

9-1-2005

Colorado River Storage Project Act Purposes: Does the Tail Wag the Dog?

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COLORADO RIVER STORAGE PROJECT ACT PURPOSES: DOES THE TAIL WAG THE DOG?

KENT HOLSINGER†

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I. INTRODUCTION

Society’s dependence upon electricity has grown tremendously in recent years. As energy prices rise, so does the number of conflicts over existing sources of electricity. Increased societal demands for recreation, fish, and wildlife uses are creating conflicts with traditional production of hydroelectricity from existing water storage facilities.

Within the last few years, conflicts over the operations of federal facilities have called into question the very purposes of the federal water projects. These conflicting uses include water storage versus compact compliance, producing hydroelectricity versus downstream angling,

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maintaining aesthetics versus allowing sediment transport, and protecting endangered species versus sustaining irrigation and agriculture. In one recent example, debate centered on whether the purposes for which Congress authorized Colorado River Storage Project reservoirs included operations for fish, wildlife, or recreation. The U.S. Bureau of Reclamation has undertaken an environmental impact statement ("EIS") process assessing potential effects of operational changes on Endangered Species Act ("ESA") compliance on the Aspinall Unit reservoirs in Western Colorado. The EIS process has cast a spotlight on the use of federal water facilities.

Operating federal facilities for fish, wildlife, or recreation could result in a myriad of effects on western watercourses. In general, rafters and kayakers crave high flows over long periods. Downstream anglers appreciate the clear, steady tailwater flows that produce gold-medal trout. Wildlife management agencies are wary of seasonal changes in river flow rates because rainbow trout spawn in the spring and brown trout spawn in the fall. Environmentalists call for hydrographs mimicking natural seasonal flow rates – high spring peak flows and low summer and winter flows. Downstream federal land managers covet high flows that transport sediment and remove trees and other vegetation from the river channel. Upstream anglers often wish to keep stored water in reservoirs benefiting flat-water fishery or kokanee salmon spawning.

The Notice of Intent to Prepare a Draft EIS for the Aspinall Unit provides that "[t]he purpose of Reclamation's proposed action is to operate the Aspinall Unit to avoid jeopardy to endangered species while maintaining the congressionally authorized Unit purposes."¹ For an effective EIS process, the cooperating agencies and stakeholders must have a clear understanding of what it means to "avoid jeopardy" while maintaining the purposes authorized by Congress. In the end, careful management may help balance these competing interests.

II. ENDANGERED SPECIES

Four listed fish species inhabit the Colorado River and the Gunnison River downstream of the Aspinall Unit reservoirs: the Colorado pikeminnow (formerly known as the Colorado squawfish), the razor-back sucker, the humpback chub, and the bonytail chub.² The U.S. Fish and Wildlife Service ("FWS") has identified some of the major threats to the listed fish. Five of these threats include: (1) changes in river flows and dams that prevent fish from reaching their historic

1. Notice of Intent to Prepare a Draft Environmental Impact Statement and Announcement of Public Scoping Meetings, 69 Fed. Reg. 2943, 2944 (Jan. 21, 2004).

2. Endangered and Threatened Wildlife and Plants, 59 Fed. Reg. 13,374 (Mar. 21, 1994).

range, (2) competition with and predation by nonnative fish, (3) hybridization, (4) pesticides and pollutants, and (5) parasitism.³ The FWS designated 1,980 miles of the Colorado River as "critical habitat" for the listed fish in March 1994.⁴ This designation included approximately 35 miles of the Gunnison River from Grand Junction downstream to Delta.

Interested parties have created recovery programs in the Upper Colorado River Basins with the goal of eliminating threats to the species while allowing existing and future water development to continue. For example, water and power providers are working with public agencies to provide habitat and create fish passages.⁵ Through federal and state hatchery programs, native fish stocking has become a key factor in recovery. Nonnative fish management efforts are also underway, including the construction of fish screens in reservoirs, which control the distribution of nonnative species.⁶

The Upper Colorado River Endangered Fish Recovery Implementation Program began in 1988 through a cooperative agreement between the governors of Colorado, Wyoming, and Utah, the Secretary of the Interior, and the Administrator of the Western Area Power Administration.⁷ The San Juan Recovery Implementation Program is a similar effort involving Colorado and New Mexico, as well as the Bureau of Reclamation, FWS, Bureau of Land Management, Bureau of Indian Affairs, Native American tribes, and water development interest groups.⁸ "To date, over \$20 million has been spent for capital projects to recover the endangered fish in the Upper Basin. But the participants in these recovery programs estimate the need for up to \$100 million in capital construction funds through fiscal year 2007."⁹

3. U.S. Fish and Wildlife Service, Upper Colorado River Basin and Endangered Fish Recovery Program Homepage, <http://www.r6.fws.gov/coloradoriver/> (follow "Why some native fish in the upper Colorado River basin are endangered" hyperlinks) (last visited Oct. 21, 2005).

4. Endangered and Threatened Wildlife and Plants, 59 Fed. Reg. at 13,374.

5. U.S. FISH AND WILDLIFE SERV., RECOVERY IMPLEMENTATION PROGRAM FOR ENDANGERED FISH SPECIES IN THE UPPER COLORADO RIVER BASIN 7 (rev. April 2003) [hereinafter BLUEBOOK].

6. U.S. Fish and Wildlife Service, Upper Colorado River Basin and Endangered Fish Recovery Program Homepage, <http://www.r6.fws.gov/coloradoriver/> (follow "Managing non-native fish" hyperlink) (last visited Oct. 21, 2005).

7. COOPERATIVE AGREEMENT FOR RECOVERY IMPLEMENTATION PROGRAM FOR ENDANGERED SPECIES IN THE UPPER COLORADO RIVER BASIN (1988), available at <http://www.r6.fws.gov/crrip/doc/coop.pdf>.

8. *Program Highlights 2003-2004*, ANN. PUBLICATION (Upper Colorado River Endangered Fish Recovery Program and San Juan Basin Recovery Implementation Program, Denver, Colo. and Albuquerque, N.M.), 2003-2004, at 7.

9. *To Authorize the Bureau of Reclamation to Provide Cost Sharing for the Endangered Fish Recovery Implementation Programs for the Upper Colorado and San Juan River Basins: Hearing on S. 2239 Before the Subcomm. on Water and Power of the S. Comm. on Energy and Natural*

Colorado, Wyoming, Utah, water and power providers, and environmental interest groups are active participants in these recovery programs.¹⁰ The fundamental goal of these programs is to aid recovery of endangered fish and ultimately delist the endangered fish species while allowing water development in the Upper Basin and San Juan Basin in accordance with a complex array of state and federal laws, treaties, interstate compacts, Supreme Court decrees, and the Secretary of Interior's trust responsibilities, collectively referred to as the "Law of the River." These recovery programs have given a greater voice to the states, water and power providers, and environmental interest groups, and have shifted the focus from a regulatory approach to solution-based approach. Both Recovery Implementation Programs have made significant progress toward the recovery of the endangered fish.

With support from the state of Colorado, the FWS finalized recovery goals in August 2002 for the listed fish in the Colorado River Basin.¹¹ The FWS developed these goals as supplements to existing recovery plans. The existing recovery plans detail population numbers and habitat conditions required for the recovery of the Colorado pikeminnow, razorback sucker, humpback chub, and bonytail chub. The recovery goals are comprehensive and contain attainable criteria for down-listing and delisting of each species.

Populations of the Colorado pikeminnow are increasing, and delisting, or at least down-listing, is a distinct possibility.¹² The humpback chub has made similar progress. Razorback suckers are also beginning to show signs of improvement, but programs may need additional focus for the bonytail chub.

