MEMORANDUM

TO: Harris D. Sherman, Executive Director
Department of Natural Resources

FROM: Felix L. Sparks, Director
Colorado Water Conservation Board

SUBJECT: Fryingpan-Arkansas Project

This memorandum responds to your request for my comments on (1) a recent opinion of the Department of Interior Solicitor holding that the proposed operation of that portion of the Fryingpan-Arkansas project relating to the south tributaries of Hunter Creek is illegal, and (2) an opinion voiced by various interests in Pitkin County that the proposed project operation will place greater water demands on Hunter Creek than contemplated by the original project plans.

In addition to a review of the printed record of the Fryingpan-Arkansas project, my observations and conclusions are also based upon my personal knowledge of all the major events and negotiations which led to the congressional authorization of the project. I chaired every meeting of the state policy and review committee during the final three years of negotiations on the project operating principles, prepared the final draft of the operating principles and affixed my signature to those principles on behalf of the Colorado Water Conservation Board, assisted in the preparation of the legislation to authorize the project, was one of the principal witnesses at all congressional hearings held subsequent to the final adoption of the operating principles, and, since authorization of the project, have acted as chairman of the project commission established by the authorizing legislation.

Based both upon my personal knowledge of the project history and a review of the printed record, I can only conclude that the
opinions shared by the Solicitor and various interests in Pitkin County relating to the Hunter Creek portion of the Fryingpan-Arkansas project are wholly erroneous. These opinions appear to be based upon a fragmentary and uncoordinated review of the project history. My reasons for this conclusion follow.

In January, 1950, the Bureau of Reclamation issued a report entitled, "Initial Development, Gunnison-Arkansas Project, Roaring Fork Diversion, Colorado", subsequently printed as House Document No. 187, 83rd Congress. The project plan relating to the Roaring Fork and its tributaries contemplated the diversion of 69,200 acre-feet of water annually from the Roaring Fork drainage to the Arkansas River drainage. The project plan also included an additional diversion of 14,900 acre-feet annually by the Twin Lakes Company. The plan provided for the construction of Aspen Reservoir on the Roaring Fork River immediately above the town of Aspen, with an active capacity of 28,000 acre-feet. The purpose of this reservoir was to provide replacement water and to provide water for future use in western Colorado.

The Western Slope Collection System is described in the report as follows: "A system consisting of about 50 miles of canals and tunnels would enable the collection of water from Hunter Creek and the Fryingpan River -- both tributaries of the Roaring Fork River. The water so collected would be diverted to the eastern slope through the potential Fryingpan-Arkansas tunnel, about six miles in length. Since 1935, the Twin Lakes Reservoir and Canal Company has diverted western slope water from the Roaring Fork drainage to its reservoir on the eastern slope. The company has a legal right to divert more water than it has diverted to date; but such increased diversions would be detrimental to fishery values in the Roaring Fork River and its tributaries above Aspen. In order to preserve those fishery values the project plan includes an extension of the collection system to the South Fork of Hunter Creek and enlargement of other project facilities to permit an exchange of water with the Twin Lakes Company."

In summary, the original project plans contemplated the diversion of water from Hunter Creek and tributaries for both project diversion and for partial replacement of flows diverted from the Roaring Fork by the Twin Lakes Company in order to enhance fishery values in the Roaring Fork River above Aspen.

In addition to the foregoing diversions from Hunter Creek, another diversion from Hunter Creek was contemplated as follows: "A
diversion dam across Hunter Creek, a tributary of the Roaring Fork River, would divert water into a canal with a capacity of 200 second feet which would carry the water about two miles to the Aspen Reservoir."

In summary, the original project plans contemplated a total tunnel and canal diversion system of 355 second feet from Hunter Creek and its various tributaries. The total diversion capacity from Hunter Creek and tributaries as now designed and under construction is 270 second feet.

