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

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Pursuant to C.R.C.P. 59(a), the United States of America, the State of Colorado, the Ute Mountain Ute Tribe, the Southern Ute Indian Tribe and the Southwestern Water Conservation District ("District") (collectively, "Moving Parties") respectfully request the Court to reconsider those limited portions of its *Findings of Fact, Conclusions of Law and Decree* (Nov. 9, 2006) ("November 9 Decree") which impose monthly and annual diversion limits on the water supply for the Animas-La Plata Project ("ALP" or "Project") for the benefit of the Ute Mountain Ute Tribe and the Southern Ute Indian Tribe (collectively, "Ute Tribes" or "Tribes"). *See* November 9 Decree ¶¶ 3.b., c., at 35-36. The Moving Parties further request the Court to hold oral argument on this Motion.

I. INTRODUCTION AND BACKGROUND.

In these cases, the Moving Parties have asked the Court to modify the *Consent Decree*, Case No. W-1603-76F (Dec. 19, 1991) and *Consent Decree*, Case No. W-1603-76J (Dec. 19, 1991) (collectively, "1991 Consent Decrees") (Exs. 2, 3)[1] governing the resolution of the reserved right claims of the Ute Tribes to conform to the Colorado Ute Settlement Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-258 to 2763A-266, Title III, §§ 301-03 (2000) ("2000 Settlement Act Amendments") (Ex. 1 at 4-12 of 12).[2] As part of those

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[1]In order to avoid unduly lengthy citations, this memorandum cites only to the 1991 Consent Decree for the Animas River. Similar provisions are contained in the 1991 Consent Decree for the La Plata River. A copy of Paragraph 6.A. describing the Ute Mountain Ute Tribe's rights from ALP under the 1991 Consent Decree is attached as Exhibit 1. Although the quantities are different, Paragraph 7.A. describes the Southern Ute Indian Tribe's rights to water supplied from ALP with the same language.

[2]The citation is to the page(s) referenced and the total number of pages in the exhibit.

modifications, the Moving Parties requested the Court to approve a change in use from agricultural to municipal and industrial ("M&I") purposes for a portion of the Ute Mountain Ute Tribe's rights and to reduce the amount of water from ALP which may be depleted or consumed by the two Ute Tribes. The Moving Parties also asked the Court to extend the deadline by which the Ute Tribes must return to court in order to litigate their claims should the terms of the settlement not be completed in a timely manner.

To resolve the reserved rights claims of the Ute Tribes, the 1991 Consent Decrees required the construction of virtually all of ALP, a federal reclamation project. 1991 Consent Decrees ¶¶ 6.A., 7.A. (Ex. 2 at 13, 19 of 164). Under those Decrees, certain portions of the Project, sometimes referred to as Phase I, had to be constructed by 2000 or the Ute Tribes were entitled to return to court to litigate their reserved rights claims on the Animas and La Plata Rivers. *Id.* ¶¶ 6.A.v.b., 7.A.v.b. (Ex. 2 at 16-17, 22-23 of 164). By using ALP to supply Project allocations of water to the Ute Tribes, the settling parties were able to assure the Tribes of a reliable supply of water to meet their present and future needs without depriving existing State water rights holders of the water on which they had relied, in many instances for generations. The settlement avoided what threatened to be long and bitter litigation over the nature, quantification and scope of the Ute Tribes' reserved rights claims. In the 2000 Settlement Act Amendments, Congress acknowledged that the terms of the original settlement, as incorporated in the 1991 Consent Decrees, could not be fulfilled and authorized the settlement of the Ute Tribes' claims through the allocation of a lesser amount of water for use by the Tribes from a greatly downsized Project which would deplete considerably less water than would have

occurred under the Phase I facilities. *See* 2000 Settlement Act Amendments § 301(b)(5) (Ex. 1 at 5 of 12).

The task which the Moving Parties asked the Court to undertake was complex. While only Congress has the authority to authorize a tribal settlement of the nature at issue here, only this Court has the authority to modify its own decrees. The 1991 Consent Decrees had struck a delicate balance between the provisions for State administration of the Ute Tribes' water rights (including procedural issues) and the protections afforded those rights under federal law. The Court's job in evaluating the requested modifications was made more difficult by Citizens Progressive Alliance's ("CPA") insistence that it was entitled to look behind the 1991 Consent Decrees and challenge the nature and extent of the Ute Tribes' rights recognized in those decrees. CPA also sought to challenge various federal decisions related to the merits of ALP, despite the fact that those decisions were not within the jurisdiction of the Court.

In these circumstances, the Moving Parties may have failed to explain adequately to the Court that the rights recognized for the Ute Tribes under the 1991 Consent Decrees are for a water supply or allocation from ALP and do not constitute an independent right to divert water from the Animas River or to store water in Ridges Basin Reservoir. Rather, the Ute Tribes are to take their water allocations from ALP, which receives its water supply pursuant to the water rights decreed to the District in Case Nos. 1751-B and 807-C and changed in Case No. 80 CW 237 and for which a finding of reasonable diligence was recently granted in Case No. 01 CW 54. *See Decree of Adjudication*, Water Div. No. 7, Case No. 1751-B (Mar. 21, 1966) (CPA Ex. 19); Animas La Plata Project, Water Div. No. 7, Case No. 807-C (CPA Ex. 18); *Findings of Fact and*

Decree Approving Application for Change of Water Right, Case No. 80 CW 237 (Aug. 7, 1984) (CPA Ex. 33) (collectively, "ALP Decree"). *See also Findings of Fact, Conclusions of Law and Decree*, Case No. 01 CW 54 (Nov. 9, 2006) ("November 9 Diligence Decree"). The water supply for the Project depends on the ALP Decree which is not before the Court in these cases.[3] As a result, the Moving Parties submit that it is unnecessary to include monthly and annual limits on the diversions to the Project under the ALP Decree for the benefit of the Ute Tribes either (1) to ensure that no enlargement of the Tribal rights results from the modification of the 1991 Consent Decrees or (2) to prevent injury to other water rights holders on the Animas River. *See* November 9 Decree ¶¶ 3.b., c., at 35-36. In the press of the litigation, the Moving Parties may not have fully described their position on this critical matter. This motion seeks to correct any such oversight.

