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DISTRICT COURT, WATER DIVISION NO. 4, COLORADO

Kay Phillips, Clerk. _____

Case Nos. 86-CW-202 & 86-CW-203

FINDINGS, CONCLUSIONS AND JUDGMENT ON THE MERITS OF THE APPLICATIONS

CONCERNING THE APPLICATIONS FOR WATER RIGHTS OF

THE UPPER GUNNISON RIVER WATER CONSERVANCY DISTRICT
in Gunnison County, Colorado.

This order addresses the merits of the Applications for water rights filed by the Upper Gunnison River Water Conservancy District (referred to herein as Applicant or as the Gunnison District) on December 30, 1986. This judgment is based upon evidence presented during eight days of trial from June 25, 1990 through July 9, 1990, a view of the Taylor River and the Taylor Park Reservoir and its release facilities on June 28, 1990, with the Division Engineer Keith Kepler and Water Commissioner Bob Drexel, oral arguments presented by counsel on July 16, 1990, and materials filed by counsel by August 1, 1990.

In this litigation the Applicant was represented by Anthony Williams of Grand Junction, Colorado. The Opposers appearing at trial and their respective counsel included: The Crystal Creek Homeowners Association [CCH] (which was generally supportive of the Applications) represented by Charles B. White, the City of Aurora [Aurora] represented by William Hillhouse and Frederick Fendel, III, and the County of Arapahoe [Arapahoe] represented by Paul Zilis and George Henderson. Other Opposers included the Uncompahgre Valley Water Users Association [UVWUA] and the United States of America [United States or Bureau of Reclamation], and the Colorado Water Conservation Board [CWCB]. However, in May 1990, based upon an Agreement with the Applicant, both UVWUA and the United States withdrew their statements of opposition. CWCB did not participate in the trial.

Based upon the evidence and the arguments by counsel, the Court now finds and concludes as follows, to-wit:

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Procedural Considerations

1. These actions are "water matters" within the exclusive jurisdiction of the Water Judge under §37-92-203(1), CRS 15. The Court has jurisdiction over the subject matter of this action and over all parties affected thereby, whether they appeared or not.

2. Cases Nos. 86-CW-202 and 86-CW-203 have been consolidated for all purposes.

3. In its Pre-Trial Order of May 10, 1990, and in its Order of June 11, 1990, ruling on four motions for summary judgment filed by Arapahoe and Aurora, the Court recognized that certain questions of

material fact remained for adjudication at trial. Having now heard the evidence, the Court enters this Judgment on the merits of the controversy, and adopts all of the findings and conclusions it made in said Orders, except to the extent the same conflict with new findings and conclusions made in this Final Judgment, and in the event of conflict, the findings and conclusions herein shall control.

The Applications in 86-CW-202 and 86-CW-203

4. The Applications in the two above-captioned cases, filed by the Gunnison District on December 30, 1986, are summarized as follows:

a. In case 86-CW-202, the Application was designated: "Application for additional use of water right." It made reference to an existing adjudicated water right for 111,260 acre feet of water for storage in Taylor Park Reservoir in Gunnison County, Colorado, with a priority date of August 3, 1904. Said right is presently decreed for the beneficial use of irrigation. Essentially the Applicant sought to add to the existing water right the beneficial uses of "fishery" and "other recreational uses" based upon allegations that by virtue of its contract with the owners (the United States and the UFWUA) of the water right, the Applicant had utilized 111,260 acre feet of water in Taylor Park Reservoir and releases thereof, for the purposes of optimizing conditions for fishery and other recreational uses in the Taylor Park Reservoir and in the downstream reaches of the the Taylor and Gunnison Rivers below said reservoir, except when the reservoir could not be operated in that fashion due to an act of God or other emergency conditions. The Applicant expressly alleged that it began applying water to the claimed new beneficial uses as of August 28, 1975.

b. In case 86-CW-203, the Application was designated: "Application for Water Storage Right." Essentially this Application sought the right to refill the Taylor Park Reservoir based upon the initiation of an appropriation and the simultaneous application of said water to the claimed beneficial uses as of October 31, 1970. [During the presentation of evidence the Applicant amended its position with respect to said date and changed the same to August 28, 1975.] The Application seeks an absolute decree for 44,700 acre feet of water and a conditional decree for 106,230 acre feet of water to use for recreational purposes, including fishery and wildlife, with the understanding that the "refill" water would be released from Taylor Park Reservoir at times and in quantities calculated to enhance the fishery and recreational uses of the Taylor and Gunnison Rivers, and to benefit irrigable lands within the boundaries of the Applicant District by "stabilizing and increasing the flow of water in the Taylor and Gunnison Rivers, thereby providing an additional 19,200 acre feet of water for increased and supplemental irrigation use within the District."

The Uncompahgre Project and The Taylor Park Reservoir

5. Both Applications concern the Taylor Park Reservoir and water associated therewith. These Applications seek to use the Taylor Park Reservoir in ways for which that facility is not currently decreed.

6. The Taylor Park Reservoir is an "on-stream" reservoir located on the main channel of the Taylor River which, at its confluence with the East River (at Almont, Colorado), forms the Gunnison River in Gunnison County, Colorado. The Taylor Park Reservoir was constructed by the Bureau of Reclamation for the United States of America as part of the "Uncompahgre Project" to store and supply water to supplement an irrigation system administered by the UVWUA with respect to more than 75,000 acres of irrigable lands in the Uncompahgre Valley located approximately 100 miles downstream from the reservoir.

7. A primary source of water for the Uncompahgre Project is the Gunnison Tunnel, which diverts water under an absolute direct flow right for 1135 c.f.s. decreed in 1913, with a priority date of June 1, 1901, from the Gunnison River to the Uncompahgre River drainage (which eventually drains back in to the Gunnison River). The Gunnison Tunnel also holds a conditional decree for 165 c.f.s.

8. The Taylor Park Reservoir was decreed in 1941, with a priority date of August 3, 1904, for irrigation and other purposes. The decreed capacity of the Taylor Park Reservoir is 111,260 acre feet, although its active capacity below the spillway level is 106,230 acre feet. In 1942, the irrigation decree for the Taylor Park Reservoir was made absolute. In 1986, the conditional decree for non-irrigation uses of Taylor Park Reservoir was terminated for lack of diligence, with the exception of two cubic feet per second, not to exceed four acre feet per year, which was continued for hydroelectric purposes. At the present time, Taylor Park Reservoir is decreed for irrigation purposes only, with the sole exception of this small hydroelectric power use. The reservoir has no decree for fishery or recreational purposes, nor does it have a refill decree.

9. Historically, Taylor Park Reservoir released water to provide a supplemental supply for the Gunnison Tunnel when its direct flow right was not fully satisfied. Taylor Park Reservoir is (legally) owned by the United States and is operated by the UVWUA (as the equitable owner) pursuant to a contract with the United States, under which the UVWUA is entitled to receive water from the Uncompahgre Project and is obligated to repay the United States for that project.

The Curecanti [Aspinall] Unit Project

10. The two subject cases involve the interrelationship between the Taylor Park Reservoir and the Curecanti Unit. [The Curecanti Unit is now known as the Aspinall Unit, and all subsequent references herein to the Curecanti Unit (except in quotations) will be "Aspinall Unit."]

