DISTRICT COURT, LA PLATA COUNTY, COLORADO Court address: 1060 E. 2nd Ave., P.O. Box 3340 Durango, CO 81301 Phone Number : (970) 247-2304	
CONCERNING 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▲**
	Case Numbers: W-1603-76F, W-1603-76J, 02CW85, 02CW86 Division: Water Division 7

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE

These four consolidated cases having been filed with Water Court Division 7 as set forth below, and the Court being fully advised in the premises, DOES HEREBY FIND AND ORDER AS FOLLOWS:

I. GENERAL FINDINGS OF FACT

1. The name, mailing address, and telephone number of the Applicant is:

The United States of America on behalf of the Southern Ute Indian Tribe
and the Ute Mountain Ute Tribe
c/o Susan Schneider
U.S. Department of Justice
Environment and Natural Resources Division
Indian Resources Section
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2. The name, mailing address, and telephone number of the Opponents in Support are:

Southern Ute Indian Tribe
c/o Scott B. McElroy, No. 13964

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The State of Colorado
c/o Eve W. McDonald, No. 26304
Assistant Attorney General
Office of the Attorney General
Natural Resources Section
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Ute Mountain Ute Indian Tribe
c/o Daniel H. Israel, No. 3878
1315 Bear Mountain Dr., Suite A
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Phone: 303-543-0384 Fax: 303-543-0384

Southwestern Water Conservation District
c/o David W. Robbins, No. 6112
Jennifer Hunt, No. 29964
Hill & Robbins, P.C.
1441 18th Street #100
Denver, Colorado 80202
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Maynes, Bradford, Shipps & Sheftel
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Durango, Colorado 81301
Phone: 970-247-1755 Fax: 970-247-8827

3. The name, mailing address, and telephone number of the Opponents (hereinafter, collectively referred to as "CPA") are:

Citizens Progressive Alliance and Jack Scott
c/o Alison Maynard
Attorney at Law
P.O. Box 22135
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A. Procedural History

4. In 1991, the State of Colorado, the Ute Mountain Ute Tribe, the Southern Ute Indian Tribe, and the United States entered into a Stipulation for a Consent Decree resulting in this Court's Consent Decrees entered December 19, 1991 in Case Nos. W-1603-76A through K. Applicant's Ex. 2&3 (1991 Consent Decrees). The Consent Decrees incorporated the 1986 Colorado Ute Indian Water Rights Final Settlement Agreement ("1986 Settlement Agreement"), the Colorado Ute Indian Water Rights Settlement Act of 1988 ("1988 Settlement Act") and, ultimately, the Stipulation for a Consent Decree. *Id.* The Stipulation reached by the parties was based upon the 1986 Settlement Agreement and the 1988 Settlement Act. *Id.* at Stipulation for a Consent Decree, preamble.

5. In August 2002, Applicant, the United States of America ("United States"), acting for the benefit of the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe (collectively the "Ute Tribes" or "Tribes," or individually, "Tribe"), moved this Court to amend the 1991 Consent Decrees on the Animas and the La Plata Rivers in Case Nos. W-1603-76F and W-1603-76J. *Motions to Amend Consent Decree* and *Stipulations for Amendment to Consent Decree*, Case Nos. W-1603-76F, W-1603-76J (Aug. 7, 2002) ("Motions to Amend" and "Stipulations to Amend"); *see Consent Decree*, Case No. W-1603-76F (Dec. 19, 1991) and *Stipulation for a Consent Decree*, Case No. W-1603-76F (Nov. 12, 1991); *Consent Decree*, Case No. W-1603-76J (Dec. 19, 1991) and *Stipulation for a Consent Decree*, Case No. W-1603-76J (Nov. 12, 1991). Appropriate notice was provided.

6. Also in August 2002, Applicant, the United States, acting for the benefit of the Ute Mountain Ute Tribe, filed related Change Applications regarding a portion of that Tribe's water rights. *Application for Change of Water Right*, Case Nos. 02-CW-85, 02-CW-86 (Aug. 26, 2002) ("Change Applications"). Appropriate notice was given by resume and publication pursuant to C.R.S. § 37-92-302. *Resume Notice* (Sept. 20, 2002).

7. These cases are related in that Applicant seeks to conform limited portions of the Ute Tribes' reserved water rights on the Animas and La Plata Rivers to congressional direction authorizing a revised settlement of the tribes' reserved rights claims on these two rivers. *See* Applicant's Ex. 1, *Colorado Ute Settlement Act Amendments of 2000*, Pub. L. 106-554, 114 Stat. 2763A-258 (2001) ("2000 Settlement Act Amendments").

8. The United States is joined in these cases and filings by the Southern Ute Indian Tribe, the Ute Mountain Ute Tribe, the State of Colorado ("State"), and the Southwestern Water Conservation District ("SWCD") (collectively, the "Moving Parties"). Pursuant to C.R.S. § 37-92-302, *Statements of Opposition (in Support)* of the Change Applications were timely filed by the Ute Mountain Ute Tribe, the State and the SWCD. These parties and the Southern Ute Indian Tribe support the relief sought in the Motions to Amend. *See, e.g., Joint Request for Amendments of Consent Decrees Entered*

in Cases No. W-1603-76F and W-1603-76J and Motion to Set Status Conference (March 28, 2002).

9. The Motions and Stipulations to Amend were filed in Case Nos. W-1603-76F and W-1603-76J. The Change Applications were filed in Case Nos.02CW85 and 02CW86.

10. All notices required by law for the Motions to Amend and the Change Applications have been fulfilled, and the Water Court has jurisdiction over the Motions to Amend and the Change Applications.

11. Pursuant to C.R.S. § 37-92-302, *Statements of Opposition* to the Change Applications were timely filed by Opposer Citizens' Progressive Alliance. CPA also filed a *Statement of Opposition* in Case No. W-1603-76F, as well as a *Motion to Intervene and Vacate Consent Decree* (March 30, 2002) ("Motion to Intervene"). Jack Scott filed a *Motion to Require Compliance with Rule 5, Deny Motion to Amend Decree, and Vacate Status Conference* (May 15, 2002), in Case No. W-1603-76J. The time for filing statements of opposition has expired.

12. On November 12, 2002, this Court ordered that the Change Applications be re-referred to the Water Judge for a decision.

13. On April 25, 2003, the Court granted CPA's Motion to Intervene conferring standing on CPA consistent with C.R.S. § 37-92-302, which allows "any person" to file a timely statement of opposition. *Order* (April 25, 2003).

14. The Court consolidated the four cases for purposes of motions, briefing, discovery and hearing, and further consolidated these cases with Case No. 01CW54 for the same purposes. *Order* (April 25, 2003). Subsequently, the Court issued one Case Management Order for the above four cases and a separate Case Management Order for Case No. 01CW54 to govern discovery and trial of these matters. *Case Management Order*, Case No. 01CW54 (June 17, 2005); *Case Management Order*, Case Nos. W-1603-76F, W-1603-76J, 02CW85, 02CW86 (June 29, 2005). Case No. 01CW54 was tried before this Court on April 17-20, 2006.

B. History of the 2000 Settlement Act Amendments

15. The "Animas-La Plata Project" ("ALP") "is a participating project under the Act of April 11, 1956 (70 stat.105; 43 U.S.C. 620; commonly referred to as the "Colorado River Storage Project Act") and the Colorado River Basin Project Act (82 Stat. 885; 43 U.S.C. 1501et seq.)." Applicant's Ex. 13 (1988 Settlement Act) at Sec. 3(2). The Court takes judicial notice that the conditional water rights originally decreed in Case Nos. 1751-B and 807-C, Water Division No. 7, and changed in Case No. 80CW237, Water Division No. 7, constitute the Colorado water rights for the ALP. CPA Ex. RR-18, RR-19, RR-33 (collectively referred to hereinafter as the "ALP Decrees").

16. In 1976, the United States filed an *Application of the United States of America for Reserved Rights*, Case No. W-1603-76 (Dec. 30, 1976), pursuant to C.R.S. § 37-92-102, asserting reserved water rights on behalf of the Ute Tribes ("Tribal Claims"). Subsequently, this case was divided into numerous separate cases, each addressing claims on a different regional river. Rather than litigate their claims, the Ute Tribes agreed to negotiate with the State, the United States, and other parties. In 1986, the negotiating parties entered into the *Colorado Ute Indian Water Rights Final Settlement Agreement of December 10, 1986* ("1986 Settlement Agreement"), which formed the basis of the *Colorado Ute Indian Water Rights Settlement Act of 1988*, Pub. L. 100-585 (102 Stat. 2973) ("1988 Settlement Act"). *E.g.*, Applicant's Ex. 2 & 3 (1991 Stipulations) at 1.

17. As contemplated by the 1988 Settlement Act, the Moving Parties entered into the Stipulations for a Consent Decree, which were submitted to this Court for approval. *Notice and Order*, Case Nos. W-1603-76F and W-1603-76J (Dec. 19, 1991) ("1991 Notice and Order"). *See* Applicant's Ex. 13 (1988 Settlement Act) at §§ 3(4), 5(a), 5(c)(1), 5(c)(2), 7(e), 9, 13(a) (referring to "final consent decree"); Applicant's Ex. 12 (1986 Settlement Agreement) at VI.A. Court approval followed on December 19, 1991. Applicant's Ex. 2 & 3 (1991 Consent Decrees).

18. As a basic matter, the Tribal Claims on the Animas and La Plata Rivers, which were at issue in Case No. W-1603-76F (Animas River) and W-1603-76J (La Plata River), were to be satisfied by allocating a certain quantity of water from the ALP to the Ute Tribes for agricultural irrigation and municipal and industrial ("M&I") uses. Applicant's Ex. 2 & 3 (1991 Consent Decrees); 13 (1988 Settlement Act).

19. The Tribes agreed in the settlement that their water right to water supplied from the ALP would be "subordinated to all water rights decreed and senior to the Animas-La Plata Project." Applicant's Ex. 2 & 3 (Stipulation for a Consent Decree) at ¶¶6.A.&7.A. The Tribes also agreed to "share on a pro rata basis the priority of the Animas-La Plata Project, which has an adjudication date of March 21, 1966, and an appropriation date of September 2, 1938." *Id.* The 1991 Consent Decrees and the 1986 Settlement Agreement both allowed the Ute Tribes to litigate or renegotiate their claims on the Animas and La Plata Rivers if certain ALP facilities were not completed by January 1, 2000. Applicant's Ex. 2 & 3 (1991 Consent Decrees) at ¶¶ 6.A.v., 7.A.v.; 12 (1986 Settlement Agreement) at III.A.2.f., III.B.1.f.

20. The settlement authorized in the 1988 Settlement Act was not implemented due to Endangered Species Act ("ESA"), water quality and other concerns in relation to ALP. Applicant's Ex. 10 (2000 FSEIS); 11 (ROD). The water rights associated with ALP cannot be put to beneficial use until ALP construction is completed. Over a period of years, there were considerable efforts by involved parties, including the State and federal governments, to determine an alternate way to settle the reserved Tribal claims. *Id.* Following completion of a federal environmental review process, BOR conducted a supplemental environmental review of various ways in which the ALP might be configured and the Ute Tribes' water rights be settled. Applicant's Ex. 1 (2000

Settlement Act Amendments); 6 (1996 FSFES); 7 (1998 Admin. Proposal); 10 (2000 FSEIS); and 11 (ROD).

