



# 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

In fact, the Roth Memorandum went so far so to criticize the Bernhardt White Paper for considering the “potential tension between a water right that provides for high spring flows downstream in the Park and an upstream Reclamation project that seeks to capture and store those high flows” as “conflicting mandates.”<sup>55</sup> According to the Roth Memorandum, before recognizing the potential for tension between the Park’s water right and Aspinall Unit operations, the Bernhardt White Paper was required to “first determine whether and to what extent the two can be harmonized.”<sup>56</sup>

This criticism (relied upon by the Tompkins Memorandum) is inaccurate and ill-founded. The Bernhardt White Paper discussed the obligation to “strive to harmonize any two statutes that are potentially in conflict in a manner that provides force and effect to both.”<sup>57</sup> But as the Bernhardt White Paper explained, the tension between Aspinall Unit and exercise of the Park’s water right could not be disregarded: “[W]e are faced with two conflicting authorities, one is specific with regard to a plan of development, the other very general with no specific direction as to how to manage the resource; one is express with regards to water, and one is implied.”<sup>58</sup>

At bottom, the Tompkins Memorandum, Roth Memorandum, and Reclamation-NPS Agreement neglect a fundamental tenet of western water—that is, the practical reality of competing water rights warrants transparent, cogent legal analysis and the clear establishment of whether and to what extent the rights may be enforced as against each other. To the extent that the Tompkins Memorandum withdrew the Bernhardt White Paper and Bernhardt Memorandum based on the Reclamation-NPS Agreement, that withdrawal was inappropriate and unwarranted.

#### **B. The Bernhardt Memorandum and Bernhardt White Paper Properly Recognize the Secretary’s Obligation to Produce Power Through Aspinall Unit Operations Notwithstanding Potential Impacts to the Park.**

I next turn to the central difference between the Bernhardt Memorandum and Bernhardt White Paper, on the one hand, and the Tompkins Memorandum and Roth Memorandum, on the other. In the view of Solicitor Bernhardt, through enactment of the CRSP, Congress constrained the Secretary from exercising the Park’s water right in a manner that would frustrate the authorized purposes of the Aspinall Unit.<sup>59</sup> As the Bernhardt White Paper explained, “[t]o the extent the exercise of the Park right would interfere with this congressional authorization, the discretion to exercise the reserved right must be considered to have been modified.”<sup>60</sup>

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variations in water supply . . . or other unforeseen events affecting the water supply in the western United States, generally, and in the Gunnison basin, in particular.” Bernhardt Memorandum at 2.

<sup>55</sup> Roth Memorandum at 5.

<sup>56</sup> *Id.*

<sup>57</sup> Bernhardt White Paper at 15 (citing 2B Norman J. Singer, Sutherland Statutory Construction § 46.06 (5th ed. 1992)).

<sup>58</sup> Bernhardt White Paper at 16.

<sup>59</sup> In Section III of this memorandum, I separately address the Roth Memorandum’s contention that the Bernhardt White Paper did not adequately consider section 8 of the Reclamation Act.

<sup>60</sup> Bernhardt White Paper at 25.

Solicitor Tompkins disagreed with Solicitor Bernhardt's position, claiming that the Bernhardt White Paper "[did] not reflect a full and accurate legal analysis" and that the Bernhardt Memorandum was flawed to the extent it relied upon the Bernhardt White Paper.<sup>61</sup> Therefore, Solicitor Tompkins adopted the view of the Roth Memorandum that Solicitor Bernhardt did not "fully or properly address the broad discretion vested in the Secretary to interpret the meaning of the purposes for which the Aspinall Unit is authorized and to implement them in a way that provides benefits to the Park as well as Reclamation's water and power users."<sup>62</sup>

It is readily apparent that the Bernhardt Memorandum and Bernhardt White Paper provide the correct approach regarding the relationship between the Park's water right and Aspinall Unit operations. In accordance with applicable canons of statutory construction, the Bernhardt Memorandum and Bernhardt White Paper looked to the text of the authorizing legislation, comparing the "direct and specific statutory provisions of the CRSP Act"<sup>63</sup> to the "broad and general language in the Proclamation itself and the Organic Act and its 1978 Amendment."<sup>64</sup> Relying further on legislative history concerning the Aspinall Unit and relevant case law, Solicitor Bernhardt reached the clear and reasoned conclusion that "Congress established that Aspinall Unit authorized purposes should not be frustrated by exercise of the Black Canyon's reserved right."<sup>65</sup>