11. In the late 1950s, the United States Bureau of Reclamation began construction of the Aspinall Unit of the Colorado River Storage Project and the same was completed about 20 years later. The Aspinall Unit includes three dams across the Gunnison River (Blue Mesa Dam, Morrow Point Dam and Crystal Dam) which created three reservoirs, the largest of which is Blue Mesa Reservoir. The dam for Blue Mesa Reservoir is located about 70 miles downstream from the Taylor Park Reservoir and backs water up for more than 25 miles along the course of the Gunnison River to a point within five miles or less of the City of Gunnison. The Blue Mesa Dam was completed in 1965.

12. Prior to the creation and filling of the Blue Mesa Reservoir, the flow of water in the Taylor River below the Taylor Park Reservoir changed abruptly and fluctuated widely depending upon the availability of water in a given year and calls for delivery of water by the UVWUA. This fluctuation was detrimental to the use of the Taylor and Gunnison Rivers for fishing purposes, both because the lack of a reasonable flow of water destroyed fish habitats and spawning areas and because abrupt surges in flow endangered fishermen in the Taylor River.

13. The Gunnison District, the Applicant herein, is a conservancy district organized in 1959 under the laws of the state of Colorado [See: Title 37, Article 45, C.R.S.] for the purpose of conserving water resources and promoting the greatest beneficial use of water within its jurisdiction. [See: 37-45-102 (1), C.R.S. 15]. The District's boundaries encompass the entire Upper Gunnison River Basin, and more particularly include the Taylor Park Reservoir, the Taylor River and the East River (and tributaries of both rivers) as well as the Gunnison River from its inception (at the confluence of the East and Taylor Rivers) downstream to the dam for Blue Mesa Reservoir.

14. Because the construction and filling of Blue Mesa Reservoir eliminated many miles of prime trout fishing streams, and because the construction of said reservoir provided an opportunity to stabilize the flows in the Taylor and Gunnison Rivers, various owners of resorts and others interested in fishing and recreational use of the Taylor River met with the Applicant's Board of Directors in the late 1960's for the purpose of establishing a procedure by which a constant flow of water could be released from the Taylor Park Reservoir and stored in the Blue Mesa Reservoir under an exchange agreement.

15. Subsequent meetings between members of the Applicant Board, UVWUA, the Bureau of Reclamation, the Division Engineer for Water Division 4 and other interested agencies eventually led to an informal agreement regarding the releases of water from Taylor Park Reservoir for the purpose of establishing a stable flow of water to enhance fishery interests and also to address power demands and destructive icing in the winter which was resulting from the filling of Blue Mesa Reservoir.

Contracts Regarding Reservoir Administration

16. By 1968 it became apparent that UVWUA wanted a long-term agreement with respect to the operation of the Taylor Park Reservoir. The UVWUA believed that such an agreement was desirable to establish a definite regimen for the releasing of water from the Taylor Park Reservoir and also to obtain financial assistance in the operations of the reservoir from those in the Upper Gunnison area who were benefiting from these stabilized flows. Eventually, in 1972, an exchange agreement was executed between the UVWUA and the United States through its Bureau of Reclamation with respect to the operation of Taylor Park Reservoir. This agreement was executed effective August 21, 1972.

17. As a result of the 1972 agreement, the governing board of the Applicant became concerned that it should be a party to the agreement so that it would have certain rights with respect to the regulation of stream flows in the Taylor and Gunnison Rivers. During the next three years the Applicant negotiated with the United States and with the

VWUA to be included in a contract similar to the 1972 exchange agreement so that the Applicant District would be in a better position to enhance and protect the fishing and recreational interests within its jurisdiction. As a result of several meetings which were publicized by the media and based upon input provided by the Sierra Club, the United States Forest Service, the Bureau of Reclamation, the Division of Wildlife and the National Park Service, a contract known as the "Taylor Park Reservoir Operation and Storage Exchange Agreement" [herein the "1975 Agreement"] was eventually entered into by the United States of America, the UVWUA, the Applicant District and the Colorado River Water Conservation District. This agreement superseded the 1972 Agreement and lies at the heart of this litigation and its interpretation is essential to the determination of the validity of the claims of the Applicant and the positions of the Opposers.

18. The purposes of the 1975 Agreement and the various rights and duties of the parties thereto are found to be as follows:

a. The overall purpose of the 1975 Agreement was to authorize exchanges of water stored in the Taylor Park Reservoir and in the Aspinall Unit to promote conservation and better utilization and management of available water supplies under the water rights decreed to each storage unit.

b. The Agreement contemplated coordinated releases of water from the Taylor Park Reservoir, with regulation thereof to occur at the Aspinall reservoirs, to "benefit the Gunnison District [the Applicant herein], the [UVWUA] and the Colorado (River Water Conservation) District and enhance the recreation and fishery purposes of the Colorado River Storage Project." Specific benefits of the coordinated releases of said water included:

"fishery benefits in Taylor Reservoir and downstream reaches at rates which will optimize fishery conditions in and below the reservoir area. The operating goal of Taylor River will be to stabilize Taylor River and Gunnison river flows through the year, to provide flood control and irrigation uses, and eliminate as much as possible abrupt changes that would adversely affect the fisheries, fishery studies and recreation uses." Exhibit 2 (paragraph 1(b) on page 3).

Further, "All such releases in excess of the water needs of the [UVWUA] shall be construed as releases made at the request of the United States to be accounted for as an exchange of storage as provided herein." Exhibit 2 (paragraph 1(c) on page 3).

c. The Agreement recognized that the UVWUA physically controlled the releases of water from the Taylor Park Reservoir, but it also recognized that the UVWUA would release said stored water upon the request of the United States or the Gunnison District with the approval of the United States. To the extent water was released from Taylor Park Reservoir, the United States was to store a like amount of water for the credit of the UVWUA in the Aspinall Unit. (Exhibit 2, paragraph 1(a) on page 3).

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d. Paragraph 3 on page 4 of the Agreement provided that "all exchanges and storage credits will be maintained by the United States and such records will be available at all times for inspection by the [UVWUA] and the Districts. All credits created under this agreement shall be cancelled on October 31 of each year." This underlined sentence was stricken from the Agreement in 1979 by the parties for the purpose of allowing "for a more normal operation of Taylor Park Reservoir releases based upon the historical operations of the Reservoir by the [UVWUA]."

e. The Agreement also provided that when the Taylor Park Reservoir spilled and the United States has a credit therein, then the first water spilled was to be charged against the credit of the United States, and the Agreement also limited the UVWUA's credit in the Aspinall reservoirs so that said credit, when added to the UVWUA's water stored in Taylor Park Reservoir, could not exceed the active capacity of the Reservoir (i.e. 106,230 acre feet) after taking into account storable inflow, storage releases for UVWUA uses, evaporation and other reservoir losses. (Exhibit 2, paragraph 4 on page 4).

f. The Gunnison District was obligated under the Agreement to pay \$2,000 per year to the UVWUA as consideration for the Gunnison District's exercise of its rights under the Agreement. And said Agreement expressly authorized the Gunnison District to

1) participate with the other parties to the Agreement in supervising and coordinating the exchanges contemplated by the Agreement, (Exhibit 2, paragraph 7, page 5), and

2) make application for a water right on "all surplus flows in Taylor River above the Taylor Park Reservoir and all water appropriated thereunder shall be used by the Gunnison District in the Gunnison District area. Taylor Park Reservoir will be operated in such a manner to assist the Gunnison District in using such water provided all other purposes herein and the original purposes of said reservoir are accommodated." (Exhibit 2, paragraph 8 on pages 5 & 6). [Emphasis supplied]

g. The Gunnison District was also authorized to acquire water from the United States at the Aspinall Unit reservoirs and to exchange such water for water stored in Taylor Park Reservoir based upon a separate agreement to be made by the District and the United States. (Exhibit 2, paragraph 9, page 6). However, as of the date of trial, no separate agreement had been executed.

h. Further, the Agreement required the written consent of the Gunnison District and the United States before the UVWUA or the United States could "sell, lease or exchange water from Taylor Park Reservoir." (Exhibit 2, paragraph 10 on page 6).

i. The Agreement provides that it is effective for 50 years after the date of its execution (on August 28, 1975), unless sooner terminated by mutual consent, and that it would continue in force after the 50-year period, until terminated by one or more of the parties upon 90 days' written notice. (Exhibit 2, paragraph 15, page 8).

