

DISTRICT COURT, WATER DIVISION NO. 7 COLORADO LaPlata County Courthouse 1060 E. Second Avenue Durango, CO 81301 (970) 247-2304	FILED Document CO La Plata County District Court 6th JD Filing Date: Jan 16 2008 5:10PM MST Filing ID: 18099385 Review Clerk: N/A ▲ COURT USE ONLY ▲
IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE SOUTHWESTERN WATER CONSERVATION DISTRICT	Case Number: 07 CW 55 Ctrm/Div:
FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE	

THIS APPLICATION, having been filed with Water Division 7 on August 31, 2007, and the Court being fully advised in the premises, DOES HEREBY ENTER the following findings of fact, conclusions of law and decree:

A. GENERAL FINDINGS OF FACT

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

Southwestern Water Conservation District
 P.O. Box 475
 Durango, CO 81302
 (970) 247-1302
 water@frontier.net

2. On August 31, 2007, Applicant filed a timely application for a sexennial finding of reasonable diligence with the District Court, Water Division 7. All notices required by law for the filing of this application have been fulfilled, and the Water Court has jurisdiction over the application filed in this case.

3. Timely statements of opposition in support were filed by the United States of America, the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe pursuant to C.R.S. § 37-92-302. The State of Colorado late filed a statement of opposition in support, which was accepted for filing by order dated December 5, 2007. A statement of opposition was late filed by Margaret Kral, through her attorney Amy Huff, The Craig Law Firm P.C. The Court allowed the late filing in an Order dated December 1, 2007. The time for filing statements of opposition has expired.

4. On January 16, 2008, at 2:00 p.m., the Court held a hearing and took evidence from the Applicant concerning activities which had been undertaken to perfect a portion of the conditional water rights before the Court in Case No. 07CW55 and to establish ongoing diligent activity concerning all of the conditional water rights before the Court in this case.

5. The Applicant was represented at the hearing by David W. Robbins and Jennifer H. Hunt of Hill & Robbins, P.C. and Janice Sheftel of Maynes Bradford Shipps & Sheftel. Appearing in support of the Application were Scott McElroy for the Southern Ute Tribe, Dan Israel for the Ute Mountain Ute Tribe, and Susan Schneider for the United States of America. Eve McDonald, Assistant Attorney General, appeared on behalf of the State by telephone. Opposer Margaret Krai reached a stipulation with the Applicant and did not appear at the hearing.

6. The Applicant called two witnesses to present sworn testimony and identify documents for introduction into evidence:

a. Mr. Bruce Whitehead, Executive Director of the Southwestern Water Conservation District testified to his personal observation of construction activity on the portion of the Animas-La Plata Project currently being constructed by the United States Bureau of Reclamation. Mr. Whitehead identified summaries of public information which established the amounts of money spent by the Applicant during this diligence period in seeking the development of the conditional water rights in this case and the amounts of money spent by the Bureau of Reclamation and project sponsors in actual construction of Project components. Mr. Whitehead also described litigation during the diligence period to protect the water rights and identified a total of seven agreements that had been negotiated to insure that the local cost share of project construction would be paid. Finally, Mr. Whitehead identified several clerical errors in the Application that he felt should be corrected for the sake of accuracy in the decree. The Court considers Mr. Whitehead's testimony to be thorough, probative, and reliable.

b. Mr. John Porter, President of the Applicant, testified to his personal participation on the Board of Directors of the Applicant throughout the diligence period. Mr. Porter testified that the Board of Directors had taken a keen interest in protecting the conditional water rights, had authorized the expenditures summarized by Mr. Whitehead, and had never discussed or considered limiting or abandoning any of the water rights described in the application in this case. The Court considers Mr. Porter's testimony to be both probative and reliable.

7. During the hearing, Counsel for the Applicant requested that the clerical errors in legal descriptions in the application be corrected in the final decree in this case. The Court, having considered Mr. Whitehead's testimony, agrees that those errors are clerical in nature and do not, in any way, affect the adequacy of the notice given to all persons and that the correct legal descriptions will be utilized in this decree.

8. Applicant seeks a sexennial finding of reasonable diligence with the District Court, Water Division 7, for the following water rights for the following structures (the following water rights, together, are the "ALP Water Rights"):

a. DIRECT FLOW RIGHTS:

i. Animas Diversion Canal - Teft Diversion Dam

- (a) Decree: #1751-B, March 21, 1966; #807-C, March 21, 1966; District Court, Water Division No. 7.
- (b) Location of point of diversion (hereafter "POD") for the Canal/Teft Dam: At a point whence the NW corner of Section 1, T38N, R9W, N.M.P.M, bears N 79° 45' W, 11,150.0 ft.
- (c) Alternate POD (hereafter "APOD"): Durango Pumping Plant and Ridges Basin Inlet Conduit, decreed in Case No. 80CW237.
 - (1) APOD: At a point from the SE corner of Section 32, T35N, R9W, bear N 49° 00' W, 4,200 ft.;
 - (2) Means of diversion: Pump and pipeline from the Durango Pumping Plant: The pipeline from the Plant bears South Southwest 2,000 ft., West 1,600 ft., thence West Southwest 1,100 ft., South Southwest 1,300 ft., thence West Southwest 4,600 ft. to point of inlet into Ridges Basin Reservoir a/k/a Lake Nighthorse.
- (d) Source: Animas River and its tributaries.
- (e) Appropriation Date: September 2, 1938.
- (f) Amount: 600 cfs, conditional.
- (g) Use: Irrigation, domestic, municipal, industrial, recreation, stock, fish and wildlife, flood control and other beneficial uses.

