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DISTRICT COURT LA PLATA COUNTY, COLORADO 1060 E. Second Ave., Durango, Colorado 81301 Phone number: 970-247-2304	
IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE UNITED STATES OF AMERICA (BUREAU OF INDIAN AFFAIRS, SOUTHERN UTE AND UTE MOUNTAIN UTE INDIAN TRIBES) FOR CLAIMS TO THE ANIMAS RIVER and the LA PLATA RIVER IN DIVISION NO. 7, COLORADO	▲ Court Use Only ▲
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MOVING PARTIES' RESPONSE TO ORDER (MAR. 1, 2006)	

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I. INTRODUCTION.

The State of Colorado, the United States of America, the Southwestern Water Conservation District, the Ute Mountain Ute Tribe and the Southern Ute Indian Tribe (collectively, "Moving Parties") respectfully respond to the Court's *Order* (Mar. 1, 2006) ("Mar. 1 Order") which directed the parties to address ten issues set forth in that order no later than ten days prior to oral argument. Argument is now scheduled after the conclusion of the trial in Case No. 01CW54 (ALP Diligence) and this brief is due on April 7, 2006. The Moving Parties respond as follows to the issues identified in the Mar. 1 Order.

II. MOVING PARTIES' RESPONSES.

Question 1. Whether the 1991 Consent Decrees authorized any off-reservation or out-of-state use of Indian Reserved Water Rights, and if so, a) identify the presently decreed locations for such use, and b) describe how notice requirements were fulfilled in Case No. W-1603-76 for such use.

A. USE OF WATER OUT OF STATE OR OFF-RESERVATION.

The *Consent Decree*, Case No. W-1603-76F (Dec. 19, 1991), and *Consent Decree*, Case No. W-1603-76J (Dec. 19, 1991) (collectively, "1991 Consent Decrees") describe the attributes of the "Reserved Water Rights" that are to be supplied to the Ute Mountain Ute Tribe and the Southern Ute Indian Tribe (collectively, "Ute Tribes" or "Tribes") from the Animas-La Plata Project ("ALP" or "Project") and that the United States holds in trust for the benefit of the Tribes pursuant to those decrees.[1] *See Stipulation for a Consent Decree* at 11, ¶ 6 and 17, ¶ 7, *Consent Decree*, Case No. W-1603-76F (Animas River) ("Animas Stipulation"); *Stipulation for a Consent Decree* at 11, ¶ 6 and 17, ¶ 7, *Consent Decree*, Case No. W-1603-76J (La Plata River) ("La Plata Stipulation"). The Ute Tribes may use the water to which they are entitled from the ALP (1) on their Reservations within the State of Colorado or (2) within the boundaries of the Animas-La Plata Water Conservancy District ("ALP District"). *Id.* Thus, pursuant to the 1991 Consent Decrees, the Tribes may use their water rights off their Reservations but only within the

[1] The 1991 Consent Decrees govern the use of water from ALP by the two Ute Tribes. Those decrees do not address the use of project water by the Navajo Nation or the non-Indian ALP participants. The water supply for those parties is governed by the decrees that are the subject matter of Case No. 01CW54 ("ALP Decrees"), as well as other legal documents, such as the Animas-La Plata Compact. C.R.S. § 37-63-101. The proposed amendments to the 1991 Consent Decrees and the change applications in these four cases likewise apply only to the rights decreed to the two Ute Tribes and have no bearing on the allocations of water to the Navajo Nation and the non-Indian ALP participants whose rights are defined elsewhere.

boundaries of the ALP District which is fully within the State of Colorado. The ALP District was established pursuant to Case No.79CV191 and the Colorado Water Conservancy Act, C.R.S. §§ 37-45-101 to 37-45-153, subject to inclusions and exclusions of land pursuant to C.R.S §§ 37-45-136 and 137.[2]