21. As a result of this effort, the U.S. Bureau of Reclamation ("BOR") selected "Refined Alternative 4" ("RA4") to implement the Colorado Ute Indian Water Rights Settlement Act of 1988 (1988 Settlement). Applicant's Ex. 10 (2000 FSEIS); 11 (ROD). The structural components of RA4 include an off-stream reservoir of 120,000 AF capacity; a 280 cfs pumping plant on the Animas River (the Durango Pumping Plant); a pipeline from the pumping plant to the reservoir; and a pipeline to transport M&I water to the Shiprock area for the benefit of the Navajo Nation. RA4 does not include any structural components to convey water for actual use by the Ute Tribes. Applicant's Ex. 10 (2000 FSEIS) at 2.1.1.2

22. In late 2000, Congress approved the 2000 Settlement Act Amendments to amend the 1988 Settlement Act and provide for an alternative approach to finalize the Ute Tribes' settlement of its reserved water rights claims on the Animas and La Plata Rivers. Applicant's Ex. 1 (2000 Settlement Act Amendments). The settlement is based upon a modified ALP and substitute benefits provided to the Ute Tribes. *Id.* The 2000 Settlement Act Amendments are consistent with RA4.

23. All agricultural water was removed from the settlement, with the modified ALP water to be used only for municipal and industrial ("M&I") uses. Applicant's Ex. 1 (2000 Settlement Act Amendments) at § 302. Absent further express congressional authorization, "other project features authorized by Public Law 90-537 [An Act to authorize the construction, operation, and maintenance of the Colorado River Basin project, and for other purposes] shall not be commenced." Id. at § 302(a)(1)(C)(i).

24. Congress also determined that the decision to amend the original settlement and related ALP construction delays necessitated an extension of time for the Ute Tribes to decide whether to commence litigation of the Tribal claims. Applicant's Ex. 1 (2000 Settlement Act Amendments) at § 303(c)(Sec. 18).

25. Section 18(c) of the 2000 Settlement Act Amendments (Applicant's Ex. 1) directed the Attorney General to file with this court "such instruments as may be necessary to request the court to amend the final consent decree to provide for the Amendments made to this Act under the [2000 Settlement Act Amendments]."

26. The Court takes judicial notice of the fact that ALP is being constructed, and at the time this decree is entered, is approximately 40% complete.

C. The Proposed Amendments to the 1991 Consent Decrees and Proposed Changes Sought in the Change Applications.

27. Moving Parties ask this Court to make the following amendments to

subparagraphs (i)-(vii) of Paragraph 6.A. and subparagraphs (i)-(vii) of Paragraph 7.A. of the 1991 Stipulations which were incorporated into the 1991 Consent Decrees (the remainder of the 1991 Consent Decrees are unchanged, including all waiver provisions):

6. RESERVED WATER RIGHT OF THE UTE MOUNTAIN UTE INDIAN TRIBE

. . . . . .

i. The water right shall entitle the Tribe to receive and beneficially use, on that part of the Ute Mountain Ute Reservation within the State or within the boundaries of the Animas-La Plata Water Conservancy District, 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), consistent with the Colorado Ute Settlement Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2001) ("2000 Amendments"), for present and future municipal and industrial uses with an average annual depletion not to exceed 16,525 acre-feet of water.

ii. In proceedings pursuant to Paragraph 12.D. below, the computations concerning the Tribe's historic beneficial use of water shall be based upon:

a. actual historic use or, if there has not yet been full use of water, then the Tribe shall be deemed to have historically consumed 100 percent of the unused portion of the 16,525 acre-feet of water available to the Tribe pursuant to subparagraph 6.A.(i); or
b. any agreement which may be entered into among the State, the Tribes, the Animas-La Plata Water Conservancy District, and the United States Bureau of Reclamation which modifies 6.A.(ii)(a) above.

iii. The water right shall always be consistent with:

a. Bureau of Reclamation procedures, which shall include, among other things, NEPA compliance;

b. the Animas-La Plata Project Compact, § 37-64-101, C.R.S. (1973); and

c. the La Plata River Compact, § 37-64-101, C.R.S. (1973).

iv. The final settlement of the Tribe's reserved water rights claims on the Animas and La Plata Rivers as described in this Stipulation or Amended Consent Decree shall be subject to the following conditions:

a. If the Animas-La Plata Project facilities necessary to deliver the Tribe's municipal and industrial water are completed so as to enable the delivery of water to the Tribe as described in this Paragraph 6.A. on or before January 1, 2009, then: (1) the settlement of the Tribe's pending reserved and appropriative water rights claims on the Animas and La Plata Rivers

contained in an amended decree consistent with this Stipulation shall become final; (2) the Tribe shall be entitled to the full water right as described in this Paragraph 6.A.; and (3) the Tribe shall not be entitled to claim any additional reserved water rights either on the Animas River or on the La Plata River.

b. If the Animas-La Plata Project facilities necessary to deliver the Tribe's municipal and industrial water are not completed so as to enable the delivery of water to the Tribe as described in this Paragraph 6.A. by January 1, 2009, then by January 1, 2012, the Tribe, in consultation with the United States as trustee, must elect either: (1) to retain the water right; or (2) to commence litigation or renegotiation of its pending reserved and appropriate water rights claims on the Animas and La Plata Rivers. If the Tribe, in consultation with the United States as trustee, has not elected to commence litigation or renegotiation of its pending claims on the Animas and La Plata Rivers by notification to the parties by January 1, 2012, as provided below, then: (1) the Tribe shall be deemed to have elected to retain its water right; (2) the settlement of the Tribe's pending reserved and appropriative water rights claims on the Animas and La Plata Rivers contained in this Stipulation or Amended Consent Decree shall become final; and (3) the Tribe shall not be entitled to claim any additional reserved water rights either on the Animas River or on the La Plata River. If the Tribe elects to commence litigation or renegotiation of its pending reserved and appropriate water rights claims on the Animas and La Plata Rivers, then the Tribe shall relinquish and forfeit the water right from the Animas-La Plata Project as described in this Paragraph 6.A.; provided, however, that if the Animas-La Plata Project facilities necessary to deliver the Tribe's municipal and industrial water are at any time thereafter completed so as to enable the delivery of water to the Tribe or if the Tribe elects at any time thereafter to receive an allocation of water from Ridges Basin Reservoir, then: (1) the Tribe shall be entitled to the full water right as described in this Paragraph 6.A.; (2) the Tribe shall not be entitled to claim any other reserved water rights either on the Animas River or on the La Plata River; and (3) the Tribe shall relinquish any then-pending reserved water rights claims or any benefits it may have obtained by litigating or renegotiating its reserved water rights claims on the Animas and La Plata Rivers, including all reserved water rights which may have been decreed.

Notice of the Tribe's election shall be made as follows: to the United States, through the Secretary of the Interior and the Attorney General; to the Tribes, through the respective Tribal Chairman; to the State, through the Attorney General; and to all other parties, through their respective offices.

c. Notwithstanding the first proviso to Paragraph 14 of the 1991

Stipulation, the waiver of claims described in Paragraph 14 shall be effective as provided in this paragraph.

v. Under no circumstances shall anything in this Stipulation or Amended Consent Decree be construed as an admission, or be used by any party as evidence, that the Tribe is or is not legally entitled to reserved water rights on the Animas or La Plata Rivers. This water right shall have no precedential or presumptive value in the event the terms of this Stipulation or Amended Consent Decree do not become final.

vi. Nothing in this Stipulation shall affect the authority of the Secretary of the Interior to allocate additional water from the Animas-La Plata Project for use by the two Ute Tribes pursuant to § 302 of the 2000 Amendments, which water shall be available to the two Ute Tribes on the same terms and conditions as the water provided under this paragraph.

* * * * * *

7. RESERVED WATER RIGHT OF THE SOUTHERN UTE INDIAN TRIBE

. . . . . .

i. The water right shall entitle the Tribe to receive and beneficially use, on that part of the Southern Ute Indian Reservation within the State or within the boundaries of the Animas-La Plata Water Conservancy District, an allocation of water from the Animas-La Plata Project (as measured at Ridges Basin Dam and Reservoir5/ or at the point on the Animas River where diversions are made to the Durango Pumping Plant), consistent with the Colorado Ute Settlement Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-258 (2001) ("2000 Amendments"), for present and future municipal and industrial uses with an average annual depletion not to exceed 16,525 acre-feet of water.

ii. In proceedings pursuant to Paragraph 12.D. below, the computations concerning the Tribe's historic beneficial use of water shall be based upon:

a. actual historic use or, if there has not yet been full use of water, then the Tribe shall be deemed to have historically consumed 100 percent of the unused portion of the 16,525 acre-feet of water available to the Tribe pursuant to subparagraph 7.A.(i); or

b. any agreement which may be entered into among the State, the Tribes, the Animas-La Plata Water Conservancy District, and the United States Bureau of Reclamation which modifies 7.A.(ii)(a) above.

iii. The water right shall always be consistent with:

a. Bureau of Reclamation procedures, which shall include, among other

things, NEPA compliance;

b. the Animas-La Plata Project Compact, § 37-64-101, C.R.S. (1973); and

c. the La Plata River Compact, § 37-64-101, C.R.S. (1973).

iv. The final settlement of the Tribe's reserved water rights claims on the Animas and La Plata Rivers as described in this Stipulation or Amended Consent Decree shall be subject to the following conditions:

a. If the Animas-La Plata Project facilities necessary to deliver the Tribe's municipal and industrial water are completed so as to enable the delivery of water to the Tribe as described in this Paragraph 7.A. on or before January 1, 2009, then: (1) the settlement of the Tribe*s pending reserved and appropriative water rights claims on the Animas and La Plata Rivers contained in an amended decree consistent with this Stipulation shall become final; (2) the Tribe shall be entitled to the full water right as described in this Paragraph 7.A.; and (3) the Tribe shall not be entitled to claim any additional reserved water rights either on the Animas River or on the La Plata River.

b. If the Animas-La Plata Project facilities necessary to deliver the Tribe's municipal and industrial water are not completed so as to enable the delivery of water to the Tribe as described in this Paragraph 7.A. by January 1, 2009, then by January 1, 2012, the Tribe, in consultation with the United States as trustee, must elect either: (1) to retain the water right; or (2) to commence litigation or renegotiation of its pending reserved and appropriate water rights claims on the Animas and La Plata Rivers. If the Tribe, in consultation with the United States as trustee, has not elected to commence litigation or renegotiation of its pending claims on the Animas and La Plata Rivers by notification to the parties by January 1, 2012, as provided below, then: (1) the Tribe shall be deemed to have elected to retain its water right; (2) the settlement of the Tribe's pending reserved and appropriative water rights claims on the Animas and La Plata Rivers contained in this Stipulation or Amended Consent Decree shall become final; and (3) the Tribe shall not be entitled to claim any additional reserved water rights either on the Animas River or on the La Plata River. If the Tribe elects to commence litigation or renegotiation of its pending reserved and appropriative water rights claims on the Animas and La Plata Rivers, then the Tribe shall relinquish and forfeit the water right from the Animas-La Plata Project as described in this Paragraph 7.A.; provided, however, that if the Animas-La Plata Project facilities necessary to deliver the Tribe's municipal and industrial water are at any time thereafter completed so as to enable the delivery of water to the Tribe or if the Tribe elects at any time thereafter to receive an allocation of water from Ridges Basin Reservoir, then: (1) the Tribe shall be entitled to the full water right

as described in this Paragraph 7.A.; (2) the Tribe shall not be entitled to claim any other reserved water rights either on the Animas River or on the La Plata River; and (3) the Tribe shall relinquish any then-pending reserved water rights claims or any benefits it may have obtained by litigating or renegotiating its reserved water rights claims on the Animas and La Plata Rivers, including all reserved water rights which may have been decreed.