The key issue with the inclusion in the November 9 Decree of monthly and annual limits on the "ALP Diversions from the Animas River" for the benefit of the Ute Tribes is that such limits interfere with the operation of the downsized Project, as designed and modeled in the *Animas-La Plata Project, Colorado-New Mexico, Final Supplemental Environmental Impact Statement* (July 2000) ("2000 FSEIS") (Ex. 10), to provide the Ute Tribes with their Project allocations authorized under the 2000 Settlement Act Amendments. *See* November 9 Decree ¶¶ 3.b., c., at 35-36; 2000 Settlement Act Amendments, § 302(a)(1)(A)(ii)(I), (II) (Ex. 1 at 7 of 12). Under that legislation, Congress limited the Tribes' allocations of water from the Project to

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[3]The November 9 Diligence Decree includes none of the limitations and conditions on the diversions that the Court imposed in the November 9 Decree.

defined "average annual depletions" and, among other things, mandated the Secretary of the Interior ("Secretary") to operate the reduced Project to meet the specific average annual depletions allocated to each of the Project water users. 2000 Settlement Act Amendments § 302 (a)(1)(A)(ii) (Ex. 1 at 7 of 12). Neither the 2000 Settlement Act Amendments nor the 1991 Consent Decrees impose any limits on the diversions under the ALP Decree required to supply the total Project water allocation, including the water that will be used by the Ute Tribes or by any other Project water user. In short, both the 1991 Consent Decrees and Congress in the 2000 Settlement Act Amendments always envisioned that the Ute Tribes would receive allocations of water supplied by ALP and that the diversions and storage for the Project to satisfy those allocations would be constrained by the ALP Decree and, in the case of the 2000 Settlement Act Amendments, by the reductions to the Project facilities required by that legislation. Certainly, it was never contemplated that the Ute Tribes' water supply from the Project would be singled out for independent diversion limits when no other Project participant is subject to similar restraints.

In any event, it is not necessary to impose monthly and annual limits on the ALP diversions to the Project for the benefit of the Ute Tribes to protect other Project water users or other water rights holders on the Animas River. As the Court recognized, the operation of the downsized Project under the requested modifications to the 1991 Consent Decrees contained in the *Stipulation for Amendment to Consent Decree*, Case Nos. W-1603-76J and W-1603-76F (Aug. 23, 2002) ("Stipulation to Amendment"), will not adversely affect the rights of other Animas River water rights holders, regardless of the inclusion of the disputed diversion limits. November 9 Decree ¶¶ 55-58, at 19-20. In addition, under the 2000 Settlement Act Amendments,

Congress required the Secretary to operate the authorized facilities to deliver to all of the project water users -- not just the Ute Tribes -- the "municipal and industrial allocations" necessary to provide their respective "average annual depletions." 2000 Settlement Act Amendments § 302(a)(1)(A)(ii) (Ex. 1 at 7 of 12).[4] Finally, examination of the anticipated operation of the Project under the 2000 Settlement Act Amendments shows that the necessary modifications to the 1991 Consent Decrees should not be construed to expand the Ute Tribes' rights.

II. ARGUMENT.

A. THE DIVERSIONS TO ALP FOR THE PROJECT WATER SUPPLY ALLOCATED TO THE UTE TRIBES ARE GOVERNED BY THE ALP DECREE.

1. Under the 1991 Consent Decrees, the Ute Tribes' Rights Were Defined as "Allocations of Water from the Animas-La Plata Project."

Under the 1991 Consent Decrees, the Ute Tribes were entitled to "[a] water right to water supplied from the Animas-La Plata Project." 1991 Consent Decrees ¶¶ 6.A., 7.A. (Ex. 2 at 13, 19 of 164). The rights were further described as "allocations of water from the Animas-La Plata Project, as measured at Ridges Basin Dam or Reservoir or at the point on the Animas River where diversions are made to the Durango Pumping Plant . . . . " *Id.* ¶¶ 6.A.i., 7.A.i. (Ex. 2 at 13, 19 of 164). The Ute Tribes, like other Project water users, may take their Project water supply prior to the storage of that supply in the Reservoir. *Id.* Under the terms of the 1991 Consent Decrees, the Tribes' rights did not possess all of the independent attributes of a typical Colorado state law

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[4]ALP is a multistate project in which the congressionally-identified participants are both Indian Tribes and non-Indian entities located in both New Mexico and Colorado. 2000 Settlement Act Amendments § 302(a)(1)(A)(ii) (Ex. 1 at 7 of 12).

water right but rather constituted a judicially and congressionally confirmed entitlement to a portion of the ALP water supply that the Tribes could use in accordance with the terms of the 1991 Consent Decrees.

To be sure, under paragraph 12.D. of the 1991 Consent Decrees, the Ute Tribes have the right to seek a change to their water rights, including a change to a place of use outside their Reservations, in which case the right would become a state law right. *Id.* ¶ 12.D. (Ex. 2 at 28-29 of 164). In these cases, however, the Ute Tribes do not seek such a change or otherwise to segregate their share of the Project water supply from that of other Project water users under the ALP Decree. As a result, the complex administration issues that might be associated with such changes are not presently before the Court and are not now appropriate for resolution.

2. <u>The 1991 Consent Decrees Do Not Contain Limits on the Diversions to ALP for the Benefit of the Ute Tribes</u>.

a. Project Water Supply Provisions.

The 1991 Consent Decrees contain a number of provisions defining the manner in which the Ute Tribes may take and use their judicially and congressionally recognized water supply from the Project. Certain of those provisions described the amount of water from the Project which the Ute Tribes may "receive and beneficially use." 1991 Consent Decrees ¶¶ 6.A.i., 7.A.i. (Ex. 2 at 13-14, 19-20 of 164) (stating, for example, that the Ute Mountain Ute Tribe was entitled to an allocation of water from ALP with "a maximum of 6,000 acre-feet per annum of municipal and industrial water"). Under the Stipulation for Amendment approved by the Court, no changes were proposed for the introductory paragraph of paragraphs 6.A. and 7.A. of the 1991 Consent Decrees

that establish that the Ute Tribes' rights were to "water supplied from the Animas - La Plata Project." Stipulation for Amendment ¶ 2, at 1; *see* 1991 Consent Decrees ¶¶ 6.A., 7.A. (Ex. 2 at 13, 19 of 164). The Moving Parties agreed to change Paragraphs 6.A.i. and 7.A.i to delete the prior water supply allocations and, instead, to define the Ute Tribes' water allocations from the downsized Project solely in terms of the "average annual depletions" set aside for each of the Ute Tribes under the 2000 Settlement Act Amendments. Stipulation for Amendment ¶ 2, at 1; 2000 Settlement Act Amendments § 302(a)(1)(A)(ii)(I), (II) (Ex. 1 at 7 of 12). In its November 9 Decree at paragraphs 3.b. and c., however, the Court used the water supply provisions and deemed historical consumptive use provisions from the 1991 Consent Decrees to develop annual limits on the ALP diversions from the River for the benefit of the Ute Tribes. November 9 Decree ¶¶ 3.b., c., at 35-36; *see also id.* ¶ 41, at 16; ¶ 68, at 22; ¶ 73, at 23; ¶ 9, at 30; ¶ 15, at 31.[5]