Although the 1991 Consent Decrees include authority for a Tribe to apply to this Court to change the decreed places of use to a location off its Reservation pursuant to ¶ 12.D. of the Animas and La Plata Stipulations, no such application is at issue in these cases. Under the language of those paragraphs, if a Tribe were to seek to change the place of use of a portion of its water rights to an off-reservation location, the Tribe would first have to affirmatively state that the tribal rights are to be "a Colorado State water right, but be such a State water right only during the use of that right off the reservation." Animas Stipulation at 26-27, ¶ 12.D.; La Plata Stipulation at 26-28, ¶ 12.D.; *see also* Animas Stipulation at 28, ¶ 13 (tribal water rights used off reservation "will be State water rights only during that use" and will "regain" status of reserved rights when off reservation use is "concluded" and thus are "permanent" and "cannot be lost . . . [by] forfeiture, abandonment or nonuse"); La Plata Stipulation at 28 ¶ 13 (same). The 1991 Consent Decrees include a number of additional provisions in ¶¶ 6 and 7 governing changes to the tribal water rights that are designed to protect both project participants and other potentially affected water users on the Animas and the La Plata Rivers in addition to the safeguards afforded by ¶ 12.D. of the Stipulations. *See* Animas Stipulation at 13-14, ¶ 6.A.iii-iv; 18-20, ¶ 7.A.iii-iv; La Plata Stipulation at 12-14, ¶ 6.A.iii-iv; 18-20, ¶ 7.A.iii-iv.

Under the 1991 Consent Decrees, the decreed places of use for the tribal water rights do not encompass out-of-state use and no provision in the 1991 Consent Decrees expressly addresses the out-of-state use of a tribal right. In the future, a Tribe may seek to change the place of use of its decreed water rights to a location out of state on the same terms that other holders of state rights may use their rights out of state. In addition, the Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973 (1988) ("1988 Settlement Act") specifically provides that the Tribes may dispose of their water from ALP in the Lower Basin of

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[2] To the extent that CPA might argue that any of the provisions of the 1991 Consent Decrees are in error, the time has long expired for such a contention to be brought before the Court. *See* C.R.S. § 37-92-304(10); *Pueblo W. Metro. Dist. v. S.E. Colo. Water Conservancy Dist.*, 689 P.2d 594, 600 (Colo. 1984) (declaring that "[u]nder [C.R.S. § 37-92-304(10)] any substantive challenge to a judgment of a water right decree is barred unless filed within three years of entry of such judgment and decree and unless supported by a satisfactory showing of mistake, inadvertence, or excusable neglect"). "[A] judgment entered within the jurisdiction of the [C]ourt, even though wrong, is not subject to collateral attack." *Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 637 (Colo. 1987).

the Colorado River only to the extent that water held by "non-Federal, non-Indian holders" of water rights may be so used. *Id.*

B. NOTICE.

This Court previously addressed questions about the adequacy of the notice and opportunity to object provided in advance of the entry of the 1991 Consent Decrees. *See Order* (Oct. 1, 2003, effective Oct. 16, 2003) ("Oct. 1 Order") (denying Citizens' Progressive Alliance's ("CPA") *Motion to Vacate and Dismiss for Lack of Subject Matter Jurisdiction* (June 6, 2003)); *Order* (Oct. 1, 2003, effective Oct. 16, 2003);[3] *Order* (Mar. 25, 2004) ("Mar. 24 Order"). In its Oct. 1 Order, the Court rejected the argument that the notice leading up to the entry of the 1991 Consent Decrees was inadequate. In particular, the Court found that copies of the Colorado Ute Indian Water Rights Final Settlement Agreement (Dec. 10, 1986) ("1986 Settlement Agreement") and 1988 Settlement Act had been sent to all objectors in the case, including Jack Scott, prior to entry of the 1991 Consent Decrees, as the Court expressly noted in the 1991 Consent Decrees. Oct. 1 Order at 3-5. The 1986 Settlement Agreement contains precisely the same description of the place of use for the tribal rights as is contained in the 1991 Consent Decrees. *See* 1986 Settlement Agreement at 15, 27. In any event, the Court previously held that any differences between the 1986 Settlement Agreement and the 1991 Consent Decrees did not render the notice regarding the proposed entry of the 1991 Consent Decrees inadequate. Mar. 25 Order at 2.

