

<p>District Court, Water Division 4  Montrose County Justice Center  1200 North Grand Avenue, Bin A  Montrose, CO 80401</p> <hr/> <p>CONCERNING THE WATER RIGHTS OF THE  UNITED STATES OF AMERICA IN THE TAYLOR  RIVER, A TRIBUTARY OF THE GUNNISON RIVER</p> <p>IN GUNNISON COUNTY, COLORADO</p>	<p>DATE FILED: December 28, 2016 11:07 AM  CASE NUMBER: 2015CW3064</p> <p><b>▲ COURT USE ONLY ▲</b></p> <hr/> <p>Case Number: 2015CW3064</p>
<p align="center"><b>FINDINGS OF FACT, CONCLUSIONS OF LAW,  RULING OF THE REFEREE AND DECREE</b></p>	

This matter comes before the Court upon the Amended Application For Change of Water Right filed by the United States of America (United States). The Referee, having made such investigations as are necessary to determine whether the statements in the application are true, and having become fully advised with respect to the subject matter of the application, hereby enters and makes the following findings of fact, conclusions of law, and ruling.

**FINDINGS OF FACT**

1. The United States filed the Application on September 2, 2015 and the Amended Application on January 27, 2016.
2. Statements of Opposition were timely filed by the Upper Gunnison River Water Conservancy District (Upper Gunnison District), the Colorado River Water Conservation District (River District), and Taylor Placer, Ltd. (Taylor Placer). The time for filing statements of opposition and motions to intervene has expired.

3. The water right the United States seeks to change is the water right decreed by this Court in Case No. 86CW203 on September 18, 1990, and amended by an Order dated November 13, 1990 (Refill Decree), for the refill of Taylor Park Reservoir (Refill Right).

4. The dam impounding Taylor Park Reservoir is located in Gunnison County in the N½ of Section 24, Township 14 South, Range 83 West of the 6th Principal Meridian. The initial point of survey for the reservoir impounded by the dam is at a point whence the North quarter corner of Section 8, Township 14 South, Range 82 West of the 6th Principal Meridian bears North 39° 13' East a distance of 15,911.5 feet.

5. The Refill Right was decreed for 106,230 acre-feet, of which 44,700 acre-feet was decreed absolute and 61,530 acre-feet was decreed conditional, with a priority date of August 28, 1975. The source of supply for the water right decreed to the Refill Right is the Taylor River and its tributaries, tributaries of the Gunnison River.

6. The Refill Decree was granted upon an Application filed by the Upper Gunnison District; thereafter, the Refill Right was assigned to the United States by the Upper Gunnison District by an Assignment of Water Rights dated March 22, 1993 in accordance with a Contract dated April 16, 1990 between the United States, the Upper Gunnison District, the Uncompahgre Valley Water Users Association and the Colorado River Water Conservation District.

7. Under the terms of the April 16, 1990 Contract and March 22, 1993 Assignment, the Upper Gunnison District is the beneficial user of the Refill Right.

8. The Refill Decree provides that while the water is impounded in Taylor Park Reservoir, it shall be used for recreational purposes, including fishery and wildlife, and that the impounded water shall be released at times and in quantities calculated to enhance the fishery and recreational uses of the Taylor and Gunnison Rivers above Blue Mesa Reservoir.

9. Of the 106,230 acre-feet, 19,200 acre-feet were decreed for additional use for increased and supplemental irrigation within the Upper Gunnison District. Of said 19,200 acre-feet, 13,777 acre-feet were decreed absolute (as part of the 44,700 acre-feet), and the remaining 5,423 acre-feet were decreed conditional (as part of the 61,530 acre-feet).

10. The 61,530 acre-feet conditional portion of the Refill Right, including 5,432 acre-feet decreed for increased and supplemental irrigation, was continued in force until March 31, 2011 by this Court by decree entered on April 12, 2005 in Case No. 96CW224.

11. The 61,530 acre-feet conditional portion of the Refill Right including 5,432 acre-feet decreed for increased and supplemental irrigation, was decreed absolute on May 9, 2016 in Case No. 11CW31.