Notice of the Tribe's election shall be made as follows: to the United States, through the Secretary of the Interior and the Attorney General; to the Tribes, through the respective Tribal Chairman; to the State, through the Attorney General; and to all other parties, through their respective offices.

c. Notwithstanding the first proviso to Paragraph 14 of the 1991 Stipulation, the waiver of claims described in Paragraph 14 shall be effective as provided in this paragraph.

v. Under no circumstances shall anything in this Stipulation or Amended Consent Decree be construed as an admission, or be used by any party as evidence, that the Tribe is or is not legally entitled to reserved water rights on the Animas or La Plata Rivers. This water right shall have no precedential or presumptive value in the event the terms of this Stipulation or Amended Consent Decree do not become final.

vi. Nothing in this Stipulation shall affect the authority of the Secretary of the Interior to allocate additional water from the Animas-LaPlata Project for use by the two Ute Tribes pursuant to § 302 of the 2000 Amendments, which water shall be available to the two Ute Tribes on the same terms and conditions as the water provided under this paragraph.

* * * * *

28. Moving Parties ask this Court to approve Change Applications regarding the Ute Mountain Ute Tribe's water right on the Animas and La Plata Rivers decreed in the 1991 Consent Decrees. Applicant, the United States of America on behalf of the Ute Mountain Ute Tribe, requests change with respect to "Portions of the [ALP] that supply water for the Ute Mountain Ute Tribe, and others." Applicant acknowledges that the ALP water rights are decreed in Case No. 1751B, as amended in Case No. 80-CW-237, and "no change to these decrees is sought." The change applications relate to the Tribe's water rights entered December 19, 1991, in Case No.s W-1603-76F and W-1603-76J with a decreed point of diversion at the "Durango Pumping Plant and Ridges Basin Inlet Conduit." The sources of water are the Animas River and its tributaries (W-1603-76J) and the La Plata River and its Tributaries (W-1603-76F). The priority date of the water sought to be changed is set forth as March 2, 1868. The amount of water sought to be changed is "A maximum of 6,000 acre-feet per annum of municipal and industrial (M&I)

water and a maximum of 26,300 acre-feet per annum of agricultural irrigation water. The requested change is as follows:

> The requested change addresses only the decreed water rights of the Ute Mountain Ute Tribe ("Tribe"), which are generally described in Paragraph 6.A of the *Stipulation for Consent Decree* (Nov. 12, 1991) ("1991 Stipulation"). The 1991 Consent Decree incorporated the 1991 Stipulation, which was based on the Colorado Ute Indian Water Rights Settlement Act of 1988 (Pub. L. 100-585, 102 Stat. 2973) ("1988 Settlement Act") and the 1986 Settlement Agreement. Under the 1991 Consent Decree, settlement of the Tribe's water rights claims ("Claims") was based on the construction of certain ALP facilities that, among other things, were to deliver the above-described amounts of water to the Tribe for irrigation, and municipal and industrial ("M&I") uses.
>
> The changes to the Tribe's water rights in the 1991 Consent Decree are necessary to comply with the Colorado Ute Settlement Act Amendments of 2000 (Pub. L. 106-554) ("2000 Settlement Act Amendments"). The 2000 Settlement Act Amendments reduce both the size of ALP and the amount of water provided to the Tribe in settlement of its Claims. The 2000 Settlement Act Amendments authorize settlement of the Tribe's Claims by construction of the necessary facilities to provide "an average annual depletion not to exceed 16,525 acre-feet of water to the Ute Mountain Ute Indian Tribe for its present and future needs . . . ." 2000 Settlement Act Amendments, Sec. 302(a)(1)(A)(i)(ii)(I). In addition, this water may be used only for municipal and industrial ("M&I") uses. Although the 2000 Settlement Act Amendments reduced the amount of water provided to the Tribe in settlement of its Claims, the reallocation of water to only M&I uses has increased the amount of M&I water.
>
> (a) Location and source: Unchanged; same as in 1991 Consent Decree.
>
> (b) Use: Municipal and industrial use only.
>
> (c) Amount: average annual depletion of 16,525 af (which can be increased if the State of Colorado elects not to take its share of water, as described in the 2000 Settlement Act Amendments).
>
> (d) Proposed plan of operation: The water will be initially stored in the reduced Ridges Basin Reservoir authorized for construction under the 2000 Settlement Act Amendments.

II. FINDINGS OF FACT REGARDING REQUESTED AMENDMENTS AND CHANGES

A. Suitability

29. The 1991 Consent Decrees may be modified due to the change in law found in the 2000 Settlement Act Amendments. *See* Order (Mar. 7, 2005) ("Mar. 7 Order") at 9. The Court incorporates herein the factual findings made in its Mar. 7 Order at 9 regarding this determination.

30. The 1988 Settlement Act authorized the Secretary of the Department of the Interior to supply water to the Tribes from the ALP in accordance with the 1986 Settlement Agreement. Applicant's Ex. 2&3 (1991 Consent Decrees) at 1988 Settlement Act, § 4(a) ("Provision of Water to the Tribes"). The 1991 Consent Decrees, implementing the 1986 Settlement Agreement and the 1988 Settlement Act, provide a certain quantity of water supplies for each Tribe for municipal and industrial ("M&I") and agricultural irrigation uses. Under the 1991 Consent Decrees, the Ute Mountain Ute Tribe would receive 6,000 acre-feet ("af") of ALP water for M&I uses and 26,300 af of ALP water for irrigation; the Southern Ute Tribe would receive 26,500 af of ALP water for M&I uses and 3,400 af of ALP water for irrigation. Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation for a Consent Decree, ¶¶6.A.i., 7.A.i.

31. The 2000 Settlement Act Amendments amend section 6 of the 1988 Settlement Act ("Repayment of Project Costs") to authorize the Secretary of the Department of the Interior, acting through the Bureau of Reclamation, to "complete construction of, and operate and maintain," the following facilities: "a reservoir, a pumping plant, inlet conduit, and appurtenant facilities with sufficient capacity to divert and store water from the Animas River to provide for an average annual depletion of 57,100 acre-feet to be used for a municipal and industrial water supply...,". *Id.* at § 302. Under the Act, the Secretary of the Interior will deliver through these facilities certain municipal and industrial allocations "for present and future needs," to the Ute Tribes and to five other entities. *Id.* Congress allocated "an average annual depletion not to exceed 16,525 acre-feet of water to each Tribe for its present and future needs." Id. at § 302 (a)(1)(C)(I). The Act establishes the "Colorado Ute Settlement Fund" to receive monetary appropriations over a 5-year period to allow construction of the project features within seven years. *Id.* at § 303. As to the La Plata River, the facts demonstrate that under the 2000 Settlement Act Amendments and Stipulations to Amend, a previously-planned trans-basin diversion to bring Animas River water to the La Plata River Basin for purposes of irrigation is not contemplated by Refined Alternative 4. Applicant's Ex. 10 (2000 FSEIS); 11 (ROD). Accordingly, the agricultural irrigation facilities required to provide irrigation water supplies from the ALP are "not authorized" under the 2000 Settlement Amendments, Applicant's Ex. 1, and the La Plata River is no longer a source for the reserved water rights of the Ute Tribes. *See* Stipulations to Amend.

32. The alternative settlement, as reflected in the 2000 Settlement Act Amendments, is intended to provide substitute benefits to the Southern Ute Indian Tribe

and the Ute Mountain Ute Tribe equivalent to those that the Tribes would have received under the 1988 Settlement Act, the congressional act incorporated into the 1991 Consent Decrees. *See* Applicant's Ex. 1 (2000 Settlement Act Amendments). Congress specifically found that the 2000 Settlement Act Amendments ensure that the federal commitments made to the Tribes in the 1988 Settlement Act are honored. Applicant's Ex. 1 (2000 Settlement Act Amendments) at § 301(b)(9). The Ute Tribes, the State of Colorado, and the Southwestern Water Conservation District supported the 2000 Settlement Act Amendments and are signatories to the Stipulations to Amend filed in W-1603-76F and W-1603-76J.

33. 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. *See* Applicant's Ex. 13 (1988 Settlement Act) at Sec. 2. This purpose continues to be central under the current amending legislation. Applicant's Ex. 1 (2000 Settlement Act Amendments). *See* Mar. 7 Order at 10.

34. The 2000 Settlement Act Amendments show that the congressionally-approved changes were intended to meet the requirements of various federal environmental laws, findings, and decisions while ensuring full and final settlement of the water rights claims of the Ute Tribes on the Animas and La Plata Rivers. *See* Applicant's Ex. 1 (2000 Settlement Act Amendments) at § 301(b).

35. The proposed amendments to the 1991 Consent Decrees and the Change Applications accomplish three key goals of the 2000 Settlement Act Amendments by 1) changing the description of the Ute Tribes' water rights set forth in the 1991 Consent Decrees to be consistent with operation of the ALP as set forth in the 2000 Settlement Act Amendments; 2) deleting agricultural irrigation use of the Ute Tribes' water rights, and replacing it with municipal and industrial uses, and 3) extending the deadlines by which the settlement of the Ute Tribes' pending reserved and appropriative water rights claims on the Animas and La Plata Rivers shall become final.

36. The Stipulations to Amend and Change Applications are designed to implement the amendments to the 1986 Settlement Agreement as approved by Congress. *See* Applicant's Ex. 1 (2000 Settlement Act Amendments); Stipulations to Amend; Change Applications. Consequently, the proposed modifications are suitably tailored to the changed circumstances to this extent. *See also* Applicant's Ex. 11 (ROD) at 1-3; 19 (Sen. Rep. 106-513).

B. ALP Decrees

37. The storage right and diversion amount for ALP are set forth in the ALP Decrees. Testimony of Bruce Whitehead, Division Engineer for the State Engineer's Office; *see* CPA Ex. RR-18, RR-19, RR-33. The 1991 Consent Decree provide each Tribe with a water supply from ALP. Testimony of Mr. Whitehead; *see* Applicant's Ex. 2&3 (1991 Consent Decree) at ¶¶6.A.i. &7.A.i. The water supply provided each Tribe by

the 1991 Consent Decrees is a "project allocation" of water that is subject to an "annual diversion limit." Testimony of Mr. Whitehead. Diversion and storage rights for ALP, as decreed in Case No. 80CW237, have a priority date of September 2, 1938 and an adjudication date of March 21, 1966. ALP Decrees.

38. The change decree for ALP executed August 24, 1984, in Case No. 80CW237, authorizes an alternate point of diversion, the Durango Pumping Plant and Ridges Basin Inlet Conduit, with a capacity of 600 cubic feet per second (cfs) and authorizes an alternate structure, Ridges Basin Reservoir, with a capacity of 280,040 acre feet total. The decree contains the following conditions (hereinafter, the "Teft Limitations"):

> 1.(a) That measuring devices be placed at the original points of diversion in accordance with specifications as required by the Colorado Division of Water Resources.
> 2. That the amount of water to be diverted at the alternate points be limited to the amount of water available at the original heading in accordance with their priority, and allowances made for transportation losses, if any.
> 3. That the amount of water to be stored at the alternate reservoir sites be limited to that amount which would have been available at the original reservoir in accordance with their priority, and allowances made for transportation losses, if any.
> .....
> CPA Ex. RR33 (Decree, Case No. 80CW237).

