WRITTEN TESTIMONY of Sandy White
Pueblo Chieftain and Arkansas Native, LLC
Before the United States House of Representatives
Committee on Natural Resources
Subcommittee on Water and Power
Oversight Field Hearing
The Fryingpan-Arkansas Project at 45; Sustainable Water for the 21st Century
June 1, 2007

Chairwoman Napolitano and Members of the Subcommittee:

I am Sandy White, a local water lawyer from La Veta, Colorado, and a partner in the Denver firm of White & Jankowski, LLP. I have represented clients on the Arkansas River since 1971. Today, I appear on behalf of the *Pueblo Chieftain* and Arkansas Native, LLC, a water right owner determined to protect the Arkansas River Basin and the Fryingpan-Arkansas Project. Thank you for inviting me to testify concerning the Project. As noted in the subject of this hearing, the larger issue is "sustainable water." In this basin whose native water has long been over-appropriated, the Fry-Ark Project's purposes of regulating base flows and importation of water to supplement the base flow are essential to a sustainable water supply, a sustainable economy.

Background and Introduction

Almost forty-five years ago, on August 16, 1962, President John F. Kennedy signed PL 87-590, authorizing the Fry-Ark Project. Two days later, he flew to Pueblo where he spoke at the then Pueblo Public Schools Stadium, about 6 blocks from here. After acknowledging the worthies on the podium, the President began: "I don't think there is any more valuable lesson for a President or for a member of the House and Senate to fly as we have flown today over some of the bleakest land in the United States and then to come to a river and see what grows next to it … to know how vitally important water is." Noting that federally funded Reclamation projects were started some sixty years before under President Theodore Roosevelt's administration, President Kennedy went on. "We are finally on our way to bringing water through the Continental Divide into the Arkansas River Basin."

Other witnesses have and will describe to you the vast benefits brought by the Project to the valley. I testify, however, in opposition to a planned future development: the Bureau's proposed 40-year "excess storage contract" with the City of Aurora.

Under that contract, Aurora will use Project facilities to facilitate its export of water out of the Arkansas Basin for municipal use in Aurora. Located some 115 miles from here, Aurora is a large and powerful city. It has many good qualities, but it is not in the Arkansas Basin. The proposed contract will increase Aurora's average annual exports by over 20,000 a.f..

We must ask: If President Kennedy thought he signed project authorization to bring water *into* the Arkansas Basin, how is it that the project facilities will now be used to help Aurora or anyone else take water *out* of the basin?

Summary

The Bureau of Reclamation is without authority to enter into the proposed Aurora contract:

1. Original Project purposes are diametrically opposed to current contract purposes.

- The original purposes of the Project were two-fold: (1) to make more efficient use of Arkansas base or native flows by providing storage facilities on the Arkansas, and (2) to add new water to the Arkansas by importing supplemental supplies from the Colorado River Basin into the Arkansas.

- Under the Aurora contract, however, instead of using Project facilities to enhance the Arkansas base flows or to import supplemental water, the Bureau proposes to lend Project facilities to facilitate Aurora's taking water from the Arkansas Basin.

2. For the Bureau to be authorized to enter the Aurora contract, two things must happen.

- The Secretary of the Interior must find , *inter alia*, that the contract is "necessary" and "in the interests of the project," 43 USC § 389, and

- Since the Aurora contract "seriously affects" project purposes and involves "major operation changes," Congress must give its approval. 43 USC § 390(d)

3. For the Bureau to comply with Colorado law in the Project's "control, appropriation, use, and distribution of water," PL 87-590, § 5(e), under the Aurora contract:

- The Project's west-slope water must be used solely in the Arkansas basin, based on Project water right decrees.

- There may be no "re-coloring" of imported water as native water. *Thornton v. Bijou*.

- Each contract exchange must either be approved by water court decree or be administered by the State Engineer, *Empire Lodge v. Moyer*, not by the Bureau's Regional Director, who is given "exclusive authority" over the exchanges by the Aurora contract.