- ii. Hay Gulch via ALP Project Works, a/k/a Dry Side Canal
- (a) Decree: #1751-B, March 21, 1966; #807-C, March 21, 1966; District Court, Water Division No. 7.
 - (b) Location of POD: At a point whence the NE corner of Section 3U, T34N, R12W, N.M.P.M., bears N 79° 12' E, 3,150.0 ft.
 - (c) Source: Animas and La Plata Rivers and their tributaries, including but not limited to Hay Gulch.
 - (d) Appropriation Date: September 2, 1938.
 - (e) Amount: 625 cfs, conditional.
 - (f) Use: Irrigation, domestic, municipal, industrial, recreation, stock, fish and wildlife, flood control and other beneficial uses.
- iii. Falls Creek Diversion Dam and Canal
- (a) Decree: #1751-B, March 21, 1966; District Court, Water Division No. 7.
 - (b) Location of POD: At a point whence SW corner of Section 21, T36N, R9W, N.M.P.M., bears S 45° 50' W, 1,050.0 ft.
 - (c) Source: Falls Creek, a tributary of the Animas River.
 - (d) APOD: Durango Pumping Plant and Ridges Basin Inlet Conduit (as described in ¶ 8(a)(i)(c)(1) above, with the alternate source as the Animas River and its tributaries) decreed in Case No. 80CW237.
 - (e) Appropriation Date: September 2, 1938.
 - (f) Amount: 60.0 cfs.
 - (g) Use: Irrigation, domestic, municipal, industrial, recreation, stock, fish and wildlife, flood control and other beneficial uses.

iv. Junction Creek Diversion Dam and Pipeline

- (a) Decree: #1751-B, March 21, 1966; District Court, Water Division No. 7.
- (b) Location of POD: At a point whence SW corner of Section 31, T36N, R9W, N.M.P.M., bears N 51° 15' E 2,200.0 ft.
- (c) Source: Junction Creek, a tributary to the Animas River.
- (d) APOD: Durango Pumping Plant and Ridges Basin Inlet Conduit (as described in ¶ 8(a)(i)(c)(1) above, with the alternate source as the Animas River and its tributaries) decreed in Case No. 80CW237.
- (e) Appropriation Date: September 2, 1938.
- (f) Amount: 100.0 cfs, conditional.
- (g) Use: Irrigation, domestic, municipal, industrial, recreation, stock, fish and wildlife, flood control and other beneficial uses.

v. La Plata Diversion Dam and Canal

- (a) Decree: #807-C, March 21, 1966; District Court, Water Division No. 7.
- (b) Location of POD: At a point whence SE corner of Section 7U, T34N, R11W, N.M.P.M., bears S 16° 04' E, 2,150.0 ft.
- (c) APOD: From the SW Corner of Section 13, T34N, R12W, bears N 88° 00' E, 6,100 ft.
- (d) The point of beginning is the Ridges Basin Pumping Plant outlet, from the NE Corner, Section 4, T34N, R10W, bear S 27° W 2,200 ft
- (e) Source: La Plata River and its tributaries
- (f) Appropriation Date: September 2, 1938.
- (g) Amount: 400 cfs, conditional.

- (h) Use: irrigation, domestic, municipal, industrial, recreation, stock, fish and wildlife, flood control and other beneficial uses.

vi. Longhollow Diversion Dam and Canal

- (a) Decree: #1751-B, March 21, 1966; #807-C, March 21, 1966; District Court, Water Division No. 7
- (b) Location of POD: At a point whence NE corner of Section 3, T32N, R13W, N.M.P.M., bears N 02° 00' E, 1,580.0 ft.
- (c) APOD: Southern Ute Diversion Dam and Inlet Canal, located at a point from the SW corner of Section 3, T32N, R13W, bear N 21° 00' E for a distance of 12,400 ft., with gravity flow into a canal.
- (d) Source: Animas River, La Plata River and their tributaries and ALP return flows.
- (e) Appropriation Date: September 2, 1938.
- (f) Amount: 175.0 cfs, conditional.
- (g) Use: Irrigation, domestic, municipal, industrial, recreation, stock, fish and wildlife, flood control and other beneficial uses.

vii. Meadows Diversion Canal

- (a) Decree: #1751-B, March 21, 1966; #807-C, March 21, 1966; District Court, Water Division No. 7.
- (b) Location of POD: At a point whence NE corner of Section 3, T32N, R13W, N.M.P.M., bears 02° 00' E, 1,580.0 ft. (The same POD as Long Hollow Diversion Dam and Canal, but with separate delivery canal.)
- (c) APOD: Southern Ute Diversion Dam and Inlet Canal (see ¶ 8(a)(vi)(c)).
- (d) Source: Animas River, La Plata River and their tributaries

and A/LP Project return flows.