Under the water supply provisions of the 1991 Consent Decrees, the Ute Tribes were entitled to "receive and beneficially use" certain quantities of water supplied by the Project. 1991 Consent Decrees ¶¶ 6.A.i., 7.A.i. (Ex. 2 at 13, 19 of 164). Those provisions did not establish Tribal rights to divert any amounts of water from the Animas River independent of the ALP

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[5]The Court reduced the quantities of water set forth in Paragraphs 6.A.i. and 7.A.i. to the amounts that would have been consumed under the deemed historical beneficial use provisions contained in Paragraphs 6.A.iii.b. and 7.A.iii.b. Assuming for the sake of argument that the allocations in Paragraphs 6.A.i. and 7.A.i. could be viewed as limits on the diversions by the Project under the ALP Decree for the benefit of the Ute Tribes (when instead they were limits on the amounts the Ute Tribes could "receive and beneficially use" from the Project) there is no justification to reduce those amounts to the deemed historical consumptive use amounts.

Decree. *See id.*[6] Nor did they add any limitations to the diversions that could be made under the ALP Decree to supply the Ute Tribes' allocations from the Project. *See id.*[7] There were no other provisions in the 1991 Consent Decrees that contemplated, let alone established, ALP diversion limits for supplying the Ute Tribes' Project water allocations. *Cf.* November 9 Decree ¶ 39, at 15 (recognizing that the 1988 Settlement Act did not alter ALP's size or capacity under the ALP Decree).

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[6]The Moving Parties and others have occasionally referred to the water allocation amounts as "diversions" in recognition of the fact that under the 1991 Consent Decrees, those amounts limited the deliveries to the Ute Tribes from the Project. The Moving Parties never meant to suggest that those amounts served as limits on the diversions from the Animas River to the Project. While a portion of Bruce Whitehead's testimony may seem to imply diversion limits from the River for the Ute Tribes, Mr. Whitehead corrects this reference to define the amounts for the Tribes in the 1991 Consent Decrees as an "allocation of the Animas-La Plata water right." *Reporter's Partial Transcript of Trial, Whitehead Testimony* at 14:4 (Aug. 10, 2006) (attached hereto as Exhibit 2). He adds that

> [t]he water right that this [Ute Tribal allocations] would be diverted under would be the Animas-La Plata water rights in case -- originally decreed in B-1751 and in change to alternate points of diversion in 80CW237. The limitation would be the 600 cfs amount originally decreed to those rights.

Id. at 14:23 to 15:3.

[7]It is impossible to predict the diversion patterns for the ALP under the ALP Decree. The pumping regime from the Animas River will vary from year to year depending on hydrologic conditions since the underlying premise of the Project is to divert during times of high flow. Thus, there is no established relationship between deliveries of water from the Project and the diversion of water into Ridges Basin Reservoir under the ALP Decree.

b. Tribal Change of Use Provisions.

Other provisions of the 1991 Consent Decrees established rules to protect other Project water users in the event the Ute Tribes sought to change the use of their Project water supply prior to actually putting the water to use. *See* 1991 Consent Decrees ¶¶ 6.A.iii., 7.A.iii. (Ex. 2 at 15-16, 20-21 of 164). Paragraphs 6.A.iii.a. and 7.A.iii.a. established theoretical "monthly deliveries of the available annual supply." *Id.* ¶¶ 6.A.iii.a., 7.A.iii.a. (Ex. 2 at 15, 20 of 164). These provisions were applicable if a Tribe sought to change its water rights prior to actually putting the water to use. *Id.* Under the Stipulation for Amendment, the Moving Parties agreed to eliminate these provisions because they addressed the use of the Phase I facilities for the delivery of water to Project water users and were written to account for the fact that the Phase I delivery facilities had to handle both irrigation and municipal & industrial water. *See* Stipulation for Amendment ¶ 2, at 1. The Court, nevertheless, inserted them into the November 9 Decree as monthly limitations on ALP diversions supplying water to the Project for use by the Ute Tribes. November 9 Decree ¶¶ 3.b., c., at 35-36.

The change of use provisions in the 1991 Consent Decrees were meant to ensure that the ALP water supply available for other Project water users would not be injured if the Ute Tribes sought a change of their irrigation or M&I water rights supplied by the Project. *See* 1991 Consent Decrees ¶¶ 6.A.iii., 7.A.iii. (Ex. 2 at 15-16, 20-21 of 164). These provisions did not seek to restrict the diversions that could be made to the Project under the ALP Decree to provide the allocations to the Ute Tribes but instead provided a theoretical delivery schedule from the Project for the tribal use of Project water. *Id.* Indeed, it would undermine the very purpose of a water storage project,

such as ALP, if diversions from the Animas River for storage in the Project were limited to the same time periods as the stored water would actually be delivered from ALP and put to use.

Any doubt that these provisions were meant to protect other Project water users, rather than to limit the ALP diversions for the benefit of other Animas River water rights holders, is resolved by examination of paragraphs 6.A.iii.c. and 7.A.iii.c., which provide that subparagraphs a. and b. may be changed in the absence of Court approval by agreement among the State, the Ute Tribes, the United States Bureau of Reclamation and the Animas-La Plata Water Conservancy District ("ALP District"). *Id.* ¶¶ 6.A.iii.c., 7.A.iii.c. (Ex. 2 at 15-16, 20-21 of 164). And, of course, all of those parties, except for the ALP District which supported the 2000 Settlement Act Amendments and receives a water supply from the downsized Project, executed the Stipulation for Amendment. Stipulation for Amendment ¶ 1, at 1.