- Contract exchanges should operate only when Aurora's decreed exchanges could operate, thereby complying with the terms and conditions imposed by state law.

- Since the Aurora contract's Environmental Assessment expressly avoided consideration of water right injury, only court adjudication or State Engineer administration of those exchanges will protect other water rights.

Aurora's Problem Water

How did this situation arise? First, Aurora purchased some Arkansas water which is diverted some 25 - 90 miles downstream from here. At that point, Aurora faced a geographic problem. The city had no feasible way to move the water directly from its original head-gate to Aurora's terminal storage and water treatment facilities. A 115 mile pipeline is mighty expensive. In addition, the water quality diverted in that reach of the Arkansas is not attractive for municipal use, particularly in comparison with water much farther upstream near the headwaters.

As a result, Aurora started to work its water upstream – towards the point where the distance is shorter, where the headwaters of the Arkansas and South Platte River basins back up to one another. First, Aurora got temporary annual contracts with the Bureau to store its water in Pueblo Reservoir. That was followed by state water court decrees allowing that storage. Then Aurora got decrees allowing it to exchange the water from Pueblo Reservoir to its Otero Pump Station, some 115 miles upstream. At Otero, Aurora has existing facilities which can pump water into the South Platte River basin. However, Aurora's decrees imposed strict terms and conditions on the storage and exchanges, limiting Aurora's ability to exchange water to the Otero Pump Station.

The Aurora Contract

Even though Aurora is in a different river basin and will not use its water in the Arkansas basin, the Bureau of Reclamation agreed to assist Aurora. A deal was struck in the form of Contract No. 07XX6C0010. Comments on the final draft contract are due on or before June 4th, next Monday.

Under the contract, Aurora could continue to store its water in Pueblo Reservoir; not for just one year, but for 40 years. Once the water was stored in Pueblo Reservoir, the Bureau would help Aurora again. Finding it difficult to comply with the terms and conditions of its decrees, Aurora needed a way to circumvent them. Again the Bureau was there to help. When Aurora could not operate under its decrees, the Bureau itself would move the water upstream. It would do so by "accounting." In what came to be called "contract exchanges" the Bureau would trade Aurora the same amount of Project water upstream as native water Aurora stored downstream in Pueblo Reservoir. Consequently, Fry-Ark Project water stored in project facilities, Twin Lakes or Turquoise Lake reservoirs which are 125 and 150 miles upstream, will become Aurora's water by computer keystroke. From those reservoirs, Project water is then released back to the Arkansas River. It flows 26 and 11 miles downstream, respectively, before it is diverted by Aurora at the Otero Pump Station. Once diverted the water flows through a tunnel to the South Platte River. *See* Map of Project Area, Attachment # 1, as well as Map of District Boundaries, Attachment #2, and Exchange Schematic, Attachment #3, to this testimony.

Project Purposes

The Project's Authorizing Act, PL 87-590, simply describes a multi-purpose reclamation project. The legislative history and documents which the act incorporated, however, tell a more specific story. *See* the Project's engineering plans (House Doc. No. 187, 83rd Cong., as modified), and the Project operating principles (House Doc. No. 130, 87th Cong). The Project's original purpose was to provide supplement municipal and irrigation water by: (1) making more efficient use of the Arkansas base or native flows by providing eastern slope storage facilities, and (2) to add new water to the Arkansas by importing water from the Colorado River Basin (Fryingpan River) into the Arkansas.

Enhancing the base flows

As Secretary Udall wrote to the respective committee chairs in the House and Senate, "The Project contemplates [*inter alia*] the construction of storage on the eastern slope … for eastern slope floodwaters and winter flows averaging 50,000 and 93,000 acre-feet per annum, respectively." Senate Report No. 1742, Senator Carrol's Report of Accompany Fry-Ark Bill (July 1962). The Report itself described "regulation of winter flows" and "conservation of floodflows" in the respective annual amounts of 88,600 a.f. and 19,100 a.f.