12. In addition to the Refill Right, the United States is the owner of the following water rights:

A. A water right as described in a decree granted on May 8, 1913 in Case No. 1745, Water District No. 62, Montrose County, for diversions into the Gunnison Tunnel and South Canal Project in an amount not to exceed 1,300 cubic feet per second (Gunnison Tunnel Right); and,

B. A water right described in the decree granted on April 21, 1942 in Case No. 2021, Water District No. 59, Gunnison County, for storage in Taylor Park Reservoir in an amount not to exceed 111,230 acre-feet annually (First Fill Right).

13. Under the terms of contracts with the United States, the Uncompahgre Valley Water Users Association (Association) is the beneficial user of the Gunnison Tunnel Right and the First Fill Right.

14. The Gunnison River and its tributaries upstream from the East portal of the Gunnison Diversion Tunnel (Gunnison Tunnel) are administered by the Division 4 Engineer pursuant to the *Gunnison River System - Official Accounting Spreadsheet* (Accounting Sheet), a daily accounting using a water year beginning on November 1 and ending on October 31 of the following calendar year.

15. Accounting Condition 9 in the Accounting Conditions (Schedule "A") to the Refill Decree provides, in part, that "When additional water supplies are needed by the Gunnison District for irrigation purposes and when such water is available from Taylor Park Reservoir under the water right in Case No. 86-CW-203, releases of such supplies shall be made."

16. The United States seeks to change the uses of 106,230 acre-feet of water stored in Taylor Park Reservoir to provide an additional use under the Refill Right to postpone or avoid curtailment of water rights junior to the Gunnison Tunnel Right within the Upper Gunnison District and additional changes to the Refill Decree as set forth in paragraph 24 below.

17. The uses of the Refill Right pursuant to the changes sought by the United States in this case will not alter the rate or volume of releases that would otherwise occur from Taylor Park Reservoir under existing decrees and the Taylor Park Reservoir Operation and Storage Exchange Agreement dated August 28, 1975 (1975 Exchange Agreement).

18. The changes sought by the United States in this case are consistent with the intent and purpose of the 1975 Exchange Agreement.

19. The changes sought by the United States in this case will not injure other vested water rights or decreed conditional water rights.

### **CONCLUSIONS OF LAW**

20. To the extent that they constitute legal conclusions, the foregoing Findings of Fact are incorporated herein.

21. All notices required by law have been properly made, including those required under C.R.S. §§ 37-92-302(2)(b)(II) and 37-92-302(3). This Court has jurisdiction over the Application and over all persons or entities that had standing to appear, even though they did not do so.

22. The Amended Application is complete, covering all applicable matters required pursuant to the *Water Right Determination and Administration Act of 1969*, C.R.S. §§ 37-92-101, *et seq.*, and should be granted.

### **RULING OF THE REFEREE**

23. The Findings of Fact and Conclusions of Law as set forth above are incorporated herein by reference.

24. The Amended Application For Change of Water Right is GRANTED, and the Refill Decree is changed as follows:

A. When there exists a shortage of natural flows to fully satisfy the Gunnison Tunnel Right, which would entitle the Association to place a legal call on the Gunnison River under the Gunnison Tunnel Right, upon the request of the Upper Gunnison District the Division Engineer shall satisfy the shortage by charging against water stored in Taylor Park Reservoir under the Refill Right an amount sufficient to satisfy the Gunnison Tunnel shortage, which shall be considered to be a release of Refill water being diverted by the Gunnison Tunnel as the senior calling right, and be thus accounted for in the Accounting Sheet.

B. The shortage described in paragraph 24.A. above is defined by the three-day average Tunnel shortage column in the Accounting Sheet, which is calculated by subtracting computed Aspinall Unit inflows below Taylor Park Reservoir and computed Taylor Park inflow from the amount of Gunnison Tunnel diversions. In this calculation, Aspinall Unit inflow below Taylor Park is calculated by converting the change in Aspinall Unit storage to a flow rate in cubic feet per second, adding computed Crystal Reservoir outflow in cubic feet per second and subtracting Taylor Park outflow in cubic feet per second.

