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DISTRICT COURT,
WATER DIVISION 4, COLORADO
1200 N. Grand Avenue, Bin A
Montrose, CO 81401

**CONCERNING THE APPLICATION FOR
WATER RIGHTS OF THE
UPPER GUNNISON RIVER
WATER CONSERVANCY DISTRICT**

in Hinsdale County.

▲ COURT USE ONLY ▲

Case Number: 03CW108

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECREE**

This matter comes before the Court upon the amended application of the Upper Gunnison River Water Conservancy District (Upper Gunnison District or District) for a storage water right and approval of a plan for augmentation including exchange. The Court, 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 Application was filed by the Upper Gunnison District on April 30, 2003. An Amended Application was filed by the District on December 10, 2008.

2. Statements of opposition were timely filed by the United States of America - Bureau of Land Management (BLM), the Colorado Water Conservation Board (CWCB), Trout Unlimited and Carolyn Kates. The District entered into a stipulation with the Estess Family Limited Partnership and Cockrell Investment Partners, L.P. in lieu of entry in the case by those parties. That stipulation is reflected in paragraphs 7(c)ii, 7(c)iii, 52, 54, and 55 of this Decree. Daniel L. Plies' Motion to Intervene was denied on June 23, 2010. No other person or entity sought to intervene. The time for filing statements of opposition and motions to intervene has expired.

3. The CWCB filed its Statement of Opposition to protect the natural lake level water right decreed to Lake San Cristobal in Case No. W-3366, Water Division No. 4, to protect the natural environment to a reasonable degree.

4. On October 12, 2010, the Water Referee approved Findings of Fact, Conclusions of Law, Ruling of the Referee and Decree that was filed pursuant to stipulations with, or consent by, the Opposers identified in paragraph .2 above.

5. On October 29, 2010, Daniel L. Plies filed a Protest to Ruling of the Referee and the matter is now before this Court.

6. The State Engineer filed a Motion to Intervene which was granted by the Court on December 20, 2010.

7. In the Amended Application, the District seeks:

(a) A conditional water storage right for 950 acre-feet with an appropriation date of April 28, 2003, to store in priority flows of the Lake Fork of the Gunnison River in Lake San Cristobal after construction of an outlet structure by the Enterprise described in paragraph 13, to be used for domestic, municipal, commercial, industrial to include mining, milling and reclamation, irrigation, recreation, and fishery and wildlife habitat within the Upper Gunnison River Water Conservancy District directly or by augmentation or exchange;

(b) A conditional water storage right for 950 acre-feet with an appropriation date of December 10, 2008 to store in priority flows of the Lake Fork of the Gunnison River for a second filling of Lake San Cristobal, to be used for domestic, municipal, commercial, industrial to include mining, milling and reclamation, irrigation, recreation, and fishery and wildlife habitat within the Upper Gunnison River Water Conservancy District directly or by augmentation or exchange;

(c) Approval of a plan for augmentation to augment out-of-priority depletions by wells, surface diversions and ponds in the Lake Fork and Gunnison River basins and the basins of tributaries thereof within the boundaries of the District by providing a substitute supply of water either directly or by exchange.

i. Out-of-priority depletions in the reach of the Lake Fork of the Gunnison River downstream from Lake San Cristobal can be augmented directly under the proposed plan.

ii. Out-of-priority depletions in the reach of the Lake Fork of the Gunnison River upstream from Lake San Cristobal can be augmented under the proposed plan by exchange. The District seeks approval of a conditional appropriative right of exchange for this exchange with a priority date of

December 10, 2008. The lower terminus of the exchange reach is the outlet of Lake San Cristobal; the upper terminus of the exchange reach is the depletions on the Lake Fork of the Gunnison River upstream from Lake San Cristobal. The rate of exchange claimed is four cubic feet per second.

iii. Out-of-priority depletions in the reach of the Gunnison River and its tributaries downstream of the structures listed in the table below or the lower terminus of the instream flow water rights listed in the table below can be augmented under the proposed plan by exchange. The exchange described in this paragraph 7(c)iii cannot operate on the tributaries of the Gunnison River upstream of the listed structures or the lower terminus of listed instream flow reaches because water rights decreed to those structures or reaches can exercise a local call that would interrupt the exchange. Attached *EXHIBIT A* shows the locations of the points of diversion of the local calling rights and lists a legal description for the points of diversion. The map is for guidance only, and is subject to change by the Division Engineer in accordance with Colorado law. The District seeks approval of a conditional appropriative right of exchange for the exchange with a priority date of December 10, 2008. The lower terminus of the exchange reaches is the confluence of the Lake Fork of the Gunnison River and Blue Mesa Reservoir; the upper termini of the exchange reaches are the depletion locations on the Gunnison River and its tributaries below the local call points identified on *EXHIBIT A* and in the following table. The rate of exchange claimed is four cubic feet per second.

