



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.¹ 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,

¹ 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.²

Three years later, following an internal Solicitor's Office analysis,³ 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.⁴ 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.⁵

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.

² 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").

³ 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).

⁴ 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").

⁵ 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.