Importation of supplemental water

According to the then Chairman of the House Interior Committee, Colorado's Wayne Aspinall, speaking on the floor of the House, "The purpose of the Project is to take water out of the Fryingpan tributaries and send it across the mountains … and drop it into the Arkansas Valley and send it down to the users … in the Arkansas Valley. Congressional Record – House, June 12, 1962, p. 9404.

The authorizing act itself incorporates and directs the Bureau "to comply with … operating principles" contained in House Document Numbered 130, herinafter "HD-130." PL 87-590, § § 5(e), 3(a). Those principles define the Project as one "planned and designed … for the transmountain diversion of water … to the basin of the Arkansas River." The operating principles also provide that the SECWCD shall "acquire title to the water required by the project for diversion to the Arkansas Valley." HD 130, §§ 1(a), 18.

The Bureau itself has recognized that the purpose of the Project facilities is to bring water to the Arkansas basin. In the Aurora contract's Environmental Assessment, for example, the project is described as a "multipurpose transbasin project that delivers water from the West Slope of Colorado *to the upper Arkansas River* basin" EA, § 1.1, p. 1, emphasis added.

The incontrovertible purpose of Fry-Ark Project facilities is to import water into the Arkansas River basin. Nevertheless, under the Aurora Contract, those works will be used to facilitate the export of water from the Arkansas basin.

The Bureau is Not Authorized to enter the Aurora Contract

Perhaps the most important issue to address by way of oversight is: Whether the Bureau is authorized to enter into the proposed Aurora Contract. The proposed Aurora Contract would be authorized only under two circumstances: (1) if the Secretary of Interior were to find that the changes in Project operations required by the Contract are in the "interests of the Project," and (2) if Congress were to approve of the changes wrought by the contract which "seriously affect" operations. Let's take these requirements one at a time.

Secretarial Finding

The Reclamation Act, § 14, codified at 43 USC § 389, authorizes the Secretary of Interior, "for the purpose of orderly and economical construction or operation and maintenance" of a project to enter into "such contracts for exchange or replacement of water … as in his judgment are *necessary and in the interests of the United States and the project*." (emphasis added) Accordingly, at pp. 1-2, the Aurora Contract repeats in full the requirements of § 14, above.

Nevertheless, the contract nowhere reflects that the Secretary or his appropriate designee has made such a judgment or finding that the Aurora Contract is "necessary and in the interests of the United States and the project." Informally, the Bureau points to the April 3, 2003, letter from Reclamation Commissioner John W. Keys, III, to James Broderick of the Southeastern District. The letter is Attachment #4 to this testimony. Attachment #5 is Regional Director Bach's letter of August 20, 2003. She cautions, "The request for any such contracts, however, will be reviewed for authority and evaluated on a case-by-case basis…."

In his letter the Commissioner neither makes nor reports any finding as required by § 14. Instead, he simply says, "we have concluded that such authority exists" to issue a long-term contract to Aurora. Without providing any support for his conclusion, the Commissioner continued, "The arrangements with the City of Aurora will not adversely affect Reclamation's contract" with the Southeastern District. The Keyes letter could be considered an appropriate finding only if non-interference with Reclamation's contract with the district means the same as being "necessary and in the interests of the … project." It does not.

Should the Secretary make such a determination, it would be an abuse of discretion on two related counts. First, since the purpose of the Fry-Ark Project is to enhance the base supply of the Arkansas River, it cannot be in the interest of the Project to facilitate removal of a portion of that base supply. Second, since the purpose of the Project is also to *import water into* the Arkansas basin, it cannot be in the best interest of the Project to use its facilities to enable the *export of water from* the basin. It strains credulity to assume that the discretion of a rational public servant could be properly exercised to decide that black is white, that up is down or, in this instance, that in is out, *i.e.* that import means export.

Congressional Approval

Another provision of the Reclamation Act, 43 USC § 390(d), provides that any project modifications … which would seriously affect the purposes for which the project was authorized … or which would involve major … operational changes shall be made only upon the approval of Congress."