Stream Name	Local Calling Right
Tomichi Creek	Biebel Ditches No.1 and No.2
Stubbs Gulch	Graham Ditch
Powderhorn Creek	Schecker Ditch
Trout Creek	Johnson Ditch
Ohio Creek	CWCB Instream Flow
East River	East River No. 2 Ditch
Slate River	CWCB Instream Flow
Antelope Creek	Hamor Ditch

8. The reaches described above are within the boundaries of the District.

9. The operation and administration by the Division Engineer, Water Division No. 4 (Division Engineer) of the exchanges described in paragraph 7(c) above constitute an appropriative right subject to adjudication in this action in accordance with § 37-80-120(4), C. R. S. (2010).

10. Lake San Cristobal is located in Sections 15, 22 and 27, Township 43 North, Range 4 West, New Mexico Principal Meridian, in Hinsdale County. The left abutment of the proposed outlet structure is located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 15, Township 43 North, Range 4 West, New Mexico Principal Meridian, at a point approximately 2,260 feet east of the west section line and 2,040 feet north of the south section line of Section 15.

11. The proposed outlet structure will be approximately three feet high, approximately 85 feet long, and will be constructed at the location described in paragraph 10, which is the outlet of Lake San Cristobal into the Lake Fork of the Gunnison River.

12. Use of the outlet structure to maintain the lake level at 8,995 feet whenever augmentation releases are not required enhances the recreational, fishery and wildlife habitat uses of the lake, which are vital to Lake City's and Hinsdale County's tourism-based economy.

13. The District proposes to provide augmentation by releases of water stored in Lake San Cristobal under the storage rights described above as and when requests for release of water are made by the Division Engineer to provide replacement water sufficient to replace out-of-priority depletions by structures owned by holders of Augmentation Certificates issued by the Lake San Cristobal Water Activity Enterprise, an enterprise established in 2009 pursuant to § 37-45.1-101, *et seq.*, C.R.S. (2010), by Hinsdale County (Enterprise). The Enterprise is managed by the District, Hinsdale County, and the Town of Lake City pursuant to an Intergovernmental Agreement, and will operate the plan for augmentation approved by this Decree. Accordingly, the District will transfer the rights and obligations of this Decree to the Enterprise; nevertheless, the District will remain obligated to ensure compliance with the terms of this Decree. Augmentation Certificates will be available to owners of wells, surface diversions, ponds and other structures in the Lake Fork and Gunnison River basins and the basins of tributaries thereof within the boundaries of the District, subject to the limitations of paragraph 7(c)(iii).

14. The District's engineering consultants have determined that, taking into account the no call agreement contained in the District's Stipulation with Daniel L. Plies, attached hereto as Exhibit B, the firm annual yield of the water stored under the first filling in this Decree in Lake San Cristobal is sufficient to provide the amounts of water specified in paragraphs 18 and 41(h) below. As used herein, firm annual yield means the quantity of water that can dependably be released from the reservoir in every water year and be sold by the Enterprise as replacement water under this plan for augmentation.

15. The Division Engineer has declared that the Lake Fork and Gunnison River Basins are over-appropriated, thus requiring a plan for augmentation for new well permits and other uses within those basins.

16. The Town of Lake City relies on wells with junior water rights for its municipal water supply. Presently the wells are augmented by exchange using replacement water stored in Blue Mesa Reservoir pursuant to two water service contracts with the Bureau of Reclamation. The CWCB instream flow water rights in the Lake Fork of the Gunnison River downstream from the Town are senior to that exchange and could therefore require curtailment of the Town wells in times of shortage. In addition, the Bureau contracts expire in 19 and 37 years, respectively, with no guarantee of renewal, and permit the Bureau to reduce or terminate water service under certain circumstances. Through participation in the Enterprise and the proposed plan for augmentation, the Town seeks to secure a supply of replacement water to protect its existing wells and provide for future growth of its service area. Participation in the plan for augmentation will permit the Town to cancel the Bureau contracts, resulting in significant reduction in the annual cost of augmenting the Town wells.

17. Hinsdale County and the District seek to provide replacement water for augmentation of new wells and other junior water rights within the over-appropriated Lake Fork and Gunnison River Basins. Currently, the District relies on a water service contract with the Bureau of Reclamation for 500 acre-feet of water stored in Blue Mesa Reservoir utilized by its constituents (including Hinsdale County residents) through third-party contracts for augmentation by exchange. The District has entered into third-party contracts for 206 acre-feet to date. The water service contract expires in 34 years with no guarantee of renewal, and permits the Bureau to reduce or terminate water service under certain circumstances. Replacement water stored in Lake San Cristobal will serve as protection against expiration, interruption or termination of the Blue Mesa contract and to provide for future growth. Furthermore, if current estimates for the outlet structure and related costs are correct, water stored in Lake San Cristobal will be significantly less expensive than Blue Mesa water, and can be offered as an alternative supply to District constituents now relying on a Blue Mesa exchange, subject to the limitations of paragraph 7(c)(iii).