C. The limitation of 19,200 acre-feet per year contained in paragraph 59.f. (as amended by the Order dated November 13, 1990) and Accounting Condition 9 in the Refill Decree is changed to permit the use of the total amount in storage under the Refill Right for the purpose described in paragraph 24.A. above when the conditions described in that paragraph exist; and,

D. The requirement of Accounting Condition 7 in the Refill Decree is changed to permit releases to be charged against water stored under the Refill Right for the purpose described in paragraph 24.A. above, when the conditions described in that paragraph exist, notwithstanding the presence in Taylor Park Reservoir of water stored under the First Fill Right.

### **Terms and Conditions**

25. In accordance with the Stipulation filed in this Court in Case No. 11CW31 dated July 31, 2015, entered into among the parties as a compromise and settlement of disputed issues, which Stipulation has been approved by the Court, the terms and conditions contained in paragraphs 26 and 27 below are incorporated into this Decree.

26. For the purposes of: (1) a compromise and settlement of the issues in dispute concerning the administration of instream flow rights in the Taylor River and certain of its tributaries as decreed in Case No. W-1991, Water Division No. 4, on February 11, 1975 (the “W-1991 Rights”) and the Refill Right; (2) specifying terms and conditions in a water court decree granting the application in Case No. 11CW31 in whole or in part; (3) specifying terms and conditions on the change of water rights approved in this Case 15CW3064; and (4) the administration of any exchanges between or among the Wayne N. Aspinall Unit, Taylor Park Reservoir, and the Gunnison Tunnel; the parties agree that the W-1991 Rights and all water stored in and released from Taylor Park Reservoir shall be administered according to the following procedures and criteria:

A. Taylor Placer shall be notified of each annual Taylor Park Reservoir operations meeting of the parties to the 1975 Exchange Agreement and may attend and provide written and oral information at each meeting. The parties shall cooperate with one another to determine the amount and timing of releases from Taylor Park Reservoir in accordance with the terms and conditions of this paragraph 26.

B. Subject to the terms of this paragraph 26, the rate and timing of releases from Taylor Park Reservoir shall be established by the United States, after consultation with Taylor Placer, the Taylor Local Users Group (if any), and the other parties to the 1975 Exchange Agreement, in a manner consistent with the following criteria:

(1) Definitions. As used in this paragraph 26:

(a) “Forecasted Inflow” means the forecast for the Taylor River Basin issued by the Colorado Basin River Forecast Center or successor agency, and used by the Bureau of Reclamation for forecasts, of the most probable (50% chance of exceedance) unregulated April 1 through July 31 inflow to Taylor Park Reservoir. After consultation with the Colorado State Engineer and the Upper Gunnison River Water Conservancy District, the United States may adopt a different forecast which uses the best scientifically accepted techniques to predict unregulated inflow to Taylor Park Reservoir, or change the date of the forecast if the timing of peak runoff in the Upper Gunnison Basin changes significantly on a consistent basis.

(b) The Taylor Local Users Group (TLUG) consists of five citizen members appointed by the Board of Directors of the Upper Gunnison District. TLUG provides recommendations to the District regarding Taylor Park Reservoir operations. The members presently represent rafting or boating interests, flat water recreation interests in Taylor Park Reservoir, irrigation users along the Taylor and Gunnison Rivers, wade fishermen, and property interests along the Taylor and Gunnison Rivers. A representative selected by Taylor Placer shall be appointed to and shall serve on the TLUG and any successor entity that serves the same or a similar purpose. Taylor Placer shall provide to the Upper Gunnison District the name and contact information of Taylor Placer’s selected representative. Actions of Taylor Placer’s selected representative shall be binding on Taylor Placer.

(c) Available water is water that is available for release from Taylor Park Reservoir in accordance with the Accounting Conditions of the Refill Decree and as determined using the criteria set forth below.

