



United States Department of the Interior  
OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

January 10, 2025

M-37081

Memorandum

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

From: Solicitor

Subject: Resolution of Questions About the Water Rights of the Black Canyon of the Gunnison National Park and the Wayne N. Aspinall Unit of the Colorado River Storage Project

Questions concerning the water rights of the Black Canyon National Park (Black Canyon) and the Bureau of Reclamation's Wayne N. Aspinall Unit of the Colorado River Storage Project (Aspinall Unit) have been debated for years. The issue is the relationship between the reserved water right for Black Canyon and the operation of the upstream series of dams and storage that comprise the Aspinall Unit. This Office has issued competing memoranda over the last 15 years to try to resolve these questions.<sup>1</sup> These competing interpretations originated in response to the Colorado Water Court's issuance of a final decree quantifying the Black Canyon's water right (*Decree Quantifying the Federal Reserved Water Right for the Black Canyon of the Gunnison National Park* (Final Decree), January 8, 2009 (*nunc pro tunc* – December 31, 2008)).

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<sup>1</sup> Below is an abbreviated outline and chronology of the opinions:

- 1) January 14, 2009 – Solicitor Bernhardt Memo (with White Paper). Secretary Kempthorne Concurrence.
- 2) January 14, 2009 – Secretary Kempthorne Memo to the Solicitor, the Assistant Secretary, Water & Science, and the Assistant Secretary, Fish and Wildlife and Parks directing implementation of the Final Decree.
- 3) April 20, 2012 – Memorandum from the Associate Solicitor for the Division of Parks and Wildlife, the Associate Solicitor for the Division of Land and Water Resources, and the Regional Solicitor for the Rocky Mountain Region (Staff Memorandum) to Solicitor Tompkins. N.B. This is referred to as the Roth Memorandum in M-37058.
- 4) April 24, 2012 – Solicitor Tompkins Memo to Deputy Secretary Hayes withdrawing portions of the Bernhardt Memo. Deputy Secretary Hayes Concurrence.
- 5) December 14, 2020 – Solicitor Jorjani M-Opinion (M-37058 - *Exercise of the Water Rights for Black Canyon of the Gunnison National Park in the Context of Congressional Authorization for the Bureau of Reclamation's Aspinall Unit*).

The M-Opinion by Solicitor Jorjani in 2020 was the most recent attempt to address these questions. M-37058. This Opinion effectively reinstated the earlier series of opinions issued in 2009 by Secretary Kempthorne and Solicitor Bernhardt, which were released shortly after the issuance of the Final Decree. The Kempthorne/Bernhardt Memos had been *partially* withdrawn by the 2012 memorandum issued by Solicitor Hilary Tompkins (and concurred in by Deputy Secretary Hayes).

The issuance of these competing memoranda has complicated matters for agency staff tasked with managing water rights quantified by the Final Decree. The competing opinions have created the impression that disagreement exists between the agencies when, in fact, on the ground managers of the Aspinall Unit and the Black Canyon have been able to effectively and collaboratively manage operations to ensure park and project purposes are being met consistent with applicable laws. This Office's legal guidance should support that ongoing practical management approach.

Staff managers have been following directives contained in the operative Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) for the Aspinall Unit. For example, the ROD included the following direction:

The Black Canyon of the Gunnison National Park Water Right (Black Canyon Water Right) is a downstream water right senior to the Aspinall Unit, and Reclamation will meet the water right when it is exercised. As such, along with the other senior water rights, it is a condition that is common to all alternatives. When the Secretary exercises the Black Canyon NP Water Right, Reclamation shall undertake operational actions consistent with the Black Canyon Decree and in accordance with applicable laws. If the Secretary places a water right call in the exercise of the Black Canyon Water Right, Reclamation shall undertake operational actions consistent with the Black Canyon Decree and in accordance with applicable laws. If the Secretary places a water right call in the exercise of the Black Canyon Water Right, Reclamation shall also comply with valid administrative orders from the Colorado State Engineer or the Division Engineer related to the administration of the decree for the Aspinall Unit and the Black Canyon Decree, both of which are made applicable to Reclamation by Section 8 of the Reclamation Act of 1902. In the event of discrepancies in the description of the water right in the FINAL EIS or this Record of Decision and the terms and conditions of the water right decree, the decree language shall govern.<sup>2</sup>

In developing this consensus language, the National Park Service and Bureau of Reclamation were clarifying that the Secretary determines the extent to which the Park's water right will be exercised in a given year, and Reclamation shall operate the project to support the Secretary's decision. Since issuance of the FEIS and ROD, agency staff have been able to support these operational decisions without conflict.

Recently, Park Service staff expressed concern about confusion created by M-37058 and the other related documents issued by the Solicitor's Office on this topic and asked for the Solicitor's Office to consider revisiting this issue. National Park Service and Bureau of Reclamation staff

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<sup>2</sup> Record of Decision, Aspinall Unit Operations Final Environmental Impact Statement, May 3, 2012, at 8-9.

agree that the consensus language in the ROD is sufficient to support operational decisions and withdrawal of M-37058 and related documents is appropriate. While I have been reluctant to have my Office weigh in on this matter yet again, there continues to be uncertainty, and the Solicitor's Office is best situated to provide the agencies with clear direction on this matter.

The existing environmental compliance documents have done a good job of recognizing the competing needs of the Park and the Project while also protecting downstream communities from flooding. Similarly, over the last several decades of managing water resources in the west in drought conditions brought on by climate change, we have learned that it is beneficial to rely on the expertise and discretion of our agency managers, where possible, to allow for real-time and collaborative decision making. This approach is particularly appropriate here, where confusing and sometimes conflicting legal opinions have not improved the ability of the affected agencies to manage the resources Congress entrusted them to protect.

As acknowledged in the Final Decree,<sup>3</sup> the Secretary retains all necessary authority and discretion to resolve conflicts. More importantly and for purposes of this question, the Secretary directed the bureaus to resolve their differences and adopt a position for implementation of the ROD. The bureaus have done so, and these questions have largely been put to rest.

Unfortunately, the conflicting memoranda issued by my Office have created unnecessary confusion. This has created tension between two offices that have otherwise worked collaboratively to comply with all applicable law. For these reasons, I withdraw M-37058 and reiterate that this situation is being carefully and appropriately managed by local agency staff. I am also withdrawing *all* of the other memoranda and opinions referenced above in footnote 1 as unnecessary. Ultimately, the Secretary retains her discretion to effectively resolve conflicts between these projects and staff may elevate concerns to the Secretary as needed.



Robert T. Anderson

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<sup>3</sup> Paragraph 31.5.4 of the Final Decree reads, "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." This language illustrates that the Secretary has broad discretion to interpret the meaning of the Decree and competing authorities and implement them in a way that provides benefits to competing interests.