Habitat protection for the listed fish includes floodplain easements and backwater habitat, as well as providing adequate stream flows. The September 29, 1987 [there is only one Blue Book] of the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin ("RIP Blue Book") provides that the acquisition of flows will be accomplished by "working with the State agencies that are responsible for instream flow protection[,] and that "[u]nder this program, water rights will be appropriated, acquired, and administered

Resources, 106th Cong. 13 (2000) (statement of Greg Walcher, Executive Director, Colorado Department of Natural Resources).

10. U.S. Fish and Wildlife Service, Upper Colorado River Basin and Endangered Fish Recovery Program Homepage, <http://www.r6.fws.gov/coloradoriver/> (follow "Recovery Program overview" hyperlink) (last visited Oct. 21, 2005).

11. Notice of Availability of Recovery Goals for Four Endangered Fishes of the Colorado River Basin, 67 Fed. Reg. 55,270 (Aug. 28, 2002).

12. U.S. Fish and Wildlife Service, Upper Colorado River Basin and Endangered Fish Recovery Program Homepage, <http://www.r6.fws.gov/coloradoriver/> (follow "Colorado pikeminnow" hyperlink) (last visited Oct. 21, 2005).

pursuant to State law.”¹³ In addition, the Bureau of Reclamation is to “assist in meeting instream flow requirements for the rare fish through the refined operations of Flaming Gorge, Blue Mesa [Aspinall], and Ruedi Reservoirs in a manner consistent with all applicable laws.”¹⁴ Therefore, the Bureau must be mindful not only of the ESA but of “all applicable laws,” including its own statutory authority.

As part of the ESA Section 7 consultation, the FWS completed a Programmatic Biological Opinion for the “15 Mile Reach” of the Colorado River near Grand Junction on December 20, 1999.¹⁵ This put more than one million acre-feet of existing water and 120,000 acre-feet of future water depletions on the main stem of the Colorado River in compliance with the ESA. The FWS recently completed a similar biological opinion on the Yampa River, and they will likely complete another concurrently with the Aspinall EIS process on the Gunnison River.

Section 7 of the ESA requires that those actions for which an agency is authorized must “not likely . . . jeopardize the continued existence of any endangered species.”¹⁶ All federal agencies and private parties must consult with the FWS when any activity permitted, funded, or conducted by that agency may affect a listed species or designated critical habitat, or is likely to jeopardize proposed species or adversely modify proposed critical habitat.¹⁷

13. U.S. FISH AND WILDLIFE SERV., RECOVERY IMPLEMENTATION PROGRAM FOR ENDANGERED FISH SPECIES IN THE UPPER COLORADO RIVER BASIN 1-7 (1987) [hereinafter BLUEBOOK 1987], *available at* <http://www.r6.fws.gov/crrip/doc/bluebookfinal.pdf>; *See also* U.S. Fish and Wildlife Service, Upper Colorado River Basin and Endangered Fish Recovery Program Homepage, <http://www.r6.fws.gov/coloradoriver/> (follow “Protecting stream flows” hyperlink) (last visited Oct. 21, 2005) (listing some accomplishments of the recovery program as: management of the release of 30,000 acre-feet of water from Green Mountain Reservoir and coordinated releases from Ruedi and Wolford Mountain Reservoirs; agreement to release up to 3,300 acre-feet of water annually from Steamboat Lake for endangered fish in the Yampa River; agreements to coordinate water releases from several Colorado reservoirs to benefit endangered fishes; construction of structures in the Government Highline Canal near Grand Junction, Colorado to improve efficiency and reduce diversions; synthesis reports and flow recommendations for endangered fish habitats to be used in preparing new biological opinions for future dam operations) (last visited Oct. 21, 2005).

14. BLUEBOOK 1987, *supra* note 13, at 1-7.

15. U.S. FISH AND WILDLIFE SERV., FINAL PROGRAMMATIC BIOLOGICAL OPINION FOR BUREAU OF RECLAMATION’S OPERATIONS AND DEPLETIONS, OTHER DEPLETIONS, AND FUNDING AND IMPLEMENTATION OF RECOVERY PROGRAM ACTIONS IN THE UPPER COLORADO RIVER ABOVE THE CONFLUENCE WITH THE GUNNISON RIVER (1999), *available at* www.r6.fws.gov/crrip/15mile/Final%20PBO.pdf.

16. Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2000). Section 1536 of the ESA is also known by its Congressional Act section designation, section 7. Section 7(a)(2) is triggered by federal agency action, but 7(a)(1) allows federal agencies to take voluntary measures, such as participation in recovery program activities to benefit listed species. 16 U.S.C. § 1536(a)(1)-(2).

17. 16 U.S.C § 1536(a)(2).

The ESA does not grant independent power to federal agencies, and a federal agency is limited to its existing authority in carrying out its obligations pursuant to the ESA.¹⁸ “Moreover, the ESA does not alter or override existing laws . . . nor does the ESA expand the scope of a federal agency’s authority and allow the imposition of restrictions or requirements because they are considered by agency employees to be beneficial to listed species.”¹⁹

Consultation under the ESA must be considered in light of the Bureau of Reclamation’s statutory authority. The RIP Blue Book proscribes that implementation of the program is to be “compatible with all Federal and State laws and all private development projects.”²⁰ Moreover, the authorizing legislation for RIP funding specifies that “with regard to the acreage limitation provisions of Federal reclamation law,” no action taken pursuant to, or in furtherance of, the RIP shall affect Reclamation Law.²¹

III. THE CONGRESSIONALLY-AUTHORIZED PURPOSES OF CRSP UNITS

A. 1956 Colorado River Storage Project Act (“CRSP”)

Following World War II and the enactment of the 1948 Upper Colorado River Basin Compact, the states helped initiate legislation for the comprehensive development of the river system through water storage. The goal was to ensure that the Upper Basin states could develop their proportion of water and meet downstream delivery obligations.²² The result was the 1956 Colorado River Storage Project Act (“CRSP”). The CRSP authorized initial units including Glen Canyon, Aspinall, Flaming Gorge, and Navajo for specific purposes:

In order to initiate the comprehensive development of the water resources of the Upper Colorado River Basin, for the purposes, among others, of regulating the flow of the Colorado River, storing water for beneficial consumptive use, making it possible for the States of the

18. *Id.* § 1536(a)(1).

19. Norm James, *The Endangered Species Act and Current Problems Concerning the Administration of Livestock Grazing on National Forests in the Southwest* 22 (Oct. 26, 2001) (unpublished submission to the Forest Service and the Department of the Interior, on file with the author) (citing *American Forest and Paper Ass’n v. U.S. EPA*, 137 F.3d 291, 298-299 (5th Cir. 1998) (EPA cannot invoke the ESA as a means of imposing requirements that are not authorized under the Clean Water Act) and *Platte River Whooping Crane Trust v. Fed. Energy Reg. Comm’n*, 962 F.2d 27, 33-34 (D.C. Cir. 1992) (the ESA “does not *expand* the powers conferred on an agency by its enabling act”).

20. BLUEBOOK 1987, *supra* note 13, at 1-8.

21. Act of Oct. 30, 2000, Pub. L. No. 106-392, § 4, 114 Stat. 1602, 1606.

22. James S. Lochhead, *An Upper Basin Perspective on California’s Claims to Water From the Colorado River*, 4 U. DENV. WATER L. REV. 290, 312 (2001).

Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, providing for the reclamation of arid and semiarid land, for the control of floods, and for the generation of hydroelectric power, as an incident of the foregoing purposes²³

Analysis of statutes must include the social conditions and societal ideals at the time of the statute's enactment.²⁴ After World War II, the arid West demanded reliable water supplies, protection from flooding, and electricity. Congress aimed to deliver. Congress enacted the CRSP decades before the United States adopted some of the most powerful environmental laws in the world, namely the ESA and the National Environmental Policy Act ("NEPA"). The rationale behind enacting the CRSP was to supply water and power to the West.²⁵ Today, great controversy surrounds any proposed water and power development because of potential effects on the environment. Even the operation of existing water storage facilities, such as the Aspinall Unit reservoirs, attracts significant environmental opposition.

Congress excluded fish, wildlife, and recreation from CRSP purposes. "While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose."²⁶ The introductory phrase in Section 620, "among others," does not expand the express purposes.²⁷ "[W]here the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."²⁸ The CRSP addressed recreational facilities and fish hatcheries in another provision.²⁹ Therefore, the drafters could have included boating, angling, or instream flows as listed purposes of the CRSP, but chose not to do so.

Noscitur a sociis provides that unclear words within a list have their meaning colored by the other words in the list.³⁰ Courts often apply *noscitur a sociis* to avoid giving "unintended breadth to the Acts of Congress."³¹ In Section 620 of the CRSP, Congress describes the "comprehensive development" of the Upper Basin, the "control of floods," that water would be stored "for beneficial consumptive use," that the Upper Basin States would be able to "utilize" their compact-apportioned wa-

23. Colorado River Storage Project Act, 43 U.S.C. § 620 (2000).

24. MICHAEL SINCLAIR, A GUIDE TO STATUTORY INTERPRETATION 140 (2000).

25. Colorado River Storage Project Act, 43 U.S.C. § 620 (2000).

26. NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 192 (6th ed. 2000).

27. 43 U.S.C. § 620.

28. SINGER, *supra* note 26, at 194.

29. 43 U.S.C. § 620(g).

30. SINGER, *supra* note 26, at 265.

31. SINCLAIR, *supra* note 24, at 152.

ter, and that the "generation of hydroelectric power" is "an incident of the foregoing purposes."³² Under *noscitur a sociis*, the expression of these uses requires the *exclusion* of other uses such as navigation, aesthetics, rafting, fishing, or channel maintenance.

The principle *ejusdem generis* limits a listed general phrase in meaning to the same category or classification as other specific items in the list.³³ In the CRSP, the list of purposes exhibits a common comprehensive scheme for development of the Colorado River for the economic and societal benefit of the Upper Basin States. Storing and releasing water for aesthetics, rafting, angling, sediment transport, etc., would be inconsistent with the comprehensive scheme of the authorized purposes. Therefore, if the Bureau of Reclamation operates the CRSP facilities for aesthetics, rafting, angling, or sediment transport, then the Bureau is allowing inconsistent uses to dictate the operation of facilities built for a specific comprehensive development scheme. Operating the CRSP facilities in this way is allowing the tail to wag the dog.

B. Legislative History of the CRSP

"[T]he two most basic rules of statutory interpretation are: Read [sic] the statute, and give the words their ordinary meanings."³⁴ Under this "plain meaning rule," where the meaning of statutory language is unambiguous, it is not appropriate to examine legislative history.³⁵ Because some contend that CRSP purposes are broader than providing water and power, a review of the legislative history of the CRSP helps clarify these issues. The House Committee stated:

The Colorado River is an erratic stream. The periods of high flow do not coincide with the periods of greatest demand on its waters. Large holdover reservoirs, like Lake Mead behind Hoover Dam which stores and regulates water for use in the lower basin, are needed in the upper basin for storing water during years of high flow for use during subsequent years of low stream discharges, as well as to serve on a seasonal basis. Using these large storage reservoirs, the Bureau of Reclamation can equalize the flow of the river from year to year and maximize water utilization on a long-term basis.³⁶

President Eisenhower understood the need for the CRSP to prevent flooding and to supply water and power to the West for economic growth:

32. 43 U.S.C. § 620.

33. SINGER, *supra* note 26, at 272-74.

34. SINCLAIR, *supra* note 24, at 135.

35. SINGER, *supra* note 26, at 123.

36. H.R. REP. NO. 84-1087, at 6 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2346, 2349.

I also recommend enactment of legislation authorizing the Bureau of Reclamation to undertake construction of two comprehensive river-basin improvements which are beyond the capacity of local initiative, public or private, but which are needed for irrigation, power, flood control and municipal and industrial water supply. These are the upper Colorado River Basin development in the States of Colorado, Utah, Wyoming, Arizona, and New Mexico, and the Fryingpan-Arkansas development in Colorado. The Colorado River development will enable the upper basin States to conserve floodwaters and to assure the availability of water and power necessary for the economic growth of the region. * * * Sale of power generated at these developments will repay the power investment within 50 years and will make a contribution toward repayment of other investments.³⁷

Congress recognized and addressed the increasing demand for municipal and industrial water supply³⁸ and the possibility of catastrophic consequences for the Upper Basin States in the event of a compact call from the Lower Basin. The foresight in the CRSP included planning “sufficient holdover capacity . . . in the upper basin to enable it to meet its commitment to the lower basin required by the Colorado River compact of 1922 and at the same time permit the upper basin States to make full use of their apportioned share of the water.”³⁹ The CRSP directed the Secretary to “have regard for the achievement within each of said States of the fullest practicable use of the waters of the Upper Colorado River system, consistent with the apportionment thereof among such States.”⁴⁰

C. Hydroelectric Power

Hydroelectric power is the nation’s leading renewable energy resource.⁴¹ Of all renewable power sources, hydroelectric power is “the most reliable, efficient and economical.”⁴² It also provides one of the few means to store energy because dam operators can release water stored in a reservoir to generate power when needed.

Preceding the enactment of the CRSP, there is little doubt that the Congress recognized the value of hydroelectricity. In 1941, Franklin Delano Roosevelt asked his countrymen to build an arsenal of ships, boats, and planes capable of defending the United States and the world from the evils embodied in Hitler’s advancing forces. The con-

37. *Id.* at 20, reprinted in 1956 U.S.C.C.A.N. 2346, 2364 (quoting H.R. DOC. NO. 84-16 at M65 (1954)).

38. *Id.* at 8, reprinted in 1956 U.S.C.C.A.N. 2346, 2351.

39. *Id.* at 7, reprinted in 1956 U.S.C.C.A.N. 2346, 2350.

40. CRSP, 43 U.S.C. § 620(1) (2000).

41. Western Area Power Administration, Products, <http://www.wapa.gov/newsroom/factsproducts.htm> (last visited Oct. 21, 2005).

42. *Id.*

struction of the nation's defenses in World War II required huge quantities of aluminum, the production of which required staggering amounts of electrical power. The nation achieved Roosevelt's goal—thanks in large part to nearly unlimited hydroelectric power production in the Northwest.

Today, the Bureau of Reclamation's power program is the caretaker for some of the nation's most important electrical resources. The policies set by the Bureau of Reclamation regulate the flow of water, which generates power from dams, on a monthly and yearly basis under the CRSP Act and the Law of the River. Another federal agency, the Western Area Power Administration ("WAPA"), substantially controls the generation of power on a daily and hourly basis from CRSP facilities from which WAPA sells power.