- (e) Appropriation Date: September 2, 1938.
- (f) Amount: 165 cfs, conditional.
- (g) Use: Irrigation, domestic, municipal, industrial, recreation, stock, fish and wildlife, flood control and other beneficial uses.

b. STORAGE RIGHTS

i. Animas Mountain Reservoir

- (a) Decree: #1751-B, March 21, 1966; District Court, Water Division No. 7.
- (b) Location: Portions of Sections 28, 29, 32 and 33, T36N, R9W, N.M.P.M., and Sections 4 and 5, T35N, R9W, N.M.P.M. Initial point of survey of the high water line of the Reservoir is located at a point from whence the NW corner of Section 4, T35N, R9W, N.M.P.M., bears N 29° 28' W, a distance of 2,230.0 ft. The axis of Dam No. 1 extends N 9° 17' E, from a point on the right abutment at Station 0+00 from whence the NW corner of Section 4, T35N, R9W, N.M.P.M., bears N 30° 58' W, a distance of 2,430.0 ft. The axis of Dam No. 2 extends S 6° 00' E, from a point on the right abutment at Station 0+00 from whence the NE corner of Section 5, T34N, R9W, N.M.P.M., bears N 72° 57' E, a distance of 3,690.0 ft.
- (c) Source: Falls Creek, Junction Creek, Animas River and its tributaries.
- (d) Appropriation Date: September 2, 1938.
- (e) Amount: Initial storage - 17,640 AF, conditional; Annual storage 14,640 AF, conditional, and 14,640 AF, conditional, refill from all three sources, if capacity and water available
- (f) Use: Irrigation, domestic, municipal, industrial, recreation stock, fish and wildlife, flood control and other beneficial

uses.

(g) Alternate Structure: Ridges Basin Reservoir.

- (1) POD and location Reservoir: The Reservoir is located in portions of Section 6 and 7, T34N, R9W, N.M.P.M., and Sections 1, 2, 3, 4, 9, 10, 11, 12, 2U and 3U, T34N, R10W, N.M.P.M., and Section 36, T35N, R10W, N.M.P.M. Inlet from the NE corner of Section 1, T34N, R10W, bears N 80° 00' W, 1,600 ft. The South abutment of the darn is located 2,100 ft. from the SW corner of Section 7, T34N, R9W, on an angle of 64° E of N. The dam extends 1,600 ft. across the streambed bearing 7° 10' E of N along the dam axis.
- (2) Capacity: 280,040 AF.
- (3) Source and means of diversion: By pump from the Animas River via the Durango Pumping Plant and Ridges Basin Inlet Conduit (see Paragraph 8(a)(i)(c)(1)).

ii. Hay Gulch Reservoir

- (a) Decree: #1751-B, March 21, 1966; #807-C, March 21, 1966; District Court, Water Division No. 7.
- (b) Location: In portions of Sections 6 and 7, T34N, R11W; Sections 1, 2, 3, 11 and 12, T34N, R12W; Section 31, T35N, R11W; Sections 35 and 36, T35N, R12W, N.M.P.M. Initial point of survey of the high water line of the Reservoir is located at a point from whence the South Quarter corner of Section 12, T34N, R12W, N.M.P.M, bears S 80° 31' E, a distance of 1,200.0 ft. From Station 10+00, a point on the axis of the dam, the South Quarter corner of Section 12, T34N, R12W, N.M.P.M., bears S 86° 58' E, a distance of 3,970.0 ft. and, from said Station 10+00, the axis of the dam bears S 89° 15' E.
- (c) Source: La Plata River and its tributaries, including but not limited to Hay Gulch, a tributary of the La Plata River, and Animas River and its tributaries for Alternate Point of

Storage

- (d) Appropriation Date: September 2, 1938.
- (e) Capacity: 56,330 AF.
- (f) Use: Irrigation, domestic, municipal, industrial, recreation, stock, fish and wildlife, flood control and other beneficial uses.
- (g) Conditions: Initial storage 56,330 AF conditional from the Animas River; annual storage of 53,730 AF conditional from the Animas River and 46,740 AF conditional of water from the Animas River for refill if said reservoir capacity and water are available. Further, 56,330 AF, conditional, initial storage from Hay Gulch and the La Plata River, with annual storage: 53,730 AF, conditional, and refill 46,730 AF, conditional, from Hay Gulch and the La Plata River if capacity and water are available. With the provision that Hay Gulch Reservoir is a re-regulation reservoir and that such re-regulation shall not be charged against the storage rights appropriated herein.
- (h) Alternate point of Storage: Ridges Basin Reservoir (previously described in ¶ 8(b)(i)(g)(1) above) and Southern Ute Reservoir (to be filled through Southern Ute Inlet Canal or Durango Pumping Plant):
 - (1) POD and location: Inlet, from the SW corner of Section 2, T32N, R13W, bears N 88° 00' E 3,700 ft. The West abutment of the dam is located 550 ft. from the SE corner of Section 12, T32N, R13W, on an angle of 71° W of N. The dam axis extends 700 ft. bearing 65° E of S to a point, then 2,300 ft. bearing 72° E of N to the East abutment. The Reservoir is located partially in the following sections: Sections 1, 2, 11 and 12 of T32N, R13W, N.M.P.M., and Sections 10, 15 and 22, in T32N, R12W, N.M.P.M., all in Colorado; and in Sections 12 and 13, T32N, R13W, N.M.P.M., and in Section 7, T32N, R12W, N.M.P.M., all in New Mexico.
 - (2) Capacity: 70,000 AF