The Fry-Ark Project was authorized to enhance the base supply of the Arkansas River and to import water into the Arkansas basin as a supplemental supply to the existing base supply. The Aurora Contract, however, is designed to diminish the base flows and to export Project water from the basin.

Although the amounts involved are relatively small, compliance with the proposed Aurora contract will reverse Project purposes. Instead of enhancing base flows, they will be diminished. Instead of importing supplemental water, it will be exported. The reversal of purposes involves "major operational changes" which would "seriously affect the purposes for which the project was authorized." Congress must approve these operational changes. It has not.

Intergovernmental Agreement

Even after Commissioner Keys' letter of April 3, 2003, Aurora and the SECWCD continued to seek "the enactment of federal legislation expressly authorizing Reclamation to enter into contracts … with Aurora for use of Fryingpan-Arkansas Project facilities." Intergovernmental Agreement Between the Southeastern Colorado Water Conservancy District and the City of Aurora (Oct. 2003) (hereinafter "2003 IGA"), p. 2.

Indeed one of the purposes of the IGA was to cooperate "in efforts to pass federal legislation that provides specific authorization … for Aurora's contracting for 'if-and-when' available storage and exchange use of excess capacity in current Fryingpan-Arkansas facilities," 2003 IGA, § II. A, B, and to "request Members of Congress to introduce and support federal legislation" to the same effect. *Id.,* § III.B.1.iii.

Prior to its IGA with Aurora, the SECWCD adamantly opposed any proposed Bureau contract with Aurora. In 2001, counsel for the District prepared a lengthy (23 pp) memorandum regarding the authority of the Secretary of Interior to contract with Aurora for use of Fry-Ark Project "excess capacity space to store native Arkansas River water right for use out of the Fry-Ark service area and the Arkansas River Basin." He concluded that there was no authority except, perhaps, the 1920 Miscellaneous Purposes Act which requires several conditions for such a contract, including that no other practicable water supply source is available. In a portent of things to come, perhaps, the District's counsel concluded, "At a minimum, Southeastern contends that no contract could be entered with Aurora pursuant to the 1920 Miscellaneous Purposes Act without Southeastern's approval." Memorandum, Lee E. Miller to Brian Person, March 9. 2001, *re*: Authority to contract with Aurora for use of Fry-Ark excess capacity space to store and transport native Arkansas River water rights out of the Arkansas River Basin.

To induce SECWCD approval, Aurora committed itself to payments totaling some $19,000,000. 2003 IGA,§ III.E. Most of those payments are due only after "execution by Aurora and Reclamation of a long-term contract for use of Fryingpan-Arkansas facilities." § III.E.1.a, b, III.E.3. In the meantime, the District is to be on its best behavior: "Until Aurora obtains a forty year contract with Reclamation, Southeastern will not oppose Aurora's request for annual 'if-and-when' agreements for storage and exchange purposes."

Is it surprising that Aurora continues to feel that the Bureau needs express legislative authority before entering into the Aurora Contract? Probably not, considering what the current statutes say, as discussed above. What is surprising is that the District allowed itself to be co-opted. If the custodian of the Fry-Ark Project itself can be bought off, the only chance for water users in the Arkansas Valley who are the intended beneficiaries of the Project is that Congress will see fit unconditionally to close the door on the type of adventurism being displayed by Aurora and the Bureau.

Parenthetically, it should be noted that Aurora has entered IGAs with innumerable other entities in the Arkansas Basin, often providing substantial consideration for their cooperation. In addition, under the proposed contract, Aurora is also paying the Bureau well over $60 million. All-in-all, a good bargain in light of the alternative, a much costlier pipeline and water treatment facility.

The First (1986) Aurora Contract

The Bureau's first excess storage contract with Aurora was executed in 1986. Like those that followed, the contract was limited to one year. The Southeastern District (SECWCD) challenged the Bureau's authority to enter the contract. Relying on the incidental purposes provision in the authorizing legislation ("other useful and beneficial purposes incidental thereto"), the Bureau brushed aside the District. The Bureau went on to rely on § 10(b) of the "Homestake Contract" for authority. Raymond Williams' April 30, 1986, letter to Raymond Nixon (emphasis added).