WAPA markets and distributes hydroelectric power to millions of consumers in fifteen western states including Arizona, California, Colorado, Iowa, Kansas, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas, Utah and Wyoming.⁴³ In 2004, WAPA sold more than 39.6 billion kilowatt-hours (kWh) of energy⁴⁴—enough to serve roughly 11 million homes for a year. WAPA's customers include rural electric cooperatives, municipal utilities, irrigation districts, and Native American tribes.⁴⁵ CRSP facilities supply energy to several tribes including the Navajo, Shoshone, Ute, and Apache tribes.⁴⁶

Congress labeled hydroelectric power an "incident" of the authorized purposes enumerated in Section 620 of the CRSP.⁴⁷ Black's Law Dictionary defines "incident" as "[a] dependent, subordinate, or consequential part (of something else)."⁴⁸ The CRSP inexorably linked hydroelectric power to the development of water resources for economic development in the arid West. As long as hydropower operations do not "affect or interfere with" the compacts or contracts,⁴⁹ the CRSP Act mandates that the projects be operated "so as to produce the

43. WESTERN AREA POWER ADMINISTRATION, ANNUAL REPORT 2004 6 (2005) [hereinafter ANNUAL REPORT], *available at* <http://www.wapa.gov/newsroom/pdf/annrep04.pdf>.

44. *Id.* at 4.

45. *Id.* at 2.

46. Western Area Power Administration, Native American power customers, <http://www.wapa.gov/newsroom/factsnative.htm> (last visited Oct. 21, 2005).

47. CRSP, 43 U.S.C. § 620 (2000).

48. BLACK'S LAW DICTIONARY 777 (8th ed. 2004).

49. H.R. REP. NO. 84-1950, at 9 (1956) (Conf. Rep.), *reprinted in* 1956 U.S.C.C.A.N. 2422, 2423 ("This language has been adopted to make clear the intent that all of the instruments constituting the law of the Colorado River shall be read together by the Secretary of the Interior in the operation of the power facilities authorized to be constructed, operated, and maintained by this legislation.").

greatest practicable amount of power and energy that can be sold at firm power and energy rates⁵⁰

Section 620 of the CRSP prompted an agreement among the upper Colorado River Basin states (the “Santa Fe Accord”) as to how to credit power revenues to the Upper Basin states.⁵¹

The Aspinall Unit reservoirs are capable of producing around 287 MW of renewable power.⁵² Hydroelectric power from the Aspinall Unit also meets up to 50% of the peak power needs of all CRSP power customers. The Reservoir Operation section of Water Supply Appendix of the 1959 Economic Justification Report on Curecanti (“Aspinall”) provides that “[t]he reservoirs of the Curecanti unit have as their primary purpose the production of as much power and energy as is possible.”⁵³ The legislative history also illustrates the importance Congress attributed to hydroelectric power. “The three downstream reservoirs would be primarily for the development of power head with only nominal active storage capacities.”⁵⁴ Congress, in discussing the plan of development in the CRSP, recognized that “[a] great new source of hydroelectric power would be provided to meet the need of the expanding economy of the area.”⁵⁵

However, the conference committee made clear that the “impounding and use of water for the generation of power and energy at the plants of the Colorado River storage project . . . shall be subservient

50. 43 U.S.C. § 620(f). *See also* *Badoni v. Higginson*, 455 F. Supp. 641, 647 (D. Utah 1977) (quoting *Friends of the Earth v. Armstrong*, 485 F.2d 1, 11 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171, 1171-1172 (1974), and *reh'g denied*, 416 U.S. 952 (1974)).

51. *Friends of the Earth*, 485 F.2d at 4-5 (explaining how section 620(1) also created the Upper Colorado River Basin Fund and directed that proceeds from the sale of power were to be applied towards maintenance, operating and replacement costs of the CRSP and participating projects; the Basin Fund is also used to repay power and municipal costs incurred by the Government including interest. Any surplus is allocated to the Upper Basin states for repayment of project costs.); *see also* H.R. REP. NO. 84-1087, at 13 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2346, 2408.

52. WESTERN AREA POWER ADMINISTRATION, SYSTEM, PROJECT & FINANCE DATA TO THE 2004 ANNUAL REPORT 19 (2005), *available at* <http://www.wapa.gov/newsroom/sa04/sa04.htm>.

53. DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, CURECANTI UNIT OF THE COLORADO RIVER STORAGE PROJECT: ECONOMIC JUSTIFICATION REPORT 27 (1959).

54. H.R. REP. NO. 84-1087, at 9 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2346, 2352; *see also id.* at 12 *reprinted in* 1956 U.S.C.C.A.N. 2346, 2356 (estimating that “[i]n a 50-year period following the last power installation, net power revenues from the power facilities herein authorized are estimated at \$1,075 million. . . . After the project has been completely repaid, the net power revenues . . . for the units herein authorized will continue to flow into the Treasury.”).

55. *Id.* at 8, *reprinted in* 1956 U.S.C.C.A.N. 2346, 2351; *see also id.* at 4, *reprinted in* 1956 U.S.C.C.A.N. 2346, 2347 (“After all project costs have been returned, many millions of dollars of net annual project revenues will continue to flow into the Treasury.”).

to the appropriation of water for domestic or agricultural purposes.⁵⁶ Congress could have chosen to subordinate hydroelectric power generation to other uses, such as aesthetics, boating, fishing, camping, in-stream flows, or channel maintenance. It did not.

Should the tail wag the dog and Congress allow use of the Colorado River for unauthorized purposes, there could be significant consequences stemming from the reduction of hydroelectric power production at the Aspinall Unit reservoirs. Possible consequences include increased reliance on non-renewable energy sources, inability to meet peak power demands, and rolling brownouts. Power customers throughout the rural West face substantial cost increases when WAPA must purchase power on the markets (likely from coal-fired sources) to meet existing power contracts. Purchase power costs have increased significantly in recent years. For example, purchase power cost approximately \$380 million in 2003 and \$385 million in 2004.⁵⁷

Commenting on economic indicators, Federal Reserve Board Chairman Alan Greenspan expressed the "chronic concern" that rising energy prices could threaten the nation's economic recovery.⁵⁸ Should demand for electricity continue to rise as projected, by 2020 the United States will require more than one new power plant per week.⁵⁹ To meet Colorado's power demands, power providers will require 1,600 megawatts of new generation by 2012.⁶⁰

D. Do Fish, Wildlife or Recreation Constitute CRSP Purposes?

The CRSP facilities provide habitat for the listed species, and downstream from the Aspinall Unit reservoirs are gold-medal trout fishing and the Black Canyon of the Gunnison National Park.⁶¹ At over 2,500 feet deep, the Black Canyon of the Gunnison is one of the deepest and narrowest canyons in North America.⁶² In 2004, over 175,000 people visited the National Park.⁶³ Blue Mesa Reservoir, the largest of the

56. H.R. REP. NO. 84-1950, at 9 (1956) (Conf. Rep.), *reprinted in* 1956 U.S.C.C.A.N. 2422, 2424.

57. ANNUAL REPORT, *supra* note 43, at 30.

58. *Monetary Policy and the State of the Economy: Hearing Before the H. Comm. on Financial Services*, 108th Cong. 64 (2004) (testimony of Alan Greenspan, Chairman Board of Governors of the Fed. Reserve System).

59. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, NATIONAL ENERGY POLICY 5-10 (2001).

60. Steve Raabe, *Utility eyes two new coal plants*, THE DENVER POST, Feb. 6, 2004, at 1C.

61. Black Canyon of the Gunnison National Park and Gunnison Gorge National Conservation Area Act of 1999, Pub. L. No. 106-76, § 2(3), 113 Stat. 1126, 1126-1127 (transforming a national monument created in 1933 into a National Park and Conservation Area).

62. National Park Service, Black Canyon of the Gunnison - Canyon Dimensions, <http://www.nps.gov/blca/webvc/dimensions.htm> (last visited Oct. 21, 2005).

