

# Mancos River Basin Instream Flow Report

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## Preliminary Evaluation of Flow Restoration Options



Photo by Russell Klatt, MCD/NRCS

Prepared for The Mancos Conservation District  
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COLORADO WATER TRUST

## EXECUTIVE SUMMARY

After a tour and study of the Basin for this report, it became clear that a number of diversion structures impede and impair streamflows in the Mancos River Basin. Downstream of many of the local diversion structures, the river goes completely dry, not springing back to life until tailwater and return flows accrue to the river. And after the river is used and reused as it makes its way through the Mancos Valley, not much water is left for the river itself as it passes into Mesa Verde National Park and beyond the Park for the Ute Mountain Ute Tribe. Water rights use and other features of the Basin's hydrology prevent a one-size-fits-all, silver bullet solution to restoring the Basin's streamflows. Instead, a series of efforts will need to be applied in order to bolster and protect flows from the top of the basin to the state line, provided that such a result remains a long-term goal of the Mancos Valley Water Conservation Project.

New instream flow appropriations are a tool that should be considered. They are appropriate, however, only for sections of stream that meet three requirements: (1) a natural environment exists; (2) water is available for the appropriation; and (3) no injury will occur to other water users. They also are limited to *protecting* flows from *future* uses. Protection from future uses has its benefits, but if *improving* streamflows is desired, a different tool must be used: the state's instream flow program's water rights acquisition program. We recommend in this report some further analyses to determine where these tools will be most effective. Implementation of projects that use these tools will require consultation with the Water Commissioner and/or Division Engineer to assure that the efforts are--among other required elements--administrable and non-injurious.

Other tools, such as diversion and delivery system projects that increase efficiency, habitat restoration projects, and phreatophyte eradication, may also help restore and protect flows. We learned through our interviews of local water users that the handful of efficiency projects already implemented in the Basin have made more water available to the system, making downstream and junior water rights more reliable. The power of these tools should not be overlooked.

Any efforts that are suggested in this report will benefit from collaboration, a tool that the Mancos Conservation District has been so good at using. Continued work with existing partners, as well as solidifying relationships with newer partners like the Colorado Water Conservation Board and the Colorado Division of Wildlife, will be the key to long-term success for any efforts to balance flows in the Mancos River Basin.



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## I. OBJECTIVE AND ORGANIZATION OF REPORT

This report is the result of a request by the Mancos Conservation District ("MCD") for the Colorado Water Trust ("CWT") to study options for balancing the needs of Mancos River water users with the desire to improve streamflows in the Mancos River Basin. CWT is a private, non-profit organization that works to restore and protect streamflows throughout the state of Colorado. This study is consistent with CWT's mission.

This study is funded by the MDC as part of its ongoing Mancos Valley Water Conservation Project ("Conservation Project"), an effort ongoing since 2003 to accomplish a number of goals, including: (1) the reduction of salt in the Colorado River; (2) the conservation of water lost through seepage and inefficient water application practices; (3) the restoration of the Mancos River's riparian habitat; and (4) the establishment of an increase in the amount of water available to local properties.<sup>1</sup> The Conservation Project is conducted in concert with the Natural Resources Conservation Services ("NRCS") and with financing from a number of sources, including the Colorado Water Conservation Board ("CWCBC").

Much of the proposed work under the Conservation Project is underway. In 2004, the MCD was successful in having the Mancos Valley designated as a Salinity Control Area. This designation made funding available to pipe irrigation ditches in order to increase water delivery efficiencies, reduce water losses, and reduce the amount of salt leached from underlying shale into the Mancos River. Other completed projects include:

- The completion of the *Mancos Watershed (Hydrologic Unit Code 14080107) Rapid Assessment*, Mancos Conservation District and Natural Resources Conservation Service (March 2008)
- The completion of a survey of the health of seventeen reaches of the Mancos and its major tributaries, reported in the *Functional Assessment of the Mancos River Watershed: Mancos Valley and Adjacent Areas*, Peter Stacey (April 2007)
- Monthly water quality monitoring through Colorado Riverwatch
- Tamarisk and Russian olive eradication on sixty acres of land in the watershed
- Two instream aquatic habitat/bank stabilization enhancement projects (Perry Ranch and Wolcott Ranch)
- Fencing of livestock from riparian corridors
- Compilation and analysis of all existing East Mancos River studies
- Completion of a Mancos Source Water Protection Plan with the Colorado Rural Water Association
- Landowner survey of resource concerns

This report concludes the initial phase of CWT's involvement in the Conservation Project. It provides information related to preliminary, reconnaissance-level research into flow restoration and improvement options, suggesting general ways to improve local streamflows without

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<sup>1</sup> LANDOWNER'S GUIDE, MANCOS VALLEY WATER CONSERVATION PROJECT at 5 (Mancos Conservation District Board of Supervisors, April 2003) [hereinafter LANDOWNER'S GUIDE]. The Conservation Project's stated primary goal is to increase water efficiency in the basin to make more water available: "(1) to the livestock and crops of the Mancos Valley's nearly 400 landowners with water rights, (2) to wildlife, and (3) to support restoration of the river channel." *Id.* at 6.

affecting existing water rights or the state's compact entitlements. Research for this report included a basin tour, in-person and telephone interviews with local stakeholders, and research from public records, laws, rules, and other sources of information.<sup>2</sup> The initial sections of this report provide the results of CWT's research to prepare this report. Final sections of this report explain the tools available to the MCD for protecting and improving local streamflows, providing basic information about those tools and making preliminary suggestions about specific possibilities for projects. PLEASE NOTE: These are preliminary recommendations; follow-up studies and structured planning of an overall implementation approach will need to be conducted. This report is organized as follows:

- *Section II* – provides an overview of the Basin, from the geography to the land ownership.
- *Section III* – provides a brief description of Colorado water law.
- *Section IV* – provides a brief examination of certain water rights within the Basin.
- *Section V* – provides a preliminary overview of the Basin's hydrology from readily available public information.
- *Section VI* – provides an overview of the project stakeholders and their respective interests, concerns, and potential roles.
- *Section VII* – provides an overview of the different tools available to achieve the flow restoration aspects of the Conservation Project. Where possible, these tools have been applied to information gathered about the Mancos River Basin.
- *Section VIII* – sets out our conclusions and recommendations.

## II. THE MANCOS RIVER BASIN

The Mancos River originates on the west side of the La Plata Mountains, a western subrange of the San Juan Mountains in southwestern Colorado.<sup>3</sup> Four main tributaries form the river's headwaters: the East, Middle, and West Mancos Rivers, and Chicken Creek. The river flows southwesterly from its headwaters through the Mancos Valley, where it picks up a fifth major tributary, Mud Creek, which drains the lower elevation regions in the northwestern part of the upper watershed.<sup>4</sup> It then flows down through Mancos Canyon, where a number of side canyons and ephemeral washes, such as Johnson Canyon and Grass Canyon, flow into the river. The river then flows through flat desert lowland across the border between Colorado and New Mexico, where it ultimately flows into the San Juan River in northwestern New Mexico.<sup>5</sup> It is 116 miles long and drains approximately 800 square miles, with a range of precipitation from forty inches at its highest elevation to eight inches where it meets the San Juan in New Mexico.<sup>6</sup> Land ownership in the Basin is a unique feature within the Basin. The headwaters lie largely within the San Juan National Forest; thus, the land is owned by the federal government and

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<sup>2</sup> This information included: (1) water rights documents such as decrees, agreements, and engineering reports; (2) information from interviews with stakeholders; (3) water rights tabulations, structure summaries, and diversion records obtained from the Colorado Division of Water Resources; (4) tabulations of instream flow rights held by the CWCB; (5) Colorado and federal laws pertaining to water allocation and various rules, including the rules governing the state's Instream Flow Program; (6) stream gauge data; and (7) other public information.

<sup>3</sup> Mancos Watershed (Hydrologic Unit Code 14080107) Rapid Assessment, Mancos Conservation District and Natural Resources Conservation Service (March 2008) at 8 [hereinafter RAPID ASSESSMENT]; see also Functional Assessment of the Mancos River Watershed: Mancos Valley and Adjacent Areas, Peter Stacey (April 2007) at 6 [hereinafter FUNCTIONAL ASSESSMENT].

<sup>4</sup> RAPID ASSESSMENT at 8; FUNCTIONAL ASSESSMENT at 6.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

managed under the laws governing United States Forest Service ("USFS") lands. After flowing through the higher-altitude lands, the river flows through the Mancos Valley, which consists largely of private lands. Then, immediately south of the lower end of the Mancos Valley lies Mesa Verde National Park. The river flows for four miles through the Park before it makes its way to the Ute Mountain Ute Indian Reservation,<sup>7</sup> flowing through the Reservation for sixty-seven miles (with the last mile or so running through the Navajo Reservation) before it meets up with the San Juan River in New Mexico.<sup>8</sup> Note that over half of the landmass in the Mancos River Basin watershed falls within the boundaries of the Ute Mountain Ute Reservation.<sup>9</sup> This array of land ownership results in a unique interplay of different types of water rights.

This report does not address the natural environment supported by the Mancos River. Such an assessment has already been conducted. For a detailed description of the natural environment supported by the Mancos River, one should review the *Mancos Watershed (Hydrologic Unit Code 14080107) Rapid Assessment*, Mancos Conservation District and Natural Resources Conservation Service (March 2008).<sup>10</sup>

### III. COLORADO WATER LAW

This section of the report provides a brief description of Colorado water law to provide some context for the discussions that follow.

#### A. Prior Appropriation Doctrine

There are two general forms of water allocation systems in the United States, the prior appropriation system and the riparian system. Colorado, like most arid/western states, follows the prior appropriation system. The essence of the prior appropriation system is that the first user to divert and put water to beneficial use has a prior right to that source of water as compared to later users. Under this system, the riparian landowner has no rights based on proximity to a stream or lake. In addition, water users do not share the burden of shortages; the prior user is entitled to the full amount of water to meet her entire water right before the next junior user may legally divert any water.

Colorado's Constitution adopted the doctrine of prior appropriation. It provides that the water of every natural stream in Colorado is public property, which shall be dedicated to the use of the people by diversion and application to beneficial use, subject to the rights of prior appropriators.<sup>11</sup> The Constitution further provides that "[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."<sup>12</sup> Because the water of every natural stream in Colorado is public property, however, a person

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<sup>7</sup> RAPID ASSESSMENT at 10.

<sup>8</sup> RAPID ASSESSMENT at 10. Although the boundaries of the Mancos Conservation District do not encompass the entire watershed, it can be helpful for perspective to view the breakdown of land ownership within the MCD's boundaries. The breakdown of land ownership within the MCD boundaries is: (1) Privately owned - 61,400 acres; (2) Forest Service - 68,400 acres; (3) Bureau of Land Management - 23,800 acres; (4) County and State lands - 1,700 acres; and (5) Bureau of Reclamation - 700 acres. See <http://www.colorado.gov/cs/Satellite/Agriculture-Main/CDAG/1178305637502>.

<sup>9</sup> RAPID ASSESSMENT at 18.

<sup>10</sup> RAPID ASSESSMENT at 11 & 15.

<sup>11</sup> COLO. CONST. art. XVI, § 5.

<sup>12</sup> COLO. CONST. art. XVI, § 6.

may only acquire the right to use water but does not develop any ownership of the water itself. All water that is not beneficially consumed must be returned to the stream. Therefore, a water right is a usufructuary right, that is, a right of use.

### **B. Elements of an Appropriation**

There are only two acts required to create a water right: (1) diversion; and (2) beneficial use. Colorado courts have generally required that water be diverted or removed from the stream to constitute a valid appropriation. Diversion is statutorily defined as "removing water from its natural course or location or controlling water in its natural course or location, by means of a ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump, or other structure or device."<sup>13</sup> Water may also be "diverted" by controlling it in its natural course. For example, the Colorado Supreme Court found that a boat chute and fish ladder controlled water in its natural course by concentrating the flow of the river to allow boats and fish to pass over the dam at low flows.<sup>14</sup>

Recall, too, that the Colorado Constitution provides for the right to divert the unappropriated waters of any natural stream for "beneficial uses."<sup>15</sup> Therefore, a water right may not be appropriated unless the water is put to a "beneficial" use. The beneficial use requirement encourages the actual use of water and discourages the holding of water rights for speculative purposes. Courts have interpreted beneficial use broadly. Almost any use of water that requires diversion or impoundment is considered beneficial, including irrigation, mining, manufacturing, domestic, and impoundment for recreation, fire protection, and fish and wildlife purposes.

### **C. Nature of an Interest in Water**

The nature of an interest in water may be an interest in real property (ownership of a water right itself), an interest in personal property (ownership of a contractual right to use water owned by another), have attributes of both real and personal property (such as shares of stock in a mutual ditch or reservoir company), or be an allotment contract with a water conservancy district. In Colorado, water rights are conveyed like real estate, either with or without the land where historically used.<sup>16</sup> These rights can vary by source (surface or groundwater that is tributary, nontributary, or not nontributary), manner of use (primarily direct or storage), and degree of vesting (absolute or conditional).

### **D. Water Rights Administration**

The State Engineer and the Division Engineers have exclusive authority to administer, distribute, and regulate the waters of the state. The regulation of water use follows the priority system established by the state constitution. The State Engineer appoints a Division Engineer for each of the water basins. The divisions are: (1) South Platte; (2) Arkansas; (3) Rio Grande; (4) Gunnison, including Dolores and San Miguel; (5) Colorado (except for Gunnison and White), (6) Yampa/White; and, (7) San Juan/Animas. The Division Engineer, in turn, may appoint

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<sup>13</sup> § 37-92-103(7), C.R.S. (2010).

<sup>14</sup> *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

<sup>15</sup> COLO. CONST. art. XVI, § 6.

<sup>16</sup> § 38-30-102, C.R.S. (2010); *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).



Water Commissioners for districts created within the division. Water Commissioners are the state officials who are directly responsible for the day-to-day administration of water. Through modeling developed by the Division Engineers and through experience and observation of the conditions in each division, the Water Commissioners determine how water should be allocated so that senior water rights are fully satisfied under varying stream conditions. The Water Commissioners observe diversions in their district, communicate directly with individual water owners and ditch riders, and receive and keep records of diversions which become the official record of water use. Most importantly, the Division Engineer and Water Commissioners have the authority to prevent and stop water users from diverting water when they are not in priority.

A “call” is the common term for a request by a water user for an order issued by the Division Engineer to stop diversions when water is needed by senior water rights holders. A call may be placed on a river when a senior appropriator's water right is not being satisfied. If appropriate, it can result in the curtailment of upstream junior water users to let sufficient water flow to meet the requirements of the senior priority.

#### **IV. WATER RIGHTS ANALYSIS**

This section describes some of the water rights decreed to the Basin. The water rights described in this section are included either because they feature into the Basin hydrology, which is discussed in the following section, or are significant to the discussion in this report in other ways. The water rights discussed in this section are those of the Mancos Project, Mesa Verde National Park, and the Ute Mountain Ute Tribe.<sup>17</sup> We have also provided information pertaining to the State of Colorado Instream Flow Program instream flow appropriations in the Basin.

##### **A. Jackson Gulch Reservoir**

Jackson Gulch Reservoir is the heart of the Mancos Project (the “Project”), a federal water supply project authorized by Congress during the years 1939 to 1941.<sup>18</sup> The Project consists of an off-river reservoir filled from the West Mancos River and Jackson Gulch through the Jackson Gulch Inlet Canal; the Jackson Gulch Outlet Canal; and the West Mancos Water Supply System for Mesa Verde National Park.

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<sup>17</sup> We did not conduct an analysis into decrees for any of the private water rights in the Basin because an analysis of these water rights was not necessary for this reconnaissance-level report. In-depth analysis of the private water rights in the system may become necessary if a future phase of the Conservation Project contemplates placing water from these private water rights into the instream flow program, among other reasons.

<sup>18</sup> See Civil Action No. 967 at 260, ¶ 3 (District Court in and for Montezuma County) (March 22, 1962) [hereinafter CA 967]. The Water Conservation and Utilization Act (“WCUA”) authorized the Bureau of Reclamation to “construct water conservation and utilization projects in the . . . arid and semiarid areas of the United States” for the purpose of “stabilizing water supply and thereby rehabilitating farms on the land and providing opportunities for permanent settlement of farm families.” 16 U.S.C.A. § 590y (2011). No water may be delivered under these projects until a repayment contract is executed. 16 U.S.C.A. § 590z-1(a) (2011). Jackson Gulch Reservoir is a WCUA project. The Mancos Water Conservancy District (“MWCD”), a quasi-municipal corporation, was formed to manage the Project and enter into a repayment contract to repay the Bureau of Reclamation (“BOR”) \$600,000, a portion of the nearly \$4 million it cost for project construction. See CONTRACT BETWEEN THE UNITED STATES AND MANCOS WATER CONSERVANCY DISTRICT RELATING TO THE MANCOS PROJECT.

The Reservoir has a capacity of just under 10,000 acre-feet.<sup>19</sup> The carrying capacity of the Jackson Gulch Inlet Canal is 258.17 cubic feet per second.<sup>20</sup> The carrying capacity of the Jackson Gulch Outlet Canal is 207.33 cubic feet per second.<sup>21</sup> Water was first diverted into Jackson Gulch Reservoir on March 18, 1949.<sup>22</sup>

Various decrees govern the allocation of Jackson Gulch Reservoir water. They are set out in the chart attached to this report as **Exhibit 1**.<sup>23</sup> Jackson Gulch Reservoir has a storage right for 9,980 acre-feet.<sup>24</sup> The Inlet Canal is decreed for 258.17 cubic feet per second. The Outlet Canal is decreed for 207.33 cubic feet per second. These rights were decreed by the District Court in and for the County of Montezuma in Civil Action No. 967 ("Mancos Project decree") and all have an appropriation date of October 31, 1936 (determined by the date of survey for the project) and a decree date of March 22, 1963.<sup>25</sup> The Reservoir also has a refill right of 1,385 acre-feet and 616 acre-feet, for a total refill right of 2,001 acre-feet.<sup>26</sup> Appropriation and adjudication dates for those rights are set out in **Exhibit 1**.

## **B. Mesa Verde National Park**

Mesa Verde National Park ("MVNP" or "the Park") has both state appropriative rights and Federal reserved rights. The Park's state appropriative rights were decreed along with the rights decreed to Jackson Gulch Reservoir in the Mancos Project decree. The Park's reserved rights were decreed by the District Court in and for Water Division 7 in Case No. W-1633-76.

Under the Mancos Project decree, the Park holds a storage right in Jackson Gulch Reservoir and a direct flow right for a pipeline (the West Mancos Water Supply System) that diverts from the West Mancos above the Jackson Gulch Inlet Canal for the delivery of 120 acre-feet per year. In order for the Park to divert through the pipeline when out of priority, exchange releases may be made from the reservoir to satisfy senior water rights. The pipeline travels nearly twenty-nine miles from its point of diversion to the Park and is able to divert at a rate of 0.167 cfs for "domestic, fire protection and other beneficial purposes to and for the use of the Mesa Verde National Park."<sup>27</sup> It has a priority date of Oct. 31, 1936<sup>28</sup> and an adjudication date of March 22, 1963.<sup>29</sup> Additionally, MVNP has "the right reserved to an additional 100 acre feet of water per annum from said reservoir or stream should occasion and necessity require in the manner provided for as to said 120 acre feet of water."<sup>30</sup> The table supplied at **Exhibit 2** describes these appropriative water rights in more detail. Photos of the pipeline's diversion structure are attached to this report as **Exhibit 3**.

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<sup>19</sup> CA 967 at 263, ¶ 7(e).

<sup>20</sup> CA 967 at 264, ¶ 8(f).

<sup>21</sup> CA 967 at 265, ¶ 9(f).

<sup>22</sup> CA 967 at 261, ¶ 5.

<sup>23</sup> Note that this chart does not include the water rights available from the Project for Mesa Verde National Park. The Park's rights are discussed below in Part 3.2 of this report. We have not included the decree as an exhibit because it is more than 1000 pages long.

<sup>24</sup> CA 967 at 268.

<sup>25</sup> See CA 967.

<sup>26</sup> *Id.*

<sup>27</sup> CA 967 at 269.

<sup>28</sup> CA 967 at 261, ¶ 5.

<sup>29</sup> CA 967 at 294.

<sup>30</sup> CA 967 at 265, ¶ 10(b).

The Park also has a decree for Federal reserved rights, which were adjudicated in the Colorado water court system under the McCarran Amendment. Reserved water rights are water rights generally created by implication from Federal land withholdings. In *Winters v. United States*, 207 U.S. 564 (1908), the U.S. Supreme Court recognized that when the Federal government withheld land for Indian tribes it also "reserved" an amount of water necessary to fulfill the purposes of the reservation, even if the treaty establishing the reservation were silent regarding water.<sup>31</sup> Later, the Court expanded the *Winters* ruling to include other types of Federal land withdrawn from the public domain, including national parks.<sup>32</sup> Thus, when Congress creates a national park, Congress also withholds the amount of water necessary to fulfill the purpose of the park.

Because these Federal water rights seemed to exist outside of a state's appropriation system, Western states were concerned about the possible existence of two systems of water rights. In an attempt to unify those systems, Senator Pat McCarran of Nevada ran the McCarran Amendment in 1952, a law that waived the Federal government's sovereign immunity in state general stream adjudications. The law provides that:

consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.<sup>33</sup>

Under the McCarran Amendment, the federal government could no longer hide behind sovereign immunity when states wished to quantify water rights, including Federal reserved ones.

In 1976, pursuant to the McCarran Amendment, the United States filed an application in Colorado water court for reserved rights associated with MVNP. On July 31, 1997, the District Court in and for Water Division 7 signed a decree that granted these Federal reserved water rights, attached as **Exhibit 4**.<sup>34</sup> Attached as **Exhibit 5** is a table that describes the Park's Federal reserved rights. The decree uses for these reserved rights, which are related to the purposes for the establishment of the Park, are:

for the preservation from injury or spoliation of the ruins and other works and relics of prehistoric and primitive man within said park; recreation, domestic

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<sup>31</sup> *Winters v. United States*, 207 U.S. 564, 576 (1908).

<sup>32</sup> See *Arizona v. California*, 373 U.S. 546, 601 (1963).

<sup>33</sup> 43 U.S.C. § 666.

<sup>34</sup> Case No. W-1633-76.

uses; municipal and administrative site uses; irrigation; stock grazing and watering; *the development, conservation and management of resident and migratory wildlife and wildlife resources, the terms wildlife and wildlife resources to include birds and mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent*; fire fighting and protection, forest growth, management, improvement and protection; commercial drinking and sanitary uses; road watering; *watershed protection and management; wilderness preservation*, flood, soil erosion control; preservation of educational, historic, scientific, scenic, aesthetic and other public values and *habitat protection and management*.<sup>35</sup>

The decree granted the United States a series of Federal reserved water rights for Mancos River surface water, springs occurring within the Park boundaries, and other surface and ground water within the Park for the purposes described above.<sup>36</sup> As part of those rights, the decree provided MVNP with a right to continuous flows (i.e., an instream flow) in the Mancos River within the Park for the following amounts during the designated time periods each year:

|                                |                     |
|--------------------------------|---------------------|
| August 1 through January 31    | 5 cfs               |
| February 1 through February 28 | 10 cfs              |
| March 1 through March 31       | 15 cfs              |
| April 1 through April 30       | 30 cfs              |
| May 1 through May 31           | 45 cfs              |
| June 1 through June 30         | 12 cfs              |
| July 1 through July 31         | 6 cfs <sup>37</sup> |

The priority date for this instream flow right on the Mancos River is January 1, 1995.<sup>38</sup> This instream flow is monitored and protected by the Park. It is not a part of the state's Instream Flow Program.<sup>39</sup>

The Park also has federal reserved water rights for 119 springs in the amounts listed in Exhibit B of the decree and for the purposes described above. The water rights for the springs have no monthly variation in flow. The priority dates for the springs differ and are set out in Exhibit B to the decree. The United States also has other rights which it can rely on for certain uses.

<sup>35</sup> Case No. W-1633-76 at 2, ¶ 4(b) (emphasis added).

<sup>36</sup> Case No. W-1633-76 at 6, ¶ 23.

<sup>37</sup> Case No. W-1633-76 at 6 ¶ 24.

<sup>38</sup> This priority date did not reflect any of the legal principles regarding establishment of a priority date (for example, this is not the date the Park lands through which the Mancos River flows were reserved from the public domain, which is presumptive priority date for Federal reserved water rights) and nothing else in the decree discussed the method by which this date was established. Thus, it was our belief that this priority date was a negotiated date. This was confirmed by Park staff. Acceptance of this much more junior priority date allows existing upstream water uses to continue their use. In effect, this negotiated priority date has left the Park with only the right to request curtailment of junior water rights that are injuring the instream flow but not the ability to curtail senior water rights it might have been able to curtail had legal principles – rather than negotiations – established the priority date. It is our understanding that there may now be some junior users on the Mancos River that could injure this instream flow.

<sup>39</sup> The CWCBC did receive a recommendation from the Colorado Division of Wildlife for 14 cfs extending from Mud Creek downstream to the Ute Mountain Ute Indian Reservation. The Preliminary Recommendation was presented to the CWCBC Board in May 1984, but was withdrawn from final consideration due to the ongoing MVNP water rights litigation. This instream flow would have covered the same river mileage that the MVNP instream flow covers, plus some additional upstream miles.



Paragraphs 25 and 26 from the decree state:

The United States is decreed reserved water rights in the amount of 70 acre-feet of water per annum to help satisfy the future requirements for the operation, administration, and protection of Mesa Verde National Park, including but not limited to such uses as, excavation, restoration and preservation of ruins and structures; construction of visitor facilities; staff and visitor domestic uses; and fire suppression. This water is necessary to fulfill the primary purposes of Mesa Verde National Park . . . . Except as provided in paragraph 26, below, this water may be developed from "any water in, on, under, adjacent or otherwise appurtenant to" Mesa Verde National Park. The priority dates for these 70 acre-feet are the dates of reservation associated with the location of the diversion. The priority date for the water which may be diverted from the Mancos River pursuant to paragraph 26 below is June 20, 1913.

The National Park Service will satisfy its need for water for future park operation, administration, and protection of Mesa Verde National Park in the following order: 1) First, from the existing 120 acre-feet per annum appropriative water right from the West Mancos River described in paragraph 16 above; 2) Second, from the additional 100 acre-feet per annum appropriative from the West Mancos River described in paragraph 16 above; and 3) Third, to the extent such appropriative rights are not adequate to accommodate increased utilization and visitation at Mesa Verde National Park, then from the reserved water rights of the United States for 70 acre-feet of water per annum described in paragraph 25 above, provided that at no time will the withdrawal of water from the Mancos River pursuant to this reserved right exceed 10 acre-feet per annum, with only five acre feet diverted during the irrigation season: June through October.<sup>40</sup>

As stated above, the 70 acre-feet per year of reserved rights includes both surface and ground water sources.

Prior to constructing a well or diverting surface water under the reserved right, the United States is required to provide the Colorado State Engineer information required in paragraphs 28, 29, and 30 of the decree. This includes the requirement to construct a gauge. The reason for establishing the gauge is described in Paragraph 30 of the decree which states:

Subject to the availability of funds, the United States shall install and maintain such water measurement devices, recording devices, content gauges and inlet and outlet measurement and recording devices, as the case may be, as are deemed essential by the Office of the State Engineer; provided, however, that such devices shall not be located as to interfere with the purposes of Mesa Verde National Park; and further provided that the United States shall not be entitled to curtailment of other water rights for the benefit of the water rights decreed herein unless the United States has installed and is maintaining the measurement devices required in this paragraph.

Given this requirement, the United States established a stream gauge on July 18, 2000 on the

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<sup>40</sup> Case No. W-1633-76 at 7, ¶¶ 25-26.

Mancos River at the upstream location of reserved lands within the park boundary. It is the "Mancos River at Anitas Flat below Mancos" gauge. The data generated by this gauge can be used to alert Park staff when flows in the river are lower than those to which the Park is entitled. Under the state's administration scheme, the Park cannot request the curtailment of any junior water rights if this gauge is not operating properly. This gauge is discussed in more detail in Part V of this report.

### C. Ute Mountain Ute Tribe

The Ute Mountain Ute Tribe (the "Tribe") has Mancos River water rights, rights to water from the Dolores and Animas-La Plata Projects, rights to McElmo Creek and Navajo Wash, and on the main stem of the San Juan. We begin this discussion with a history of the confirmation of these rights and end with a description of only those rights that are satisfied from the Mancos River because they are the only Tribal water rights that are relevant to this report.

As with all tribal water rights, the history begins with the *Winters* case, discussed earlier in Part IV.B. of this report. Recall that in *Winters v. United States*, 207 U.S. 564 (1908), the United States Supreme Court held that when the federal government withheld land for Indian tribes it also by implication reserved an amount of water necessary to fulfill the purposes of the reservation, even if the treaty establishing the reservation failed to mention water.<sup>41</sup> Despite this recognition of water rights associated with reservations of land, however, the amount of water available to the reservation was not often quantified, leading to disagreement among local water users. These disagreements typically played themselves out through years of negotiations.

The Tribe's water rights claims were no exception, enduring years of negotiations. Finally, in 1986, the Tribe signed a Final Settlement Agreement ("Settlement", **Exhibit 6**) that established its water rights, along with those of the Southern Ute Tribe.<sup>42</sup> The Settlement required Congress to enact several pieces of legislation to finalize its terms, and Congress passed that legislation in 1988, attached as **Exhibit 7**.<sup>43</sup> In the final step of approval, the Water Court in and for Water Division 7 issued a Stipulation for a Consent Decree, memorializing the settlement and bringing the water rights into Colorado's water administration system.<sup>44</sup> These documents spell out the water rights held by the Tribe. The Tribe's water right to the Mancos is set out in the following chart:

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<sup>41</sup> *Winters v. United States*, 207 U.S. 564, 576 (1908).

<sup>42</sup> See COLORADO UTE INDIAN WATER RIGHTS FINAL SETTLEMENT AGREEMENT, Dec. 10, 1986.

<sup>43</sup> See COLORADO UTE INDIAN WATER RIGHTS SETTLEMENT ACT OF 1988, Pub. L. No. 100-585. The Act modified the Settlement Agreement "to provide that the Tribe may voluntarily elect to sell, exchange, lease, use, or otherwise dispose of any portion of a water right confirmed in the Agreement and final consent decree off its reservation."

<sup>44</sup> See Case No. W1603-76F, **Exhibit 8**.

| Name               | Amount     | Decreed Source | Decree/ Adjudication Date   | Decreed Use(s)  |
|--------------------|------------|----------------|---|---|
| Mancos Direct Flow | 21,000 afy | Mancos River   | Has "an 1868 priority date, but shall be subordinated to all rights with an adjudication date prior to 1985." | "for the irrigation of 7,200 acres of Tribal lands within the Mancos River drainage basin." |

Note that the priority of this 21,000 acre-foot water right is subordinated to all rights decreed before 1985. This means that the right will be exercised as junior to all water rights decreed prior to 1985.

#### D. State of Colorado Instream Flows

There are four State of Colorado Instream Flow Program appropriated instream flows in the Mancos watershed. The following table describes these rights:

| Case #    | Source                    | Appropriation Date | Location  | Length     | Flow              |
|-----------|---------------------------|--------------------|---|------------|-------------------|
| 7-84CW268 | East Mancos               | 7/13/1984          | Headwaters to confluence w/ Mancos                              | 11.7 miles | 2 cfs (1/1-12/31) |
| 7-84CW269 | Middle Mancos             | 7/13/1984          | Headwaters to headgate of Weber Reservoir Inlet Ditch           | 3.6 miles  | 3 cfs (1/1-12/31) |
| 7-84CW267 | North Fork of West Mancos | 7/13/1984          | Headwaters to confluence w/ West Mancos                         | 4.3 miles  | 2 cfs (1/1-12/31) |
| 7-84CW266 | West Mancos               | 7/13/1984          | Confluence of North and South Fork to headgate of Jackson Ditch | 6.4 miles  | 4 cfs (1/1-12-31) |

These instream flows are located high up in the Basin in the headwaters region and all have an appropriation date of July 13, 1984. See **Exhibit 9** for copies of these decrees. See **Exhibit 10** for a map showing the location of these instream flows.

The first, the East Mancos instream flow, has a flow rate of two cfs year-round and flows from

the headwaters of the East Mancos for nearly twelve miles to the confluence with the West Mancos near the Town of Mancos.<sup>45</sup> Fish sampling was conducted to support this instream flow filing on July 20, 1977, just below the confluence with the Middle Mancos.<sup>46</sup> The sampling showed fifteen Rainbow trout (4"-9" in length); twenty-two Mottled Sculpin (1"-4" in length); and seven Speckled Dace (3"-4" in length).

The second instream flow, the Middle Mancos instream flow, has a flow rate of three cfs and starts at the headwaters of the Middle Mancos and flows 3.6 miles to the headgate of the Weber Reservoir Inlet Ditch.<sup>47</sup> Sampling for this instream flow was also conducted on July 20, 1977. It was done near the confluence with the East Mancos. At the time, the measured flow was very low. Fry were stocked in the Middle Mancos in 1971. There aren't very many details about the sample except that it contained 100 percent game fish.

The third instream flow begins at the headwaters of the North Fork of the West Mancos to the confluence of the North and South Forks of the West Mancos.<sup>48</sup> The reach covers 4.3 miles and protects two cfs year round. Sampling for this segment was conducted on July 7, 1976 at two locations: (1) above the confluence with the South Fork of the West Mancos River; and (2) at the road crossing below Shark Tooth Mountain. Sampling revealed four Brook Trout (7"-8" in length) and two unidentified native fish (1" -6" in length).

The upper terminus of the last instream flow is the confluence of the North and South Forks of the West Mancos and the downstream terminus is the headgate of the "Jackson Ditch"<sup>49</sup>, traveling 6.4 miles.<sup>50</sup> This appropriation is for four cfs year round. Sampling for this instream flow was conducted on July 7, 1976. Fishery samples were collected at three locations:

Station 1 - at the USFS Boundary. The sample showed four Rainbows (7"-13" in length); seven Brook Trout (4"-9" in length); seventeen Mottled Sculpin (1"-6" in length); and 1 small unidentified trout (1" in length).

Station 2 - above Jackson Reservoir Inlet Canal. There were one Rainbow (8" in length); sixteen Brook Trout (4"-9" in length); fifty Mottled Sculpin (1"-5" in length); and 12 small unidentified trout (1" in length) in the sample.

Station 3 - above the Mesa Verde National Park water diversion above Box Canyon. This sample turned up eleven Rainbows (5"-9" in length); twenty-nine Brook Trout (1"-8" in length); and fifty-five Mottled Sculpin (2"-5" in length).

These are the CWCB's four instream flow rights in the Basin. It should be noted that the CWCB neither manages or protects the MVNP instream flow; it is not included in the above list of Basin instream flows because it is a Federal water right, managed by the Park. Despite that, the Colorado Division of Wildlife has conducted an assessment of the natural environment

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<sup>45</sup> See Case No. 7-84CW268.

<sup>46</sup> This information and the following natural environment surveys and sampling data were provided by CWCB staff.

<sup>47</sup> See Case No. 7-84CW269.

<sup>48</sup> See Case No. 7-84CW267.

<sup>49</sup> We believe Jackson Ditch and Jackson Gulch Inlet Canal are likely the same structure based on mapping.

<sup>50</sup> See Case No. 7-84CW266.



supported by this instream flow.<sup>51</sup> At the Anitas Flat gauge, the river is considered a “cool water fishery,” located between 6,400 and 6,000 feet in elevation and downstream of segments of the Mancos River that support cold-water salmonid fisheries. Summer water temperatures frequently exceed 18 degrees Celsius (64 F) and occasionally exceed 24 degrees Celsius (75 F). Fishery surveys indicate that the Mancos River supports self-sustaining Speckled dace, Roundtail chub, Flannemouth sucker, Bluehead sucker, and Fathead minnow fisheries. Mottled sculpins and rainbow trout have also been seen in this section. Note that the State of Colorado currently considers the Roundtail chub as a Species of Special Concern.<sup>52</sup> Roundtail chub, Flannemouth sucker, and Bluehead sucker populations have been in decline for years and are involved in significant conservation and management efforts in the Colorado River Basin, but as of now, these species are not currently listed under the Endangered Species Act.<sup>53</sup>

## V. PRELIMINARY HYDROLOGIC ANALYSIS

Because the Basin’s hydrology will form the foundation for any project intended to address streamflows, this section provides a general hydrological overview of the Basin. Note that this is not a comprehensive hydrologic report. The analysis we are providing in this report relies on easily obtainable, public information. In some cases, the information provides only an historical snapshot. In others, more comprehensive and current information is available. To be sure, however, more in depth analyses will need to occur before any projects to restore flows are undertaken.

As with most Western rivers, water rights development drives the Basin’s hydrology. Most of the water rights development has occurred in the upper parts of the watershed. In his *Functional Assessment of the Mancos River Watershed: Mancos Valley and Adjacent Areas*, Dr. Peter Stacey notes:

Intensive settlement and the modification of the Mancos River and its tributaries for irrigated agriculture began around 1876, and major water delivery systems and several small water storage reservoirs had been established by the 1890s. The U[nited] S[tates] Bureau of Reclamation estimated that in 1994 approximately 14,900 acres in the Valley and surrounding areas were used for agricultural production, including alfalfa, grasses and small grains. At that time, 11,700 acres were irrigated: 9900 acres by flood irrigation and 1800 acres with sprinklers. To deliver water to the fields, there are approximately 46 water diversions on both the main Mancos River and on its tributaries. There are also several large storage reservoirs that are located above [the] Mancos Valley itself, including Jackson Gulch and Weber reservoirs. Annual diversions from the Mancos River and its tributaries in the upper watershed were estimated by the Colorado Department of Natural Resources (Colorado Decision Support System 2001) to range between 14,600 acre feet and 67,000 acre feet per year for the

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<sup>51</sup> See Draft Letter from Mark Uppendahl, Colorado Division of Wildlife, to George San Miguel, Mesa Verde National Park, dated June 10, 2005.

<sup>52</sup> See <http://wildlife.state.co.us/WildlifeSpecies/SpeciesOfConcern/Fish/FishOfConcern.htm>

<sup>53</sup> As a proactive measure to keep these three fish off the federal endangered species list, Wyoming, Utah, New Mexico, Arizona and Colorado all entered into an agreement in 2006 to “expedite implementation of conservation measures” for that purpose. See RANGEWIDE CONSERVATION AGREEMENT FOR ROUNDTAIL CHUB, BLUEHEAD SUCKER, AND FLANNELMOUTH SUCKER. The agreement can be found at <http://wildlife.state.co.us/NR/rdonlyres/C0157052-214D-4E9D-B9C3-CCCE989EE715/0/ChubSuckerRangewideConservationAgreementandStrategy010407.pdf>.

period between 1974 and 2000, with an average of 42,100 acre feet per year.<sup>54</sup>

The Mancos River Basin has scattered gauges that permit a glance into this region's hydrology.

#### A. Gauge Records

Since 1921, streamflows in the basin have been measured at various points and for various periods of record. Note on the **Exhibit 11** map the location of the following stream gauges: West Mancos Near Mancos (Structure I.D. No. 9365000), Middle Mancos Near Mancos (Structure I.D. No. 9369500), and East Mancos Near Mancos (Structure I.D. No. 9369000); Mancos River Near Mancos (Structure I.D. No. 9370000); Mancos River at Anitas Flat Below Mancos (Structure I.D. No. 9370600); Mancos River Near Cortez (Structure I.D. No. 9370800); Mancos River Below Johnson Canyon Near Cortez (Structure I.D. No. 9370820); Mancos River Near Towaoc (Structure I.D. No. 9371000); and Navajo Wash Near Towaoc (Structure I.D. No. 9371002). **Figure 3.1** shows the period of record for each of these gauges.