iii. Howardsville Reservoir

- (a) Decree: #1751-B, March 21, 1966; District Court, Water Division No. 7.
- (b) Location: 2 Miles above Silverton in an unsurveyed area. Probable projections would place the reservoir in Sections 29, 30, and 31, T42N, R6W, N.M.P.M.; Section 36, T42N, R7W; Section 6, T41N, R6W; Sections 1, 11, 12, T41N, R7W, N.M.P.M. Initial point of survey of high water line, whence U.S. Mineral Monument Uncle Sam bears S 84° 15' W, 26,300 ft. Axis of dam extends S 15° 08' E, from point on right abutment at Station 0+00, whence U.S. Mineral Monument Uncle Sam, bears N 56° 01' W, 16,400.0 ft.
- (c) Source: Animas River and its tributaries.
- (d) Appropriation Date: September 2, 1938.
- (e) Amount: 93,700 AF
- (f) Use: Irrigation, domestic, municipal, industrial, recreation, stock, fish and wildlife, flood control and other beneficial uses.
- (g) Alternate point of storage: Ridges Basin Reservoir, described in paragraph 8(b)(i)(g)(1) above.
- (h) Conditions: Initial storage 93,700 acre feet, annual storage 90,700 acre feet, and 90,700 acre feet to refill if capacity and water are available.

iv. Meadows Reservoir

- (a) Decree: #1751-B, March 21, 1966; #807-C, March 21, 1966; District Court, Water Division No. 7.
- (b) Location: Portions of Sections 25, 26, 27, 34 and 36, T31N, R14W, N.M.P.M., in New Mexico. The initial point of survey of the high water line of the reservoir is located at a point from whence the Southwest corner of Section 26,

T31N, R14W, N.M.P.M. bears S 25° 18' W, 1,300.0 ft.
The axis extends S 45° 50' W from a point on the right
abutment at Station 0+00 from whence the Southwest
corner of Section 26, T31N, R14W, N.M.P.M. bears S 34°
42' W, 2,130.0 ft.

- (c) Source: Animas River, La Plata River and their tributaries and Project return flows.
- (d) Appropriation Date: September 2, 1938.
- (e) Amount: 17,450 AF, initial storage, conditional, from the Animas River, annual storage - 13,750 AF, conditional, from the Animas River, and 13,750 AF from the Animas River to refill. Additionally, 13,750 AF, conditional from the La Plata River, whenever capacity is available for refilling and water is available in the La Plata River for refilling.
- (f) Use: irrigation, domestic, municipal, industrial, recreation, stock, fish and wildlife, flood control and other beneficial uses.
- (g) Alternate point of storage: Southern Ute Reservoir and Dam (previously described in paragraph 8(b)(ii)(h)(1) above).

v. Three Buttes Reservoir

- (a) Decree: #1751-B, March 21, 1966; #807-C, March 21, 1966; District Court, Water Division No. 7.
- (b) Location: Portions of Sections 1, 2, 11 and 12, T32N, R12W, N.M.P.M., and Sections 10, 15 and 22, T32N, R12W, N.M.P.M., in Colorado; and Section 7, T32N, R12W, N.M.P.M., and Sections 12 and 13, T32N, R13W, N.M.P.M., in New Mexico. The initial point of survey of the high water line of the Reservoir is located at a point from which the SW corner of Section 7, T32N, R12W, N.M.P.M., in New Mexico bears S 59° 00' W, 2,405.0 ft.; the axis of the dam beginning at Station 0+00 whence the SW corner of Section 7, T32N, R12W, N.M.P.M., in New Mexico bears S 56° 00' W, 2,445.0 ft.

- (c) Source: Animas River, La Plata River and their tributaries and Project return flows.
- (d) Appropriation Date: September 2, 1938.
- (e) Amount: Initial storage 38,400 AF, conditional, from the Animas River, annual storage - 38,400 AF, conditional, from the Animas River and 38,400 AF, conditional; from the La Plata River.
- (f) Use: Irrigation, domestic, municipal, industrial, recreation, stock, fish and wildlife, flood control and other beneficial uses.
- (g) Alternate point of storage: Southern Ute Reservoir and Dam (previously described in paragraph 8(b)(ii)(h)(1) above).

c. OTHER PROJECT FEATURES:

i. McDermott Canal

- (a) Decree: #1751-8, March 21, 1966; #807-C, March 21, 1966; District Court, Water Division No. 7.
- (b) Location: Water from Three Buttes Reservoir, portions of Sections 1, 2, 11 and 12, T32N, R12W, N.M.P.M., and Sections 15 and 22, T32N, R12W N.M.P.M., in Colorado and Section 7, T32N, R12W, N.M.P.M., and Sections 12 and 13, T32N, R13W, N.M.P.M, in New Mexico.
(Headworks located in Three Buttes Dam)
- (c) Source: Animas River, La Plata River and their tributaries.
- (d) Appropriation Date: September 2, 1938.
- (e) Amount: 100.0 cfs.
- (f) Use: Irrigation, domestic, municipal, industrial, recreation, fish and wildlife, flood control, stock, and other beneficial uses.

ii. Ponds Canal

- (a) Decree: #1751-B, March 21, 1966; District Court, Water Division No. 7.
- (b) Location: Diversion from Dry Side Canal, whence NW corner of Section 32, T34N, R13W, N.M.P.M., bears N 23° 48' W, 1,090.0 ft.
- (c) Source: Dry Side Canal and the Animas River and its tributaries and La Plata River and its tributaries, including but not limited to Hay Gulch.
- (d) Appropriation Date: September 2, 1938.
- (e) Amount: 175.0 cfs.
- (f) Use: Irrigation, domestic, municipal, industrial, recreation, fish and wildlife, flood control, stock, and other beneficial uses.