18. Based upon a study of potential future demand for augmentation water in the District, Lake City and Hinsdale County conducted in 2008 and updated in 2011, the current demand for Blue Mesa water for augmentation, and a fifty-year planning horizon, 475 acre-feet is a reasonable estimate of the three entities' anticipated future water needs in the next fifty years sufficient to qualify for the limited governmental entity water supply exception to Colorado's anti-speculation doctrine. Those entities have therefore agreed, as part of the Settlement Agreement with Daniel L. Plies, to limit the sale of augmentation certificates to a total of 475 acre-feet during the first 40 years following the entry of this decree.

19. The Enterprise will sell Augmentation Certificates which will entitle the Certificate holder to have water released from Lake San Cristobal in increments of 0.05 acre-feet (Base Units). The holder of an Augmentation Certificate described in paragraph 37 becomes

entitled to the benefits of the plan for augmentation and will not be required to implement or amend an individual plan for augmentation, but will be subject to the requirements of paragraph 41(g).

Stream Depletions

20. For purposes of this plan for augmentation, “dwelling unit” means a structure or any part of a structure designed for residential purposes having one or more rooms, not more than one kitchen and at least one bathroom, that is intended for long-term occupancy by one or more persons for living and sleeping purposes and that may or may not be placed on a permanent foundation.

21. Based upon the State Engineer’s assumption that daily indoor household use is 350 gallons per day per dwelling unit, the total annual diversion by a well for indoor household use is 0.39205 acre-feet per dwelling unit.

22. If a dwelling unit utilizes a non-evaporative sewage disposal system, the annual consumptive use by the well serving that dwelling unit from indoor household use is ten percent (10%) of the total amount diverted by the well. Therefore, the stream depletion by a well serving a dwelling unit utilizing a non-evaporative sewage disposal system will not exceed 0.0392 acre-feet per year. The depletion occurs at a uniform rate throughout the year.

23. If a dwelling unit is connected to a wastewater treatment facility, the annual consumptive use by the well serving that dwelling unit from indoor household use is five percent (5%) of the total amount diverted by the well. Therefore, the stream depletion by a well serving a dwelling unit connected to a wastewater treatment facility will not exceed 0.0196 acre-feet per year. The depletion occurs at a uniform rate throughout the year.

24. Consumptive use by a well diverting water for lawn irrigation has been determined by the District’s engineering consultants using a modified Blaney-Criddle assessment adjusted for precipitation and temperature conditions in each elevation zone within the District. The calculation of stream depletions from lawn irrigation is contained in Tables 2 and 3 attached hereto.

25. Consumptive use resulting from evaporation from ponds and other water surfaces in each elevation zone within the District has been determined by the District’s engineering consultants. The calculation of stream depletions from evaporation is contained in Table 1 attached hereto.

26. Consumptive use of water diverted for stock watering purposes is assumed to be one hundred percent of diversions and results in stream depletions of eleven gallons per animal watered per day.

27. The consumptive use calculations described in paragraphs 21 through 26 above have been reviewed and approved by the State Engineer. Stream depletions from any other uses authorized to be augmented under this plan for augmentation shall be determined by the Division Engineer on a case-by-case basis consistent with the provisions of paragraph 37(b). Such determinations by the Division Engineer shall be subject to reconsideration by this Court on the question of injury to the vested rights of others pursuant to § 37-92-304(6), C.R.S. (2010).

Transit Loss

28. Transit losses occur in the delivery of water in a natural stream primarily as the result of channel storage, bank storage, evapotranspiration by phreatophytes and evaporation. For purposes of determining the amount of replacement water that must be released from Lake San Cristobal in order to replace depletions to the stream at the point of depletion, the transit losses associated with the incremental increase in the natural flow of the stream caused by reservoir releases must be included.

29. Based on the analysis by the District's engineering consultants, and after consultation with the Division Engineer and review of a number of relevant studies, the District and the Division Engineer concur that a reasonable and conservative transit loss assessment for releases from Lake San Cristobal is 0.1% (0.001) of the reservoir release for each mile of distance from the reservoir to the point of depletion.

30. The Court concludes that the transit loss assessment described in paragraph 29 accurately estimates the transit losses associated with releases from Lake San Cristobal under this plan for augmentation; however, upon proof that such transit loss rate is incorrect, the rate is subject to modification by the Division Engineer to a rate proven to be accurate.

Mitigation of Injury to CWCB Water Right

31. The CWCB holds a water right decreed to Lake San Cristobal by this Court in Case No. W-3366 with an appropriation date of May 12, 1976 (the NLL Right). The Amended Decree in that case provides that the elevation of the natural water surface is approximately 8,995 feet above sea level and awards a water right "To maintain such lake level and volume as are required to preserve the natural environment to a reasonable degree" pursuant to § 37-92-102(3), C.R.S. (2010).

32. Installation of the proposed outlet structure will permit the Enterprise to control the lake surface level between 8,992 feet and 8,995 feet, representing a volume of approximately 950 acre-feet, the volume of water sought to be appropriated for certain of the uses claimed in this case. Specifically, reservoir operations may lower the surface level below the CWCB's decreed elevation of 8,995 feet during periods when augmentation releases are required to be made from the reservoir.