Figure 3.1

| Site ID <sup>1</sup> | Station Name                                   | Period of Record |           |
|----------------------|--|------------------|-----------|
|                      |  | Start Date       | End Date  |
| 09368500             | WEST MANCOS RIVER NEAR MANCOS                  | 10/1/1938        | 9/30/1953 |
| 09369000             | EAST MANCOS RIVER NEAR MANCOS                  | 4/1/1937         | 9/30/1951 |
| 09369500             | MIDDLE MANCOS RIVER NEAR MANCOS                | 4/1/1938         | 9/30/1951 |
| 09370000             | MANCOS RIVER NEAR MANCOS                       | 10/1/1931        | 9/30/1938 |
| MANMAN<br>CO         | MANCOS RIVER NEAR MANCOS                       | 11/14/1953       | Present   |
| 09370600             | MANCOS RIVER AT ANITAS FLAT BELOW<br>MANCOS    | 10/1/2003        | Present   |
| 09370800             | MANCOS RIVER NEAR CORTEZ                       | 7/1/1976         | 6/22/1979 |
| 09370820             | MANCOS RIVER BELOW JOHNSON CANYON<br>NR CORTEZ | 6/23/1979        | 9/30/1982 |
| 09371000             | MANCOS RIVER NEAR TOWAOC                       | 4/1/1921         | Present   |
| 09371002             | NAVAJO WASH NEAR TOWAOC                        | 10/1/1986        | 9/30/1993 |

**Figures 3.2 through 3.6** show the average daily flow for the period of record for several of these gauges and include a wet and a dry year to illustrate the potential range of flows which may occur. "Mean Daily for Period of Record" data for United States Geological Survey gauges was downloaded from the USGS National Water Information System website. "Mean Daily for Period of Record" data had to be calculated for the Colorado Department of Water Resources ("CDWR") "Mancos River near Mancos gauge" (MANMANCO).<sup>55</sup>

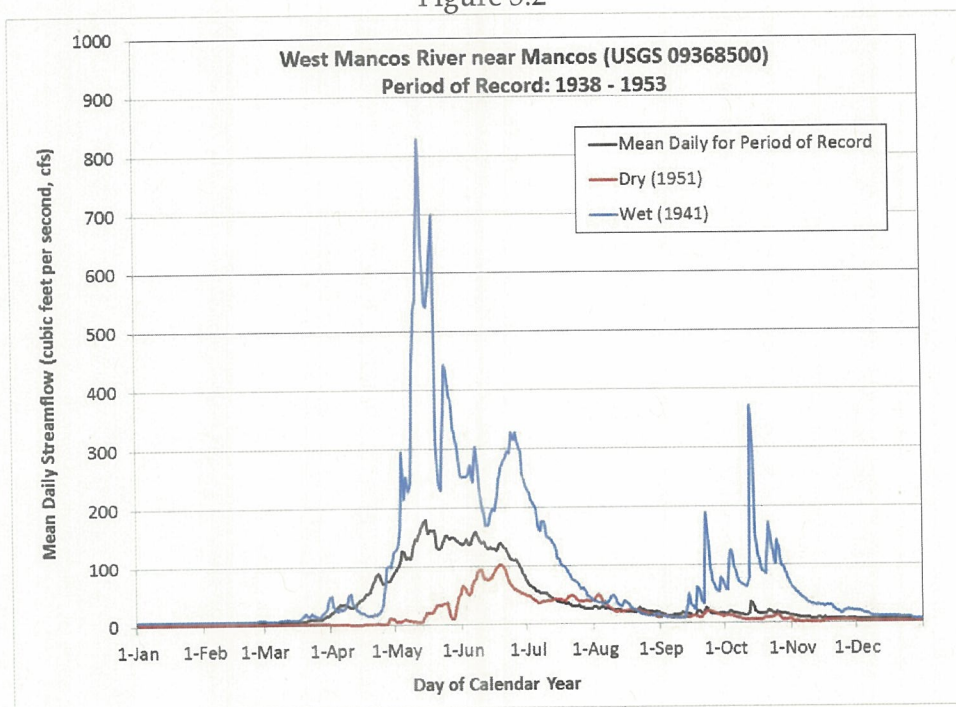
<sup>54</sup> FUNCTIONAL ASSESSMENT at 9 (citations omitted).

<sup>55</sup> The selection of wet and dry years for inclusion on each of the figures depended on data availability. For the two gauges with longer periods of record (MANMANCO and "Mancos River near Towaoc"), recent data (2002 for the dry year and 2005 for the wet year) was used. For all the other gauges with shorter periods of record, the wettest and the driest year available were selected to illustrate the potential range in flows. The "Period of Record" range listed on each figure shows the year in which data began to be collected and the last year in which data was collected, though frequently only partial data was available for the start and end years. Additionally, the one CDWR gauge (MANMANCO) had many years without readings and many others with only partial data. Only years with complete datasets were used in selecting data to be graphed.

## B. East, West, and Middle Mancos Gauges

As explained in Part II of this report, above, four main tributaries form the Mancos River's headwaters: the East, Middle, and West Mancos Rivers, and Chicken Creek. Available public records for the first three of these four main tributaries are not very current; we found no records for Chicken Creek. The three gauges for the East, West, and Middle Mancos Rivers were operated from the late 1930s until the early 1950s, as shown on **Figure 3.1**. The average, dry-year, and wet-year numbers are shown on **Figure 3.2** (West Mancos gauge), **Figure 3.3** (East Mancos gauge), and **Figure 3.4** (Middle Mancos gauge). For each period of record for the three gauges, 1941 represented the wettest year and is shown as such on the graphs. Note, however, that the dry years differ for each of the graphs. The periods of record did not allow for application of a standard dry year.<sup>56</sup>

Figure 3.2



<sup>56</sup> Additionally, the datasets for the last few years at each of the gauges were incomplete so in some cases, the dry year information has been extrapolated.

Figure 3.3

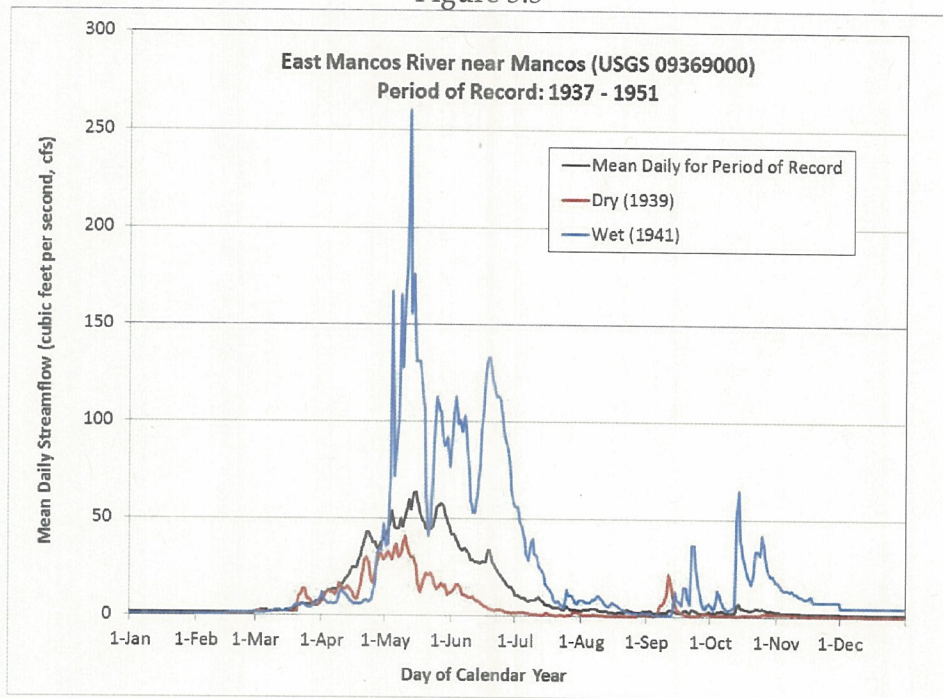
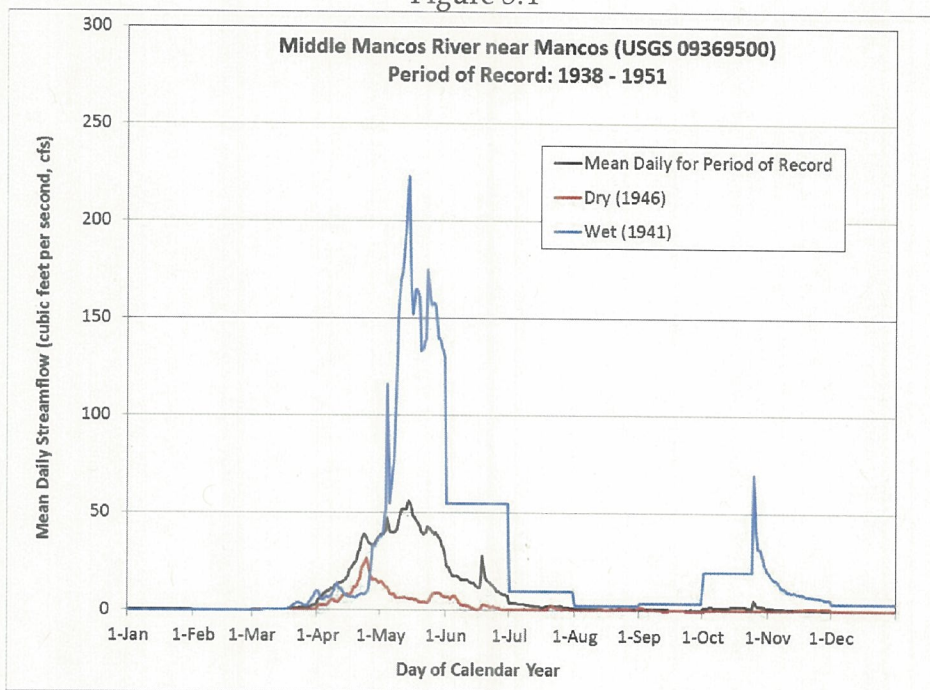


Figure 3.4

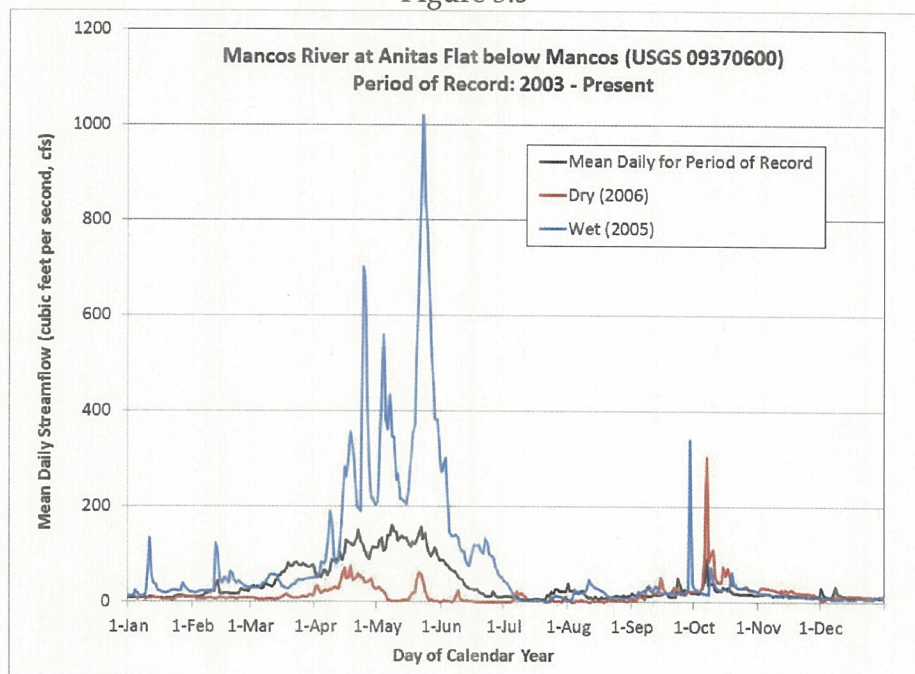




### C. Anitas Flat Gauge

The gauge at Mancos River at Anitas Flat Below Mancos ("Anitas Flat") is located about a mile south of the MVNP boundary, three miles downstream from the confluence with Mud Creek, and about seven and a half miles southwest of the town of Mancos. It drains an area of approximately 162 square miles. The Anitas Flat records are important because they show the water leftover after the river has been applied to irrigation and other beneficial uses upstream from the Park boundary. Thus, this gauge records the amount of water that makes its way out of the Town of Mancos and into the Park, showing every drop available to Mesa Verde National Park's instream flow. **Figure 3.5** shows the average of the gauge records for 2003 to the present, and the wettest and driest years in the period of record. "Mancos River at Anita Flats below Mancos" is an active gauge, but didn't come online until 2003 so 2006 was used as the dry year.

Figure 3.5

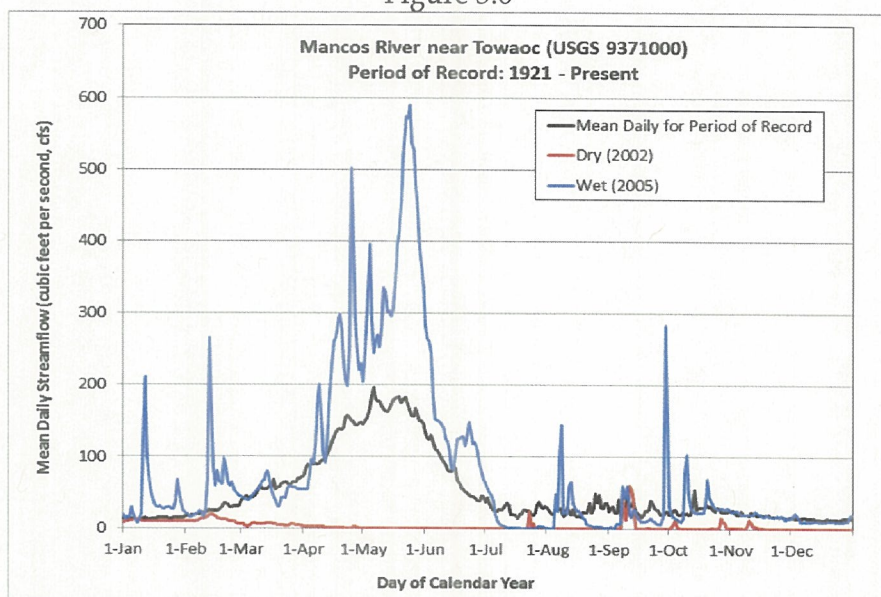


### D. Mancos River Near Towaoc Gauge

**Figure 3.6** shows the average daily, dry-year (2002), and wet-year (2005) streamflow at the Mancos River Near Towaoc gauge from 1921 to the present, the longest period for which there are continuous records in the Basin. This gauge is located 700 feet upstream from the bridge on U.S. Highway 666, two miles north of the Colorado-New Mexico state line, six miles upstream from Aztec Creek, and twelve miles south of Towaoc. Note that during 2002, the river flatlines at this gauge from May until December and that even during the wet year of 2005, the records bottom out during the late irrigation season.



Figure 3.6



#### E. Additional Considerations

The gauges are used to provide snapshots of segments of the basin. They do not show natural flow. Rather, they show flow in the river at various stages of the year with all influences at play. In spring, runoff can be seen through spikes in the hydrographs, summers and fall will show the influences of changes in precipitation as well as irrigation diversions, and other times of year, seasonality and considerations such as reservoir diversions may be influencing the hydrographs.

There are also points in the river that are known dry-up points - dried up due to diversions to satisfy water rights - that are not reflected by these gauges. The major diversion points in the Basin have been catalogued, photographed, and described in the Mancos River Watershed Diversions Project ("Watershed Diversions Project") conducted by Jesse Lanci, Project Manager and Field Technician, for the MCD.<sup>57</sup> The purpose of the Watershed Diversions Project was to provide photographic images of the major diversions in the basin to assist in determining good candidates for reconstruction. Because this comprehensive cataloging with data already exists, we did not conduct our own investigations into all the known dry-up points in the Basin. The information from the Watershed Diversions Project, however, will likely be useful for purposes of assessing any instream flow work when more detailed analyses are conducted.

#### VI. OVERVIEW OF PROJECT STAKEHOLDERS AND ROLES

The success of any efforts undertaken as a result of this report will depend upon broad-based stakeholder input and/or support. Stakeholders include agricultural, municipal, industrial, and

<sup>57</sup> The deliverable for this project is kept at the offices of the Mancos Conservation District. Each assessed diversion has been photographed and described in terms of fish passage, entrainment, and flow capture. Take, for example, the description of the Bauer #2 diversion. It states: "Barrier is made of concrete; drops off about 4 feet; there is no possible fish passage. If there were any water, it would all flow into the inlet canal."

other water users; local governmental and quasi-governmental entities; federal entities, including the USFS and MVNP; and the Tribe. CWT is currently in various stages of communication and outreach and has begun meeting individually with representatives of each of the stakeholder groups to introduce the project concepts and receive feedback.

#### **A. Mancos Conservation District**

The MCD (an entity separate and distinct from the Mancos Water Conservancy District) is at the helm of the Conservation Project, having funded this report as part of the project's ongoing efforts to improve the use and quality of water in the Mancos River Basin. The MCD was established on August 30, 1948, and has provided education and technical assistance to constituent landowners for more than sixty years, currently serving approximately 800 landowners. The result has been a long list of accomplishments that have enhanced watershed health, established water use efficiencies, and improved salinity levels, among other benefits. In addition, representatives of MCD have established a dialogue and/or partnership with representatives of NRCS, the Division of Reclamation Mining and Safety, MVNP, the United States Environmental Protection Agency, USFS, CWCBC, the Southwest Basin Roundtable, Southwestern Water Conservancy District, the Mancos Water Conservancy District, and the Mancos Rural Water Company, to name only some of the entities to which the MCD has engaged in outreach or collaboration. In 2004, the Mancos Valley was designated a Salinity Control Area by the Colorado River Salinity Control Forum, setting off a series of efforts managed by the MCD, of which this report is one.

#### **B. Mancos Water Conservancy District**

The Mancos Water Conservancy District ("MWCD"), a quasi-municipal corporation, was the beneficiary and manager of the Mancos Project. The MWCD signed a repayment contract with the United States Bureau of Reclamation to repay a portion of the nearly \$4 million in project costs and for "furnishing of most of the water appropriated and developed by said project for the irrigation of lands lying thereunder, and for domestic use on said lands, and other beneficial uses."<sup>58</sup> Jackson Gulch Reservoir plays an important role in the functioning of the Mancos River; it is one of the driving forces behind the river's flow regime.

CWT spoke with Gary Kennedy, Superintendent, on August 5, 2010, about this report. He is aware that releases from Jackson Gulch Reservoir are seen as an option for streamflow enhancement. Although he mentioned reservations about and limitations to the reservoir's use in such a manner, he expressed a willingness to entertain ongoing discussions about options, including the possibility of water that might be available for leasing from year to year. It will be important to keep Mr. Kennedy apprised of all efforts underway under the Conservation Project.

#### **C. Mesa Verde National Park**

Congress established MVNP in 1906 "for the preservation from injury or spoliation of the ruins and other works and relics of prehistoric and primitive man within said park."<sup>59</sup> With such a

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<sup>58</sup> *Id.* See also CONTRACT BETWEEN THE UNITED STATES AND MANCOS WATER CONSERVANCY DISTRICT RELATING TO THE MANCOS PROJECT.

<sup>59</sup> 16 U.S.C. § 112.

purpose, MVNP was the first national park of its kind. After its creation, the Park grew, its boundaries modified by Acts of Congress a number of times to include more land. This growth included the land surrounding the five-mile section of the Mancos River as it flows through the Park.<sup>60</sup> According to Park staff, even in average precipitation years, the Mancos River inside the Park boundaries receives too little water to maintain natural functions. The dry year impacts are particularly severe.<sup>61</sup> In 2002, upstream diversions completely dried up the river as it flowed through the Park.<sup>62</sup>

CWT spoke with George San Miguel, MVNP's Natural Resource Manager, on June 4, 2010. Although the Park tends to focus on visitation and archaeology, members of the Park's staff are committed to improving the health of the Park's natural condition, including the Mancos River as it flows through the Park's boundaries.<sup>63</sup> Park staff members interpret the Park's enabling legislation and the laws creating the National Park Service as requiring staff to keep the natural resources of the Park unimpaired in perpetuity, and where appropriate, to improve existing conditions. In fact, recall that an amendment to the Park's enabling legislation of 1906 officially expanded the purpose of Mesa Verde National Park to include the: "preservation from injury or spoilation...[of]...all timber, natural curiosities, or wonderful objects within said park...and for the protection of the animals and birds in the park." Thus, it is our belief that the Park will be a strong supporter of any efforts to restore flows in the Mancos River Basin given the Park's commitment to the health of the section of the river that flows through the Park.

#### **D. Ute Mountain Ute Tribe**

The Ute Mountain Utes are the Weeminuche band of Utes, one of the seven original Ute bands that inhabited the entire state of Colorado.<sup>64</sup> The Tribe resides on their reservation in Southwestern Colorado. The Tribe has an interest in the Mancos River; the river is a cultural and natural resource as it flows through the Ute Mountain Tribal Park. It is also considered a potential source of water for a Tribal farm on the state line that the Tribe is gearing up to operate again.

Considering the Tribe's interest in maintaining flows through the Tribal Park and having water available to the state-line farm that is being developed, the Tribe may be willing to assist with the effort to restore flows to the Mancos River. Certainly, there are common issues. CWT discussed these common issues with Allen Maez, from NRCS, who serves as the Ute Mountain Ute Tribal Liaison on June 5, 2010, and with Scott Clow, the Tribe's Environmental Program Director, in early Winter 2010. They indicated that the Tribe, if engaged, would likely support efforts to restore flows to the river.

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<sup>60</sup> See Case No. W-1633-76 at 3, ¶ 6 (July 31, 1997, District Court in and for Water Division 7).

<sup>61</sup> See Letter from Larry T. Wiese, Superintendent, Mesa Verde National Park, to Gary Kennedy, Superintendent, Mancos Water Conservancy District (July 26, 2007).

<sup>62</sup> Interview with George San Miguel, Natural Resource Manager, Mesa Verde National Park in Mancos, Colorado (June 4, 2010) [hereinafter *San Miguel Interview*]. In partnership with the Colorado Division of Wildlife and the Ute Mountain Ute Tribe, Park staff rescued twenty-two native fish from drying pools in the river and placed them in a state breeding facility in Alamosa. Memorandum from George San Miguel on Mancos River Stream Gauge Issues at 1 (May 25, 2007).

<sup>63</sup> San Miguel Interview.

<sup>64</sup> See [http://www.utemountainute.com/overview\\_statistics.htm](http://www.utemountainute.com/overview_statistics.htm).



#### **E. Southwestern Water Conservation District**

The Southwestern Water Conservation District ("SWCD") was created by legislation approved by the Colorado legislature on April 16, 1941. The charter of the SWCD is to protect, conserve, use, and develop the water resources of the Southwestern basin for the welfare of the District, and to safeguard for Colorado all waters of the basin to which the state is entitled. Included in the SWCD are nine counties: Archuleta, Dolores, La Plata, Montezuma, San Juan, San Miguel, and parts of Hinsdale, Mineral, and Montrose. County Commissioners in each county appoint a person to represent them on the SWCD Board of Directors, and the Directors' terms are for three-year periods. The Mancos River lies within the boundaries of the Southwestern basin.

#### **F. Colorado Water Conservation Board**

The CWCB is uniquely suited to assist with all elements of a project like the Conservation Project. Its mission is to "Conserve, Develop, Protect and Manage Colorado's Water for Present and Future Generations."<sup>65</sup> The CWCB's mission is focused through the seven different sections within the agency.<sup>66</sup> They allow it to develop and maintain expertise in a broad range of programs and provide technical assistance to further the utilization of Colorado's waters for all purposes.

For purposes of the Conservation Project, two sections will be of importance: the Stream and Lake Protection section, which manages the state's Instream Flow Program, and the Watershed and Flood Protection section, which, among other efforts, engages in stream restoration projects. The staff of these two sections understand well that stream restoration projects married with flow restoration projects can have synergistic effects. For example, a flow restoration project may be less beneficial to an aquatic ecosystem than a project that marries flow restoration with some kind of stream restoration effort, such as creation of a low flow channel.

CWT has been in ongoing discussions with the staff of these two sections. Both sections heartily endorse the efforts of the MCD under the Conservation Project. Both see the Conservation Project as an important, ground-breaking effort that can showcase joint use of the tools available, showing that projects can be undertaken to improve aquatic ecosystems without affecting existing water rights.

#### **G. Colorado Division of Wildlife**

CDOW manages the state's wildlife species and regulates hunting and fishing. It also manages more than 230 wildlife areas for public recreation.<sup>67</sup> CDOW has a water section whose overall goal is to optimize water use for wildlife utilizing a series of different programs. One of those programs requires the water section to work closely with the Colorado Water Conservation Board to appropriate, acquire, and protect instream flow and natural lake level water rights to

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<sup>65</sup> <http://cwcb.state.co.us/about-us/about-the-cwcb/Pages/main.aspx>.

<sup>66</sup> The different substantive sections within the CWCB are: finance, interstate and federal, water conservation and drought planning, water information, water supply planning, stream and lake protection, and watershed and flood protection.

<sup>67</sup> See <http://wildlife.state.co.us/About>.

preserve and improve the natural environment.

CWT has begun discussions with Mark Uppendahl, the Instream Flow Program Coordinator at CDOW, about the Conservation Project. Ultimately, MCD should look to CDOW to assist with obtaining biological information necessary to identify a range of optimal seasonal flows for any target streams for streamflow restoration work.

#### **H. Colorado Division of Water Resources**

CDWR is responsible for water rights administration throughout the state of Colorado. The implementation of streamflow restoration work under the Conservation Project may implicate administration issues (e.g., accommodation of bypass flows). Implementation will require consultation with the Water Commissioner and/or Division Engineer to assure that the efforts are administrable and non-injurious.

#### **I. Natural Resources Conservation Service**

NRCS districts throughout the state work closely with conservation districts in project work. In the case of the Conservation Project, staff of the local NRCS office works with the MCD when the work falls within the goals of the NRCS. When this is the case, NRCS is able to bring staff time, technical expertise, and sometimes funding to the table. If the projects the MCD chooses to pursue based on this report fall within the goals of NRCS, the NRCS may be able to assist.

#### **J. Local Water Users**

In order for much of the work to be done to improve streamflows in the Basin, the MCD will need buy-in and support from local water users. Several of the tools suggested in this report will require voluntary, willing participation of local water users. It will be imperative to stress that any projects undertaken to improve streamflows will not injure existing water rights.

### **VII. TOOLS TO ACHIEVE THE CONSERVATION PROJECT GOALS**

There are a number of different streamflow protection and restoration tools available to help the MCD achieve the Conservation Project goals. These tools were briefly presented by Amy Beatie, Executive Director of CWT, to the MCD at its Board meeting on April 10, 2010. They are discussed in more detail in this section of this report. It should be kept in mind that the flow regime of the Mancos River Basin has several major drivers, such as Jackson Gulch Reservoir and large irrigation diversions, but microregimes are present as well. Thus, any flow restoration options are likely to have geographic limitations. In other words, the hydrology of the basin suggests that there is no silver bullet solution to restore flows. Rather, a series of efforts will need to occur in order to bolster flows from the top of the basin to the state line, provided that such a result remains a long-term goal of the project.

#### **A. CWCB Instream Flow Program**

As mentioned previously, Colorado's Instream Flow Program is housed within the CWCB and managed by the CWCB's Stream and Lake Protection Section. The program is set up obtain



water rights that “to preserve or improve the natural environment to a reasonable degree.”<sup>68</sup> To accomplish the Stream and Lake Protection Section’s mission, the CWCB adds water to the instream flow program in two ways. The first is through appropriating new water rights for particular stretches of river. The second is through acquiring water.

#### **i. Instream Flow Appropriations**

The CWCB appropriates water rights to preserve the natural environment of streams (and lakes) in the state. Each February, the CWCB holds a public workshop to request recommendations for streams and lakes to be protected. New instream flow appropriations are appropriate only for sections of stream that meet three requirements: (1) a natural environment exists; (2) water is available for the appropriation; and (3) no injury will occur to other water users. These criteria are applied rigidly to proposed appropriations; the failure to meet one of them will affect the entire proposal.

Any person or entity may submit new appropriation recommendations, but the recommendations must be specific and in writing. For guidance regarding the information that is required for the CWCB to process an instream flow appropriation recommendation, the CWCB has created a “Recommendation Questionnaire.” It is attached as **Exhibit 12**. All recommendations are processed in accordance with the CWCB’s instream flow program rules, attached as **Exhibit 13**,<sup>69</sup> and statutes, as well as the timeline prepared by CWCB Stream and Lake Protection Section staff attached as **Exhibit 14**.<sup>70</sup>

After receiving recommendations, the CWCB reviews and processes the recommendations in accordance with its rules. When an ISF appropriation is uncontested, the CWCB files an application in Water Court to adjudicate the water right. If an instream flow appropriation is contested, the CWCB follows certain procedures, which include holding a hearing on the appropriation prior to taking final action on it.

Keep in mind that CWCB new instream flow appropriations are junior water rights. In practical effect, they *preserve* the current state of the stream they protect. The result is that any future water development must take into consideration—and not injure—the instream flow water right. Instream flows are thus protected against future uses. But they cannot be used to *improve* the natural environment. Acquisitions, discussed below in Part VII(a)(iii) of this report, are a good tool to be used to *preserve* or *improve* streams.

#### **ii. Instream Flow Appropriations: Mancos River Basin**

New instream flow appropriations could be applied as part of the Conservation Project, but more work will need to be done to determine whether the reaches that remain unprotected can

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<sup>68</sup> § 37-92-102(3), C.R.S. (2010) (stating that “[f]urther recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the exclusive authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution, such waters of natural streams and lakes as the board determines may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree”).

<sup>69</sup> See also 2 COLO. CODE REGS. 408-2 (“ISF Acquisition Rules”).

<sup>70</sup> These documents are all available at <http://cwcb.state.co.us/environment/instream-flow-program/Pages/InstreamFlowAppropriations.aspx>

qualify for protection under the instream flow program (i.e., that there is a natural environment to be protected, that water is available, and that no injury will occur). Water availability may be the toughest hurdle to obtaining protections and more research will need to be done to determine suitability. Nonetheless, we have described some of the obvious places where protections should be examined and any information we have about those reaches. For purposes of this discussion, refer to the map attached hereto as **Exhibit 10**.

Of the tributaries of the West Mancos, only the North Fork of the West Mancos has instream flow protection. And the West Mancos itself lacks instream flow protection from the headgate of the Jackson Inlet Canal<sup>71</sup> to the confluence of the West Mancos with the Mancos. This stretch of river could be considered for a new instream flow appropriation if water is available. It may not be, however. Oftentimes when an instream flow ends at a headgate, water is not available below that headgate. At the very least, an instream flow that ends at a headgate indicates that negotiations--rather than science--determined the reach to be covered. While we were conducting our investigations, we were also told of some undecreed exchanges that involve Jackson Gulch Reservoir and Chicken Creek. It may be that these exchanges affected the appropriation of instream flows on the lower West Mancos.

There is no streamflow protection on Chicken Creek, either. That may be due to these undecreed exchanges as well. However, further analyses might show that instream flow appropriations are suitable for Chicken Creek and should be conducted.

The tributaries of the Middle Mancos such as Silver Creek and Horse Creek also lack protection, and the Middle Mancos itself lacks protection from the Weber Reservoir Inlet Canal to the confluence of the Middle Mancos and the East Mancos. Again, there may be water availability issues due to water use, especially diversions into Weber Reservoir, but more investigations will be necessary.

The main Mancos River does not have any streamflow protections from the confluence of the East and West Mancos down to the Mesa Verde National Park boundary, where the Park's Federal reserved instream flow begins. Weber Canyon, East Canyon, and Mud Creek also all lack streamflow protections.

In order to assess unprotected stream reaches for appropriateness for instream flow protections, we suggest obtaining engineering that will examine the unprotected reaches and determine physical and legal water availability, which will likely be the most important analysis for purposes of moving forward with new appropriations. Once an engineering analysis has been conducted, we then suggest follow-up analyses such as fishery surveys to determine if there is a natural environment that can be protected. These analyses can be done by the CDOW local fisheries biologist or by private groups like FlyWater, inc. if the CDOW staff does not have the time or resources to assist. Once these analyses have been completed, the MCD can prepare a presentation to the CWCB for its annual February new ISF appropriations meeting. The next such meeting will be held in February of 2012.

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<sup>71</sup> The lower West Mancos instream flow decree references the "Jackson Ditch" as its lower terminus. We did not find any structure named the Jackson Ditch in the basin in the Colorado Decision Support System database but plotting the location of the Jackson Ditch and the Jackson Inlet Canal together indicates they are the same structure.

### iii. Instream Flow Acquisitions

Protection from future uses has its benefits, but if *improving* streamflows through use of the instream flow program is desired, a different tool from the appropriations process must be used: water rights acquisitions.<sup>72</sup> Acquisitions are an important mechanism that have at least three benefits that are not available to the appropriations program. First, the acquisitions program matches willing sellers (or lessors) with a willing buyer (or lessee). As a result, it represents a market-based approach to protection of streamflows. Second, it provides the CWCB's instream flow program with access to senior water rights.

And third, unlike new appropriations, under the acquisition program the CWCB can acquire water to preserve or *improve* the natural environment to a reasonable degree.<sup>73</sup> It can acquire absolute direct flow or storage rights on either permanent or temporary bases.<sup>74</sup> Similar to how the CWCB considers new instream flow appropriations, to determine whether to accept an offered water right, the CWCB evaluates proposed water acquisitions using a public process and established criteria.<sup>75</sup> It works closely with the CDOW to conduct its analyses.<sup>76</sup> Once it has determined to accept a water right into the Instream Flow Program, the CWCB must apply to water court to obtain a decreed right to use the water right for instream flow purposes.<sup>77</sup> The water court ensures that no injury will result to other water users from the change.<sup>78</sup>

In addition to acquiring a water right outright, the CWCB has other options for putting acquired water in the instream flow program. Two are temporary in nature. The first option is under a lease under section 37-83-105, C.R.S. (2010) (a "3-in-10 lease"). Water rights placed in 3-in-10 lease may only be used for a period of 120 days in a given year, and only for three (3) years of use over a ten (10) year period.<sup>79</sup> A 3-in-10 lease may be used on any stream where the CWCB currently holds an appropriated instream flow right, and in an amount up to the decreed amount of the instream flow.<sup>80</sup> One of its most valuable attributes is that a 3-in-10 lease

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<sup>72</sup> See § 37-92-102(3), C.R.S. (2010) (stating that the CWCB "also may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any person, including any governmental entity, such water, water rights, or interests in water in such amount as the board determines is appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree.").

<sup>73</sup> *Id.*

<sup>74</sup> See § 37-92-102(3), C.R.S. (2010) ("The board also may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any person, including any governmental entity, such water, water rights, or interests in water in such amount as the board determines is appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree."). It is prohibited from acquiring conditional water rights. C.R.S. § 37-92-102(3)(c.5) (stating that "as to any application filed by the board on or after July 1, 1994, the board may not acquire conditional water rights or change conditional water rights to instream flow uses").

<sup>75</sup> See generally § 37-92-102(3), C.R.S. (2010).

<sup>76</sup> See § 37-92-102(3), C.R.S. (2010) ("Prior to the initiation of any such appropriation or acquisition, the board shall request recommendations from the division of wildlife and the division of parks and outdoor recreation.").

<sup>77</sup> 2 COLO. CODE REGS. 408-2 (ISF Acquisition Rule 6i).

<sup>78</sup> See § 37-92-304(6), C.R.S. (2010) (No injury rule).

<sup>79</sup> See C.R.S. § 37-83-105(2)(a) (stating that "[a] water right owner may loan water to the Colorado water conservation board for use as instream flows pursuant to a decreed instream flow water right held by the board for a period not to exceed one hundred twenty days"); see also § 37-83-105(2)(a)(IV) (stating that a 3-in-10 loan "shall not be exercised for more than three years in a ten-year period, for which only a single approval by the state engineer is required").

<sup>80</sup> See C.R.S. § 37-83-105(2)(a) (stating that "[a] water right owner may loan water to the Colorado water conservation board for use as instream flows pursuant to a decreed instream flow water right held by the board for a period not to exceed one hundred twenty days") (emphasis added).

does not require a water court change case; the State and Division Engineers can approve the use of a 3-in-10 lease as long as there will be no injury to other water rights.<sup>81</sup> The 3-in-10 lease is ideal for use in emergency circumstances such as drought.

The CWCB may also enter into long-term leases. These leases are controlled by section 37-92-102(3), C.R.S. (2010). Although long-term leases are not new to the Instream Flow Program, in 2008, the Colorado legislature established protections for a lessor. The same process used to determine whether to accept fee simple title to a water right for instream flow purposes is used to evaluate water proposed for use under a long-term lease,<sup>82</sup> in addition to a few additional considerations.<sup>83</sup> For all long-term leases, the CWCB must file a change of water right application with the water court to obtain a decreed right to use the leased water for ISF purposes.<sup>84</sup>

#### iv. Instream Flow Acquisitions: Mancos River Basin

After a tour of the Basin, it became clear that a number of diversion structures impede flow. Downstream of many of the local diversion structures, the river goes completely dry, not springing back to life until tailwater and return flows accrue to the river. Acquisitions of water rights—either permanent or temporary—could rewater some of these dry up points. MCD's approach to acquisitions can build naturally from the effort engaged in to determine appropriate areas for new appropriations described in Part VII(A)(ii). If there are areas identified in the new appropriations analysis that cannot qualify for instream flow appropriations due to water availability issues, the acquisitions program then becomes a natural tool.

We suggest that the MCD determine the locations in the Basin where acquisitions have the potential to do the most good from hydrologic and natural environment perspectives and to match those areas with existing water rights. The District should then conduct outreach to determine if there are any willing sellers or lessors. This should be a coordinated effort, with the ability to put several water rights in the program together, because given the nature of the rights held in the Basin with few large rights held by individuals, each individual transaction alone may not meet the requirements under the CWCB's rules.

The process of finding willing sellers and lessors to pool water rights together can be accomplished by a "reverse auction." In a conventional auction, a seller announces its intention to dispose of an item or class of items. A reverse auction is an auction that announces a buyer's interest in acquiring an item or class of items. Reverse auctions have been used for instream flow acquisitions in the Yakima River Basin in Washington in 2005 and 2007, and in Oregon's Deschutes River basin in 2003 and 2004. They are more commonly applied as a tool to develop

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<sup>81</sup> See §§ 37-83-105(2)(a)(III), -105(2)(a)(V), & -105(2)(b), C.R.S. (2010). The approval process requires the filing of a request for approval with Division Engineer. Written notice of the proposed loan is sent to all parties that have indicated they would like to be notified of such requests. The process includes time for the filing of a protest, and instructions for the circumstances under which Division Engineer can approve.

<sup>82</sup> See *supra* n. 77.