Executed in 1965 between the Bureau and the cities of Colorado Springs and Aurora, the Homestake Contract provides for the transportation of Homestake water. The one possible exception is §10(b). It "grants an *option* to the Cities *to negotiate* for additional storage service in the Eastern Slope project works" of the Fry-Ark Project. The type of water to be stored is not specified, but from the context and the title of the contract, the most likely interpretation is that it is Homestake water. Agreement between the United States and the Cities of Colorado Springs, and Aurora, Colorado for the Transportation of Water from the Homestake Project, Contract No. 14-06-700-6019, December 14, 1965.

The history of Aurora's first contract has little of value by way of providing authority for today's proposed contract. The incidental purposes provision is a weak reed. Relying on it to support diminishing the Arkansas River base supply or the

exporting of Project water from the river, would transform incidental purposes into super-purposes, those which conflict with and override primary purposes.

Similarly, § 10(b) of the Homestake Contract, simply grants an "option to negotiate," nothing more than permission to apply. It certainly doesn't give the Bureau the authority to enter into such a contract. If it did, then the Bureau would have never-ending opportunities to expand its authority, with regard to any project, simply by executing contract after contract granting options to negotiate for other contracts which were theretofore unauthorized.

Finally, as pointed out by the Williams letter, the 1986 Aurora contract "specifically excludes exchanges involving Project water." That Project water is "involved" in the proposed contract is undeniable. According to Williams, the 1986 Aurora contract "requires both storage of water and any exchange with nonproject water to be approved by the State of Colorado Division of Water Resources." No such state administration is contained in the proposed contract. As pointed out below, it must be.

Compliance with Colorado Law

The authorizing act also requires Project operation to "comply with the *laws of the State of Colorado* relating to the control, appropriation, use, and distribution of water therein." PL 87-590, § 5(e), emphasis added.

Filings and Decrees

The filings and decree for the Fry-Ark Project's western-slope water leave little doubt about where it was intended to be used.

To create *prima facie* evidence of the appropriation of water rights for the Fry-Ark Project, pursuant to 1953 CRS 147-4-1 *et seq.* and 1963 CRS 148-4-1 *et seq.*, the SECWCD and its predecessor filed maps with the Office of the Colorado State Engineer. Those maps recited that the Fry-Ark Project works "are to be constructed for (a) Supplying water to the *lands of the Arkansas Valley in Southeastern Colorado*; (b) Domestic water supply *in the area served*; (c) The regulation and flood control of waters *in the Arkansas River and its tributaries*; (d) Power, recreational, and industrial purposes; [and] (e) Other beneficial consumptive and nonconsumptive uses *in the area served*." Filings in the Office of the Colorado State Engineer numbered 20997 and 20997A, accepted February 1, 1957, and November 25, 1968, emphasis added.

After filing the maps, the SECWCD began to adjudicate its state water rights for the Fry-Ark Project. On the western-slope, for example, the decree provided that Project Water "will be used for irrigation, manufacturing, domestic, municipal, power, and other beneficial purposes. Various cities and towns *in the Arkansas Valley in Colorado* will use such water for all municipal purposes…. The various ditch companies and farmers *of the Arkansas Valley* will use such water for all farming purposes…." Decree, Supplemental Adjudication, Water District 38, In the District Court in and for Garfield

County, Colorado, CA 4613, entered July 21, 1959, Art. VIII, pp 25-26 (emphasis added).

Consequently, the intent of the Fry-Ark Project appropriations and the provisions of the decree which made them enforceable was to provide water for beneficial use only in the Arkansas River basin. By the proposed Aurora Contract, the Bureau now intends to allow project water to be exported from the Arkansas Basin for beneficial use elsewhere. To do so lawfully, an application must be made to and a decree obtained from the Colorado Water Court authorizing the change of place of use. The appropriate venue for such an application is the Division 2 Water Court, Pueblo. *People v. Ogburn*, 194 Colo. 60, 570 P.2d 4 (1977)

Re-coloring

The Bureau may seek to avoid the prohibition on export of Project water by simply presuming that Project Water may be re-colored or relabeled as reusable native Arkansas water which may be diverted out of the Arkansas basin.