33. The District and the CWCB have reached a settlement regarding the injury to the CWCB water right pursuant to Rule 8i(3) of the *Rules Concerning the Colorado Instream Flow and Natural Lake Level Program* (IWM Rule) under the terms of which the District will provide mitigation that enables the CWCB to accept the impact to its water right while continuing to preserve the natural environment to a reasonable degree.

34. The mitigation consists of:

(a) Utilizing the outlet structure during most years to improve maintenance of a constant lake surface level at the decreed natural lake level of 8,995 feet where it has historically fluctuated;

(b) Utilizing the outlet structure to store water to provide replacement water for out-of-priority diversions on the Lake Fork of the Gunnison River, and to release water from the impoundment of the outlet structure that will supplement CWCB instream flow water rights in the Lake Fork of the Gunnison River downstream from Lake San Cristobal (these instream flow rights are entitled to call the river when flows fall below their decreed rates, but without the impoundment there would be little or no replacement water available);

(c) Dedicating 200 acre-feet of water stored in priority in Lake San Cristobal under the storage rights decreed herein for use as directed by the CWCB, in its discretion, to preserve the natural environment to a reasonable degree under its water rights decreed in Case Nos. 80CW097 and 80CW119. Notwithstanding any other provision of this decree, this 200 acre-feet of water will be released solely on such terms and according to a schedule as directed by the CWCB in consultation with the Colorado Division of Parks and Wildlife.

35. The settlement with the CWCB includes the following terms and conditions:

(a) The Enterprise will not store water in Lake San Cristobal under this Decree until the outlet structure is in place and fully operational, and the dedication required by paragraph 34(c) above has been delivered to the CWCB, thus providing the agreed-upon mitigation measures.

(b) The outlet structure must be maintained permanently as a condition of making releases from Lake San Cristobal.

(c) CWCB staff and Colorado Division of Parks and Wildlife staff shall have access to the outlet structure and the Reservoir at all times for the purpose of inspecting the structure and, if necessary, to perform biological lake monitoring; provided, however, that the Enterprise shall receive written notice of the date and time of any such inspection or testing at least fourteen days prior to the date of

inspection or testing and shall be provided with the results of the testing and a copy of any report prepared as a result of such inspection or testing.

(d) If the Enterprise ceases to utilize the outlet structure when hydrologic conditions permit to improve maintenance of a constant lake surface level at the decreed natural lake level of 8,995 feet, or ceases in dry years to release water from the impoundment that supplements CWCB instream flow water rights in the Lake Fork of the Gunnison River downstream from Lake San Cristobal, all in accordance with this Decree, the CWCB will no longer accept the injury to the NLL Right. In such case, if the CWCB places a call for the natural lake level water right, the CWCB will notify the Division Engineer this provision of this Decree is now in effect and that the CWCB is not accepting the injury.

(e) All water released from Lake San Cristobal for the benefit of the CWCB pursuant to the injury with mitigation agreement described in paragraph 34 shall be available for diversion, for power generation only, by the Crooke's Falls Flume hydroelectric facility located on the Lake Fork of the Gunnison River in Hinsdale County, Colorado; provided, however, that at those specific times when: (1) such releases are necessary and are being made to satisfy the CWCB's instream flow decreed in Case No. 80CW097, and (2) such instream flow right is lawfully calling for water, and (3) the District and Enterprise are in compliance with their stipulation with Daniel L. Plies in this case, then the Crooke's Falls Flume may divert the amount of such releases that is needed to satisfy such instream flow right only if the location of the facility's discharge of hydropower return flows to the Lake Fork has not been moved downstream from its location on the date of this Decree.

(f) This court shall retain jurisdiction indefinitely to enforce the terms of the settlement with the CWCB as a water matter.

36. The injury with mitigation agreement incorporated in this Decree shall not otherwise interfere with the regular administration of the NLL Right, or the water rights decreed herein, in priority consistent with Colorado water law. The water rights decreed herein shall be administered in priority against all other water rights. The injury with mitigation settlement incorporated in this Decree shall not result in the CWCB subordinating the NLL Right to any other water rights that are junior to that water right. The CWCB is allowing the District and the Enterprise to cause impact to the NLL Right as specified in this Decree only because the proposed mitigation will enable the CWCB to continue to preserve the natural environment to a reasonable degree.

Augmentation Certificates

37. Water users with wells or other structures located in the Lake Fork of the Gunnison River basin, or the Gunnison River basin upstream from Blue Mesa Reservoir, who

wish to be included in the District's plan for augmentation may purchase one or more of the following Augmentation Certificates.

(a) Class A Augmentation Certificate. This certificate entitles the owner to the release from Lake San Cristobal of 0.05 acre-feet of water (one Base Unit) per year when such releases are ordered by the Division Engineer to protect vested water rights or decreed conditional water rights from injury. A Class A Augmentation Certificate will provide sufficient replacement water, including transit loss at least as far as Blue Mesa Reservoir, to augment the annual depletions from in-house use only for a single dwelling unit that utilizes a non-evaporative sewage disposal system.