In addition, the Court rejected the argument advanced by CPA that the original applications filed by the United States on behalf of the Ute Tribes were inadequate to provide notice of the nature of the tribal claims since they failed to include the legal description of any of the proposed points of diversion or the amount of water claimed. Oct. 1 Order at 1-2, 4. After recognizing that "Indian reserved water rights entail a broad definition of purpose and secure substantial amounts that may change over time," *id.* at 3, the Court held that "under the 'particular facts and circumstances' and the 'practicalities and peculiarities' of the Tribes' reserved rights claim[s], the resume notice [of the tribal claims] was sufficient to satisfy inquiry notice standards." *Id.* at 4.

Question 2. Whether the proposed amendments to the 1991 Consent Decrees in case numbers W-1603-76J and W-1603-76F would authorize permanent off-reservation use of the Tribes' Indian Reserved Water Rights, and if so, a) identify the entities that would obtain such use, b) whether notice requirements have been met with respect to said water rights, c) whether the

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[3] The Court's *Order* (Oct. 29, 2003) makes the orders rendered on October 1, 2003 effective on October 16, 2003.

proposed amendments affecting water rights are subject to Colorado State water law or any other laws affecting the approval of the proposed amendments, d) whether the proposed amendments would result in abandonment of any Indian Reserved Water Rights identified by the 1991 decrees, and e) whether the proposed amendments are consistent with the underlying purpose of the 1991 consent decree.

The proposed amendments to the 1991 Consent Decrees in Case Nos. W-1603-76J and W-1603-76F would not authorize the permanent off-reservation use of the Tribes' reserved water rights beyond the use within the ALP District already permitted under the 1991 Consent Decrees. *See generally* Moving Parties' response to Question No. 1(a), *supra*.[4] In other words, the proposed amendments to the 1991 Consent Decrees do not seek a change in the provisions of the 1991 Consent Decrees that control the place of use for the water rights awarded to the Tribes.[5]

A. USE BY NON-TRIBAL ENTITIES.

The Tribes have not entered into any agreements with any other entity for the use of the water rights decreed to the Tribes under the 1991 Consent Decrees or the amounts of water to be supplied to the Tribes under the proposed amendments to the 1991 Consent Decrees.

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[4] Tribal off-reservation uses are subject to the provisions of ¶ 13 of the Animas and La Plata Stipulations which provide that tribal water rights used off reservation regain the status of reserved rights when off-reservation use is "concluded" and thus are "permanent" and "cannot be lost . . . [by] forfeiture, abandonment or nonuse." Animas Stipulation at 28, ¶ 13; La Plata Stipulation at 28 ¶ 13.

[5] The Moving Parties seek to modify the 1991 Consent Decrees in three ways. First, the proposed amendments to the 1991 Consent Decrees would extend the deadline for the completion of the reduced ALP required to satisfy the reserved water rights decreed to the Tribes. Second, under the proposed amendments to the 1991 Consent Decrees, the amount of water which must be supplied to the Tribes in order to settle the tribal claims on the Animas and La Plata Rivers is substantially reduced from that required by the 1991 Consent Decrees. In addition, the modification eliminates any irrigation use and defines the quantity of municipal and industrial uses to conform to the Colorado Ute Settlement Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-258 to 2763A-266, Title III, §§ 301-303 (Oct. 25, 2000) ("2000 Settlement Act Amendments"). This proposed change required the filing of the change applications. Settlement of the tribal claims on the basis of the reduced amounts was authorized by Congress in the 2000 Settlement Act Amendments but requires the approval of this Court.

CPA's *Reply to "Moving Parties' Opposition to CPA's Request for Ruling on Cross-Motion for Summary Judgment," and Supplement to Motion* (Oct. 17, 2005) erroneously assumes the proposed amendments to the 1991 Consent Decrees reallocate to the non-Indian ALP participants a portion of the reserved water rights decreed to the Tribes under the 1991 Consent Decrees. That assumption is wrong. Neither the proposed amendments to the 1991 Consent Decrees nor the Colorado Ute Settlement Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-258 to 2763A-266, Title III, §§ 301-303 (Oct. 25, 2000) ("2000 Settlement Act Amendments") affect the water rights of the non-Indian ALP participants in any respect. To be sure, the 2000 Settlement Act Amendments limit the purposes for which the facilities authorized by that legislation may be used to supply water to the Navajo Nation and the non-Indian project participants. But the water rights used to supply water to those entities are not part of these cases. In short, the proposed amendments to the 1991 Consent Decrees pertain only to the tribal rights, with the sole exception that all water users on the Animas and La Plata Rivers will benefit from the settlement of the tribal claims.