63. National Park Service, Park Visitation Report, Black Canyon of the Gunnison, <http://www.nps.gov> (search with terms "Black Canyon 2004 visitation;") then follow

three Aspinall Unit reregulating reservoirs, is a popular flat-water recreation destination and attracts about 960,000 visitors per year.⁶⁴

Congress considered the maintenance of national parks an important issue and incorporated certain protections for them into the CRSP.⁶⁵ Environmentalists[“Representatives” could be confused with Members of Congress] wrote Chairman Wayne N. Aspinall and voiced support for the legislation conditioned on: (1) the administration’s agreement to drop the Echo Park proposal from the bill, (2) adequate protection for Rainbow Bridge National Monument, and (3) Congress’ expressed intention not to construct a dam or reservoir within any national park or monument.⁶⁶ With such provisions included in the CRSP, the environmentalists⁶⁷ endorsed the legislation.

There are distinctions between the purposes of the CRSP units and the benefits derived from them. Congress enacted the CRSP to provide long-term water supplies and hydroelectric power for the benefit of the West and its economic development.⁶⁸ There are, however, many subordinate benefits to the reservoirs, such as recreation. The legislature recognized that construction of water storage facilities would have important incidental benefits. In addition to new water storage and hydroelectric power, Congress acknowledged that “the plan would create new recreational facilities and substantial benefits to fish and wildlife.”⁶⁹ The Tenth Circuit held similarly in *Jicarilla Apache Tribe v. United States*.⁷⁰

“NPS Visitation Database – Park Report” hyperlink; then select “Black Canyon, 2004, all months” pull-down menus; then follow “View Report” hyperlink) (last visited Oct. 21, 2005).

64. The Colorado Directory, Blue Mesa Reservoir/Curecanti National Recreation Area, <http://www.coloradodirectory.com/nationalparks/bluemesa.html> (last visited Oct. 21, 2005).

65. Colorado River Storage Project Act, 43 U.S.C. § 620(b) (2000).

66. H.R. REP. NO. 84-1087, at 11 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2346, 2407.

67. In particular, Horace M. Albright signed for the Trustees for Conservation, Ira N. Gabrielson signed for the Citizens’ Committee on Natural Resources, and Howard Zahniser signed for the Council of Conservationists. *Id.* Similar letters to the committee were sent by: “American Nature Association, the American Forestry Association, National Wildlife Federation, the Wilderness Society, National Parks Association, Izaak Walton League of America, Inc., Sierra Club, Wildlife Management Institute, General Federation of Women’s Clubs, Conservation Education Association, and National Audubon Society.” *Id.*

68. *See* 43 U.S.C. § 620.

69. H.R. REP. NO. 84-1087, at 8 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2346, 2351.

70. 657 F.2d 1126, 1139 (10th Cir. 1981) (holding that recreation was not a primary purpose of the CRSP).

1. Section 620(g) Facilities

a. Facilities for Recreation

Section 620(g) authorized facilities for recreation.⁷¹ Congress recognized that the creation of water storage would provide recreational areas and therefore authorized facilities such as boat ramps, picnic tables, and campgrounds through Section 620(g).⁷² In fact, ten years later, the National Park Service began constructing a boat-launching ramp, camping and picnic sites, and a boat dock at Blue Mesa.⁷³ The April 1962 Economic Justification Report on the Curecanti Unit projected costs from recreational facilities and fish and wildlife facilities to be \$5,181,000 and \$3,235,000, respectively.⁷⁴ This report defines recreational facilities specifically to include a “boat-launching ramp, boat dock, sanitary facilities, and refuse containers,” as well as concession facilities.⁷⁵

As to fish and wildlife, the Department of the Interior demonstrated its regard related primarily to the ability to fish and access to fishing.⁷⁶ The FWS described the Crystal Reservoir as providing a minor addition to fishing use at Curecanti, and as having “an insignificant effect upon wildlife since the reservoir pool will be largely retained within the Gunnison River Canyon.”⁷⁷ Section 620(g) authorized “public recreational facilities” on the lands withdrawn for construction of the four initial units: Glen Canyon, Aspinall, Flaming Gorge, and Navajo, as well as the public use and enjoyment of such facilities and the water areas created so long as they were “consistent with the primary purposes of said projects.”⁷⁸

b. Facilities for the Propagation of Fish and Wildlife

Section 620(g) of the CRSP also authorized “facilities to mitigate losses of, and improve conditions for, the propagation of fish and wildlife.”⁷⁹ Congress was likely referring to fish hatcheries. There are two

71. 43 U.S.C. § 620(g).

72. *Id.*

73. DEPARTMENT OF THE INTERIOR, TENTH ANNUAL REPORT ON THE STATUS OF THE COLORADO RIVER STORAGE PROJECT AND PARTICIPATING PROJECTS, S. DOC. NO. 90-7, at 5 (1967).

74. DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, CURECANTI UNIT OF THE COLORADO RIVER STORAGE PROJECT: ECONOMIC JUSTIFICATION REPORT APRIL 1962, A SUPPLEMENT TO THE ECONOMIC JUSTIFICATION REPORT OF FEBRUARY 1959 3 (1962).

75. *Id.* at 28.

76. *Id.* at 29 (stating that public use facilities would be constructed “in the event good stream fishing develops below Crystal Dam”).

77. *Id.* at 27.

78. Colorado River Storage Project Act, 43 U.S.C. § 620(g) (2000) (emphasis added).

79. *Id.*

federal fish hatcheries in Colorado: one in Hotchkiss and one in Leadville. In fact, ten years after the passage of the CRSP, the Department of the Interior reported to Congress that, working with state fish and game departments, it stocked 3.9 million rainbow fingerlings in CRSP reservoirs, completed engineering for the Jones Hole National Fish Hatchery in Utah, and developed the Delta National Fish Hatchery to serve the Aspinall reservoirs and other nearby participating projects.⁸⁰ Congress noted that these recreational facilities and fish hatcheries were nonreimbursable expenses under the CRSP.⁸¹

Only about \$8.2 million, or less than 1 percent, of the total cost is nonreimbursable for flood control, fish and wildlife, and recreation. The remainder of over 99 percent is allocated to irrigation, power, and municipal water supply as follows: \$331.6 million to irrigation, \$510.9 million to power, and \$45.5 million to municipal water supply.⁸²

In contrast, enumerated CRSP purposes were reimbursable.⁸³

E. 1968 Colorado River Basin Project Act ("CRBPA")

Following the U.S. Supreme Court's opinion in *Arizona v. California*,⁸⁴ legislators introduced bills in Congress to authorize the Central Arizona Project, and complex negotiations followed amongst all of the Colorado River Basin States.⁸⁵

The origin of the CRBPA was a November 1962 letter from Chairman Aspinall to Secretary Udall that requested a comprehensive plan for meeting the water and power needs of the Southwest. This Pacific Southwest Water Plan evolved to encompass the Central Arizona Project Act and eventually came to be known as the CRBPA.⁸⁶ The CRBPA

80. DEPARTMENT OF THE INTERIOR, TENTH ANNUAL REPORT ON THE STATUS OF THE COLORADO RIVER STORAGE PROJECT AND PARTICIPATING PROJECTS, S. DOC. NO. 90-7, at 12 (1967).

81. 43 U.S.C. § 620(g). Further, the legislative history provides that "[a]ll costs incurred for recreational and fish and wildlife purposes would be nonreimbursable under the provisions of this section." H.R. REP. NO. 84-1087, at 18 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2346, 2362-63.

82. H.R. REP. NO. 84-1087, at 11-12 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2346, 2355.

83. 43 U.S.C. § 620(c); *see also* 43 U.S.C. § 620(a-1).