39. Congress has stated its intent to reduce the size of ALP and its water supply by approval of the 2000 Settlement Act Amendments. In its findings, Congress states that "the amendments made by this title are needed to provide for a significant reduction in the facilities and water supply contemplated under the [Colorado Ute Indian Water Rights Settlement Agreement]," 2000 Settlement Act Amendments at § 301(b)(5), and that "it is the intent of Congress to enact legislation that implements the [ROD]." *Id.* at § 301(b)(10). However, Applicant and Moving Parties do not seek any change to the ALP Decrees. Applications for Change of Water Right; Motions and Stipulations to Amend Consent Decree. The Court finds that the Change Applications and the Stipulations to Amend the consent decrees, if approved, will not alter or affect the size or capacity of the ALP as decreed in Colorado by the ALP Decrees. Furthermore, the 1988 Settlement Act and the 2000 Settlement Act Amendments do not have the effect of altering the size or capacity of the ALP as decreed in Colorado by the ALP Decrees.

40. The water supply for ALP, as decreed and as amended in 80CW237, is confined by the Teft Limitations, is limited in its priority, and is subject to administration by the State Engineer's Office.

C. Impact of Amendments and Change Applications

41. Once federal reserved water rights are quantified, "that amount is then outside the state appropriation system." U.S. v. City and County of Denver, By and Through Bd. of Water Com'rs, 656 P.2d 1, 34-35 (Colo.1982); *see* Mar. 7 Order, *esp.* pp. 23-24. The Indian reserved water rights in this case are "permanent and cannot be lost as a result of change of use, forfeiture, abandonment, or nonuse." Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation for a Consent Decree, ¶13.[1] The federal Indian reserved water rights provided to each tribe under the 1991 Consent Decrees are subject to annual diversion limits as provided by decree. See Applicant's Ex. 2&3 (1991 Consent Decrees). The doctrine of *res judicata* bars the United States from expanding its reserved water rights adjudication through an amendment of its original decree. *See* In re Application for Water Rights of U.S., 101 P.3d 1072, 1082 (Colo.2004); Arizona v. California, 460 U.S. 605, 620, 103 S.Ct. 1382, 1392 (1983); Nevada v. U.S., e.g., 463 U.S. 110, 133, 103 S.Ct. 2906, 2920 (1983). Moving Parties have never disputed that the 1991 Consent Decrees settled the amount of reserved water rights for the benefit of the Tribes. *See e.g.*, Tr. April 21, 2006, at 27 (Argument of Scott McElroy); Mar. 7 Order.

42. Under Colorado law a change of water rights may not injure other water rights. C.R.S. § 37-92-305(3). Under Colorado law, the court shall determine whether conditions must be imposed on a change of water rights to prevent injury to other water rights. *See* C.R.S. § 37-92-305; Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 53-54 (Colo. 1999) ; In re Application for Water Rights of Midway Ranches Property Owners Ass'n, 938 P.2d 515, 521 (Colo.1997). The Court must ensure continuation of stream conditions as they existed at the time vested water rights holders first made their appropriation. Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo.2002) (citations omitted).

43. Although the Motions to Amend filed on behalf of both Ute Tribes are proceedings in equity for which relief is appropriate under C.R.C.P. 60(b), these proceedings may function in reality as an action to enlarge or change a water right (*see* ¶47 herein). Therefore, the motions are governed by the provisions of the Water Right Determination and Administration Act. *See* Town of Breckenridge v. City and County of Denver By and Through Bd. of Water Com'rs, 620 P.2d 1048, 1051 (Colo. 1980); Mar. 7 Order at 11-12. The court must be cognizant of all the actual impacts of the amendments with respect to both paragraphs 6.A. and 7.A. of the Stipulations for a Consent Decree. *See* Town of Breckenridge, *supra.* The Water Court must determine in a change of water right proceeding whether such change will injuriously affect others who are entitled to use water under a vested water right or decreed conditional water right. C.R.S. 37-92-305(3). Town of Breckenridge, *supra.*, at 1050. The Court finds that where the impact

[1] "If the change is to an off-reservation use, the Tribe must affirmatively state that it is voluntarily electing to change the use to an off-reservation place of use and understands that as a condition precedent, that portion of its water right shall be changed to a Colorado State water right...during the use of that right off the Reservation." Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation to a Consent Decree, ¶12.D.

of amendments to a consent decree for water rights cause injury to other water rights holders or enlarge a water right, the amendments are not suitably tailored to the change in circumstances.

44. The burden of showing absence of injurious effect is upon the applicant. *See* Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064, 1068 (Colo.1981).

45. Under the proposed Change Applications and Stipulations to Amend, the description of each Tribe's water right is changed to an allocation of water from the ALP "for present and future [M&I] uses with an average annual depletion not to exceed 16,525 acre-feet of water." Change Applications; Stipulations to Amend.

46. Depletion, as set forth in the federal documents, is "the amount of water that is not returned to a river system due to project implementation, i.e., the amount diverted minus return flows, plus evaporation loss from new reservoirs or ponds, equals the depletion."[2] Applicant's Ex. 8 (2000 BO) at 2 of 50 n.2. Average annual depletion means "the amount of water depleted each year averaged over a number of years."[3] Applicant's Ex. 5 (1996 BO) at 4 of 128 n.2. The term "average annual depletion" is used in the 2000 Settlement Act Amendments in order to conform to the environmental requirements established by the ROD and the 2000FSEIS. The use of the term "depletion" is not the norm in Colorado. *See* Concerning Application for Water Rights of Midway Ranches Property Owners' Ass'n, Inc. in El Paso and Pueblo Counties, 938 P.2d 515, 521 (Colo.1997) (operation of a water right is "through its decreed point of diversion in a specified amount, usually expressed in rate of flow for a diversion right or in acre-feet of water for a storage right."

47. Use of the term "average annual depletion" corresponds to the description of ALP water rights set forth in the 2000 Settlement Act Amendments. Congress amended the 1988 Settlement Act to provide for a significant reduction in the ALP facilities and water supply under RA 4 in comparison to the ALP facilities and water supply contemplated under the 1986 Settlement Agreement. *See* Applicant's Ex. 1(2000 Settlement Act Amendments) at § 301(b)(5). Therefore, the Court finds that the evidence does not suggest any intent, express or implied, on the part of Congress to expand the quantity of Ute Tribal reserved water rights established in 1991. *See* Applicant's Ex. 1(2000 Settlement Act Amendments); Applicant's Ex. 2&3 (1991 Consent Decrees). The Stipulations for Amendment of Consent Decree are in conformity with the 2000 Settlement Act Amendments, and likewise, do not evidence an intent on the part of

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[2] In comparison, the 1986 Settlement Agreement defined "consumptive use" as "that quantity of water diverted from the hydrologic stream system and not returned to the hydrologic stream system by either surface flow or percolation." Applicant's Ex. 2&3 (1991 Consent Decrees) at 1986 Settlement Agreement at pp. 61-63 of 164.

[3] In comparison, the 1986 Settlement Agreement quantified water rights on a "per annum" basis, meaning "per water year, with a water year commencing on October 1 each year and running through the next succeeding September 30th." Applicant's Ex. 2&3 (1991 Consent Decrees) at 1986 Settlement Agreement at 61 of 164.

Moving Parties to expand the quantity of reserved water rights established in 1991. *See* Stipulation for Amendment of Consent Decree.

48. The irrigation delivery systems to the La Plata Basin have been deleted from the Project facilities, and the current proposal, in advance of identification of actual M&I uses for the water, is to store the water in Ridges Basin Reservoir in the Animas Basin. Applications for Change of Water Rights; Stipulations for Amendments to Consent Decree. The proposed amendments, if approved, will result in a change of the source of the water rights to the Animas River, rather than the Animas and La Plata Rivers, with respect to both Tribes' water. Stipulation for Amendment to Consent Decree. Approval of the Stipulations to Amend and the Change Applications will also result in a change in type of use with respect to the Ute Mountain Ute Tribe's water. Change Applications; Stipulations to Amend.

49. In Colorado, the right to change a point of diversion or place or type of use is limited in quantity and time by historical use. *See* Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo.1980). Agricultural water may be changed to M&I uses, "provided that no adverse [effect] be suffered by other users from the same stream, particularly those holding junior priorities." Green v. Chaffee Ditch Co., 150 Colo. 91, 106, 371 P.2d 775, 783 (Colo.1962), *quoting* Farmers Highline Canal and Reservoir Company et al. v. City of Golden et al., 129 Colo. 575, 272 P.2d 629 (Colo.1954). The principle is well established that "junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations, and that subsequent to such appropriations they may successfully resist all proposed changes in points of diversion and use of water from that source which in any way materially injures or adversely affects their rights." *Id.*

50. Stream conditions cannot be preserved in proceedings for a change of use and change in place of use without calculating the amount of water diverted from a stream and the resulting amounts of water both consumed and returned to the stream system from the use with due regard to quantity, location, and time. *See* Weibert, *supra*; Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217 (Colo.1988). Bruce Whitehead testified that in order to calculate "consumptive use," one requires the following variables: the actual amount of water diverted, a report of the particular use of the water, and the return flows (as estimated through engineering analysis, or less often, as measured).

51. Mr. Whitehead stated that the Durango Division Office of the State Engineer has not done any engineering or injury analysis with respect to the proposed Amendments and Change Applications.

52. The Municipal and Industrial applications of the Ute Tribes' water rights under RA4 are not currently known, and projected M&I uses by the Ute Tribes are non-binding. Applicant's Ex. 10 (2000FSEIS) at 2.1.1.3.1. Therefore, it is "difficult to accurately project the actual diversions and corresponding return flows" under RA4. *Id.* at 2.1.1.3.1. *accord*, testimony of Dr. Leonard Eisel at trial (diversions cannot be

calculated until actual use of water is identified); testimony of Bruce Whitehead at trial (depletion factor cannot be applied until the actual use of the water is identified).

53. The Court finds that without knowing the actual application of the water, it is not possible to make a reasonable estimate of how much water must be diverted from the Animas River and its tributaries to meet "depletion" allocations of the Tribes as set forth in the 2000 Settlement Act Amendments, Change Applications, and Stipulations to Amend.

54. Moving Parties presented evidence of the absence of injurious effect to other water rights through the testimony of Dr. Leo Eisel. This Court accepted Dr. Eisel to testify as an expert on the issues of water rights, water supply development, water resources engineering, which include assessing the potential for injury to water rights. Applicant's Ex. 20-58.

55. Dr. Eisel's assessment investigated the potential for injury to water rights on the Animas River from "operation of the [ALP] as configured in the 2000 Final Supplemental Environmental Impact Statement (2000FSEIS)." Applicant's Ex. 20 (Engineering Report) at p. 5 of 13. The Court recognizes that the 2000FSEIS does not include an injury analysis. Testimony of Bruce Whitehead. Because the Ute Tribal water rights are subordinated to the ALP water right, *see* Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation to a Consent Decree, ¶¶6.A.&7.A., it is appropriate to consider the overall impact of the project.