<sup>83</sup> § 37-92-102(3), C.R.S. (2010). To use water under an HB 1280 lease, the CWCB must maintain records of how much water the CWCB uses under the contract each year it is in effect and must install any measuring device(s) deemed necessary by the Division Engineer to administer the lease of water and to measure and record how much water flows out of the reach after use by the Board under the lease.

<sup>84</sup> *Id.*

consumptive water supplies for industrial and municipal uses. For example, Tri-State Generation and Transmission used a reverse auction to acquire water rights on the Lower Arkansas in 2006.

Jackson Gulch Reservoir may also provide a solution to some of the flow issues on the West Mancos and below. Although the MWCD is limited in how it can use the water stored in the reservoir by among other documents its repayment contract to the federal government and its water court decrees, the United States maintains some rights that could allow releases from the reservoir for streamflow enhancement. Take, for example, the repayment contract. Although it mainly focuses on the MWCD's repayment responsibilities, it does include guidelines on the use of the water supply. Section 16 provides "[t]he District shall have the perpetual right to the use of all water that becomes available through the construction and operation of the Project works, delivered at the lower end of the outlet canal for irrigation, domestic, municipal and industrial purposes exclusive of the development of hydro-electric power as hereinafter excepted."<sup>85</sup> The U.S. reserved the right "[t]o use or permit the use of the Project Works or water supply for any other purposes not inconsistent with the right of the District to the use of the said Works"<sup>86</sup> and to "dispose of that part of the project water supply not required for use within the District."<sup>87</sup> Furthermore, the statute that authorized the United States to entered into such repayment contracts also provides the Secretary of the Interior the authority "for furnishing municipal or miscellaneous water supplies" by provision or contract of sale, as long as this additional supply "will not impair the efficiency of the project for irrigation purposes." 16 U.S.C. § 590z-7. Thus, the MCD could contract with the Federal government for releases from Jackson Gulch Reservoir, so long as those releases would not affect the project's primary responsibility to provide supplemental irrigation supplies within the Basin.<sup>88</sup>

## **B. Physical Solutions to Improve Streamflows**

Physical tools are also available to the MCD to achieve streamflow restoration. Two types of physical solutions are projects that involve implementation of irrigation efficiencies and phreatophyte eradication.<sup>89</sup> Neither of these efforts, however, is a direct solution towards improving streamflows, mainly because the water "saved" cannot be placed into the instream flow program directly, such as under an acquisition. Nevertheless, these efforts may have indirect beneficial effects that can be protected in other ways.

Studies have shown that phreatophyte eradication has the potential to add water to a system.<sup>90</sup>

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<sup>85</sup> See CONTRACT BETWEEN THE UNITED STATES AND MANCOS WATER CONSERVANCY DISTRICT RELATING TO THE MANCOS PROJECT at § 16(a).

<sup>86</sup> *Id.* at § 16(b)(4)(v).

<sup>87</sup> *Id.* at § 16(b)(4)(vi).

<sup>88</sup> This approach should be examined in more detail because careful consideration should be given to the consequences to the system if a lease from Jackson Gulch Reservoir is used. A lease of Jackson Gulch Reservoir water should not trade fixing flows in the system in one season at the expense of another.

<sup>89</sup> A phreatophyte, literally a 'water-loving' plant, takes its water out of the water table and is often found on the banks of western rivers.

<sup>90</sup> The pervasive spread of two nonnative plants, the saltcedar and Russian olive, lead many to believe that removal of those species would generate dramatic water savings. New studies indicate a more nuanced understanding. A recent United States Geological Survey review found "[p]rojects that remove saltcedar and Russian olive with the intention of making more water available for beneficial use by reducing evapotranspiration and increasing flow in streams have produced mixed results." See United States Geological Survey, SALT CEDAR AND RUSSIAN OLIVE IN THE WESTERN UNITED STATES - A REPORT ON THE STATE OF THE SCIENCE, Fact Sheet 2009-3110. Found at



But the water freed up by such efforts belongs to the system, not the individual. Colorado law differentiates between “developed water” and “salvaged water.” Developed water is water an appropriator makes available to a system that would not have been available by natural means; transbasin water is the classic example of developed water. Salvaged water is water that belonged to the system but for some reason was lost (e.g., through phreatophyte evapotranspiration). Phreatophyte eradication does not produce new water, only water that is subject to the call of the river.<sup>91</sup>

Structural projects/efficiency improvements in irrigated agriculture also have the potential to free up a significant amount of water. Techniques to improve agricultural efficiency include changing from flood to drip irrigation, levelling fields, better scheduling and managing of water deliveries, mixing crops and planting patterns, reconstructing inefficient headgates, and reducing seepage and evaporation through ditch lining and pipes.<sup>92</sup> With the implementation of conservation measures, the idea is that there will be no unintended or detrimental changes to the agricultural operations but water is freed up for additional uses.

However, improving irrigation efficiency to unleash wasted water does not have the effect of creating the transferable (i.e., leasable or saleable) savings that some hope. It is axiomatic that rights to use water in Colorado are based on the system of prior appropriation. Under prior appropriation, an appropriator obtains a water right from the state for a fixed amount of water necessary to accomplish a beneficial use. Any surplus water above the amount needed to accomplish the beneficial use is technically not part of the water right, i.e., is waste; a water right ripens only to the extent of the amount of water actually put to beneficial use. Thus, if a farmer improves irrigation efficiency, meaning he or she accomplishes the same beneficial use with less water, he or she is not entitled to use—or claim a property interest in—the conserved water because the water right only extends to the amount of water necessary to accomplish the beneficial use. As a result, prior appropriation laws create a disincentive to improve efficiency because the appropriator is not legally entitled to the conserved water. Thus, water conservation may make water formerly used for irrigation available to local streams, but because there isn’t a legal mechanism to claim it, there isn’t a marketable interest in it. The water savings become water available to the stream and subject to appropriation by downstream users.

Just because efforts such as phreatophyte eradication and irrigation efficiencies fail to create marketable interests in the saved water does not mean that these efforts don’t have a role to play in the Conservation Project. Quite the contrary. As previously mentioned, we learned through our interviews that the handful of efficiency projects conducted in the Basin have made more water available in the system, making downstream and junior water rights more reliable. If these kinds of projects continue to be conducted and new water uses do not come immediately online, the extra water in the system could address some of the water availability problems discussed above. An instream flow appropriation could then be used to protect this water from future diversions.

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<http://pubs.usgs.gov/fs/2009/3110/>. The study review found “[g]enerating water savings through vegetation removal requires long-term replacement of saltcedar and Russian olive with plant communities that transpire less water than saltcedar or Russian olive.”<sup>90</sup> *Id.*

<sup>91</sup> *Southeastern v. Shelton Farms*, 529 P.2d 1321 (1974).

<sup>92</sup> Michael A. Gheleta, *Water Use Efficiency and Appropriation in Colorado: Salvaging Incentives for Maximum Beneficial Use*, 58 U. COLO. L. REV. 657, 658 (1988).



Finally, streambeds and channels themselves can be modified to enhance habitat for fish or waterfowl. A wide-braided stream can have its width reduced and depth increased to provide better fish habitat. Deep pools or eddies can be constructed to provide holding and breeding areas for fish. Sections of river with reaches of shallow rocky channel that, in the summer, get hot during the day and increase the evaporative losses can be remediated with the creation of pools that can cool the flow and improve downstream flow and issues with temperature. Even if no additional water is provided, these improvements can result in better and additional habitat, which ultimately is a prime goal of instream flow protection.

## **VIII. CONCLUSIONS AND RECOMMENDATIONS**

Our analyses of the Mancos River Basin, from our interviews with local stakeholders to familiarizing ourselves with existing studies, have uncovered a unique example of collaborative work making a real difference in Colorado. If the Mancos Conservation District continues to pursue projects to bolster and protect flows from the top of the basin to the state line, much of the infrastructure to engage in these efforts exists already, with partnerships being developed or already in place, funding secured or being pursued, and with the community largely supportive of the ongoing efforts. In our Recommendations below, we have outlined the next steps, all of which can be accomplished with the will and adequate funds in place.

## RECOMMENDATIONS

1. **Examine potential for new instream flow appropriations.** The MCD should examine if new appropriations for instream flows can be put in place. The group will need to determine if there is a natural environment to be protected, that water is available, and that no injury will occur on reaches where there isn't any existing protection. The threshold analysis will be water availability, followed by an analysis of the natural environment. The MCD will need to hire some technical help with these analyses.
2. **Examine potential for instream flow acquisitions.** The MCD should look to the acquisitions program to assist with flow restoration in places where low flows are limiting the existence of a natural environment. MCD's approach to acquisitions can build naturally from the effort to determine appropriate areas for new appropriations described in Part VII(A)(ii) of this memo. If there are areas identified in the new appropriations analysis that cannot qualify for instream flow appropriations due to water availability issues, the acquisitions program then becomes a natural tool. A recommended method for working to supply enough water for the acquisitions program is a reverse auction for water rights.
3. **Continue efficiencies projects.** We learned through our interviews that the handful of efficiency projects conducted in the Basin have made more water available in the system, making downstream and junior water rights more reliable. If these kinds of projects continue to be conducted and new water uses do not come immediately online, the extra water in the system could address some of the water availability problems discussed above. An instream flow appropriation could then be used to protect this water from future diversions, but this method will only be effective to the extent it is implemented in a timely fashion.
4. **Consider other projects as appropriate.** Efforts to eradicate phreatophytes should continue, as well as streambed and other modifications that may help improve the local system. These projects can also be used in conjunction with instream flow projects to maximize the benefits.



COLORADO WATER TRUST

### Exhibit 1 - Jackson Gulch Reservoir's Decrees

| Name  | Amount   | Decreed Source                      | Appropri'n Date   | Decree/<br>Adjud'n Date | Decreed Use(s)  |
|---|--|-------------------------------------|-------------------|-------------------------|---|
| Jackson Gulch Reservoir (CA 967)  | 9,980 acre-feet  | Jackson Gulch and West Mancos River | October 31, 1936  | March 22, 1963          | "irrigation, power, domestic, municipal, fire protection, recreational, industrial, manufacturing, and other beneficial purposes"   |
| Jackson Gulch Inlet Canal (CA 967)  | 258.17 cfs   | West Mancos River                   | October 31, 1936  | March 22, 1963          | "for storage and direct passage . . . for discharge and release . . . in the irrigation of lands . . . and for other beneficial purpose"  |
| Jackson Gulch Reservoir (CA 967)  | Not less than 200 acre-feet  | Jackson Gulch and West Mancos River | October 31, 1936  | March 22, 1963          | "shall, at all times, be retained and remain in said reservoir for the preservation of fish life therein"   |
| Jackson Gulch Reservoir (Case No. 91CW58)                                     | 1,385 acre-feet  | West Mancos River                   | 1954              | December 31, 1991       | Refilling of Jackson Gulch Reservoir for "irrigation, domestic, municipal, fire protection, recreational, industrial, manufacturing and other beneficial purposes"  |
| Jackson Gulch Reservoir (Case No. 91CW58) (Case No. 04CW52)                   | 1,385 acre-feet conditional (made absolute by 04CW52)                    | West Mancos River                   | December 31, 1990 | December 31, 1991       | "power generation" (Case No. 04CW52 makes clear that this is not a separate water right, simply the addition of power use to above right)   |
| Jackson Gulch Reservoir (Case No. 91CW58) (Case No. 04CW52) (Case No. 07CW21) | 616 acre-feet conditional (extended by 04CW52) (made absolute by 07CW21) | West Mancos River                   | December 31, 1990 | December 31, 1991       | "irrigation, domestic, municipal, fire protection, recreational, industrial, manufacturing, power generation and other beneficial purposes"   |
| Jackson Reservoir Diversion (Case No. 91CW58)                                 | 258 cfs  | West Mancos River                   | 1971              | December 31, 1991       | "fish enhancement and recreation"<br><br>"any water diverted from river for this flow through surface water right will be measured into the Reservoir and measured back to the river system, with Jackson Gulch Reservoir absorbing any loss through evaporation" |
| Jackson Gulch Reservoir (Case No. 91CW58)                                     | 33 cfs, conditional (Case No. 04CW52 abandoned)                          | West Mancos River                   |                   | December 31, 1991       | "for the historic irrigation season: March 15 - October 31, for the Jackson Reservoir Power Diversion . . . for nonconsumptive use for power generation"  |

**Exhibit 2 - Mesa Verde National Park's Appropriated Rights**

| Name   | Amount  | Decreed Source    | Appropri'n Date | Decree/ Adjud'n Date | Decreed Use(s)  |
|--|---|-------------------|-----------------|----------------------|---|
| West Mancos Water Supply System for Mesa Verde National Park | 120 acre-feet per annum of storage or direct flow | West Mancos River |                 | 3/22/1963            | "for domestic, fire protection, and other beneficial uses to and for the use of the Mesa Verde National Park" |
| West Mancos Water Supply System for Mesa Verde National Park | 100 acre-feet per annum                           | West Mancos River |                 | 3/22/1963            | "should occasion and necessity require in the manner provided for as to said 120 acre feet of water"          |













RECEIVED

DISTRICT COURT, WATER DIVISION NO. 7, STATE OF COLORADO

APR 06 1997

CASE NO. W-1633-76

WATER RESOURCES  
STATE ENGINEER  
COLO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE UNITED STATES OF AMERICA IN THE COUNTY OF MONTEZUMA (Reserved Water Rights for Mesa Verde National Park)

THIS MATTER comes before the Court for entry of Findings of Fact, Conclusions of Law and Decree on the application for reserved water rights at Mesa Verde National Park. The Court, having examined the records and files herein, having taken testimony where such testimony was necessary, and being now fully and sufficiently advised in the premises, hereby makes the following Findings of Fact, Conclusions of Law and Decree:

FINDINGS OF FACT

1. Pursuant to the McCarran Amendment, 43 U.S.C. §666, the United States of America filed an application for water rights at Mesa Verde National Monument, Hovenweep National Monument and Yucca House National Monument on December 30, 1976, which was assigned Case No. W-1633-76. An amended application for reserved water rights for Mesa Verde National Monument was filed on February 7, 1977. Thereafter, on March 17, 1977, the United States filed a pleading to correct its Application to indicate that Mesa Verde was a national park rather than a national monument.

2. The following Objectors timely filed Statements of Opposition in Case No. W-1633-76:

City and County of Denver  
State of Colorado, Department of Natural Resources  
Dolores Water Conservancy District  
Southwestern Water Conservation District  
Florida Water Conservancy District  
La Plata Water Conservancy District  
Mancos Water Conservancy District  
Summit Reservoir and Irrigation Co.  
Colorado River Water Conservation District  
Town of Rico  
City of Cortez  
Town of Dolores  
Town of Dove Creek  
Montezuma Valley Irrigation Co.  
Dolores Flood Control District

All of the Objectors, with the exception of the Town of Rico and the Dolores Flood Control District, have stipulated to the

CENTRAL FILES

entry of this Findings of Fact, Conclusions of Law and Decree ("Decree") or withdrawn their Statement of Opposition. As stated in the Affidavit filed concurrently with this Decree, the United States was unable to locate present counsel for the Dolores Flood Control District or confirm that it is still in existence.

3. The name, address and telephone number of the applicant:

United States of America  
% U.S. Department of Justice  
999 18th Street, Suite 945  
Denver, CO 80202  
(303) 312-7300

4. In its application, the United States:

a. claims reserved rights in Mesa Verde National Park to "all water in, on, under, adjacent or otherwise appurtenant to the land . . . , tributary or non-tributary . . ." described by an Act creating Mesa Verde National Park approved June 29, 1906 (34 Stat. 616), and the Acts of June 30, 1913 (38 Stat. 82); February 26, 1931 (46 Stat. 1422); April 25, 1928 (45 Stat. 458); December 23, 1963 (77 Stat. 473); and Presidential Proclamation No. 1998 of May 27, 1932 (47 Stat. 2511), with priority dates as of the dates these lands were withdrawn from the public domain.

b. claims reserved water rights for the following uses:

for the preservation from injury or spoliation of the ruins and other works and relics of prehistoric and primitive man within said park; recreation, domestic uses; municipal and administrative site uses; irrigation; stock grazing and watering; the development, conservation and management of resident and migratory wildlife and wildlife resources, the terms wildlife and wildlife resources to include birds and mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent; fire fighting and protection, forest growth, management, improvement and protection; commercial drinking and sanitary uses; road watering, watershed protection and management; wilderness preservation, flood, soil erosion control; preservation of educational, historic, scientific, scenic, aesthetic and other public values and habitat protection and management.

c. claims reserved water rights from the following sources and in the following amounts: that quantity "of surface, ground and underground waters, both tributary and non-tributary, which are situated in this Water Division and are located in, on, under, adjacent, or otherwise appurtenant to" the reservation, and which are, or will become, necessary to fulfill the present and future purposes for which the reservation was created.

5. Mesa Verde National Park was established by an Act of Congress creating Mesa Verde National Park on June 29, 1906 (34 Stat. 616) "for the preservation from injury or spoliation of the ruins and other works and relics of prehistoric and primitive man within said park."

6. On June 30, 1913, (38 Stat. 82) an Act making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June 30, 1914, extended the boundaries of the Mesa Verde National Park adding additional parcels of land in which the Mancos River flows and in which springs originate.

7. On April 25, 1928, (45 Stat. 458) an Act to accept the cession by the State of Colorado of exclusive jurisdiction over the land embraced within the Mesa Verde National Park, and for other purposes required the Secretary of the Interior to

make and publish such general rules and regulations as he may deem necessary and proper for the management and care of the park and for the protection of the property therein, especially for the preservation from injury or spoliation of the ruins and other works and relics of prehistoric or primitive man, all timber, natural curiosities, or wonderful objects within said park, and for the protection of the animals and birds in the park from capture or destruction, and to prevent their being frightened or driven from the park; and he shall make rules and regulations governing the taking of fish from the streams or lakes in the park.

8. On May 27, 1932 Presidential Proclamation No. 1998 (47 Stat. 2511) reserved certain additional lands described therein for scenic and road preservation purposes for inclusion within Mesa Verde National Park.

9. On December 23, 1963 an Act to revise the boundaries of Mesa Verde National Park, Colorado and for other purposes, (77 Stat. 473) further amended the boundaries of Mesa Verde National Park and required the National Park Service to administer lands "in

accordance with the Act entitled 'An Act to establish a National Park Service, and for other purposes,' approved August 25, 1916 (39 Stat. 535), as amended and supplemented (16 U.S.C. § 1, et seq.).

10. The boundaries of the respective reservations are shown in Exhibit A, the map attached hereto and made a part hereof.

11. The Mancos River, an identifiable and discrete water course within Mesa Verde National Park, enters the northeast part of Mesa Verde National Park in the NW1/4NE1/4 of Section 26, T. 35 N., R. 14 W. of the New Mexico P.M., and traverses lands reserved by the Act of June 30, 1913 (38 Stat. 82) in the E1/2 of Section 26, and the E1/2 of Section 35, T. 35 N., R. 14 W. and the W1/2 of Section 1 and the N1/2 of Section 12 T. 34 N., R. 14 W. of the New Mexico P.M., and exits the park in the NW1/4SE1/4, Section 12, T. 34 N., R. 14 W. of the New Mexico P.M.

12. Maintenance of instream flows in the Mancos River in Mesa Verde National Park is necessary to meet the primary purposes of the Park as described by the Acts of June 29, 1906 (34 Stat. 616); April 25, 1928 (45 Stat. 458); December 23, 1963 (77 Stat. 473); and Presidential Proclamation No. 1998 of May 27, 1932 (47 Stat. 2511).

13. There are numerous springs located on the lands reserved from the public domain in Mesa Verde National Park. These springs served as sources of water for the "prehistoric and primitive" inhabitants of the lands now comprising Mesa Verde National Park. The flow of these springs irrigates natural vegetation of the kind which was used by the "prehistoric and primitive" inhabitants as sources of food and fiber. The continued flow of these springs is necessary for interpretation of the life of the "prehistoric and primitive" inhabitants of Mesa Verde National Park. Also, the continued flow of these springs is necessary for preservation of "all timber, natural curiosities, or wonderful objects within said park, and for the protection of the animals and birds in the park."

14. Exhibit B (IN SITU USES FOR SPRINGS AT MESA VERDE NATIONAL PARK), which is attached hereto and made a part hereof, lists the springs located on the lands reserved from the public domain in Mesa Verde National Park by number, name, legal location, and amount of water necessary for the purposes described by the Acts of June 29, 1906 (34 Stat. 616); April 25, 1928 (45 Stat. 458); December 23, 1963 (77 Stat. 473); and Presidential Proclamation No. 1998 of May 27, 1932 (47 Stat. 2511). The springs identified in Exhibit B will be utilized for in situ uses that include evapotranspiration by natural vegetation, used by birds and animals, and the interpretation of the life of the "prehistoric and primitive" inhabitants.

15. In addition to the foregoing requirements for water



within Mesa Verde National Park, the National Park Service needs a reserved water right of 70 acre-feet per annum to help satisfy future requirements for the operation, administration, and protection of Mesa Verde National Park, including but not limited to such uses as, excavation, restoration and preservation of ruins and structures; construction of visitor facilities; staff and visitor domestic uses; and fire suppression. This water is necessary to fulfill the primary purposes of Mesa Verde National Park as described by the Acts of June 29, 1906 (34 Stat. 616); April 25, 1928 (45 Stat. 458); and December 23, 1963 (77 Stat. 473); and Presidential Proclamation No. 1998 of May 27, 1932 (47 Stat. 2511).

16. The United States has an appropriative water right for 120 acre-feet per annum and has an additional appropriative right for 100 acre-feet per annum pursuant to water rights decreed on March 22, 1963. These rights have a priority date of October 31, 1936, and consist of either storage or direct-flow, or both, from the West Mancos River with compensatory exchange releases from Jackson Gulch Reservoir.

#### CONCLUSIONS OF LAW

17. All notices required by law for filing and publication of the application in the Resume of Water Division No. 7 have been fulfilled and the court has jurisdiction over the subject matter and all parties whether or not they appeared. The time for filing Statements of Opposition has expired.

18. The primary purposes of Mesa Verde National Park are as stated in the Acts of June 29, 1906 (34 Stat. 616); April 25, 1928 (45 Stat. 458); and December 23, 1963 (77 Stat. 473); and Presidential Proclamation No. 1998 of May 27, 1932 (47 Stat. 2511) to wit: "the protection . . ." and "the preservation from injury or spoliation of the ruins and other works and relics of prehistoric and primitive man, all timber, natural curiosities, or wonderful objects . . ., and for the protection of the animals, birds and fish in the park."

19. Under the federal reserved rights doctrine, the United States has reserved instream flow rights in the Mancos River within the boundaries of Mesa Verde National Park to fulfill the primary purposes of Mesa Verde National Park. Arizona v. California, 373 U.S. 546, 600 (1963); Cappaert v. United States, 426 U.S. 128, 138 (1976); United States v. Denver, 656 P.2d 1, 20 (Colo. 1982).

20. Under the federal reserved rights doctrine, the United States also has the following reserved water rights with the following priority dates to meet the present and future needs for water necessary to fulfill the primary purposes of Mesa Verde National Park. Arizona v. California, 373 U.S. 546, 600 (1963); Cappaert v. United States, 426 U.S. 128, 138 (1976); United States

v. Denver, 656 P.2d 1, 34-35 (Colo. 1982).

a. The United States has reserved water rights for the springs described in Finding of Fact Nos. 13 and 14 above and Exhibit B. The priority dates are the dates of the reservation of the land containing the springs.

b. The United States has reserved water rights for 70 acre-feet of water per annum to help satisfy future requirements for the operation, administration, and protection of Mesa Verde National Park, including but not limited to such uses as, excavation, restoration and preservation of ruins and structures; construction of visitor facilities; staff and visitor domestic uses; and fire suppression. The priority dates are the dates the lands were withdrawn from the public domain.

21. The United States has demonstrated its entitlement to this decree as a matter of law.

#### DECREE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

22. The Findings of Fact and Conclusions of Law contained herein are incorporated by reference and made a part of this Decree.

23. The United States is decreed reserved rights for the springs identified in Exhibit B, which is incorporated by reference and made a part of this decree, for use in situ, in the amounts stated in Exhibit B. This water is necessary to fulfill the primary purposes of Mesa Verde National Park as described by the Acts of June 29, 1906 (34 Stat. 616); April 25, 1928 (45 Stat. 458); December 23, 1963 (77 Stat. 473); and Presidential Proclamation No. 1998 of May 27, 1932 (47 Stat. 2511). The priority dates are the respective reservation dates identified in Exhibit B.

24. For the flows and time periods listed below, the United States is decreed reserved rights to instream flows in the Mancos River, flowing within Mesa Verde National Park, beginning at the point where the Mancos River enters reserved lands in the SE1/4 quarter of Section 26, T. 35 N., R. 14 W. of the New Mexico Principal Meridian, with a priority date of January 1, 1995. This water is necessary to fulfill the primary purposes of Mesa Verde National Park as described by the Acts of June 29, 1906 (34 Stat. 616); April 25, 1928 (45 Stat. 458); December 23, 1963 (77 Stat. 473); and Presidential Proclamation No. 1998 of May 27, 1932 (47 Stat. 2511).

a: August 1 through January 31 - 5 c.f.s.

b: February 1 through February 28 - 10 c.f.s.

- c: March 1 through March 31 - 15 c.f.s.
- d: April 1 through April 30 - 30 c.f.s.
- e: May 1 through May 31 - 45 c.f.s.
- f: June 1 through June 30 - 12 c.f.s.
- g: July 1 through July 31 - 6 c.f.s.

25. The United States is decreed reserved water rights in the amount of 70 acre-feet of water per annum to help satisfy future requirements for the operation, administration, and protection of Mesa Verde National Park, including but not limited to such uses as, excavation, restoration and preservation of ruins and structures; construction of visitor facilities; staff and visitor domestic uses; and fire suppression. This water is necessary to fulfill the primary purposes of Mesa Verde National Park described by the Acts of June 29, 1906 (34 Stat. 616); April 25, 1928 (45 Stat. 458); and December 23, 1963 (77 Stat. 473); and Presidential Proclamation No. 1998 of May 27, 1932 (47 Stat. 2511). Except as provided in paragraph 26, below, this water may be developed from "any water in, on, under, adjacent or otherwise appurtenant to" Mesa Verde National Park. The priority dates for these 70 acre-feet are the dates of reservation associated with the location of the diversion. The priority date for the water which may be diverted from the Mancos River pursuant to paragraph 26 below is June 20, 1913.

26. The National Park Service will satisfy its need for water for future operation, administration, and protection of Mesa Verde National Park in the following order: 1) First, from the existing 120 acre-feet per annum appropriative water right from the West Mancos River described in paragraph 16 above; 2) Second, from the additional 100 acre-feet per annum appropriative right from the West Mancos River described in paragraph 16 above; and 3) Third, to the extent such appropriative rights are not adequate to accommodate increased utilization and visitation at Mesa Verde National Park, then from the reserved water rights of the United States for 70 acre-feet of water per annum described in paragraph 25 above, provided that at no time will the withdrawal of water from the Mancos River pursuant to this reserved right exceed 10 acre-feet per annum, with only five acre feet diverted during the irrigation season: June through October.

27. This judgment and decree constitutes the final adjudication of all claims of the United States for reserved rights for Mesa Verde National Park pursuant to the Acts of June 29, 1906 (34 Stat. 616); June 30, 1913 (38 Stat. 82); April 25, 1928 (45 Stat. 458); December 23, 1963 (77 Stat. 473); and Proclamation No. 1998 of May 27, 1932 (47 Stat. 2511) and any other applicable federal acts enacted prior to December 30, 1976.

28. Prior to diversion and use of any surface water on land reserved from the public domain in Mesa Verde National Park, the National Park Service shall provide the State Engineer the same

information that would be required in an application for a surface water right. Whereupon, the State Engineer shall administer the use in accordance with this Decree.

29. Prior to constructing any well, the National Park Service shall provide the State Engineer the same information required of an applicant for a permit to construct a well. Upon receipt of the information required of an applicant for a permit to construct a well, the State Engineer shall issue a permit and administer the use in accordance with the terms of this decree.

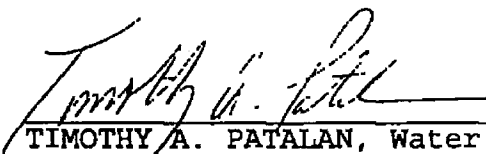
30. Subject to the availability of funds, the United States shall install and maintain such water measurement devices, recording devices, content gauges and inlet and outlet measurement and recording devices, as the case may be, as are deemed essential by the Office of the State Engineer; provided, however, that such devices shall not be located so as to interfere with the purposes of Mesa Verde National Park; and further provided that the United States shall not be entitled to curtailment of other water rights for the benefit of any of the water rights decreed herein unless the United States has installed and is maintaining the measurement devices required pursuant to this paragraph.

31. Because this Decree was entered pursuant to agreement of the parties and the issues decided herein have not been litigated between the parties, the parties shall not be collaterally estopped from asserting any factual and/or legal issues in any other cases not involving these water rights. This Decree shall not be used, considered, or cited as precedent in any other case except and only to the extent that the rights decreed herein are at issue.

32. The water clerk shall serve a copy of this Decree upon the parties, the Division Engineer, Water Division No. 7, and the State Engineer.

DATED this 31<sup>st</sup> day of July, 1997.

BY THE COURT:

  
TIMOTHY A. PATALAN, Water Judge  
Water Division No. 7  
State of Colorado

cc: K. Beegles (3)      C. Fossum  
H. Simpson            K. McCabe  
W. Weiss  
J. Sheftel  
L. W. McDaniel  
D. Hallford  
P. Wells

# EXHIBIT B

## IN SITU USES FOR SPRINGS AT MESA VERDE NATIONAL PARK

The following springs are located north of the Ute Line on land reserved by the Act of June 29, 1906:

| <u>Spr.</u><br><u>#</u> | <u>Source Name</u>              | <u>Legal</u><br><u>Description</u> | <u>Amount</u><br><u>(gpm)</u> |
|-------------------------|---------------------------------|------------------------------------|-------------------------------|
| 3                       | Rock Springs #1                 | SWSES7T34NR15W *                   | 0.014                         |
| 26                      | West Long Canyon Spring         | NESES7T34NR15W *                   | 0.045                         |
| 28                      | Upper Soda Can. Spring #4       | NWNWS3T34NR15W *                   | 5.0                           |
| 29                      | Upper Soda Canyon Spring #3     | SWSWS34T35NR15W                    | 0.022                         |
| 30                      | East Navajo Canyon Spring #2    | NENWS4T34NR15W *                   | 0.022                         |
| 31                      | Battleship Rock Spring #1       | SESW34T35NR15W                     | 0.022                         |
| 35                      | Long Canyon Spring #1           | NWNES31T35NR15W                    | 0.022                         |
| 36                      | West Navajo Canyon Spring       | NWSES32T35NR15W                    | 0.022                         |
| 38                      | School Section Canyon Spring #3 | SESES25T35NR15W                    | 0.022                         |
| 39                      | Prater Canyon Spring #3         | SESW32T35NR14W                     | 0.022                         |
| 40                      | Morefield Can. Spring #4        | NWNWS4T34NR14W *                   | 0.25                          |
| 41                      | Prater Canyon Spring #2         | NWSWS29T35NR14W                    | 0.022                         |
| 42                      | Morefield Canyon Spring #3      | SWNWS33T35NR14W                    | 0.022                         |
| 43                      | Moccasin Canyon Spring #1       | NWSWS19T35NR14W                    | 0.022                         |

NOTE: Legal descriptions are defined as the quarter section of the quarter section of a given section, township, and range (e.g., SWSW3T36NR30W). All townships are north of the Base Line, except as noted below, which extends across New Mexico (between 34 and 35 degrees latitude), and all ranges are west of the New Mexico Principal Meridian. Unsurveyed or protracted sections are taken from Bureau of Land Management Protraction Diagram #31, October 28, 1964 and are identified with an asterisk (\*) following the legal description.



| <u>Spr.</u><br><u>#</u> | <u>Source Name</u>              | <u>Legal</u><br><u>Description</u> | <u>Amount</u><br><u>(gpm)</u> |
|-------------------------|---------------------------------|------------------------------------|-------------------------------|
| 44                      | West Prater Canyon Spring       | SWNES19T35NR14W                    | 0.022                         |
| 45                      | Waters Can. Spring #1           | NENES28T35NR14W                    | 0.5                           |
| 46                      | Prater Canyon Tunnel Spring     | NWSWS17T35NR14W                    | 0.022                         |
| 56                      | Frink Trail Boulder Spring      | NWNWS23T35NR15W                    | 5.0                           |
| 62                      | Moccasin Overlook Spring        | NENES24T35NR15W                    | 0.022                         |
| 70                      | Morefield Canyon Spring #1      | SWSES20T35NR14W                    | 12.0                          |
| 71                      | Morefield Point Spring #2       | SWNWS21T35NR14W                    | 0.355                         |
| 74                      | Moccasin Canyon Spring #2       | SWSWS19T35NR14W                    | 0.022                         |
| 77                      | Keesee Field Spring             | SESWS4T35NR14W                     | 5.0                           |
| 81                      | East Navajo Canyon Spring #1    | SWNWS27T35NR15W                    | 0.022                         |
| 87                      | Line Change Seep                | NENWS19T35NR14W                    | 0.022                         |
| 90                      | School Sec. Can. Spring #2      | NESWS24T35NR15W                    | 0.75                          |
| 112                     | W Little Soda Can. Spring #3    | NWNES34T35NR15W                    | 0.022                         |
| 122                     | Prater Canyon Boxelder Spring   | NWNWS20T35NR14W                    | 0.022                         |
| 134                     | W Little Soda Can. Spring #1    | SWSES22T15NR35W                    | 1.0                           |
| 135                     | Frink Trail Slum Gullion Spring | NWSWS23T35NR15W                    | 0.022                         |
| 146                     | W Little Soda Can. Spring #2    | NWNES27T35NR15W                    | 0.125                         |
| 153                     | Vulture Cliff Spring            | SESWS9T35NR14W                     | 5.0                           |
| 154                     | Mancos Canyon Spring 1906       | SENES27T35NR14W                    | 0.022                         |
| 158                     | School Section Canyon Spring #1 | SENWS24T35NR15W                    | 0.022                         |

| <u>Spr.</u><br><u>#</u> | <u>Source Name</u>            | <u>Legal</u><br><u>Description</u> | <u>Amount</u><br><u>(gpm)</u> |
|-------------------------|-------------------------------|------------------------------------|-------------------------------|
| 165                     | Morefield Ridge Spring        | SWNWS33T35NR14W                    | 0 022                         |
| 176                     | East Rim Trail Spring         | SWSWS16T35NR14W                    | 0 33                          |
| 177                     | Morefield Point Spring #1     | SWNWS21T35NR14W                    | 0.022                         |
| 182                     | Upper Soda Canyon Spring #2   | NWSES26T35NR15W                    | 0.022                         |
| 183                     | Morefield Canyon Spring #2    | NESES29T35NR14W                    | 0.125                         |
| 192                     | Mile 2 Wetherill Road Spring  | SENES21T35NR15W                    | 0 5                           |
| 195                     | Prater Ridge Spring #1        | NWSES7T35NR14W                     | 5.0                           |
| 196                     | Prater Ridge Spring #2        | NWSES7T35NR14W                     | 5.0                           |
| 197                     | Prater Ridge Spring #3        | SWSSES7T35NR14W                    | 0 355                         |
| 198                     | Prater Canyon Spring #1       | NWSES18T35NR14W                    | 5 0                           |
| 199                     | Prater Can Side Canyon Spring | NWNWS29T35NR14W                    | 0.125                         |
| 204                     | Knife Edge Trail Spring       | SWSWS7T35NR14W                     | 0.125                         |
| 213                     | Mancos Canyon Gully #1        | NWNWS26T35NR14W                    | 1.5                           |
| 214                     | Mancos Canyon Gully #2        | SENWS26T35NR14W                    | 2 0                           |
| 215                     | Mancos Canyon Gully #5        | NENWS35T35NR14W                    | 2 0                           |
| 216                     | Mancos Canyon Gully #6        | NENWS35T35NR14W                    | 2 0                           |
| 217                     | Mancos Canyon Gully #7        | SESW35T35NR14W                     | 1.5                           |
| 223                     | Waters Canyon Spring #2       | SESES28T35NR14W                    | 1.0                           |
| 224                     | Whites Canyon Spring          | NESWS27T35NR14W                    | 1.0                           |
| 226                     | Upper Soda Canyon Spring #1   | NWSES23T35NR15W                    | 1.0                           |

| <u>Spr.</u><br><u>#</u> | <u>Source Name</u>          | <u>Legal</u><br><u>Description</u> | <u>Amount</u><br><u>(gpm)</u> |
|-------------------------|-----------------------------|------------------------------------|-------------------------------|
| 259                     | Culvert One                 | NWNES7T35NR14W                     | 5.0                           |
| 262                     | Prater Canyon-Turkey Spring | SWSWS29T35NR14W                    | 2.5                           |

