

**COLORADO UTE WATER SETTLEMENT ACT
AMENDMENTS**

JOINT HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
AND THE
COMMITTEE ON ENERGY AND
NATURAL RESOURCES
UNITED STATES SENATE
AND THE
SUBCOMMITTEE ON WATER AND POWER
UNITED STATES SENATE
ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

S. 2508

TO AMEND THE COLORADO UTE INDIAN WATER RIGHTS SETTLEMENT
ACT OF 1988 TO PROVIDE FOR A FINAL SETTLEMENT OF THE CLAIMS
OF THE COLORADO UTE INDIAN TRIBES

JUNE 7, 2000
WASHINGTON, DC



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COLORADO UTE INDIAN WATER SETTLEMENT ACT AMENDMENTS

WEDNESDAY, JUNE 7, 2000

U.S. SENATE, COMMITTEE ON INDIAN AFFAIRS, MEETING
JOINTLY WITH THE COMMITTEE ON ENERGY AND NATURAL
RESOURCES, SUBCOMMITTEE ON WATER AND
POWER

Washington, DC.

The committees met, pursuant to notice, at 2:30 p.m. in room 485, Senate Russell Building, Hon. Ben Nighthorse Campbell (chairman of the Committee on Indian Affairs) presiding.

Present from the Committee on Indian Affairs: Senators Campbell and Inouye.

Present from the Committee on Energy and Natural Resources: Senator Allard.

Also present: Representative McInnis.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Good afternoon. The committees will come to order.

Today the committee will receive testimony on S. 2508, the Colorado Ute Indian Water Rights Settlement Act of 2000, which I introduced in May 2000. This legislation is borne of a compromise to a compromise and forged in the good will of those who have a stake in it, which includes the Ute Tribes, the States of Colorado and New Mexico, the affected Federal agencies, and advocates of a just settlement. Congress has already given the tribes \$52 million. The State of Colorado has spent \$30 million, with millions more spent by New Mexico as part of the 1988 Ute Indian Water Rights Settlement Act.

The history of this unfulfilled legislation is as shameful as it is well-known. For more than 10 years numerous environmental studies, just a fraction of which are on display here, have concluded that by substantially reducing the water diverted and stored by the Animas-La Plata project, we can fulfill our treaty obligations to the Ute Tribes and not violate any Federal laws or environmental standards. More than two years ago, numerous stakeholders in this project reached an accord to this effect after prolonged negotiations.

In doing so, the Ute Tribes agreed to a substantial modification of their rights and obligations under the 1986 Settlement Agreement and the 1988 Settlement Act to make this proposal work.

What started out as a \$750 million project has been cut by two-thirds.

You would think that commonsense would dictate that if an agreement is reached based on several decades of environmental reports with the agreement to scale back the project, then the project's completion and implementation of the law would be made easier, not harder. I want to believe all of the parties involved with the negotiations of this project did so in good faith. We shall soon find out if that is the case.

If it turns out not to be the case, then unfortunately it looks like our Nation's environmental laws really are just another tool for those who oppose development in any form to frustrate and delay projects—and in this case treaties—that they do not like. If this is so, all the worst fears of Indian people and all Americans who suspect the integrity, honesty and ability of our American Government to act honorably will be validated. This is especially troubling because this bill embodies significant effort and good will of two Indian tribes attempting to secure water for their present and future needs. The tribes have retreated over and over. They can retreat no more. They have waited for over 1 century for their water rights to be fulfilled. Enough is enough.

I remain hopeful that commonsense and basic American respect for the dignity and honor of our obligations as a Federal Government will prevail and in the process the rights of the Ute Tribes will be vindicated without further frustration or frivolous delay. It is more urgent than ever to reach an agreement on this project. As of the beginning of this year, in accordance with the 1988 act, the tribes have the right to sue to enforce their water rights. If we take much longer, the tribes will have no other recourse but to go back to court. If they decide to pursue that claim in the courts, in my view, they will win. They have senior water rights and that priority will put them in very good stead in the Federal courts.

My bill represents what I think may be the last opportunity for us as a Nation to do the right thing by honoring our treaty obligations in a manner that is as environmentally and fiscally respectful of reality as is possible, as well as avoid protracted and costly litigation.