C. NOTICE.

This Court addressed the question of the notice to be provided for the *Stipulation for Amendment to Consent Decree*, Case Nos. W-1603-76F, W-1603-76J (Aug. 23, 2002) ("Stipulation") in its *Scheduling Order*, Case Nos. W-1603-76F, W-1603-76J (June 20, 2002) ("Scheduling Order").[6] The Court directed that the Moving Parties serve the Stipulation, along with the Scheduling Order on the existing list of objectors in the reserved rights cases, together with Ms. Maynard. Scheduling Order at 1. In addition, the Court directed that notice be provided by resume and publication. *Id.* Counsel for the United States filed a certificate of service regarding the service of these documents on or about August 26, 2002. Attached as Exhibit 1 is a copy of the resume notice.

D. LEGAL STANDARDS.

This Court previously set forth the legal standards that it would apply in its consideration of the proposed amendments to the 1991 Consent Decrees in its *Order* at 4-12 (Mar. 7, 2005) ("Mar. 7 Order"). The Court determined that the changed circumstances that resulted in the request to modify the 1991 Consent Decrees warranted modification of the Decrees. The Court however, set the matter for an evidentiary hearing to review the impact of the proposed amendments to the 1991 Consent Decrees on other water users and to ensure that the

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[6] The Stipulation is attached as an exhibit to the *Memorandum in Support of Motion to Amend Consent Decree*, Case Nos. W-1603-76F, W-1603-76J, filed by the United States on August 26, 2002.

amendments were "tailored to resolve the problems created by the change in circumstances." *Id.* at 10.

E. ABANDONMENT.

The proposed amendments to the 1991 Consent Decrees would reduce the amount of water to which the Tribes are entitled from the quantities decreed to the Tribes under the 1991 Consent Decrees. Under the decrees as they are to be amended, the Tribes would waive any claim to additional reserved water rights from the Animas and La Plata Rivers within Colorado beyond the amounts set forth in the Stipulation, provided that the facilities authorized under the 2000 Settlement Act Amendments are timely constructed. The effect of the proposed amendments would be to reduce the amount of water available to the Tribes from the ALP. Although the bottom line is a reduction in the amount of water decreed to the two Tribes in settlement of their claims under federal law, the legal route to that reduction differs from the state law procedure of abandonment.[7]

F. CONSISTENCY WITH THE UNDERLYING PURPOSES OF THE 1991 CONSENT DECREES.

The proposed amendments to the 1991 Consent Decrees are fully consistent with the purpose of the 1991 Consent Decrees. This Court previously held:

> The core purpose of the settlement resulting in an act of congress and ultimately in this court's entry of the 1991 Consent Decrees was resolution of the Federal reserved water rights claims of the Ute Mountain Ute Indian Tribe and the Southern Ute Indian Tribe. This purpose continues to be central under the current amending legislation.

Mar. 7 Order at 10 (citing 1988 Settlement Act § 2; 2000 Settlement Act Amendments).

Examination of the proposed amendments to the 1991 Consent Decrees as set forth in the Animas and La Plata Stipulations demonstrates that they are consistent with the 2000 Settlement Act Amendments and that the sole purpose of the proposed amendments is the settlement of the tribal reserved water rights claims by providing water to the Tribes from the reduced ALP. Attached as Exhibit 2 is a document prepared by counsel for the Moving Parties that provides an

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[7] Prior to the negotiations that led to the settlement of their reserved rights claims, the Tribes were to be participants in the ALP. If the Project were developed further, the Tribes would be entitled to participate in the larger project, provided acceptable terms could be negotiated. Any such allocation of water to the Tribes would not have the characteristics of reserved water rights.