The following springs are located south of the Ute Line on land reserved by the Act of June 30, 1913:

| <u>Spr.</u><br><u>#</u> | <u>Source Name</u>         | <u>Legal</u><br><u>Description</u> | <u>Amount</u><br><u>(gpm)</u> |
|-------------------------|----------------------------|------------------------------------|-------------------------------|
| 1                       | Spruce Tree House Spring   | NWNWS21T34NR15W *                  | 0.014                         |
| 2                       | Soda Canyon Cliff Spring   | SESES27T34NR15W *                  | 0.014                         |
| 4                       | Spring House Spring        | SWNWS18T34NR15W *                  | 0.014                         |
| 5                       | Cliff Palace Spring        | SESES28T34NR15W *                  | 0.014                         |
| 6                       | Cliff Canyon Spring #1     | NWSES21T34NR15W *                  | 0.014                         |
| 7                       | Wickiup Canyon Spring #3   | NWSWS20T34NR15W *                  | 0.014                         |
| 8                       | Square Tower House Spring  | SESES29T34NR15W *                  | 0.014                         |
| 9                       | Fewkes Canyon Spring #2    | SWNES28T34NR15W *                  | 0.014                         |
| 10                      | Fewkes Canyon Spring #1    | SWNES28T34NR15W *                  | 0.014                         |
| 11                      | Fewkes Canyon Spring #4    | SESES28T34NR15W *                  | 0.014                         |
| 12                      | Cliff Canyon Spring #3     | NENES28T34NR15W *                  | 0.014                         |
| 13                      | Sunset House Spring        | NWSWS27T34NR15W *                  | 0.014                         |
| 14                      | Navajo Canyon Reed Springs | NESWS29T34NR15W *                  | 0.045                         |
| 15                      | Bobcat Canyon Spring #1    | NWNWS19T34NR15W *                  | 0.014                         |

| <u>Spr.</u><br><u>#</u> | <u>Source Name</u>           | <u>Legal</u><br><u>Description</u> | <u>Amount</u><br><u>(gpm)</u> |
|-------------------------|------------------------------|------------------------------------|-------------------------------|
| 16                      | Long Canyon Spring #3        | NESWS18T34NR15W *                  | 0.014                         |
| 17                      | Rock Can. Kodak House Spring | NESES24T34NR16W                    | 0.125                         |
| 18                      | Rock Can. Long House Spring  | SWSES13T34NR16W                    | 0.003                         |
| 19                      | Wicklup Can. Spring #2       | SESW57T34NR15W *                   | 5.0                           |
| 20                      | Navajo Can. Spring #1        | NENES7T34NR15W *                   | 5.0                           |
| 21                      | Wicklup Canyon Spring #1     | NWNWS7T34NR15W *                   | 0.045                         |
| 22                      | Rock Can. Spring #2          | NESES25T34NR16W                    | 5.0                           |
| 23                      | Lower Soda Canyon Spring #3  | NESES27T34NR15W *                  | 0.014                         |
| 24                      | Rock Canyon Spring #1        | NESWS13T34NR16W                    | 0.045                         |
| 25                      | Rock Canyon Jug House Spring | SWNWS13T34NR16W                    | 0.045                         |
| 47                      | Balcony House Spring #1      | NESWS27T34NR15W *                  | 0.014                         |
| 48                      | Balcony House Spring #2      | NESWS27T34NR15W *                  | 0.014                         |
| 53                      | Lower Soda Canyon Spring #2  | SENWS27T34NR15W *                  | 0.014                         |
| 54                      | Lower Soda Canyon Spring #1  | SWSES22T34NR15W *                  | 0.045                         |
| 55                      | Horse Canyon Spring          | SWSWS25T34NR16W                    | 0.355                         |
| 61                      | Cliff Canyon Spring #2       | NENES28T34NR15W *                  | 0.014                         |
| 63                      | Navajo Canyon Spring #3      | NESWS29T34NR15W *                  | 0.045                         |
| 64                      | Navajo Canyon Spring #4      | NESWS29T34NR15W *                  | 0.045                         |
| 66                      | Nordenskiold Site 12 Spring  | NENES25T34NR16W                    | 0.014                         |
| 67                      | Fuller Brush House Spring    | NESES30T34NR15W *                  | 0.014                         |

| <u>Spr.<br/>#</u> | <u>Source Name</u>            | <u>Legal<br/>Description</u> | <u>Amount<br/>(gpm)</u> |
|-------------------|-------------------------------|------------------------------|-------------------------|
| 68                | Rock Canyon Spring #3         | SWSWS30T34NR15W *            | 0.045                   |
| 75                | Navajo Canyon Spring #5       | NWSES29T34NR15W *            | 0.045                   |
| 80                | Middle Soda Canyon Spring #1  | SWNES16T34NR15W *            | 5.0                     |
| 86                | Echo Cliff Dike Spring        | SESW29T34NR15W *             | 0.072                   |
| 95                | Echo Cliff Slump Springs      | SWNES29T34NR15W *            | 5.0                     |
| 98                | Rock Springs #2               | SWNWS12T34NR16W              | 3.0                     |
| 99                | Rock Springs #3               | SWNWS12T34NR16W              | 1.0                     |
| 107               | Spruce Canyon Spring          | NESES20T34NR15W *            | 0.045                   |
| 109               | Spruce Tree Canyon Spring     | SWNWS21T34NR15W *            | 0.045                   |
| 115               | Chapin Mesa Spring            | SWSWS9T34NR15W *             | 0.014                   |
| 118               | Long Canyon Spring #2         | NENES13T34NR16W              | 0.355                   |
| 119               | Fewkes Canyon Spring #3       | SESES28T34NR15W *            | 0.014                   |
| 128               | Spruce Canyon Spring #2       | SESES8T34NR15W *             | 0.67                    |
| 131               | Spruce Canyon Spring #1       | SWNES8T34NR15W *             | 0.014                   |
| 136               | Fewkes Canyon Spring #5       | NESES28T34NR15W *            | 0.013                   |
| 137               | Lower Soda Canyon Spring #4   | SESES27T34NR15W *            | 5.0                     |
| 143               | Bobcat Canyon Spring #2       | NESWS19T34NR15W *            | 0.045                   |
| 144               | Bobcat Canyon Spring #3       | SESW19T34NR15W *             | 0.045                   |
| 147               | Lower Long Canyon Spring #2   | SESES30T34NR15W *            | 0.355                   |
| 148               | Lower Long Canyon Spring #1   | NESES30T34NR15W *            | 0.045                   |
| 149               | Soda Point Overlook Spring #2 | SWNES27T34NR15W *            | 0.045                   |



| <u>Spr.</u><br><u>#</u> | <u>Source Name</u>              | <u>Legal</u><br><u>Description</u> | <u>Amount</u><br><u>(gpm)</u> |
|-------------------------|---------------------------------|------------------------------------|-------------------------------|
| 160                     | Lower Long Canyon Spring #3     | SWSES30T34NR15W *                  | 0.045                         |
| 161                     | Wickiup Point Spring            | SENWS20T34NR15W *                  | 1.42                          |
| 169                     | Spruce Tree Point Spring        | NWNWS21T34NR15W *                  | 0.29                          |
| 174                     | Soda Point Overlook Spring #1   | SWNES27T34NR15W *                  | 0.014                         |
| 188                     | Navajo Canyon Spring #2         | NENWS20T34NR15W *                  | 0.045                         |
| 208                     | Upper Wickiup Point Spring      | SENWS20T34NR15W *                  | 0.014                         |
| 218                     | Under Limy Draw Pour-off Spring | NESWS30T34NR15W *                  | 0.014                         |
| 233                     | Hemenway House Spring           | SWSWS26T34NR15W                    | 0.014                         |

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The following spring is located north of the Ute Line on land reserved by the Act of December 23, 1963:

| <u>Spr.</u><br><u>#</u> | <u>Source Name</u>   | <u>Legal</u><br><u>Description</u> | <u>Amount</u><br><u>(gpm)</u> |
|-------------------------|----------------------|------------------------------------|-------------------------------|
| 73                      | Park Entrance Spring | SWSES29T36NR14W                    | 5.0                           |

**Exhibit 5 - Mesa Verde National Park Federal Reserved Rights**

| Name           | Amount  | Decreed Source   | Priority Date | Decree/ Adjud'n Date  | Decreed Use(s)  |
|----------------|---|--|---------------|---|---|
| Instream Flows | 8/1 -1/31<br>5 cfs<br>2/1 - 2/28<br>10 cfs<br>3/1 - 3/31<br>15 cfs<br>4/1 - 4/30<br>30 cfs<br>5/1 - 5/31<br>45 cfs<br>6/1 - 6/30<br>12 cfs<br>7/1 - 7/31<br>6 cfs | Mancos River   |               | 1/1/1995  | "necessary to meet the primary purposes of the Park as described by the [organic acts]"   |
| Springs        | See Decree, <b>Exhibit 4</b>  | See Decree   | See Decree    | See Decree  | "will be utilized for in situ uses that include evapotranspiration by natural vegetation, used by birds and animals, and the interpretation of the life of the 'prehistoric and primitive' inhabitants."  |
| Future Rights  | 70 acre-feet of water per annum   | "any water in, on, under, adjacent or otherwise appurtenant to Mesa Verde National Park" |               | "The priority dates for these 70 acre-feet are the dates of reservation associated with the location of the diversion." | "to help satisfy future requirements for the operation, administration, and protection of MVNP, including but not limited to such uses as excavation, restoration and preservation of ruins and structures; construction of visitor facilities; staff and visitor domestic uses; and fire suppression." |

COLORADO UTE INDIAN WATER RIGHTS

FINAL SETTLEMENT AGREEMENT

December 10, 1986

STATE OF COLORADO  
UTE MOUNTAIN UTE INDIAN TRIBE  
SOUTHERN UTE INDIAN TRIBE  
UNITED STATES DEPARTMENT OF THE INTERIOR  
UNITED STATES DEPARTMENT OF JUSTICE  
ANIMAS-LA PLATA WATER CONSERVANCY DISTRICT  
DOLORES WATER CONSERVANCY DISTRICT  
FLORIDA WATER CONSERVANCY DISTRICT  
MANCOS WATER CONSERVANCY DISTRICT  
SOUTHWESTERN WATER CONSERVATION DISTRICT  
CITY OF DURANGO  
TOWN OF PAGOSA SPRINGS  
FLORIDA FARMERS DITCH COMPANY  
FLORIDA CANAL COMPANY  
FAIRFIELD COMMUNITIES, INC.

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COLORADO UTE INDIAN WATER RIGHTS  
FINAL SETTLEMENT AGREEMENT

The United States, the State of Colorado, the Ute Mountain Ute Indian Tribe, the Southern Ute Indian Tribe, and the additional governmental and private entities signatory hereto, acting through their respective representatives, hereby agree as follows:

I. GENERAL PURPOSES

The purposes of this Colorado Ute Indian Water Rights Final Settlement Agreement are to: (1) determine finally all rights of the Southern Ute and Ute Mountain Ute Indian Tribes, and of the persons claiming under the Tribes, to beneficially use water for, or to beneficially use water on, under, adjacent to or otherwise appurtenant to, the Southern Ute and Ute Mountain Ute Indian Reservations within the State of Colorado; (2) settle existing disputes and remove causes of future controversy between the Tribes and the State, between the Tribes and the United States, and between Indians of the Reservations or their successors and other persons, concerning the rights to beneficially use water in southwestern Colorado; (3) settle all claims by the Tribes and by

the United States on behalf of the Tribes in the water adjudication proceedings pending in the Colorado District Court for Water Division No. 7 pursuant to the Colorado Water Right Determination and Administration Act of 1969, title 37, article 92, C.R.S. (1973 and as amended); (4) to secure for the Tribes an opportunity to derive an economic benefit or generate revenue from the use of the project and non-project reserved water rights secured in this Agreement; (5) to enhance the Tribe's ability to meet their repayment obligations under this Agreement; and (6) to authorize the Tribes to sell, exchange, lease or otherwise temporarily dispose of their water.

## II. DEFINITIONS

For purposes of this Agreement:

1. The term "Agreement" shall mean the Colorado Ute Indian Water Rights Final Settlement Agreement.
2. The term "Animas-La Plata Project" means the Animas-La Plata Project, Colorado-New Mexico, a participating project under the Colorado River Storage Project Act, 70 Stat. 105, 43 U.S.C. 620, as amended by the Colorado River Basin Project Act, 82 Stat. 885.
3. The term "Dolores Project" means the Dolores Project, Colorado, a participating project under the Colorado River Storage Project Act, 70 Stat. 105, 43 U.S.C. 620, as amended by the

Colorado River Basin Project Act, 82 Stat. 885.

4. The term "net acres" means the acres, exclusive of lands necessary for roads, buildings, or farm practices, which the Tribes have a right to irrigate pursuant to this Agreement.

5. The term "per annum" means per water year, with a water year commencing on October 1 each year and running through the next succeeding September 30th.

6. The term "Secretary" means the Secretary of the Interior.

7. The term "State Engineer" means the State Engineer of the State of Colorado, as described in title 37, article 80, C.R.S. (1973 & 1986 Supp.), and his agents and employees.

8. The term "State" means the State of Colorado.

9. The term "Tribal lands" means lands owned by the Tribes or Tribal members or lands held in trust or other restricted status by the United States for the benefit of the Tribes or individual Indians.

10. The terms "Tribe" or "Tribes" mean the Ute Mountain Ute Indian Tribe and/or the Southern Ute Indian Tribe, as the context requires, whose Indian reserved water rights are quantified and secured by this Agreement.

11. The term "tributary ground water" means "underground water" as that term is defined and used in section 37-92-103(11), C.R.S. (1973 & 1986 Supp.).



12. The term "project reserved water right" means an Indian reserved water right secured to the Tribes by this Agreement to water supplied either from the Animas-La Plata Project or from the Dolores Project and held in trust by the United States on behalf of the Tribes.

13. The term "non-project reserved water right" means an Indian reserved water right secured to the Tribes by this Agreement other than the rights to water supplied from the Animas-La Plata and Dolores Projects and held in trust by the United States on behalf of the Tribes, and other than water secured to the Southern Ute Indian Tribe from the Florida Project or the Pine River.

14. The term "Tribal permit" means a permit issued by the appropriate Tribal government to authorize the utilization of water allocated to the Tribes under the terms of this Agreement.

15. The term "cfs" means cubic feet per second.

16. The term "combined Highline-Towaoc Canal" means the Highline Ditch as improved and, if necessary, extended, or any other canal or ditch constructed for the purpose of delivering agricultural irrigation and fish and wildlife development water from the Dolores Project to the Ute Mountain Ute Indian Reservation, including the laterals to be constructed by the Bureau of Reclamation pursuant to the DPR.

17. The term "DPR" means the Definite Plan Report dated

September, 1979, for the Animas-La Plata Project or the Definite Plan Report dated April, 1977, and its supplement, dated April 1981, for the Dolores Project, as the context requires.

18. The term "consumptive use" means that quantity of water diverted from the hydrologic stream system and not returned to the hydrologic stream system by either surface flow or percolation.

19. The term "Florida Project" means the Florida Project, Colorado, a participating project under the Colorado River Storage Project Act, 70 Stat. 105, 43 U.S.C. 620, as amended by the Colorado River Basin Project Act, 82 Stat. 885.

20. The term "Vallecito Reservoir" means the Vallecito Reservoir, Colorado, which is located on the Pine River and which is a feature of the Pine River Project, Colorado, which project was constructed under the provisions of section 4 of the Act of June 25, 1910 (36 Stat. 835), and of subsection B, section 4 of the Act of December 5, 1934 (43 Stat. 701).

21. The term "OM&R" means operation, maintenance and replacement.

22. The term "parties" means the signatories to this Agreement.

23. The term "Towaoc Pipeline" means the pipeline to be constructed from the City of Cortez water treatment plant to the Town of Towaoc on the Ute Mountain Ute Indian Reservation, which

pipeline is intended to carry the Ute Mountain Ute Indian Tribes's municipal and industrial water supply from the Dolores Project to the Town of Towaoc.

### III. QUANTIFICATION AND DETERMINATION

#### A. UTE MOUNTAIN UTE INDIAN TRIBE

The Ute Mountain Ute Indian Tribe shall be entitled to the rights described below to beneficially use water from the following sources:

##### 1. Dolores Project

a. The Tribe shall receive a project reserved water right to stored water from the Dolores Project. This project reserved water right shall have an 1868 priority date, shall for all time be subordinated to all water rights decreed and senior to the Dolores Project, and shall share for all time on a pro rata basis the priority of the Dolores Project, which has an adjudication date of March 22, 1963, and an appropriation date of September 10, 1940, C.A. 967, District Court, Montezuma County, Colorado.

b. The project reserved water right shall entitle the Tribe to receive and beneficially use, on that part of the Ute Mountain Ute Indian Reservation within the State or

within the boundaries of the Dolores Water Conservancy District, the following allocations of water from the Project, as measured at McPhee Dam and Reservoir:

(i) a maximum of 1,000 acre-feet per annum of municipal and industrial water;

(ii) a maximum of 23,300 acre-feet per annum of agricultural irrigation water; and

(iii) a maximum of 800 acre-feet per annum for fish and wildlife development.

The project reserved water right shall not exceed the total of the above allocations.

c. During periods of water shortage, deliveries of project water, or deliveries of the supply of water available under the project priority, to the Tribe and to all others shall be as follows:

(i) municipal and industrial water allocations as quantified in the DPR shall first be fully satisfied;

(ii) agricultural irrigation water allocations and other allocations as quantified in the DPR, exclusive of stream fishery releases, shall share shortages on a pro rata basis even if changed to other beneficial uses; and

(iii) stream fishery releases to the Dolores River set forth in the DPR shall be made in accordance



with the operating agreement between the Dolores Water Conservancy District and the United States Bureau of Reclamation's Contracting Officer as specified by the repayment contract between the District and the United States.

The sharing of shortages in the project's water supply shall govern the actual amount of agricultural irrigation water and water for fish and wildlife development delivered to the Tribe whether or not the average supply of 22,900 acre-feet per annum of agricultural irrigation water and of 800 acre-feet per annum of fish and wildlife development water, as contemplated by the DPR, is actually achieved.

d. In proceedings pursuant to Article IV, Section F, the computations concerning the Tribe's historic beneficial use of water shall be based upon:

(i) actual historic monthly deliveries of the available annual supply, made pursuant to the DPR, measured at the McPhee Dam and Reservoir or, if there has not yet been full use of water, then the Tribe shall be deemed to have historically made beneficial use of any unused portion of each year's available water based upon the following monthly percentage distribution of the available water:

| <u>Month</u> | <u>Agricultural<br/>Irrigation<br/>Water</u> | <u>M&amp;I<br/>Water</u> | <u>Fish and Wildlife<br/>Development Water</u> |
|--------------|--|--------------------------|--|
| October      | 4%   | 6%                       | 12.5%  |
| November     | 0  | 5                        | 0  |
| December     | 0  | 3                        | 0  |
| January      | 0  | 3                        | 0  |
| February     | 0  | 3                        | 0  |
| March        | 0  | 5                        | 0  |
| April        | 2  | 8                        | 37.5   |
| May          | 15   | 13                       | 0  |
| June         | 25   | 16                       | 12.5   |
| July         | 28   | 16                       | 12.5   |
| August       | 16   | 13                       | 12.5   |
| September    | 10   | 9                        | 12.5   |
| Totals       | 100%   | 100%                     | 100.0 %  |

(ii) actual historic consumptive use or, if there has not yet been full use of water, then the Tribe shall be deemed to have historically consumed 50 percent of the unused portion of the water available to the Tribe from its annual municipal and industrial water allocation, 78.5 percent of the unused portion of the water available to the Tribe from its annual agricultural irrigation water allocation, and 100 percent of the unused portion of the water available to the Tribe from its annual fish and wildlife development allocation; or

(iii) any agreement which may be entered into among the State, the Tribe, the Dolores Water Conservancy District and the United States Bureau of Reclamation which modifies (i) and (ii) above.

e. The project reserved water right shall

always be consistent with:

(i) The DPR, except as modified by this Agreement;

(ii) The allocations, shortage provisions, delivery schedules, and consumptive use calculations described in this subsection;

(iii) Bureau of Reclamation procedures, which shall include, among other things, NEPA compliance and assurance that other project water users are not injured by any change in the use of project water.

f. The project reserved water right may be changed pursuant to the change in reserved water right procedures set forth in Article IV, section F; provided, however, that the project reserved water right shall not entitle the Tribe to any other reserved water right from the Mancos or Dolores Rivers, except, in the event of the failure of the project, the Tribe may convert the project reserved water right to a separate reserved storage or reserved direct flow water right from these rivers with the consent of the State Attorney General, the Mancos Water Conservancy District, and the Dolores Water Conservancy District, so that the Tribe and all other project beneficiaries will be placed in the same position in attempting to put their water rights to use.

g. Based upon the parties' expectation that

the combined Highline-Towaoc Canal will be completed, subject to Congressional appropriations, the final settlement of the Tribe's reserved water rights claims on the Mancos and Dolores Rivers as described in this Agreement shall be subject to the following conditions:

(i) If the Dolores Project is completed so as to enable the delivery of water to the Reservation through the combined Highline-Towaoc Canal on or before May 1, 1994, then: (a) the settlement of the Tribe's pending reserved and appropriative water rights claims on both the Mancos River and the Dolores River contained in this Agreement shall become final; (b) the Tribe shall be entitled to the full project reserved water right as described in this subsection; and (c) the Tribe shall not be entitled to claim any additional reserved water rights, either on the Mancos River or on the Dolores River.

(ii) If the combined Highline-Towaoc Canal is not completed so as to enable the delivery of water to the Reservation by May 1, 1994, then by January 1, 1995, the Tribe, in consultation with the United States as trustee, must elect either: (a) to retain the project reserved water right by accepting any portion of the Tribes' allocations of water, excluding municipal and industrial water, for delivery directly from McPhee Reservoir; or (b) to commence litigation or renegotiation of its pending reserved water rights claims on the Mancos



River. If the Tribe, in consultation with the United States as trustee for the Tribe, has not elected to commence litigation or renegotiation of its pending claims on the Mancos River by notification to the parties by January 1, 1995, as provided below, then: (a) the Tribe shall be deemed to have elected to retain the project reserved water right by accepting delivery of its allocations of water directly from McPhee Reservoir, (b) the settlement of the Tribe's pending reserved and appropriative water rights claims on both the Mancos River and the Dolores River contained in this Agreement shall become final; and (c) the Tribe shall not be entitled to claim any additional reserved water rights either on the Mancos River or on the Dolores River. If the Tribe elects to commence litigation or renegotiation of its pending reserved water rights claims on the Mancos River, then: (a) the Tribe shall retain its project reserved water right to 1000 acre feet of municipal and industrial water; (b) the Tribe shall relinquish and forfeit the remainder of the project reserved water right from the Dolores Project as described in this subsection and all other pending reserved and appropriative water rights claims on the Dolores River; and (c) the Tribe shall not be entitled to claim any additional reserved water rights on the Dolores River; provided, however, that if the combined Highline-Towaoc Canal is at any time thereafter completed so as to enable the delivery of water to the Reservation or if the Tribe elects any time there-

after to receive an allocation of water from McPhee Reservoir, in addition to the 1,000 acre feet of municipal and industrial water, then: (a) the Tribe shall be entitled to the full project reserved water right as described in this subsection; (b) the Tribe shall not be entitled to claim any other reserved water rights on either the Mancos River or the Dolores River, and (c) the Tribe shall relinquish any then pending reserved water rights claims or any benefits it may have obtained by litigating or negotiating its reserved water rights claims on the Mancos River, including all reserved water rights which may have been decreed. Notice of the Tribe's election shall be made as follows: to the United States, through the Secretary of the Interior and the Attorney General; to the Tribes, through the respective Tribal Chairman; to the State, through the Attorney General; and to all other parties, through their respective offices.

h. Subject to Congressional appropriations, nothing in this section shall reduce or limit the present authorization of the United States to complete the construction of the Dolores Project in general conformity with the DPR, including the Towaoc drains, if needed.

i. Under no circumstances shall anything in this Agreement be construed as an admission, or be used by any party as evidence that the Tribe is or is not legally entitled to reserved water rights on the Dolores River. The project reserved

water right shall have no precedential or presumptive value in the event the terms of this Agreement do not become final.

j. Repayment of that portion of the construction costs allocable to the Tribe's agricultural irrigation water allocation for which the Tribe is responsible shall be deferred pursuant to the Leavitt Act. Pursuant to the federal legislation required by Article VI, Section A, subsection 1.b:

(a) repayment of the construction costs of the joint use facilities that are allocable to the Tribe's municipal and industrial water allocation shall be deferred, and interest thereon shall not accrue, until the water is used or temporarily disposed of by the Tribe; and (b) the reimbursable OM&R costs allocable to the Tribe's municipal and industrial water allocation shall be borne by the United States, subject to Congressional appropriations, until the water is used or temporarily disposed of by the Tribe. As an increment of municipal and industrial water is put to use or otherwise temporarily disposed of, prospective repayment of that increment's pro rata share of the allocable costs shall commence. If the Tribe does not take delivery of its agricultural irrigation or fish and wildlife development water through the combined Highline-Towaoc Canal, then the Tribe shall: (a) continue to remain responsible for such portion of the OM&R costs of the combined Highline-Towaoc Canal as will ensure that all other project users under the combined Highline-Towaoc Canal bear no

greater OM&R costs than would have otherwise been the case; and (b) ensure that deliveries to, and carriage losses of, all other project water users under the combined Highline-Towaoc Canal are not adversely affected. Similarly, the District shall ensure that if non-Indian water users do not take delivery of their agricultural irrigation water through the combined Highline-Towaoc Canal there will not be an increase in the OM&R costs or a reduction in deliveries to the Tribe.

2. Animas-La Plata Project

a. The Tribe shall receive a project reserved water right to water supplied from the Animas-La Plata Project. This project reserved water right shall have an 1868 priority date, shall be subordinated to all water rights decreed and senior to the Animas-La Plata Project, and shall share on a pro rata basis the priority of the Animas-La Plata Project, which has an adjudication date of March 21, 1966, and an appropriation date of September 2, 1938, C.A. 1751-B, District Court, La Plata County, Colorado.

b. The project reserved water right shall entitle the Tribe to receive and beneficially use, on that part of the Ute Mountain Ute Reservation within the State or within the boundaries of the Animas-La Plata Water Conservancy District, the following allocations of water from the Animas-La Plata

Project, as measured at Ridges Basin Dam and Reservoir or at the point on the Animas River where diversions are made to the Durango Pumping Plant or, for La Plata River water, at the point on the La Plata River where water is diverted for project purposes:

(i) a maximum of 6,000 acre-feet per annum of municipal and industrial water; and

(ii) a maximum of 26,300 acre-feet per annum of agricultural irrigation water.

The project reserved water right shall not exceed the total of the above allocations; provided, however, that nothing herein shall limit the Tribe's right to receive an additional 900 acre-feet per annum of agricultural irrigation water in accordance with the DPR.

Pending completion of the construction of the Ute Mountain Pumping Plant, the reach of the Dry Side Canal beyond the turn out to the Dry Side Lateral, and the laterals on the Ute Mountain Ute Reservation, the Tribe's allocations of water will be delivered to the Tribe at Ridges Basin Reservoir or at the point on the Animas River where diversions are made to the Durango Pumping Plant. When the Tribe takes delivery of its municipal and industrial water allocation at these locations, the timing of the deliveries of its annual municipal and industrial water allocation may be at the Tribe's discretion, so long as neither the



project supply nor other project users are adversely affected. The Tribe shall take monthly deliveries of its agricultural irrigation and municipal and industrial water allocations in the manner contemplated by the DPR; provided that the Tribe may take delivery of its agricultural irrigation and municipal and industrial water at its discretion so long as neither the project supply nor other project users are adversely affected.

c. During periods of water shortage, deliveries of project water, or deliveries of the supply of water available under the project priority, to the Tribe and to all others shall be as follows:

(i) the municipal and industrial water allocations as quantified in the DPR shall first be fully satisfied; and

(ii) the agricultural irrigation water allocations as quantified in the DPR shall share shortages on a pro rata basis even if changed to other beneficial uses.

The sharing of shortages in the project's water supply shall govern the actual amount of agricultural irrigation water delivered to the Tribe whether or not the average supply of 25,560 acre-feet per annum as contemplated by the DPR is actually achieved.

d. In proceedings pursuant to Article IV, Section F, the computations concerning the Tribe's historic beneficial use of water shall be based upon:

(i) actual historic monthly deliveries of the available annual supply, measured at Ridges Basin Reservoir or at the point on the Animas River where diversions are made to the Durango Pumping Plant, or if there has not yet been full use of water, then the Tribe shall be deemed to have historically made beneficial use of any unused portion of each year's available water based upon the following monthly percentage distributions of the available water:

| <u>Month</u> | <u>Agricultural<br/>Irrigation<br/>Water</u> | <u>M&amp;I<br/>Water</u> |
|--------------|--|--------------------------|
| October      | 2.0%   | 20.0%                    |
| November     | 0  | 0                        |
| December     | 0  | 0                        |
| January      | 0  | 0                        |
| February     | 0  | 0                        |
| March        | 0  | 0                        |
| April        | 1.0  | 20.0                     |
| May          | 11.0   | 20.0                     |
| June         | 25.0   | 0                        |
| July         | 31.0   | 0                        |
| August       | 18.0   | 20.0                     |
| September    | 11.0   | 20.0                     |
| Totals       | 100.0%                                       | 100.0%                   |

(ii) actual historic use or, if there has not yet been full use of water, then the Tribe shall be deemed to have historically consumed 100 percent of the unused portion of the water available to the Tribe from its annual municipal and industrial allocation and 80.1 percent of the unused portion of the water available to the Tribe from its

annual agricultural irrigation allocation; or

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

e. The project reserved water right shall always be consistent with:

(i) the allocations, shortage provisions, delivery schedules, and consumptive use calculations described in this subsection;

(ii) Bureau of Reclamation procedures, which shall include, among other things, NEPA compliance and assurance that all other project water users are not injured by any change in the use of project water;

(iii) The Animas-La Plata Project Compact, section 37-64-101, C.R.S. (1973); and

(iv) The La Plata River Compact, section 37-64-101, C.R.S. (1973).

f. The final settlement of the Tribe's reserved water rights claims on the Animas and La Plata Rivers as described in this Agreement shall be subject to the following conditions:

(i) If Ridges Basin Reservoir, Long Hollow Tunnel, and the Dry Side Canal to the turnout to the Dry

Side Lateral are completed so as to enable the delivery of water to the Tribe as described in this subsection on or before January 1, 2000, then: (a) the settlement of the Tribe's pending reserved and appropriative water rights claims on the Animas and La Plata Rivers contained in this Agreement shall become final; (b) the Tribe shall be entitled to the full project reserved water right as described in this subsection; and (c) the Tribe shall not be entitled to claim any additional reserved water rights either on the Animas River or on the La Plata River.

(ii) If Ridges Basin Reservoir, Long Hollow Tunnel, and the Dry Side Canal to the turnout to the Dry Side Lateral are not completed so as to enable the delivery of water to the Tribe as described in this subsection by January 1, 2000, then by January 1, 2005, the Tribe, in consultation with the United States as trustee, must elect either: (a) to retain the project reserved water right; or (b) to commence litigation or renegotiation of its pending reserved water rights claims on the Animas and La Plata Rivers. If the Tribe, in consultation with the United States as trustee, has not elected to commence litigation or renegotiation of its pending claims on the Animas and La Plata Rivers by notification to the parties by January 1, 2005, as provided below, then: (a) the Tribe shall be deemed to have elected to retain its project reserved water right; (b) the settlement of the Tribe's pending reserved and appropriative

water rights claims on the Animas and La Plata Rivers contained in this Agreement shall become final; and (c) the Tribe shall not be entitled to claim any additional reserved water rights either on the Animas River or on the La Plata River. If the Tribe elects to commence litigation or renegotiation of its pending reserved water rights claims on the Animas and La Plata Rivers then the Tribe shall relinquish and forfeit the project reserved water right from the Animas-La Plata Project as described in this subsection; provided, however, that if Ridges Basin Reservoir, Long Hollow Tunnel, and the Dry Side Canal to the turnout to the Dry Side Lateral are at any time thereafter completed so as to enable the delivery of water to the Tribe or if the Tribe elects at any time thereafter to receive an allocation of water from Ridges Basin Reservoir, then: (a) the Tribe shall be entitled to the full project reserved water right as described in this subsection; (b) the Tribe shall not be entitled to claim any other reserved water rights either on the Animas River or on the La Plata River; and (c) the Tribe shall relinquish any then pending reserved water rights claims or any benefits it may have obtained by litigating or renegotiating its reserved water rights claims on the Animas or La Plata Rivers, including all reserved water rights which may have been decreed. Notice of the Tribe's election shall be made as follows: to the United States, through the Secretary of the Interior and the Attorney General; to the



Tribes, through the respective Tribal Chairman; to the State, through the Attorney General; and to all other parties, through their respective offices.

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

h. Repayment of that portion of the construction costs allocable to the Tribe's agricultural irrigation water allocation for which the Tribe is responsible shall be deferred pursuant to the Leavitt Act. Pursuant to the federal legislation required by Article VI, Section A, subsection 1.b, reimbursable OM&R costs allocable to the Tribe's agricultural irrigation water allocation shall be borne by the United States, subject to Congressional appropriations, until the water is used or temporarily disposed of by the Tribe. Pursuant to the federal legislation required by Article VI, Section A, subsection 1.b:

- (a) repayment of the construction costs allocable to the Tribe's municipal and industrial water allocation shall be deferred, and interest thereon shall not accrue, until the water is used or temporarily disposed of by the Tribe; and (b) the reimbursable

OM&R costs allocable to the Tribe's municipal and industrial water allocation shall be borne by the United States, subject to Congressional appropriations, until the water is used or temporarily disposed of by the Tribe. As an increment of water is put either to municipal and industrial use or to agricultural irrigation use or temporarily disposed of by the Tribe, prospective repayment of that increment's pro rata share of the allocable costs shall commence. The OM&R costs allocable to the Tribe which are to be borne by the United States shall include any OM&R costs for which the Tribe is responsible pursuant to paragraph i. below, until water is used or temporarily disposed of by the Tribe under that paragraph.

i. If the Tribe does not take delivery of its Animas-La Plata Project allocations from the Ridges Basis Pumping Plant through the Long Hollow Tunnel and the Dry Side Canal, even though those facilities have been constructed with the capacities contemplated by the DPR, then the Tribe shall:

(a) continue to remain responsible for such portion of the OM&R costs of the Ridges Basin Pumping Plant, the Long Hollow Tunnel and the Dry Side Canal so as to ensure that all other project users bear no greater OM&R costs than would have otherwise been the case; and (b) ensure that deliveries to, and carriage losses of, all other project users are not adversely affected. On or before November 1, 1988, the Tribe may elect to have the United

States Bureau of Reclamation reduce the capacity of the Ridges Basin Pumping Plant, the Long Hollow Tunnel and the Dry Side Canal, and any associated delivery facilities, from the capacities contemplated by the DPR; provided that any additional capital costs to other water users occasioned by such election must be equitably apportioned. If such an election is made, then the Tribe shall: (a) be required to take delivery of its municipal and industrial water allocation and its agricultural irrigation water allocation at the Ridges Basin Reservoir or at the point on the Animas River where diversions are made to the Durango Pumping Plant, or, for La Plata River water, at the point on the La Plata River where water is diverted for project purposes; (b) continue to remain responsible for such portion of the OM&R costs of the Ridges Basin Pumping Plant, the Long Hollow Tunnel and the Dry Side Canal as will ensure that all other project users bear no greater OM&R costs per acre-foot of water than would have been the case had the capacity of these facilities not been reduced; and (c) ensure that deliveries to, and carriage losses of, all other project users are not adversely affected. Whether or not the Tribe so elects, if water users other than the Ute Mountain Ute Indian Tribe do not take delivery of their project water through the Long Hollow Tunnel and the Dry Side Canal then there will not be an increase in the OM&R costs or a reduction in deliveries to the Tribe.

### 3. Other Sources

The Tribe shall receive:

a. A non-project reserved water right for direct flow diversions and/or storage of 21,000 acre-feet per annum from the Mancos River for the irrigation of 7,200 acres of Tribal lands within the Mancos River drainage basin. This right shall have an 1868 priority date, but shall be subordinated to all rights with an adjudication date prior to 1985. For measurement purposes, the delivery point for water under this right will be at the point where the Mancos River enters the Ute Mountain Ute Indian Reservation on the south line of section 2U, T34N, R18W, N.M.P.M., at a point below the confluence of the Mancos River and Weber Canyon. When water is put to use or temporarily disposed of by the Tribe, the Tribe agrees to operate and maintain a stream gauging station at this point and to allow the State Engineer access to this gauging station. Notwithstanding the provisions of Article IV, Section F of this Agreement, as long as the water is diverted south of the delivery point as surface flow and applied to beneficial use on Tribal lands within the Mancos River drainage, no change in place of use, as described in Article IV, Section F of this Agreement, shall be required.

b. A non-project reserved water right for direct flow diversions for 4,800 acre-feet per annum from the

Navajo Wash for the irrigation of 1,200 acres of Tribal lands within the Navajo Wash drainage basin at a maximum diversion rate of 15 cfs. This right shall have an 1868 priority date, but shall be subordinated to all rights with an adjudication date prior to 1985 and shall be subject to the decree and stipulation in Case No. 81 CW 126, Colorado District Court for Water Division No. 7. The Tribe's existing state appropriative water rights on Navajo Wash will be relinquished, upon confirmation by the Colorado District Court for Water Division No. 7 of the non-project reserved water right provided for in this paragraph.

c. A non-project reserved water right for direct flow diversions of 1600 acre-feet per annum from the main stem of the San Juan River within the southwestern part of the Ute Mountain Ute Indian Reservation in Colorado, for the irrigation of 640 acres of Tribal lands within the San Juan mainstem drainage basin at a maximum diversion rate of 10 cfs. This right shall have a priority date of 1868.

#### B. SOUTHERN UTE INDIAN TRIBE

The Southern Ute Indian Tribe shall be entitled to the rights described below to beneficially use water from the following sources:



1. Animas-La Plata Project

a. The Tribe shall receive a project reserved water right to water supplied from the Animas-La Plata Project. This right shall have an 1868 priority date, shall be subordinated to all water rights decreed and senior to the Animas-La Plata Project, and shall share on a pro rata basis the priority of the Animas-La Plata Project, which has an adjudication date of March 21, 1966, and an appropriation date of September 2, 1938, C.A. 1751-B, District Court, La Plata County, Colorado.

b. The project reserved water right shall entitle the Tribe to receive and beneficially use, on that part of the Southern Ute Reservation within the State or within the boundaries of the Animas-La Plata Water Conservancy District, the following allocations of water from the Animas-La Plata Project, as measured at Ridges Basin Dam and Reservoir or at the point on the Animas River where diversions are made to the Durango Pumping Plant, or, for La Plata River water, at the point on the La Plata River where water is diverted for project purposes:

(i) a maximum of 26,500 acre-feet per annum of municipal and industrial water; and

(ii) a maximum of 3,400 acre-feet per annum of agricultural irrigation water.

The project reserved water right shall not exceed the total of

the above allocations.

Pending completion of the Southern Ute Reservoir, the Tribe's municipal and industrial water allocation will be delivered to the Tribe at Ridges Basin Reservoir or at the point on the Animas River where diversions are made to the Durango Pumping Plant, or, for La Plata River water, at the point on the La Plata River where water is diverted for project purposes. The Tribe shall take monthly deliveries of its agricultural irrigation water allocation in the manner contemplated by the DPR; provided that the Tribe may take its agricultural irrigation water at its discretion so long as neither the project supply nor other project users are adversely affected.

c. During periods of water shortage, deliveries of project water, or deliveries of the supply of water available under the project priority, to the Tribe and to all others shall be as follows:

(i) the municipal and industrial water allocations as quantified in the DPR shall first be fully satisfied; and

(ii) the agricultural irrigation water allocations as quantified in the DPR shall share shortages on a pro rata basis even if changed to other beneficial uses.

The sharing of shortages in the project's water supply shall govern the actual amount of agricultural irrigation water delivered

to the Tribe whether or not the average supply of 3,300 acre-feet per annum as contemplated by the DPR is actually achieved.

d. In proceedings pursuant to Article IV, Section F, the computations concerning the Tribe's historic beneficial use of water shall be based upon:

(i) actual historic monthly deliveries of the available annual supply, measured at Ridges Basin Reservoir or at the point on the Animas River where diversions are made to the Durango Pumping Plant, or, if there has not yet been full use of water, then the Tribe shall be deemed to have historically made beneficial use of any unused portion of each year's available water based upon the following monthly percentage distributions of the available water:

| <u>Month</u> | <u>Agricultural<br/>Irrigation<br/>Water</u> | <u>M&amp;I<br/>Water</u> |
|--------------|--|--------------------------|
| October      | 0%   | 8%                       |
| November     | 0  | 8                        |
| December     | 0  | 8                        |
| January      | 0  | 8                        |
| February     | 0  | 8                        |
| March        | 0  | 8                        |
| April        | 0  | 8                        |
| May          | 9  | 8                        |
| June         | 29   | 9                        |
| July         | 32   | 9                        |
| August       | 18   | 9                        |
| September    | 12   | 9                        |
| Totals       | 100%   | 100%                     |

(ii) actual historic use or, if there

has not yet been full use of water, then the Tribe shall be deemed to have historically consumed 90.5 percent of the unused portion of the water available to the Tribe from its annual municipal and industrial water allocation and 78.8 percent of the unused portion of the water available to the Tribe from its annual agricultural irrigation water allocations; or

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

e. The project reserved water right shall always be consistent with:

(i) the allocations, shortage provisions, delivery schedules, and consumptive use calculations described in this section;

(ii) Bureau of Reclamation procedures, which shall include, among other things, NEPA compliance and assurance that all other project water users are not injured by any change in the use of project water;

(iii) The Animas-La Plata Project Compact, section 37-64-101, C.R.S. (1973); and

(iv) The La Plata River Compact, section 37-64-101, C.R.S. (1973).

f. The final settlement of the Tribe's

reserved water rights claims on the Animas and La Plata Rivers as described in this Agreement shall be subject to the following conditions:

(i) If Ridges Basin Reservoir and the facilities necessary for the delivery of the Tribe's agricultural irrigation water are completed so as to enable the delivery of water to the Tribe as described in this subsection on or before January 1, 2000, then: (a) the settlement of the Tribe's pending reserved and appropriative water rights claims on the Animas and La Plata Rivers contained in this Agreement shall become final; (b) the Tribe shall be entitled to the full project reserved water right as described in this subsection; and (c) the Tribe shall not be entitled to claim any additional reserved water rights either on the Animas River or on the La Plata River.