iii. Red Mesa Canal

- (a) Decree: #1751-B, March 21, 1966; District Court, Water Division No. 7.
- (b) Location: Water from Animas Diversion Canal, whence SW corner of Section 17, T34N, R11W, N.M.P.M., bears S 85° 56' W, 575.0 ft.
- (c) Source: Animas River and its tributaries diverted from Animas Diversion Canal.
- (d) Appropriation Date: September 2, 1938.
- (e) Amount: 235.0 cfs.
- (f) Use: Irrigation, domestic, municipal, industrial, recreation, fish and wildlife, flood control, stock, and other beneficial uses.

iv. Ute Canal

- (a) Decree: #1751-B, March 21, 1966; #807-C, March 21, 1966; District Court, Water Division No. 7.
- (b) Location: Diversion from Dry Side Canal, whence NW corner of Section 32, T34N, R13W, N.M.P.M., bears N 23° 48' W, 1,090.0 ft.
- (c) Source: Dry Side Canal and the Animas River and its tributaries.
- (d) Appropriation Date: September 2, 1938
- (e) Amount: 195.0 cfs.
- (f) Use: Irrigation, domestic, municipal, industrial, recreation, fish and wildlife, flood control, stock, and other beneficial uses.

9. The water rights described above were originally decreed to the Applicant in Case Nos. 1751-B and 807-C, decreed on March 21, 1966 in Water Division No. 7. These water rights constitute the water rights for the project known as the "Animas-La Plata Project" ("ALP" or the "Project"), which was authorized by the United States Congress on September 30, 1968 under Public Law No. 90-537, the Colorado River Basin Project Act. Applicant obtained a decree for a change of water right to reflect a redesign of the Project in Case No. 80 CW 237. The decree in Case No. 80 CW 237 included alternate points of diversion for many of the Project features. Applicant maintained reasonable diligence for the ALP and its various features in Case Nos. W-190, W-577, 80 CW 101, 84 CW 59, 88 CW 48, 94 CW 51, and 01CW54. Findings of reasonable diligence have been made for ALP considering its features at both the original and alternate points of diversion.

B. FINDINGS OF FACT FOR DILIGENCE

10. Construction responsibility for the ALP, a federal water project to be owned by the U.S. Department of the Interior, was delegated by the United States Congress to the U.S. Bureau of Reclamation ("Reclamation") (Colorado Ute Settlement Act Amendments of 2000), Public Law 106-554 ("2000 Settlement Act Amendments"). Reclamation began construction on the Project in 2001. Applicant's conditional water rights cannot be put to beneficial use until the Reservoir and Pumping Facilities are fully constructed.

11. ALP is currently authorized by Congress to supply water to meet non-Indian needs as well as to satisfy the reserved water rights decreed to the United States in trust for the benefit

of the Ute Tribes pursuant to the Consent Decrees entered in Case Nos. W-1603-76F and W-1603-76J on December 19, 1991, in District Court, Water Division 7. Colorado Ute Settlement Act Amendments of 2000 at p. 7 of 12. The Consent Decrees implement a settlement with the Tribes authorized by Congress in the *Colorado Ute Indian Water Rights Settlement Act of 1988*, Pub. L. 100-585 ("1988 Settlement Act").

12. Since Applicant's filing of the previous application for reasonable diligence for the ALP Water Rights in Case No. 01CW54, District Court, Water Division 7, Applicant exercised reasonable diligence, as described below, in the development of the appropriation of the ALP Water Rights, at a total expenditure of approximately \$500,000, to protect and develop the ALP Water Rights. These expenses included attorney fees and expenses (excluding the fees related to the court proceedings in Case No. 01 CW 54), lobbying fees, consultant costs, and Board member travel and expenses. In addition, Reclamation and cost-share parties spent more than \$286,140,189 on the actual construction of the current configuration of the ALP during the current diligence period. As of July 1, 2007, construction of the ALP as currently configured was 52% complete; construction of Ridges Basin Dam was 84% complete; and construction of the inlet conduit was 78% complete.

Federal Legislative Process

13. During the reasonable diligence period, from August 2001 through August 2007, Applicant actively supported Reclamation's efforts in the construction of the ALP. Applicant, as well as the two Ute Tribes, participated in the Congressional legislative process during the diligence period, providing testimony at Congressional hearings and meeting with federal and state agencies.

14. To assist in these efforts, Applicant retained the services of its general counsel, Maynes, Bradford, Shippy & Sheftel, LLP ("MBS&S"); Hill & Robbins, P.C., a law firm in Denver, Colorado; and Kogovsek & Associates, Inc. ("K&A"), a lobbying firm in Pueblo and Denver, Colorado. Applicant spent several hundred thousand dollars for these consultants and in conjunction with various legislative issues related to ALP. For more than four years, from December 2003 through July 2007, the ALP Project Construction Committee ("PCC") (consisting of representatives from the Bureau of Reclamation and the ALP Project Beneficiaries) met on a periodic basis to discuss ALP construction progress. In addition, Applicant's representatives, including K&A, participated in the Congressional appropriations process for the ALP, including testifying at ALP appropriations hearings before both the House and Senate Appropriations Committees, during the past six years. Applicant spent substantial amounts of time and money to help obtain appropriations for FY2001 - 2008, for the construction of the ALP by working with the appropriate Congressional committees.