Implementation of the 1975 Exchange Agreement

19. Before the Aspinall Unit was constructed and the 1975 Exchange Agreement was adopted, Taylor Park Reservoir was operated as a typical irrigation storage reservoir. At the end of the irrigation season, the Reservoir would begin storing and when it reached its capacity it would then preserve the water stored until a shortage required its usage in the late summer and early fall of the ensuing irrigation season. This resulted in extreme fluctuations in the flow of Taylor River often resulting in extremely low flows during the winter. The Environmental Assessment (Exhibit 31) which was necessary before execution of the 1975 Agreement, reported winter flows at a minimum of zero c.f.s. before the Aspinall Unit was constructed and about 19 c.f.s. after Blue Mesa Reservoir (the most upstream reservoir of the Aspinall Unit) was constructed, but before the 1975 Agreement was executed.

20. Following the execution of the Agreement, the same was implemented with the result that the Taylor Park Reservoir and the Aspinall Unit were (and continue to be) operated in a coordinated fashion to satisfy the supplemental irrigation requirements of the UVWUA, while at the same time providing fishery, recreational, irrigation, and flood control benefits within Taylor Park Reservoir and in the Taylor and Gunnison Rivers below the Taylor Park Dam. The effect of the implementation of the Agreement was to stabilize the flow of these two rivers, and to eliminate the daily fluctuation of inflow to the Reservoir as well as the seasonal variation in stream flow below the Reservoir between the run-off, late summer and winter months.

21. The use of the active storage capacity of Taylor Park Reservoir, in conjunction with the Aspinall Unit, has been essential in order to achieve the benefits listed in paragraph 20 above. The stabilization of flows under the 1975 Agreement has benefitted downstream irrigators by reason of easier headgate management and higher river flows; fisheries, in that the spawn and fry life stages are not disrupted by changes in flow and flows are established within an optimum range for all life stages; landowners, by virtue of the reduction in the frequency and severity of flooding; and recreational users, in that river flows are more predictable and useable boating flows occur more frequently.

22. The managed operation of the active storage capacity of the Taylor Park Reservoir has resulted in significant fishery benefits both within the Reservoir and downstream. Releases within the following flow rates have been beneficially used for the optimization of the fishery conditions and recreational uses in the Taylor and Gunnison Rivers downstream from the Reservoir:

<u>Period</u>	<u>Optimum Flow</u>	<u>Purpose</u>
October 16-31	100-150 c.f.s.	Spawning and incubation
November	100-150 c.f.s.	Spawning and incubation
December	100-150 c.f.s.	Spawning and incubation
January	100-150 c.f.s.	Spawning and incubation
February	100-150 c.f.s.	Spawning and incubation
March	100-150 c.f.s.	Spawning and incubation

<u>Period</u>	<u>Optimum Flow</u>	<u>Purpose</u>
April	300-500 c.f.s.	Hatching and fry emergence
May	300-500 c.f.s.	Hatching and fry emergence
June	300-500 c.f.s.	Hatching and fry emergence
July	500 c.f.s.	Adult habitat and flushing
August	500 c.f.s.	Adult habitat and flushing
September	500 c.f.s.	Adult habitat and flushing
October 1-15	500 c.f.s.	Adult habitat and flushing

(See Exhibit 73A, page 7)

23. Fishing and recreation in and on Taylor Park Reservoir, Taylor River and the Gunnison River below Almont and above the Blue Mesa Reservoir contribute to the economy of the area within the Gunnison District and the improvement of the fishery and recreation opportunities thus improves the economy of said area.

24. The coordinated operation of the Taylor Park Reservoir and of the Aspinall Unit has also minimized reservoir spills which in turn has allowed the Division of Wildlife to regulate temperatures within the Reservoir for the benefit of the various fish species therein, and has minimized the risk that the mysis shrimp within the Reservoir would survive the journey from Taylor Park Reservoir to the Blue Mesa Reservoir, where they would have deleterious consequences if established.

25. Prior to the construction of Blue Mesa Reservoir, flood storage in Taylor Park Reservoir was incidental. Since that time, flood storage has increased, and one of the purposes of the 1975 Agreement was to formalize the use of the Reservoir for flood control purposes, with the result that the implementation of the Agreement has reduced the frequency and severity of flooding of the Taylor River.

26. The 1975 Agreement has resulted in legal benefit to irrigation water rights between Taylor Park Reservoir and Blue Mesa Reservoir. The evidence is in conflict as to whether there were increased diversions by these irrigators after the construction of Blue Mesa Reservoir. However, prior to the 1975 Agreement, irrigation water rights could not lawfully divert water released from Taylor Park Reservoir, since they were subject to curtailment by the Division Engineer. On several occasions prior to 1975, the UVWUA attempted to curtail such diversions by notifying the Division Engineer. Subsequent to the 1975 Agreement, such diversions did not injure the UVWUA water right, for which full credit is given in the Aspinall Unit for all water which passes the gauge below Taylor Park Dam. By itself, this would be an exchange of Aspinall water upstream to the headgates of the diverting ditches, which the Gunnison District does not seek to adjudicate. However, the operations under the 1975 Agreement, including the accounting of a "paper fill" of Taylor Park Reservoir, have resulted in the second fill of Taylor Reservoir which is claimed by the Gunnison District in Case No. 86-CW-203. This has made water legally available to downstream irrigators which would not have been available in the absence of the 1975 Agreement.

27. The Court finds that in the year 1980 storage waters were diverted and applied to irrigation uses within the Gunnison District by downstream irrigators from Taylor Park Reservoir in the total amount of 13,777 acre feet. These waters should be attributed to the refill right under 86-CW-203 which will be defined hereafter. The Court also finds that there was undoubtedly additional water used for irrigation purposes but that the same was not quantified except that total development would utilize the entire 19,200 acre feet for which application was made under 86-CW-203.

Accounting and Administration after the 1975 Agreement

28. After the execution of the 1975 Agreement, the United States (through the Bureau of Reclamation) has accounted for the exchange between Taylor Park Reservoir and the Aspinall Unit by means of a formula which gives credit to the UVWUA account in the Aspinall Unit for all water in excess of 20 c.f.s. which is measured at the U.S.G.S. stream gauge below Taylor Park Dam. The parties to the 1975 Agreement intended, and the Court finds, that the water in the UVWUA account in the Aspinall Unit was stored under the 1904 priority of the Taylor Park Reservoir water right.

