agreement, the Bernhardt White Paper and Bernhardt Memorandum remained a prudent exercise of the Secretary's and Solicitor's authority to develop a binding legal approach regarding management of Departmental property interests. By withdrawing the Bernhardt White Paper and Bernhardt Memorandum on the mere basis of the Reclamation-NPS Agreement, the Tompkins Memorandum improperly stripped the Department of needed legal guidance concerning the relationship between the Black Canyon water right and Aspinall Unit operations.

It is both appropriate and prudent for federal agencies to develop legal plans where limited water supplies are unable to meet all hydrological demands.<sup>51</sup> As a matter of course, the Department should be prepared for a circumstance in which limited water supplies may not satisfy both Aspinall Unit operational demands and the Park's downstream water right. An alternative approach in which the Department foregoes the development of a legal position until the onset of severe water supply conditions in the Gunnison River Basin would place Reclamation and NPS at undue and substantial risk.

Consistent with these sound planning principles, the Bernhardt Memorandum and Bernhardt White Paper expressly considered the threat of insufficient water supplies. For example, the Bernhardt Memorandum anticipated that "there will be years where neither Aspinall Unit operations nor ESA-related flow releases will provide sufficient water to allow for the water rights under the Decree to be fully exercised."<sup>52</sup> Faced with this potential conflict, Solicitor Bernhardt examined the relevant authorizing statutes and concluded that the "most reasonable determination is that Congress chose Compact development and river regulation to be of a higher priority than protection of parks and monuments and, in doing so, thereby impacted the resources and values of these parks and monuments and the exercise of the implied water rights that attached."<sup>53</sup>

Conversely, the Reclamation-NPS Agreement does not acknowledge or otherwise address the prospect of water supply challenges in the Gunnison River Basin. Nonetheless, the Tompkins Memorandum and Roth Memorandum concluded that the Reclamation-NPS Agreement by itself merited withdrawal of the Bernhardt White Paper and Bernhardt Memorandum. This left the Department without legal guidance on the interaction between the exercise of the Park's water right and the authorized purposes of the Aspinall Unit.<sup>54</sup>

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<sup>51</sup> See *Federal "Non-Reserved" Water Rights*, 6 U.S. Op. O.L.C. 328, 330 (1982) (noting "[t]he need to establish clear, dependable, reliable, and sound legal policies and to avoid conflicts and uncertainty in the western states to the extent possible, and to facilitate future planning for the use of water resources by both the western states and the responsible federal agencies").

<sup>52</sup> Bernhardt Memorandum at 2. See also Bernhardt White Paper at 12 (acknowledging the need to analyze the "exercise of the water right in years where there is insufficient water to meet both the needs of the Black Canyon and the authorized purposes of the Aspinall Unit").

<sup>53</sup> *Id.* at 25.

<sup>54</sup> While the Roth Memorandum mentions "the inability to fully realize one aspect of the project's purposes, such as the power purpose," Roth Memorandum at 7, this cryptic reference pales in comparison to Solicitor Bernhardt's direct recognition of "the potential for the Decree's water right to be less than fully exercised in all years due to