56. Dr. Eisel estimates that the seasonal aquatic bypass flows set forth in the 2000FSEIS ("bypass flows") will be sufficient to meet the decreed rights (junior and senior) of water users on the Animas River to the New Mexico state line so long as ALP is operated in conformity with the 2000FSEIS. Applicant's Ex. 20 at 12 of 13, ¶¶1-4. Dr. Eisel based his findings upon the three seasonal bypass flows past the Durango Pumping Plant BOR established to mitigate environmental impacts of the ALP under RA4: 225 cfs (April - September); 160 cfs (October-November) and 125 cfs (December-March). Applicant's Ex. 20; *see* Applicant's Ex. 11 (ROD).

57. The bypass flows are set forth as an environmental commitment to protect the downstream aquatic habitat, Applicant's Ex. 6 (1996 FSFES) at II-41; Applicant's Ex. 11 (ROD) at 21-23 of 29; Moving Parties' Post Trial Brief at 6. However, the bypass flows are not legally protected in Colorado to protect the aquatic habitat as there are no in-stream flow rights associated with the bypass flows. *See* Moving Parties' Post Trial Brief at 6. Therefore, Moving Parties argue that if bypass flows are available downstream of ALP, they may be diverted by downstream water right holders in Colorado. *Id.*

58. The Court finds that if the bypass flows are maintained by federal law or regulation and ALP is operated consistent with the 2000FSEIS, there is a reasonable degree of certainty that downstream conditions will be adequate to meet the needs of decreed Colorado water users and conditional water rights holders under the

administration of the Division 7 State Engineer. Testimony of Dr. Eisel and Mr. Whitehead.

59. The diversion and storage rights for the ALP, as decreed in Case No. 80CW237, have a priority date of September 2, 1938, and an adjudication date of March 21, 1966. Applicant's Ex. 20 at 13 of 13, ¶ 8. Dr. Eisel also found that administration of the ALP under the prior appropriations system by the Division 7 Engineer will further protect downstream senior Animas River water rights from possible injury by future implementation of ALP while it is operated pursuant to the 2000FSEIS. *Id.*

60. The Change Applications in 02CW85 and 02CW86 relate only to the decreed water rights of the Ute Mountain Ute Tribe with respect to the Animas and La Plata Rivers, which are described in Paragraph 6.A. of the *Stipulation for Consent Decree* (11/12/91). Change Applications. The proposed changes include a change in plan of operation from delivery of UMU Tribe water for irrigation and M&I to a plan for water to be "initially stored in the reduced Ridges Basin Reservoir authorized for construction under the 2000 Settlement Act Amendments." *Id.* Under the Application a "maximum of 6,000 acre-feet per annum of municipal and industrial water and a maximum of 26,300 acre-feet per annum of agricultural irrigation water" would be changed to an "average annual depletion of 16,525 af (which can be increased if the State of Colorado elects not to take its share of water, as described in the 2000 Settlement Act Amendments)." Change Applications. The change is to municipal and industrial use only. *Id.*

61. "A change of water right shall be granted" by this Court "if the change does not increase the consumptive use of the Tribal water right or injure other water rights." Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation for a Consent Decree, ¶12.D. Thus, a change of water rights may be granted so long as both conditions are met: no increase in consumptive use and no injury to other water rights. Under Colorado law, a "change of water right...shall be approved if such change, contract, or plan...will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right." C.R.S. § 37-92-305(3).

62. The Ute Mountain Ute Tribe may not change a periodic flow for irrigation to a continuous flow for M&I if the result is an enlargement of water rights. Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 246 -247 (Colo.,2002) (citations omitted); Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1224 (Colo.1988). One result of the change to M&I may be that the Tribe will attempt to use a continuous diversion of water rather than the seasonal diversion as set forth in the monthly percentage distributions established by the 1991 Consent Decree. City of Westminster v. Church, 167 Colo. 1, 13, 445 P.2d 52, 58 (Colo.1968). The Court recognizes that under some circumstances such a change may enlarge the consumption of water from the stream to the detriment of other appropriators. *Id.* at 59.

63. For the purposes of considering the question of consumptive use, Moving Parties submit that the permanent quantification of water rights set forth in the 1991 Consent Decrees shall be converted to historic consumptive use pursuant to factors set

forth in paragraph 6 of the Stipulation for a Consent Decree. *Moving Parties' Post-Trial Brief at* 3-5; *see* Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation for a Consent Decree, ¶12.D. CPA argues that the conversion factors are not applicable to the change applications because in advance of application of the water there is no "change of a Tribal water right within the boundaries of a Reservation or from within the boundaries of a Reservation to outside the boundaries of that Reservation." CPA's *Brief to Supplement Closing Argument at* 5-6; *see* Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation for a Consent Decree, ¶12.D.

64. The Court finds that the 1991 Consent Decree specifically contemplated a change of water rights prior to application of the water. Paragraph 6 provides that in the event of proceedings for a change in water rights pursuant to subparagraph 12.D of the Stipulation for a Consent Decree where "there has not yet been full use of water," the Tribe is deemed to have historically made beneficial use based upon monthly percentage distributions of the available water and is deemed to have historically consumed certain percentages of the water supplies, as set forth by the terms of the Consent Decrees. Applicant's Ex. 2 & 3 (1991 Consent Decree) at Stipulation to a Consent Decree, ¶¶6.A.iii.a. and b.

65. The Ute Mountain Ute Tribe has not presently identified any place of use or specific application of the water rights which are the subject of the change applications. There is no indication that the water rights are to be used off reservation and the Ute Mountain Ute Tribe has made no request to change the water rights involved herein to a State water right.[4] Therefore, the Court finds under the 1991 Consent Decree that the water rights at issue in these change cases have the character of Indian reserved water rights that may be used on the Ute Mountain Ute Reservation. Under these circumstances, the Court finds that the changes requested herein in Case Nos. 02CW85 and 02CW86 are properly treated as changes of water rights "within the boundaries of a Reservation" pursuant to Paragraph 12.D of the Stipulation for a Consent Decree. *Id.* Applicant's Ex. 2 & 3 (1991 Consent Decrees).

66. Paragraphs 6.A.iii.a&b of the 1991 Consent Decree contractually limit the Ute Mountain Ute Tribe's right to change its conditional reserved water right to the quantity, timing and duration "deemed" historic consumptive use and monthly percentage distribution. The Court finds that the provisions for a "deemed" quantity, and the limitation as to timing and duration, are consistent with the purposes of the Colorado Water Right Determination Act. Application of City and County of Denver By and Through Bd. of Water Com'rs, 935 F.2d 1143, 1151 (C.A.10 (Colo.)1991); *see* C.R.S. § 37-92-305(3) (change of use shall be approved if such change will not injuriously affect

[4] "When the water rights confirmed in paragraphs 6 and 7 are used off reservation, they will be State water rights only during that use and will regain the status of Indian reserved water rights for the use of the Tribes when the off-reservation use is concluded, thus ensuring that the rights are permanent and cannot be lost as a result of change of use, forfeiture, abandonment, or nonuse." Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation to a Consent Decree, ¶13.

the owner of or persons entitled to use water under a vested water right or decreed conditional water right); *see* Rominiecki, *supra* at 1069.

67. The Court finds pursuant to paragraph 12.D that the water rights which are the subject of the change applications "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 [paragraph 6]," pursuant to the terms of the Consent Decree. Applicant's Ex. 2 & 3 (1991 Consent Decree) at Stipulation to a Consent Decree, ¶12.D.

68. Using the percentages provided in the 1991 Consent Decree, the quantity of water deemed to have been historically consumed by the Ute Mountain Ute Tribe is 6,000 af of M&I water and 21,066 af of irrigation water, for a total of 27,066 acre-feet. *Id.* at Stipulation to a Consent Decree, ¶¶6.A.iii. b. The Court finds that, under the circumstances of the filing of a change application, the 1991 Consent Decree limits the Ute Mountain Ute Tribe's diversions for beneficial use of M&I water to 27,066 acre feet per annum deemed historically consumed. Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation to a Consent Decree, ¶¶6.A.iii.b.

69. Furthermore, under subparagraph 6 A.iii.a, the Ute Mountain Ute Tribe is deemed to have historically used its water based upon the monthly percentage distributions of the available water as set forth in the table found at Paragraph 6 A.iii.a. Applicant's Ex. 2 & 3 (1991 Consent Decree) at Stipulation to a Consent Decree, ¶6.A.iii.a. The Court finds that, under the circumstances of the filing of a change application, the 1991 Consent Decree limits the timing and duration of diversions by the Ute Mountain Ute Tribe to the monthly percentage distributions set forth in the table found at Paragraph 6 A.iii.a. Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation to a Consent Decree, ¶¶6.A.iii.a.

70. Actual uses are not presently identified by the Ute Mountain Ute Tribe with the result that absolute certainty of all impacts of the change from irrigation to M&I cannot be established. Accordingly, it was not possible for Moving Parties to present comparative analysis of the impact of the change in type of use, from irrigation to M&I. The Court finds that the limitations upon the change of use, necessitated by the terms of the 1991 Consent Decree, are intended to preserve the stream conditions contemplated in 1991 when the water rights were decreed. Until the water is applied to actual M&I uses, the Court is unable to identify any injurious impacts that result from approval of the Change Applications.

71. The monthly percentage distributions and the historic consumptive use percentages set forth in subparagraphs 7.A.iii.a. and b. are not legally applicable to the motions to amend submitted by the Southern Ute Indian Tribe. *See* Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation for a Consent Decree at ¶7.A.iii.a.&b. and ¶12.D. (requiring filing of an application for a change of water rights in the Colorado District Court for Water Division 7); *accord Moving Parties' Post-Trial Brief at* 3-5.

72. Pursuant to the 1991 Consent Decree, the Southern Ute Indian Tribe is entitled to receive and beneficially use a maximum of 26,500 acre-feet per annum of municipal and industrial water and a maximum of 3,400 acre-feet per annum of agricultural irrigation water "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." *See* Applicant's Ex. 2&3 (Stipulation for a Consent Decree) at ¶7.A.i.a. The Southern Ute Indian Tribe did not apply to change the use of its 3,400 acre-feet per annum of agricultural irrigation water to M&I use because "the Southern Utes had a significantly large enough M&I allocation at the outset," i.e., established by the 1991 Consent Decree. Tr. April 21, 2006, at 30 (Argument of Scott McElroy). Thus, the Court reasonably finds and infers that the quantity of M&I water established in 1991 for the Southern Ute's M&I uses is adequate to meet the depletion allowance established in the 2000 Settlement Act Amendments, and correspondingly, in the *Stipulation for Amendment to Consent Decree.*

73. Any objection to the term "depletion" in relation to the reserved water rights of the Tribes (in the Stipulations to Amend and in the Change Applications) is overcome by expressly limiting ALP diversions from the Animas River on behalf of the Tribes to the quantities of water established, respectively for each of the Ute Tribes, in the 1991 Consent Decrees. Applicant's Ex. 2&3 (1991 Consent Decrees) at Stipulation for a Consent Decree, ¶6 and ¶12.D (UMU) and ¶7 (SUIT); *see* In re Application for Water Rights of U.S., *supra.*

74. The Court finds that the 2000FSEIS identifies only non-binding uses of the Tribes' ALP water rights, and the Tribes have not identified any actual contracts or commitments with respect to use of the water rights which are the subject of the Motions to Amend and the Change Applications. The Court finds that a customary injury analysis cannot be conducted until the Tribes identify how and where the water will be used. *See* City of Thornton v. Clear Creek Water Users Alliance, 859 P.2d 1348, 1354 - 1355 (Colo.1993). Therefore, it is reasonable that the 2000FSEIS does not contain an injury analysis and the State Engineer's office did not submit an injury analysis with respect to Ute Tribal water rights which are the subject of the Stipulations to Amend and Change Applications herein.