15. Applicant's Board of Directors was kept apprised of the status of ALP throughout the diligence period, and gave direction to District representatives and consultants as necessary. Applicant cooperated with Reclamation, the State of Colorado, the Animas-La Plata Water

Conservancy District and others in joint efforts to promote the Project and in activities necessary for Project construction.

ALP Construction Activities

16. The formal initiation of ALP construction occurred on November 9, 2001. Applicant worked closely with Reclamation to support construction of ALP throughout the diligence period.

17. Water and Energy Management and Development. During the diligence period, which encompasses federal fiscal years 2002 through 2007, final designs were completed construction work on Ridges Basin Dam and the Durango Pumping Plant were initiated. Major construction contracts were awarded for both Ridges Basin Dam and Durango Pumping Plant in 2003, as well as relocation of the gas pipelines within the Basin and acquisition of several land parcels for use in ALP construction. Preliminary design of the Navajo Nation Municipal Pipeline was completed in 2004. Construction of Ridges Basin Dam (including foundation preparation and embankment placement; materials processing; outlet works tunnel construction; foundation and tunnel grouting; embankment placement; and materials processing) continued through 2007. Construction of the Durango Pumping Plant (including completion of the intake structure and construction of pumping plant structure) also continued through 2007. Pre-construction activities for the Navajo Nation's Municipal Pipeline continued through 2005 and 2006, and final construction specifications for the pipeline were completed in 2007. Pre-construction activities on the Ridges Basin Inlet Conduit, including utility relocations and project support activities occurred during 2006 and 2007.

18. Land Management and Development. During the diligence period, Reclamation conducted ongoing field work on the cultural resource mitigation data recovery program and continued its interim management of ALP lands in the Ridges Basin area.

19. Fish and Wildlife Management and Development. During the diligence period, Reclamation continued ongoing baseline data collection on river fisheries and water quality, completed payment obligations for the Mitigation Area land acquisition, implemented site development for wetlands mitigation commitments, and continued its interim management of mitigation properties. In 2005, Reclamation completed implementation of the site development for meeting its wetlands mitigation commitments and began a required program to fulfill fishery mitigation commitments. Reclamation also coordinated with the State of Colorado on recreation facilities and finalized angler access requirements. In 2007, the site development for wetlands mitigation commitments was completed, and transfer of the Mitigation Area to operation and maintenance status was initiated. An additional \$3 million was advanced from the escrow accounts of the Colorado Water Resources Power and Development Authority and the San Juan Water Commission.

20. A summary of approximate expenditures by Reclamation for ALP construction activities during the diligence period, through federal fiscal year 2006, follows:

Animas-La Plata Project - Construction Budget Execution History 1/

Data as of: January 2008

Fiscal Year	Net Federal Appropriation at Year End 2/	Federal Expenditures 3/	Non-Federal Upfront Cost Share Expenditures	Total Expenditures
2002 4/	\$18,422,979	\$12,642,940	\$1,270,843	\$13,913,783
2003	\$36,311,854	\$34,324,288	\$1,580,364	\$35,904,652
2004	\$47,138,375	\$36,308,629	\$2,041,244	\$38,349,873
2005	\$50,341,422	\$58,165,648	\$795,298	\$58,960,946
2006	\$58,751,519	\$66,485,984	\$1,401,173	\$67,887,157
2007	\$68,894,506	\$68,473,688	\$2,650,090	\$71,123,778
TOTAL:				\$286,140,189

1/ All figures are approximate.

2/ Includes underfinancing, rescission, transfers, and reprograms.

3/ From Year-End Fund Detail Reports.

4/ Approval to Initiate Construction dated November 9, 2001.

Water Court Litigation

21. In 2002, in cases W-1603-76 F & J, the United States asked the District Court, Water Division 7, to amend the two 1991 Consent Decrees on the Animas and La Plata and Animas Rivers to conform the Ute Tribe's water rights as set forth in these 1991 Consent Decrees to the 2000 Amendments. At the same time, in case numbers 02CW85 and 86, the United States filed Change Applications to change a portion of the water right originally decreed to the Ute Mountain Ute Tribe from agricultural uses to M&I uses, consistent with the 2000 Amendments. Applicant, the two Ute Tribes, and the State of Colorado joined in the United States' request to amend the two 1991 Consent Decrees and filed Statements of Opposition (in Support) of the Change Applications.

22. The District Court, Water Division 7, ruled in favor of Applicant, two Ute Tribes, the United States and the State of Colorado, in each of the four consolidated cases (02CW85, 02CW86, W-1603-76F and W-1603-76J) and issued its Findings of Fact, Conclusions of Law and Decree on November 9, 2006, as amended by order dated February 8, 2007. An Objector in these cases, Citizens Progressive Alliance ("CPA"), appealed the Water Court's Findings of Fact, Conclusions of Law and Decree to the Colorado Supreme Court, which appeal is pending at the time of this Decree.

23. Applicant spent significant funds in the litigation of these cases on attorney fees, expert witness fees, filing fees, costs for travel, lodging, meals, court fees, appeal expenses, and depositions, which amount is included in the sum set forth above.