84. 373 U.S. 546 (1963).

85. COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, COLORADO RIVER BASIN PROJECT, H.R. REP. NO. 90-1312 at 30-31 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3666, 3680.

86. *Id.* at 183, *reprinted in* 1968 U.S.C.C.A.N. 3666, 3773. The name change reflected the conference committee's intent that the bill "give to the Secretary of the Interior the authority and the responsibility for planning the best possible use of this Nation's water resources west of the Continental Divide and for meeting the future

authorized the construction of the Central Arizona Project⁸⁷ but gave first priority in the Lower Basin to California.⁸⁸

The CRBPA also directed the Secretary to proceed with construction of participating projects authorized under the CRSP.⁸⁹ The government is currently building Animas-La Plata, but did not build the West Divide, Fruitland Mesa, Savory Pothook, and San Miguel Projects.⁹⁰

1. What Was the Intent of Congress in Passing the CRBPA?

The primary theme in the CRBPA was water storage for beneficial use. The House Committee outlined its findings after exhaustive consideration and debate and concluded that water shortages in the West were quickly leading the area into an economic crisis. Additional storage would allow for conservation in times of abundance and sustenance throughout the seasons and the years. The Committee concluded:

(1) One of America's fastest growing regions—the Colorado River Basin—is in danger of economic stagnation unless its presently available water supplies can be augmented. Colorado River water, which is the very life blood of this area, is fast being exhausted. . . . The answer to the Colorado River controversy is not to try to divide shortages but to provide additional water. (2) In addition . . . [i]t seems to the Committee that this presently thriving, prosperous area of our Nation is clearly on a collision course with economic disaster unless this water gap can be closed by augmentation of the Colorado River basin water supplies....

(9) This bill constitutes another important step in the broad national program devised by Congress to develop and utilize wisely the resources with which the Nation is endowed. . . . This particular water development program has added urgency because of the desperate water supply situation existent throughout the Colorado River Basin.⁹¹

Water storage had the added benefit of curtailing the destructive forces of flooding.⁹² The House Committee deliberated upon the CRBPA for many days. Recognizing the problems of scarcity and overly optimistic projections of flows in the Colorado River, the Com-

water needs of our 11 Western States." *Id.* at 19-20, *reprinted in* 1968 U.S.C.C.A.N. 3666, 3774.

87. Colorado River Basin Project Act, 43 U.S.C. §1501 (2000).

88. Lochhead, *supra* note 22, at 313.

89. 43 U.S.C. § 1501 (b).

90. Lochhead, *supra* note 22, at 313 n.102.

91. H.R. REP. NO. 90-1312 at 20-22 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3666, 3669-71.

92. *Id.* at 24, *reprinted in* 1968 U.S.C.C.A.N. 3666, 3673.

mittee considered the availability of water the single most important issue at hand.⁹³

2. How Does the CRBPA Amend the CRSP?

Only Title V of the CRBPA amended the CRSP.⁹⁴ It added: (1) participating projects and planning reports in Section 620, and 620(a) of the CRSP; (2) a provision that construction of projects be concurrent with construction of the Central Arizona Project in Section 620(a-1); (3) a provision for the establishment of nonexcess irrigable acreage for CRSP participating projects in Section 620(a-2); (4) a provision regarding priority of appropriation for projects within, and for the benefit of, only the State of Colorado in Section 620(c-1); (5) a provision regarding the reimbursements for deficiencies in generation at Hoover dam in Section 620(d-1); and (6) Section 620(k) regarding authorization for additional appropriations.⁹⁵

The amendments to Section 620 and Section 620(c-1) are most relevant to the issues discussed here. The purpose of the CRBPA amendment to the CRSP is expressly stated as a note at the end of Section 620:⁹⁶

Section 501(a) of Pub. L. 90-537 provided that the amendment of this section and section 620a of this title by such section 501(a) were made in order to provide for the construction, operation, and maintenance of the Animas-La Plata Federal reclamation project, Colorado-New Mexico; the Dolores, Dallas Creek, West Divide, and San Miguel Federal reclamation projects, Colorado; and the Central Utah project (Uintah Unit), Utah, as participating projects under the Colorado River Storage Project Act, and to provide for the completion of planning reports on participating projects.⁹⁷

Title V of the CRBPA amended section 620(c-1) of the CRSP by adding language regarding the priority of appropriations:

93. *Id.* at 33, *reprinted in* 1968 U.S.C.C.A.N. 3666, 3682. The legislative history of the CRBPA reinforced that “[t]he Upper Basin projects are needed in the areas they will serve to provide dependable water supplies to meet the ever-growing needs for agricultural, municipal, and industrial uses.” *Id.* at 55, *reprinted in* 1968 U.S.C.C.A.N. 3666, 3703.

94. *Id.* at 27-28, *reprinted in* 1968 U.S.C.C.A.N. 3666, 3677. “In 1956 the Congress enacted the Colorado River Storage Project Act (70 Stat. 105). This Act authorized the construction of a comprehensive, multiple-purpose, basinwide, water resource development plan known as the Colorado River Storage Project and Participating Projects. It is amended by Title V of H.R. 3300.” *Id.*

95. Colorado River Storage Project Act, 43 U.S.C. § 620 (2000); *see also* 43 U.S.C. § 620c-1, § 620d-1.

96. 43 U.S.C. § 620.

97. *Id.*

In the diversion and storage of water for any project or any parts thereof constructed under the authority of the Colorado River Basin Project Act [43 U.S.C. 1501 et seq.] or the Colorado River Storage Project Act [43 U.S.C. 620 et seq.] within and *for the benefit of the State of Colorado only*, the Secretary is directed to comply with the constitution and statutes of the State of Colorado relating to priority of appropriation; with State and Federal court decrees entered pursuant thereto; and with operating principles, if any, adopted by the Secretary and approved by the State of Colorado.⁹⁸

The Aspinall Unit is located within the State of Colorado, but Congress authorized Aspinall, and the other CRSP units, for the benefit of the entire Upper Colorado River Basin—not solely for the state of Colorado. Similarly, Congress did not intend Flaming Gorge to be solely for Utah, or Glen Canyon to be solely for Arizona.

Even if Section 620(c-1) applied to the Aspinall Unit, the legislative history of the CRBPA indicates that Congress intended the units to operate in priority with state water law. Congress did not intend to disrupt the congressionally authorized purposes of the units:

The Committee understands this requirement to mean that diversion and storage rights for these projects will be junior to existing rights recognized under Colorado law. This is merely a reaffirmation of the rule of law that would apply in any event. . . . The Committee does not intend this language to interfere with the executive discretion of the Secretary in contracting for the sale and distribution of water.⁹⁹

Congress stated CRBPA's purposes differently than it stated CRSP's purposes. The CRBPA's purposes, among others, include:

regulating the flow of the Colorado River; controlling floods; improving navigation; providing for the storage and delivery of the waters of the Colorado River for reclamation of lands, including supplemental water supplies, and for municipal, industrial, and other beneficial purposes; improving water quality; providing for basic public outdoor recreation facilities; improving conditions for fish and wildlife, and the generation and sale of electrical power as an incident of the foregoing purposes.¹⁰⁰

The language "improving conditions for fish and wildlife" could be construed to mean CRBPA reservoirs can store and release water expressly for fish and wildlife. However, the CRBPA did not contradict, amend, or alter the purposes of projects authorized in the CRSP. In fact, the CRBPA specifically provides:

98. 43 U.S.C. § 620(c-1) (emphasis added).