29. The 20 c.f.s. exception to credits is based upon an assumption by the Bureau that 20 c.f.s. is the minimum bypass of inflows into the Reservoir which is necessary to maintain at least some live flow in the river below the dam. This figure bears a reasonable relationship to the minimum river flows which were historically bypassed from storage by the UVWUA prior to the 1975 Agreement. The Bureau has determined to credit UVWUA for all measured flows in excess of this minimum bypass because this is water which is either released from storage or could have been stored in Taylor Park Reservoir in priority, but was not stored for the benefit of UVWUA until it reached the Aspinall Unit. The Court finds that this procedure facilitates the implementation of said Agreement which requires certain flows to maintain the beneficial uses for fishery and recreation described in the Agreement. [This procedure is also consistent with the provisions of §37-87-102(4), CRS 15 (1989 Cum. Supp.).]

30. The policy of the Bureau in charging all water measured at the Taylor Park gauge in excess of 20 c.f.s. against the 1904 storage right is consistent with Colorado water law and the intent of the parties to effect an exchange of storage under §37-80-120 and §37-83-104 & 105, CRS 15. Were it not for the beneficial uses sought to be achieved under the 1975 Agreement, including fishery, recreation, irrigation and flood control, Taylor Park Reservoir could, and would historically, have stored all water available to it in priority until it filled. See Exhibit 31, the Environmental Assessment of the 1975 Agreement, pp. 2-5, Figure 1. The filling of the Reservoir with the waters first available after the end of the irrigation season historically resulted in the inflows to the Reservoir being made available to downstream water users at the earliest possible date during the following irrigation season, after the Reservoir filled. Charging Taylor Park Reservoir with a "paper fill" of water voluntarily bypassed from storage under the irrigation storage right protects the interests of downstream junior appropriators and ensures the maximum utilization of available water supplies. Under the 1972 and 1975 Agreements, this practice also

results in the complete protection of the interests of the UVWUA, since it is credited in its account in the Aspinall Unit with all water released from Taylor Park Reservoir.

31. The UVWUA exchange account has been adjusted to ensure that the total UVWUA water in the Aspinall account and in storage in Taylor Park Reservoir, did not, at the end of any month, then exceed the active capacity of Taylor Park Reservoir, which is 106,230 acre feet. The Bureau has assumed that all water in Taylor Park Reservoir should be credited to the UVWUA and adjusted the UVWUA-Aspinall account accordingly. However, this accounting has not recognized the second filling of Taylor Park Reservoir which has occurred under Colorado law by virtue of operations under the 1975 Agreement. Water stored under a junior second filling right can be recognized and separately accounted for under Paragraph 4 of the 1975 Agreement, which requires cancellation of credits only when total UVWUA water in Taylor Park Reservoir plus its account in Aspinall, exceeds 106,230 acre feet.

32. Debits are posted to the UVWUA account at such time as the diversions through the Gunnison Tunnel are greater than the calculated inflows to the Aspinall Unit from all sources other than the Taylor River. This approach results in an estimate of water which would have been available to the UVWUA under the direct flow rights associated with the Gunnison Tunnel, and a resulting debit to the Aspinall account for the balance, which is drawn from storage. The Taylor River flows are not included in the calculation of supplies to the Gunnison Tunnel because these flows contribute to water stored either in Taylor Reservoir or, by exchange, in the UVWUA account in the Aspinall Unit.

33. When the UVWUA account in the Aspinall Unit is overdrawn as a result of insufficient credits in relation to the calculated demand for supplemental storage, the United States has received and accounted for credits for an equivalent amount of water stored in Taylor Park Reservoir. This situation occurred in 1975, 1977, 1978 and 1979. The 1975 Agreement therefore involves exchanges of stored water both from Taylor Park Reservoir downstream to the Aspinall Unit and from the Aspinall Unit upstream to Taylor Park Reservoir.

34. The Division Engineer was informed of the 1972 Agreement by the Bureau of Reclamation and respondent on October 25, 1972 that, subject to one concern, the Agreement was lawful and subject to administration by the state water officials. See Exhibit 333. The "concern" referred to was the treatment of "spillway overflow" and the Bureau acknowledged that said overflow (as opposed to bypass water which was not the subject of said concern) belongs to the stream. The Bureau found the Division Engineer's interpretation to be acceptable because when the spillway overflow occurs, the "water then is available to supply all water rights junior to the Uncompahgre Project Taylor Park Reservoir Storage right" and "(i)t is quite likely that the Curecanti [Aspinall] Units would benefit from the spills from Taylor Park under Curecanti's water rights which are junior to Taylor Park." See Exhibit 334. This is consistent with the 1975 Agreement which states that the first water "spilled" works to reduce the credit of the United States to storage in Taylor Park Reservoir. (See Exhibit 2, paragraph 4, p. 4)

35. The Division Engineer was informed of the negotiations of the 1975 Agreement and attended at least one meeting at which the provisions of the Agreement were discussed and explained. Shortly after the Agreement was signed, he requested a copy of the Agreement and kept it in his files. Although the Division Engineer was never called upon to administer the exchanges contemplated by the 1975 Agreement, the parties administered it and the Bureau maintained accounting records in accordance with Paragraph 3 of the Agreement.

36. From 1972 through the time of trial, neither the Taylor Park Reservoir storage rights nor the Aspinall Unit storage or direct flow rights has ever been administered in priority. This lack of administration is the result of an absence of calls by or affecting either of these federal projects. The Division Engineer did not administer irrigation releases of water from Taylor Park Reservoir to the Gunnison Tunnel. The Court finds that there was no necessity for administration of storage or releases from Taylor Park Reservoir at any time from 1972 through 1986.

37. No claim of injury resulting from, or objections to, the exchanges of water between Taylor Park Reservoir and Blue Mesa Reservoir were made at any time. The exchange of water between Taylor Park Reservoir and Blue Mesa Reservoir did not result in material injury to the owners of or persons entitled to use any water right, absolute or conditional.

38. Taylor Park Reservoir is entitled to one filling of its actual capacity during each 12-month period under the priority of the original irrigation water storage right which was adjudicated in 1941. City of Westminster v. Church, 167 Colo. 1, 445 P.2d 52 (1968); North Sterling Irr. Ditch v. Riverside Reservoir & Land Co., 119 Colo. 50, 200 P.2d 933 (1948). Regardless of the calendar date selected for administration of the Reservoir, that date must be consistent from year to year in order to ensure that the Reservoir is administered on an annual, 12-month cycle in accordance with Colorado law. An administration date which varies from year to year, as, for example, between the low points of storage prior to commencement of the runoff as contended by the Opposers, will not adequately protect junior downstream water users from an expansion of the one filling right. For example, only 7 months existed between low points in 1958, and 11 months between May of 1984 and April of 1985. During each of these periods, the original storage right for the Reservoir was satisfied, and additional storage occurred during the remaining portions of the 12-month cycle. See Exhibit 384. Had the Reservoir been administered on this basis, it would have resulted in injury to downstream junior water users who were entitled to the entire inflow into the Reservoir for the remainder of the year once the first filling had been satisfied.