interlineated version of the Stipulations showing the proposed changes to the 1991 Consent Decrees as well as the general reason for each change. The proposed amendments settle the tribal claims by providing the Tribes with altered amounts of water that can be used only for municipal and industrial ("M & I") purposes. The intent of the proposed amendments to the 1991 Consent Decrees to resolve the tribal claims consistent with the purposes of the 1991 Consent Decrees is further demonstrated by the *Record of Decision Animas-La Plata Project/Colorado Ute Indian Water Rights Final Supplemental Environmental Impact Statement July 2000* at 1-3 (Sept. 25, 2000) (a copy of which is attached as Exhibit 3), and S. REP. NO. 106-513 (2000) (a copy of which is attached as Exhibit 4).

Question 3. Whether the proposed amendments to the 1991 decrees in case numbers W-1603-76J and W-1603-76F would authorize permanent out-of-state use of the Tribes' Indian Reserved Water Rights, and if so, *see* issues listed in 2.a-e above.

The proposed amendments to the 1991 Consent Decrees would not authorize the Tribes to use their water rights out of state. Similarly, and as described in the Moving Parties' response to Question No. 1, *supra*, the 1991 Consent Decrees do not authorize the Tribes to use any of their water rights out of state. In the future, the Tribes may seek to change the place of use of their water rights to a location out of state to the same extent that any other holder of state water rights may seek such a change in accordance with applicable state law and subject to the provisions in the 1991 Consent Decrees that govern the relationship between the Tribes and other project water users. Among other things, the Tribes would have to apply to this Court for a change in place of use in accordance with the 1991 Consent Decrees as those decrees may be amended.

Question 4. Whether approval of the change applications in case numbers 02CW85 and 02CW86 would result in permanent off-reservation use of the Ute Mountain Ute Tribe's Indian Reserved Water Rights, and if so, a) identify the entities that would obtain such use, b) whether notice requirements have been met with respect to said change of water rights, c) whether the proposed change applications affecting water rights are subject to Colorado State water law or any other laws affecting the approval of the proposed amendments, d) whether approval of the change applications would result in abandonment of any Indian Reserved Water Rights identified by the 1991 decrees, and e) whether approval of the change applications is consistent with the underlying purpose of the 1991 consent decree.

A. OFF-RESERVATION USE.

The sole purpose of the change applications is to change the purpose of use for a portion of the water rights decreed to the Ute Mountain Ute Tribe in the 1991 Consent Decrees to allow

those rights to be used for M & I rather than irrigation purposes. The change applications seek to modify only the purpose of use and not the place of use. Accordingly, if granted, the change applications would result in the Ute Mountain Ute Tribe being able to use water on its Reservation within Colorado and off its reservation within the ALP District which exists only within Colorado, just as it could use its ALP water in those locations under the 1991 Consent Decrees. Again, under the terms of the 1991 Consent Decrees, the Tribes could apply to this Court for a further change in the place of use in accordance with the requirements of those decrees.

B. NOTICE.

As described in the Moving Parties' response to Question No. 2, *supra*, the change applications were served on all parties to the original cases concerning the tribal reserved right claims on the Animas and La Plata Rivers and resume notice was provided under Colorado law.

C. LEGAL STANDARDS.

In its Mar. 7 Order, the Court described the legal standards that apply to its consideration of the change applications. *Id.* at 20-28. Among other things, the Court concluded that the Moving Parties must apply to the Court for a change of water rights, but that the provisions of ¶ 12.D. of the Animas and La Plata Stipulations control its consideration of the change applications. Mar. 7 Order at 21. The Court found that the provisions of the 1991 Consent Decrees "incorporate basic principles of Colorado state water law and acknowledge the authority of the Colorado state court with respect to change applications." *Id.* at 22. The Court expressly held that the tribal rights are not "'conditional' or unperfected in terms of the 'basis, measure, and limit of the appropriation.'" *Id.* at 24. Thus, the Court found that for purposes of the change applications, the 1991 Consent Decrees' determination of historic consumptive use prior to actual use was res judicata. *Id.* at 24-25. The Court further held that the anti-speculation doctrine did not apply to the tribal rights. *Id.* at 25-26. The Court also determined that such rights could not be lost through non-use or abandonment. *Id.* at 23.