The Colorado Supreme Court has rejected the practice of re-coloring Project water in an exchange. It determined that project water cannot be relabeled as reusable native water. In *Thornton v. Bijou*, 926 P.2d 1 (Colo. 1996), involving the Bureau of Reclamation's Colorado-Big Thompson Project, the court was faced with a similar municipal attempt to exchange Non-Project Water for Project Water, then export the Project Water outside of the Northern Colorado Water Conservancy District. As the Bureau does here, Thornton asserted that the "character of exchange rule" provides that water diverted by exchange takes on the character of the substitute supply, *i.e.* if Project Water is diverted in exchange for Non-Project Water, the Project Water becomes Non-Project Water available for diversion out of the district. Noting that the trial court labeled the rule as a "legal fiction," *Thornton*, 926 P.2d 1, 70, the Supreme Court "affirm[ed] the trial court's denial of Thornton proposed application of CBT water for replacement and exchange purposes creating benefits for Thornton outside the boundaries of the NCWCD." *Thornton*, 926 P.2d 1, 77.

Consequently, any Project Water in Twin Lakes or Turquoise reservoirs which is the subject of Aurora's contract exchange is still Project Water which cannot lawfully be exported to the South Platte River basin.

State Engineer supervision

Under the proposed contract, "The [Regional Director] shall have exclusive authority to determine if and when an exchange may occur," and he "shall execute the exchanges herein contemplated through reservoir water accounting procedures." Aurora Contract, ¶¶ 5.b.(2),(3). These provisions presumably apply only to the "contract exchanges" authorized by the Aurora Contract. Those exchanges, however, would only "occur when the exchange potential in the Arkansas River is insufficient to move water stored in Pueblo Reservoir upstream." EA, § 2.3.1, p. 12. More specifically, Aurora's

current decrees do not cover the contract exchanges. EA, § 2.2, p. 10. Simply put, the contract exchanges ignore Colorado water law.

The Bureau's slightly cock-eyed rationale for this approach is found in the Bureau's *Draft Hydrologic Model Documentation*, p 4-24: "Contract exchanges are not decreed by the water court, because the exchange occurs between two willing parties who have legally diverted water, which is under their control, and when doing so would not injure other water rights holders."

The Bureau's understanding is only partially correct. It is correct that exchanges must be administered so that they do not cause injury. In addition, exchanges, including contract exchanges, do not require decrees. *City of Florence v. Board of Waterworks of Pueblo*, 793 P.2d 148, 155-56 (Colo. 1990) (Erickson, J., concurring). Nevertheless, all exchanges, including contract exchanges, are subject to regulation by the State Engineer. *Id.* at 156. All exchanges must be regulated to ensure there is no injury to other water rights. They *may* be adjudicated if the party operating the exchange wishes to receive a priority date for the exchange. Justice Erickson's characterization of exchanges was adopted by the majority opinion of the Colorado Supreme Court eleven years later. *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1155 (Colo. 2001) ("an exchange is a water management practice the State Engineer administers between decreed points of diversion. . . The State Engineer may allow an exchange in absence of a decree confirming it. If the exchange is adjudicated, it receives the priority date of its appropriation."). *See also, Colorado Water Conservation Board v. City of Central*, 125 P.3d 424, 436-37 (Colo. 2005) ("A water right exchange is a trade of water between structures or users administered by the state engineer."). *See also* CRS § 37-83-104 (exchanges to be charged deductions for stream loss "to be determined by the state engineer");

The water court or the State Engineer, not the Bureau's Regional Director, is responsible for ensuring exchanges do not injure senior water rights. As such, exchanges must subject themselves to his authority and administration before the exchange is operated. The primary concern is to ensure that water will be available to satisfy senior rights when needed. *See, e.g., City and County of Denver v. City of Englewood*, 826 P.2d 1266, 1272-73 (Colo. 1992) (disallowing Denver's "owe-the-river" accounting system for its exchange where the division engineer was not informed of the exchange until after the water had been diverted; "[p]rior notification of the exchange allows the engineers to ensure that water is available to be released to meet the needs of downstream senior appropriators.").