(ii) If Ridges Basin Reservoir and the facilities necessary for the delivery of the Tribe's agricultural irrigation water are not completed so as to enable the delivery of water to the Tribe as described in this subsection by January 1, 2000, then by January 1, 2005, the Tribe, in consultation with the United States as trustee, must elect either; (a) to retain the project reserved water right; or (b) to commence litigation or renegotiation of its reserved water rights claims on the Animas and La Plata Rivers. If the Tribe, in consultation with the United States as trustee, has not elected to commence litigation

tion or renegotiation of its pending claims on the Animas and La Plata Rivers by notification to the parties by January 1, 2005, as provided below, then: (a) the Tribe shall be deemed to have elected to retain its project reserved water right; (b) the settlement of the Tribe's pending reserved and appropriative water rights claims on the Animas and La Plata Rivers contained in this Agreement shall become final; and (c) the Tribe shall not be entitled to claim any additional reserved water rights either on the Animas River or on the La Plata River. If the Tribe elects to commence litigation or renegotiation of its pending reserved water rights claims on the Animas and La Plata Rivers, then the Tribe shall relinquish and forfeit the project reserved water right from the Animas-La Plata Project as described in this subsection; provided, however that if Ridges Basin Reservoir and the facilities necessary for the delivery of the Tribe's irrigation water are at any time thereafter completed so as to enable the delivery of water to the Tribe or if the Tribe elects at any time thereafter to receive an allocation of water from Ridges Basin Reservoir, then: (a) the Tribe shall be entitled to the full project reserved water right as described in this subsection; (b) the Tribe shall not be entitled to claim any other reserved water rights either on the Animas River or on the La Plata River; and (c) the Tribe shall relinquish any then pending reserved water rights claims or any benefits it may have obtained by litigating



or renegotiating its reserved water rights claims on the Animas or La Plata Rivers, including all reserved water rights which may have been decreed. Notice of the Tribe's election shall be made as follows: to the United States, through the Secretary of the Interior and the Attorney General; to the Tribes, through the respective Tribal Chairman; to the State, through the Attorney General; and to all other parties, through their respective offices.

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

h. Repayment of that portion of the construction costs allocable to the Tribe's agricultural irrigation water allocation for which the Tribe is responsible shall be deferred pursuant to the Leavitt Act. Pursuant to the federal legislation required by Article VI, Section A, subsection 1.b, reimbursable OM&R costs allocable to the Tribe's agricultural irrigation water allocation shall be borne by the United States, subject to Congressional appropriations, until the water is used or temporarily disposed of by the Tribe. Pursuant to the federal

legislation required by Article VI, Section A, subsection 1.b:

(a) repayment of the construction costs allocable to the Tribe's municipal and industrial water allocation shall be deferred, and interest thereon shall not accrue, until the water is used or temporarily disposed of by the Tribe; and (b) the reimbursable OM&R costs allocable to the Tribe's municipal and industrial water allocation shall be borne by the United States, subject to Congressional appropriations, until the water is used or temporarily disposed of by the Tribe. As an increment of water is put either to municipal and industrial use or to agricultural irrigation use or temporarily disposed of by the Tribe, prospective repayment of that increment's pro rata share of the allocable costs shall commence. The OM&R costs allocable to the Tribe which are to be borne by the United States shall include any OM&R costs for which the Tribe is responsible pursuant to paragraph i. below, until the water is used or temporarily disposed of by the Tribe under that paragraph.

i. If the Tribe does not take delivery of its Animas-La Plata Project allocations from the Ridges Basin Pumping Plant through the Long Hollow Tunnel and the Dry Side Canal, even though those facilities have been constructed with the capacities contemplated by the DPR, then the Tribe shall: (a) continue to remain responsible for such portion of the OM&R costs of the Ridges Basin Pumping Plant, the Long Hollow Tunnel and the

Dry Side Canal so as to ensure that all other project users bear no greater OM&R costs than would have otherwise been the case; and (b) ensure that deliveries to, and carriage losses of, all other project users are not adversely affected. On or before November 1, 1988, the Tribe may elect to have the United States Bureau of Reclamation reduce the capacity of the Ridges Basin Pumping Plant, the Long Hollow Tunnel and the Dry Side Canal, and any associated delivery facilities, from the capacities contemplated by the DPR; provided that any additional capital costs to other water users occasioned by such election must be equitably apportioned. If such an election is made, then the Tribe shall: (a) be required to take delivery of its municipal and industrial water allocation and its agricultural irrigation water allocation at the Ridges Basin Reservoir or at the point on the Animas River where diversions are made to the Durango Pumping Plant; (b) continue to remain responsible for such portion of the OM&R costs of the Ridges Basin Pumping Plant, the Long Hollow Tunnel and the Dry Side Canal as will ensure that all other project users bear no greater OM&R costs per acre-foot of water than would have been the case had the capacity of these facilities not been reduced; and (c) ensure that deliveries to, and carriage losses of, all other project users are not adversely affected. Whether or not the Tribe so elects, if water users other than the Southern Ute Indian Tribe do not take delivery of their project water though

the Long Hollow Tunnel and the Dry Side Canal then there will not be an increase in the OM&R costs or a reduction in deliveries to the Tribe.

## 2. Pine River

The Tribe shall be entitled to retain its reserved water right from the Pine River with an 1868 priority date for 181.7 cfs, as set forth in the 1930 federal decree and the 1934 state decree, except as modified herein, and shall be entitled to a 1/6 interest in the Vallecito Reservoir, Reservoir No. 1, Appropriation Priority No. 1965-1, decreed in Civil Action No. 1848-B, La Plata County.

## 3. Other Sources

The Tribe shall be entitled to the rights to beneficially use water as quantified below, unless otherwise specified: (1) for agricultural irrigation purposes; (2) during an irrigation season of May 1 to September 30; (3) at the locations specified on the Tribal maps provided to the State of Colorado on December 5, 1985; and (4) on Tribal lands. Points of diversion will be identified by stream reach on maps to be attached to the consent decree provided for in Article VI, Section A of this Agreement.

All parcel numbers used in the following descriptions refer

to the numbers shown on the December 5, 1985, Tribal maps. Copies of these Tribal maps will be attached to and incorporated in the proposed stipulation and consent decree submitted to the Colorado District Court for Water Division No. 7 pursuant to the procedure described in Article VI, Section A.

a. Florida River

(i) The Tribe agrees to accept Florida Project water stored behind Lemon Dam in exchange for and in lieu of its reserved water rights claims for the lands within parcels 1, 2, 3 and 15. The Florida Water Conservancy District agrees to allocate 563 acre-feet per annum of project waters to the Tribe for these four parcels. The Tribe will be responsible for paying operation and maintenance charges assessed uniformly by the Florida Water Conservancy District on the Florida Project water. Repayment of that portion of the construction costs of the project which have been allocated to the 563 acre-feet of agricultural irrigation water for which the Tribe is responsible shall be deferred by the Secretary pursuant to the Leavitt Act and the Florida Water Conservancy District's current repayment obligation shall not change.

It is understood that the full project supply may not be available in times of shortage, and that the Tribe will share the reduced supply pro rata with the other project users. The Tribe

will take its water subject to state water law, the District's repayment contract with the United States Bureau of Reclamation, and any of the ditch company's or the Florida Water Conservancy District's rules or guidelines.

The water may be used on parcels 1, 2, 3 and 15 as follows:

Parcel 1:

A maximum of 134 net acres are to be irrigated with this water, with a duty of water of 2 acre-feet per acre per year, for a maximum of 268 acre-feet per year. The flow rate of delivery is to be limited to 1 cfs per 80 acres, for a maximum of 1.68 cfs.

Parcel 2:

A maximum of 97 net acres are to be irrigated with this water, with a duty of water of 2 acre-feet per acre per year, for a maximum of 194 acre-feet per year. The flow rate of delivery is to be limited to 1 cfs per 80 acres, for a maximum of 1.21 cfs.

Parcel 3:

A maximum of 36.1 net acres are to be irrigated with a duty of water of 2.54 acre-feet per acre per year, for a maximum of 91.7 acre-feet per year. The flow rate of delivery is to be limited to 1 cfs per 80 acres, for a maximum of 0.45 cfs.



Parcel 15:

A maximum of 2.7 net acres are to be irrigated with a duty of water of 2.54 acre-feet per acre per year, for a maximum of 6.85 acre-feet per year. The flow rate of delivery is to be limited to 1 cfs per 80 acres, for a maximum of .04 cfs.

Diversions for parcels 1 and 2 will be made at the Florida Farmers Ditch headgate. It will be the responsibility of the various Florida ditch companies serving Florida mesa lands to improve their delivery systems in order that the water requested for parcels 1 and 2 under the above subparagraphs can be delivered to the edge of the parcels at no cost to the Tribe for such improvements. There is no delivery agreement for water to parcels 3 and 15.

The Tribe agrees to execute contract(s) simultaneously with submission of the proposed stipulation described in Article VI, section A, with the Florida Water Conservancy District and the United States Bureau of Reclamation governing its participation in the Florida Project, as described herein, as well as to execute contracts governing its receipt of the 2000 acre-feet of water previously allocated to the Tribe from the Florida Project.

(ii) The Tribe shall receive non-project reserved water rights for parcels 4, 5, 6, 9, 10, 11, 12, 13, and 14 as shown in Table 1. Water for these parcels shall have a

priority date of 1868 but shall be subordinated to all rights with an adjudication date prior to January 1, 1976.

TABLE 1  
Parcels  
in the Florida Basin

| <u>Parcel</u> | <u>Net<br/>Acreage</u> | <u>Diversion<br/>Rate (cfs)</u> | <u>Annual Volume<br/>(acre-feet)</u> |
|---------------|------------------------|---------------------------------|--------------------------------------|
| 4             | 103                    | 1.29                            | 206                                  |
| 5             | 86                     | 1.08                            | 172                                  |
| 6             | 21                     | 0.26                            | 42                                   |
| 9             | 38                     | 0.48                            | 76                                   |
| 10            | 29                     | 0.36                            | 58                                   |
| 11            | 25                     | 0.31                            | 50                                   |
| 12            | 105                    | 1.31                            | 210                                  |
| 13            | 57                     | 0.71                            | 114                                  |
| 14            | 81                     | 1.01                            | 162                                  |
| TOTAL         | 545                    | 6.81                            | 1090                                 |

(iii) No water rights are recognized for parcels 7 and 8.

b. Stollsteimer Creek

The Tribe shall receive the following non-project reserved water rights, which will be used to irrigate 600 acres, which are within the 781 acres of arable land within the watershed identified on the Tribal maps:

(i) A non-project reserved water right with an 1868 priority date for storage of 1850 acre-feet per annum in Pargin Reservoir, Reservoir No. 24 (a/k/a Lake Capote),

with no refill right.

(ii) A non-project reserved water right with a 1986 priority date for one refill of Pargin Reservoir in the amount of 1,850 acre-feet. The Tribe owns an existing state storage reservoir right for 530.6 acre-feet of water in Pargin Reservoir, adjudicated on April 19, 1962 in Archuleta County District Court, with priority No. 24 in Case Nos. 73 and 308. The right will be relinquished upon confirmation by the Colorado District Court for Water Division No. 7 of the reserved rights described in this subparagraph and in subparagraph (i) above.

(iii) A non-project reserved water right for 2 cfs from Stollsteimer Creek. This right shall have a priority and use equivalent to, and be diverted and used at the same locations and for the same purposes as, the Cruther Ditch state appropriative right, adjudicated on November 13, 1912 in Archuleta County District Court, with priority No. 117 in Civil Action 73 and 308; however, this right shall be subordinated to all direct flow rights with an adjudication date prior to 1986 on Stollsteimer Creek. The Cruther Ditch state appropriative right shall not be considered to have been abandoned, but shall be relinquished upon confirmation by the Colorado District Court for Water Division No. 7 of the reserved water right described in this paragraph.

(iv) A non-project reserved water right

for 3.5 cfs from Stollsteimer Creek. This right shall have a priority and use equivalent to, and be diverted and used at the same locations and for the same purposes as, the Washington Flats Ditch state appropriative right adjudicated on June 25, 1928, in Archuleta County District Court, with priority No. 206 in Case No. 73 and 308. The Washington Flats Ditch state appropriative right shall be relinquished upon confirmation by the Colorado District Court for Water Division No. 7 of the reserved water right described in this paragraph.

The augmentation plan developed by Fairfield-Pagosa, as described in Case No. W958-72, Water Division No. 7, subordinates 8.5 cfs of the Linn and Clark water right to other Stollsteimer Creek state appropriative water rights, including the Washington Flats Ditch. The subordination of the Linn and Clark water right shall be maintained for the benefit of the Washington Flats Ditch direct-flow reserved water right in the event the present augmentation plan described in W958-72 is modified.

#### c. Piedra River

The Tribe shall receive a non-project reserved water right with an 1868 priority date for direct flow diversions of 1595 acre-feet per annum from the mainstem of the Piedra River for the irrigation of 535 net acres of land at a maximum flow rate of 1 cfs per 60 acres, for a maximum diversion rate of 8.9 cfs. A

portion of the water for parcel 4 will be diverted through the existing M.E. and M. Ditch. The parcels and acreages are as set out in the following Table 2. Lands requiring pumping shall have a duty of water of 2.54 acre-feet/acre, while lands proposed to be flood-irrigated shall have a duty of water of 3.0 acre-feet/acre.

TABLE 2

Parcels  
along the Mainstem Piedra River

| <u>Parcel</u> | <u>Net<br/>Acreage</u> | <u>Diversion<br/>Rate (cfs)</u> | <u>Annual Volume<br/>(acre-feet)</u> |
|---------------|------------------------|---------------------------------|--------------------------------------|
| 1             | 289                    | 4.81                            | 867                                  |
| 2             | 40                     | 0.67                            | 110 (21.9 acres pumped)              |
| 3             | 162                    | 2.69                            | 486                                  |
| 4             | 44                     | 0.73                            | 132                                  |
| TOTAL         | 535                    | 8.90                            | 1595                                 |

d. Devil Creek

The Tribe shall receive a non-project reserved water right with an 1868 priority date subordinated to all rights with an adjudication date prior to 1976 for direct flow diversions of 183 acre-feet per annum from Devil Creek for the irrigation of 61 net acres of land. The duty of water shall be 3 acre-feet/acre.

e. San Juan River

The Tribe shall receive a non-project reserved water right with an 1868 priority date for direct flow diversion of 1530 acre-feet per annum from the San Juan River for the irrigation of 510 net acres of land at a maximum flow rate of 1 cfs per 60 acres, for a maximum total diversion rate of 8.5 cfs, which will be limited to 4 cfs in September.

The Tribe is currently using a portion of the 1962 Carr Ditch right, 73CA309, a right owned by a non-Indian and shared with other non-Indian users, to irrigate these lands. The Tribe agrees to make the necessary modifications of, and reductions to, the existing Carr Ditch right in the amount of approximately 480 acre-feet per annum of water and to relinquish all claim to water taken from the Carr Ditch and used to irrigate approximately 140 acres of Tribal land, in the Colorado District Court for Water Division No. 7. The State agrees to support the Tribe in its efforts.

The duty of water shall be 2.54 acre-feet per acre for lands requiring pumping, and 3.0 acre-feet per acre for lands proposed to be flood irrigated. The parcels and acreage are as set out in the following Table 3.

TABLE 3

| <u>Parcel</u> | <u>Net<br/>Acreage</u> | <u>Diversion<br/>Rate (cfs)</u> | <u>Annual Volume<br/>(acre-feet)</u> |
|---------------|------------------------|---------------------------------|--------------------------------------|
| 1             | 23                     | 0.38                            | 69                                   |
| 2             | 29                     | 0.48                            | 87                                   |
| 3             | 120                    | 2.00                            | 360                                  |
| 4             | 338                    | 5.64                            | 1014 (86.4 acres pumped)             |
| TOTAL         | 510                    | 8.50                            | 1530                                 |

f. Round Meadow Creek

The Tribe shall receive a non-project reserved water right with an 1868 priority date for direct flow diversions of 975 acre-feet per annum from Round Meadow Creek for the irrigation of 325 net acres of land at a maximum flow rate of 1 cfs per 60 acres for a maximum total diversion rate of 5.4 cfs. The duty of water shall be 3 acre-feet/acre. The diversion point shall be on Round Meadow Creek.

g. Cat Creek

The Tribe shall receive a non-project reserved water right with an 1868 priority date for direct flow diversions of 1372 acre-feet per annum from Cat Creek for the irrigation of 482 net acres of land, at a maximum flow rate of 1 cfs per 60 acres, for a maximum total diversion rate of 8.0 cfs. The duty of water shall be 3 acre-feet/acre for the 318 acres proposed to be



flood-irrigated, and 2.54 acre-feet/acre for the 164 acres which require pumping.

h. Navajo River

No reserved water rights are recognized for the Navajo River.

C. FURTHER QUANTIFICATION

1. Existing Uses

a. Any existing beneficial use of surface water or ground water for which the Tribes claim a reserved water right, other than those provided for in this Article and other than existing uses of water from the Pine River, shall be identified and inventoried as to location, quantity, use, and other reasonably necessary information by June 15, 1987, or such other date upon which the State, the Tribes, and the United States shall mutually agree.

b. All parties to this Agreement will have the right to review the resulting inventory, including the parameters of the uses identified, which shall be subject to the mutual agreement of the parties. The parties shall not unreasonably withhold their agreement.

c. Uses identified and agreed upon shall be included in the proposed stipulation for inclusion in the consent decree and submitted to the Colorado District Court for Water Division No. 7 by the parties as additions to the reserved water rights awarded to the Tribes pursuant to this Agreement.

2. Future Domestic and Livestock Tributary Ground Water Uses

a. A non-project reserved water right for the beneficial use of tributary ground water with an 1868 priority date from future individual domestic and livestock wells on the Ute Mountain Ute Reservation shall be recognized in the amount of 350 acre-feet per annum in the McElmo Creek drainage basin and water tributary thereto and 1,500 acre-feet per annum in the remainder of the Reservation.

b. A non-project reserved water right with an 1868 priority date for the beneficial use of tributary ground water from future individual domestic and livestock wells on the Southern Ute Reservation shall be recognized in the amount of 2,000 acre-feet per annum; provided that in the La Plata River drainage such individual domestic and livestock wells shall be limited as follows:

(i) the well will be the only well on a residential site and shall be used solely for in-household pur-

poses for one single-family dwelling; or

(ii) the well will be the only well on a 35 acre site, shall not exceed 15 gallons per minute of production, and shall be used for ordinary household purposes, fire protection, the watering of poultry, domestic animals, and livestock on farms and ranches, the irrigation of not over one acre of home gardens and lawns, and for not more than three single-family dwellings.

This provision will not preclude the United States, the Tribe and the State from agreeing on an alternative allocation plan prior to June 15, 1987 or such other date upon which the State, the Tribes and the United States shall mutually agree.

c. The further parameters of the future individual domestic and livestock water uses, which may include place of use, diversion and depletion amounts, and metering and gauging requirements, shall be identified by the Tribes by June 15, 1987, or such other date upon which the State, the Tribes and the United States shall mutually agree, and shall be subject to the reasonable mutual agreement of the State and the affected Tribe.

#### D. DISPUTES

The parties shall present to the Colorado District Court for Water Division No. 7 all disputes over whether water is being

beneficially used in accordance with Article III of this Agreement.

#### IV. ADMINISTRATION

##### A. INTRODUCTION

The State, the Tribes, and the United States acknowledge the hydrologic relationship between surface and underground use of water and among the Tribes' project and non-project reserved water rights, the water rights used by non-Indians within Colorado, and the waters used outside the State. Accordingly, the parties recognize the need for a cooperative and coordinated administration of water rights arising under state law and the project and non-project reserved water rights secured to the Tribes by this Agreement, and intend to provide for such administration with this Article IV. The purpose of this Article is to establish the means by which the project and non-project water rights confirmed in Article III shall be administered. Administration by the State Engineer shall ensure that the water rights of all users, including the Tribes, are fully protected. The Tribes agree to coordinate their administrative responsibilities under this Agreement with the Secretary when those administrative responsibilities affect the water rights of allottees. The Tribes agree to allow the State Engineer access to Reservation

lands solely for the purpose of performing his administrative duties under this Agreement.

#### B. SURFACE DIVERSIONS

The State Engineer, in a manner consistent with the agreements contained herein, shall have primary administrative responsibility over all waters apportioned to the Tribes at the points of diversion located on each river. The Tribes shall have primary administrative responsibility over all the waters within the Tribes' canal distribution systems.

When water is put to use under this Agreement, the Tribes agree to install and maintain headgates on the diversion points from the rivers and to install and maintain necessary totalizing or accumulating meters, gauges, or other measuring devices on these headgates, to inspect the recorders on a weekly basis, and to report to the State Engineer the reading of these meters as often as needed to ensure compliance with this Agreement. The Tribes agree to allow reasonable inspection of headgates by the State Engineer upon request. The Tribes further agree to keep their diversion, transportation, and storage facilities in good repair.

The Tribes agree to annually provide the State Engineer with: (1) aerial photos or remote sensing images of the lands irrigated; or (2) Bureau of Indian Affairs Crop Reports, showing

the lands irrigated. If these aerial photos, remote sensing images, or crop reports are unsatisfactory, the Tribes agree to allow the State Engineer access to Tribal lands to inventory the number and location of irrigated acres. The Tribes may elect to allow the State Engineer to conduct an annual examination of the irrigated lands so that the State Engineer can inventory the number and location of irrigated acres in substitution for the images and reports. At least once in every five-year period the Tribes shall provide the State Engineer with aerial photos or remote sensing images, satisfactory to the State Engineer, or shall allow the State Engineer access to Tribal lands to inventory the location and number of irrigated acres.

The Tribes agree that when there is an administrative call on the waters of the rivers and a demonstrated likelihood of shortage exists, the Tribes will permit the State Engineer to monitor the Tribes' diversions of water within the priority system to ensure that the waters are being beneficially used in compliance with the terms of this Agreement.

The parties shall present to the Colorado District Court for Water Division No. 7 all disputes over whether waters are being used in accordance with the terms of this section, provided that disputes involving solely Tribal members or lessees of the Tribes over the use of water within the Tribes' canal distribution system may be resolved in a Tribal forum.

Notwithstanding anything in this section to the contrary, the Tribes' responsibilities for the maintenance and repair of United States Bureau of Reclamation Project facilities and reporting obligations for project waters shall remain identical to that of other project water users.

Nothing in this section shall commit or obligate the United States to expend funds which have not been appropriated and budgeted. Nothing in this section shall commit or obligate the State to expend funds which have not been appropriated and budgeted.

#### C. DAMS AND RESERVOIR SAFETY

The Tribes agree to construct, maintain and operate existing or future storage reservoirs, together with inlet, outlet, and spillway structures or other necessary water works facilities in a manner which will protect downstream persons and property. The Tribes agree to inspect such dams using qualified, experienced personnel as often as appropriate for the protection of public health and safety and agree to allow state inspection of the dam and storage reservoirs for the purpose of ensuring public health and safety. The Tribes agree to cooperate with the State Engineer to ensure that dams and reservoirs remain safe and do not endanger public health and safety. In the event either finds that a dam or reservoir is unsafe and presents an immediate dan-



ger to public health and safety, the Tribes and the State Engineer agree to cooperate and to take all necessary actions to prevent the danger to public health and safety and to render the structure safe. Disputes over conditions of such reservoirs and the need for other remedial actions shall be decided by a court of competent jurisdiction.

Nothing in this provision shall be construed to alter the federal dam safety program.

Nothing in this section shall commit or obligate the United States to expend funds which have not been appropriated and budgeted. Nothing in this section shall commit or obligate the State to expend funds which have not been appropriated and budgeted.

#### D. INDIVIDUAL DOMESTIC AND LIVESTOCK WELLS

The Tribes agree to provide the State Engineer with the following information in a Tribal permit 30 days before the Tribes intend to permit the drilling of a well for individual domestic or livestock purposes as set forth in Article III, Section C, subsection 2: the aquifer or, if the aquifer is unknown, the depth from which the water is proposed to be withdrawn, the location of the proposed well, the name of the owner of the land on which the well will be located, the estimated average annual amount of water applied for in acre-feet, and the

estimated maximum pumping rate in gallons per minute. Thirty (30) days after the receipt of a Tribal permit to drill a well, the State shall issue well permits for individual domestic and livestock wells with the parameters and up to the amounts specified in Article III, Section C, subsection 2.

The parties shall present to the Colorado District Court for Water Division No. 7 all disputes arising under this section.

Nothing in this section shall commit or obligate the United States to expend funds which have not been appropriated and budgeted. Nothing in this section shall commit or obligate the State to expend funds which have not been appropriated and budgeted.

#### E. AQUIFER PROTECTION AND WATER WELL AND PUMP INSTALLATION

The Tribes agree to drill, maintain, and/or abandon wells in a manner consistent with public health and safety and applicable laws or regulations. Well completion reports and well drilling logs shall be completed and filed with the State Engineer within 30 days of completion of the well.

Disputes arising under this section shall be decided by a court of competent jurisdiction.

Nothing in this section shall commit or obligate the United States to expend funds which have not been appropriated and bud-

geted. Nothing in this section shall commit or obligate the State to expend funds which have not been appropriated and budgeted.

#### F. CHANGE OF RESERVED WATER RIGHT

##### 1. Change of Non-project Reserved Water Rights

The Tribes may change their non-project reserved water rights from the types of use, places of use, amounts, times of use or location of points of diversion set forth in Article III, Section A, subsection 3 and Article III, Section B, subsection 3 of this Agreement. No change shall be allowed unless the Tribes and the United States first file an application for a change of water rights in the Colorado District Court for Water Division No. 7 and the court grants such change. Changes of water rights may be to any beneficial use.

A change of water right shall be granted by the district court if the change does not increase the Tribe's consumptive use or injure other water rights. In determining the consumptive use of Tribal water rights and injury to other water rights for the change of a water right within the boundaries of a reservation or from within the boundaries to outside the boundaries of a reservation, the Tribes shall be deemed, notwithstanding the provisions of Article V, Section B, a., to have historically diverted

and beneficially used their water in the full amounts, in the manner and for the purposes set forth in Article III, Section A, subsection 3 and Article III, Section B, subsection 3. For subsequent changes of water rights, once a water right has been changed from within the boundaries to outside the boundaries of a reservation, consumptive use shall be determined based upon actual historic use.

The Tribes and the United States further agree that for a change of a surface diversion of agricultural irrigation water to a ground water diversion, they will provide the State Engineer with a Tribal permit containing the following information before the Tribes file an application for a change of water right in Colorado District Court for Water Division No. 7: the aquifer or, if the aquifer is unknown, depth from which the water is proposed to be withdrawn, the location of the proposed well, the name of the owner of the land on which the well will be located, the estimated average annual amount of water applied for in acre-feet, the estimated maximum pumping rate in gallons per minute, the proposed use, and a description of the land proposed to be irrigated or the use to which the water will be put and the location of that use. Within thirty (30) days after receipt of a Tribal permit to drill a well, the State Engineer shall issue a well permit for the proposed well if the change does not increase the Tribe's consumptive use or injure other water users. In

determining the consumptive use of water and injury to other water users, the Tribes shall be deemed to have diverted and beneficially used their water in the full amounts, and manner, and for the purposes contemplated by this Agreement.

For changes of water rights which contemplate that the water rights defined herein or water under those rights may be used outside the boundaries of the Reservations, the parties shall be bound by Article V, Section B.

The parties shall present to the Colorado District Court for Water Division No. 7 all disputes arising under this section.

Nothing in this section shall commit or obligate the United States to expend funds which have not been appropriated and budgeted. Nothing in this section shall commit or obligate the State to expend funds which have not been appropriated and budgeted.

## 2. Change of Project Reserved Water Rights

The Tribes and the United States may change their project reserved water rights from the types of use, places of use, amounts, times of use or location of points of diversion set forth in Article III, Section A, subsections 1 and 2 and Article III, Section B, subsection 1 of this Agreement. No change shall be allowed unless the Tribes and the United States file, to the same extent other project water users are required to file, an

application for a change of water rights in the Colorado District Court for Water Division No. 7 and the court grants such change. Changes of water rights may be to any beneficial use.

The change of water right shall be granted by the district court if the change does not increase the Tribe's consumptive use or injure other water rights. In determining the consumptive use of project reserved water rights and injury to other water rights, the provisions of Article III, Section A, subsection 1.d. and 2.d. and Article III, Section B, subsection 1.d shall govern, notwithstanding the provisions of Article V, Section B, a.

For changes of water rights which contemplate that the water rights defined herein or water under those rights may be used outside the boundaries of the Reservations, the parties shall be bound by Article V, Section B.

The parties shall present to the Colorado District Court for Water Division No. 7 all disputes arising under this section.

Nothing in this section shall commit or obligate the United States to expend funds which have not been appropriated and budgeted. Nothing in this section shall commit or obligate the State to expend funds which have not been appropriated and budgeted.

#### G. STATE ADJUDICATED WATER RIGHTS

The parties acknowledge that the administrative provisions

of this Article govern the Tribes' use of the project and non-project reserved water rights recognized herein, but that any and all other waters appropriated by the Tribes pursuant to the state adjudication or permitting process will be decreed, administered and regulated by the State pursuant to existing state law.

The State shall administer all rights to the use of surface or ground water within or outside the Reservation which are not a part of the Tribes' reserved water rights. The District Court for Water Division No. 7 shall have exclusive jurisdiction to resolve all disputes over uses of nonreserved water rights established under state law.

## V. LEASING AND OFF-RESERVATION USE

### A. LEASING

Pursuant to the legislation required by Article VI, Section A, subsections 1.a. and 1.c of this Agreement, the Tribes may, subject to the Federal legislation required by Article VI, Section A, subsection 1.b. of this Agreement, sell, exchange, lease, or otherwise temporarily dispose of their water within or, subject to Section B below, outside the boundaries of the Reservations.



B. WATER USE OUTSIDE THE BOUNDARIES OF THE RESERVATIONS

Solely as a compromise for the purposes of this settlement, the parties agree that the Tribes may, under this Agreement, use the project and non-project reserved water rights secured to the Tribes by this Agreement outside the boundaries of their reservations:

a. within the State subject only to the same requirements and conditions of:

- (i) State law;
  - (ii) Federal law, excluding the doctrine of Indian reserved water rights and Federal reclamation law; and
  - (iii) interstate compacts
- as apply to the exercise of water rights held by non-federal, non-Indian entities and

b. outside the State to the extent permitted by any:

- (i) State law;
- (ii) Federal law;
- (iii) interstate compact; or
- (iv) international treaty

that pertains to the Colorado River or its tributaries, including the appropriation, use, development, storage, regulation, allocation, conservation, exportation or quality of those waters; provided, however, that nothing in this Agreement shall be con-

strued to establish, address, or prejudice whether, or the extent to which, or to prevent any party from litigating whether, or the extent to which, any of the aforementioned laws do or do not permit, govern or apply to the use of the Tribes' water outside the State.

## VI. FINALITY OF SETTLEMENT

### A. JUDICIAL APPROVAL

On or before August 31, 1987, or such other date upon which the State, the Tribes and the United States shall mutually agree, the parties shall present to the Colorado District Court for Water Division No. 7 a proposed stipulation reflecting the terms of this Agreement, which shall not be implemented until the entry of the Final Consent Decree.

Nothing in this final agreement or consent decree shall be construed as an enlargement of the subject matter jurisdiction of the District Court for Water Division No. 7. Article IV Section C, Article VI Sections A.1, A.2, and B, and Article VII Section G shall be excluded from the proposed stipulation to be presented to the District Court for Water Division No. 7; provided that any waiver of tribal water right claims contained within Article VI Section A.1.e. shall be included in such proposed stipulation. Such exclusion shall not delete or alter the terms or the effect

of the excluded sections of the Agreement.

Upon the submission of such proposed stipulation the parties shall request the Court to give appropriate notice and hold the necessary hearings to consider and rule upon any objections to the proposed stipulation submitted. Upon the entry of a Final Consent Decree as provided below reflecting the proposed stipulation, the Tribes, and the United States as trustee for the Tribes, shall waive any and all claims to water rights within the State of Colorado not expressly identified in the Final Consent Decree, established by existing state or federal court decree, or otherwise recognized under state law, including any and all claims to water rights or injury to water rights, for the benefit of the Tribes or any individual claiming the right to use water under the Tribes, from any source of surface water or waters tributary thereto, arising under any laws of the United States or of the State. The Final Consent Decree shall not be executed or become final until the State, the Tribes, and the United States jointly certify that the legislative enactments necessary to implement this Agreement, as enumerated below, have been obtained to their satisfaction.

Execution and entry of the Final Consent Decree shall be contingent upon the enactment of the legislation described below.

# 1. Congressional Legislation

Required enactment by the Congress shall consist of legislation that:

a. provides relief from the prohibition of 25 U.S.C. 177;

b. provides that:

(i) the repayment of the construction costs allocable to the Tribes' municipal and industrial water allocation from the Dolores and Animas-La Plata Projects shall be deferred, and interest thereon shall not accrue, until the water is used;

(ii) the United States is authorized to bear the reimbursable OM&R costs allocable to the Tribes' municipal and industrial water allocation from the Dolores and Animas-La Plata Projects until the water is used; and

(iii) the United States is authorized to bear the reimbursable OM&R costs allocable to the Tribes' agricultural irrigation water allocation from the Animas-La Plata Project until the water is used.

As an increment of water is leased or otherwise used, prospective repayment of that increment's pro rata share of the allocable costs shall commence.

c. assures that the Tribes and their lessees are not restricted by application of federal reclamation laws

from using, selling, exchanging, leasing or otherwise temporarily disposing of their water;

d. authorizes and appropriates the federal share of the \$60.5 million Tribal Development Fund provided for in Article VI, Section B below;

e. provides that performance by the United States of the actions required by the aforementioned legislative provisions will be conditioned on the Tribes executing waivers and releases of all claims concerning water rights whether in rem or against any party to this Agreement other than those which may arise under the terms of this Agreement;

provided that the waivers of such claims, if any, relative to the Animas and La Plata Rivers shall not be effective until Phase I of the Animas-La Plata Project as defined in the June 30, 1986 Binding Agreement for Animas-La Plata Project Cost-Sharing, is complete or the Tribes elect to retain their project reserved water rights as described in Article III, Section A, subsection 2.f(ii) or Article III, Section B, subsection 1.f(ii); except that waivers of such claims, if any, for monetary damages against the State shall be effective as soon as the State appropriates and disburses the funds described in Article VI, Section A, subsection 2;

provided further that the waivers of such claims relative to the Mancos River shall not be effective until

the combined Highline-Towaoc Canal is completed so as to enable the delivery of water to the Ute Mountain Ute Indian Reservation, or the Ute Mountain Ute Tribe elects to exercise the project reserved water right by taking the Tribe's allocation of water directly from McPhee Reservoir; except that waivers of such claims, if any, for monetary damages against the State shall be effective as soon as the State appropriates the funds described in Article VI, Section A, subsection 2;

provided further that in the event that either Tribe obtains a judgment for monetary damages against the United States, the State, or any other parties, the United States or the State or the affected party shall be entitled to apply as an offset against the judgment the money actually provided by that party to the Tribe as Tribal Development Funds and any interest or any other moneys generated by this fund under this Agreement and its implementing legislation;

provided further that nothing in this paragraph e. shall be deemed to create or give validity to any claim by the Tribes against the United States, the State, or any other parties to this settlement, or in any way constitute an acknowledgment of the validity of any claims by the Tribes against the United States, the State, or any other party to the settlement;

provided further that neither Tribe may assert any claim against the United States, the State or any other party

arising out of:

- (i) the negotiation of this Agreement;
- (ii) the adoption of the specific terms of this Agreement; or
- (iii) allegations concerning the lack of authority of either Tribe or the other parties to enter into this Agreement.

f. authorizes the Tribes, to waive the claims referred to in the preceding paragraph; and

g. provides that, in exercising his authority to administer water rights on the Reservations, the Secretary, on behalf of the United States, is authorized and directed to comply with the administrative procedures governing the water rights confirmed in this Agreement to the extent provided in Article IV.

The parties contemplate that other enactments, as mutually agreed upon and needed but not enumerated herein, may be drafted by the parties and proposed to the Congress.

## 2. Colorado General Assembly Legislation

Required enactments by the Colorado General Assembly shall consist of legislation that:

- a. authorizes and appropriates \$5 million to be deposited by the State to the Tribal Development Funds no

later than 30 days following the deposit of the first installment of federal monies to said Development Funds.

b. authorizes such amount as needed, estimated at \$6 million, to be expended by the State for construction of the Towaoc Pipeline and a domestic water distribution system for the Ute Mountain Ute Tribe as a credit to the Ute Mountain Ute Development Fund, with said construction to be initiated within 1 year of the execution of this Final Settlement Agreement, and completed within 1 year of the initiation of construction; and

c. authorizes and appropriates \$5.6 million to be provided by the State to the Secretary for Ridges Basin Dam on a schedule acceptable to the State and the Secretary beginning in the first year of construction of said dam.

#### B. TRIBAL DEVELOPMENT FUNDS

Tribal Development Funds shall be established for the Tribes, with \$20.0 million for the Southern Ute Indian Tribe and \$40.5 million for the Ute Mountain Ute Indian Tribe, said funds to be created as follows:

1. \$5.0 million to be deposited by the State, contingent upon appropriation by the Colorado General Assembly, to the Tribal Development Funds no later than 30 days following the deposit of the first installment of Federal monies to said Devel-



opment Funds.

2. Such amount as needed, estimated at \$6.0 million, to be expended by the State for construction of the Towaoc Pipeline and a domestic water distribution system for the Ute Mountain Ute Indian Tribe as a credit to the Ute Mountain Ute Development Fund. Said construction will be initiated within one year of the execution of this Agreement, and shall be completed within one year of the initiation of construction.

3. \$49.5 million to be provided by the Secretary, contingent upon appropriations, to the Tribal Development Funds in three annual installments beginning in the first year for which the Congress of the United States appropriates such monies, as follows: \$19.5 million in year 1; \$15 million in year 2; and \$15 million in year 3. The Secretary will annually deposit any appropriated monies to the Development Funds within 30 days following the availability of such annual appropriation by the Congress to the Secretary.