(b) Class B Augmentation Certificate. This certificate entitles the owner to the release from Lake San Cristobal of sufficient water to replace depletions from diversions for domestic, municipal and industrial uses, pond evaporation, lawn irrigation and livestock watering when such releases are ordered by the Division Engineer to protect vested water rights or decreed conditional water rights from injury. The required amount of replacement water shall be determined by the Division Engineer, in increments of 0.05 acre-feet of water (Base Units) per year, on a case-by-case basis. Diversions for drinking and sanitary uses other than in single dwelling units are to be estimated based on the table attached as *APPENDIX A*. Consumptive use of such diversions is ten percent for individual non-evaporative sewage disposal systems and five percent for central wastewater treatment systems that discharge effluent within the drainage of diversion. Pond evaporation is to be determined using the table attached as Table 1. The amount of consumptive use from lawn irrigation shall be determined using the tables attached as Tables 2 and 3. Consumptive use by livestock is eleven gallons per animal per day.

38. Water users with wells or other structures located in the Lake Fork of the Gunnison River basin, or the Gunnison River basin upstream from Blue Mesa Reservoir, who wish to acquire replacement water for use in a plan for augmentation other than the District's plan may apply for purchase of a Class C Augmentation Certificate. Said purchase shall be subject to review and approval by the Enterprise Board of Directors. This certificate will entitle the owner to the release from Lake San Cristobal of 0.05 acre-feet of water per Base Unit purchased per year when such releases are ordered by the Division Engineer to protect vested water rights or decreed conditional water rights from injury.

39. The terms and conditions which apply to the ownership and use of the Augmentation Certificates are set out in an *Agreement For Purchase of Augmentation Certificate Providing for Water Service From Lake San Cristobal* which must be entered into between the purchaser of an Augmentation Certificate and the Enterprise, and which may be amended by the Enterprise in its discretion. The Enterprise will maintain records of Augmentation Certificates issued in sufficient detail to enable the Division Engineer to determine the total annual augmentation requirements for all structures participating in this plan for augmentation. The Enterprise will provide annual reports of changes to the Division Engineer.

40. The Water Commissioner will require the Enterprise to make releases from Lake San Cristobal pursuant to this Decree for all structures participating in the District's plan for augmentation when such releases are necessary to protect vested water rights or decreed conditional water rights from injury by out-of-priority depletions by participating structures.

TERMS AND CONDITIONS TO PREVENT INJURY

41. The following terms and conditions will prevent injury to vested water rights and decreed conditional water rights and are applicable to approval of the plan for augmentation sought in this case:

- (a) Transit losses are assessed on releases in accordance with paragraph 29;
- (b) An accounting of reservoir operation is maintained by the Enterprise;
- (c) The augmentation requirements of each structure served by the plan decreed herein are calculated in accordance with the provisions of paragraphs 21 through 26.
- (d) The Enterprise operates and maintains measuring devices that record storage and releases from Lake San Cristobal under the storage rights and the plan for augmentation decreed herein;
- (e) The exchanges described in paragraph 7(c) shall be operated only at such times as there are flows in the respective reaches of the exchange sufficient to satisfy all decreed priorities (including exchanges) within the exchange reach which are senior to the structures served by the plan decreed herein seeking to divert out-of-priority. Further, the exchange will be operated only at such times when there is a live flow of water in the stream within the exchange reach.
- (f) The Enterprise shall not include in this plan for augmentation any structures on the listed tributaries upstream of the point of diversion of the local calling rights identified in paragraph 7(c)iii.
- (g) Prior to issuance of an Augmentation Certificate where the applicant therefor proposes to augment by exchange, the applicant for the Augmentation Certificate shall provide the Division Engineer with sufficient details about the proposed exchange to enable the Division of Water Resources to determine whether an exchange can be made without impairing the availability of water lawfully divertible by others pursuant to § 37-80-120(4) C.R.S. (2010) or impairing decreed instream flow water rights. Paragraph 42 below describes additional requirements for applications for structures located within or upstream of a senior decreed CWCB instream flow water right. At the time of submission to the Division Engineer, the

applicant shall provide notice of the application for an Augmentation Certificate by publication in the Water Resume for Water Division No. 4. Such notice shall state that any affected person may provide written comments regarding the application to the Division Engineer within thirty days after the date of publication. The Division of Water Resources shall not conclude its evaluation until after the expiration of thirty days from the date of publication of the resume.

(h) In accordance with the Stipulation between the District, the Enterprise, and Daniel L. Plies on file with this Court, the Enterprise shall not issue augmentation certificates that total more than 475 acre-feet during the first 40 years following the entry of this decree. The Enterprise shall have the right after such 40-year period to submit evidence to this Court, and to the owner of Crooke's Falls Flume hydroelectric facilities, that the Enterprise has a reasonable non-speculative need to issue augmentation certificates for more than 475 acre- feet, and upon establishing such need, augmentation certificates may be increased up to such demonstrated additional need, but not to exceed a total of 700 acre feet.