The Roth Memorandum (relied upon by the Tompkins Memorandum) is far less persuasive. In response to the Bernhardt White Paper's detailed and exhaustive review, the Roth Memorandum provides only a cursory analysis that is rife with conclusory assertions and mischaracterizations.<sup>66</sup> The failure of the Roth Memorandum to address several of the authorities discussed in the Bernhardt White Paper is especially glaring.<sup>67</sup>

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<sup>61</sup> Tompkins Memorandum at 3.

<sup>62</sup> *Id.* at 2.

<sup>63</sup> Bernhardt Memorandum at 7.

<sup>64</sup> Bernhardt White Paper at 14.

<sup>65</sup> Bernhardt White Paper at 17.

<sup>66</sup> One particularly bald assertion is the Roth Memorandum's claim that "further analysis is needed from the perspective of the law of the case with respect to both the legal holding in *HCCA v. Norton* [448 F.2d 1235 (D. Co. 2006)] and the Final Decree before the conclusions reached in the White Paper can be adequately supported." Roth Memorandum at 7. The Roth Memorandum itself fails to acknowledge that Solicitor Bernhardt developed the Bernhardt Memorandum to inform implementation of the Final Decree and that the Bernhardt Memorandum's legal position was consistent with the position taken by the United States and the Department of Justice following the *HCCA* litigation. See Bernhardt Memorandum at 4-7.

<sup>67</sup> A partial list of the authorities and analyses in the Bernhardt White Paper that are unaddressed in the Roth Memorandum includes: 1) Testimony of Senator Watkins' in support of the CRSP (see White Paper at 16 (citing 101 Cong. Rec. 4667)); 2) *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973) (see White Paper at 16); 3) Testimony of Reclamation Commissioner Dexheimer (see White Paper at 18, citing Hearing on S. 500, 84th Cong. 1st Sess. Feb. 28, 1955) (see White Paper at 18); 4) Deputy Solicitor General Edwin S. Kneedler, United States Dep't of Justice, Office of the Solicitor General, Sept. 19, 2001 Memorandum for the Solicitor General re: *United States v. Idaho*, No. 25546 (May 1, 2001) (see White Paper at 25); and 5) *Arizona Power v. Morton*, 549 F.2d 1231 (9th Cir. 1977) (see White Paper at 27).

Most fundamentally, the Roth Memorandum's claim that the Bernhardt White Paper "does not address or give due weight to 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" is in error.<sup>68</sup> In reality, the Bernhardt White Paper addressed both the Secretary's "discretion to exercise the reserved right"<sup>69</sup> and his "discretion to regulate the river"<sup>70</sup> through Aspinall Unit operations. And in contrast to the Roth Memorandum, the Bernhardt Memorandum engaged in a detailed comparison of these two discretionary authorities, determining that Congress's more specific legislation in the CRSP controlled over the general language provided in the Organic Act.<sup>71</sup>

Congress has placed a higher emphasis on regulation of the river over the exercise of a more senior implied reserved water right and the general statutory directions contained in the Organic Act. The basic rule of construction that the specific controls the general supports the conclusion that Congress, in 1956, did intend to allow Reclamation's Aspinall Unit to meet its purposes notwithstanding the existence of the reservation at the Black Canyon. With the very specific and direct authorization to harness and develop the water resources of the Gunnison River, Congress placed a new and subsequent mandate on the Secretary. By enacting CRSP and determining that it would focus on river regulation and water development on the Gunnison River, Congress established that Aspinall Unit authorized purposes should not be frustrated by the exercise of the Black Canyon's reserved right.<sup>72</sup>

Tellingly, the Roth Memorandum does not respond to this analysis, repeated throughout the Bernhardt White Paper.<sup>73</sup> The Roth Memorandum similarly neglects to make any effort to address the text of the CRSP or Organic Act, canons of statutory construction, or the legislative history discussed in the Bernhardt White Paper.<sup>74</sup> Instead, the Roth Memorandum complains that the Bernhardt White Paper "would very tightly constrain the Secretary's discretion under the CRSP to manage among competing priorities in a manner that, we understand, would restrain his ability to satisfy the Park water right much more than has ever occurred under historic operations."<sup>75</sup> But as the Bernhardt White Paper consistently explained and the Roth

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<sup>68</sup> See Roth Memorandum at 5-6 (citing *SUWA v. Norton*, 542 U.S. 55 (2004)).