Funding Agreements Regarding ALP

24. During the diligence period at least seven agreements were negotiated to insure that the local cost share for the constructed portion of the ALP will be paid. Those include:

- a. Escrow Agreement between the San Juan Water Commission ("SJWC") and Reclamation, dated November 1, 2001;
- b. Animas-La Plata Water Conservancy District("ALP District")/Colorado Water Resources Power and Development Authority ("CWRPDA") Agreement to transfer certain interests to the CWRPDA, dated November 4, 2001;
- c. ALP Funding Agreement Between the CWRPDA and Reclamation, dated November 9, 2001;
- d. ALP Funding Agreement between SJWC and Reclamation, dated March 5, 2002;
- e. Escrow Agreement Among the CWRDPA, ALP District and the La Plata Water Conservancy District, dated November 4, 2002;
- f. CWRDPA/City of Durango Agreement, dated April 22, 2005;
- g. CWRDPA/ALP District Agreement, dated April 22, 2005.

25. The evidence submitted by Applicant establishes that, during the diligence period from August 2001 to August 2007, political, economic and legal conditions, aided by Applicant and Project Proponents, allowed construction of the ALP, as currently configured, and the partial development of Applicant's ALP Water Rights.

26. The Court finds that the Applicant took sufficient steps during the diligence period to establish its exercise of reasonable diligence in developing its conditional water rights that are the subject of this application.

C. CONCLUSIONS OF LAW

27. Applicant, a political subdivision of the state of Colorado, has a statutory duty to promote the conservation, use and development of the water resources of the San Juan and Dolores rivers and their principal tributaries, C.R.S. § 37-47-101 (2005), and has the authority to hold water rights in the name of the District "for the use and benefit of the ultimate appropriators,

and to perform all acts and things necessary to secure an adequate supply of water, present and future, for irrigation, mining, manufacturing, and domestic purposes within said districts.” C.R.S. § 37-47-107(1)(c) (2005).

28. Applicant exercised reasonable diligence in its efforts during this diligence period (August 2001 through August 2007) to put its decreed conditional water rights to beneficial use in the manner required by Colorado law. To establish diligence, an applicant must show “the steady application of effort to complete the appropriation in a reasonably expedient and efficient manner under all the facts and circumstances. *See* C.R.S. § 37-92-301(4)(b); *Municipal Subdistrict v. Oxy USA, Inc.*, 990 P.2d 701 (Colo. 1999); *Municipal Subdistrict v. Chevron Shale Oil Co.*, 986 P.2d 918 (Colo. 1999).

29. The water court’s determination of reasonable diligence is a case by case determination, considering all the relevant evidence, and the following nonexclusive list of factors: 1) economic feasibility; 2) the status of required permits and governmental approvals; 3) expenditures made to develop the appropriation; 4) the ongoing conduct of engineering and environmental studies; 5) the design and construction of facilities; and 6) the nature and extent of land holdings and contracts demonstrating the water demand and beneficial uses which the conditional right is to serve when perfected. *Oxy USA*, 990 P.2d at 706; *Chevron Shale Oil*, 986 P.2d at 921. In considering these factors, the Court takes into consideration, as relevant here, the size and complexity of the project and the intervention of outside delaying factors. *Oxy USA*, 990 P.2d at 706 (citation omitted). Work on one feature of the project may be sufficient to demonstrate diligence towards development of the entire project. *Id.* An individual applicant’s financial efforts may be considered as part of the diligence finding. *Id.* at 707.

30. The “can and will” test must be met by an applicant for a finding of reasonable diligence. *Municipal Subdistrict, Northern Colorado Water Conservancy Dist. v. Getty Oil Exploration Co.*, 997 P.2d 557, 564 (Colo. 2000); *OXY USA*, 990 P.2d at 707. The legislative intent implied in C.R.S. § 37-92-305(9)(b), in diligence proceedings, is to require that the Applicant demonstrate:

that the decreed conditional appropriation is being pursued in a manner which affirms that capture, possession, control, and beneficial use of water can and will occur in the state, thereby justifying continued reservation of the antedated priority pending perfection of a water right.

Dallas Creek Water Co. v. Huey, 933 P.2d 27, 37 (Colo. 1997) (footnote omitted). Conditions which are to some extent dependent on future developments not within the applicant’s control, are denominated as “factors” in determining whether the “can and will” statute has been satisfied, rather than as elements of the applicant’s proof. *See Public Serv. Co. v. Board of Water Works*, 831 P.2d 470, 478-79 (Colo. 1992).

31. Work done in development of a conditional water right must be evaluated under the circumstances in existence at the time it is performed. *Application of Talco, Ltd.*, 769 P.2d 468, 475 (Colo. 1989). Thus, the Court properly considers only that evidence relevant to the applicable diligence period. The application for findings of reasonable diligence must be considered on a case-by-case basis in light of all the factors presented. *Id.*

32. Applicant has met the "can and will" standard, which requires that the Applicant show, pursuant to C.R.S. § 37-92-305(9)(b), a substantial probability that the intended appropriation can and will reach fruition. *Oxy USA, Inc.*, 990 P.2d at 708. Specifically an applicant for a finding of reasonable diligence must show that an intended project is currently technically feasible and that, when conditions are more favorable, the applicant intends to complete the project. *Id.* Here, as detailed in the Findings of Fact for Diligence, above, Applicant has established that it had no intent to abandon any portion of the Project and that significant features of the Project are currently under construction.