[Text of S. 2508 follows:]

106TH CONGRESS
2D SESSION

S. 2508

To amend the Colorado Ute Indian Water Rights Settlement Act of 1988 to provide for a final settlement of the claims of the Colorado Ute Indian Tribes, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 4, 2000

Mr. CAMPBELL (for himself and Mr. ALLARD) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

A BILL

To amend the Colorado Ute Indian Water Rights Settlement Act of 1988 to provide for a final settlement of the claims of the Colorado Ute Indian Tribes, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; FINDINGS; DEFINITIONS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Colorado Ute Settlement Act Amendments of 2000”.

6 (b) **FINDINGS.**—Congress makes the following find-
7 ings:

1 (1) In order to provide for a full and final set-
2 tlement of the claims of the Colorado Ute Indian
3 Tribes on the Animas and La Plata Rivers, the
4 Tribes, the State of Colorado, and certain of the
5 non-Indian parties to the Agreement have proposed
6 certain modifications to the Colorado Ute Indian
7 Water Rights Settlement Act of 1988 (Public Law
8 100-585; 102 Stat. 2973).

9 (2) The claims of the Colorado Ute Indian
10 Tribes on all rivers in Colorado other than the
11 Animas and La Plata Rivers have been settled in ac-
12 cordance with the provisions of the Colorado Ute In-
13 dian Water Rights Settlement Act of 1988 (Public
14 Law 100-585; 102 Stat. 2973).

15 (3) The Indian and non-Indian communities of
16 southwest Colorado and northwest New Mexico will
17 be benefited by a settlement of the tribal claims on
18 the Animas and La Plata Rivers that provides the
19 Tribes with a firm water supply without taking
20 water away from existing uses.

21 (4) The Agreement contemplated a specific
22 timetable for the delivery of irrigation and municipal
23 and industrial water and other benefits to the Tribes
24 from the Animas-La Plata Project, which timetable
25 has not been met. The provision of irrigation water

1 can not presently be satisfied under the current im-
2 plementation of the Federal Water Pollution Control
3 Act (33 U.S.C. 1251 et seq.) and the Endangered
4 Species Act of 1973 (16 U.S.C. 1531 et seq.).

5 (5) In order to meet the requirements of the
6 Endangered Species Act of 1973 (16 U.S.C. 1531 et
7 seq.), and in particular the various biological opin-
8 ions issued by the Fish and Wildlife Service, the
9 amendments made by this Act are needed to provide
10 for a significant reduction in the facilities and water
11 supply contemplated under the Agreement.

12 (6) The substitute benefits provided to the
13 Tribes under the amendments made by this Act, in-
14 cluding the waiver of capital costs and the provisions
15 of funds for natural resource enhancement, result in
16 a settlement that provides the Tribes with benefits
17 that are equivalent to those that the Tribes would
18 have received under the Colorado Ute Indian Water
19 Rights Settlement Act of 1988 (Public Law 100-
20 585; 102 Stat. 2973).

21 (7) The requirement that the Secretary of the
22 Interior comply with the National Environmental
23 Policy Act of 1969 (42 U.S.C. 4321 et seq.) and
24 other national environmental laws before implement-
25 ing the proposed settlement will ensure that the sat-

1 isfaction of the tribal water rights is accomplished in
2 an environmentally responsible fashion.

3 (8) Federal courts have considered the nature
4 and the extent of Congressional participation when
5 reviewing Federal compliance with the requirements
6 of the National Environmental Policy Act of 1969
7 (42 U.S.C. 4321 et seq.).

8 (9) In considering the full range of alternatives
9 for satisfying the water rights claims of the South-
10 ern Ute Indian Tribe and Ute Mountain Ute Indian
11 Tribe, Congress has held numerous legislative hear-
12 ings and deliberations, and reviewed the considerable
13 record including the following documents:

14 (A) The Final EIS No. INT-FES-80-18,
15 dated July 1, 1980.

16 (B) The Draft Supplement to the FES No.
17 INT-DES-92-41, dated October 13, 1992.

18 (C) The Final Supplemental to the FES
19 No. 96-23, dated April 26, 1996;

20 (D) The Draft Supplemental EIS, dated
21 January 14, 2000.