(2) Year types: The May 1 Forecasted Inflow to Taylor Park Reservoir shall be used to define year categories as specified in Table 1 below:

**Table 1: Year Types**

<b>Year type</b>	<b>A year in which the Forecasted Inflow is:</b>
Dry Year	Less than 75,000 acre-feet
Average Year	equal to or greater than 75,000 acre-feet but less than 110,000 acre-feet
Wet Year	equal to or greater than 110,000 acre-feet

(a) Provided, that the volumetric criteria for each year type (initially 75,000 AF and 110,000 AF as set forth above) shall be recalculated prior to May 1 of each year so that the Dry Year, Average Year, and Wet Year Types each represent 1/3rd of the years of actual unregulated April 1 through July 31 inflow to Taylor Park Reservoir during the 30 years preceding the year of such adjustment (the “Nominal 1/3 Volumetric Criteria”);

(b) Provided further, that in each year the volumetric criteria to be used to determine the year type shall be the average of the Nominal 1/3 Volumetric Criteria that were calculated for the preceding five years in accordance with the foregoing subparagraph 26.B.(2)(a) (the “Adjusted Volumetric Criteria”).

(3) Storage objectives: The volume of water available for release from the Reservoir during the period of May 1 through October 31 shall initially be determined based on the May 1 Forecasted Inflow and Reservoir storage level, and shall periodically be redetermined as necessary from May through October based on actual storage levels and inflows, in order to achieve the objective of a minimum Reservoir storage level of:

(a) 75,000 acre-feet as of October 31 in Wet Years;

(b) 70,000 acre-feet in Average Years; and

(c) 70,000 acre-feet in Dry Years; provided that in years with Forecasted Inflows less than 70,000 acre-feet, the minimum storage level may be reduced by up to 1,000 acre-feet for each 1,000 acre-feet by which the Forecasted Inflows are less than 70,000 acre-feet.

(4) Peak flows: Releases of available water will be made to achieve the following minimum peak flow rates for the minimum number of consecutive days each year specified below. The timing of such peak flow releases will be during the runoff period from May 1 through June 30, and will be coordinated with the other parties to the 1975 Exchange Agreement and Taylor Placer.

(a) Average Year (as defined in Table 1): Not less than 445 c.f.s. for 5 consecutive days.

(b) Wet Year (as defined in Table 1): Not less than 445 c.f.s. for 10 consecutive days.

(c) Releases shall be adjusted to avoid a Reservoir spill and flooding in the Taylor and Gunnison Rivers, with consideration given to projected East River flows.

(5) Rate and timing of other releases of available water:

(a) At times during the period of May 1 through October 31 when the foregoing peak flows are not being released from the Reservoir, the rate and timing of release of available water as determined above shall be established based on the following multi-use considerations, which are not listed in any order of priority:

- (i) Optimizing fish habitat in the Taylor and Gunnison Rivers;
- (ii) Recreational fishing in the Taylor and Gunnison Rivers;
- (iii) Recreational boating in the Taylor and Gunnison Rivers;
- (iv) Fisheries management in Taylor Park Reservoir;
- (v) Recreational boating and fishing in Taylor Park Reservoir;
- (vi) Irrigation; and,
- (vii) Any other purpose for which Taylor Park Reservoir is authorized to release water.

(b) The rate and timing of May 1 through October 31 releases shall be adjusted in accordance with the volume available for release as determined above after consultation with the parties to the 1975 Exchange Agreement, and the TLUG.

(6) Winter operations (November – March): The rate of release of available water from the Reservoir from November 1 to March 31 will be established on or before November 1 based on the actual content of the Reservoir on October 31, as specified below:

(a) If the actual content of the Reservoir on October 31 is equal to or greater than 75,000 acre-feet, the release rate shall be 100 c.f.s.

(b) If the actual content of the Reservoir on October 31 is less than 75,000 acre-feet and greater than 70,000 acre-feet, the release rate shall be determined by the following formula:

$85 + .003 \times (\text{actual October 31 content} - 70,000)$  rounded to the nearest whole number.

(c) If the actual content of the Reservoir on October 31 is less than 70,000 acre-feet and greater than 60,000 acre-feet, the release rate shall be determined by the following formula:

$75 + .001 \times (\text{actual October 31 content} - 60,000)$  rounded to the nearest whole number.