75. Bruce Whitehead recommended that the Court impose two conditions upon these amended decrees in order to avoid injurious impacts as a result of the amendments and changes to the decrees. *See* C.R.S. § 37-92-305. Because the water is not yet applied to actual uses, Mr. Whitehead recommended that the Court impose a reporting requirement and a period of retained jurisdiction. *See* C.R.S. § 37-92-304(6).

76. The Tribes' reserved water rights are immune from Colorado's non-use requirement to the extent necessary to fulfill the purposes of the reservation. U.S. v. City and County of Denver, By and Through Bd. of Water Com'rs, 656 P.2d 1, 34 (Colo.1982) (citations omitted). Nevertheless, Colorado law requires that the Tribes use reasonable diligence in developing their allocations of ALP water. *Id.*; *See* C.R.S. § 37-92-301(4). Congress has authorized monetary appropriations to complete construction of ALP by December 21, 2007. Applicant's Ex. 1 (2000 Settlement Act Amendments) at § 17. The

Stipulations to Amend change the ALP construction and water delivery date to January 1, 2009. In the event construction is not complete by January 1, 2009, the Tribes have until January 1, 2012 to decide whether to accept the water right or litigate or renegotiate their claims. Therefore, the Court finds that it is reasonable to require that the United States, acting for the benefit of the Ute Tribes, and the Ute Tribes file a report in January of the year 2009, and every sixth calendar year thereafter, demonstrating the Tribes' progress in applying their respective reserved water rights, not currently in use, to beneficial use.

77. Water courts are required to incorporate into decrees a condition regarding reconsideration of the question of injury by the water court during "such period after the entry of such decision as is necessary or desirable to preclude or remedy [injury]" to the vested rights of others. C.R.S. § 37-92-304(6); *see* City of Thornton, *supra* at 1359. The change applications and the proposed amendments[5] are subject to reconsideration of the question of injury pursuant to C.R.S. § 37-92-304(6). The statutory protection of section 37-92-304(6), C.R.S., is intended to protect vested water rights holders insofar as it allows the water court to reconsider the question of injury until it is convinced that the nonoccurrence of injury to water rights is conclusively established. Given the anticipated schedule for completion of ALP, and the amended deadline for final acceptance of the water rights by the Ute Tribes as outlined in paragraph 76 above, the Court finds it is reasonable to anticipate identification of initial uses of the Tribes' water rights by the Tribes between January 1, 2009, and January 1, 2012. Therefore, the Court will impose a period of retained jurisdiction for reconsideration of the question of injury through December 31, 2012. Pursuant to C.R.S. § 37-92-304(6), the period of reconsideration may be extended if the nonoccurrence of injury is not then established.

78. The state doctrine of beneficial use is applicable to these water rights. *See* Order (3/7/05), p. 25; *see* Applicant's Ex. 2&3 (1991 Consent Decrees) at Stipulation for a Consent Decree, ¶¶6.A., 7.A., and 12.D (references to beneficial use). The Court's scrutiny of how and where the water will be used is necessarily limited in advance of the application of the water to actual use where reserved rights are involved, however, this should not prohibit a change of use. *See* U.S. v. City and County of Denver, By and Through Bd. of Water Com'rs, 656 P.2d 1, 35 (Colo.1982).

79. The Court finds that the Ute Mountain Ute Tribe's water is not yet placed to beneficial use, in part because ALP has not been completed. Opponents did not present any argument or evidence suggesting that the Ute Mountain Ute Tribe lacks legal authority to use reserved water for M&I purposes or is unlikely to apply water to beneficial M&I uses. Furthermore, M&I uses are recognized uses of the Ute Mountain Ute Tribe's and the Southern Ute Tribe's reserved water rights as established in the 1991 Consent Decrees. *See* Applicant's Ex. 2&3 (1991 Consent Decrees) at Stipulation for a Consent Decree, ¶¶6.A. & 7.A. Finally, the ALP decree in Case No. 80CW237 designates municipal and industrial uses, inter alia, of Ridges Basin Reservoir.

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[5] In this respect, the proposed amendments are analogous to a "change of water right" under C.R.S. § 37-92-304(6) because the amendments change the description of the water right with the result of potential injury to other vested water rights in the absence of imposition of conditions.

Therefore, the Court finds that a change in use from Agricultural Irrigation and M&I uses to only M&I uses is a change to a type of beneficial use.

80. In order to ensure that the M&I water will be applied to actual beneficial uses by the Ute Tribes, this Court may require the Tribes to report on their progress towards application of the reserved water to a beneficial use. *See* U.S. v. City and County of Denver, By and Through Bd. of Water Com'rs, 656 P.2d 1, 35 (Colo.1982); *see also* City of Thornton v. Bijou Irr. Co., 926 P.2d 1, 44 (Colo.1996); *see* ¶76 above.

81. Under the Stipulations to Amend the Tribes will receive a depletion allocation from ALP that is subject to operational management by federal agencies. *See* Tr. April 21, 2006 at 28 (Argument of Scott McElroy). The operation of ALP and distribution of project water among ALP participants is not the concern of this Court. The supply of water to the Tribes may vary from year to year as a result of the ALP's averaging of depletions over a course of years. Testimony of Bruce Whitehead. The term "*average annual* depletion" permits the Tribes to deplete a greater- than-average project allocation in one year or in a series of years. Testimony of Bruce Whitehead. The Court finds that any negative impact of these variations in the supply of water to the Tribes would be upon other project participants and not to non-project participants who have water rights on the affected streams. *Id.*

82. CPA asks the Court to deny the Motions to Amend and Change Applications as they relate to the La Plata River as moot, claiming that these filings as to both the Animas and La Plata Rivers constitute "double-dipping." Moving Parties argue that the rights related to both river basins need to be addressed to ensure that the Ute Tribal claims on both rivers are satisfied. The Court has already found that "a change of place of use is admitted to the extent that the irrigation delivery systems to the La Plata Basin have been deleted from the Project facilities, and the current proposal is to develop the water in the Animas Basin for M&I use." July 7 Order at 5. The Court determines as a matter of fact that the Motions to Amend and Change Applications are not intended to double the water rights at issue, and instead, are intended to clarify that the settlement contained therein settles the Ute Tribal claims on both rivers.

83. There will be no injury to water rights on the La Plata River from the ALP because the Ute Tribal water rights under consideration may be diverted only from the Animas River 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 and may not be diverted from the La Plata River. Stipulation for Amendment to Consent Decree, Paragraphs 6.A. and 7.A.; *see also* Applicant's Ex. 20 at 12 of 13, ¶7.

84. CPA presented evidence of possible injury to specific, existing water rights on the Animas River, depending upon how ALP is operated. James Welles, the Ditch Rider for the Twin Rock Ditch company, testified on behalf of Colorado water rights holders in the ditch. Mr. Welles described potential reduced flow as a result of future operation of ALP. Mr. Welles stated that modifications of the diversion structure may mitigate the effect. In any event, the Twin Rock Ditch company has senior water

rights with priority over ALP, and thus are protected by administration of their water rights in priority. Carl Weston, the owner of Earl Stull Pipeline No. 2, described potential impacts from fluctuations in river flow as a result of operation of the ALP. Mr. Weston did not describe any potential injury resulting from the change applications or proposed amendments to the Tribal water rights. The Court finds that Mr. Welles and Mr. Weston did not establish injury to water rights on the Animas River as a result of approval of the Change Applications or Stipulations to Amend the 1991 Consent Decrees. *See* Applicant's Ex. 20 at 12 of 13, ¶6.

85. Jack Scott, who owns water rights on the La Plata River, testified that commingling of ALP water from the Animas River into the waters of the La Plata River may result in difficulty in monitoring and administering the La Plata Basin waters. Bruce Whitehead testified that the waters will be monitored and administered in priority. The Court finds that Mr. Scott did not establish that any injury would occur to his water rights on the La Plata River as a result of approval of the Change Applications or Stipulations to Amend the 1991 Consent Decrees.

D. Extension of Deadlines to Commence Tribal Reserved Rights Litigation

86. Section 303 (§ 18(c)) of the 2000 Settlement Act Amendments (Applicant's Ex. 1) states that "the amended final consent decree [1991 Consent Decree] shall specify terms and conditions to provide for an extension of the current January 1, 2005, deadline for the Tribes to commence litigation of their reserved rights claims on the Animas and La Plata Rivers."

87. The 1986 Settlement Agreement (Applicant's Ex. 12) states that the final settlement of each Tribe's reserved rights claims on the Animas and La Plata Rivers are subject to the construction of certain ALP features. If these features (Ridges Basin Reservoir, Long Hollow Tunnel, Dry Side Canal) were completed so as to enable the delivery of settlement water to each Tribe on or before January 1, 2000, then: 1) Settlement of each Tribe's pending reserved and appropriative water rights claims on the Animas and La Plata Rivers contained in the 1986 Settlement Agreement becomes final; 2) Each Tribe is entitled to the full "project reserved water right"[6] set forth in the 1986 Settlement Agreement; and each Tribe shall not be entitled to claim additional reserved water rights either on the Animas River or on the La Plata River. Applicant's Ex. 12 (1986 Settlement Agreement) at Art. III, Sec. A.2.f. (UMU Tribe); Art. III, Sec. B.1.f. (SUIT Tribe).

88. These same conditions and deadlines are found in the 1991 Consent Decrees. Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation for a Consent Decree ¶ 6.A.v. (UMU); ¶ 7.A.v. (SUIT).

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[6] Congress changed this description.

89. Congress recognized the need to change the deadline for completion of the modified ALP and final settlement of the Ute Tribal water rights claims on the Animas and La Plata Rivers. Applicant's Ex. 1 (2000 Settlement Act Amendments) at §18.

90. This Court also recognized the need to continue these deadlines. *Order* (Dec. 28, 2004).

91. Moving Parties have stipulated to change the ALP construction and water delivery date from January 1, 2000, to January 1, 2009. Stipulations to Amend at pp. 3-4, ¶iv. (UMU) and pp.5-7, ¶iv.(SUIT). The Moving Parties have also stipulated to change the date by which the Tribe must decide whether to accept the water right or to litigate or renegotiate its pending Tribal claims on the Animas and La Plata Rivers from January 1, 2005, to January 1, 2012. *Id.*

92. This Court finds that the requested extensions of deadlines for final settlement of the Tribal reserved water rights claims on the Animas and La Plata Rivers, or in the alternative, for the Ute Tribes to determine whether to agree to the settlement or commence litigation of their Tribal claims are tailored to resolve the problems created by the change in circumstances. It is in the interest of the Ute Tribes and all other Moving Parties and area water users to allow sufficient time for implementation of the Ute Tribal settlement on the Animas and La Plata Rivers. A contrary decision would be unreasonable and would not allow the settlement to be implemented.