22 (c) DEFINITIONS.—In this Act:

23 (1) AGREEMENT.—The term “Agreement” has
24 the meaning given that term in section 3(1) of the

1 Colorado Ute Indian Water Rights Settlement Act of
2 1988 (Public Law 100-585; 102 Stat. 2973).

3 (2) ANIMAS-LA PLATA PROJECT.—The term
4 “Animas-La Plata Project” has the meaning given
5 that term in section 3(2) of the Colorado Ute Indian
6 Water Rights Settlement Act of 1988 (Public Law
7 100-585; 102 Stat. 2973).

8 (3) DOLORES PROJECT.—The term “Dolores
9 Project” has the meaning given that term in section
10 3(3) of the Colorado Ute Indian Water Rights Set-
11 tlement Act of 1988 (Public Law 100-585; 102
12 Stat. 2974).

13 (4) TRIBE; TRIBES.—The term “tribe” or
14 “tribes” has the meaning given that term in section
15 3(6) of the Colorado Ute Indian Water Rights Set-
16 tlement Act of 1988 (Public Law 100-585; 102
17 Stat. 2974).

18 **SEC. 2. AMENDMENTS TO SECTION 6 OF THE COLORADO**
19 **UTE INDIAN WATER RIGHTS SETTLEMENT**
20 **ACT OF 1988.**

21 Subsection (a) of section 6 of the Colorado Ute In-
22 dian Water Rights Settlement Act of 1988 (Public Law
23 100-585; 102 Stat. 2975) is amended to read as follows:

24 “(a) RESERVOIR; MUNICIPAL AND INDUSTRIAL
25 WATER.—

1 “(1) FACILITIES.—

2 “(A) IN GENERAL.—After the date of en-
3 actment of this subsection, but prior to January
4 1, 2005, the Secretary, in order to settle the
5 outstanding claims of the Tribes on the Animas
6 and La Plata Rivers, acting through the Bu-
7 reau of Reclamation, is specifically authorized
8 to—

9 “(i) complete construction of, and op-
10 erate and maintain, a reservoir, a pumping
11 plant, a reservoir inlet conduit, and appur-
12 tenant facilities with sufficient capacity to
13 divert and store water from the Animas
14 River to provide for an average annual de-
15 pletion of 57,100 acre-feet of water to be
16 used for a municipal and industrial water
17 supply, which facilities shall—

18 “(I) be designed and operated in
19 accordance with the hydrologic regime
20 necessary for the recovery of the en-
21 dangered fish of the San Juan River
22 as determined by the San Juan River
23 Recovery Implementation Program;

24 “(II) include an inactive pool of
25 an appropriate size to be determined

1 by the Secretary following the comple-
2 tion of required environmental compli-
3 ance activities; and

4 “(III) include those recreation fa-
5 cilities determined to be appropriate
6 by agreement between the State of
7 Colorado and the Secretary that shall
8 address the payment of any of the
9 costs of such facilities by the State of
10 Colorado in addition to the costs de-
11 scribed in paragraph (3); and

12 “(ii) deliver, through the use of the
13 project components referred to in clause
14 (i), municipal and industrial water
15 allocations—

16 “(I) with an average annual de-
17 pletion not to exceed 16,525 acre-feet
18 of water, to the Southern Ute Indian
19 Tribe for its present and future
20 needs;

21 “(II) with an average annual de-
22 pletion not to exceed 16,525 acre-feet
23 of water, to the Ute Mountain Ute In-
24 dian Tribe for its present and future
25 needs;

1 “(III) with an average annual de-
2 pletion not to exceed 2,340 acre-feet
3 of water, to the Navajo Nation for its
4 present and future needs;

5 “(IV) with an average annual de-
6 pletion not to exceed 10,400 acre-feet
7 of water, to the San Juan Water
8 Commission for its present and future
9 needs;

10 “(V) with an average annual de-
11 pletion of an amount not to exceed
12 2,600 acre-feet of water, to the
13 Animas-La Plata Conservancy Dis-
14 trict for its present and future needs;

15 “(VI) with an average annual de-
16 pletion of an amount not to exceed
17 5,230 acre-feet of water, to the State
18 of Colorado for its present and future
19 needs; and

20 “(VII) with an average annual
21 depletion of an amount not to exceed
22 780 acre-feet of water, to the La
23 Plata Conservancy District of New
24 Mexico for its present and future
25 needs.