There is no need for additional provisions to protect other Project water users regarding the operation of the downsized ALP and the distribution of Project water.[8] Certainly, none of the Project participants have asked for such language. Moreover, the Secretary is required to deliver to each Project participant within the constraints of the ALP Decree, the "municipal and industrial water allocations" necessary to provide each participant's "average annual depletion[s]" as set forth in the statute. 2000 Settlement Act Amendments § 302(a)(1)(A)(ii) (Ex. 1 at 7 of 12). In addition, each Project participant is required to enter into an agreement with the Secretary regarding the

[8]The Court recognized that its concern in these proceedings was with the effect on other state water rights holders, not other recipients of water from the Project. November 9 Decree ¶ 81, at 25 ("The operation of ALP and distribution of project water among ALP participants is not the concern of this Court.").

repayment of the costs applicable to its share of the project water supply. *Id.* § 302(a)(3) (Ex. 1 at 7-8 of 12). Those contracts add a further layer of protection for Project users to ensure that the Secretary operates the Project in accordance with the statutory mandate to provide each Project water user with the allocation to which it is entitled. In other words, the Secretary is required to provide the Ute Tribes and other project participants with their statutory allocation of water and the Ute Tribes have no right to change their water rights in a way which would deprive other Project water users of their statutory water allocations as supplied either from storage or the Animas River.

B. MONTHLY AND ANNUAL LIMITS ON THE DIVERSIONS UNDER THE ALP DECREE ARE NOT NECESSARY TO PREVENT INJURY TO OTHER ANIMAS RIVER WATER RIGHTS HOLDERS OR TO ENSURE THAT THERE IS NO ENLARGEMENT OF THE TRIBAL RIGHTS UNDER THE 2000 SETTLEMENT ACT AMENDMENTS.

1. The Court's Findings Recognize That the Requested Decree Modifications Will Not Injure Other Animas River Water Rights Holders.

Because no change is sought to the ALP Decree which continues to control the diversions and storage of water for ALP, it is difficult to envision that the proposed modifications to the 1991 Consent Decrees could adversely affect other water rights holders on the Animas River. In the November 9 Decree, the Court found that under the operation of the downsized ALP, "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." November 9 Decree ¶ 58, at 19-20. The Court's finding was based on the testimony of Dr. Leo Eisel, who explained that the required seasonal by-pass flows for the downsized Project would be sufficient in all instances to meet the demands of the downstream

Colorado water rights.[9] *Id.* ¶¶ 55-57, at 19 ("[I]t is appropriate to consider the overall impact of the [reduced] project."). The Court also requires the United States to notify it and affected water users in advance of any change in those by-pass requirements. *Id.* ¶ 3.d., at 36. The Court further found that the testimony of CPA's witnesses, 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." *Id.* ¶ 84, at 25-26.[10] In addition, the Court held that annual variations in the Tribes' uses of water from ALP would not affect other water rights holders on the Animas River. *Id.* ¶ 81, at 25. The Court also retained jurisdiction to reconsider any injury issues that may arise. *Id.* ¶ 77, at 24.[11]

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[9]Dr. Eisel's conclusions are further described in the *Engineering Report on Purported Injury to Water Rights from the Animas-La Plata Project* (July 29, 2005) ("Eisel Report") (Ex. 20 at 12-13 of 13).

[10]No other Animas River water right holders objected to the proposed changes. The District and the State, who are both charged with protecting the interests of state water right holders, executed the Stipulations for Amendment and support the proposed changes to the 1991 Consent Decrees.

[11]The Court also required the United States and each Ute Tribe to file a report with the Court in January 2009 and every sixth calendar year thereafter, "demonstrating progress in applying its reserved waters to beneficial use" and to notify all persons who may be affected by any proposed use "of the proceeding." November 9 Decree ¶¶ 3.e., f., at 36. The Moving Parties assume that the Court has issued this requirement to require the United States and Tribes to report on their progress in applying reserved water to beneficial use and does not intend "to cause the forfeiture of federal reserved claims if the United States [or the Tribes] fail[] to use reasonable diligence in developing [their water rights]." *United States v. City and County of Denver, By and Through Bd. of Water Comm'rs*, 656 P.2d 1, 34 (Colo. 1982). The Moving Parties also assume that the Court intends that notice be accomplished through the resume process.

Accordingly, there is no need to impose the monthly and annual ALP diversion limits contained in paragraphs 3.b. and c. of the November 9 Decree to protect other water rights holders on the Animas River. November 9 Decree ¶¶ 3.b., c., at 35-36. Those water rights holders are fully protected by (1) the limit on the diversions and storage for the Project in the ALP Decree, (2) the operation of the Project in accordance with the 2000 FSEIS and *Record of Decision, Animas La Plata Project/Colorado Ute Indian Rights Water Settlement, Final Supplemental Environmental Impact Statement, July 2000* (Sept. 25, 2000) ("ROD") (Ex. 11), including the by-pass requirements described by Dr. Eisel, and (3) the Court's retained jurisdiction. *See* ALP Decree ¶ 6, at 6-11, ¶¶ 2, 3, at 14 (CPA Ex. 33); 2000 FSEIS (Ex. 10); ROD (Ex. 11); Eisel Report ¶¶ 2, 3 (Ex. 20 at 12-13 of 13); November 9 Decree ¶ 77, at 24.

2. The Modifications to the 1991 Consent Decrees Should Not Be Deemed to Enlarge the Ute Tribes Water Rights Supplied from ALP So As to Limit the Implementation of the 2000 Settlement Act Amendments.

The proposed modifications to the 1991 Consent Decrees should not be deemed to expand the original Ute Tribes rights recognized in the 1991 Consent Decrees so as to prevent the implementation of the 2000 Settlement Act Amendments. *See* 2000 Settlement Act Amendments § 302(a)(1)(A)(ii) (Ex. 1 at 7 of 12); 1991 Consent Decrees ¶¶ 6.A., 7.A. (Ex. 2 at 13-17, 19-24 of 164). To the contrary, the water rights that the Ute Tribes are to receive from the downsized ALP authorized by the 2000 Settlement Act Amendments are substantially reduced from those to which they were entitled under the 1991 Consent Decree. *See* 2000 Settlement Act Amendments § 301(b)(5) (Ex. 1 at 5 of 12). In seeking to modify the 1991 Consent Decrees, the Moving Parties have requested only those modifications required to permit the settlement of the Ute Tribes claims

on the terms authorized by Congress in the 2000 Settlement Act Amendments. *See* Stipulation for Amendment ¶ 1, at 1. The requested modifications were intended to permit the Secretary to operate the downsized Project in accordance with the 2000 Settlement Act Amendments and are not intended to decree any expansion of the tribal rights and should not be viewed as such.

a. The Project Is Greatly Downsized.