99. H.R. REP. NO. 90-1312 at 81, *reprinted in* 1968 U.S.C.C.A.N. 3666, 3723.

100. Colorado River Basin Project Act, 43 U.S.C. § 1501 (2000).

Nothing in this chapter shall be construed to alter, amend, repeal, modify, or be in conflict with the provisions of the Colorado River Compact (45 Stat. 107), the Upper Colorado River Basin Compact (63 Stat. 31), the Water Treaty of 1944 with the United Mexican States (Treaty Series 994; 59 Stat. 1219), the decree entered by the Supreme Court of the United States in Arizona against California and others (376 U.S. 340), or, except as otherwise provided herein, the Boulder Canyon Project Act, . . . the Boulder Canyon Project Adjustment Act, . . . or the Colorado River Storage Project Act.¹⁰¹

In 1968, Congress amended Section 620 of the CRSP by adding participating projects.¹⁰² Although Congress added participating projects in Section 620, Congress chose *not* to amend the authorized purposes within Section 620. It is a standard rule of statutory interpretation “that the legislature did not intend to effect a greater change than is clearly apparent either by express declaration or by necessary implication.”¹⁰³

Simply because Congress enacted the CRBPA on a later date does not make it controlling. Most often, later and more specific statutes control earlier and more general ones.¹⁰⁴ This is not the case here because the CRSP is not less specific than the CRBPA. More importantly, as discussed above, the CRBPA did not amend the project purposes enumerated in the CRSP.

Further, the government completed Blue Mesa, the primary reservoir in the Aspinall Unit, in 1967 before Congress enacted the CRBPA, and courts consider construction of a water project prior to changes in laws a factor in rejecting limits on the use of stored water.¹⁰⁵

IV. STATE DECREES AND CASE LAW

Congress did not intend that state decrees would interfere with the federal purposes of CRSP units. State court decrees cannot override congressionally authorized purposes.

The Colorado River Water Conservation District (“River District”) obtained Colorado water court decrees to the Aspinall Unit beginning in 1960 for domestic, municipal, industrial, power, flood control, piscatorial, wildlife protection and preservation, recreation, irrigation, and

101. *Id.* § 1551(a) (emphasis added).

102. *See* Act of Sept. 30, 1968, Pub. L. No. 90-537, § 501(a), 82 Stat. 885, 896-97.

103. *Heflin v. State Farm Mut. Auto. Ins. Co.*, 547 F. Supp. 247, 251 (N.D. Ga. 1982) (quoting *C.W. Matthews Contracting Co. v. Capital Ford Truck Sales, Inc.*, 254 S.E.2d 426, 428 (1979)) (stating that such a presumption is a standard rule of statutory construction).

104. *See* SINCLAIR, *supra* note 24, at 138.

105. *See, e.g., Friends of the Earth v. Armstrong*, 485 F.2d 1, 5-8 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974), *and reh'g denied*, 416 U.S. 952 (1974).

stock watering purposes.¹⁰⁶ The River District obtained the decrees because the United States was unwilling to subject itself to state court adjudication.¹⁰⁷

In the 1960 decree, the court stated,

while these uses [piscatorial, wildlife protection and preservation, and recreational purposes] are not necessarily essential to the industrial and agricultural development of the Basin, they are recognized [sic] beneficial uses of water for which decree [sic] may be entered, and add greatly to the attraction and welfare of the area, and there is apparent reason to consider it will serve these purposes.¹⁰⁸

However, "state water law does not control in the distribution of reclamation water *if* inconsistent with other congressional directives to the Secretary."¹⁰⁹ Here, Congress expressly defined the purposes of the CRSP units and in so doing, preempted inconsistent state law.

The Colorado Supreme Court recognized the development of compact water, hydropower, and compact deliveries as CRSP project purposes.¹¹⁰ The court also recognized that the Aspinall decrees permit power generation, and that power generation provided most of the Aspinall Unit's economic justification. "Congress considered power revenues to be the most important aspect of CRSP. . . . Without the revenues from power sales, Congress might not have approved the Aspinall Unit."¹¹¹

However, the Colorado Supreme Court upheld the Colorado water court's finding that the Bureau of Reclamation "stored and released water from the Aspinall Unit not only for hydropower, but for other beneficial purposes, including flood control, fish and wildlife, recreation, irrigation, and domestic uses, under the appropriative rights" of the unit.¹¹² The court interpreted the 1968 CRBPA as amending the

106. Final hearing and decree, *In re* Matter of the Adjudication of Priorities for Water Rights, No. 6981, at 247-48 (Colo. Dist. Ct., Montrose County, Water Dist. No. 62, Mar. 30, 1960); *see also* Final hearing and adjudication, *In re* Matter of the Supplemental Adjudication of Priorities of Right to the Use of Water for All Beneficial Purposes, No. 5590 (Colo. Dist. Ct., Gunnison County, Water Dist. No. 59, Oct. 28, 1961); Final hearing and Adjudication, *In re* Matter of the Adjudication of Priorities, No. 5782 (Colo. Dist. Ct., Gunnison County, Water Dist. No. 59, Jan. 27, 1965).

107. Final hearing and decree, *In re* Matter of the Adjudication of Priorities for Water Rights, No. 6981, at 246-47 (Colo. Dist. Ct., Montrose County, Water Dist. No. 62, Mar. 30, 1960).

108. *Id.* at 249.

109. *California v. United States*, 438 U.S. 645, 668 (1978).

110. *See Bd. of County Comm'rs v. Crystal Creek Homeowners Ass'n (Union Park Case)*, 14 P.3d 325, 333 (Colo. 2000).

111. *Id.* at 337 (quoting *Arizona Power Auth. v. Morton*, 549 F.2d 1231, 1236 (9th Cir. 1977)).

112. *Id.* at 336.

project purposes of the CRSP units to include fish, wildlife, and recreation as “bona fide purposes of the Aspinall Unit.”¹¹³

V. FEDERAL PROJECT PURPOSES PREEMPT STATE CASE LAW AND DECREES

Courts have grappled with inconsistencies between state court decrees and federal project purposes before. The Commerce,¹¹⁴ Property,¹¹⁵ and Supremacy Clauses¹¹⁶ of the U.S. Constitution provide Congress with the authority to preempt state law. Generally, courts hold that specific congressional directives or authorizations override inconsistent state law.¹¹⁷ In the case of the CRSP, Congress has clearly exercised its power in describing the authorized purposes of the CRSP units.

Neither the reference to fish, wildlife, and recreation benefits in the Colorado water court decrees for the Aspinall Unit nor the Colorado Supreme Court’s holding that such uses are [use of the terms “primary” or “secondary” may lead one erroneously to believe there are separate classes of purposes] project purposes in the *Union Park* case is consistent with the clear Congressional intent in authorizing the CRSP units. Rather, Congress intended fish, wildlife, and recreation as benefits to reservoir operations when consistent with the primary purposes of the project.¹¹⁸

Unlike the CRSP, the authorizing statute of the San Juan-Chama legislation specified that water may be used “for the purposes of furnishing water supplies [for irrigation] and for municipal, domestic, and industrial uses, providing recreation and fish and wildlife benefits.”¹¹⁹ The *Jicarilla* court rejected the legality of storing water solely for fish and wildlife, particularly in the arid Rio Grande Basin. Even though the statute referenced these uses as purposes of the project, the court held that fish, wildlife, and recreation were “incidental byproducts” and “secondary” to other uses.¹²⁰

In response to this decision, the city of Albuquerque sought and obtained a limited Congressional change in the authorized purposes of the San Juan-Chama Project to allow the project to store water in cer-

113. *Id.* at 339.

114. *See* U.S. CONST. art. I, § 8, cl. 3.