The water that the Bureau books over to Aurora upstream in Twin Lakes and Turquoise reservoirs will not be sent downstream to project beneficiaries, as it otherwise would be. That water is destined for the Otero pump station and the South Platte basin instead, forever unavailable to downstream rights along the exchange reach. The Bureau's own analysis demonstrates the impact of the contract exchanges on the flow of the Arkansas. Attachment # 6, hereto, demonstrates that the cumulative effects of the Aurora Contract will reduce the flow of the Arkansas River in the exchange reach at the Wellsville Gage by up to approximately 5% during a "mean dry year."

Consequently, in order to comply with Colorado water law, the Aurora Contract must be amended to reflect that the Colorado State Engineer, not the Bureau's Regional Director, has sole authorization to determine when contract exchanges may operate without injury to others and how much water may be exchanged. In addition, as described below, the Aurora contract must also incorporate the restrictions in Aurora's exchange decrees.

Compliance with Aurora's Exchange Decrees

Aurora holds several decrees allowing the exchange of its water in Pueblo Reservoir, including those issued in cases 87CW63, and 99CW170(A), as well as a consolidated decree for cases 84CW62 and 84CW63, 84CW64, , all in the water court for Water Division No. 2. To protect other water rights, those decrees impose on Aurora's exchanges a variety of terms and conditions, including priorities among competing exchanges, and requirements for a live stream in the exchange reach, Division Engineer determination of non-injury, volumetric limitation, daily accounting, the satisfaction of all intervening senior rights which are calling for water, seasonal limitations (*e.g.* no exchanges November 15 through March 15th; reduced exchanges, July 1st through August 15th), flow limitations, volumetric limitation, protection of minimum stream flows, matching of exchange diversions to reservoir releases, limitations on simultaneous exchanges, protection of water quality, maximum diversion rates based on gage readings, protection of the Upper Arkansas River Voluntary Flow Management Program, and subject to the terms of over 30 stipulations incorporated by reference, subject to IGAs incorporated by reference, compliance with its own exchange priorities, making all the exchanges absolute, notice to the Division Engineer prior to exchange operation, and the court's retained jurisdiction.

These decrees aggregate over 70 pages and are the result of thousands of hours of effort by expert witnesses, lawyers, and judges. Aurora now wants to circumvent the results by doing an end run around the decrees using the contract and with the Bureau running interference. If Aurora and the Bureau truly wish to comply with Colorado law, the exchanges contemplated by the contract should be subject to all the terms. conditions, and limitations contained in those decrees.

Summary

The proposed Bureau contract with Aurora is unlawful and unauthorized. It is unlawful since, contrary to the Project Authorizing Act, the contract is an unvarnished an attempt to circumvent Colorado water law. The Aurora Contract is unauthorized (1) since the Secretary has not found that the contract operations are in the interest of the project, and (2) since Congress has not authorized such changes which would "seriously affect" Project purposes.

Supporters of the contract will ask, "What is the big deal? We've had temporary annual contracts for years in the past. Why not save us the trouble of renewal and make the contract good for forty years?" The answer is two-fold: First, 40 years is a long time, a professional life-time, practically permanent from the view point of a resident of the Arkansas Valley. Second, after forty years, when Aurora has become dependent on Arkansas River water, contract renewal will be politically mandatory.

Once again, thank you for inviting me to testify. I am available to answer any questions you may have.

List of Attachments

1. Map of Project Area
2. Map of District Boundaries
3. Exchange Schematic
4. Reclamation Commissioner John W. Keys III April 3, 2003, letter to James Broderick of the Southeastern District
5. Regional Director Bach August 20, 2003, letter to James Broderick of the Southeastern District
6. Cumulative Effects of contract exchanges on stream flow