First, the downsized ALP from which the reduced Ute Tribes' allocations will be supplied under the ALP Decrees is substantially smaller than Phase I of the Project which was required to be constructed under the 1991 Consent Decrees to settle the Ute Tribes' reserved rights. *See* 2000 Settlement Act Amendments § 301(b)(5) (Ex. 1 at 5 of 12). Congress made it crystal clear that the settlement authorized by the 2000 Settlement Act Amendments was based on the decreased depletions allocated to the Ute Tribes from the downsized Project. *See id.* § 303, adding Section 18(a) ("[T]he construction of the facilities described in section 6(a)(1)(a) [the downsized Project], the allocation of the water supply from those facilities to the Tribes as described in that section, and the provision of funds to the Tribes . . . shall constitute final settlement of the tribal claims to water rights on the Animas and La Plata Rivers in the State of Colorado.") (Ex. 1 at 12 of 12). The operation of the downsized ALP can be compared to the operation of Phase I to further demonstrate that the Project water supply is reduced under the 2000 Settlement Act Amendments.

Under Phase I of ALP, the anticipated Project water supply was 169,710 acre-feet per year ("afy"), with a Project depletion for Phase I of 128,600 afy. *Final Supplement to the Final Environmental Statement* (Apr. 1996) ("1996 FSFES") (Ex. 6 at II-22). Ridges Basin Reservoir was designed with a total capacity of 280,000 af with an active storage capacity of 130,000 af. *Id.*

The facilities authorized for construction under the 2000 Settlement Act Amendments are greatly reduced in comparison. The downsized Project contemplates a water supply of 111,965 afy with an average annual depletion of only 57,100 afy. 2000 FSEIS (Ex. 10 at 2-10). The downsized Ridges Basin Reservoir will have a capacity of only 120,000 af with an active storage capacity of 90,000 af. *Id.* at 2-102; ROD (Ex. 11 at 3 of 29). In sum, the downsized Project, which would provide the Ute Tribes' rights under the 2000 Settlement Act Amendments, has a smaller reservoir and a diminished water supply that provides for the depletion or actual consumption of water of less than half of that available under Phase I of the Project. *See also* November 9 Decree ¶ 47, at 17.

b. The Tribal Depletions Are Greatly Reduced under the 2000 Amendments.

Second, the amount of water from the downsized Project that the Ute Tribes may actually deplete in accordance with the 2000 Settlement Act Amendments is decreased by over 20,000 afy from that allocated under the 1991 Consent Decrees. *See generally Proposed Findings of Fact and Conclusions of Law and Decrees* at 16 (Jul. 21, 2006). Depletions represent the amount of water actually consumed by the Project or Project water users since it constitutes water that is "not returned to a river system . . . ." November 9 Decree ¶ 46, at 17. Water returned to a river system is ultimately available for use by other water users. Accordingly, depletions (or the amounts that will be actually consumed) are the critical attribute of the Ute Tribes' entitlement under the 2000 Settlement Act Amendments which, like the 1991 Consent Decrees, provide the Ute Tribes with water from ALP rather than providing the Ute Tribes with an independent right to divert or store

water from the Animas River. Thus, in terms of the water that would be available from the Project for the Ute Tribes' exclusive consumption, the quantities required for the settlement of the tribal reserved rights claims were substantially diminished by the 2000 Settlement Act Amendments.

c. The 2000 Settlement Act Amendments or Stipulation for Amendment Should Not be Deemed to Otherwise Expand or Enlarge the Ute Tribes'Rights.

Third, examination of the anticipated operation of the Project under the 2000 Settlement Act Amendments shows that the necessary modifications to the 1991 Consent Decrees should not be construed to expand the Ute Tribes' rights. Because the 2000 Settlement Act Amendments defined the Ute Tribes' rights solely as an allocation of water from the Project necessary to supply each Tribe with 16,525 afy of average annual depletions rather than as a certain allocation of the Project water supply, the Stipulation for Amendment did not include a Project water supply limit for the Ute Tribal rights that would parallel the water supply or allocation numbers found in the 1991 Consent Decrees. *See* 2000 Settlement Act Amendments § 302(a)(1)(A)(ii)(I), (II) (Ex. 1 at 7 of 12); 1991 Consent Decrees ¶¶ 6.A.i., 7.A.i. (Ex. 2 at 13-14, 19-20 of 164); Stipulation for Amendment. That is because the Ute Tribes have no entitlement under the 2000 Settlement Act Amendments to a specific portion of the Project water supply. *See* 2000 Settlement Act Amendments (Ex. 1). Instead, Congress directed the Secretary to operate the downsized Project to provide all of the recipients of Project water with the average annual depletions to which they are entitled under that legislation. *Id.* § 302(a)(1)(A)(ii) (Ex. 1 at 7 of 12). Given these unique circumstances, the fact that the portion of the Project water supply that the Secretary may utilize

to meet the decreased tribal depletion amounts required under the 2000 Settlement Act Amendments may exceed the water supply limits found in the 1991 Consent Decrees does not constitute an "enlargement" of the tribal rights of the nature that has concerned the Colorado water courts with regard to water rights developed under state law.[12]

The downsized ALP authorized by the 2000 Settlement Act Amendments will operate much differently from the intended operation of Phase I of ALP, which was required to be constructed under the 1991 Consent Decrees. *See generally* 2000 FSEIS at 2-10 (Ex. 10). The differences in operation are not surprising, given that water from the reconfigured and downsized Project will not be used for agricultural purposes and the Project does not presently include facilities for the delivery of water to the La Plata basin for any purpose. The downsized Project was designed on the assumption set forth in the 2000 FSEIS that the Ute Tribes' water uses, as well as the uses of other Project participants, would result in a 50% depletion of the Project water supply. *Id.*[13] A larger consumptive use factor, however, was used in the 1991 Consent Decrees for the Ute Tribes' rights. *See* 1991 Consent Decrees ¶¶ 6.A.iii.b., 7.A.iii.b. (Ex. 2 at 15, 21 of

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[12]It is for this reason that the United States and the Southern Ute Indian Tribe did not seek a change to the agricultural use allocation to the Southern Ute Indian Tribe. The Moving Parties do not believe that the water supply numbers are an attribute of the revised Ute Tribes' water rights under the 2000 Settlement Act Amendments and therefore did not see the need to address that issue where the Tribe's consumptive use under Paragraphs 7.A. and 12.D. of the 1991 Consent Decrees greatly exceeds the reduced average annual depletions to which it is entitled under the 2000 Settlement Act Amendments.

[13]The assumptions in the 2000 FSEIS about depletion rates are not binding on the Project water users. The actual depletion rates will depend, among other things, on the uses of the water supply and where those uses occur.