<sup>69</sup> Bernhardt White Paper at 25.

<sup>70</sup> *Id.* at 26.

<sup>71</sup> Cf. *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016) ("When two statutes come into conflict, courts assume Congress intended specific provisions to prevail over more general ones, the assumption being that the more specific of two conflicting provisions 'comes closer to addressing the very problem posed by the case at hand and is thus deserving of credence.'") (citing *Fourco Glass Co. v. Transmirra Prods Corp.*, 353 U.S. 222, 228-29 (1957) and quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012)).

<sup>72</sup> Bernhardt Memorandum at 17.

<sup>73</sup> The Roth Memorandum's claim that the Bernhardt White Paper "makes conclusions regarding the lack of discretion associated with section 7 and power use" is especially spurious.

<sup>74</sup> One looks in vain for any mention of Congress in the Roth Memorandum.

<sup>75</sup> Roth Memorandum at 6.

Memorandum failed to appreciate, it was *Congress* that constrained the Secretary's discretion to exercise the Black Canyon water right.<sup>76</sup>

Although the Roth Memorandum cites *Norton v. SUWA*<sup>77</sup> and *Laughlin River Tours v. Reclamation*<sup>78</sup> in support of its claim that the Secretary retained broad discretion regarding the Department's Aspinall Unit obligations, those cases are easily distinguishable. In *SUWA*, the Court considered whether the discretion provided to the Bureau of Land Management pursuant to the Federal Land Policy and Management Act of 1976 precluded judicial review under the Administrative Procedure Act ("APA").<sup>79</sup> *SUWA* did not consider two separate statutory directives and is thus inapposite. Similarly, the court in *Laughlin River* evaluated differing congressional priorities within the statutory scheme of the Boulder Canyon Project Act of 1928.<sup>80</sup> *Laughlin Rivers* did not address, as presented here with the Organic Act and CRSP, two different statutes enacted at different points in time. The question before us is not whether a single statute provides broad discretion; rather, it is whether Congress limited the scope of the Secretary's discretion under the Organic Act pursuant to the later-enacted CRSP. Thus, *Norton* and *SUWA* simply do not apply here.

Finally, I address the Roth Memorandum's contention that "there must be an ongoing or constant impairment of the ability to minimally meet multiple project purposes for CRSP to have been 'frustrated.'"<sup>81</sup> No authority is provided for this proposition, and I am not aware of any relevant analysis which suggests that the inability to meet a specific statutory directive does not constitute "frustration" if other, separate directives in the same statutory scheme are satisfied. However, in order to avoid any further confusion, I construe the Bernhardt Memorandum and Bernhardt White Paper to have determined that the frustration of one statutory directive may not be obviated by the satisfaction of another in the same statutory scheme, and that the frustration, disturbance, or inhibition of any of the Aspinall Unit's operational purposes may not be undertaken by the Secretary or the Department.

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<sup>76</sup> See 43 U.S.C. § 620f ("The hydroelectric powerplants and transmission lines . . . to be constructed, operated, and maintained by the Secretary *shall be operated in conjunction with other Federal powerplants, present and potential, so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates.*") (emphasis added). Cf. *Lopez v. Davis*, 531 U.S. 230, 242 (2001) (noting Congress's use of the mandatory "shall" to "impose discretionless obligations"). Accord Bernhardt Memorandum at 26 ("By directing the Secretary to generate as much power as can be sold at firm power and energy rates as is practicable while not interfering with several specific commitments on water made under these acts and compacts . . . Congress has limited the Secretary's discretion to regulate the river."). As the Ninth Circuit has similarly observed, Congress "has imposed some restrictions on the Secretary's discretion to market hydroelectric power" in the CRSP, including the legislation's requirement that "plants be operated with other federal power plants 'to produce the greatest practicable amount of power . . . that can be sold at firm power . . . rates.'" *Arizona Power*, 549 F.3d at 1231, 1240 (quoting section 7 of the CRSP).