(i) All water released from storage in Lake San Cristobal by the District or Enterprise will be available for diversion, for power generation only, by the Crooke's Falls Flume hydroelectric facility located on the Lake Fork of the Gunnison River in Hinsdale County, Colorado; provided, however, that at those specific times when: (1) such releases are necessary and are being made to replace out of priority depletions by the holders of Lake San Cristobal augmentation certificates who are junior to the CWCB's instream flow decreed in Case No. 80CW097 and upstream of Crooke's Falls Flume, and (2) such instream flow right is lawfully calling for water, and (3) the District and Enterprise are in compliance with their stipulation with Daniel L. Plies in this case, then the Crooke's Falls Flume may divert the amount of such releases that is needed to satisfy such instream flow right only if the location of the facility's discharge of hydropower return flows to the Lake Fork has not been moved downstream from its location on the date of this Decree.

(j) At times that the Crooke's Falls Flume hydroelectric facility is in operation, releases of water from Lake San Cristobal stored pursuant to the storage right decreed in this case will be aggregated and made during the morning and evening peak power rate hours, as specified by Plies, or the then owner of the hydroelectric facility on an annual basis, unless such manner of operation is prohibited by Water Court decree or the State or Division Engineers. Plies will provide the Enterprise with written notice when operations at the hydroelectric facility begin and end each year, and at times during the year that operations are expected to cease for more than thirty consecutive days.

(k) With respect to the period of retained jurisdiction on the question of injury to the vested water rights of others required by § 37-92-304(6), C.R.S. (2010), the

court finds that a period from the date of entry of this Decree to seven years following an out-of-priority diversion by the last participating structure is sufficient. Upon inclusion of the last participating structure in the plan, notice of that action will be provided by the Enterprise to the Court, the Division Engineer and the Opposers.

42. After the date of this Decree, the Enterprise shall not include in this plan for augmentation any structure which the owner proposes to augment by exchange that is located within or upstream of the reach of a senior decreed CWCB instream flow water right without completing the following procedure:

(a) The Enterprise shall prepare an analysis of the historical flows in said reach to determine if flows in excess of the decreed instream flow water right have consistently occurred in amounts sufficient to permit the exchange approved in this Decree to operate in said reach. The analysis shall utilize, without limitation, stream gauge data from a gauge within said instream flow reach, or a statistical analysis of stream gauge data from the nearest appropriate gauge or gauges, for the driest year of record for the Upper Gunnison Basin. Upon approval of the analysis by the CWCB pursuant to paragraph 42(c) or 42(d), structures served by the plan decreed herein shall be permitted to deplete the flows of said instream flow reach to the extent of the flows in excess of the decreed instream flow water right for said reach.

(b) If future hydrologic conditions result in lower flows at the selected gauge than were recorded in the year of record utilized in the Enterprise's analysis, the CWCB may require the Enterprise to prepare an updated analysis before accepting additional structures in this plan for augmentation which the owners propose to augment by exchange and are located within or upstream of the reach of a CWCB instream flow water right.

(c) When the Enterprise has completed the analysis pursuant to paragraph 42(a), the Enterprise shall deliver a copy of the analysis to the Stream and Lake Protection Section of the CWCB by electronic mail and by U. S. Mail at the following address: 1313 Sherman Street, Room 721, Denver, CO 80203, or to such other address designated by the CWCB by written notice to the Enterprise. The CWCB shall have sixty days from the date of the electronic mailing to review and approve the analysis. If no objection is delivered by the CWCB to the Enterprise within that period, the analysis shall be deemed accepted and the procedure in paragraph 42(a) shall be deemed completed; however, paragraph 42(b) shall remain in effect.

(d) If the CWCB disagrees with the Enterprise's analysis, it shall state specific reasons for such disagreement, which may not include disapproval of the methodology or procedure described in paragraph 42(a) above. In the event of disagreement by the CWCB, the Enterprise may apply to the water court for a hearing to determine that the Enterprise's analysis demonstrates that flows in excess of the

decreed instream flow water right have consistently occurred in amounts sufficient to permit the exchange approved in this Decree to operate in said reach, utilizing data from the driest year of record on the date of the analysis. If the court deems the CWCB rejection to be consistent with the terms of this Decree, the Enterprise shall have the burden of proof to establish the determination required by this paragraph 42(d). Because this determination constitutes reconsideration of the question of injury to the vested rights of others, the court shall retain jurisdiction over this plan for augmentation for the purpose of making the determination required in this paragraph 42(d) indefinitely.

(e) This paragraph 42 shall not apply to Participating Structures for which Third-Party Agreements for contract water in Blue Mesa Reservoir were signed prior to the date of this Decree.

(f) Once a structure has been included in this plan for augmentation in accordance with the procedure described in this paragraph 42, it may not be subsequently excluded from the plan as a result of updated analyses by the Enterprise or changes in hydrologic conditions.

(g) Actual valid gauge data shall take precedent over that obtained by statistical analysis.