(d) These values are reflected in the following Table 2:



**Table 2**  
**November – March Release Rate**

<b>Oct. 31 content &gt;= (acre-feet)</b>	<b>Release Rate (cfs)</b>
<b>75,000</b>	<b>100</b>
<b>74,000</b>	<b>97</b>
<b>73,000</b>	<b>94</b>
<b>72,000</b>	<b>91</b>
<b>71,000</b>	<b>88</b>
<b>70,000</b>	<b>85</b>
<b>69,000</b>	<b>84</b>
<b>68,000</b>	<b>83</b>
<b>67,000</b>	<b>82</b>
<b>66,000</b>	<b>81</b>
<b>65,000</b>	<b>80</b>
<b>64,000</b>	<b>79</b>
<b>63,000</b>	<b>78</b>
<b>62,000</b>	<b>77</b>
<b>61,000</b>	<b>76</b>
<b>60,000</b>	<b>75</b>

(e) Provided, however, that notwithstanding the reservoir content and release rate schedule described above:

(i) the objective of reservoir operations shall be to achieve a minimum Reservoir storage level of 75,000 acre-feet as of October 31 in Wet Years and 70,000 acre-feet in Average Years and Dry Years, subject to the foregoing paragraph 26.B.(3)(c);

(ii) the rate of release from the Reservoir from November 1 to March 31 shall be no less than 100 c.f.s. in years in which the actual April through July inflow to the Reservoir is equal to or greater than that specified for a Wet Year type; and

(iii) If the adjustments described in paragraph 26.B.(2)(b) result in Adjusted Volumetric Criteria for a Wet Year Type with Forecasted Inflow of less than 105,000 acre-feet, the rate of release for Wet Year Type set forth in subparagraph 26.B.(6)(e)(ii) above shall be reduced proportionately according to the following formula and rounded to the nearest whole number:

Rate of release from November 1 – March 31 =  $85 + .0005 \times (\text{Adjusted Volumetric Criteria for Wet Year Type} - 75,000)$

(f) the parties recognize that it may not be possible to set the release from the dam to the exact number and that the release rate may vary from the initial setting due to gage drift over time.

(7) Operations in exceptionally dry years: In exceptionally dry years when actual April through July inflow to the Reservoir is less than 70,000 acre-feet and the Reservoir content on October 31 is less than 60,000 acre-feet (1977, 1981, 2002, and 2012 in the historical period of record), the rate of release from the Reservoir from November 1 to March 31 shall be a minimum of 50 c.f.s., with higher releases made to the extent possible.

(8) Ramping rates: The rate of change in releases (“ramping”) shall be as follows: Ramping down shall be limited to no more than 100 c.f.s. per day from flows of 500 c.f.s. or greater, 50 c.f.s. per day from flows between 250 c.f.s. and 500 c.f.s., and 25 c.f.s. per day from flows of less than 250 c.f.s. The rate of ramping up shall generally be no more than 50 c.f.s. per day, but can occur at higher rates to mobilize sediments and other material in the stream. Exceptions to the foregoing ramping rates may be made for emergency operations.

C. The implementation of the foregoing release criteria shall be subject to the following limitations:

(1) The rate and timing of releases shall not interfere with the rights of the UVWUA under the 1975 Exchange Agreement or impair the ability of the UVWUA to utilize the full amount of water stored in the exercise of the 1904 right in accordance with the Accounting Conditions of the decree in Case No. 86CW203.

(2) Nothing in the Stipulation or this Decree shall prevent the United States from altering the rate and timing of releases if necessary to respond to emergency conditions, to accommodate maintenance and repair of the Reservoir, or comply with its non-discretionary obligations under federal law.

(3) In addition, and notwithstanding paragraph 26.C.(2) herein, the terms and conditions of the Stipulation this Decree are subject to the Secretary of the Interior’s exercise of discretion pursuant to the laws governing operation of the Reservoir and Federal Reclamation projects generally.

D. A copy of the proposed operations of Taylor Park Reservoir established or modified in accordance with the Stipulation and this Decree shall promptly be provided by the United States to Taylor Placer, the parties to the 1975 Exchange Agreement, and the Division Engineer.