The critical question with regard to the change applications is whether they will result in an increased consumptive use by the Ute Mountain Ute Tribe or "injure" other water right holders on the Animas River. *See generally* Mar. 7 Order at 21, 26-29; *see also* Moving Parties' response to Question No. 10, *infra*. A party who has a "legally protected interest in a vested water right or conditional decree" that may be affected by a change of a water right has standing to assert injury. *Id.* at 26-27 (citing *Application of Turkey Cañon Ranch, Ltd.*, 937 P.2d 739, 747 (Colo. 1997); C.R.S. § 37-92-305(3)). While CPA claims to have members who have water rights on the Animas River, it has not produced any evidence that it is authorized to represent such interests in this matter. *See CPA's Responses to Moving Parties' First Set of Pattern and Non-Pattern Interrogatories and Requests for Production of Documents to Jack Scott and Citizens'*

Progressive Alliance, Response to Interrogatory Nos. 1, 6, 12, 18 and correlating requests for production (Oct. 3, 2005). In the absence of a demonstration that it represents such parties, CPA may participate in these cases only to hold the Moving Parties to a standard of "strict proof." *See* Mar. 7 Order at 26.

D. ABANDONMENT.

The approval of the change applications, along with the proposed amendments to the 1991 Consent Decrees, would result in the settlement of the Ute Mountain Ute Tribe's reserved water rights claims, provided the reduced ALP is constructed or the terms of the Decrees are otherwise satisfied. As a result, the depletions associated with the ALP water supply to which the Ute Mountain Ute Tribe would be entitled would be reduced from the quantities to which the Tribe is entitled under the 1991 Consent Decrees. As noted in the Moving Parties' response to Question No. 2(e), *supra*, this would not constitute abandonment under state law.

E. CONSISTENCY WITH THE PURPOSE OF THE 1991 CONSENT DECREES.

As set forth in the Moving Parties' response to Question No. 3, *supra*, the fundamental purpose of the 1991 Consent Decrees was to settle the tribal reserved rights claims. The purpose of the change applications is to accomplish that same result within the current environmental and fiscal constraints that resulted in the enactment of the 2000 Settlement Act Amendments.

Question 5. Whether approval of the change applications in case numbers 02CW85 and 02CW86 would authorize permanent out-of-state use of the Ute Mountain Ute Tribe's Indian Reserved Water Rights, and if so, *see* issues listed in 4.a-e above.

As described in the Moving Parties' response to Question No. 1, *supra*, the 1991 Consent Decrees did not authorize the Tribes to use any of their water rights out of state. Similarly, the change applications, like the proposed amendments to the 1991 Consent Decrees, do not authorize out-of-state use of water decreed to the Tribes.

Question 6. Whether approval of the change applications in case numbers 02CW85 and 02CW86 requires a finding that the changes are to a "beneficial use" in the presently decreed locations.

Paragraph 12.D. of the Animas and La Plata Stipulations establishes the standards for the Court's consideration of the change applications. *See generally* Mar. 7 Order at 21. That paragraph provides that "changes of water rights may be to any beneficial use." Animas Stipulation at 27, ¶ 12.D; La Plata Stipulation at 27, ¶ 12.D. That paragraph also provides that "the Tribal water right shall be deemed to have been historically diverted and beneficially used in

the full amounts, in the manner and for the purposes set forth in paragraphs 6 and 7 above." Animas Stipulation at 27, ¶ 12.D.; La Plata Stipulation at 27, ¶ 12.D. This Court previously held that "[a] decreed quantification of an amount of water deemed 'historic beneficial use,' prior to actual use, is consistent with the nature of Indian reserved water rights." Mar. 7 Order at 23 (citing Animas Stipulation ¶ 6.A.; La Plata Stipulation ¶ 6.A.). The Court further held that "the determination of historic consumptive use, prior to actual use, found in paragraph 6.A. of the 1991 Consent Decrees is *res judicata* with respect to consideration of these change applications." Mar. 7 Order at 24-25. The provisions of the 1991 Consent Decrees presume tribal uses to be beneficial for purposes of change applications prior to actual use of the water by the Tribes. Those provisions constitute the basis for the Court to conclude that the subject change applications are to a beneficial use in the presently-decreed locations.