CONCLUSIONS OF LAW

43. The applicant is a water conservancy district established pursuant to the Water Conservancy Act, § 37-45-101 *et seq.*, C.R.S. (2010) and is entitled to make appropriations of water to benefit citizens within the Upper Gunnison River Water Conservancy District boundaries. On the facts herein, the District and the Enterprise are entitled to the governmental agency exception to the anti-speculation doctrine articulated in *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

44. Operation of the plan for augmentation decreed herein, and the sale of Augmentation Certificates as described in paragraph 13 by the Lake San Cristobal Water Activity Enterprise is authorized by § 37-45.1-101, *et seq.*, C.R.S. (2010).

45. Timely and adequate notice of the pendency of this proceeding *in rem* was given in the manner required by law. This Court has jurisdiction over the subject matter of this proceeding and over all who have standing to appear as parties, whether they have appeared or not.

46. Subject to the limitations of paragraph 41(h) above, the District has demonstrated the intent to appropriate 950 acre-feet of storage with an appropriation date of April 28, 2003, and a second filling of 950 acre-feet with an appropriation date of December 10, 2008, for domestic, municipal, commercial, industrial to include mining, milling and reclamation,

irrigation, recreation, and fishery and wildlife habitat within the Upper Gunnison River Water Conservancy District directly or by augmentation or exchange, and which may be released to augment out-of-priority depletions pursuant to the plan for augmentation decreed herein, and manifested that intent by an act sufficient to provide notice to third parties. The District has also demonstrated that it can and will store said water and put it to beneficial use within a reasonable time. § 37-92-305(9)(b), C.R.S. (2010). Consequently, the District is entitled to a conditional storage right for 950 acre-feet with an appropriation date of April 28, 2003 and a second filling of 950 acre-feet (conditional) with an appropriation date of December 10, 2008.

47. The settlement between the District and the CWCB described in paragraphs 31-35 and paragraph 42 was entered into by way of compromise and settlement of this litigation and any agreement by the CWCB not to oppose entry of this Decree shall not be construed as concurrence with any specific finding of fact or conclusion of law contained therein or with the specific engineering methodologies or administrative practices utilized by the District or the Enterprise other than for purposes of settlement of this matter. Nothing contained in this Decree shall be binding upon the CWCB other than in the current proceeding.

48. The CWCB's finding that, because of the proposed mitigation to the NLL Right, the CWCB can continue to preserve the natural environment to a reasonable degree despite the impacts caused by the water storage rights and plan for augmentation decreed herein is entitled to deference by this Court. The CWCB may exercise discretion in determining when and how to apply the IWM Rule because the CWCB has the unique statutory authority to "enter into stipulations for decrees or other forms of contractual agreements, including enforcement agreements, that it determines will preserve the natural environment to a reasonable degree" pursuant to § 37-92-102(4)(a), C.R.S. (2010). The IWM Rule allows the CWCB to meet its statutory responsibility to correlate the activities of mankind with some reasonable preservation of the natural environment by allowing necessary, reasonable water development when no other reasonable water supply alternatives can be implemented and only when the CWCB determines that the mitigation offsetting such injury enables the CWCB to continue to preserve the natural environment to a reasonable degree. The stipulations contained in this Decree incorporating injury with mitigation are an appropriate exercise of the CWCB's statutory authority and are consistent with the IWM Rule and the CWCB's responsibility to correlate the activities of mankind with some reasonable preservation of the natural environment.

RULING

IT IS HEREBY RULED AND ORDERED:

49. The foregoing Findings of Fact and Conclusions of Law are incorporated into and form a part of this Decree, as if fully set forth herein at this point.

50. The facts alleged in the amended application are true.

51. The Application for a conditional water storage right in LAKE SAN CRISTOBAL RESERVOIR for 950 acre-feet with an appropriation date of April 23, 2003 to be used for domestic, municipal, commercial, industrial to include mining, milling and reclamation, irrigation, recreation, and fishery and wildlife habitat, and be released to augment out-of-priority depletions by such uses (including pond evaporation and livestock watering) is GRANTED, subject to the limitations of paragraph 41(h) above. Pursuant to § 37-92-306, C.R.S. (2010), the priority date decreed herein for said 950 acre-feet shall be April 23, 2003 and shall establish its relative priority among water rights awarded for applications filed in 2003.

52. The Application for a conditional water storage right in LAKE SAN CRISTOBAL RESERVOIR for a second filling in the amount of 950 acre-feet with an appropriation date of December 10, 2008 to be used for domestic, municipal, commercial, industrial to include mining, milling and reclamation, irrigation, recreation, and fishery and wildlife habitat, and be released to augment out-of-priority depletions by such uses (including pond evaporation and livestock watering) is GRANTED, subject to the limitations of paragraph 41(h) above. Pursuant to § 37-92-306, C.R.S. (2010), the priority date decreed herein for said 950 acre-feet shall be December 10, 2008 and shall establish its relative priority among water rights awarded for applications filed in 2008.

53. The Application for approval of the plan for augmentation described in this Decree is GRANTED subject to the terms and conditions stated in this Decree.