164); *see also* 1996 FSFES (Ex. 6 at II-22). The result is that while the Ute Tribes will be able to deplete or consume far less water under the 2000 Settlement Act Amendments than under the 1991 Consent Decrees, the Secretary may use a larger portion of the Project water supply to meet those reduced depletions. The critical point is that the defining attribute of the Ute Tribes' rights under the 2000 Settlement Act Amendments is consumptive use or depletion and not the amount of water diverted or stored on behalf of the Ute Tribes, or delivered for tribal use. The amount of the Project water supply not actually consumed will ultimately be available for other water users since, by definition, it returns to the stream system. The same factors apply to the other Project water users, as well, who also will be depleting substantially less water than they would have under Phase I.[14]

It is also useful to consider the nature of the right that the Ute Tribes received under the 1991 Consent Decrees. As discussed above, the 1991 Decrees awarded the Tribes an allocation of water from ALP, not an independent right to divert or store the waters of the Animas River. 1991 Consent Decrees ¶¶ 6.A., 7.A. (Ex. 2 at 13-14, 19-20 of 164). Because the diversions and storage for the Project are controlled by the ALP Decree which is not subject to change in these cases, the Ute Tribes never had a "right" to a specific diversion amount from the Animas River and thus there can be no increased appropriation of water from the Animas River under the requested modifications to the 1991 Consent Decrees. Nor do the Ute Tribes have an entitlement to a

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[14]The Court has already determined that there is a reasonable certainty that there will not be any injury to other water users from the operation of the downsized ALP. *See supra* Part II.B.1.

specific diversion amount under the 2000 Settlement Act Amendments. *See* 2000 Settlement Act Amendments (Ex. 1). Instead, the Ute Tribes -- just like the other Project water users -- are entitled to have the Project operated by the United States and the ALP Decree administered by the Division Engineer in a fashion that provides them with the average annual depletions required under the 2000 Settlement Act Amendments. *Id.* § 302(a)(1)(A)(ii) (Ex. 1 at 7 of 12).

There is nothing here that is unfair to other Project water users. Under the 2000 Settlement Act Amendments, as with the 1991 Consent Decrees, the Ute Tribes have no priority over other Project water users to the water supply from ALP. *See* 2000 Settlement Act Amendments (Ex. 1); 1991 Consent Decrees. Under that legislation, the Secretary must use the water supply from the downsized Project to meet the statutory water allocations authorized for each of the Project water users. 2000 Settlement Act Amendments § 302(a)(1)(A)(ii) (Ex. 1 at 7 of 12). Needless to say, while under the 2000 FSEIS and the ROD, the Project is anticipated to provide a full water supply in all but the driest years, hydrologic conditions may not permit satisfying the tribal depletion amounts or those for the other Project water users in each and every year.

In sum, the operation of ALP in accordance with the 2000 Settlement Act Amendments should not be construed to expand the Ute Tribes' rights under the 1991 Consent Decrees. As noted above, the Project that will supply water to the Tribes under the 2000 Settlement Act Amendments is substantially reduced and will take and consume far less water from the Animas River than the larger project mandated for settlement under the 1991 Consent Decrees. *See* 2000

Settlement Act Amendments § 302(a)(1)(A)(ii)(I), (II) (Ex. 1 at 7 of 12); 1991 Consent Decrees ¶¶ 6.A.i., 7.A.i. (Ex. 2 at 13-14, 19-20 of 164). As the Court found, the operation of that reduced Project pursuant to the controlling federal requirements is not likely to injure other Animas River water rights holders in Colorado. In addition, the amount of water available for actual consumption by the Tribes under the 2000 Settlement Act Amendments is more than 20,000 afy less than the "deemed historical consumptive use" available to the Tribes under the 1991 Consent Decrees. Moreover, in the absence of seeking a future change of use of the Ute Tribes' rights, the Tribes have no right to divert or store water from the Animas River independently of ALP or outside the scope of the ALP Decree. Finally, the diversions and storage for the Project have always been controlled by the District's ALP Decree and remain under those limits pursuant to the 2000 Settlement Act Amendments. In these circumstances, the necessary changes to the 1991 Consent Decrees do not constitute an enlargement of the Ute Tribes' rights.

C. LIMITS ON THE ALP DIVERSIONS FOR THE BENEFIT OF THE UTE TRIBES ARE NOT CONSISTENT WITH THE 2000 SETTLEMENT ACT AMENDMENTS.

As noted above, the differences between Phase I of ALP required for the settlement of the Ute Tribes' claims under the 1991 Consent Decrees and the downsized Project authorized by Congress in the 2000 Settlement Act Amendments were fully described in the environmental documentation that was included in the 2000 FSEIS (Ex. 10 at 2-9 to 2-10). That documentation recognized that the Project would be operated by the Secretary through the Bureau of Reclamation, to provide the Ute Tribes and the other Project participants with the required depletion amounts. There is nothing in any of those documents that implies that the Project

diversions required to provide the authorized depletion amounts would be constrained by monthly or annual limits derived from the 1991 Consent Decrees. *Id.*

When Congress determined to authorize the settlement of the Ute Tribes' claims by the construction of a much smaller ALP, it specifically relied on the environmental compliance documents associated with the downsized Project. 2000 Settlement Act Amendments §§ 301(b)(8)(E), (F), 301(b)(9) (Ex. 1 at 5 of 12) (indicating congressional review of the 2000 FSEIS and the ROD and the intent to enact legislation consistent with those documents); *see also* ROD (Ex. 11). Congress thus understood that the Project would -- and could -- be operated to provide the Ute Tribes with that portion of the Project depletions allocated to them under the 2000 Settlement Act Amendments.

The Court's imposition of monthly and annual limits on the ALP diversions under the ALP Decree to supply water to the Ute Tribes from the Project cannot be reconciled with Congress's directions to the Secretary in the 2000 Settlement Act Amendments. Examination of that legislation reveals no intent on the part of Congress to impose limits on the amount of water that could be diverted under the ALP Decree to supply water to the downsized Project. *See* 2000 Settlement Act Amendments (Ex. 1). Because the underlying environmental concerns were with depletions and not diversions, nothing in the legislation or its history suggests a Congressional desire to limit diversions for the Project. *Id.*

The diversion limits imposed by the Court in its November 9 Decree will conflict with the Secretary's operation of the downsized Project to provide the Ute Tribes with the depletion amounts authorized by Congress for settlement of the Tribal claims under the 2000 Settlement Act

Amendments. Indeed, these limitations may also interfere with the Secretary's obligations to other Project water users, as well as federal environmental responsibilities. *See* 2000 Settlement Act Amendments § 302(a)(1)(A)(i) (Ex. 1 at 6 of 12).