E. Effect on Ute Tribal Decrees Relating to Other Rivers

93. Congress was explicit in the 2000 Settlement Act Amendments that the only tribal water rights in the 1986 Settlement Agreement to be affected by the 2000 Settlement Act Amendments were the water rights claims on the Animas and La Plata Rivers. As a threshold matter, Congress made an express finding that:

> The Claims of the Colorado Ute Indian Tribes on all rivers in Colorado other than the Animas and La Plata Rivers have been settled in accordance with the provisions of the [1988 Act].

Applicant's Ex. 1 (2000 Settlement Act Amendments) at § 301(b)(2).

94. Congress further underscored this distinction in instructions as to the statutory construction of the 2000 Settlement Act Amendments:

> **Statutory Construction.** Nothing in this section shall be construed to affect the rights of the Tribes to water rights on the streams and rivers described in the Agreement, other than the Animas and La Plata Rivers, to receive the amounts of water dedicated to tribal use under the Agreement, or to acquire water rights under the laws of the State of Colorado.

Applicant's Ex. 1 (2000 Settlement Act Amendments) at § 303 (§ 18(b)).

95. The 2000 Settlement Act Amendments provide the conditions to be fulfilled before the Ute Tribal claims to water rights on the Animas and La Plata Rivers in Colorado may become final:

> IN GENERAL – The construction of the facilities described [herein], the allocation of the water supply from those facilities to the Tribes as described [herein], and the provision of funds to the Tribes in accordance with section 16 and the issuance of an amended final decree as contemplated in subsection (c) shall constitute final settlement of the tribal claims to water rights on the Animas and La Plata Rivers in the State of Colorado.

Applicant's Ex. 1 (2000 Settlement Act Amendments) at § 303 (§ 18(a)). Nothing in these provisions addresses the water rights claims or settlements on rivers other than the Animas and La Plata Rivers that were entered in 1991 as final Consent Decrees.

96. This Court finds as a matter of fact that the water rights settlements of the United States for the benefit of the two Ute Tribes in other rivers (*e.g.*, the Mancos, Piedra, Pine, etc.) are not before the Court in any manner.

F. Other Entities to Receive Water Under the 2000 Settlement Act Amendments: Out of State Use; Abandonment

97. CPA alleges that Section 302 of the 2000 Settlement Act Amendments would grant Indian reserved water rights to entities other than the Ute Tribes and would allow use of water outside the State of Colorado in violation of the 1991 Consent Decrees. *Reply on Cross-Motion for Summary Judgment* at 7-9 (Jan. 17, 2006). In addition, CPA argues that the "alleged reallocation" of water and uses under the 2000 Settlement Act Amendments as to the Ute Tribal water right constitutes abandonment of some or all of the Tribal water rights in the 1991 Consent Decrees. *See* July 7 Order at 13. The Court finds no basis in fact for these claims.

98. There is nothing in the 2000 Settlement Act Amendments (Applicant's Ex. 1) that grants Indian reserved water rights to entities other than the United States on behalf of the two Ute Tribes. Reallocation of ALP project water to various water recipients does not imply that federal reserved water rights are bestowed upon entities other than the two Ute Tribes.

99. CPA's claims that the 2000 Settlement Act Amendments authorize use of Indian reserved water rights outside of the State of Colorado are without factual support.

100. As to CPA's allegations of abandonment based on the requested amendments to the 1991 Consent Decrees, the Court also finds this argument to be without factual support. CPA has presented no evidence that the United States or the Ute Tribes, by seeking an amendment to the 1991 Consent Decrees, evidence an intent to abandon a water right.

101. The Court further finds that all other objections raised by CPA are without factual basis.

III. CONCLUSIONS OF LAW

1. The Court incorporates its previous findings of fact and conclusions of law as set forth in its prior Orders in these cases. In the event of any conflict between previous orders and this decree, this decree shall control.

2. Modification of a consent decree, like modification of any judgment or order, is formally governed by Rule 60(b) of the Rules of Civil Procedure. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378-380 (1992). Rule 60(b)(4), C.R.C.P. is the generally applicable rule for modifying a previously issued judgment when "it is no longer equitable that the judgment should have prospective application." *See* Building and Construction Trades Council v. National Labor Relations Board, 64 F.3d 880, 888 (3d Cir.1995).

3. This is a limited review because a "court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires." Mar. 7 Order at 10, citing Rufo, *supra* and C.R.C.P. 60(b)(4).

4. "[T]he United States, as sovereign, is 'immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. Lehman v. Nakshian, 453 U.S. 156, 160 (1981) *citing* United States v. Testan, 424 U.S. 392, 399 (1976). In this case, the applicable waiver of sovereign immunity is the McCarran Amendment, 43 U.S.C. § 666. The jurisdiction of this Water Court over the United States, therefore, is limited by the express terms of the McCarran Amendment to the "adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, ..." The McCarran Amendment requires the federal government to assert any and all claims to the use of water in a comprehensive state adjudication of water rights. In re Application for Water Rights of U.S., 101 P.3d 1072, 1079 (Colo.2004).

5. This Court's jurisdiction with respect to the actions of the United States regarding ALP is limited to the adjudication and administration of the water rights associated with the project. The merits of Congress' determinations in the 2000 Settlement Act Amendments, including the design, construction, and operation of ALP, and the revised settlement of the Ute Tribal claims on the Animas and La Plata Rivers, are not before this Court. *See* In re Application for Water Rights of United States, *supra.*

6. This Court has already found that the applicable standard for review of the Motion to Amend under C.R.C.P. 60 (b)(4) is found in Rufo, *supra*:

Under the Rufo standard, to the extent it is applicable here, the moving party first

bears the burden of establishing that a significant change in circumstances warrants modification of a consent decree. Rufo, 502 U.S. at 393. The party may satisfy this initial burden 'by showing either a significant change in factual conditions or in law." *Id.* at 384. Second, if the moving party meets this standard, the court then considers whether "the proposed modification is suitably tailored to the changed circumstance." *Id.* at 383.

Mar. 7 Order at 7.

7. The first part of the Rufo standard has been met and the 1991 Consent Decrees may be modified due to the change in law found in the *Colorado Ute Settlement Act Amendments of 2000*, Pub. L. 106-554, 114 Stat. 2763A-258 (2001) ("2000 Settlement Act Amendments"). Mar. 7 Order at 9.

8. With respect to the second part of the Rufo standard, the Court must be cognizant of all the actual impacts of the amendments. *See* Town of Breckenridge v. City and County of Denver By and Through Bd. of Water Com'rs, 620 P.2d 1048, 1051 (Colo. 1980) (proceedings may also function in reality as an action to enlarge or change a water right and therefore are governed by the provisions of the Water Right Determination and Administration Act); Mar. 7 Order at 11-12. The Court finds that where the impact of amendments to a consent decree for water rights causes injury to other water rights holders or enlarges a water right, the amendments are not suitably tailored to the change in circumstances. *See* C.R.S. § 37-92-305(3).

9. The doctrine of *res judicata* bars the United States from expanding its 1991 reserved water rights adjudication through an amendment of its original decree. *See* In re Application for Water Rights of U.S., 101 P.3d 1072, 1082 (Colo.2004); Arizona v. California, 460 U.S. 605, 620, 103 S.Ct. 1382, 1392 (1983); Nevada v. U.S., e.g., 463 U.S. 110, 133, 103 S.Ct. 2906, 2920 (1983); Mar. 7 Order at 12-30. The 1991 Consent Decree settled the amount of reserved water rights for the benefit of the Ute Tribes. Mar. 7 Order at 12-30. The 1991 Consent Decree entitled each Tribe to a supply of water from the ALP with annual diversion limits. *See* Applicant's Ex. 2&3 (1991 Consent Decrees). Therefore, diversions by ALP from the Animas and La Plata Rivers on behalf of the two Ute Tribes are limited to the reserved water rights quantified in the 1991 Consent Decrees.

10. The court is required to determine whether conditions must be imposed on a change of water rights to prevent injury to other water rights. *See* C.R.S. § 37-92-305; Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 53-54 (Colo. 1999) ; In re Application for Water Rights of Midway Ranches Property Owners Ass'n, 938 P.2d 515, 521 (Colo.1997).

11. This Court's analysis of the impacts of the proposed amendments and change applications is confined to an analysis of water rights as decreed in Colorado. The size, capacity, or other features of ALP, are authorized by separate decrees in Colorado (see ALP Decrees), and are not affected by this decree.

12. Although the ALP Decrees limit the ultimate capacity and size of the overall project, the draft on the stream may vary depending upon the types of use to which the ALP water will be applied. *See* City of Westminster v. Church, *supra.* To the extent that approval of the Ute Mountain Ute Tribe's change of use to M&I uses will affect the timing and duration of ALP diversions, other stream users are entitled to terms and conditions to prevent injury.

13. The Stipulations to Amend the 1991 Consent Decrees and Change Applications do not result in any expansion of either the ALP water right or the Ute Tribes' allocations of water from ALP so long as the quantification of reserved water rights established in 1991 are incorporated into this decree as conditions.

14. Substitute benefits, as authorized by the 2000 Settlement Act Amendments, cannot be afforded to the Ute Tribes in the absence of amendment of the 1991 Consent Decrees. Applicant's Ex. 1 (2000 Settlement Act Amendments); *see Stipulation for Amendment to Consent Decree.* The 2000 Settlement Act Amendments, and correspondingly, the Stipulations for Amendment to Consent Decree, change the description of each Tribes' ALP water rights to an ALP allocation "with an average annual depletion not to exceed 16,525 acre-feet of water." Change Applications; Stipulations to Amend. Describing the water rights in terms of depletion limits is necessary in order for the Tribes to participate in the ALP project as reconfigured under federal law. *See* Applicant's Ex. 1 (2000 Settlement Act Amendments).

15. With respect to the Change Applications filed by the Ute Mountain Ute Tribe, the Court concludes as a matter of law that the 1991 Consent Decrees limit the Ute Mountain Ute Tribe's diversions for beneficial use of M&I water to a deemed amount of 27,066 af per annum historically consumed. Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation to a Consent Decree, ¶6.A.iii.b. Furthermore, the Court concludes as a matter of law that the 1991 Consent Decree limits the timing and duration of diversions by the Ute Mountain Ute Tribe to that specified in the monthly percentage distributions table found at ¶6.A.iii.a. of the Stipulation to a Consent Decree. Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation to a Consent Decree, ¶6.A.iii.A. The Court concludes as a matter of law that the establishment of historic consumptive quantity and establishment of limitations as to timing and duration of use of water will preserve the stream conditions as contemplated in 1991 when the water rights were decreed by consent. Therefore, there is presently no evidence of any injurious impacts resulting from approval of the Change Applications. Correspondingly, there is presently no evidence of any injurious impacts resulting from approval of the Stipulations to Amend in relation to the Ute Mountain Ute Tribe.

16. The Court concludes that the Ute Mountain Ute Tribe's change in use from Agricultural Irrigation uses and M&I uses to only M&I uses is a change to a type of beneficial use.

17. The Court concludes as a matter of law that the 1991 Consent Decrees limit ALP diversions from the Animas and La Plata Rivers on behalf of the Southern Ute Indian Tribe to a maximum of 26,500 acre-feet per annum of municipal and industrial water, as measured at the points described in paragraph 7.A.i. *See* Applicant's Ex. 2&3 (Stipulation for a Consent Decree) at ¶7.A.i.a. Explicitly limiting ALP diversions made on behalf of the Southern Ute Indian Tribe to a maximum of 26,500 acre feet per annum of municipal and industrial water will preserve the stream conditions as contemplated in 1991 when the water rights were decreed by consent. *See* Applicant's Ex. 2&3 (1991 Consent Decrees). Therefore, there is presently no evidence of any injurious impacts resulting from approval of the Stipulations to Amend in relation to the Southern Ute Indian Tribe.