Concurrently with the development of the project plan, a policy and review committee was organized by the Colorado Water Conservation Board under date of November 24, 1948, to study and review the plans and reports on the proposed project. The committee was composed of representatives of the Board, the Colorado Game and Fish Commission, Western Colorado, the Arkansas Valley, and the City of Colorado Springs. Recommendations of the Colorado Game and Fish Commission and the United States Fish and Wildlife Service were considered by the Policy and Review Committee and were incorporated into operating principles formally adopted by the State of Colorado on January 19, 1951.

Streamflow fishery releases at the various collection points were established for the Fryingpan River and its tributaries and the Roaring Fork River. However, there is nothing in either the project report or the operating principles relating to such releases for Hunter Creek and its tributaries. Unlike the Fryingpan and its tributaries, Hunter Creek had substantial decreed senior water rights along its lower reaches. The releases required for these senior decrees were deemed to be more than sufficient to maintain a viable stream below the Fry-Ark Collection System. This is still the case, although the existing private decrees very often substantially deplete the lower reaches of Hunter Creek. This situation will be aggravated at times by the Fry-Ark diversion, but will often exist when no project diversions are being made.

Based upon the project plan above outlined and the operating principles adopted by the State of Colorado, legislation to authorize the Fryingpan-Arkansas project was introduced in the United States Congress in 1953 and in every subsequent session of Congress thereafter. Although Congress scheduled a number of hearings on the project and favorable recommendations were made by House Committee on Interior and Insular Affairs, no final action on the project was taken by the Congress
In 1958, the Colorado Water Conservation Board established another policy and review committee to determine what changes in the project plans should be made. The official members of the Policy and Review Committee consisted of one representative each from the Colorado Water Conservation Board, the Southeastern Colorado Water Conservancy District (Pueblo), the Colorado River Water Conservation District (Glenwood Springs), and the Southwestern Water Conservation District (Durango). After almost three years of negotiations and amendments, final operating principles for the Fryingpan-Arkansas project were agreed upon. The final operating principles, as amended, were executed on December 30, 1960, at Denver, Colorado, by Steve McNichols, Governor of the State of Colorado, J. Selby Young, President of the Southeastern Colorado Water Conservancy District, Cy T. Hanson, President of the Colorado River Water Conservation District, and by Ira A. Kelly, President of the Southwestern Water Conservation District. These amended operating principles contained at their conclusion the following statement:

"These operating principles shall be and do constitute a contract between the signatory parties, and shall inure to the benefit of and shall be and remain binding upon said parties, their respective successors and assigns."

These operating principles were subsequently adopted by the United States Congress and made a part of the 1962 act by which Congress authorized the construction of the Fryingpan-Arkansas project.

As a result of the new operating principles adopted by the State of Colorado, the following major changes were made in the project plans and approved by Congress:

1. Western Slope storage for replacement and Western Slope use was increased from 28,000 acre-feet to 100,000 acre-feet.

2. The Aspen Reservoir was eliminated and the Ruedi Reservoir substituted therefor.

3. The Hunter Creek-Aspen Canal was eliminated.

4. The maximum annual and long-term average transmountain
diversions were specifically enumerated, although the annual average long time diversion did not change, to wit, 69,200 acre-feet.

The proposal to augment the flows of the Roaring Fork River by exchange for fishing purposes was taken into early consideration by the state policy committee. Because the principal objective of the Fryingpan-Arkansas project was to furnish a specified amount of water to southeastern Colorado, it was obvious that some limitation had to be placed upon the amount of project water which could be exchanged for fishery purposes. This limitation was dictated by the available water supply.

In reviewing the estimated annual average water supply above the proposed project collection system, including Hunter Creek and its tributaries, and taking into consideration the releases required for downstream demands, the Committee agreed upon a limitation of 3,000 a.f. annually for fishery exchange purposes. It did not appear from the water supply figures available that the fishery exchange could be provided unless the full collection system were developed as described in the project plans.