4. The Tribal Development Funds shall be allocated between the Tribes as provided for in the following table.

Development Fund Allocations

(Millions of Dollars)

|                     | <u>Year 1</u> | <u>Year 2</u> | <u>Year 3</u> | <u>Total</u> |
|---------------------|---------------|---------------|---------------|--------------|
| <u>Ute Mtn Ute</u>  |               |               |               |              |
| Federal             | 12.0          | 10            | 10            | 32.0         |
| State               | 2.5           | -             | -             | 2.5          |
| Towaoc              |               |               |               |              |
| Pipeline            | 6.0           | -             | -             | 6.0          |
| Subtotal            | <u>20.5</u>   | <u>10</u>     | <u>10</u>     | <u>40.5</u>  |
| <u>Southern Ute</u> |               |               |               |              |
| Federal             | 7.5           | 5             | 5             | 17.5         |
| State               | 2.5           | -             | -             | 2.5          |
| Subtotal            | <u>10.0</u>   | <u>5</u>      | <u>5</u>      | <u>20.0</u>  |
| TOTAL               | 30.5          | 15            | 15            | 60.5         |

C. REMEDIES IN THE EVENT CONTINGENCIES ARE NOT MET

1. Confirmation by the Colorado District Court for Water Division No. 7.

In the event that the Colorado District Court for Water Division No. 7 fails to recognize the water rights described in Article III of this Agreement, or otherwise departs in any material way from implementing the substance of the proposed stipulation, either Tribe or the United States shall have the opportunity to void this Agreement in its entirety upon 60 days' notice to the Attorney General of the State. On the same grounds the Colorado Attorney General may void the Agreement upon 60 days' notice to the United States Attorney General and the chair-

men of both Tribes. On the same grounds other parties materially and adversely affected by a change in the substance of the decree entered by the court shall have the opportunity to void this Agreement insofar as this Agreement affects their interest, upon 60 days notice to the State, the Tribes and the United States.

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

## 2. Enactment of Necessary Legislation

In the event necessary legislation, or any part thereof, is not enacted by the end of the 100th Congress, or such other date upon which the parties shall mutually agree, the United States, either Tribe or the State shall have the right to void this Agreement in its entirety upon 60 days' notice. On the same grounds other parties materially and adversely affected by a change in the substance of the necessary legislation shall have the opportunity to void this Agreement insofar as this Agreement affects their interest, upon 60 days notice to the State, the Tribes, the United States and all other parties. Notice shall be made as follows: To the United States, through the Secretary of the Interior and the Attorney General; to the Tribes, through the

respective Tribal Chairmen; to the State, through the Attorney General; to all other parties, through their respective offices.

## VII. GENERAL PROVISIONS

A. Nothing in this Agreement shall be deemed:

1. To preclude the Tribes or their members, or the United States on its own behalf or on behalf of the Tribe or tribal members, from seeking additional water rights by appropriation in accordance with and pursuant to state law or from acquiring existing state law water rights by purchase, relinquishment, or other operation of law.

2. To limit in any way the rights of the parties or any other person to litigate any issues or questions not resolved by this agreement.

3. To authorize the taking of a water right which is vested under State or Federal law other than as prescribed by Section C of this Article.

4. To alter the effect of any subordination agreement pertaining to relative priorities of water rights previously entered into between or among the United States and/or either Tribe and any other water user.

B. The parties expressly reserve all rights not granted, recognized, or relinquished in this Agreement.

C. Whenever a reserved water right is recognized

herein for use on a parcel of tribal land that is already irrigated under an existing state decreed right owned by the Tribe, individual tribal members, or by the United States for the benefit of the Tribe or individual tribal members, the state decreed right shall be deemed relinquished unless otherwise expressly agreed.

D. The agreement contained herein has been arrived at in the process of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceeding other than one for approval or interpretation of this Agreement pursuant to or following the entry of a Final Consent Decree.

E. The law of the State relating to abandonment shall not apply to any of the project or non-project reserved water rights recognized in this Agreement, even if used or temporarily disposed of by the Tribes outside the boundaries of their reservations, nor shall those reserved water rights be forfeited or lost under state law by nonuse.

F. The Secretary agrees not to request assignment of the Dolores Water Conservancy District's water rights pursuant to article V(c) of Contract 7-07-40-W0470, dated September 23, 1977, as amended February 25, 1986, unless the District should

undertake some action that would jeopardize the project or the government's right of repayment.

G. To the extent permitted by existing law, the United States Bureau of Reclamation shall give preference to the Tribes to design and/or construct Dolores or Animas-La Plata Project facilities, so long as the implementation of such preference does not detrimentally affect the project construction schedule.

H. This Agreement may only be modified with the joint consent of the parties.

I. This Agreement may be executed in any number of counterparts, all of which together shall constitute one original Agreement.

J. Any entitlement to water of any individual member of the Tribes shall be satisfied from the water rights confirmed in this Agreement.

K. Nothing in this Agreement shall commit or obligate the United States to expend funds which have not been appropriated and budgeted.

L. Nothing in this Agreement shall commit or obligate the State to expend funds which have not been appropriated and budgeted.

This Agreement is effective this \_\_\_\_\_ day of December, 1986.

COLORADO UTE INDIAN WATER RIGHTS


FINAL SETTLEMENT AGREEMENT

Signature Page

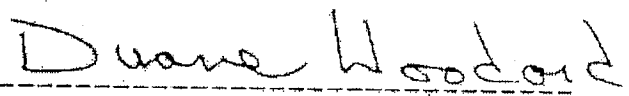
Dated this 10<sup>th</sup> day of December, 1986

STATE OF COLORADO

By

  
RICHARD D. LAMM, Governor

By

  
DUANE WOODARD, Attorney General

COLORADO UTE INDIAN WATER RIGHTS

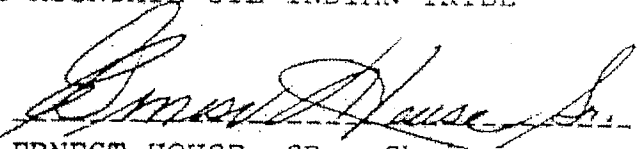
FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this 10 day of December, 1986

UTE MOUNTAIN UTE INDIAN TRIBE

By

  
ERNEST HOUSE, SR., Chairman



COLORADO UTE INDIAN WATER RIGHTS

FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this 10<sup>th</sup> day of December, 1986

SOUTHERN UTE INDIAN TRIBE

By Chris A. Baker  
CHRIS A. BAKER, Chairman

By Clement J. Frost  
CLEMENT J. FROST, Vice-Chairman

By Leonard C. Burch  
LEONARD C. BURCH, Council Member

By Orian L. Box  
ORIAN BOX, Council Member

By Vida B. Peabody  
VIDA B. PEABODY, Council Member

By Guy Pinnecoose Jr.  
GUY PINNECOOSE, JR., Council Member

By Lillian I. Seibel  
LILLIAN I. SEIBEL, Council Member

COLORADO UTE INDIAN WATER RIGHTS

FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this 10 day of December, 1986

UNITED STATES DEPARTMENT OF THE INTERIOR

By

Cliff Bennett

COLORADO UTE INDIAN WATER RIGHTS

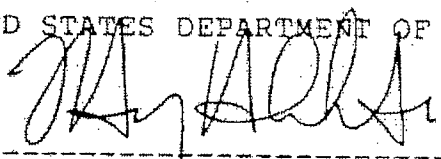
FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this 10<sup>th</sup> day of December, 1986

UNITED STATES DEPARTMENT OF JUSTICE

By



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\_\_\_\_\_

COLORADO UTE INDIAN WATER RIGHTS

FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this 10 day of December, 1986

ANIMAS-LA PLATA WATER CONSERVANCY  
DISTRICT

By John E. Murphy  
JOHN MURPHY, President

Attest: (Seal)

By Edward T. Searle  
EDWARD T. SEARLE, Secretary

COLORADO UTE INDIAN WATER RIGHTS

FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this 10th day of December, 1986

DOLORES WATER CONSERVANCY DISTRICT

By Bruce C. McAfee  
BRUCE C. McAFEE, President

Attest: (Seal)

David D. Herrick  
BY DAVID D. HERRICK, Secretary

COLORADO UTE INDIAN WATER RIGHTS

FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this 18<sup>th</sup> day of December, 1986

FLORIDA WATER CONSERVANCY DISTRICT

By Loyd N. Hess  
LOYD N. HESS, President

Attest: (Seal)

By Terry Palmer  
TERRY PALMER, Secretary

COLORADO. UTE INDIAN WATER RIGHTS

# FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this 10<sup>th</sup> day of December, 1986

MANCOS WATER CONSERVANCY DISTRICT

By Thomas K. Colbert  
THOMAS K. COLBERT, President

Attest: (Seal)

By Noland Alexander  
Secretary

COLORADO UTE INDIAN WATER RIGHTS

FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this 10<sup>th</sup> day of December, 1986

SOUTHWESTERN WATER CONSERVATION DISTRICT

By *Frederick V. Kroeger*  
FREDERICK V. KROEGER, President

Attest: (Seal)

By *Edward T. Searle*  
EDWARD T. SEARLE, Secretary - *Acting*



COLORADO UTE INDIAN WATER RIGHTS

FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this 3rd day of February, 1987

CITY OF DURANGO

By Leonel B. Silva  
LEONEL SILVA, Mayor

Attest: (Seal)



By Pauline M. Redman  
PAULINE REDMAN, City Clerk

COLORADO UTE INDIAN WATER RIGHTS

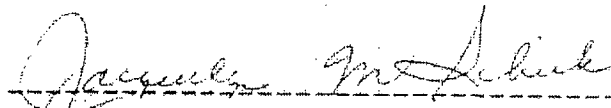
FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this 9<sup>th</sup> day of January, 1987

TOWN OF PAGOSA SPRINGS

By   
ROSS ARAGON, Mayor

By   
JACQUELYNE M. SCHICK  
Town Clerk

COLORADO UTE INDIAN WATER RIGHTS

FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this 18<sup>th</sup> day of December, 1986

FLORIDA FARMERS DITCH COMPANY

By James W. Cole  
JAMES COLE, President

Attest: (Seal)

By Hazel Brown  
HAZEL BROWN, Secretary

COLORADO UTE INDIAN WATER RIGHTS

FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this 18<sup>th</sup> day of December, 1986

FLORIDA CANAL COMPANY

By Richard C Ballantine  
RICHARD BALLANTINE, President

Attest: (Seal)

By T. G. Eggleston  
T. G. EGGLESTON, Secretary

COLORADO UTE INDIAN WATER RIGHTS

FINAL SETTLEMENT AGREEMENT

Signature Page

Dated this <sup>10<sup>th</sup></sup>~~15<sup>th</sup>~~ day of <sup>DECEMBER</sup>~~November~~, 1986

FAIRFIELD COMMUNITIES, INC.

BY

Terry L. Flora  
TERRY L. FLORA,  
Senior Vice President

Attest: (Seal)

BY

Eddie Ruth Ewing  
EDDIE RUTH EWING,  
Secretary

Public Law 100-585  
100th Congress

An Act

To facilitate and implement the settlement of Colorado Ute Indian reserved water rights claims in southwest Colorado, and for other purposes.

Nov. 3, 1988

[H.R. 2642]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Colorado Ute  
Indian Water  
Rights  
Settlement Act  
of 1988.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Colorado Ute Indian Water Rights Settlement Act of 1988".

SEC. 2. FINDINGS.

The Congress finds that—

(1) The Federal reserved water rights claims of the Ute Mountain Ute Indian Tribe and the Southern Ute Indian Tribe are the subject of existing and prospective lawsuits involving the United States, the State of Colorado, and numerous parties in southwestern Colorado.

(2) These lawsuits will prove expensive and time consuming to the Indian and non-Indian communities of southwestern Colorado.

(3) The major parties to the lawsuits and others interested in the settlement of the water rights claims of the Ute Mountain Ute Indian Tribe and the Southern Ute Indian Tribe have worked diligently to settle these claims, resulting in the June 30, 1986, Binding Agreement for Animas-La Plata Project Cost Sharing which was executed in compliance with the cost sharing requirements of chapter IV of Public Law 99-88 (99 Stat. 293), and the December 10, 1986, Colorado Ute Indian Water Rights Final Settlement Agreement.

(4) The Ute Mountain Ute Indian Tribe and the Southern Ute Indian Tribe, by resolution of their respective tribal councils, which are the duly recognized governing bodies of each Tribe, have approved the December 10, 1986, Agreement and sought Federal implementation of its terms.

(5) This Act is required to implement portions of the above two agreements.

SEC. 3. DEFINITIONS.

For purposes of this Act—

(1) The term "Agreement" means the Colorado Ute Indian Water Rights Final Settlement Agreement dated December 10, 1986, among the State of Colorado, the Ute Mountain Ute Indian Tribe, the Southern Ute Indian Tribe, the United States, and other participating parties.

(2) The term "Animas-La Plata Project" means the Animas-La Plata Project, Colorado and New Mexico, a participating project under the Act of April 11, 1956 (70 Stat. 105; 43 U.S.C. 620; commonly referred to as the "Colorado River Storage

Project Act") and the Colorado River Basin Project Act (82 Stat. 885; 43 U.S.C. 1501 et seq.).

(3) The term "Dolores Project" means the Dolores Project, Colorado, a participating project under the Act of April 11, 1956 (70 Stat. 105; 43 U.S.C. 620; commonly referred to as the "Colorado River Storage Project Act"), the Colorado River Basin Project Act (82 Stat. 885; 43 U.S.C. 1501 et seq.), and as further authorized by the Colorado River Basin Salinity Control Act (98 Stat. 2933; 43 U.S.C. 1591).

(4) The term "final consent decree" means the consent decree contemplated to be entered after the date of enactment of this Act in the District Court, Water Division No. 7, State of Colorado, which will implement certain provisions of the Agreement.

(5) The term "Secretary" means the Secretary of the Interior.

(6) The terms "Tribe" and "Tribes" mean the Ute Mountain Ute Indian Tribe, the Southern Ute Indian Tribe, or both Tribes, as the context may require.

(7) The term "water year" means a year commencing on October 1 each year and running through the following September 30.

#### SEC. 4. PROVISION OF WATER TO TRIBES.

(a) **WATER FROM THE ANIMAS-LA PLATA AND DOLORES PROJECTS.**—The Secretary is authorized to supply water to the Tribes from the Animas-La Plata and Dolores Projects in accordance with the Agreement: *Provided*, That nothing in this subsection or in the authorized purposes of the projects may be construed to permit or prohibit the sale, exchange, lease, use, or other disposal of such water by the Tribes. Any such sale, exchange, lease, use, or other disposal of water from these projects shall be governed solely by the other provisions of this Act and the Agreement as modified pursuant to section 11 of this Act.

(b) **APPLICATION OF FEDERAL RECLAMATION LAWS.**—Except as provided in section 5 of this Act, the water supplied to the Tribes from the Animas-La Plata Project and the Dolores Project shall be subject to Federal reclamation laws only to the extent needed to effectuate the terms and conditions contained in Article III, section A, subsections 1 and 2 and Article III, section B of subsection 1 of the Agreement.

#### SEC. 5. DISPOSAL OF WATER.

(a) **INDIAN INTERCOURSE ACT.**—The provisions of section 2116 of the Revised Statutes (25 U.S.C. 177) shall not apply to any water rights confirmed in the Agreement and the final consent decree: *Provided*, That nothing in this subsection shall be considered to amend, construe, supersede, or preempt any State law, Federal law, interstate compact, or international treaty that pertains to the Colorado River or its tributaries, including the appropriation, use, development, storage, regulation, allocation, conservation, exportation, or quality of those waters.

(b) **RESTRICTION ON DISPOSAL OF WATERS INTO LOWER COLORADO RIVER BASIN.**—None of the waters from the Animas-La Plata or Dolores Projects may be sold, exchanged, leased, used, or otherwise disposed of into or in the Lower Colorado River Basin unless water within the Colorado River Basin held by non-Federal, non-Indian holders of that water pursuant to any water rights could be so sold.

exchanged, leased, used, or otherwise disposed of under State law, Federal law, interstate compacts, or international treaty pursuant to a final, nonappealable order of a Federal court or pursuant to an agreement of the seven States signatory to the Colorado River Compact.

(c) **USE OF WATER RIGHTS.**—(1) The use of the rights referred to in subsection (a) within the State of Colorado shall be governed solely as provided in the Agreement as modified pursuant to section 11 of this Act and this subsection. The Agreement is hereby modified to provide that a Tribe may voluntarily elect to sell, exchange, lease, use, or otherwise dispose of any portion of a water right confirmed in the Agreement and final consent decree off its reservation. If either the Southern Ute Indian Tribe or the Ute Mountain Ute Indian Tribe so elects, and as a condition precedent to such sale, exchange, lease, use, or other disposition, that portion of the Tribe's water right shall be changed to a Colorado State water right, but be such a State water right only during the use of that right off the reservation, and shall be fully subject to State laws, Federal laws, interstate compacts, and international treaties applicable to the Colorado River and its tributaries, including the appropriation, use, development, storage, regulation, allocation, conservation, exportation, or quality of those waters.

Contracts.

(2) The characterizations in the Agreement of any water rights which may be used off the reservation of the respective Tribe as either "project reserved water right" or "nonproject reserved water right" are hereby expressly disapproved and any claim to water rights so characterized shall be extinguished when the final consent decree is entered.

(d) **RULES OF CONSTRUCTION.**—Nothing in this Act or in the Agreement shall—

(1) constitute authority for the sale, exchange, lease, use, or other disposal of any Federal reserved water right off the reservations;

(2) constitute authority for the sale, exchange, lease, use, or other disposal of any water held pursuant to a Colorado State water right, or of any Colorado State water right, outside the State of Colorado; or

(3) be deemed a congressional determination that any holders of water rights do or do not have authority under existing law to sell, exchange, lease, use, or otherwise dispose of such water or water rights outside the State of Colorado.

#### SEC. 6. REPAYMENT OF PROJECT COSTS.

Contracts.

(a) **MUNICIPAL AND INDUSTRIAL WATER.**—(1) The Secretary shall defer, without interest, the repayment of the construction costs allocable to each Tribe's municipal and industrial water allocation from the Animas-La Plata and Dolores Projects until water is first used either by the Tribe or pursuant to a water use contract with the Tribe. Until such water is first used either by a Tribe or pursuant to a water use contract with the Tribe, the Secretary shall bear the annual operation, maintenance, and replacement costs allocable to the Tribe's municipal and industrial water allocation from the Animas-La Plata and Dolores Projects, which costs shall not be reimbursable by the Tribe.

(2) As an increment of such water is first used by a Tribe or is first used pursuant to the terms of a water use contract with the Tribe, repayment of that increment's pro rata share of such allocable construction costs shall commence by the Tribe and the Tribe shall commence bearing that increment's pro rata share of the allocable annual operation, maintenance, and replacement costs.

(b) **AGRICULTURAL IRRIGATION WATER.**—(1) The Secretary shall defer, without interest, the repayment of the construction costs



within the capability of the land to repay, which are allocable to each Tribe's agricultural irrigation water allocation from the Animas-La Plata and Dolores Projects in accordance with the Act of July 1, 1932 (25 U.S.C. 386a; commonly referred to as the "Leavitt Act"), and section 4 of the Act of April 11, 1956 (70 Stat. 107; 43 U.S.C. 620c; commonly referred to as the "Colorado River Storage Project Act"). Such allocated construction costs which are beyond the capability of the land to repay shall be repaid as provided in subsection (g) of this section. Until such water is first used either by a Tribe or pursuant to a water use contract with the Tribe, the Secretary shall bear the annual operation, maintenance, and replacement costs allocable to the Tribe's agricultural irrigation allocation from the Animas-La Plata Project, which costs shall not be reimbursable by the Tribe.

Agriculture and  
agricultural  
commodities.

(2) As an increment of such water is first used by a Tribe or is first used pursuant to the terms of a water use contract with the Tribe, the Tribe shall commence bearing that increment's pro rata share of the allocable annual operation, maintenance, and replacement costs. During any period in which water is used by a tribal lessee on land owned by non-Indians, the Tribe shall bear that increment's pro rata share of the allocated agricultural irrigation construction costs within the capability of the land to repay as established in subsection (b)(1).

(c) ANNUAL COSTS WITH RESPECT TO RIDGES BASIN PUMPING PLANT.—(1) The Secretary shall bear any increased annual operation, maintenance, and replacement costs to Animas-La Plata Project water users occasioned by a decision of either Tribe not to take delivery of its Animas-La Plata Project water allocations from Ridges Basin Pumping Plant through the Long Hollow Tunnel and the Dry Side Canal pursuant to Article III, section A, subsection 2.i and Article III, section B, subsection 1.i of the Agreement until such water is first used either by a Tribe or pursuant to a water use contract with the Tribe. Such costs shall not be reimbursable by the Tribe.

(2) As an increment of its water from the Animas-La Plata Project is first used by a Tribe or is first used pursuant to the terms of a water use contract with the Tribe, the Tribe shall commence bearing that increment's pro rata share of such increased annual operation, maintenance, and replacement costs, if any.

(d) SECRETARIAL DEFERRAL.—The Secretary may further defer all or a part of the tribal construction cost obligations and bear all or a part of the tribal operation, maintenance, and replacement obligations described in this section in the event a Tribe demonstrates that it is unable to satisfy those obligations in whole or in part from the gross revenues which could be generated from a water use contract for the use of its water either from the Dolores or the Animas-La Plata Projects or from the Tribe's own use of such water.

(e) USE OF WATER.—For the purpose of this section, use of water shall be deemed to occur in any water year in which a Tribe actually uses water or during the term of any water use contract. A water use contract pursuant to which the only income to a Tribe is in the nature of a standby charge is deemed not to be a use of water for the purposes of this section.

(f) AUTHORIZATION OF APPROPRIATIONS.—There is hereby authorized to be appropriated such funds as may be necessary for the Secretary to pay the annual operation, maintenance, and replacement costs as provided in this section.

(g) **COSTS IN EXCESS OF ABILITY OF THE IRRIGATORS TO REPAY.**—The portion of the costs of the Animas-La Plata Project in excess of the ability of the irrigators to repay shall be repaid from the Upper Colorado River Basin Fund pursuant to the Colorado River Storage Project Act and the Colorado River Basin Project Act.

(h) **DEFERRAL OF CERTAIN CONSTRUCTION COSTS.**—Repayment of the portion of the construction costs of the Florida Project which have been allocated to the 563 acre-feet of agricultural irrigation water for which the Southern Ute Tribe is responsible shall be deferred by the Secretary pursuant to the Act of July 1, 1932 (25 U.S.C. 386a; 47 Stat. 564) as provided in section 4(d) of the Act of April 11, 1956 (43 U.S.C. 620c; 70 Stat. 107), and the Florida Water Conservancy District's current repayment obligation shall not change.

#### SEC. 7. TRIBAL DEVELOPMENT FUNDS.

(a) **ESTABLISHMENT.**—There is hereby authorized to be appropriated the total amount of \$49,500,000 for three annual installment payments to the Tribal Development Funds which the Secretary is authorized and directed to establish for each Tribe. Subject to appropriation, and within 60 days of availability of the appropriation to the Secretary, the Secretary shall allocate and make payment to the Tribal Development Funds as follows:

Appropriation  
authorization.

(1) To the Southern Ute Tribal Development Fund, in the first year, \$7,500,000; in the two succeeding years, \$5,000,000 and \$5,000,000, respectively.

(2) To the Ute Mountain Ute Tribal Development Fund, in the first year, \$12,000,000; in the two succeeding years, \$10,000,000 and \$10,000,000, respectively.

(b) **ADJUSTMENT.**—To the extent that any portion of such amount is contributed after the period described above or in amounts less than described above, the Tribes shall, subject to appropriation Acts, receive, in addition to the full contribution to the Tribal Development Funds, an adjustment representing the interest income as determined by the Secretary in his sole discretion that would have been earned on any unpaid amount had that amount been placed in the fund as set forth in section 7(a).

(c) **TRIBAL DEVELOPMENT.**—(1) The Secretary shall, in the absence of an approved tribal investment plan provided for in paragraph (2), invest the moneys in each Tribal Development Fund in accordance with the Act entitled "An Act to authorize the deposit and investment of Indian funds" approved June 24, 1938 (25 U.S.C. 162a). Separate accounts shall be maintained for each Tribe's development fund. The Secretary shall disburse, at the request of a Tribe, the principal and income in its development fund, or any part thereof, in accordance with an economic development plan approved under paragraph (3).

Securities.

(2) Each Tribe may submit a tribal investment plan for all or part of its Tribal Development Fund as an alternative to the investment provided for in paragraph (1). The Secretary shall approve such investment plan within 60 days of its submission if the Secretary finds the plan to be reasonable and sound. If the Secretary does not approve such investment plan, the Secretary shall set forth in writing and with particularity the reasons for such disapproval. If such investment plan is approved by the Secretary, the Tribal Development Fund shall be disbursed to the Tribe to be invested by the Tribe in accordance with the approved investment plan. The

Secretary may take such steps as he deems necessary to monitor compliance with the approved investment plan. The United States shall not be responsible for the review, approval, or audit of any individual investment under the plan. The United States shall not be directly or indirectly liable with respect to any such investment, including any act or omission of the Tribe in managing or investing such funds. The principal and income from tribal investments under an approved investment plan shall be subject to the provisions of this section and shall be expended in accordance with an economic development plan approved under paragraph (3).

(3) Each Tribe shall submit an economic development plan for all or any portion of its Tribal Development Fund to the Secretary. The Secretary shall approve such plan within 60 days of its submission if the Secretary finds that it is reasonably related to the economic development of the Tribe. If the Secretary does not approve such plan, the Secretary shall, at the time of decision, set forth in writing and with particularity the reasons for such disapproval. Each Tribe may alter the economic development plan, subject to the approval of the Secretary as set forth in this subsection. The Secretary shall not be directly or indirectly liable for any claim or cause of action arising from the approval of an economic development plan or from the use and expenditure by the Tribe of the principal of the funds and income accruing to the funds, or any portion thereof, following the approval by the Secretary of an economic development plan.

(d) PER CAPITA DISTRIBUTIONS.—Under no circumstances shall any part of the principal of the funds, or of the income accruing to such funds, or the revenue from any water use contract, be distributed to any member of either Tribe on a per capita basis.

(e) LIMITATION ON SETTING ASIDE FINAL CONSENT DECREE.—Neither the Tribes nor the United States shall have the right to set aside the final consent decree solely because subsection (c) is not satisfied or implemented.

#### SEC. 8. WAIVER OF CLAIMS.

(a) GENERAL AUTHORITY.—The Tribes are authorized to waive and release claims concerning or related to water rights as described in the Agreement.

(b) CONDITION ON PERFORMANCE BY SECRETARY.—Performance by the Secretary of his obligations under this Act and payment of the moneys authorized to be paid to the Tribes by this Act shall be required only when the Tribes execute a waiver and release as provided in the Agreement.

#### SEC. 9. ADMINISTRATION.

In exercising his authority to administer water rights on the Ute Mountain Ute and Southern Ute Indian Reservations, the Secretary, on behalf of the United States, shall comply with the administrative procedures governing the water rights confirmed in the Agreement and the Final Consent Decree to the extent provided in Article IV of the Agreement.

#### SEC. 10. INDIAN SELF-DETERMINATION ACT.

(a) IN GENERAL.—The design and construction functions of the Bureau of Reclamation with respect to the Dolores and Animas-La Plata Projects shall be subject to the provisions of the Indian Self-Determination and Education Assistance Act (88 Stat. 2203; 25

U.S.C. 450 et seq.) to the same extent as if such functions were performed by the Bureau of Indian Affairs.

(b) APPLICATION.—This section shall not apply if the application of this section would detrimentally affect the construction schedules of the Dolores and Animas-La Plata Projects.

#### SEC. 11. MODIFICATION OF AGREEMENT; RULE OF CONSTRUCTION.

(a) MODIFICATION.—The Agreement shall be deemed to have been modified to conform to this Act.

(b) RULE OF CONSTRUCTION.—The Agreement shall be construed in a manner consistent with this Act. This Act is intended solely to permit settlement of existing and prospective litigation among the signatory parties to the Agreement. This Act is the result of a voluntary compromise agreement between the Southern Ute Indian Tribe, the Ute Mountain Ute Indian Tribe, the State of Colorado, local water districts and municipalities, and the United States. Accordingly, no provision of this Act, the Agreement, or the final consent decree shall be construed as altering or affecting the determination of any questions relating to the reserved water rights belonging to other Indian tribes.

#### SEC. 12. INDIVIDUAL MEMBERS OF TRIBES.

Any entitlement to reserved water of any individual member of either Tribe shall be satisfied from the water secured to that member's Tribe.

#### SEC. 13. EFFECTIVE DATE.

(a) Sections 4(b), 5, and 6 of this Act shall take effect on the date on which the final consent decree contemplated by the Agreement is entered by the District Court, Water Division No. 7, State of Colorado. Any moneys appropriated under section 7 of this Act shall be placed into the Ute Mountain Ute and Southern Ute Tribal Development Funds in the Treasury of the United States together with other parties' contributions to the Tribal Development Funds, but shall not be available for disbursement pursuant to section 7 until such time as the final consent decree is entered. If the final consent decree is not entered by December 31, 1991, the moneys so deposited shall be returned, together with a ratable share of accrued interest, to the respective contributors and the Ute Mountain Ute and Southern Ute Tribal Development Funds shall be terminated and the Agreement may be voided by any party to the Agreement. Upon such termination, the amount contributed thereto by the United States shall be deposited in the general fund of the Treasury.

(b) No provision of this Act shall be of any force or effect if the final consent decree is not executed and approved by the court.

#### SEC. 14. VOIDING OF AGREEMENT.

The United States shall not exercise its right to void the Agreement pursuant to Article VI, section C, subsection 2 thereof.

Approved November 3, 1988.

#### LEGISLATIVE HISTORY—H.R. 2642 (S. 1415):

HOUSE REPORTS: No. 100-932 (Comm. on Interior and Insular Affairs).

SENATE REPORTS: No. 100-535, accompanying S. 1415 (Select Comm. on Indian Affairs and Comm. on Energy and Natural Resources).

CONGRESSIONAL RECORD, Vol. 134 (1988):

Oct. 3, considered and passed House.

Oct. 14, considered and passed Senate.

## **Attachment A - Part 3**

### **Solicitor's Opinion**

DEC 19 1991

Case No. W-1603-76F

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CONSENT DECREE

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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 WATER DIVISION NO. 7, COLORADO

---

THIS MATTER having come before the Water Court on the Application of the United States of America on behalf of the Bureau of Indian Affairs, the Southern Ute Indian Tribe, and the Ute Mountain Ute Indian Tribe for execution and approval of a Consent Decree based on a Stipulation for a Consent Decree entered into by the State of Colorado, the Ute Mountain Ute Indian Tribe, the Southern Ute Indian Tribe, and the United States of America, dated November 12, 1991, and filed with the Court on November 13, 1991; AND the Court having heard the testimony, statements of counsel and otherwise being fully advised in this matter, does hereby FIND, CONCLUDE, ORDER AND DECREE as follows:

1. Name, Address and Telephone No. of Applicant:

United States of America  
c/o John P. Lange  
United States Department of Justice  
Environment and Natural Resources Division  
Indian Resources Section  
999 18th Street, Suite 945  
Denver, Colorado 80202

Telephone: (303) 294-1900

2. The Stipulation for a Consent Decree in this case is based on the Colorado Ute Indian Water Rights Final Settlement Agreement of December 10, 1986, (hereinafter Settlement Agreement), and the Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. 100-585 (102 Stat. 2973), (hereinafter Settlement Act). All Objectors in this case were sent copies of the Settlement Agreement and Settlement Act by Order of this Court dated November 21, 1988.

3. The Court has jurisdiction over the subject matter of this Application and over all those persons and entities who have standing to appear as parties, whether they have appeared or not.

4. By Notice and Order dated November 13, 1991, all Objectors were notified that the Stipulation for a Consent Decree in this case had been filed with the Court and that any objections to the Stipulation for a Consent Decree were required to be filed with the Court no later than December 3, 1991. The Court further notified all Objectors that hearings on the Application of the United States and the Stipulation for a Consent Decree would be heard on December 19, 1991, commencing at 2:00 p.m.

5. No Objector in this case filed any opposition to the Stipulation for a Consent Decree in Case No. W-1603-76F; nor did any Objector oppose the Application or the Stipulation at the December 19, 1991, hearing.

6. The Court has reviewed the Stipulation for a Consent Decree and finds and concludes that the matters set forth therein are fair and reasonable, and further finds and concludes that the Stipulation for a Consent Decree meets the requirements of all applicable State and Federal law. The Court, therefore, adopts as its findings of fact, conclusions of law and Decree, the Stipulation for a Consent Decree made by the State of Colorado, the Ute Mountain Ute Indian Tribe, the Southern Ute Indian Tribe, and the United States, including the Exhibits attached thereto, and hereby expressly incorporates by reference the Stipulation for a Consent Decree and the Exhibits attached thereto in their entirety as though set forth fully herein.

7. The Court FURTHER FINDS AND CONCLUDES that the State, the Tribes and the United States have jointly certified that the contingencies set forth in Paragraph 16 of the Stipulation for a Consent Decree relating to the State and Federal Tribal Development Funds appropriations, State-Towaoc Pipeline appropriations, and State-Ridges Basin appropriations have been accomplished to their satisfaction and that they further have jointly certified, pursuant to page 62 of the Settlement Agreement, that the legislative enactments necessary to implement the Settlement Agreement have been obtained to their satisfaction.

Executed and approved by the Court this 17th day of December, 1991.

BY THE COURT

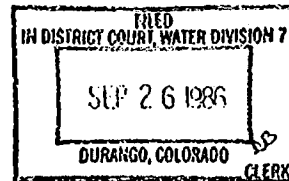


AL HAAS  
JUDGE, WATER DIVISION NO. 7

# CENTRAL FILES

DISTRICT COURT, WATER DIVISION 7, COLORADO

Case No. 84CW268



RECEIVED

RULING OF REFEREE, JUDGMENT AND DECREE

OCT 24 1986

DIV. OF WATER RESOURCES  
STATE ENGINEER  
COLORADO

CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE COLORADO WATER  
CONSERVATION BOARD ON BEHALF OF THE PEOPLE OF THE STATE OF  
COLORADO

IN EAST MANCOS RIVER, A NATURAL STREAM

IN THE WATERSHED OF THE SAN JUAN RIVER

IN MONTEZUMA COUNTY

THIS MATTER, having come on before the court on the application of the Colorado Water Conservation Board and the court being fully advised as to the matter of the application herein, hereby makes the following findings:

The application herein was filed with the water clerk, Water Division 7 on December 31, 1984. All notices required by law for the filing of this application have been fulfilled, and the court has jurisdiction over the application.

No statements of opposition were filed to this application.

All matters contained in the application have been reviewed and testimony taken where such testimony is necessary and the court finds that the statements contained in the application are true and that applicant is entitled to the water right requested in the application.



IT IS THEREFORE ORDERED AND DECREED:

Name and address of claimant:

The Colorado Water Conservation Board  
1313 Sherman Street, Room 721  
Denver, CO 80203

WATER RIGHT

Name of natural stream: East Mancos River

Location: Legal description of beginning and end points of minimum stream flow claimed: The natural stream channel from headwaters in the vicinity of lat. 37 deg. 25'26"N, long. 108 deg. 05'35"W as the upstream terminus and the confluence with the Mancos River in the SE/4 SW/4 S23 T36N R13W NMPM as the downstream terminus being a distance of approximately 11.7 miles. This segment can be located on the La Plata, Rampart Hills, Thompson Park, Mancos U.S.G.S. quadrangle(s).


Priority date: July 13, 1984 provided, however, that this right shall be junior to all priorities awarded in cases filed prior to 1984, and otherwise junior as provided in section 37-92-306, C.R.S. (1973 and 1985 Supp.).

Flow amount claimed: 2.0 c.f.s. absolute

Use of water: To maintain such minimum flows as are required to preserve the natural environment to a reasonable degree pursuant to sections 37-92-102 and 103, C.R.S. (1985 Supp.). No diversion of the water right herein will be made from the natural stream channel.


IT IS FURTHER ORDERED that the applicant shall install and maintain such water measurement devices, recording devices, content gauges and inlet and outlet measurement and recording devices, as the case may be, as are deemed essential by the Office of the State Engineer, and the same shall be installed and operated in accordance with instructions from said office.

DATED this 26<sup>th</sup> day of September 1926.

  
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AL H. HAAS  
Acting Water Referee  
Water Division 7

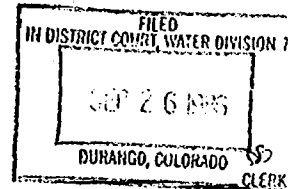
No protest was filed in this matter. The foregoing ruling is confirmed and approved, and is made the judgment and decree of this court.

DONE this 22<sup>nd</sup> day of October 1926.

  
-----  
AL H. HAAS  
Water Judge  
Water Division 7

AG Alpha No. NR WC IAAUC  
AG File EWASJUAN/R3

CENTRAL FILES



DISTRICT COURT, WATER DIVISION 7, COLORADO

Case No. 84CW269

RECEIVED

RULING OF REFEREE, JUDGMENT AND DECREE

OCT 24 1986

DIV. OF WATER RESOURCES  
STATE ENGINEER

CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE COLORADO WATER  
CONSERVATION BOARD ON BEHALF OF THE PEOPLE OF THE STATE OF  
COLORADO

IN MIDDLE MANCOS RIVER, A NATURAL STREAM

IN THE WATERSHED OF THE SAN JUAN RIVER

IN MONTEZUMA COUNTY

THIS MATTER, having come on before the court on the appli-  
cation of the Colorado Water Conservation Board and the court  
being fully advised as to the matter of the application herein,  
hereby makes the following findings:

The application herein was filed with the water clerk,  
Water Division 7 on December 31, 1984. All notices required by  
law for the filing of this application have been fulfilled, and  
the court has jurisdiction over the application.

No statements of opposition were filed to this application.

All matters contained in the application have been reviewed  
and testimony taken where such testimony is necessary and the  
court finds that the statements contained in the application are  
true and that applicant is entitled to the water right requested  
in the application.

IT IS THEREFORE ORDERED AND DECREED:

Name and address of claimant:

The Colorado Water Conservation Board  
1313 Sherman Street, Room 721  
Denver, CO 80203

WATER RIGHT

Name of natural stream: Middle Mancos River

Location: Legal description of beginning and end points of minimum stream flow claimed: The natural stream channel from headwaters in the vicinity of lat. 37 deg. 25'08"N, long. 108 deg. 08'22"W as the upstream terminus and the Weber Reservoir Inlet Ditch in the SE/4 SE/4 S5 T36N R12W NMPM as the downstream terminus being a distance of approximately 3.6 miles. This segment can be located on the Rampart Hills U.S.G.S. quadrangle(s).

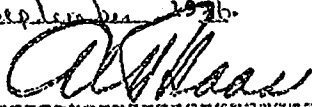
Priority date: July 13, 1984 provided, however, that this right shall be junior to all priorities awarded in cases filed prior to 1984, and otherwise junior as provided in section 37-92-306, C.R.S. (1973 and 1985 Supp.).

Flow amount claimed: 3.0 c.f.s. absolute

Use of water: To maintain such minimum flows as are required to preserve the natural environment to a reasonable degree pursuant to sections 37-92-102 and 103, C.R.S. (1985 Supp.). No diversion of the water right herein will be made from the natural stream channel.


IT IS FURTHER ORDERED that the applicant shall install and maintain such water measurement devices, recording devices, content gauges and inlet and outlet measurement and recording devices, as the case may be, as are deemed essential by the Office of the State Engineer, and the same shall be installed and operated in accordance with instructions from said office.

DATED this 21<sup>st</sup> day of September 1976.