39. The administration date of a reservoir is used to determine the point at which the contents of the reservoir will be charged against the next annual fill. North Sterling Irr. Ditch Co. v. Riverside Res. & Land Co., supra. In the case of irrigation reservoirs, a November 1 administration date is commonly used, since it occurs after the end of the normal irrigation season. A November 1 administration date was appropriate for use for Taylor Park Reservoir prior to the commencement of coordinated operations with the Aspinall Unit. Because

it was these very coordinated operations which are ratified and confirmed by the 1975 Agreement, the Court finds that it is appropriate to use a November 1, administration date for the Taylor Park Reservoir for the purposes of determining whether and to what extent a second filling has occurred. To do otherwise would result in a "catch-22" situation, in which the change in Reservoir operations resulting from coordinated management under the 1975 Agreement could not properly be assessed.

40. Further, the very wording of the 1975 Agreement itself leads to the conclusion that the administration date should be November 1. This is true for two reasons:

a. The original language in paragraph 3 of the 1975 Agreement contemplated that all credits created under the agreement would be cancelled as of October 31 of each year (a date consistent with the normal administration of the Taylor Park Reservoir as an irrigation reservoir). Said language was subsequently stricken, but the reason given by the Bureau for striking said language in 1979 was to permit "for a more normal operation of Taylor Park Reservoir releases based upon the historical operations of the Reservoir by the [UVWUA]." See Bureau Letter of 8/9/79 attached to Exhibit 2. [Emphasis supplied] The historic operation of the Reservoir was to use an administration date of November 1.

b. Also, the 1975 Agreement, in paragraph 8, gave the Gunnison District authority to file for surplus flows of water in the Taylor River, and expressly stated that the "Taylor Park Reservoir will be operated in such a manner to assist the Gunnison District in using such water [provided other purposes contemplated by the Agreement are accommodated]." It is a reasonable interpretation of the 1975 Agreement that the parties thereto anticipated that the Gunnison District would appropriate surplus (unappropriated) water from the Taylor River above the Reservoir and that it was permissible for the District to utilize the Reservoir to store said water. Further, based upon the Agreement the Reservoir itself was to be operated in such a way as to "assist" the District in its appropriative efforts. The evidence demonstrates that a November 1 administration date assists the District in accomplishing the objectives which it was authorized by the Agreement to carry out, and which it did carry out.

41. The evidence submitted by the Opposers indicated that the contemplated second fill is very limited under their proposed low point administration date and could thereby frustrate the intent of the parties to the 1975 Agreement. Given the fact that the primary and sole decreed purpose of the Taylor Park Reservoir storage right is for irrigation, it is appropriate to continue using the November 1 date even under current Reservoir operations in order to determine when that irrigation right is satisfied. This is consistent with the Taylor Park-Aspinall exchange as administered by the Bureau, under which the low point of combined total UVWUA water in the Aspinall Unit and Taylor Park Reservoir usually occurs in the fall, after the irrigation season is over.

42. Taylor Park Reservoir may fill under the original 1904 irrigation priority until the combined total UVWUA account in the Aspinall

Unit and in Taylor Park Reservoir reaches 106,230 acre feet, after which credits are cancelled. However, the cancellation of credits under the Agreement does not affect the accounting of water charged to the 1904 irrigation priority.

42. The coordinated operation of Taylor Park Reservoir and the Aspinall Unit has resulted in a second filling of Taylor Park Reservoir for several years. Using the November 1 administration date, and accounting only for physical accruals to storage in Taylor Park Reservoir during the succeeding twelve months, second fillings of the Reservoir have occurred in the amounts and at the times listed in Table 4 of Exhibit 73A. On the basis of said Table 4, the Court finds that the 13-year period from 1976 to 1988 inclusive, there was a second fill in ten of said years and that the average second-fill amounted to 19,905 acre feet, and the greatest second fill was in excess of 40,000 acre feet (in 1980). The testimony of Mrs. Gross also established that a second fill has occurred even if one uses a January 1 or April 1 administration date for the Reservoir. Exhibit 60 demonstrates that a second fill of 34,400 acre feet occurred in 1979 using a January 1 administration date, and Exhibit 61 shows 24,500 acre feet of refill in 1979 using an April 1 administration date. The Court also concludes that these figures should be increased by 2,400 acre feet to account for reservoir evaporation. Evaporation is to be charged to the first fill (to be consistent with paragraph 4 of the 1975 Agreement), in order to determine the extent to which undecreed second fillings have occurred.

43. The foregoing analysis of the second filling of Taylor Park Reservoir is based only on physical accruals to storage during a 12-month period. Given the fact that operations under the 1975 Agreement result in bypasses of water which would otherwise be available in priority, these bypasses must also be charged against the 1904 first filling priority. This is consistent with the Bureau's accounting of reservoir operations (see: Exhibit 382) which tabulates both water in storage in Taylor Park Reservoir and water bypassed and credited to the UUVWUA account in the Aspinall Unit. Exhibit 382 establishes that at least the 44,700 acre feet claimed as absolute by the Gunnison District in Case No. 86-CW-203 was stored under a second fill of Taylor Park Reservoir using either an April 1 or November 1 administration date during many years since 1975. For example, a balance of 90,180 acre feet was carried forward in the total UUVWUA account on April 1, 1980 (using the end of March figure in line 17). Total UUVWUA water, including bypasses under the 1975 Agreement and net storage accretions, increased to 106,230 acre feet by May 30 (line 17 for May). Between May 30 and June 30, 1980, an additional 52,090 acre feet¹ was stored in Taylor Park Reservoir, for a total of 158,320 acre feet charged to the UUVWUA water right. This exceeded the decreed volume of 111,260 acre feet by 47,060 acre feet, which is attributable to a second filling.

44. The fact that the Bureau subsequently cancelled UUVWUA credits in the Aspinall Unit does not affect the accounting of water which should be charged to the original 1904 priority. See paragraph 30 above. Moreover, those credits would not have been cancelled under Paragraph 4

¹ 52,090 ac/ft = 220 ac/ft (increase of line 1 for June over line 17 for May) plus 51,870 ac/ft (line 15 for June). [page 101189/Exhibit 382]

of the 1975 Agreement had the second filling been recognized, since the water stored during June was not "UVWUA water" within the terms of that Agreement. The same result is reached using a November 1, 1979, administration date, which is the annual low point of "total UVWUA water" in line 17 of the exchange accounting. On October 31, 1979, 71,700 acre feet of water existed in the account. Total UVWUA water increased to 106,230 acre feet by May 30. Again, an additional 52,090 acre feet were stored in the reservoir in the month of June, 1980. [See: footnote 1 on page 13 of this Decree.]

Authorization and Control

45. This Court previously addressed the issues of authorization and standing for the Gunnison District to make application for the water rights sought in cases 86-CW-202 and 86-CW-203. These issues were considered in the Court's Order of June 11, 1990, which addressed motions filed by Aurora and Arapahoe. In said Order, the Court concluded that the Gunnison District has standing to apply for the subject rights as an agent for the United States. Having now fully considered this issue, the Court concludes that it was wrong to base standing on an agency theory. Rather, the correct finding is that under the provisions of the 1975 Agreement, the United States authorized the District to appropriate water and to utilize its Reservoir for various beneficial purposes contemplated by said Agreement.