<sup>77</sup> 542 U.S. 55 (2004).

<sup>78</sup> 730 F. Supp. 1522 (D. Nev. 1990).

<sup>79</sup> *SUWA*, 542 U.S. at 66 ("The principal purpose of the APA limitations we have discussed—and of the traditional limitations upon mandamus from which they were derived—is to protect agencies from undue judicial interference with their lawful discretion.").

<sup>80</sup> *Laughlin River*, 730 F. Supp. at 1524.

<sup>81</sup> Roth Memorandum at 7. For the reasons described above, the Roth Memorandum's earlier assertion that "frustration" "means a continual inability of the Secretary to meet the *broad* statutory mandate established in CRSP" is not well-founded. See *id.* (emphasis added).

### C. Section 8 of the Reclamation Act Does Not Limit Congress's Authority to Manage Federal Property Interests.

I next address the Roth Memorandum's contention that the Bernhardt White Paper "fails to address section 8 of the Reclamation Act."<sup>82</sup> According to the Roth Memorandum, "[i]n light of section 8 and the language in the Final Decree . . . the White Paper fails to acknowledge that the Secretary must exercise his discretion in conformance with the Final Decree, but do so in a way that is not inconsistent with relevant Federal law."<sup>83</sup> Based on section 8, the Roth Memorandum claims further that "where there is a downstream senior water right held by the NPS, Reclamation must operate its project consistent with the requirements for priority under state law unless the underlying authorizing statute conflicts with state water law."<sup>84</sup>

As an initial matter, the claim that the Bernhardt White Paper did not consider the Decree in a manner consistent with relevant federal law is belied simply by examining the text of Solicitor Bernhardt's analysis. The Bernhardt White Paper contains an exhaustive review of applicable federal law, and a primary purpose of the analysis was to determine how the Secretary should implement the Decree in light of the law.<sup>85</sup>

The Roth Memorandum also mischaracterizes the question presented in the Bernhardt White Paper. The purpose of the White Paper, strictly speaking, was not to determine or compare Reclamation's and NPS's respective obligations. Rather, as Solicitor Bernhardt made clear, the White Paper was necessary to properly understand *the Secretary's* responsibilities under CRSP in light of the decreed water right for the Park.

Contrary to the implication in the Roth Memorandum, section 8 does not mandate that the United States exercise its own water rights in a particular manner, much less in a manner contrary to national policy as embodied in CRSP.<sup>86</sup> The Bernhardt White Paper makes this point clear:

We reiterate that the issue is not whether the water right itself has been changed or altered: it has not. Nor is the issue whether the water right may be enforced as against other non-federal appropriators with a junior

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<sup>82</sup> Roth Memorandum at 6. *See also* Reclamation Act, Sec. 8 ("Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water . . . and the Secretary of the Interior . . . shall proceed in conformity with such laws.").

<sup>83</sup> Roth Memorandum at 6.

<sup>84</sup> *Id.*

<sup>85</sup> *See* Bernhardt White Paper at 12 ("Just as the development of the Decree required careful balancing of the obligations to the Black Canyon as well as the Aspinall Unit, implementation of the Decree in the coming years will also require careful balancing of these considerations."). It is especially odd that the Roth Memorandum critiques the Bernhardt White Paper for its treatment of the Decree but makes no mention of the comprehensive summary of the Decree provided in the Bernhardt Memorandum. *See* Bernhardt Memorandum at 5-6.

<sup>86</sup> *See Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 291-92 (1958) (finding that Congress did not intend section 8 to override national policy as embodied in section 5 of the Reclamation Act).

priority date, as the water right is fully enforceable against other non-federal junior appropriators. The issue, quite simply, is whether this water right is enforceable against another federal appropriation with a junior priority date pursuant to an act of Congress that is very specific and direct with regard to the development of water resources and such development is inconsistent with the exercise of the Black Canyon's water right.<sup>87</sup>

The Bernhardt Memorandum was silent on section 8 of the Reclamation Act because that provision has no impact on the specific question presented here. Management of federal property interests is an exercise of the Property Clause of the United States Constitution.<sup>88</sup> "The power of Congress to dispose of any kind of property belonging to the United States is vested in Congress without limitation. . . . Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein."<sup>89</sup> Stated differently, "'with respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations.'"<sup>90</sup>