54. The exchanges described in paragraph 7(c) are hereby APPROVED, and conditionally decreed for proposed future exchange. The maximum rate of exchange shall be as determined by the Division Engineer when releases are needed to meet a senior call recognized and lawfully administered by the Division Engineer. Pursuant to § 37-92-305(10), C.R.S. (2010), the priority date decreed herein for the appropriative right of exchange shall be December 10, 2008.

55. The exchanges decreed in this case shall not be operated or administered so as to injure senior water rights, regardless of whether those senior water rights are upstream or downstream of the Local Calling Rights described in paragraph 7(c)iii.

56. No owners of or persons entitled to use water under a vested water right or decreed conditional water right will be injured or injuriously affected by the operation of the plan for augmentation decreed herein, including the appropriative right of exchange, so long as the terms and conditions of this Decree are administered as set forth herein. Pursuant to § 37-92-305(8), C.R.S. (2010), the Division Engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights.

57. The Enterprise shall install measuring devices for Lake San Cristobal Reservoir as required by the Division Engineer for the operation of the plan for augmentation decreed herein or for administering the terms of the District's settlement with the CWCB. Owners of Augmentation Certificates shall install totalizing flow meters on augmented wells and such other

type of measuring device for surface diversions and ponds as may be ordered by the Division Engineer.

58. In the event the CWCB directs a release of all or any part of the 200 acre-feet of water described in paragraph 34(c), the Division Engineer shall shepherd such releases to Blue Mesa Reservoir, provided, however, that all of such releases shall be available for diversion, for power generation only, by the Crooke's Falls Flume hydroelectric facility located on the Lake Fork of the Gunnison River in Hinsdale County, Colorado; provided, however, that at those specific times when: (1) such releases are necessary and are being made to satisfy the CWCB's instream flow decreed in Case No. 80CW097, and (2) such instream flow right is lawfully calling for water, and (3) the District and Enterprise are in compliance with their stipulation with Daniel L. Plies in this case, then the Crooke's Falls Flume may divert the amount of such releases that is needed to satisfy such instream flow right only if the location of the facility's discharge of hydropower return flows to the Lake Fork has not been moved downstream from its location on the date of this Decree.

59. The Enterprise shall file an annual report with the Division Engineer by December 15th of each year itemizing diversions and replacements made under this plan.

60. Prior to or during the month of December, 2017, and every six years thereafter until the conditional water right decreed herein is decreed absolutely, the District, if it desires to maintain the same, shall file an application for finding of reasonable diligence with this Court.

61. The District shall notify this Court of any change in mailing address. Upon the sale or other transfer of the conditional water right decreed herein, the transferee shall file with this Court a notice of transfer which shall state:

- (a) The title and case number of this case;
- (b) The description of the water right transferred;
- (c) The name of the transferor;
- (d) The name and mailing address of the transferee.

62. This Decree shall be filed with the water clerk and a copy shall be filed with the State Engineer and Division Engineer, Water Division No. 4.

63. Pursuant to § 37-92-304(6), C.R.S. (2010), and subject to the provisions of paragraphs 35(f) and 42(d), this court retains jurisdiction over this Decree, including the Tables attached, for reconsideration of the question of injury to the vested rights of others for a period from the date of entry of this Decree to seven years following an out-of-priority diversion by the last participating structure. Upon inclusion of the last participating structure in the plan, notice of

that action will be provided by the Enterprise to the Court, the Division Engineer and the Opposers.

64. In accordance with the terms of the settlement between the District and the CWCB, this court will retain jurisdiction to enforce the terms and conditions set out in paragraph 35 as a water matter.

65. Administration of the storage rights decreed herein shall be coordinated with administration of the NLL right; accordingly, the Division Engineer shall administer the NLL Right and the water storage rights decreed herein in accordance with the Contract entered into effective on November 23, 2011 between the Enterprise, the CWCB and the Colorado Division of Water Resources, a copy of which is attached to this Decree as *EXHIBIT C*.

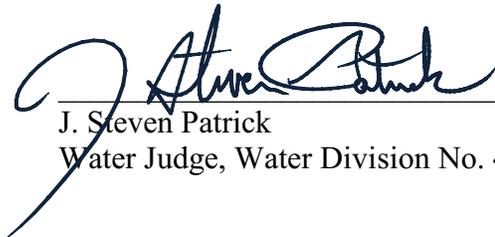
66. In the event that the transfer from the District to the Enterprise contemplated in paragraph 13 has not occurred, the rights and obligations of the Enterprise under the terms of this Decree shall be binding on the District.

67. In accordance with the terms of the Stipulation between the District and the BLM filed with this Court, the District shall submit applications to the BLM for right-of-way grants to construct and operate the outlet structure decreed herein within 12 years of the date of this Decree, or affirmatively relinquish and abandon the conditional water rights decreed in this case.

68. The terms of the Stipulation between the District and the CWCB filed with this Court are incorporated in this Decree by this reference.

69. The terms of the Stipulation between the District, the Enterprise and Daniel L. Plies filed with this Court are incorporated in this Decree by this reference.

Dated this 5th day of Dec., 2011.



J. Steven Patrick
Water Judge, Water Division No. 4