46. This Court in its order of June 11, 1990, concluded that the Gunnison District's filing in Case No. 86-CW-202 was not a true application for change of water right because it did not seek the benefit of the early priority date of the original irrigation decree for the new uses of fishery and recreation which it sought to add to said decree. Nevertheless, the Court concluded in said order that under the peculiar circumstances of this case, it is reasonable to require that Gunnison District as the applicant for the water rights (in 86-CW-202) either be the owner of the subject rights or an agent for the owner of said rights. The Court no longer recognizes agency as a proper relationship in this regard [see paragraph 45 above], but it does accept the premise that one who is not the owner of a given water right may still seek to add new beneficial uses to said right if he has authority to do so from the owner of the right. In this case, the Gunnison District does not own the 1904 irrigation decree to which it seeks to add the beneficial uses of fishery and recreation, and its authority to do so depends upon its contractual rights under the 1975 Agreement. Based upon its reading of said Agreement, and the evidence presented in Case No. 86-CW-202, the Court concludes that the Gunnison District had no authority, either expressed or implied, to seek to add said beneficial uses to the 1904 irrigation decree of the United States and the UVWUA. The District's only authority was to make application for a water right which pertained to the "surplus flows of the Taylor River above the Taylor Park Reservoir". The Court concludes that the parties to the 1975 Agreement intended the words "surplus flows" to refer to unappropriated water in the Taylor River. However, the 1904 irrigation decree for the Taylor Park Reservoir by definition identifies previously appropriated water. Thus, the Court finds and concludes that the application of the Gunnison District in Case No. 86-CW-202 must be denied and dismissed because it was not authorized by the owner(s) of the water right to which the new uses were to be added.

47. The Court further finds and concludes from the evidence presented that while the Gunnison District does not have authority to pursue a water right in Case No. 86-CW-202, the District nevertheless has contract rights under the 1975 Agreement to enforce releases from the Taylor Park Reservoir in a manner which will accomplish the purposes and objectives of the Agreement. Conversely, the UUVWUA and the United States (to the extent it is subject to the laws of contract of the state of Colorado) have contractual duties to comply with the terms of said Agreement for the life of said Agreement. The Court concludes that these rights and duties may be enforced without injury to other water users, senior or junior, because the fishery and recreational purposes to be advanced through the contract are non-consumptive and are based upon releases of water which is stored and/or credited to the storage rights of the UUVWUA under its existing 1904 irrigation decree. Said decree represents appropriated water which the UUVWUA is entitled to use and manage until the same has been used for its ultimate irrigation purposes. In this regard, the Court concludes that the UUVWUA and the United States have authority, pursuant to §37-82-102 (4), CRS 15, to utilize the Taylor River and the Gunnison River as natural streams to conduct the water stored under the 1904 irrigation decree to a new point of storage (and ultimate diversion) so long as no material injury results to the prior or subsequent rights which other users have in said natural streams. While diverted water remains under the control of the owner of the water right which authorized its diversion, said owner has the possessory interest and right to said water. Implicit in this right, is the right of the owner to control and authorize the use of said water for non-consumptive purposes (while it is conducted downstream) until he takes it out of the natural stream again. In essence this procedure (as opposed to the District's failed application in 86-CW-202) actually describes and explains what the parties sought to accomplish, and in fact did accomplish under their 1975 Agreement. In short, then the use of the 1904 irrigation decree water for fishery and recreational purposes is not a water right to be adjudicated upon the application of the Gunnison District, but rather is a contract right governed by the terms and provisions of the 1975 Agreement. This Court recognizes that the Gunnison District, as a party to said Agreement, has the right to enforce the same on behalf of the persons who have relied upon the benefits conferred by said Agreement.

48. As indicated above, authorization of the United States (as the legal owner) and the UUVWUA (as an equitable owner) is required in order to utilize Taylor Park Reservoir as a point of diversion or storage for appropriative water rights. The Gunnison District was authorized to make the appropriation for a second filling of the Reservoir as it did in case 86-CW-203. The District was not authorized to act as the agent of the United States in adjudicating water rights, including appropriative rights of exchange, which are the property of the United States and of the UUVWUA. Rather, the Gunnison District was authorized to appropriate water for its own purposes under separate water rights, including specifically the rights applied for in 86-CW-203, which seek decrees with respect to surplus flows in the Taylor River above the Reservoir. Nothing in this judgment is intended to affect or in any way compromise any water rights, including appropriative rights of exchange, in which any other parties to the 1975 Agreement claim an interest by virtue of the coordinated operation of Taylor Park Reservoir and the Aspinall Unit.

49. In taking action to properly appropriate the water rights claimed in case 86-CW-203, the Gunnison District did not make its decision by formal resolution in a public meeting of the Board of Directors as would have been the most desirable procedure. However, the Court finds that this failure is not fatal to the District's efforts to file a proper application for water rights in 86-CW-203. In this regard, the Court incorporates its findings and conclusions in its June 11, 1990, Order under the heading "B. Lack of Authority" on page 7 thereof. In short, the court continues to find and conclude that a formal resolution is not a prerequisite to the proper filing of an application for water rights, although such a document can be very helpful in demonstrating "intent" and "formal approval" of action which must be established in much more cumbersome ways if no resolution is adopted.

50. Based upon the evidence of the minutes of the Board of Directors for the Gunnison District subsequent to the filing of the applications in 86-CW-202 and 86-CW-203 on December 30, 1986, and based upon the testimony of the District's president, Mr. Trampe, and its attorney, L. Richard Bratton and based upon reasonable inferences drawn from said evidence, the Court concludes that the District's Board actually had the intent to authorize and approve said filings. Further, the Court is satisfied that even if the filings were done without official approval of the Board at the time of filing, nevertheless said action was not ultra vires, and thus the Board's subsequent ratification of the filing as demonstrated by Exhibits 100 through 110 (minutes of the Board's meetings wherein the water filings were considered) and through the April 16, 1990, Agreement (Exhibit 94) was effective to authorize the filings. See: McQuillin, The Law of Municipal Corporations, 3rd Ed., §13-47. In addition, the District has actual statutory authority to appropriate water for use within the boundaries of the district, and it exercised said authority in case 86-CW-203. See: §37-45-118(1)(j), CRS 15, as amended in 1977 (1989 Cum. Supp.).

51. With respect to the issue of "control" of the stored "second fill" water after it was released from the Reservoir, the Court now finds and concludes that the District and other parties to the 1975 Agreement in aid of the District (all acting together for the purposes of carrying out the Agreement's objectives), exercised sufficient control of the released water so as to satisfy the requisites for proper appropriation of the water and its application to the beneficial uses contemplated by the 1975 Agreement: fishery, recreation, flood control and irrigation. In point of fact, the District and the other parties used the Taylor River and the Gunnison River (as natural streams) to deliver water to Blue Mesa Reservoir. On the way to the Aspinall Unit, the water accomplished the very purposes for which it was appropriated: benefitting downstream irrigators, fisheries, landowners, and recreational users, all as previously found in paragraph 20 of this Judgment. See: §37-87-102(4); and by analogy: §37-82-106(2) with respect to developed water. Nothing can establish control more effectively than accomplishing the intended purposes. The notice provided to the Division Engineer of the 1972 and 1975 Agreements satisfied any requirement for notice of reservoir releases in view of the total absence of administration of water rights on the Taylor and Gunnison Rivers, the practices in Water Division No. 4, and the fact that the Gunnison District rights had not yet been adjudicated.