115. *See* U.S. CONST. art. IV, § 3, cl. 2.

116. *See* U.S. CONST. art. VI, cl. 2.

117. *See* *California v. United States*, 438 U.S. 645, 668 n.21 (1978).

118. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1136-37 (1981) (holding that, even if recreation was recognized as a beneficial use under New Mexico law, the authorizing statutes of the San Juan-Chama project, Act of June 13, 1962, Pub. L. No. 87-483, § 8, 76 Stat. 96, 97-98, *repealed by* 43 U.S.C. § 615pp (2000), did not allow water to be stored for those purposes).

119. Act of June 13, 1962, Pub. L. No. 87-483, 76 Stat. 96, 97-98.

120. *Jicarilla*, 657 F.2d at 1145.

tain reservoirs for flat-water boating and other recreation and fishery uses.¹²¹ Only with subsequent and specific Congressional authorization did such uses become legitimate purposes of the San Juan-Chama Project. Congress has not enacted similar legislation allowing CRSP units, such as Aspinall, to operate for aesthetics, kayaking or downstream angling.

Similarly, in *O'Neill v. United States*,¹²² the Ninth Circuit Court of Appeals addressed a water service contract where the congressional authorization *required* the project to use a portion of the water for fish, wildlife, and habitat restoration.¹²³ In that case, legislation specifically amended the project's authorizing legislation to make fish and wildlife mitigation, protection, and restoration purposes equal in priority to the original purposes of the project – irrigation and domestic use.¹²⁴ There is no comparable provision in the Aspinall Unit's authorizing legislation. Therefore, only Congress has the authority to add fish, wildlife, and recreation to the authorized purposes of the CRSP units.

VI. DO OTHER LAWS AMEND CRSP PURPOSES?

Congress enacted the Federal Water Project Recreation Act ("FWPRA") in 1965 to promote a more uniform policy on recreational opportunities.¹²⁵ The FWPRA did not amend the CRSP, nor did it change the purposes of any project authorized under the CRSP. It simply applied to investigating and planning water resource projects and urged the Secretary of the Interior to consider recreation, fish, and wildlife enhancement where consistent with project purposes.¹²⁶ In fact, the FWRPA expressly stated, "[n]othing in this part shall be construed to change, modify, or expand the authorized purposes of any Reclamation project."¹²⁷ In *Jicarilla*, the court held that the FWRPA did not authorize storage for recreation, fish or wildlife.¹²⁸ Moreover, the FWRPA did not apply to projects commenced before its effective date.¹²⁹

The Fish and Wildlife Coordination Act ("FWCA") authorizes the Secretary of Interior, in conjunction with the development of federal water projects, to provide assistance and cooperation for the development, protection, rearing, and stocking of wildlife by controlling losses

121. Act of Dec. 29, 1981, Pub. L. No. 97-140, § 5, 95 Stat. 1717, 1717-18.

122. 50 F.3d 677 (9th Cir. 1995), *cert denied*, 516 U.S. 1028 (1995).

123. *Id.* at 681.

124. Act of Oct. 30, 1992, Pub. L. No. 102-575, § 3406(a), 106 Stat. 4714, 4714.

125. 16 U.S.C. § 4601-12 (2000).

126. *See id.*

127. *Id.* § 4601-34(a).

128. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1143 (1981).

129. *Uithoven v. Stone*, 906 F. Supp. 369, 373-74 (N.D. Miss. 1995), *aff'd*, 96 F.3d 1445 (5th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997).

from disease, minimizing damages from overabundant species, and providing public shooting and fishing areas.¹³⁰ In this regard, the FWCA provides that such wildlife conservation “shall receive equal consideration and be coordinated with other features of water-resource development programs through . . . planning, development, maintenance, and coordination.”¹³¹

The FWCA applies only to the authorization or construction of new projects.¹³² Moreover, the FWCA simply requires the Secretary of the Interior to provide adequate provisions for wildlife resources “consistent with the primary purposes” of the federal water project.¹³³ There is no requirement that the project proponent follow agency advice in regards to the FWCA.¹³⁴ Even if the FWCA applied to Aspinall, compliance with NEPA generally results in compliance with the FWCA.¹³⁵

VII. CONCLUSION

Debate over the congressionally authorized purposes of the CRSP units, including the Aspinall Unit, could have long-standing policy implications. The operation of federal water projects affect water storage, compact compliance, energy supplies, and prices, as well as endangered species and ecosystems.

Enacted prior to environmental laws such as the ESA and NEPA, Congress implemented the CRSP for the express purposes of solving long-term water supply problems and generating hydroelectric power in the arid West. Congress had the opportunity to add purposes to the CRSP in 1968. As discussed herein, Congress amended the very section of the CRSP listing its purposes. The only change Congress made to that section was the addition of participating projects.

Additionally, Congress expressly provided that nothing in the CRBPA, except the additions of participating projects and other slight modifications, altered or amended the CRSP. The CRSP is in concert, rather than conflict, with the Law of the River.¹³⁶

130. 16 U.S.C. § 661 (2000).

131. *Id.*

132. *Id.* § 662(a) (stating that “whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted...[or] otherwise controlled or modified...[consultation with the United States Fish and Wildlife Service must occur]...with a view to the conservation of wildlife resources,” implying that such consultation pertains only to new projects).

133. *Id.* § 663(a) (emphasis added).

134. *Lake Erie Alliance for the Prot. of the Coastal Corridor v. U.S. Army Corps of Engrs.*, 526 F. Supp. 1063, 1081 (W.D. Pa. 1981), *aff'd*, 707 F.2d 1392 (3d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983).

135. *Bergen County v. Dole*, 620 F. Supp. 1009, 1064 (D.N.J. 1985), *aff'd*, 800 F.2d 1130 (3d Cir. 1986).

136. H.R. REP. NO. 84-1087, at 18 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2346, 2362-63 (providing that “nothing in the Act shall be construed to alter, amend, repeal, in-

In the CRSP, Congress recognized that recreational and other benefits would arise from the construction of CRSP units. Furthermore, a separate section of the CRSP authorized facilities for recreation where consistent with the primary purposes of the CRSP. The legislature authorized boat ramps, picnic tables, and camping areas so long as they did not interfere with water storage or power production. Similarly, CRSP authorized facilities for the propagation of fish and wildlife, such as fish hatcheries, to improve fishing for non-native brown and rainbow trout.

Legislation subsequent to the CRSP did not alter the purposes for which the reservoirs were constructed. The legislation that created the National Parks expressly avoided any conflict with federal or state water rights, and the recent boundary adjustment did not alter the authority of the Commissioner of Reclamation. Similarly, the recovery programs for endangered fish comply with federal and state laws. These programs do not alter, amend, or supplement Reclamation law. Neither the ESA nor NEPA alter an agency's statutory authority. To the extent state case law or state decrees are inconsistent with the authorized purposes of the Aspinall Unit, federal law preempts them under the authority of the Commerce, Property and Supremacy Clauses of the U.S. Constitution.

Absent express congressional authorization, the United States must continue to operate the Aspinall Unit pursuant to its authorized purposes under the CRSP. If the government operates the facilities in this manner, then the tail is not wagging the dog. Such operation, however, can be consistent with important benefits to plant and animal species and the environment. Careful management of the Aspinall Unit reservoirs accounting for hydrologic conditions can accomplish environmental benefits without compromising the congressionally authorized purposes or the state priority system. The alternative, continued conflict over dwindling water and power supplies, will result in few benefits to the people of the West or its rare species.

terpret, modify, or be in conflict with any provisions of the compacts and acts which comprise the so-called law of the river.”).