18. Until the water is applied to actual M&I uses, the Court is unable to fully assess the impacts that may result from approval of the Stipulations to Amend and the Change Applications. In order to ensure that the Ute Tribes' water rights will be applied to actual beneficial uses, this Court may require the Tribes to report on their progress towards application of their water rights to a beneficial use. *See* U.S. v. City and County of Denver, By and Through Bd. of Water Com'rs, 656 P.2d 1, 35 (Colo.1982); *see also* City of Thornton v. Bijou Irr. Co., 926 P.2d 1, 44 (Colo.1996). In addition, the question of injury must be reconsidered following completion of ALP and delivery of water to the Tribes for beneficial use. *See* C.R.S. § 37-92-304(6). The Moving Parties anticipate that the Tribes' ALP water will be available by January 1, 2009. Therefore, it is reasonable for the Court to retain jurisdiction pursuant to C.R.S. § 37-92-304(6) until December 31, 2009.

19. As to the La Plata River, as this Court has recognized, a "proposed change affecting an importing basin in a transbasin diversion is not a legally cognizable "injury" under Colorado state law." Mar 7 Order at 28-29. As a matter of law, the Motions to Amend and Change Applications, which change the source of the Tribes' ALP water to the Animas River rather than the Animas and La Plata Rivers, do not create a legally cognizable injury to La Plata Basin water rights under Colorado law.

20 The Court concludes that so long as ALP is operated consistent with the 2000FSEIS, including maintenance of bypass flows, there is a reasonable degree of certainty that downstream conditions will be adequate to meet the needs of decreed Colorado water users and conditional water rights holders under the administration of the Division 7 State Engineer.

21. The diversion and storage rights for the ALP, as decreed in Case No. 80CW237, have a priority date of September 2, 1938, and an adjudication date of March 21, 1966. Applicant's Ex. 20 at 13 of 13, ¶ 8. The Court concludes that administration of the ALP under the prior appropriations system by the Division 7 Engineer will further protect downstream senior Animas River water rights from possible injury by future implementation of ALP when it is operated pursuant to the 2000FSEIS. *Id.*

22. However, the Court also concludes that the bypass flows are part of ALP's operational requirements. The operational requirements of ALP are not a component of the Ute Tribes' decreed water rights. This Court determines that it does not have jurisdiction to review or enforce such commitments in these cases. Nevertheless, if BOR determines to decrease any seasonal component of the bypass flow requirements, the decrease may affect other vested water users on the stream. Therefore, to protect against such injurious impacts, it is necessary that the United States notify the Court, the State, and potentially affected water users through the resume process of any determination to decrease the bypass flow requirements and the specifics of such change reasonably in advance of such a final decision.

23. The Court has determined that the Motions to Amend and Change Applications affect users of both the Animas and La Plata Rivers, because the 1991 Consent Decrees and Motions to Amend and Change Applications set forth settlements to the Ute Tribal claims on both rivers. Consequently, the Court rejects CPA's argument that it should determine the Motions to Amend and Change Applications moot as to the La Plata River and Case Nos. W-1603-76J and 02CW86. The Court finds as a matter of law that there is no doubling effect of the water rights at issue in the Motions to Amend and Change Applications as they are applied to the Animas and the La Plata Rivers, and expressly precludes any interpretation that this Decree may result in a doubling of the water right.

24. The Ute Tribal Water Rights before the Court in the Motions to Amend and Change Applications retain their character as Indian reserved water rights and are not subject to abandonment. These cases do not present the issue of any transfer of water rights or use of reserved water rights off either Ute reservation. Therefore, the issue of off-reservation beneficial use is not before the Court at this time.

25. The Court finds no basis in law for CPA's allegations that the 2000 Settlement Act Amendments grant Indian reserved water rights to entities other than the Ute Tribes.

26. The Court finds that the issue of abandonment is not before this Court as a matter of law because once the federal reserved water right has been quantified that amount is then outside the state appropriation system. U.S. v. City and County of Denver, By and Through Bd. of Water Com'rs, 656 P.2d 1, 34 -35 (Colo.1982). There is also no basis in law for CPA's claims that the 2000 Settlement Act Amendments (Applicant's Ex. 1) as to the Ute Tribal water right constitutes abandonment of some or all of the Tribal water rights established by the 1991 Consent Decrees. *See* July 7 Order at 13.

27. This Court finds as a matter of law that the water rights settlements of the United States for the benefit of the two Ute Tribes in other rivers (*e.g.*, the Mancos, Piedra, Pine, etc.) are not before the Court in any manner. Moving Parties have not raised any such issue and nothing related to their Motions to Amend or Change Applications does so. Indeed, all of the 1991 Ute Tribal settlements, including the

settlements in Case Nos. 1603-76F and W-1603-76J and all other settlements that address rivers other than the Animas and La Plata Rivers, are *res judicata* and may not be reopened. *See* Mar. 7 Order at 16; July 7 Order at 15.

28. Likewise, there is no basis in law for CPA's claim that the 2000 Settlement Act Amendments would allow use of water outside the State of Colorado. Use of the Ute Tribes' reserved water rights is governed by this Court's decrees and not by the 2000 Settlement Act Amendments. *See* In re Application for Water Rights of U.S., *supra*.

29 This Court finds as a matter of law that the requested extensions of deadlines for ALP construction and water delivery to the Tribes or, in the alternative, for the determination by the Ute Tribes to agree to the settlement or commence litigation of the tribal Claims on the Animas and La Plata Rivers, are appropriate and reasonable and meet the second part of the Rufo test. First, this Court has already determined that significant circumstances exist that warrant amending the 1991 Consent Decrees. Second, the proposed change is tailored to resolve the problems created by the change in circumstances.

30. The Court further concludes that CPA presented no evidence of injury to water rights on the Animas or La Plata Rivers resulting from approval of the Stipulations to Amend and the Change Applications. All other objections raised by CPA are without legal basis.

31. The Court now determines as a matter of law that the second part of Rufo is satisfied and that the Motions to Amend and Stipulations for Amendment of Consent Decree are suitably tailored to implement the change in law set forth in the 2000 Settlement Act Amendments. *See* Rufo, *supra,* 502 U.S. at 393.

32. The Division Engineer is lawfully required to administer diversions under the Water Right that is the subject of this Decree pursuant to Colorado law.

33. This Court has jurisdiction over these proceedings and over the persons and water rights affected thereby, whether they have appeared or not.

34. Full and adequate notice of these proceedings and the matters adjudicated herein has been given in the manner required by law.

35. Applicant has met all burdens of proof and complied with all standards applicable to the water rights addressed herein.

III. DECREE

THEREFORE, IT IS ORDERED AND ADJUDGED that the Motions to Amend and Change Applications are GRANTED as follows:

1. The provisions of the Findings of Fact and Conclusions of Law are hereby incorporated into this Ruling. The Court, having carefully considered the information and legal argument submitted by the Applicant and other Moving Parties and the Opposers, and having completed the investigations necessary to make a determination in this matter, does find that Applicant has met the required burdens of proof regarding the Motions to Amend and Change Applications.

2. The 1991 Consent Decrees are hereby amended as set forth in the Stipulations to Amend appended to the Motions to Amend, and the Change Applications are granted. The Stipulations to Amend and the Change Applications are hereby incorporated into the 1991 Consent Decrees. *See also* I.C., above. To the extent that provisions of the Stipulations to Amend and the Change Applications may conflict with the 1991 Consent Decrees and their incorporated documents, the Stipulations to Amend and the Change Applications shall control.

3. Colorado law requires this Court to determine whether conditions must be imposed on a change of water rights to prevent injury to other water rights. *See* C.R.S. § 37-92-305. The Court has determined to impose the following conditions on this Decree:

a. Applicant and the Ute Tribes, as appropriate, shall comply with the orders of the State or Division Engineer to install necessary measuring devices with regard to these water rights, and shall keep records and make reports regarding these water rights as reasonably requested by the State or Division Engineer.

b. The Court hereby adopts and incorporates into this decree the monthly percentage distributions and historic consumptive use percentages set forth in subparagraphs 6.A.iii.a.&b. of the Stipulation for Consent Decree with respect to the Ute Mountain Ute Tribe. Applicant's Ex. 2 & 3 (1991 Consent Decree) at Stipulation to a Consent Decree. Thus, ALP diversions from the Animas River for the benefit of the Ute Mountain Ute Tribe are limited in quantity to a maximum of 27,066 af of water per annum as measured at Ridges Basin Dam and Reservoir or at the point on the Animas River where diversion are made to the Durango Pumping Plant, and the timing and duration of diversions shall be limited as set forth in the table found at Paragraph 6 A.iii.a. Applicant's Ex. 2 & 3 (1991 Consent Decrees) at Stipulation to a Consent Decree, ¶6.A.iii.a.

c. ALP diversions from the Animas River for the benefit of the Southern Ute Indian Tribe's municipal and industrial allocations from the ALP are limited in quantity to a maximum of 26,500 acre-feet per annum of water as measured at Ridges Basin Dam and Reservoir or at the point on the Animas River where diversion are made to the Durango Pumping Plant. To this extent, the Court hereby adopts and incorporates into

this decree the quantification of reserved water for M&I uses allocated to the Southern Ute Indian Tribe in the 1991 Consent Decrees at subparagraph 7.A.i.a. Applicant's Ex. 2&3 (1991 Consent Decrees) at Stipulation for a Consent Decree.

d. The bypass flows are part of ALP's operational requirements and are not a component of the Ute Tribes' decreed water rights. This Court has determined that it does not have jurisdiction to review or enforce such commitments in these cases. Nevertheless, if BOR determines to decrease any seasonal component of the bypass flow requirements, the United States shall notify the Court, the State, and potentially affected water users through the resume process of that fact and the specifics of such change reasonably in advance of such a final decision.

e. The United States, acting for the benefit of the Ute Mountain Ute Tribe, and the Ute Mountain Ute Tribe, shall file a report to this Court in January of the year 2009, and every sixth calendar year thereafter, demonstrating progress in applying its reserved water rights to beneficial use. All persons who may be affected by any proposed use shall be notified of the proceeding.

f. The United States, acting for the benefit of the Southern Ute Indian Tribe, and the Southern Ute Indian Tribe, shall file a report to this Court in January of the year 2009, and every sixth calendar year thereafter, demonstrating progress in applying its reserved water rights to beneficial use. All persons who may be affected by any proposed use shall be notified of the proceeding.

g. The Court hereby retains jurisdiction pursuant to C.R.S. § 37-92-304(6), and this decree shall be subject to reconsideration of the question of injury, through December 31, 2012.

DATED this ninth day of November, 2006.

BY THE COURT:

Gregory G. Lyman
District Court Judge

Cc: K. Beegles
H. Simpson
A. Maynard
S. Schneider
D. Israel
D. Robbins
S. McElroy
J. Sheftel
E. McDonald

e-serve: B. Whitehead
H. Simpson
A. Maynard
S. Schneider
D. Israel
D. Robbins
S. McElroy
J. Sheftel
E. McDonald