  
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AL H. HAAS  
Acting Water Referee  
Water Division 7

No protest was filed in this matter. The foregoing ruling is confirmed and approved, and is made the judgment and decree of this court.

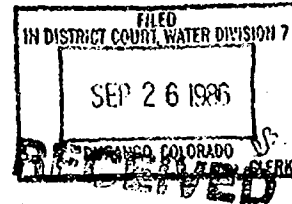
DONE this 22<sup>nd</sup> day of October 1981.

  
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AL H. HAAS  
Water Judge  
Water Division 7

AG Alpha No. NR WC 1AAUC  
AG File EWASJUAN/R4

**CENTRAL FILES**

DISTRICT COURT, WATER DIVISION 7, COLORADO  
Case No. 84CW267



----- OCT 24 1986 -----  
RULING OF REFEREE, JUDGMENT AND DECREE

DIV OF WATER RESOURCES  
STATE ENGINEER  
COLORADO

-----  
CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE COLORADO WATER  
CONSERVATION BOARD ON BEHALF OF THE PEOPLE OF THE STATE OF  
COLORADO

IN NORTH FORK WEST MANCOS RIVER, A NATURAL STREAM  
IN THE WATERSHED OF THE SAN JUAN RIVER  
IN MONTEZUMA COUNTY  
-----

THIS MATTER, having come on before the court on the appli-  
cation of the Colorado Water Conservation Board and the court  
being fully advised as to the matter of the application herein,  
hereby makes the following findings:

The application herein was filed with the water clerk,  
Water Division 7 on December 31, 1984. All notices required by  
law for the filing of this application have been fulfilled, and  
the court has jurisdiction over the application.

No statements of opposition were filed to this application.

All matters contained in the application have been reviewed  
and testimony taken where such testimony is necessary and the  
court finds that the statements contained in the application are  
true and that applicant is entitled to the water right requested  
in the application.

IT IS THEREFORE ORDERED AND DECREED:

Name and address of claimant:

The Colorado Water Conservation Board  
1313 Sherman Street, Room 721  
Denver, CO 80203

WATER RIGHT

Name of natural stream: North Fork West Mancos River

Location: Legal description of beginning and end points of minimum stream flow claimed: The natural stream channel from headwaters in the vicinity of lat. 37 deg. 26'47"N. long. 108 deg. 04'59"W as the upstream terminus and the confluence with the West Mancos River at lat. 37 deg. 27'24"N, long. 108 deg. 08'46"W as the downstream terminus being a distance of approximately 4.3 miles. This segment can be located on the La Plata, Rampart Hills U.S.G.S. quadrangle(s).

Administration: For the stream segment(s) in an unsurveyed area, the division engineer has determined for administrative purposes that the approximate legal description of the instream flow termini as protracted from U.S.G.S. quadrangles is as follows: Downstream terminus in the NW/4 NE/4 S23 T37N R12W NMPM.

Priority date: July 13, 1984 provided, however, that this right shall be junior to all priorities awarded in cases filed prior to 1984, and otherwise junior as provided in section 37-92-306, C.R.S. (1973 and 1985 Supp.).

Flow amount claimed: 2.0 c.f.s. absolute

Use of water: To maintain such minimum flows as are required to preserve the natural environment to a reasonable degree pursuant to sections 37-92-102 and 103, C.R.S. (1985 Supp.). No diversion of the water right herein will be made from the natural stream channel.

IT IS FURTHER ORDERED that the applicant shall install and

84CW 267

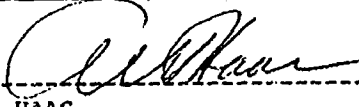
maintain such water measurement devices, recording devices, content gauges and inlet and outlet measurement and recording devices, as the case may be, as are deemed essential by the Office of the State Engineer, and the same shall be installed and operated in accordance with instructions from said office.

DATED this 25<sup>th</sup> day of September 1946.

  
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AL H. HAAS  
Acting Water Referee  
Water Division 7

No protest was filed in this matter. The foregoing ruling is confirmed and approved, and is made the judgment and decree of this court.

DONE this 25<sup>th</sup> day of October 1946.

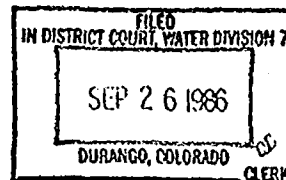
  
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AL H. HAAS  
Water Judge  
Water Division 7

AG Alpha No. NR WC IAAUC  
AG File EWASJUAN/R2



DISTRICT COURT, WATER DIVISION 7, COLORADO

Case No. 84CW266



RECEIVED

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RULING OF REFEREE, JUDGMENT AND DECREE

OCT 24 1986  
DIV OF WATER RESOURCES  
STATE ENGINEER  
COLORADO

-----  
CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE COLORADO WATER  
CONSERVATION BOARD ON BEHALF OF THE PEOPLE OF THE STATE OF  
COLORADO

IN WEST MANCOS RIVER, A NATURAL STREAM

IN THE WATERSHED OF THE SAN JUAN RIVER

IN MONTEZUMA COUNTY  
-----

THIS MATTER, having come on before the court on the appli-  
cation of the Colorado Water Conservation Board and the court  
being fully advised as to the matter of the application herein,  
hereby makes the following findings:

The application herein was filed with the water clerk,  
Water Division 7 on December 31, 1984. All notices required by  
law for the filing of this application have been fulfilled, and  
the court has jurisdiction over the application.

No statements of opposition were filed to this application.

All matters contained in the application have been reviewed  
and testimony taken where such testimony is necessary and the  
court finds that the statements contained in the application are  
true and that applicant is entitled to the water right requested  
in the application.

IT IS THEREFORE ORDERED AND DECREED:

Name and address of claimant:

The Colorado Water Conservation Board  
1313 Sherman Street, Room 721  
Denver, CO 80203

WATER RIGHT

Name of natural stream: West Mancos River

Location: Legal description of beginning and end points of minimum stream flow claimed: The natural stream channel from the confluence of the North and South Forks of the West Mancos River at lat. 37 deg. 27'24"N, long. 108 deg. 08'46"W as the upstream terminus and the Jackson Ditch diversion at lat. 37 deg. 25'56"N, long. 108 deg. 14'09"W as the downstream terminus being a distance of approximately 6.4 miles. This segment can be located on the Rampart Hills U.S.G.S. quadrangle(s).

Administration: For the stream segment(s) in an unsurveyed area, the division engineer has determined for administrative purposes that the approximate legal description of the instream flow termini as protracted from U.S.G.S. quadrangles is as follows: Downstream terminus in the SW/4 SE/4 S25 T37N R13W NMPM.

Priority date: July 13, 1984 provided, however, that this right shall be junior to all priorities awarded in cases filed prior to 1984, and otherwise junior as provided in section 37-92-306, C.R.S. (1973 and 1985 Supp.).

Flow amount claimed: 4.0 c.f.s. absolute


Use of water: To maintain such minimum flows as are required to preserve the natural environment to a reasonable degree pursuant to sections 37-92-102 and 103, C.R.S. (1985 Supp.). No diversion of the water right herein will be made from the natural stream channel.

IT IS FURTHER ORDERED that the applicant shall install and

84C W 266

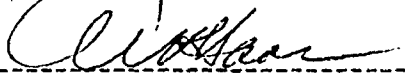
maintain such water measurement devices, recording devices, content gauges and inlet and outlet measurement and recording devices, as the case may be, as are deemed essential by the Office of the State Engineer, and the same shall be installed and operated in accordance with instructions from said office.

DATED this 26<sup>th</sup> day of September 1986.

  
AL H. HAAS  
Acting Water Referee  
Water Division 7

No protest was filed in this matter. The foregoing ruling is confirmed and approved, and is made the judgment and decree of this court.

DONE this 2nd day of October 1986

  
AL H. HAAS  
Water Judge  
Water Division 7

AG Alpha No. NR WC IAAUC  
AG File EWASJUAN/R1



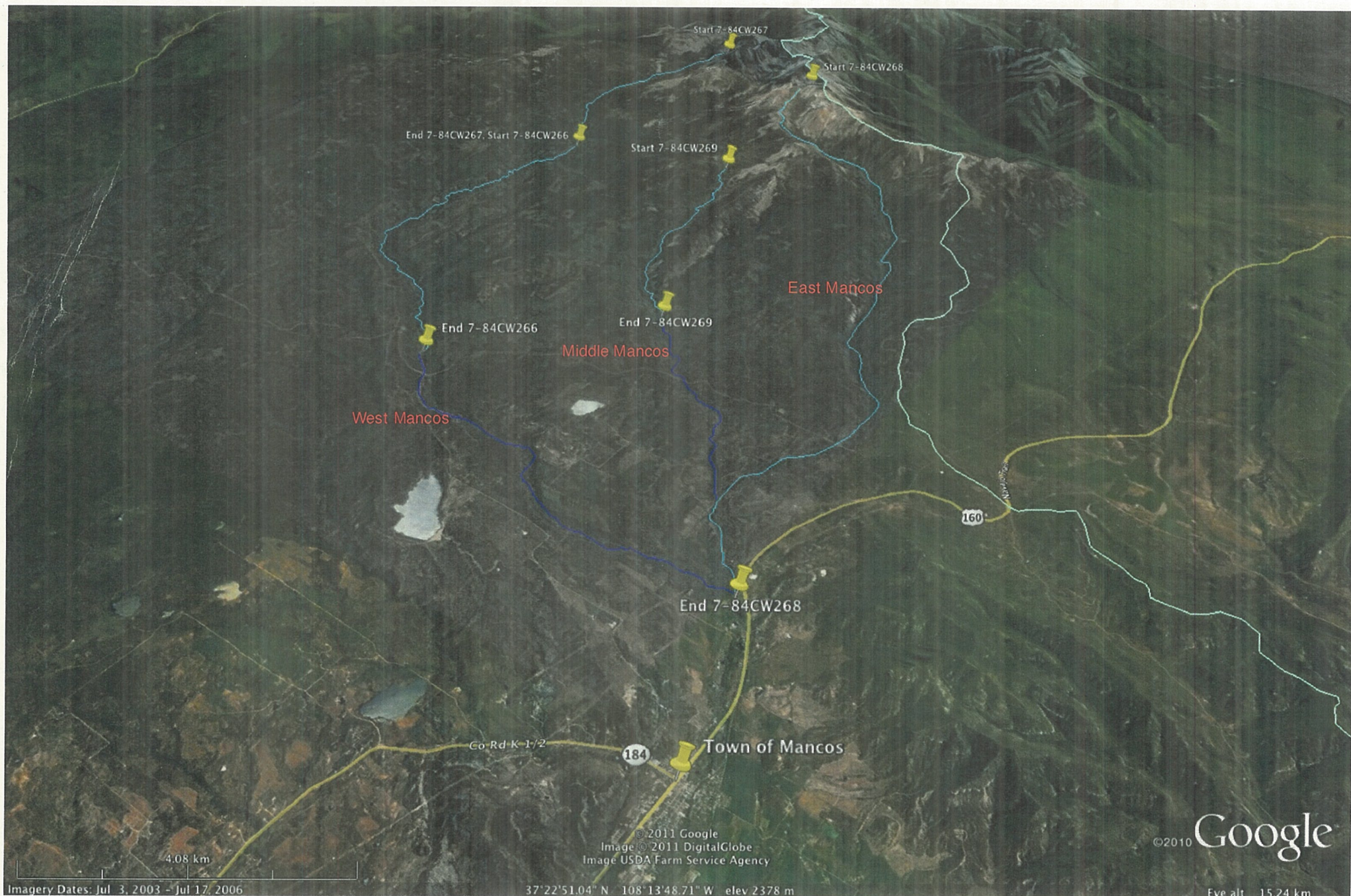
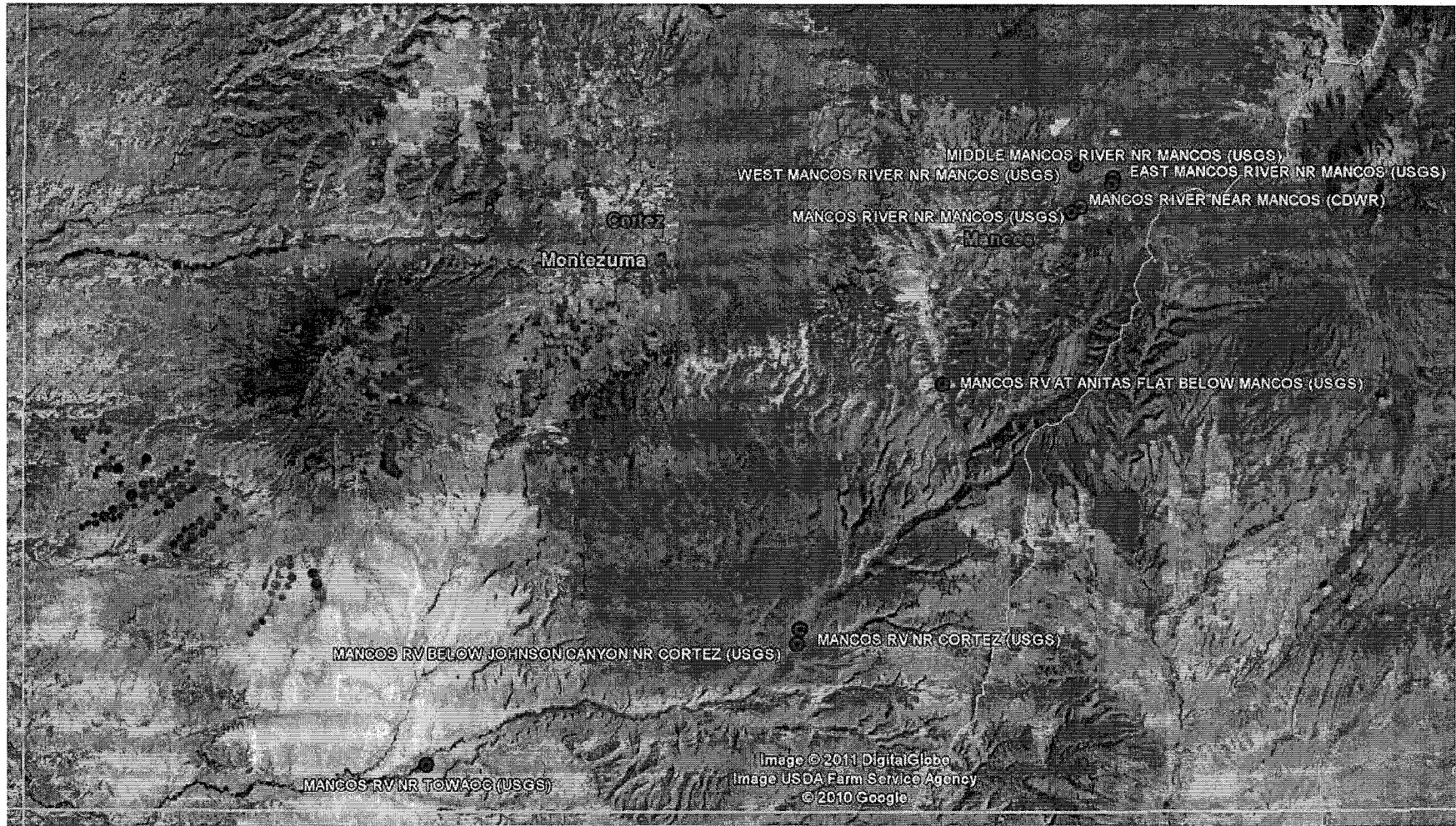




Exhibit 11 - Map of Gages





## Instream Flow Recommendation Questionnaire

The Colorado Instream Flow and Natural Lake Level Program works with State and Federal agencies, local communities, cities, local environmental groups, water users and other interested parties to identify stream segments or ecological areas for flow protection or enhancement, and to address stream flow protection needs within the framework of Colorado water law. The Program can address important emerging issues such as water requirements for declining, sensitive, threatened and endangered species, protection of non-fisheries, or restoration and improvement of the natural environment. The Program can also be relied upon to correlate mankind's need for future economic growth and development with reasonable preservation of the natural environment.

Due to the large number of recommendations received in the past and limited staff resources, staff must prioritize the streams and lakes being considered for inclusion in the Instream Flow Program. This questionnaire was developed to assist the CWCB Staff in that task. This questionnaire may also be used "to begin to develop an objective and reproducible framework for evaluating, quantifying, and prioritizing environmental and recreational water goals" as recommended by the Statewide Water Supply Initiative (SWSI).

Please complete a questionnaire for each stream or lake recommendation submitted. It is understood that not all of the information may be available when providing initial recommendations, but please complete the form to the best of your knowledge. You may use this form to apprise the CWCB Staff of the unique characteristics of a given stream or lake that may otherwise be unknown. If you have any questions regarding this questionnaire or need assistance, please feel free to contact Jeff Baessler at 303-866-3441 extension 3202 or by email at [Jeffrey.Baessler@colorado.state.co.us](mailto:Jeffrey.Baessler@colorado.state.co.us).

### **1. Please provide the following contact information:**

- a. Recommending agency, entity or individual

b. Contact person

c. Mailing address, phone number and email address

**2. Please provide a general description of stream reach or natural lake of concern to the best of your knowledge:**

a. Name of stream or natural lake

b. County

c. Water division and water district

d. Major drainage basin

e. Upper terminus (i.e. headwaters, confluence with 'ABC' Creek, etc.)

f. Lower terminus

g. Approximate segment length in miles

h. Name of USGS quad maps (Please attach copy of map to this questionnaire)

i. Any photos available? (Please attach)

**3. Please provide a brief description of the natural environment to be preserved or improved, and the basis for the recommendation.**

**4. Please provide any additional information that should be considered by the CWCB Staff when reviewing this recommendation (i.e. federal cooperation, community support, unique characteristics, resource threats, etc.).**

**5. Please provide a brief description of fieldwork (if any) that has been completed (i.e. biologic or hydrologic data, quantification studies). If work has been performed, please include the name of the individual, agency or consulting firm that performed the work.**



## DEPARTMENT OF NATURAL RESOURCES

### Colorado Water Conservation Board

#### RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM

##### 2 CCR 408-2

##### 1. TITLE.

Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, hereafter referred to as the Instream Flow ("ISF" ) Program as established in §37-92-102 (3) C.R.S., shall be hereinafter referred to as the "ISF Rules."

##### 2. PURPOSE OF RULES.

The purpose of the ISF Rules is to set forth the procedures to be followed by the Board and Staff when implementing and administering the ISF Program. By this reference, the Board incorporates the Basis and Purpose statement prepared and adopted at the time of rulemaking. A copy of this document is on file at the Board office.

##### 3. STATUTORY AUTHORITY.

The statutory authority for the ISF Rules is found at §37-60-108, C.R.S. and §37-92-102 (3), C.R.S. Nothing in these rules shall be construed as authorizing the Board to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact.

##### 4. DEFINITIONS.

##### 4a. Agenda Mailing List.

The agenda mailing list consists of all Persons who have sent a notice to the Board Office that they wish to be included on such list. These Persons will be mailed a Board meeting agenda prior to each scheduled Board meeting.

##### 4b. Board.

Means the Colorado Water Conservation Board as defined in §§37-60-101, 103 and 104, C.R.S.

##### 4c. Board Office.

The Colorado Water Conservation Board's office is located at 1313 Sherman Street, 7th Floor, Denver, CO 80203. The phone number is (303) 866-3441. The facsimile number is (303) 866-4474. The Board's website is <http://www.cwcb.state.co.us>.

##### 4d. Contested Hearing Mailing List.

The Contested Hearing Mailing List shall consist of all Persons who have received Party status or Contested Hearing Participant status pursuant to Rules 5l. or 5m. This mailing list is specific to a contested appropriation.

##### 4e. Contested Hearing Participant.

Any Person who desires to participate in the contested ISF process, but not as a Party, may obtain Contested Hearing Participant status pursuant to Rule 5m. A Person with such status will receive all Party documents. Contested Hearing Participants may comment on their own behalf, but may not submit for the record technical evidence, technical witnesses or legal memoranda.

**4f. CWCB Hearing Officer.**

The Hearing Officer is appointed by the Board and is responsible for managing and coordinating proceedings related to contested ISF appropriations, acquisitions or modifications, such as setting prehearing conferences and adjusting deadlines and schedules to further the Parties' settlement efforts or for other good cause shown. The Hearing Officer does not have the authority to rule on substantive issues.

**4g. Final Action.**

For purposes of Rule 5, final action means a Board decision to (1) file a water right application, (2) not file a water right application or (3) table action on an ISF appropriation; however, tabling an action shall not be construed as abandonment of its intent to appropriate.

**4h. Final Staff ISF Recommendation.**

Staff's ISF recommendation to the Board is based on Staff's data and report, and public comments and data contained in the official record.

**4i. ISF.**

Means any water, or water rights appropriated by the Board for preservation of the natural environment to a reasonable degree, or any water, water rights or interests in water acquired by the Board for preservation or improvement of the natural environment to a reasonable degree. "ISF" includes both instream flows between specific points on a stream and natural surface water levels or volumes for natural lakes.

**4j. ISF Subscription Mailing List(s).**

The ISF Subscription Mailing List(s) are specific to each water division. The ISF Subscription Mailing List(s) shall consist of all Persons who have subscribed to the list(s) by sending notice(s) to the Board Office that they wish to be included on such list for a particular water division. The Staff shall, at such times as it deems appropriate, mail to all Persons on the water court resume mailing list in each water division an invitation to be included on the ISF Subscription Mailing List for that water division. Persons on the list are responsible for keeping Staff apprised of address changes. Persons on the ISF Subscription Mailing List(s) shall receive agendas and other notices describing activities related to ISF recommendations, appropriations and acquisitions in the particular water division. Persons may be required to pay a fee in order to be on the ISF Subscription Mailing List(s).

**4k. Mail.**

For the purposes of the ISF Rules, mail refers to regular or special delivery by the U.S. Postal Service or other such services, electronic delivery (e-mail), or delivery by FAX transmission.

**4l. Party.**

Any Person may obtain Party status pursuant to Rule 5l. Only a Person who has obtained Party status may submit, for the record, technical evidence, technical witnesses or legal memoranda. Each Party is responsible for mailing copies of all documents to all other Parties and Contested Hearing Participants.

**4m. Person.**

Means any human being, partnership, association, corporation, special district, water conservancy district, water conservation district, municipal entity, county government, state government or agency thereof, and federal government or agency thereof.

**4n. Proper Notice.**

Means the customary public notice procedure that is provided each year by the Board in the preamble to the Board's January Board meeting agenda. This customary public notice procedure may include posting of the agenda at the Board office, filing legal notices when required, mailing to Persons on the Board mailing lists and posting notices on the Board's website.

**4o. Stacking.**

As used in Rule 6, the terms "stack" or "stacking" refer to an instance in which the Board holds more than one water right for the same lake or reach of stream and exercises the rights independently according to their decrees.

**4p. Staff.**

Means the Director of the Colorado Water Conservation Board ("CWCB Director") and other personnel employed by the Board.

**5. ORIGINAL APPROPRIATION PROCEDURE.**

**5a. Recommendation of Streams and Lakes for Protection.**

All Persons interested in recommending certain stream reaches or natural lakes for inclusion in the ISF Program may make recommendations to the Board or Staff at any time. Staff will provide a preliminary response to any Person making such a recommendation within 30 working days after receipt of the recommendation at the Board Office. Staff will collaborate with State and Federal agencies and other interested Persons to plan and coordinate collection of field data necessary for development of ISF recommendations. The Staff shall advise the Board, at least annually, of all new recommendations received and of streams and lakes being studied for inclusion in the ISF Program.

**5b. Method of Making Recommendations.**

All recommendations transmitted to the Board or Staff for water to be retained in streams or lakes to preserve the natural environment to a reasonable degree must be made with specificity and in writing.

**5c. Board Approval Process.**

Periodically, after studying streams and lakes for inclusion in the ISF Program, Staff will recommend that the Board appropriate ISF rights. The Board and Staff will use the following annual schedule for initiating, processing and appropriating ISF water rights:

**January**

- The January Board meeting agenda will list proposed ISF appropriations to be appropriated that year.
- Staff will provide data, engineering and other information supporting each proposed ISF appropriation to the Board prior to or at the January Board meeting.

- Staff will present its information and recommendation for each proposed ISF appropriation at the January Board meeting.
- The Board will take public comment on the proposed ISF appropriations at the January Board meeting.
- The Board may declare its intent to appropriate for each proposed ISF appropriation at the January Board meeting, provided that the particular ISF appropriation has been listed as being under consideration in a notice, mailed at least 60 days prior to the January Board meeting, to the ISF Subscription Mailing List for the relevant water division(s).
- Notice of the Board having declared its intent to appropriate will be distributed through the ISF Subscription Mailing List for the relevant water division(s).

#### March

- The Board will take public comment on all ISF appropriations at the March Board meeting.
- Notice to Contest an ISF appropriation, pursuant to Rule 5k, must be submitted to the Board Office by March 31<sup>st</sup>, or the first business day thereafter.

#### April

- Staff will notify all Persons on the ISF Subscription Mailing List(s) of contested ISF appropriations by April 10<sup>th</sup>, or the first business day thereafter.
- Notice of Party status or Contested Hearing Participant status, pursuant to Rules 5l. or 5m., must be submitted to the Board Office by April 30<sup>th</sup>, or the first business day thereafter.

#### May

- Staff will report to the Board which ISF appropriations are being contested.
- The Board may set hearing dates for contested ISF appropriations.
- At the May Board meeting, the Board may take final action on all uncontested ISF appropriations.

#### July

- A prehearing conference will be held prior to the July Board meeting for all contested ISF appropriations (Date specific to be determined by the Hearing Officer).
- Five working days before the prehearing conference, all Parties shall file at the Board office, for the record, any and all legal memoranda, engineering data, biological data and reports or other information upon which the Party will rely.

#### August

- All Parties must submit written rebuttal statements, including testimony and exhibits, by August 15<sup>th</sup>, or the first business day thereafter. Except for such rebuttal and testimony provided at the hearing pursuant to Rule 5p.(2), the Board will not accept any statements,

related documentation or exhibits submitted by any Party after the prehearing conference, except for good cause shown or as agreed upon by the Parties.

#### **September**

- Staff will make its final recommendations to the Board, based upon its original report, all public comments, documents submitted by the Parties and all data contained in the official record, at the September Board meeting.
- Notice of the Final Staff ISF Recommendations will be sent to all Persons on the Contested Hearing Mailing List prior to the September Board meeting.
- Parties may choose to continue or withdraw their Notice to Contest an ISF appropriation at or before the September Board Meeting.
- The Board will hold hearings on all contested ISF appropriations.

#### **November**

- The Board shall update the public on the results of any hearings through its agenda and may take final action on contested ISF appropriations.

When necessary, the Board may modify or delay this schedule or any part thereof as it deems appropriate.

#### **5d. Board's Intent to Appropriate.**

Notice of the Board's potential action to declare its intent to appropriate shall be given in the January Board meeting agenda and the Board will take public comment regarding its intent to appropriate at the January meeting.

- (1) After reviewing Staff's recommendations for proposed ISF appropriations, the Board may declare its intent to appropriate specific ISF water rights. At that time, the Board shall direct the Staff to publicly notice the Board's declaration of its intent to appropriate.
- (2) After the Board declares its intent to appropriate, notice shall be published in a mailing to the ISF Subscription Mailing Lists for the relevant water divisions and shall include:
  - (a) A description of the appropriation (e.g. stream reach, lake location, amounts, etc.);
  - (b) Availability (time and place) for review of Summary Reports and Investigations Files for each appropriation; and,
  - (c) Summary identification of any data, exhibits, testimony or other information in addition to the Summary Reports and Investigations Files supporting the appropriation.
- (3) Published notice shall also contain the following information:
  - (a) The Board may change flow amounts of contested ISF appropriations based on information received during the public notice and comment period.
  - (b) Staff will maintain, pursuant to Rule 5e.(3), an ISF Subscription Mailing List for each water division composed of the names of all Persons who have sent notice to the Board Office that they wish to be included on such list for a particular water division. Any Person

desiring to be on the ISF Subscription Mailing List(s) must send notice to the Board Office.

- (c) Any meetings held between Staff and members of the public will be open to the public. Staff may provide Proper Notice prior to any such meetings and may provide notice to Persons on the ISF Subscription Mailing List(s).
  - (d) Any Notice to Contest must be received at the Board office no later than March 31<sup>st</sup>, or the first business day thereafter. All Notices of Party status and Contested Hearing Participant status must be received at the Board office no later than April 30<sup>th</sup>, or the first business day thereafter.
  - (e) Staff will announce its Final Staff ISF Recommendation concerning contested appropriations at the September Board meeting and will send notice of the Final Staff ISF Recommendations to all Persons on the Contested Hearing Mailing List.
  - (f) The Board may take final action on any uncontested ISF appropriations at the May Board meeting.
- (4) After the Board declares its intent to appropriate, notice of the Board's action shall be mailed within five working days to the County Commissioners of the county(ies) in which the proposed reach or lake is located.
  - (5) Final action by the Board on ISF appropriations will occur no earlier than the May Board meeting.

**5e. Public Comment.**

- (1) The Board will hear comment on the recommended action to declare its intent to appropriate at the January Board Meeting.
- (2) ISF appropriations will be noticed in the Board agenda for each regularly scheduled subsequent meeting until the Board takes final action. Prior to March 31<sup>st</sup>, at each regularly scheduled Board meeting, time will be allocated for public comment. Subsequent to March 31<sup>st</sup>, the Board will accept public comment on any contested ISF appropriations or lake levels only at the hearings held on those appropriations pursuant to Rule 5j.
- (3) Staff will maintain an ISF Subscription Mailing List for each water division. Any Person desiring to receive information concerning proposed ISF appropriations for that water division must contact the Board Office to request inclusion on that ISF Subscription Mailing List.

**5f. Date of Appropriation.**

The Board may select an appropriation date that may be no earlier than the date the Board declares its intent to appropriate. The Board may declare its intent to appropriate when it concludes that it has received sufficient information that reasonably supports the findings required in Rule 5i.

**5g. Notice.**

Agenda and ISF Subscription Mailing List(s) notice shall be given pursuant to Rule 5d. and the public shall be afforded an opportunity to comment pursuant to Rule 5e. Notice of the date of final action on uncontested ISF appropriations shall be mailed to Persons on the ISF Subscription Mailing Lists for the relevant water divisions, maintained pursuant to Rule 5e.(3).

**5h. Final Board Action on an ISF Appropriation.**

The Board may take final action on any uncontested ISF appropriation(s) at the May Board meeting or any Board meeting thereafter. If a Notice to Contest has been filed, the Board shall proceed under Rules 5j. - 5q.

**5i. Required Findings.**

Before initiating a water right filing to confirm its appropriation, the Board must make the following determinations:

**(1) Natural Environment.**

That there is a natural environment that can be preserved to a reasonable degree with the Board's water right if granted.

**(2) Water Availability.**

That the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made.

**(3) Material Injury.**

That such environment can exist without material injury to water rights.

These determinations shall be subject to judicial review in the water court application and decree proceedings initiated by the Board, based on the Board's administrative record and utilizing the criteria of §§24-4-106(6) and (7), C.R.S.

**5j. Procedural Rules for Contested ISF Appropriations.**

- (1) Whenever an ISF appropriation is contested, the Board shall hold a hearing at which any Party may present evidence, witnesses and arguments for or against the appropriation and any Contested Hearing Participant or member of the public may comment. The hearing shall be a notice and comment hearing as authorized in §37-92-102(4)(a), C.R.S., and shall not be a formal agency adjudication under §24-4-105, C.R.S.
- (2) These rules are intended to assure that information is received by the Board in a timely manner. Where these rules do not address a procedure or issue, the Board shall determine the procedures to be followed on a case-by-case basis. The Board may waive the requirements of these rules whenever the Board determines that strict adherence to the rules is not in the best interests of fairness, unless such waiver would violate applicable statutes. For any such waiver, the Board shall provide appropriate justification, in writing, to Persons who have Party or Contested Hearing Participant status.
- (3) In a hearing on a contested ISF appropriation, a Party may raise only those issues relevant to the statutory determinations required by §37-92-102(3)(c), C.R.S. and the required findings in Rule 5i.

**5k. Notice to Contest.**

- (1) To contest an ISF appropriation, a Person must comply with the provisions of this section. The Board must receive a Notice to Contest the ISF appropriation by March 31<sup>st</sup>, or the first business day thereafter.
- (2) A Notice to Contest an ISF appropriation shall be made in writing and contain the following information:

- (a) Identification of the Person(s) requesting the hearing;
  - (b) Identification of the ISF appropriation(s) at issue; and,
  - (c) The contested facts and a general description of the data upon which the Person will rely to the extent known at that time.
- (3) After a Party has filed a Notice to Contest an ISF appropriation, any other Person may participate as a Party or a Contested Hearing Participant pursuant to Rules 5l. or 5m.
  - (4) Staff will notify all Persons on the relevant ISF Subscription Mailing List(s) of contested ISF appropriations by April 10<sup>th</sup>, or the first business day thereafter.

**5l. Party Status.**

- (1) Party status will be granted to any Person who timely files a Notice of Party Status with the Staff. Any Person filing a Notice to Contest shall be granted Party status and need not also file a Notice of Party Status. A Notice of Party status must be received by April 30<sup>th</sup>, or the first business day thereafter. A Notice of Party status shall set forth a brief and plain statement of the reasons for obtaining Party status, the contested facts, the matters that the Person claims should be decided and a general description of the data to be presented to the Board. The Board will have discretion to grant or deny Party status to any Person who files a Notice of Party Status after April 30<sup>th</sup> or the first business day thereafter, for good cause shown.
- (2) Only a Party may submit for the record technical evidence, technical witnesses or file legal memoranda. Each Party is responsible for mailing copies of all documents submitted for Board consideration to all other Parties and Contested Hearing Participants.
- (3) The Staff shall automatically be a Party in all proceedings concerning contested ISF appropriations.
- (4) Where a contested ISF appropriation is based fully or in part on another agency's recommendation pursuant to Rule 5a., that agency shall automatically be a Party in any proceeding.
- (5) All Parties, whether they achieved such status by filing a Notice to Contest or a Notice of Party Status, shall be afforded the same rights in the contested ISF appropriation proceedings. Specifically, but without limiting the generality of the foregoing sentence, any Person who filed a Notice of Party Status is entitled to raise issues not raised by any Person who filed a Notice to Contest.

**5m. Contested Hearing Participant Status.**

- (1) Any Person who desires to participate in the process, but not as a Party, may obtain Contested Hearing Participant status by filing a notice thereof at the Board Office prior to April 30<sup>th</sup>. A Person with such status will receive all Party documents specific to the contested appropriation. Contested Hearing Participants may comment on their own behalf, but may not submit for the record technical evidence, technical witnesses or legal memoranda. The Board will have discretion to grant or deny Contested Hearing Participant status to any Person who filed a Notice of Contested Hearing Participant Status after April 30<sup>th</sup> or the first business day thereafter, for good cause shown.
- (2) The request for Contested Hearing Participant status must be received by April 30<sup>th</sup>, or the first business day thereafter.



- (3) Staff shall notify all Parties and Contested Hearing Participants of the list of Contested Hearing Participants prior to May 31<sup>st</sup>. Thereafter, Parties shall also mail their prehearing statements and any other documents to Contested Hearing Participants.

**5n. Prehearing Conference.**

- (1) The Board will designate a Hearing Officer, who shall schedule and preside over prehearing conferences and assist the Parties with procedural matters, such as setting prehearing conferences and adjusting deadlines and schedules to further the Parties' settlement efforts or for other good cause shown. All prehearing conferences will be scheduled and held prior to the July Board meeting.
- (2) On or before five working days before the prehearing conference, each Party shall file 25 copies of its prehearing statement with the Board, and provide an electronic version when possible. The prehearing statement shall identify all exhibits, engineering data, biological data and reports or other information that the Party will rely upon at the hearing and shall contain:
- (a) A specific statement of the factual and legal claims asserted (issues to be resolved) and the legal basis upon which the Party will rely;
  - (b) Copies of all exhibits to be introduced at the hearing;
  - (c) A list of witnesses to be called and a brief description of their testimony;
  - (d) Any alternative proposal to the proposed ISF appropriation;
  - (e) All written testimony to be offered into evidence at the hearing;

and

- (f) Any legal memoranda.

Each Party shall deliver a copy of its prehearing statement to all other Parties, Contested Hearing Participants, the Hearing Officer and directly to the Assistant Attorneys General representing Staff and the Board five working days before the prehearing conference. The Board will not consider information, other than rebuttal statements and testimony provided at the hearing pursuant to Rule 5p.(2), submitted by the Parties after this deadline except for good cause shown or as agreed upon by the Parties.

- (3) Any Contested Hearing Participant may also submit written comments 5 working days prior to the prehearing conference. Contested Hearing Participants who submit written comments for the Board's consideration shall provide 25 copies to the Board, and a copy to all other Contested Hearing Participants, Parties, the Hearing Officer and the Assistant Attorneys General representing Staff and Board, and provide an electronic version when possible.
- (4) The prehearing conference will afford the Parties the opportunity to address such issues as time available for each Party at the hearing, avoiding presentation of duplicative information, consolidation of concerns, etc. The Parties may formulate stipulations respecting the issues to be raised, witnesses and exhibits to be presented, and/or any other matters which may be agreed to or admitted by the Parties. At the prehearing conference, the Parties shall make known any objections to the procedures or evidence that they may raise at the hearing unless such objections could not have been reasonably determined at that time.
- (5) August 15<sup>th</sup>, or the first business day thereafter, is the last day for submission of written rebuttal statements, including testimony, legal memoranda, and exhibits. Twenty-five copies of such

materials must be provided to the Board, and an electronic version also provided, when possible. Except for such rebuttal and testimony provided at the hearing pursuant to Rule 5p.(2), the Board will not accept any statements, related documentation or exhibits submitted by any Party after the deadline set forth in Rules 5n.(2) and 5n.(3), except for good cause shown or as agreed upon by the Parties. The scope of rebuttal is limited to issues and evidence presented in the prehearing statements. Any documentation to be submitted pursuant to this subsection (5) shall be delivered to the Board and mailed to all Parties and Contested Hearing Participants by August 15<sup>th</sup>, or the first business day thereafter, unless the Parties agree otherwise.

**5o. Notice of Hearings on Contested ISF Appropriations.**

- (1) Staff shall mail notice of prehearing conference(s) on contested ISF appropriations to all Persons on the Contested Hearing Mailing List for the particular ISF appropriation. The notice shall specify the time and place of the prehearing conference and any procedural requirements that the Board deems appropriate.
- (2) The Board may postpone a hearing to another date by issuing written notice of the postponement no later than 7 calendar days prior to the original hearing date.

**5p. Conduct of Hearings.**

- (1) In conducting any hearing, the Board shall have authority to: administer oaths and affirmations; regulate the course of the hearing; set the time and place for continued hearing; limit the number of technical witnesses; issue appropriate orders controlling the subsequent course of the proceedings; and take any other action authorized by these Rules.
- (2) At the hearing, the Board shall hear arguments, concerns or rebuttals from Parties, Contested Hearing Participants and interested members of the public. The Board may limit testimony at the hearing. Without good cause, the Board will not permit Parties or Contested Hearing Participants to introduce written material at the hearing not previously submitted pursuant to these Rules. The Board, in making its determinations, need not consider any written material not timely presented.
- (3) Only the Board may question witnesses at the hearing except where the Board determines that, for good cause shown, allowing the parties to question witnesses may materially aid the Board in reaching its decision, or where such questioning by the Parties relates to the statutory findings required by §37-92-102(3)(c), C.R.S. The Board may terminate questioning where the Board determines that such questioning is irrelevant or redundant or may terminate such questioning for other good cause.
- (4) The hearing shall be recorded by a reporter or by an electronic recording device. Any Party requesting a transcription of the hearing shall be responsible for the cost of the transcription.