In sum, the limitations imposed by the Court in the November 9 Decree conflict with Congress's directives to the Secretary regarding the operation of ALP. Congress directed the Secretary to provide each Ute Tribe with an average annual depletion of 16,525 afy, which, based on the modeled 50% depletion rate, would equate to an average annual water supply of 33,050 afy.[15] The November 9 Decree however purports to limit the Ute Mountain Ute Tribe to a maximum annual diversion of 27,066 afy, which, using the estimated 50% depletion rate, would equate to a maximum annual depletion of only 13,533 afy. Similarly, the November 9 Decree purports to limit the Southern Ute Indian Tribe to a maximum annual diversion of 26,500 afy, which, using that same modeled depletion rate, would equate to a maximum annual depletion of only 13,250 afy. In other words, Congress directed the Secretary to use average annual depletions, while the November 9 Decree addresses maximum annual diversions. Applying the November 9 Decree, along with the modeled depletion rate, would result in each of the Ute Tribes receiving an inadequate water supply to provide for the average annual depletions set forth in the authorizing legislation.

As a general matter, the United States and the Ute Tribes contend that the State cannot impose conditions on the United States that are inconsistent with the Congressional provisions

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[15]It is important to recognize that the actual operation of the Project and the depletion rate for the Project water users will depend on the uses to which the Project water supply is placed.

authorizing the ALP. *California v. United States,* 438 U.S. 645 (1978); *see also* November 9 Diligence Decree ¶¶ 29-30. There is no need, however, to address this issue if the Court accepts Moving Parties' position that the ALP Decree governs diversions and storage from the Animas River, and that there is no need in these cases to impose monthly and annual diversion limits to protect other water rights holders on the Animas River or to prevent enlargement of the tribal rights.

III. CONCLUSION.

For the reasons stated above, the Moving Parties respectfully request the Court to delete paragraphs 3.b. and c. from the November 9 Decree and to amend its Findings of Fact and Conclusions of Law accordingly. The November 9 Decree and the related Findings and Conclusions restrict the diversions for the Project under the ALP Decree owned by the District. The monthly and annual diversion limits imposed by the Court are not required to protect other water right holders on the Animas River or to prevent enlargement of the Ute Tribes' rights. Such limits will interfere with Project operations and prevent delivery of water from ALP in accordance with the terms of the 2000 Settlement Act Amendments. Thus, the Court's amendment of the 1991 Consent Decrees set forth in the November 9 Decree does not provide for the settlement of the Ute Tribes' reserved rights claims in accordance with the terms authorized by Congress and jeopardizes the work of the Moving Parties over the last two decades to settle these cases.

A proposed revised decree is attached for the Court's consideration. If the Court wishes, the Moving Parties will provide the Court with suggested changes to the underlying Order.

Wherefore, for these and such other reasons as may appear to this Court following a hearing on this matter, the Moving Parties respectfully request the Court to reconsider those limited portions

of its *Findings of Fact, Conclusions of Law and Decree* (Nov. 9, 2006), which impose monthly and annual diversion limits on the water supply for the Animas-La Plata Project for the benefit of the Ute Tribes.

Date: Dec 15, 2006

Respectfully submitted,

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By: _____
Scott B. McElroy

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing *Moving Parties' Motion for Reconsideration* as noted, on this 15th day of December, 2006:

Via LexisNexis File and Serve on 12/15/06.

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DISTRICT COURT LA PLATA COUNTY, COLORADO 1060 E. Second Ave., Durango, Colorado 81301 Phone number: 970-247-2304	
IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE UNITED STATES OF AMERICA (BUREAU OF INDIAN AFFAIRS, SOUTHERN UTE AND UTE MOUNTAIN UTE INDIAN TRIBES) FOR CLAIMS TO THE ANIMAS RIVER IN DIVISION NO. 7, COLORADO	
	Case Number: W-1603-76F Case Number: W-1603-76J Case Number: 02CW85 Case Number: 02CW86 Division: Water Division 7

ORDER AMENDING NOVEMBER 9, 2006 DECREE

THIS MATTER is before the Court pursuant to the *Moving Parties' Motion for Reconsideration and Request for Oral Argument* (Dec. 15, 2006). The Motion is well taken and therefore GRANTED. THEREFORE, IT IS ORDERED AND ADJUDGED that:

1. This Court's *Decree* (Nov. 9, 2006) ("November 9 Decree"), is hereby amended as follows:

   a. Paragraphs 3.b. and 3.c. of the November 9 Decree are deleted; and
   b. Paragraphs 3.e. and 3.f. are clarified to state that notification shall be done through the resume process.

2. The Court finds that Paragraphs 3.b. and 3.c. of the November 9 Decree are unnecessary:

   a. The Court has found that diversions for ALP are governed by the separate ALP Decree, which is not before the Court, and that each Ute Tribe has a right to an allocation of water from ALP. *See* ¶¶ 15, 18, 19, 28, 81, and 83 of the Court's Findings of Fact. The Court further finds that the two Ute Tribes have no independent diversion right from the Animas River under the 1991 Consent Decrees or their amendments, and that there can be no increased diversions from the Animas River pursuant to the requested amendments and changes because the terms and conditions of the separate ALP Decree are unchanged. Consequently, there is no basis to impose restrictions on diversions as part of amending the 1991 Consent Decrees.

   b. The Court finds that the critical attribute of the Tribal water right, which is the right to the beneficial use of an allocation of water from the Animas-la Plata Project, is reduced significantly under the amendments to the Consent Decree, so that the

consumptive use allocated each Tribe has now dropped by over 10,000 AF on an average annual basis.

c. The Court finds that Paragraph 6.A.iii.a. of the 1991 Consent Decrees, which is the source of the restrictions imposed in Paragraphs 3.b., is not applicable to diversions, but instead, applies to theoretical monthly deliveries from the earlier and larger version of ALP of the available annual supply of irrigation and municipal & industrial water, and is not relevant to the down-sized project. Moving Parties have already eliminated these provisions by their agreement to the Stipulation to Amend, which the 1991 Consent Decree expressly allowed them to do. *See* Applicant's Ex. 2 & 3 (1991 Consent Decree) at Stipulation to a Consent Decree, ¶¶6.A.iii.c, and 7.A.iii.c. (Allowing the parties to the Stipulation to a Consent Decree to modify Paragraphs 6.A.iii.a. and b. and 7.A.iii.a. and b.).