Terms and Conditions to Prevent Injury

52. The accounting conditions proposed by the Gunnison District (Exhibit 112 with certain modifications to account for the Court's denial of the application in 86-CW-202) together with the April 16, 1990, supplement to the 1975 Agreement, are adequate to prevent material injury to other vested water rights and decreed conditional water rights. [Said "Accounting Conditions" are attached to this Decree as Schedule A, and incorporated herein by this reference.] These provisions are consistent with the 1975 Agreement. The interests of the UVWUA will be fully protected by these provisions, since its full entitlement to a supplemental source of irrigation water will be provided either from Taylor Park Reservoir or from the Aspinall Unit under the Bureau's exchange. All water stored in Taylor Park Reservoir for the benefit of the Gunnison District will either be credited to the UVWUA account in the Aspinall Unit when it is released under the 1975 Agreement or will revert to the ownership of the United States for the benefit of the UVWUA at the year-end administration date provided in the 1990 supplemental agreement.

53. Further the United States and the UVWUA are both protected by the original language in paragraph 8 of the 1975 Agreement which provides that any use the Gunnison District makes of the Taylor Park Reservoir is subject to the proviso that such use must accommodate "all other purposes herein and the original purposes of said reservoir."

54. The Opposers urge that the conditional water rights decreed in Cases Nos. 82-CW-340 and 85-CW-96 will suffer injury by reason of operation of the Taylor Park Reservoir in accordance with the requested decrees. The Court finds no basis for this position, and further finds that no such injury will occur in that the water rights decreed in the said two cases are senior to the rights sought herein, and thus said senior rights will be protected through administration.

Additional Issues:

55. The Opposers continue to assert that the Gunnison District failed to demonstrate adequate intent to initiate its requested appropriations. Because the Court has already concluded that the District's application in 86-CW-202 must be dismissed, the Court will address the issues of "intent" and "overt act" for a proper first step only as they relate to Case No. 86-CW-203.

a. The Court finds that the Gunnison District had the intent to make the appropriation in 86-CW-203 as of August 28, 1975, when the 1975 Agreement, which it executed, became effective. This is evident from the minutes of their meetings at which the Agreement was considered, and from the very fact that the Agreement contemplated and designated the District as the agency responsible for making appropriations to implement the Agreement.

b. As found above, the Gunnison District has actually stored about 44,700 acre feet of water under a "second fill" in the Taylor Park Reservoir. Thus, the District is entitled to an absolute decree for said water right. As the Court stated in its June 11, 1990, Order on the Motions of Aurora and Arapahoe, the

District demonstrated the elements for the "first step" in initiating its second fill water right by actually diverting the water and subsequently applying it to the claimed beneficial uses which were contemplated in the 1975 Agreement. Here the act itself, of actually applying water to beneficial use, was sufficient to give notice of the intent which would otherwise have been required to establish a conditional water right. See: Three Bells Ranch v. Cache La Poudre, 758 P.2d 164 (Colo. 1988). Thus, the efforts which were sufficient to entitle the District to an absolute decree for a portion of its claimed water rights, are also adequate to give notice of the intent to appropriate additional water on a conditional basis.

c. In addition however, if the District must demonstrate some "first step" in addition to actually applying a portion of the water to beneficial use, then the elements of the necessary first step were completed at the time of the District's execution of the 1975 Agreement pursuant to a resolution of its Board of Directors and the circumstances leading up to said decision: ie. the numerous public meetings reflected by the exhibits, newspaper publications reflected by the exhibits, and the Environmental Assessment which was published and distributed widely. See: Exhibits 29 and 31. In addition, the knowledge of the general public with respect to these proposed appropriations was acknowledged by letters to the Bureau in response to the circulation of the Environmental Assessment. Exhibits 32-40.

56. The Opposers have argued that the appropriations were not valid because they were made for the illegal purpose of thwarting a transmountain diversion. This defense is without merit. The facts clearly illustrate that the Gunnison District intended to make appropriations for beneficial uses under Colorado law -- at least to the extent recognized by the previous findings and conclusions herein. Such intent is all that is required, even though an incidental result of the action taken is to preclude another potential water user from appropriating the same water for some other purpose.

JUDGMENT AND DECREE

IT IS DECREED THAT:

57. The foregoing Findings of Fact and Conclusions of Law are fully incorporated herein.

58. The Court hereby denies and dismisses the Gunnison District's application for water rights in Case No. 86-CW-202 for the reasons stated in its Findings and Conclusions (including particularly paragraphs numbered 46 and 47).

59. The Applicant is hereby granted a decree in Case No. 86-CW-203 for the refill of Taylor Park Reservoir, as follows:

a. The date of appropriation is August 28, 1975.

b. The total amount of such refill right is 106,230 acre feet.

c. While the water is impounded in Taylor Park Reservoir, it shall be used for recreational purposes, including fishery and wildlife.

d. 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.

e. Of the total refill right for 106,230 acre feet, the Court declares 44,700 acre feet to be adjudicated absolute under this Decree, and the remaining 61,530 acre feet is hereby decreed to be conditional for the same aforesaid uses and purposes.

f. The Court further declares that of said refill right for 106,230 acre feet, 19,200 acre feet shall have the additional use for increased and supplemental irrigation within the Gunnison District, and of said 19,200 acre feet, 13,777 acre feet shall be awarded an absolute decree (as part of the 44,700 acre feet previously declared absolute above), and the remaining 5,423 acre feet shall be awarded a conditional decree (as part of the 61,530 acre feet previously declared conditional above).

60. The location of the dam of Taylor Park Reservoir, pertinent to each decree set forth above, is as follows:

The dam is located in the N 1/2, Section 24, Township 14 South, Range 83 West, 6th P.M. The initial point of survey of the Reservoir created by the dam is at a point whence the N 1/4 corner of Section 8, T 14 S, R 82 W, 6th P.M. bears N 39 13' E, 15,911.5 feet.

61. The source of supply for the water rights decreed herein is the Taylor River and its tributaries.

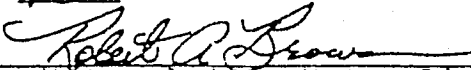
62. The administration date for the Reservoir shall be November 1 of each year and the accounting to be performed with respect to the decrees awarded herein shall generally be in accord with the principles attached hereto and incorporated herein by reference.

63. If Applicant desires to maintain any conditional decree awarded herein, an Application for a Finding of Reasonable Diligence shall be filed in September, 1996, or a showing made on or before such date that the conditional water right has become an absolute water right by reason of the completion of the appropriation and application to beneficial use.

64. Any priority herein awarded shall be junior to all priorities awarded prior to 1986. As between all water rights adjudicated in the year 1986, priority shall be determined by the historical dates of appropriation.

DONE BY THE COURT, This 18th day of September, 1990.

cc: all pro se parties
and counsel of record


Water Judge, Water Division #4

SCHEDULE "A"
(Attachment to Decree in 86-CW-203)

ACCOUNTING CONDITIONS

1. The administration and accounting of the water storage rights sought by Upper Gunnison River Water Conservancy District in Case No. 86-CW-203 shall be done on the basis of a water year that begins on November 1 and extends through the following October 31.

2. The rates and patterns of release of water from Taylor Park Reservoir shall continue to be made to accomplish fishery and recreational purposes and other purposes of the Storage Exchange Agreement as provided in the August 28, 1975, and April 16, 1990, contracts, it being expressly understood that this provision for the continued release of water attributable to the 1904 irrigation water right in the Taylor Park Reservoir shall be pursuant to the aforementioned contracts, and the continued release of water attributable to the refill right granted to the Upper Gunnison River Water Conservancy District shall be pursuant to the terms of this Court's Decree in Case No. 86-CW-203.