**5q. Final Board Action.**

The Board may take final action at the hearing or at a later date.

**5r. Statement of Opposition.**

In the event that any Person files a Statement of Opposition to an ISF water right application in Water Court, the Staff may agree to terms and conditions that would prevent injury. Where the resolution of the Statement of Opposition does not involve a change regarding the Board's determinations under Rule 5i. (including but not limited to the amount, reach, and season), the Board is not required to review and ratify the resolution. Staff may authorize its counsel to sign any court documents necessary to finalize this type of pretrial resolution without Board ratification.

**5s. Withdrawal of Filing.**

If the Board elects to withdraw a Water Court filing, notice shall be given in the agenda of the Board meeting at which the action is expected to occur.

**6. ACQUISITION OF WATER, WATER RIGHTS OR INTERESTS IN WATER FOR INSTREAM FLOW PURPOSES.**

The Board may acquire water, water rights, or interests in water for ISF purposes by the following procedures:

**6a. Means of Acquisition.**

The Board may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any Person, including any governmental entity, such water, water rights, or interests in water that are not on the Division Engineer's abandonment list in such amounts as the Board determines are appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree.

**6b. 120 Day Rule.**

At the request of any Person, including any governmental entity, the Board shall determine in a timely manner, not to exceed one hundred twenty days, unless further time is granted by the requesting Person, what terms and conditions the Board will accept in a contract or agreement for the acquisition. The 120-day period begins on the day the Board first considers the proposed contract or agreement at a regularly scheduled or special Board meeting.

**6c. Stacking Evaluation.**

The Board shall evaluate whether to combine or stack the acquired water right with any other ISF appropriation or acquisition, based upon the extent to which the acquired water will provide flows or lake levels to preserve or improve the natural environment to a reasonable degree.

If the Board elects to combine or stack the acquired water right, the details of how the water rights are to be combined or stacked with other existing ISF appropriations or acquisitions must be set forth in the application for a decree to use the acquired right for instream flow purposes.

**6d. Enforcement of Acquisition Agreement.**

Pursuant to section 37-92-102(3), C.R.S., any contract or agreement executed between the Board and any Person which provides water, water rights, or interests in water to the Board shall be enforceable by either party thereto as a water matter in the water court having jurisdiction over the water right according to the terms of the contract or agreement.

**6e. Appropriateness of an Acquisition.**

The Board shall evaluate the appropriateness of any acquisition of water, water rights, or interests in water to preserve or improve the natural environment. Such evaluation shall include, but need not be limited to consideration of the following factors:

- (1) The reach of stream or lake level for which the use of the acquired water is proposed, which may be based upon any one or a combination of the following: the historical location of return flow; the length of the existing instream flow reach, where applicable; whether an existing instream flow water right relies on return flows from the water right proposed for acquisition; the environment to

be preserved or improved by the proposed acquisition; or such other factors the Board may identify;

- (2) The natural flow regime;
- (3) Any potential material injury to existing decreed water rights;
- (4) The historical consumptive use and historical return flows of the water right proposed for acquisition that may be available for instream flow use;
- (5) The natural environment that may be preserved or improved by the proposed acquisition, and whether the natural environment will be preserved or improved to a reasonable degree by the water available from the proposed acquisition;
- (6) The location of other water rights on the subject stream(s);
- (7) The effect of the proposed acquisition on any relevant interstate compact issue, including whether the acquisition would assist in meeting or result in the delivery of more water than required under compact obligations;
- (8) The effect of the proposed acquisition on the maximum utilization of the waters of the state;
- (9) Whether the water acquired will be available for subsequent use or reuse downstream;
- (10) The cost to complete the transaction or any other associated costs; and
- (11) The administrability of the acquired water right when used for instream flow purposes.

The Board shall determine how to best utilize the acquired water, water rights or interest in water to preserve or improve the natural environment.

**6f. Factors Related to Loans and Leases.**

In addition to considering the factors listed above, for loans and leases of water, water rights and interests in water for ISF purposes under section 37-92-102(3),

- (1) The Board shall consider the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, including but not limited to:
  - (a) Whether the amount of water available for acquisition is needed to provide flows to meet a decreed ISF amount in below average years; and
  - (b) Whether the amount of water available for acquisition could be used to and would improve the natural environment to a reasonable degree, either alone or in combination with existing decreed ISF water rights.
- (2) In considering the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, the Board will request and review a biological analysis from the Colorado Division of Wildlife, and will review any other biological or scientific evidence presented to the Board.
- (3) If other sources of water are available for acquisition on the subject stream reach(es) by purchase or donation, the Board shall fully consider each proposed acquisition and give preference first to the donation and then to a reasonable acquisition by purchase.

- (4) The Board shall obtain confirmation from the Division Engineer that the proposed lease or loan is administrable and is capable of meeting all applicable statutory requirements.
- (5) The Board shall determine, through negotiation and discussion with the lessor, the amount of compensation to be paid to the lessor of the water based, in part, upon the anticipated use of the water during and after the term of the lease.
- (6) The Board shall consider evidence of water availability based upon the historical record(s) of diversion, the beneficial use of the subject water right, the location and timing of where return flows have historically returned to the stream, and the reason(s) the water is available for lease or loan.

**6g. Recording Requirements.**

- (1) All contracts or agreements for leases or loans of water, water rights or interests in water under section 37-92-102(3) shall require the Board to:
  - (a) Maintain records of how much water the Board uses under the contract or agreement each year it is in effect; and
  - (b) Install any measuring device(s) deemed necessary by the Division Engineer (1) to administer the lease or loan of water, (2) to measure and record how much water flows out of the reach after use by the Board under the lease or loan; and (3) to meet any other applicable statutory requirements.

(2) All contracts or agreements for leases or loans of water shall provide for the recording of the actual amount of water legally available and capable of being diverted under the leased or loaned water right during the term of the lease or loan, with such records provided to the Division of Water Resources for review and publication.

**6h. Water Reuse.**

All contracts or agreements for the acquisition of water, water rights or interests in water under section 37-92-102(3) shall provide that the Board or the seller, lessor, lender or donor of the water may bring about beneficial use of the historical consumptive use of the acquired water right downstream of the ISF reach as fully consumable reusable water, pursuant to the water court decree authorizing the Board to use the acquired water.

- (1) The bringing about of beneficial use of the historical consumptive use of the water may be achieved by direct use, sale, lease, loan or other contractual arrangement by the Board or the seller, lessor, lender or donor.
- (2) The contract or agreement also shall provide that the Division Engineer must be notified of any agreement for such beneficial use downstream of the ISF reach prior to the use.
- (3) Prior to any beneficial use by the Board of the historical consumptive use of the acquired water right downstream of the ISF reach, the Board shall find that such use:
  - (a) Will be consistent with the Board's statutory authority and with duly adopted Board policies and objectives; and
  - (b) Will not injure vested water rights or decreed conditional water rights.

**6i. Applications for a Decreed Right to Use Water for ISF Purposes.**

The Board shall file a change of water right application or other applications as needed or required with the water court to obtain a decreed right to use water for ISF purposes under all contracts or agreements for acquisitions of water, water rights or interests in water under section 37-92-102(3), including leases and loans of water. The Board shall file a joint application with the Person from whom the Board has acquired the water or a Person who has facilitated the acquisition, if requested by such Person. The Water Court shall determine matters that are within the scope of section 37-92-305, C.R.S. In a change of water right proceeding, the Board shall request the Water Court to:

- (1) Verify the quantification of the historical consumptive use of the acquired water right;
- (2) Verify the identification, quantification and location of return flows to ensure that no injury will result to vested water rights and decreed conditional water rights;
- (3) Include terms and conditions providing that:
  - (a) The Board or the seller, lessor, lender, or donor of the water may bring about the beneficial use of the historical consumptive use of the changed water right downstream of the ISF reach as fully consumable reusable water, subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights and decreed conditional water rights; and
  - (b) When the Board has not identified such downstream beneficial use at the time of the change of water right, the Board may amend the subject change decree, if required by the Division Engineer, to add such beneficial use(s) of the historical consumptive use downstream of the ISF reach at the time the Board is able to bring about such use or reuse, without requiring requantification of the original historical consumptive use calculation;

and

- (4) Decree the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right pursuant to section 37-92-102(3), C.R.S.

**6j. Limitation on Acquisitions.**

The Board may not accept a donation of water rights that were acquired by condemnation, or that would require the removal of existing infrastructure without approval of the current owner of such infrastructure.

**6k. Temporary Loans of Water to the Board.**

The Board may accept temporary loans of water for instream flow use for a period not to exceed 120 days in any one year, in accordance with the procedures and subject to the limitations set forth in section 37-83-105, C.R.S.

- (1) Within 5 working days after receiving an offer of a temporary loan of water to the Board for temporary instream flow use, the Director will provide a response to the proponent and, unless the proposed loan has no potential value for instream flow use, staff will coordinate with the proponent on preparing and submitting the necessary documentation to the State and Division Engineers required by sections 37-83-105(2)(a)(I) and (2)(b)(I), C.R.S., and providing the public notice required by section 37-83-105(2)(b)(II), C.R.S.
- (2) Provided that the State Engineer has made a determination of no injury pursuant to section 37-83-105(2)(a)(III), C.R.S., the Board hereby delegates authority to the CWCB Director to accept temporary loans of water for instream flow use in accordance with the procedures and subject to

the limitations set forth in section 37-83-105 and to take any administrative action necessary to put the loaned water to instream flow use.

- (3) Provided that the State Engineer's determination of non-injury is still in effect, the Director shall notify the proponent and the State Engineer whether the temporary loan is to be exercised in subsequent years. Such notification shall be provided within 5 working days of the Director being notified by the proponent that the water is available for use under the temporary loan. The CWCB's use of loaned water for instream flows shall not exceed the CWCB's decreed instream flow amount or extend beyond the CWCB's decreed instream flow reach at any time during the loan term, and shall comply with any terms and conditions imposed by the State Engineer to prevent injury. The purpose of this delegation is to expedite use of temporarily loaned water for instream flows by the Board.
- (4) At the first regular or special Board meeting after the Director accepts or rejects an offer of a loan of water to the Board for temporary instream flow use under (1) or (2) above, the Board shall vote either to ratify or overturn the Director's decision.
- (5) The Board, Director and staff will expedite all actions necessary to implement Rule 6k.

**6l. Funds for Water Right Acquisitions.**

The Board may use any funds available to it for costs of the acquisition of water rights and their conversion to ISF use. The Board shall spend available funds for such costs in accordance with section 37-60-123.7, C.R.S. and any other applicable statutory authority, and with applicable Board policies and procedures.

**6m. Public Input on Proposed Acquisitions.**

The Board shall follow the public review process in Rules 11a. - 11c. when acquiring water, water rights or interests in water, except for temporary loans or leases as provided in Rule 6k. above and except as provided below.

- (1) Prior to Board consideration of any proposed acquisition, Staff shall mail notice of the proposed acquisition to all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division, and shall provide Proper Notice. Such notice shall include:
  - (a) The case number adjudicating the water right proposed to be acquired, and the appropriation date, adjudication date, priority, decreed use(s), and flow amount of the water right proposed to be acquired, and approximately how much of the water right the Board will consider acquiring;
  - (b) The location of the stream reach or lake that is the subject of the proposal, including, when available, the specific length of stream reach to benefit from the proposed acquisition;
  - (c) Any available information on the purpose of the acquisition, including the degree of preservation or improvement of the natural environment to be achieved;
  - (d) Any available scientific data specifically supporting the position that the acquisition will achieve the goal of preserving or improving the natural environment to a reasonable degree; and

- (e) In addition to (a) - (d) above, for leases and loans of water, water rights or interests in water under section 37-92-102(3), such notice shall include the proposed term of the lease or loan and the proposed season of use of the water under the lease or loan.
- (2) At every regularly scheduled Board meeting subsequent to the mailing of notice, and prior to final Board action, Staff will report on the status of the proposed acquisition and time will be reserved for public comment.
- (3) Any Person may address the Board regarding the proposed acquisition prior to final Board action. Staff shall provide any written comments it receives regarding the proposed acquisition directly to the Board.
- (4) Any Person may request the Board to hold a hearing on a proposed acquisition. Such a request must be submitted to the Board in writing within twenty days after the first Board meeting at which the Board considers the proposed acquisition, and must include a brief statement, with as much specificity as possible, of why a hearing is being requested.
- (5) At its next regularly scheduled meeting after receipt of the request for a hearing, or at a special meeting, the Board will consider the request and may, in its sole discretion, grant or deny such a request. All hearings scheduled by the Board shall be governed by the following procedures:
  - (a) A hearing on a proposed acquisition must be held within the 120 day period allowed for Board consideration of an acquisition pursuant to Rule 6b., unless the Person requesting the Board to consider the proposed acquisition agrees to an extension of time.
  - (b) The Board shall appoint a Hearing Officer to establish the procedures by which evidence will be offered.
  - (c) At least thirty days prior to the hearing date(s), the Board shall provide written notice of the hearing(s) to the Person proposing the acquisition, all interested parties known to the Board, and all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division. The Board also shall provide Proper Notice, as defined in ISF Rule 4n.
  - (d) Any Person who desires party status shall become a Party upon submission of a written Notice of Party Status to the Board Office. The Notice shall include the name and mailing address of the Person and a brief statement of the reasons the Person desires party status. The Board Office must receive Notice of Party Status within seven days after notice of the hearing is issued.
  - (e) The Hearing Officer shall set timelines and deadlines for all written submissions. Prehearing statements will be required, and shall include, but not be limited to, the following: 1) a list of all disputed factual and legal issues; 2) the position of the Party regarding the factual and legal issues; 3) a list identifying all of the witnesses that will testify for the Party, and a summary of the testimony that those witnesses will provide; and 4) copies of all exhibits that the Party will introduce at the hearing(s).
  - (f) Any Party may present testimony or offer evidence identified in its prehearing statement regarding the proposed acquisition.
  - (g) The Hearing Officer shall determine the order of testimony for the hearing(s), and shall decide other procedural matters related to the hearing(s). The Hearing Officer does not have authority to rule on substantive issues, which authority rests solely with the Board.



- (h) The Board will not apply the Colorado Rules of Evidence at hearings on proposed acquisitions.
- (i) The Board may permit general comments from any Person who is not a Party; however, the Board may limit these public comments to five minutes per Person.
- (j) The Board may take final action at the hearing(s) or continue the hearing and/or deliberations to a date certain.
- (k) Board hearings may be recorded by a reporter or by an electronic recording device. Any Party requesting a transcription of the hearing(s) shall be responsible for the cost of the transcription.
- (l) When necessary, the Board may modify this hearing procedure schedule or any part thereof as it deems appropriate.

**6n. Board Action to Acquire Water, Water Rights or Interests in Water.**

The Board shall consider the acquisition during any regular or special meeting of the Board. At the Board meeting, the Board shall consider all presentations or comments of Staff or any other Person. After such consideration, the Board may acquire, acquire with limitations, or reject the proposed acquisition.

**7. INUNDATION OF ISF RIGHTS.**

Inundation of all or a portion of an ISF stream reach or lake may be an interference with the Board's usufructuary rights that have been acquired by Board action. "Inundation" as used in this section is the artificial impoundment of water within an ISF or natural lake; "inundation" does not refer to the use of a natural stream as a conveyance channel as long as such use does not raise the waters of the stream above the ordinary high watermark as defined in §37-87-102 (1)(e), C.R.S.

**7a. Small Inundations.**

Staff may file a Statement of Opposition to inundations described in this section if it determines that the ISF right or natural environment will be adversely affected by the inundation. The Staff shall not be required to file a Statement of Opposition to applications proposing small inundations. Small inundations are those in which the impoundment is 100 acre-feet or less, or the surface acreage of the impoundment is 20 acres or less, or the dam height of the structure is 10 feet or less. The dam height shall be measured vertically from the elevation of the lowest point of the natural surface of the ground, where that point occurs along the longitudinal centerline of the dam up to the flowline crest of the spillway of the dam.

- (1) All structures proposed by any applicant on a stream reach shall be accumulated for the purpose of determining whether the inundations proposed by the applicant are small inundations. In the event the cumulative surface acreage, volume impounded, or dam height of all impoundments exceed the definition of a small inundation, Staff may file a Statement of Opposition to that application.
- (2) In the event that no Statement of Opposition is filed pursuant to the terms of this section, the Board shall be deemed to have approved the inundation proposed without a request by the applicant.

**7b. Application of Rule 7.**

The provisions of this rule will not be applied to the following water rights:

- (1) any absolute or conditional water right that is senior to an ISF right;
- (2) any senior conditional water right that seeks a finding of reasonable diligence;
- (3) any junior absolute or conditional water right which was decreed prior to July 10, 1990, or had an application for decree pending prior to July 10, 1990, unless the Board had filed a Statement of Opposition to the absolute or conditional water right application prior to July 10, 1990; or
- (4) any inundation of an ISF reach by water that does not have an absolute or conditional water right if the inundation occurred prior to July 10, 1990.

**7c. Request to Inundate.**

Any Person seeking permission to inundate shall timely submit a written request for permission to inundate to the Board Office. No requests for inundation will be considered or approved until the Person seeking permission to inundate files a water court application outlining their storage plans or files plans and specifications with the State Engineer for a jurisdictional dam pursuant to §37-87-105, C.R.S. The Board will consider the request to inundate in a timely manner.

**7d. Staff Investigation.**

After receiving the request to inundate, the Staff may seek the recommendations from the Division of Wildlife, Division of Parks and Outdoor Recreation, Division of Water Resources, United States Department of Agriculture and United States Department of Interior.

**7e. Required Information.**

In any written request to inundate, the requesting Person shall at a minimum include information on the following factors: the location of the inundation, the size of the inundation, impact of the inundation on the natural environment, any unique or rare characteristics of the ISF water right to be inundated, any regulatory requirements or conditions imposed upon the applicant by federal, state and/or local governments, all terms and conditions included in applicant's water court decree, and any compensation or mitigation offered by the Person proposing the inundation.

**7f. Determination of Interference.**

In response to the request to inundate, the Board shall determine whether the proposed inundation interferes with an ISF right. When making this determination, the Board shall consider, without limitation, the extent of inundation proposed and the impact of the proposed inundation on the natural environment existing prior to the inundation.

**7g. Consideration of Request to Inundate.**

If the Board determines that a proposed inundation interferes with an ISF right, the Board may then approve, approve with conditions, defer, or deny the request to inundate. In making this decision, the Board shall consider all relevant factors, including, but not limited to (1) the extent of inundation proposed; (2) the impact of the proposed inundation on the natural environment existing prior to the inundation; (3) the degree to which the beds and banks adjacent to the ISF right subject to the inundation are publicly or privately owned; (4) the economic benefits arising from the inundation; (5) the benefits to recreation and downstream ISF segments arising from the inundation; (6) the degree to which the proposed inundation will allow development of Colorado's allotment of interstate waters as determined by compact or adjudication; and, (7) any mitigation or compensation offered to offset adverse impacts on the ISF right. After considering all relevant factors, the Board shall take one of the actions set forth in Rules 7h. - 7k. below.

**7h. Approval.**

If the Board approves the request to inundate, any Statement of Opposition filed by the Board shall be withdrawn.

**7i. Conditional Approval.**

The Board may require certain conditions to be performed prior to approval. Failure to perform any condition will be a reason for denial.

**7j. Deferral.**

When it appears that other governmental agencies may impose terms and conditions upon the issuance of a permit to construct a facility which will cause an inundation, the Board may defer consideration of the request to inundate until all other governmental bodies have finalized the permit or approval conditions.

**7k. Denial of Request to Inundate.**

Requests for permission to inundate may be denied if in the discretion of the Board the request is inconsistent with the goals of the ISF Program. The Board may decide to deny a request for permission to inundate if it finds:

- (1) No compensation or mitigation would be adequate for the injury caused by the inundation; or
- (2) No compensation or mitigation acceptable to the Board has been proposed by applicant; or
- (3) The proposed inundation is inconsistent with the goals of the ISF Program.

**7l. Remedies.**

The Board may seek any administrative, legal or equitable remedy through state courts (including water courts), federal courts, city, county, state or federal administrative proceedings to resolve actual or proposed inundation of its ISF rights.

**7m. Board Has Sole Right to Protect ISF Rights from Interference.**

Only the Board may seek to prevent interference with an ISF right by inundation and only the Board may seek compensation or mitigation for such interference.

**7n. Public Review Process.**

The Board shall follow the public review process in Rules 11a. - 11c. prior to any Board decision on a request to inundate an ISF right.

**8. PROTECTION OF ISF APPROPRIATIONS.**

The Board delegates the day-to-day management and administration of the ISF Program to Staff. Staff shall seek ratification of its decisions as set forth in Rules 8c., 8e.(2), 8i., and 8j.

**8a. Resume Review.**

Staff shall review the monthly resumes of all water divisions. The Staff shall evaluate each resume entry for the possibility of injury or interference to an ISF right.

**8b. Statement of Opposition.**

In the event Staff identifies a water right application in the resume that may injure an ISF right, Staff shall file a Statement of Opposition to that application. In the event Staff identifies a water right application in the resume that may interfere with an ISF right as contemplated in Rule 7, Staff may file a Statement of Opposition to that application.

**8c. Ratification of Statements of Opposition.**

At a Board meeting following the filing of the Statement of Opposition, Staff shall apprise the Board of the filing of a Statement of Opposition and the factual basis for the Staff action. At that time, the Board shall ratify the filing, disapprove the filing, or table the decision to a future meeting if more information is needed prior to making a decision.

**8d. Notice.**

Prior to ratification of a Statement of Opposition, the Staff shall mail the applicant a copy of the Board memorandum concerning the ratification and a copy of the agenda of the meeting in which the ratification will be considered. Following a Board action considering a Statement of Opposition, the Staff shall notify the applicant and/or its attorney in writing of the Board's action.

**8e. De Minimis Rule.**

In the event that Staff determines a water court application would result in a 1 percent depletive effect or less on the stream reach or lake subject of the ISF right, and the stream reach or lake has not been excluded from this rule pursuant to Rules 8f. or 8h., Staff shall determine whether to file a Statement of Opposition. Staff's decision not to file a Statement of Opposition does not constitute: (1) acceptance by the Board of injury to any potentially affected ISF water right; or (2) a waiver of the Board's right to place an administrative call for any ISF water right.

- (1) If Staff does not file a Statement of Opposition, Staff shall notify the Division Engineer for the relevant water division that it has not filed a Statement of Opposition, but that it may place an administrative call for the potentially affected ISF water right(s). Such a call could be enforced against the water right(s) subject of the application by the Division Engineer in his or her enforcement discretion. Staff also shall mail a letter to the applicant at the address provided on the application notifying the applicant: (a) of Staff's decision not to file a Statement of Opposition pursuant to this Rule; (b) that the CWCB may place a call for its ISF water rights to be administered within the prior appropriation system; and (c) that the Division Engineer's enforcement of the call could result in curtailment or other administration of the subject water right(s).
- (2) If Staff files a Statement of Opposition, Staff shall seek Board ratification by identifying and summarizing the Statement of Opposition on the Board meeting consent agenda pursuant to Rule 8c.

**8f. Cumulative Impact.**

In determining existence of a de minimis impact, Staff shall consider the existence of all previous de minimis impacts on the same stream reach or lake. If the combined total of all such impacts exceeds 1 percent, then Staff will file a Statement of Opposition regardless of the individual depletive effect of an application.

**8g. Notification of Staff Action.**

At a Board meeting following a Staff determination to apply the De Minimis rule, the Staff shall notify the Board about the factual basis leading to its application of the De Minimis rule.

**8h. Exclusion from De Minimis Rule.**

The Board may at any time exclude any stream reach or lake, or any portion thereof, from application of the De Minimis rule.

**8i. Pretrial Resolution.**

Staff may negotiate a pretrial resolution of any injury or interference issue that is the subject of a Statement of Opposition. The Board shall review the pretrial resolution pursuant to the following procedures:

**(1) No Injury.**

In the event the pretrial resolution includes terms and conditions preventing injury or interference and does not involve a modification, or acceptance of injury or interference with mitigation, the Board is not required to review and ratify the pretrial resolution. Staff may authorize its counsel to sign any court documents necessary to finalize this type of pretrial resolution without Board ratification.

**(2) No Injury/Modification.**

In the event the pretrial resolution addresses injury or interference through modification of the existing ISF decree, the process set forth in Rule 9 shall be followed prior to any Board decision to ratify the pretrial resolution.

**(3) Injury Accepted with Mitigation.**

In the event a proposed pretrial resolution will allow injury to or interference with an ISF or natural lake level (NLL) water right, but mitigation offered by the applicant could enable the Board to accept the injury or interference while continuing to preserve or improve the natural environment to a reasonable degree, and if the proposed pretrial resolution does not include a modification under ISF Rule 9, the Board shall:

- (a) Conduct a preliminary review of the proposed pretrial resolution during any regular or special meeting to determine whether the natural environment could be preserved or improved to a reasonable degree with the proposed injury or interference if applicant provided mitigation; and
- (b) At a later regular or special meeting, take final action to ratify, refuse to ratify or ratify with additional conditions.
- (c) No proposed pretrial resolution considered pursuant to this Rule 8i.(3) may receive preliminary review and final ratification at the same Board meeting.
- (d) The Board shall not enter into any stipulation or agree to any decretal terms and conditions under this Rule that would result in the Division of Water Resources being unable to administer the affected ISF or NLL water right(s) in accordance with the priority system or with Colorado water law.
- (e) To initiate CWCB staff review of an Injury with Mitigation proposal, the proponent must provide the following information in writing:
  - i. Location of injury to ISF or NLL water right(s) (stream(s) or lake(s) affected, and length of affected reach(es));
  - ii. Quantification of injury (amount, timing and frequency);

- iii. Type of water use that would cause the injury;
  - iv. Analysis showing why full ISF or NLL protection is not possible;
  - v. Detailed description of the proposed mitigation, including all measures taken to reduce or minimize the injury;
  - vi. Detailed description of how the proposed mitigation will enable the Board to continue to preserve or improve the natural environment of the affected stream or lake to a reasonable degree despite the injury;
  - vii. Identification and feasibility analysis of: (1) all water supply alternatives considered by the proponent in the context of this proposal; (2) all alternatives evaluated by the proponent to fully protect the potentially affected ISF or NLL water right, but rejected as infeasible; and (3) all alternatives evaluated by the proponent and designed to mitigate the injury to or interference with the affected ISF or NLL water right. This information shall address the environmental and economic benefits and consequences of each alternative; and
  - viii. A discussion of the reasonableness of each alternative considered.
- (f) After receipt and review of the required information, staff will consult with the DOW and with the entity that originally recommended the affected ISF or NLL water rights(s) (if other than DOW) to determine whether additional field work is necessary and to identify any scheduling concerns. Staff will request a recommendation from the DOW as to whether the proposed mitigation will enable the Board to continue to preserve or improve the natural environment of the affected stream or lake to a reasonable degree despite the injury, including a discussion of the reasonableness of the alternatives considered. CWCB staff will use best efforts to consult with affected land owners and managers regarding the proposal.
  - (g) Prior to bringing the proposal to the Board for preliminary consideration, staff will consult with the Division of Water Resources on whether the proposal would result in the Division of Water Resources being unable to administer the affected ISF or NLL water right(s) in accordance with the priority system or with Colorado water law.
  - (h) At the first meeting of the two-meeting process required by this Rule, staff will bring the proposal to the Board for preliminary consideration after completing its review of the proposal and its consultation with DOW. Staff will work with the proponent and interested parties to address any preliminary concerns prior to bringing a proposal to the Board. Preliminary consideration by the Board may result in requests for more information or for changes to the proposal. Staff will work with the proponent and interested parties to finalize the proposal and bring it back to the Board for final action at a subsequent Board meeting.
  - (i) The Board will consider the following factors when evaluating Injury with Mitigation proposals. Because Injury with Mitigation proposals may involve unique factual situations, the Board may consider additional factors in specific cases. Further, evaluation of each Injury with Mitigation proposal will require the exercise of professional judgment regarding the specific facts of the proposal.
- i. Extent of the proposed injury:
    - 1. Location of injury – affected stream(s) or lake and length of affected reach(es);

2. Amount, timing and frequency of shortage(s) or impacts to the affected ISF of NLL water right(s); and
  3. Potential impact to the natural environment of the affected stream reach(es) or lake from the proposed injury.
- ii. Benefits of the mitigation to the natural environment:
1. The nature and extent of the benefits the mitigation will provide to the existing natural environment of the affected stream or lake;
  2. The scientific justification for accepting the mitigation; and
  3. Whether the mitigation will enable the Board to continue to preserve or improve the natural environment of the subject stream or lake to a reasonable degree.
- (j) Evaluation of proposed alternatives. The Board shall evaluate: (1) all water supply alternatives considered by the proponent in the context of this proposal; (2) all alternatives evaluated by the proponent to fully protect the potentially affected ISF or NLL water right, but rejected as infeasible; and (3) all alternatives evaluated by the proponent and designed to mitigate the injury to or interference with the affected ISF or NLL water right. In its evaluation, the Board shall consider the following factors:
- i. Availability of on-site mitigation alternatives;
  - ii. Technical feasibility of each alternative;
  - iii. Environmental benefits and consequences of each alternative;
  - iv. Economic benefits and consequences of each alternative;
  - v. Reasonableness of alternatives;
  - vi. Administrability of proposed alternatives by the Board and the Division Engineer; and
  - vi. For mitigation alternatives, whether the mitigation was or will be put in place to satisfy a requirement or need unrelated to the Injury with Mitigation proposal.
- (k) The Board will consider mitigation on a different reach of stream or another stream ("off-site mitigation") as a last resort and will only consider mitigation in an area other than the affected stream reach if no reasonable alternative exists for mitigation on the affected stream reach. The Board only will consider off-site mitigation on stream(s) located in the same drainage as the affected stream. Factors that the Board may consider in looking at such a proposal include, but are not limited to, the degree and frequency of impact to the affected stream; the environmental benefits provided to the off-site stream by the mitigation; whether the proposal could, in effect, constitute a modification of the ISF water right on the affected stream; or whether the proposal could result in the Division of Water Resources being unable to administer the affected ISF water right(s) in accordance with the priority system or with Colorado water law.

- (l) Stipulations and water court decrees that incorporate Injury with Mitigation shall include, but not be limited to inclusion of, the following terms and conditions:
- i. A provision that the proponent will not divert water or take any other action that would reduce flows in the affected stream or levels in the affected lake below the decreed ISF or NLL amount until the agreed-upon mitigation measures are in place and fully operational;
  - ii. A requirement that the structural components of the mitigation be maintained permanently;
  - iii. A provision allowing CWCB or DOW staff access to the property on which structural components of the mitigation are located to inspect the structures at certain time intervals, and, if necessary, to perform biological stream or lake monitoring. This provision shall clearly define the reasonable nature, extent and timing of such access (i.e, advance notice, dates, times or season of access, coordination with proponent, and location and routes of access);
  - iv. A term providing that if the proponent ceases to provide the agreed upon mitigation (such as removing structural components or failing to maintain them to a specified level, or ceasing to implement non-structural components), that the proponent will not divert water or take any other action that would reduce flows in the affected stream or levels in the affected lake below the decreed ISF or NLL amount because the Board will no longer accept the injury based upon the mitigation no longer being in effect -- in such case, if the Board places a call for the affected ISF or NLL water right, the Board will notify the Division Engineer that this provision of the decree now is in effect and that the Board is not accepting the injury;
  - v. A requirement that the proponent install and pay operation and maintenance costs of (or commit to pay operation and maintenance costs if the CWCB installs) any measuring devices deemed necessary by the Division Engineer to administer the terms of the stipulation and decree implementing the Injury with Mitigation pretrial resolution; and
  - vi. A term providing that the water court will retain jurisdiction to enforce the terms and conditions set forth above in subsections (i) - (vi), and any other terms and conditions specific to the Injury with Mitigation pretrial resolution, as a water matter.

**8j. Authorization to Proceed to Trial.**

In the event that a Statement of Opposition filed by the Board is not settled prior to the last regularly scheduled Board meeting prior to the trial date, Staff shall seek Board authorization to proceed to trial. In the event that Staff is authorized to proceed to trial, the Board may adjourn to executive session to discuss settlement parameters with its counsel. Staff is authorized to settle any litigation without Board ratification if the settlement terms are consistent with instructions given by the Board to its counsel.

**8k. Public Review Process.**

The Board shall follow the public review process in Rules 11a. - 11c. prior to consideration of a request to ratify a pretrial resolution pursuant to Rule 8i.(3).

**8l. Notice.**



At any time Staff verifies that an ISF water right is not being fulfilled as a result of water use against which the ISF water right is entitled to protection, the Staff shall provide Proper Notice, including a description of what the Board is doing in response to the situation.

**9. MODIFICATION OF ISF RIGHTS.**

The Board may modify any existing decreed ISF right according to the procedures set forth in this Rule. "Modification" of an ISF right within the meaning of this Rule includes a decrease in the rate of flow described in the existing ISF decree, segmenting an existing ISF reach into shorter reaches with the result of decreasing the rate of flow in any portion of an ISF reach, or subtracting water from an ISF right during any particular time period or season.

**9a. Need for Modification.**

Modification may be requested by the Staff or by any Person who has filed a water right application on an ISF reach or who has applied for any governmental permit for facilities located in or near an ISF reach and who complies with Rules 9b. and 9c. Any request for modification, except by staff, shall be made in writing, submitted to Staff and such writing shall contain the following information:

- (1) name, address and telephone number of the Person seeking modification;
- (2) stream or lake subject of request;
- (3) modification requested;
- (4) reason for modification; and
- (5) the scientific data supporting the request.

**9b. Need for Water.**

Any Person who requests a modification of an ISF right must, as a precondition to the Board's consideration of the request, establish a need for the water made available by the modification. Staff does not have to comply with this rule and any governmental entity seeking to implement the terms of an agreement specified in Rule 9f. does not have to comply with this section.

**9c. Grounds for Modification.**

No request for modification may be considered until the applicant establishes that one of the following reasons for modification exists:

**(1) Mistake.**

An ISF right may be considered for modification if the requesting Person establishes that an error was made in the calculations upon which the original or supplemental appropriation or enlargement to an original appropriation was made.

**(2) Excessive Flow.**

An ISF right may be considered for modification if the requesting Person establishes that the ISF flow rate is in excess of the amount of water necessary to accomplish the purpose of the original, supplemental or enlarged ISF right when that right was appropriated.

**9d. Recovery Implementation or Other Intergovernmental Agreement.**

An ISF right may be modified if such modification was agreed upon by the Board as part of the Recovery Implementation Program for the Endangered Fishes of the Colorado River Basin or any other agreement between the Board and another governmental entity. Modifications made as a part of the Recovery Implementation Program for the Endangered Fishes of the Colorado River Basin need not be subject to the public review process in Rule 9e. Criteria for modifications made in the ISF rights decreed as part of the Recovery Implementation Program for the Endangered Fishes of the Colorado River Basin will be established in the decrees governing such appropriations.

**9e. Public Review Process of Requests for Modification.**

The Board shall adhere to the following public review process when considering requests for modification:

**(1) Notice.**

Notice of the proposed modification and the date of the public meeting at which it will first be considered shall be printed in the resume in the Water Court having jurisdiction over the decree that is the subject of the modification. The first public meeting of the Board at which the modification is to be considered shall occur at least sixty days after the month in which the resume is published. Notice shall also be published in a newspaper of statewide distribution within thirty to forty-five days prior to such first public meeting.

**(2) Public Meeting.**

If the Board decides at such first public meeting to give further consideration to the proposed modification, the Board shall announce publicly the date of a subsequent public meeting for such purpose. If the Board decides that it will not give further consideration to the proposed modification, it shall state, in writing, the basis for its decision.

**(3) Request for Delay.**

On the written request of any Person made within thirty days after the date of the first public meeting, the Board shall delay the subsequent public meeting for up to one year to allow such Person the opportunity for the collection of scientific data material to the proposed modification. The Board need not grant the request if it determines that the request is made solely to delay the proceedings.

**(4) Procedures.**

On the written request of any Person made within thirty days after the date of the first public meeting, the Board shall, within sixty days after such request, establish fair and formal procedures for the subsequent public meeting, including the opportunity for reasonable disclosure, discovery, subpoenas, direct examination, and cross examination. Subject to these rights and requirements, where a meeting will be expedited and the interests of the participants will not be substantially prejudiced thereby, the Board may choose to receive all or part of the evidence in written form.

**(5) Final Determination.**

The Board shall issue a final written determination regarding the modification that shall state its effective date, be mailed promptly to the Persons who appeared by written or oral comment at the Board's proceeding, and be filed promptly with the water court.

**10. ENFORCEMENT AGREEMENTS.**

The Board may attach conditions to an appropriation, decreased appropriation, or acquisition, and may enter into any enforcement agreements that it determines will preserve or improve the natural environment to a reasonable degree. The Board may enter into enforcement agreements that limit the

Board's discretion in the protection, approval of inundation, modification or disposal of ISF right, and/or may delegate limited authority to act on the Board's behalf.

**10a. Ratification of Enforcement Agreements.**

No enforcement agreement shall be effective to limit the discretion of the Board until that agreement and all of its terms are reviewed and ratified by the Board. Upon ratification, the Director may execute the agreement and the agreement shall be binding upon the Board for the term set forth in the enforcement agreement.

**10b. Public Review Process.**

The Board shall follow the public review process set forth in Rules 11a. - 11c. prior to any Board decision to ratify an Enforcement Agreement.

**11. PUBLIC REVIEW PROCESS.**

Except as otherwise provided in the ISF Rules, the Board shall follow the public review process set forth below prior to any Board decision requiring public review.

**11a. Public Notice.**

Public notice of all Board actions under these Rules shall be provided through the agenda of each regular or special Board meeting.

**11b. Public Comment.**

Except as otherwise provided in Rules 5k. and 6m., at a regular or special meeting, the Board shall consider public comment on the recommended ISF action prior to the Board action on the recommendation in any or all of the following manners:

- (1) Oral and/or written comments may be directed to Staff. When such comments are made, Staff may summarize these comments to the Board.
- (2) Oral and/or written comments, subject to reasonable limitations established by the Board, may be made directly to the Board during the public meeting.

**11c. Public Agency Recommendations.**

Prior to taking an ISF action pursuant to Rules 5 or 6, the Board shall request recommendations from the Division of Wildlife and the Division of Parks and Outdoor Recreation. The Board shall also request recommendations from the United States Department of Agriculture and the United States Department of Interior. The Board may also request comments from other interested Persons or agencies as it deems appropriate.

Prior to taking an ISF action pursuant to Rules 7, 8, 9, or 10, the Board may request recommendations from the Division of Wildlife, the Division of Parks and Outdoor Recreation, the Division of Water Resources, the United States Department of Agriculture, the United States Department of Interior or other Persons as it deems appropriate.

**11d. Board Procedures.**

At a regular or special Board meeting, the Board may, as necessary, adopt or amend procedures to supplement these rules.

**12. SEVERABILITY.**

In the event that any section or subsection of these Rules are judged to be invalid by a court of law or are allowed to expire by the General Assembly, the remaining Rules shall remain in full force and effect.

# New Appropriation Processing Timeline