d. The 1991 Consent Decrees entitled each Tribe to "receive and beneficially use" an allocation of water from the ALP, which in turn is governed by annual diversion limits in the ALP Decrees. There is no change to the ALP Decree; consequently there is no expansion of the decreed diversions for ALP. Because each Tribes' water right is to an allocation of water from ALP, instead of a decreed diversion right, res judicata concerns are not implicated.

e. The Stipulations to Amend the 1991 Consent Decrees and Change Applications do not result in an expansion of a water right under Colorado law. The Stipulations to Amend the 1991 Consent Decrees and Change Applications do not expand the decreed diversions for ALP under the ALP Decree. Because the two Ute Tribes' water rights are to an allocation of water from ALP that is governed by diversions under the ALP Decree and no increase in consumptive use, there is no expansion of a water right, and no injury to other water rights (including stream conditions) so long as the Ute Tribes take their decreed water right from the reduced ALP as authorized by Congress in the 2000 Settlement Act Amendments, which diverts from the Animas River pursuant to the separate ALP Decree.

f. To the extent that future uses and related deliveries of Ute Tribal water from ALP, apart from those set forth in Paragraphs 6.A.i. and 7.A.i. of the 1991 Consent Decrees, as amended, raise questions of injury, these are concerns that, if applicable, may come before this Court pursuant to its retention of jurisdiction pursuant to C.R.S. § 37-02-304(6).

3. To the extent the *Findings of Fact and Conclusions of Law* (Nov. 9, 2006) associated with the November 9 Decree conflict with this Amended Decree, they are hereby amended to be consistent with the Amended Decree.

DATED this 8th day of February, 2007.

BY THE COURT:

Gregory G. Lyman
District Court Judge

Whipple, John J., OSE

Fro Lopez, Estevan, OSE **Sent:** Tue 3/6/2007 3:42 PM
To: Whipple, John J., OSE
Cc:
Subject: FW: Memo re ALP Water Rights and Meeting March 8
Attachments: 2007Mar06 Memo to ISC re ALP Water Rights.doc(30KB)

-----Original Message-----
From: Liz Taylor [mailto:etaylor@taylormccaleb.com]
Sent: Tuesday, March 06, 2007 11:11 AM
To: Lopez, Estevan, OSE; Trujillo, Tanya, OSE
Cc: Randy Kirkpatrick; sjwcoffice@sjwc.org
Subject: Memo re ALP Water Rights and Meeting March 8

Hello Mr. Lopez and Ms. Trujillo,

Attached is a memo about the March 8 meeting concerning the Animas-La Plata Project in Durango. As it turns out, the meeting will not include the Colorado State Engineer's office, so it's premature for you to attend.

I appreciate your williness to come, but for now we'd like to take a raincheck.

Please feel free to contact me if you have any questions about the memo.
I'll be sending some background documents by a separate e-mail, in case your e-mail strainer chokes on them.

Thanks, Liz

Elizabeth Newlin Taylor
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<<2007Mar06 Memo to ISC re ALP Water Rights.doc>>

MEMORANDUM

TO: Estevan Lopez, Tanya Trujillo

CC: Randy Kirkpatrick

FROM: Elizabeth Newlin Taylor

DATE: March 6, 2007

RE: Meeting March 8 Originally Concerning Colorado Administration of Animas-La Plata Water Rights

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First, let me apologize for taking so long to get this Memo to you. However, I confirmed today that the meeting we asked you to attend has turned out to be much less than what we had expected it to be. In fact, I believe that you do *not* need to attend. The Colorado District Engineer will *not* be attending, and neither will anyone else from the State of Colorado. The meeting was almost called off as late as yesterday (Monday) because one of the key lawyers had a death in his family and cannot attend. As I hope you can understand, the situation has been confusing, to say the least.

What is scheduled to happen at the meeting March 8 is that lawyers for the two Colorado Ute tribes, and maybe the lawyer for the Southwestern Water Conservation District, will give their explanations of how the water administration will work. If the group has questions that only the Colorado District Engineer could answer, we will draft the questions and send them to him. Later, he will answer the questions and perhaps attend a meeting of the ALP group. This later meeting (which will undoubtedly be after the legislative session) may be the meeting that you should attend.

In preparation for that later meeting, it probably would be helpful for you to understand the basis of the Animas-La Plata Project ("ALP Project") water rights in Colorado and some related issues. Following are the basics as I understand them. I will send the relevant documents that I have, but I do not yet have all of them.

- The Southwestern Water Conservation District ("SWCD") obtained a conditional permit from the State of Colorado for approximately 600 cfs in anticipation of the ALP Project many years ago. The permit allows for diversion and storage of 600 cfs in the ALP Project. (I don't have this permit, but my understanding is that it's contemporary with and comparable to New Mexico State Engineer Permit No. 2883 currently held by the United States. I plan to obtain a copy as soon as I can.)

- The 1988 and 2000 Ute Indian settlements provide for the Utes to have contracts with the United States for water to settle their reserved rights claims, and the water would

come out of the SWCD permit. The 1988 settlement was reflected in 1991 water rights decrees for the Utes and a decree for the ALP Project itself. (I do not have these decrees, but I will also try to obtain copies of them.)

- Within the last few months, the Utes have completed the process to amend the 1991 decrees to comport with the 2000 amendments to the ALP Project. After they received the court's decision, they moved to reconsider a portion of that new decree to remove some restrictions on diversions. The judge revised the decree as requested. I will send, by separate attachment, the revised decree from November 2006, the Motion to Reconsider that decree from December 2006, and the amended revised decree from February 2007.

- One of the lawyers for the Utes (Dan Israel) says that "administration" of the New Mexico portion of the ALP Project will be relatively simple because the Colorado State Engineer will have only to protect the New Mexico diversions to the state line. Frankly, this sounds too simplistic to me, but it's clear that I do not understand the issues well enough now to challenge that statement. All of us have been so focused on building the ALP Project that we haven't had the time or need to understand its ultimate operation and related water administration. Now we are beginning that process, but clearly it will take a little time for all of us (in Colorado and New Mexico) to grasp the issues. Once we have a better idea and can articulate the issues, your help will be very welcome. But it's probably premature now, and we should do some more legwork before we involve you.

Thank you for your willingness to come to Durango to meet with us—and rest assured that we will ask you again when the time is right.