3. Water in storage in Taylor Park Reservoir and accumulated credits in Blue Mesa Reservoir at the end of any water year shall be charged against the one annual fill of the UVWUA water storage right in the next water year.

4. The first water flowing into Taylor Park Reservoir during the water year, which water is available under the priority of the UVWUA water storage right, shall be charged against the one annual filling of the UVWUA water storage up to the extent of the one annual filling.

5. The next water flowing into Taylor Park Reservoir during the water year, which water is available under the priority of the Upper Gunnison River Water Conservancy District water storage right sought and approved in Case No. 86-CW-203 for the refilling of Taylor Park Reservoir, shall be charged against the one annual filling of said Gunnison District water storage right up to the extent of the one annual filling.

6. Outflows that occur from Taylor Park Reservoir that exceed patterns set forth in paragraph 22 of the Decree shall not be considered as a release from water stored under either UVWUA or Gunnison District water storage rights.

7. Releases that are made from the Taylor Park Reservoir shall be charged first against the water stored under the UVWUA water storage right and shall be considered as having been used pursuant to UVWUA's obligations, and the Gunnison District's rights, under the 1975 Agreement. Such releases shall establish credits in Blue Mesa Reservoir pursuant to the above-mentioned contracts. In the event that such releases exceed the water stored under the UVWUA water storage right in Taylor Park Reservoir, the deficiency shall be charged against the water stored under the Gunnison District water storage right under Case No. 86-CW-203. Any water belonging to the Gunnison District which is in storage on October 31 shall on that date become part of the UVWUA water storage right in accordance with paragraph 5 of the April 16, 1990 Contract.

SCHEDULE "A" (Page 2)
Accounting Conditions (continued)

8. Water delivered to and diverted into the Gunnison Tunnel from UVWUA storage supplies shall be first charged against the UVWUA credit water in Blue Mesa Reservoir.

9. 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. These releases will be charged against the water stored under the Gunnison District water storage right in paragraph 5, above, and shall be limited to not more than 19,200 acre feet of water in any one water year.

10. The accounting of the UVUWA exchange shall continue to be made consistent with present procedures except as amended and supplemented herein.

11. If, and when, the Division Engineer determines that it is necessary to charge evaporation against the reservoirs in the Gunnison River Basin, the accounting conditions herein shall be modified appropriately to accommodate such evaporation charges by the Gunnison District and Division Engineer for Water Division No. 4.

NOV 13 1990

DISTRICT COURT, WATER DIVISION NO. 4, COLORADO
Case Nos. 86-CW-202 and 86-CW-203

Kay Phillips, Clerk _____

ORDER GRANTING MOTION TO AMEND JUDGMENT

Concerning the Application for Water Rights of:

THE UPPER GUNNISON RIVER WATER CONSERVANCY DISTRICT,
in Gunnison County, Colorado.

This Order addresses the Applicant's Motion to Amend Judgment filed October 3, 1990, following this Court's entry of a final judgment on September 18, 1990. The Objectors: City of Aurora and the County of Arapahoe, timely filed responses opposing the Motion, and no Reply brief was filed by the Applicant. The Court finds and concludes as follows:

In its Motion to Amend, the Applicant seeks modification of paragraph 59(f) of the final judgment, which paragraph quantifies portions of the awarded refill right as either absolute or conditional.

To put paragraph 59(f) in context, reference should be made to paragraph 59(e) of the final judgment by which the Court awarded a total refill right of 106,230 acre feet for recreational uses only, and then recognized 44,700 acre feet thereof to be absolute, and 61,530 acre feet to be conditional. The Court then went on in paragraph 59(f) to recognize the additional beneficial use of irrigation for 19,200 acre feet of the total refill right, and declared that 13,777 acre feet of the refill right was entitled to an absolute decree because that quantity of water had actually been applied to the beneficial use of irrigation. The Court also specified that said 13,777 acre feet was included in (as opposed to being in addition to) the absolute decree for 44,700 acre feet of the refill right.

Having previously declared 13,777 acre feet of the water absolute for irrigation use, the Court then decreed that the balance of the 19,200 acre feet (ie. 5,423 acre feet) for irrigation purposes were entitled to a conditional decree rather than an absolute decree because they had not actually been applied to the beneficial use of irrigation. The Court then identified this balance of 5,423 acre feet for irrigation use as part of the 61,530 acre-foot portion of the refill right which had been awarded a conditional decree, and it is this aspect of the judgment which the Applicant seeks to amend.

By its Motion to Amend, the Applicant asks that the final judgment be amended to state: "... of said 19,200 acre feet, 13,777 acre feet shall be awarded an absolute decree and the remaining 5,423 acre feet shall be awarded as a decreed conditional use, all as part of the 44,700 acre feet previously declared absolute above." [Emphasis supplied] For reasons stated below, the Court agrees that the relief requested should be granted.

Under the Court's final Judgment (of September 18, 1990), 30,923 acre feet (ie. 44,700 minus 13,777) have been decreed absolute for recreational use only, and the Applicant seeks authority to utilize a portion (up to 5,423 acre feet) of said 30,923 acre feet for the additional use of irrigation. As the Court's final judgment presently stands, the applicant cannot obtain an absolute decree for the balance of the irrigation use (for 5,423 acre feet) unless and until it actually diverts additional water (up to 5,423 acre feet) over and above the 44,700 acre feet already awarded an absolute decree, and then applies said additional water to irrigation uses. This result was not intended by the Court. Rather, except to the extent of 13,777 acre feet of the refill right which have already been decreed absolute for irrigation purposes, the Applicant should have the right to utilize any portion of the 106,230 acre-foot refill right decreed for only recreational uses (whether absolute or conditional), for the additional use of supplemental irrigation up to a total of 19,200 acre feet. Thus the Court concludes that the Applicant's Motion to Amend should be granted, although the Court will adopt language somewhat different from that proposed by the Applicant.

WHEREFORE, IT IS THE ORDER OF THE COURT:

1. Paragraph 59(f) of this Court's Findings, Conclusions and Judgment entered in case 86-CW-203 on September 18, 1990, is hereby amended to read as follows:

"f. The Court further declares that of said refill right for 106,230 acre feet of water for recreational uses as stated above, 19,200 acre feet shall have the additional use for increased and supplemental irrigation within the Gunnison District. Of said 19,200 acre feet, 13,777 acre feet are hereby awarded an absolute decree for the additional use of irrigation, (as part of the 44,700 acre feet previously declared absolute above), and the remaining 5,423 acre feet of water are hereby awarded a conditional decree for the additional use of irrigation. To the extent any portion of the refill right for 106,230 acre feet, not already awarded an absolute decree for the additional use of irrigation, is applied to the beneficial use of irrigation, the quantity of water so applied shall be entitled to an absolute decree for said irrigation use, provided however, that the total diversion for irrigation purposes shall not exceed 19,200 acre feet.

2. Except to the extent expressly amended by this Order, the findings, conclusions and decree of the Court in its Judgment of September 18, 1990, in cases 86-CW-202 and 86-CW-203 shall remain in full force and effect.

DONE BY THE COURT, This 13th day of November, 1990.

cc: Williams
Dingess
Hillhouse
Zilis
White
Sims



Water Judge