Question 7. Whether approval of the proposed amendments and the change applications will result in an allocation of a fixed maximum quantity of water from the Animas-La Plata Project in the amount of 16,525 acre-feet per annum for use by each of the Tribes; and if the maximum quantity is different than 16,525 acre-feet or may vary in the future, then show calculation of the maximum quantity that is allocated, making reference to any documents incorporated within the 1991 Consent Decree and within the proposed amendments thereto.

The proposed amendments to the 1991 Consent Decrees and the change applications provide for the settlement of the tribal claims upon the completion of the facilities required to deliver to each Tribe "an average annual depletion not to exceed 16,525 acre-feet of water." *See* Stipulation at 2, 5. The term "average annual depletion" is taken directly from the 2000 Settlement Act Amendments. The use of the term "average annual depletion" reflects present depletion limits on the Project pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531-36. *See* U.S. Fish & Wildlife Serv., *Final Biological Opinion for the Animas - La Plata Project, Colorado and New Mexico* at 27 & Table 6 (June 19, 2000). Those depletion limits are derived from the need to protect the flows in the San Juan River for the benefit of the endangered fish. *Id*; see also Moving Parties' response to Question No. 9, *infra* (same terminology applies to the Secretary of the Interior's ("Secretary") operation of ALP pursuant to 2000 Settlement Act Amendments and environmental compliance requirements). In contrast, the 1991 Consent Decrees defined the tribal rights in terms of diversions, but provided a procedure for determining consumptive use in the event that a Tribe wished to change its rights prior to the actual use of those rights. *See* Animas Stipulation at 13, ¶ 6.A.iii; La Plata Stipulation at 12-13 ¶ 6.A.iii. By definition, a limit based on an average means that in some years more than the 16,525 acre-feet of depletions may be used by a Tribe. [8]

[8] The Secretary is authorized under § 302 of the 2000 Settlement Act Amendments to reallocate water assigned to certain Colorado entities to the Tribes in the event that a cost share

In addressing the issues associated with the maximum quantity of water allocated to the Tribes, it is important to note that under the amended Decrees, the Tribes will receive "an allocation of water from the Animas-La Plata Project (as measured at Ridges Basin Dam and Reservoir or at the point on the Animas River where diversions are made to the Durango Pumping Plant)." Stipulation at 2. Because the tribal allocation is supplied by the ALP, the decrees applicable to that Project form the basis for the administration of the ALP diversions from the Animas River and effectively control the means by which the Tribes may take their water from the river. Thus, the use of water by the Tribes is limited not only by the 1991 Consent Decrees at issue in these cases but also by the limits placed on the ALP by the decrees governing ALP. *See* note 1, *supra.*

The Moving Parties will present evidence at trial concerning the bypass flows applicable to the diversion of water for the reduced ALP and the ability of those bypass flows to meet the water requirements of other water right holders on the Animas River. That evidence will demonstrate that the operation of ALP will not injure other water users on the Animas River and, accordingly, that supplying water to the Tribes from ALP under the proposed amendments to the 1991 Consent Decrees and the change applications also will not injure other water users on the Animas River. This approach will permit the Court to evaluate the question of injury to other water users despite the fact that the 1991 Consent Decrees operate in terms of diversion limits while the proposed amendments to those decrees and the change applications apply average annual depletion limits.

Finally, as noted in the Moving Parties' response to Question No. 10, *infra,* the reduced ALP authorized by the 2000 Settlement Act Amendments will only take water from the Animas River to supply each Tribe with the 16,525 acre-feet of average annual depletion which that legislation envisions. That quantity of water – although taken only from the Animas River – will serve to settle the tribal claims on both the Animas and La Plata Rivers.