With these principles in mind, and given that the Aspinall Unit and Black Canyon "represent two property interests of the United States that are both under the administration of the Secretary," Solicitor Bernhardt understood the need to "look to the intent of Congress itself with regard to the water resources of the Gunnison River Basin."<sup>91</sup> Congress addressed this issue and, as the Bernhardt White Paper explained, firmly decided to "place[] a higher emphasis on regulation of the river over the exercise of a more senior implied reserved water right and the general statutory constructions contained in the Organic Act."<sup>92</sup>

The Bernhardt White Paper thus properly analyzed the authorities in which Congress exercised its Property Clause power to manage federal interests in the Aspinall Unit and Black Canyon. There was no need for Solicitor Bernhardt to look to section 8 of the Reclamation Act or state law. The Roth Memorandum's suggestion otherwise is unpersuasive and unfounded.

#### **IV. Conclusion**

For the reasons provided above, the Tompkins Memorandum improperly and imprudently relied upon the Reclamation-NPS Agreement on Aspinall Unit operations to withdraw the Bernhardt Memorandum and Bernhardt White Paper. To the extent the Tompkins Memorandum withdrew the Bernhardt Memorandum and Bernhardt White Paper based on the

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<sup>87</sup> Bernhardt White Paper at 14 n. 11.

<sup>88</sup> See U.S. Const., Article 4, § 3, Cl. 3 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). Accord Bernhardt White Paper at 11 ("[I]t is also clear that under the Constitution, subsequent Congresses may take actions regarding the allocation of resources that are inconsistent with earlier reservations.").

<sup>89</sup> *Alabama v. Texas*, 347 U.S. 272, 273 (1954) (*per curiam*) (internal citations and quotations omitted).

<sup>90</sup> *Gibson v. Chouteau*, 80 U.S. 92, 99 (1872).

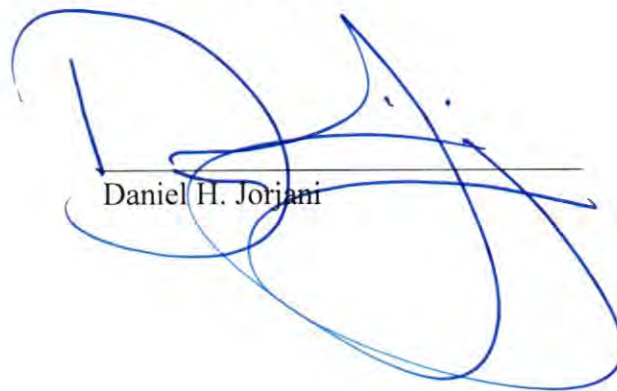
<sup>91</sup> Bernhardt White Paper at 14.

<sup>92</sup> *Id.* at 17.

Roth Memorandum, that withdrawal was in error due to the flaws contained in the Roth Memorandum.

As such, this memorandum hereby withdraws the Tompkins Memorandum and Roth Memorandum and reinstates the Bernhardt Memorandum and Bernhardt White Paper. This memorandum also adopts in full the Bernhardt Memorandum and Bernhardt White Paper. Finally, this memorandum provides the current, controlling legal view of the Department regarding exercise of the Park's water right in the context of Aspinall Unit operations, as similarly set forth in the Bernhardt Memorandum and Bernhardt White Paper. Going forward, the Department's legal opinion is that the exercise of the Park's water right may not frustrate any of the Aspinall Unit's operational purposes.<sup>93</sup>

This opinion was prepared with the assistance of Michael T. Freeman, Acting Deputy Solicitor for Water Resources, with input from the Division of Water Resources, Division of Parks and Wildlife, and the Solicitor's Rocky Mountain Regional office.



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<sup>93</sup> I recommended that Reclamation and NPS consult with the Office of the Solicitor regarding whether and to what extent this memorandum impacts the current Final EIS for Aspinall Unit operations. In addition, as Deputy Secretary Hayes withdrew the Kempthorne Memorandum to the extent it relied upon Solicitor Bernhardt's analyses, I recommend that the Office of the Secretary consult with the Office of the Solicitor regarding whether the Kempthorne Memorandum is reinstated and other appropriate next steps.