The Committee had no way of knowing whether or not all of the streams described in the Bureau report would actually be intercepted if the project were constructed. It was obvious that the streams on the outer periphery of the collection systems were the most likely candidates for omission, if in fact omissions did occur. Since the project water supply did not appear to be sufficient for both project diversion and fishery exchange without the inclusion of these peripheral streams, the fishery exchange was limited to those streams. Specifically, the operating principles as finally adopted provided that the fishery exchange was to be supplied "from any waters diverted from the south tributaries of Hunter Creek, Lime Creek, Last Chance Creek, or any of them".

At no time during the many years of negotiations on the operating principles was there any intent of limiting the diversions from Lime Creek, Last Chance Creek and the south tributaries of Hunter Creek, either individually or collectively, to 3,000 acre-feet annually. In view of the tremendous costs involved, it would have been an utter absurdity to extend the collection system for a mere 3,000 acre-feet of water.
It must be kept in mind that when the operating principles were finally agreed upon, a major change had taken place in the project plans. The proposed Aspen Reservoir on the Roaring Fork, with an active capacity of only 28,000 acre-feet, was eliminated in favor of the Ruedi Reservoir on the Fryingpan with an active capacity of 100,000 acre-feet. This change placed a water supply demand on the Fryingpan River which was never contemplated in the original project plans. The change made the water supply for project diversion even more critical. The limitation on the fishery exchange likewise became more critical and was established at a figure not to exceed 3,000 acre-feet annually. The limitation was placed solely on fishery exchanges and was never intended to be a limitation on diversions from the south tributaries of Hunter Creek, Lime Creek, Last Chance Creek, or any of them individually or collectively. Any strained interpretation to the contrary is completely irrational.

It is interesting to note that the Solicitor quotes from a portion of Section 5(e) of the Fryingpan-Arkansas Project Act (P.L. 87-590; 76 Stat. 389), which reads as follows: "In the operation and maintenance of all facilities under the jurisdiction and supervision of the Secretary of the Interior authorized by this Act, the Secretary of the Interior is directed . . . to comply with the laws of the State of Colorado relating to the control, appropriation, use, and distribution of water therein."

Following the quotation, the Solicitor acknowledges that project decrees from the Hunter Creek drainage have been awarded in accordance with state law. In light of the specific congressional mandate and the critical project water supply, the Solicitor then makes an astounding observation as follows: "Of course, having rights to the water does not mean they have to be exercised or that Congress intended that the full amount be taken . . . ."

It is painfully evident from the Solicitor's opinion that he has unilaterally taken it upon himself to amend the congressional Act to read "the Secretary of the Interior is not directed to comply with the laws of the State of Colorado". Under the Solicitor's interpretation, the project would never have been authorized. A critical issue during the entire project history was the matter of state administration versus federal administration of the project water. The residents of western Colorado were justifiably concerned about the possibility of preemptive federal water rights being obtained for the project.
Both the operating principles and the authorizing legislation are therefore replete with specific directions that the project be operated pursuant to the water laws of the State of Colorado. But the Solicitor now proposes otherwise.

The contention that the proposed project operation places a greater burden upon the Hunter Creek drainage than originally contemplated has been covered to a considerable extent in the foregoing narrative. However, a concise review of the recorded facts on this point follows.

As previously stated, the original project plans (House Document 187, 83rd Congress) proposed a total project diversion capacity of 355 cubic feet per second from the Hunter Creek drainage. The most damaging aspect of this plan was the proposed diversion of 200 cfs. from the lower end of Hunter Creek. Such a diversion would almost completely dewater the lower segment of the creek -- a segment which is already sorely depleted by water users in Pitkin County. That proposed diversion has been eliminated in the revised project plans and the total diversion from Hunter Creek has been reduced from 355 cfs. to 270 cfs.

In quantitative terms and even accepting the Solicitor's limitation on the south tributaries of Hunter Creek, the original plans contemplated an average diversion from the Hunter Creek drainage of about 37,000 acre-feet of water per year. The present plans contemplate an average diversion of only about 17,000 acre-feet per year -- less than half the original amount. If less than half of a given amount is more than such amount, the science of mathematics must be revised.