Question 8. Whether approval of the proposed amendments and the change applications would result in a change in the measure of water allocated to any entity entitled to use water as a result of the use of the phrase "average annual depletion" (see, e.g., amended subparagraph (i) of Paragraph 6.A. and 7.A., respectively, Stipulation for Amendments to Consent Decree).

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agreement is not reached with those parties. To date, there is no indication that those provisions will be utilized by the Secretary. The Stipulation, however, provides for such circumstances. *See* Stipulation at 4, 7.

If the Court approves the proposed amendments to the 1991 Consent Decree and the change applications, the depletions associated with the Tribes' water rights will not only be reduced but those rights will now be defined by the term "average annual depletion." That term differs from the diversion limits used in the 1991 Consent Decrees to describe the tribal rights. *See, e.g.*, Animas Stipulation at 11-12, ¶ 6.A.i; La Plata Stipulation at 11-12, ¶ 6.A.i.

The 2000 Settlement Act Amendments use the term "average annual depletion" as a limit on the use of the facilities authorized for construction under that legislation. The Secretary must operate ALP consistent with those requirements, both under the terms of the 2000 Settlement Act Amendments and the environmental compliance documents for the Project. Neither the proposed amendments nor the change applications, however, would affect the water rights of the Navajo Nation or any of the non-tribal entities who will receive water from the Project. The water supply for those parties is governed the decrees that are the subject matter of Case No. 01CW54.

Question 9. Whether the Priority Date of "March 2, 1868," in the change applications in case numbers 02CW85 and 02CW86, provides adequate notice of the water rights sought to be changed.

The change applications list the March 2, 1868 priority date for the tribal water rights at issue without expressly noting the subordination provisions found in the 1991 Consent Decrees. The text of the change applications and the resume notice clearly reference the 1991 Consent Decrees, which recognize the March 2, 1868 priority date, but subordinate the tribal rights to all water rights senior to ALP so that, as described in the Animas and La Plata Stipulations ¶ 6.A., the tribal rights share the ALP priority date of March 21, 1966. The reference to the 1991 Consent Decrees was sufficient to notify potential objectors of the existence of the subordination provisions.

In any event, assuming for the sake of argument that the 1966 date should also have been included in the application, there is no adverse effect from the failure to include that date since the listing of the much earlier 1868 priority date was more than adequate to provide notice to other water users of the proposed change. *See, e.g.*, *Closed Basin Landowners*, 734 P.2d at 635 n.4 ("inquiry notice" standard).

Question 10. Whether matters raised in case numbers W-1603-76J and 02CW86 are moot under the 2000 Settlement Act Amendments.

As set forth in the 2000 Settlement Act Amendments, the reduced ALP is authorized only "to divert and store water from the Animas River." 2000 Settlement Act Amendments § 302. The recognition of that water supply and the other provisions of the 1991 Consent Decrees, the 1988 Settlement Act, and the 2000 Settlement Act Amendments provide the basis for the settlement of the tribal claims on both the Animas and La Plata Rivers, even though the source of

the water for the reduced ALP is only the Animas River. *See* 2000 Settlement Act Amendments § 303 (adding a new § 18(a) to the 1988 Settlement Act, which provides that compliance with the terms of the legislation "shall constitute final settlement of the tribal claims to water rights on the Animas and La Plata Rivers in the State of Colorado").

The Moving Parties seek to modify the Ute Mountain Ute Tribe's rights to fit the confines of the water to be supplied from the reduced ALP and to ensure that the tribal rights are settled on both rivers. The proposed amendments to the 1991 Consent Decree in Case No. W-1603-76J and the change application in Case No. 02CW86 are necessary, and the cases are not moot, in order to (1) ensure that the tribal claims on the La Plata River will be settled by construction of the facilities authorized by the 2000 Settlement Act Amendments; and (2) permit the Tribes to revive those claims in the event that the terms of any amended decree are not fulfilled. *See* Stipulation at 3-4, 5-7; 2000 Settlement Act Amendments § 303.

Date: Apr. 7, 2006

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the *Moving Parties' Response to Order (Mar. 1, 2006)*, as indicated, addressed to:

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