E. For purposes of performing the terms of the Stipulation and this Decree, Taylor Placer shall provide to the United States and the Upper Gunnison District the name, mailing address, and email address of the person authorized to represent Taylor Placer in matters related to the Stipulation and this Decree.

F. Taylor Placer agrees that inflows to Taylor Park Reservoir not needed to meet the release schedule established or modified in accordance with the Stipulation and this Decree may be physically stored in the Reservoir, provided that such water is released according to the terms of the Stipulation and this Decree and allowed to flow through the decreed reach of the W-1991 Rights. The storage of such water shall occur under the priority of the 1904 right and the Refill Right, in accordance with the Accounting Conditions of the decree in Case No. 86CW203 as the same are modified by this Decree.

G. The operation of Taylor Park Reservoir in accordance with the provisions of the Stipulation and this Decree shall be considered to be consistent with the “historical operation” of the Reservoir, as that term is used in the decree in Case No. W-1991, and achieve the optimum use of such water for the purposes of the 1975 Exchange Agreement, as amended on July 9, 1979 and April 16, 1990; and the beneficial uses of the Refill Right as decreed in Case No. 86CW203 as the same modified by this Decree.

H. Releases from Taylor Park Reservoir (whether of first fill or second fill water stored in the Reservoir, or inflows to the Reservoir) shall be credited by the Division Engineer as an exercise of the 1904 right or the Refill Right of Taylor Park Reservoir, in accordance with the Accounting Conditions of the decree in Case No. 86CW203 as the same are modified by this Decree, and also as an exercise of the W-1991 Rights, up to their decreed rate of flow.

I. Nothing herein shall be construed as a subordination of the W-1991 Rights to any water right, conditional water right, or appropriation. The terms of the Stipulation, the Decree in Case No. 11CW31, and this Decree represent a compromise and settlement of a disputed issue as to the relative priority of the W-1991 Rights and the Taylor Park Reservoir water rights and an agreed interpretation of the specific terms of the decrees in Case Nos. W-1991 and 86CW203. Nothing in the Stipulation or this Decree shall limit or impair the exercise by Taylor Placer or administration by the State and Division Engineers of the W-1991 Rights as against any other water right, conditional water right, or appropriation, including without limitation exercise and administration as against diversions or depletions that would reduce inflows to Taylor Park Reservoir that are

accounted under the Refill Right. The Stipulation and this Decree do not include a selective subordination. Nothing in the Stipulation or this Decree constitutes any admission by any party as to the legality of selective subordination, or shall be used as precedent in any other case regarding any party's position on selective subordination.

J. The Stipulation was entered pursuant to agreement of the parties to address their interests and concerns and resolves them finally in this matter. However, because the issues addressed therein have not been litigated by the parties, the parties shall not be collaterally estopped from asserting any factual or legal issues in any other cases not involving these water rights. Neither the Stipulation nor this Decree shall 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.

27. The uses of the Refill Right pursuant to the changes sought by the United States in this case will not alter the rate or volume of releases that would otherwise occur from Taylor Park Reservoir under existing decrees and the Taylor Park Reservoir Operation and Storage Exchange Agreement dated August 28, 1975 (1975 Exchange Agreement).

28. A copy of this Decree of the Water Court shall be filed with the State Engineer and the Division Engineer for Water Division No. 4.

29. It is further ORDERED that this Ruling shall be filed with the Water Clerk, subject to judicial review.

Dated this 1st day of December, 2016.

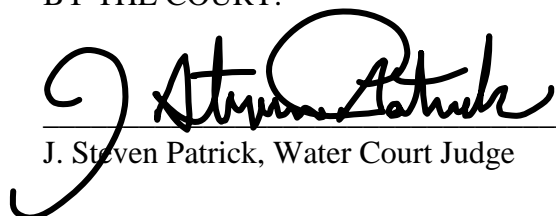
  
S. Gregg Stanway, Water Court Referee

### **JUDGMENT AND DECREE**

No protest was filed to this matter. The foregoing Ruling of the Referee is confirmed and approved and made the Judgment and Decree of this Court.

Dated this 28<sup>th</sup> day of December, 2016.

BY THE COURT:

  
J. Steven Patrick, Water Court Judge