33. The Court concludes that the Applicant is not engaged in speculation in holding the water rights at issue here. Applicant's authorizing legislation establishes that ALP is precisely the kind of water project the Applicant would be expected to develop in fulfilling its statutory responsibilities. As a result, the Court concludes that Applicant has met the "anti-speculation" requirements, which prohibit obtaining a water right merely for speculative purposes or sale expectancy. *Oxy USA*, 990 P.2d at 708-09. As detailed in the Findings of Fact for Diligence above, the Court has determined that during the diligence period the Applicant applied a steady effort to promote the construction of the Project. The Applicant's continued financial investment in promoting Project construction demonstrates that the Applicant intends to pursue completion of the Project in the future when conditions improve, so that the benefits from the Project will inure to the water users and citizens in the District. There is no evidence that the Applicant has a speculative intent for the decreed water rights.

34. As a project supplying water to satisfy the water rights decreed to the United States in trust for the benefit of the Ute Tribes, ALP is not subject to traditional cost-benefit analysis. Thus, the Court finds that factors related to economic feasibility of the ALP, to the extent that it will provide a water supply to the Tribes, are not relevant to diligence. Furthermore, a prima facie case of economic feasibility of the Project is demonstrated by the evidence of Congressional appropriations for construction of the Project and that the ALP is being constructed. *See Oxy USA*, 990 P.2d at 707.

35. As detailed in the Court's Findings of Diligence, above, under the particular facts and circumstances of this case, Applicant has established the factors supporting a finding of reasonable diligence articulated by the Colorado Supreme Court. Applicant worked steadily to obtain the appropriations needed for Reclamation to construct ALP. Activities showing reasonable diligence may include project planning, environmental studies, project design, project financing, and other miscellaneous activities such as litigation, research projects and studies. *Chevron Shale Oil*, 986 P.2d at 924; *Oxy USA*, 990 P.2d at 706. Applicant has undertaken all of

these activities during the diligence period and so has demonstrated reasonable diligence in putting the decreed conditional water rights to beneficial use.

36. When a project, like ALP, has several integrated features, work on one area of the project is considered activity appropriate for a finding of diligence for the project as a whole. C.R.S. § 37-92-301(4)(b); *see also Municipal Subdist. N. Colo. Water Conservancy Dist.*, 997 P.2d at 564. ALP is an integrated water project. The provisions of the 2000 Amendments stating that the Project may not be used for irrigation purposes without further authorization from Congress do not render Applicant's conditional water rights for irrigation use abandoned or forfeited. The Court finds that Applicant has been unable to use its water rights for irrigation purposes because of economic and political conditions beyond its control and that Applicant has demonstrated the intent to use its irrigation rights should conditions change. Pursuant to C.R.S. § 37-92-301(4)(b), the Court further finds that the actions demonstrating reasonable diligence in relation to the Project features authorized by the 2000 Colorado Ute Settlement Act Amendments also allow a finding of reasonable diligence for all of the Project features.

37. This Court has jurisdiction over these proceedings and over all persons and water rights affected thereby, whether they have appeared or not. Full and adequate notice of these proceedings and the matters adjudicated herein has been given in the manner required by Law.

38. Applicant has met all burdens of proof and complied with all standards applicable to the water right requested herein.

D. DECREE

THEREFORE, IT IS ORDERED AND ADJUDGED that the Application of the Southwestern Water Conservation District is GRANTED as follows:

1. The provisions of the General Findings of Fact, and Background for Water Rights at Issue Herein, Findings of Fact for ALP Construction and Reasonable Diligence, and Conclusions of Law are hereby incorporated into this Ruling. The Court, having carefully considered the information submitted by the Applicant and having completed the investigations necessary to make a determination in this matter, does find that Applicant has shown that it has exercised reasonable diligence in the development of its conditional water rights for the ALP.

2. Pursuant to Colorado law, "the measure of reasonable diligence is the steady application of effort to complete the appropriation in a reasonably expedient and efficient manner under all the facts and circumstances. When a project or integrated system is comprised of several features, work on one feature of the project or system shall be considered in finding that reasonable diligence has been shown in the development of water rights for all features of the entire project or system." C.R.S. § 37-92-301 (4)(b). The ALP is an integrated system, and all diligence efforts apply to all features of the Project.

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

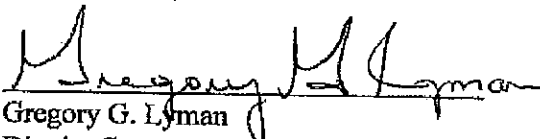
4. Applicant shall abide by the terms and conditions in Case No. 80CW237 for use of the ALP Water Rights at the alternate points of diversion and alternate locations of storage.

5. Applicant shall comply with the terms of the Stipulation between Applicant and Opposer Margaret Kral dated January 16, 2008, and attached as an appendix to this decree.

6. During the month of August, 2013 and every six years thereafter until the water rights decreed conditional herein are decreed final, the owner or user thereof, if they desire to maintain the same, shall file an application for a finding of reasonable diligence with the Water Clerk of this Court.

DATED this 16th day of January 2008.

BY THE COURT:


Gregory G. Lyman
District Court Judge