1 “(B) APPLICABILITY OF OTHER FEDERAL
2 LAW.—The responsibilities of the Secretary de-
3 scribed in subparagraph (A) are subject to the
4 requirements of Federal laws related to the pro-
5 tection of the environment and otherwise appli-
6 cable to the construction of the proposed facili-
7 ties, including the National Environmental Pol-
8 icy Act of 1969 (42 U.S.C. 4321 et seq.), the
9 Clean Water Act (42 U.S.C. 7401 et seq.), and
10 the Endangered Species Act of 1973 (16 U.S.C.
11 1531 et seq.). Nothing in this Act shall be con-
12 strued to predetermine or otherwise affect the
13 outcome of any analysis conducted by the Sec-
14 retary or any other Federal official under appli-
15 cable laws.

16 “(C) LIMITATION.—

17 “(i) IN GENERAL.—If constructed, the
18 facilities described in subparagraph (A)
19 shall not be used in conjunction with any
20 other facility authorized as part of the
21 Animas-La Plata Project without express
22 authorization from Congress.

23 “(ii) CONTINGENCY IN APPLICA-
24 TION.—If the facilities described in sub-

1 paragraph (A) are not constructed and op-
2 erated, clause (i) shall not take effect.

3 “(2) TRIBAL CONSTRUCTION COSTS.—Construc-
4 tion costs allocable to the facilities that are required
5 to deliver the municipal and industrial water alloca-
6 tions described in subclauses (I), (II) and (III) of
7 paragraph (1)(A)(ii) shall be nonreimbursable to the
8 United States.

9 “(3) NONTRIBAL WATER CAPITAL OBLIGA-
10 TIONS.—Under the provisions of section 9 of the Act
11 of August 4, 1939 (43 U.S.C. 485h), the nontribal
12 municipal and industrial water capital repayment
13 obligations for the facilities described in paragraph
14 (1)(A)(i) may be satisfied upon the payment in full
15 of the nontribal water capital obligations prior to the
16 initiation of construction. The amount of the obliga-
17 tions described in the preceding sentence shall be de-
18 termined by agreement between the Secretary of the
19 Interior and the entity responsible for such repay-
20 ment as to the appropriate reimbursable share of the
21 construction costs allocated to that entity’s municip-
22 al water supply. Such agreement shall take into ac-
23 count the fact that the construction of facilities to
24 provide irrigation water supplies from the Animas-
25 La Plata Project is not authorized under paragraph

1 (1)(A)(i) and no costs associated with the design or
2 development of such facilities, including costs associ-
3 ated with environmental compliance, shall be alloca-
4 ble to the municipal and industrial users of the fa-
5 cilities authorized under such paragraph.

6 “(4) TRIBAL WATER ALLOCATIONS.—

7 “(A) IN GENERAL.—With respect to mu-
8 nicipal and industrial water allocated to a Tribe
9 from the Animas-La Plata Project or the Dolores
10 Project, until that water is first used by a
11 Tribe or used pursuant to a water use contract
12 with the Tribe, the Secretary shall pay the an-
13 nual operation, maintenance, and replacement
14 costs allocable to that municipal and industrial
15 water allocation of the Tribe.

16 “(B) TREATMENT OF COSTS.—A Tribe
17 shall not be required to reimburse the Secretary
18 for the payment of any cost referred to in sub-
19 paragraph (A).

20 “(5) REPAYMENT OF PRO RATA SHARE.—Upon
21 a Tribe’s first use of an increment of a municipal
22 and industrial water allocation described in para-
23 graph (4), or the Tribe’s first use of such water pur-
24 suant to the terms of a water use contract—

1 “(A) repayment of that increment’s pro
2 rata share of those allocable construction costs
3 for the Dolores Project shall be made by the
4 Tribe; and

5 “(B) the Tribe shall bear a pro rata share
6 of the allocable annual operation, maintenance,
7 and replacement costs of the increment as re-
8 ferred to in paragraph (4).”.

9 **SEC. 3. COMPLIANCE WITH THE NATIONAL ENVIRON-**
10 **MENTAL POLICY ACT OF 1969.**

11 Section 6 of the Colorado Ute Indian Water Rights
12 Settlement Act of 1988 (Public Law 100-585; 102 Stat.
13 2975) is amended by adding at the end the following:

14 “(i) COMPLIANCE WITH THE NATIONAL ENVIRON-
15 MENTAL POLICY ACT OF 1969.—

16 “(1) AUTHORITY.—Nothing in this Act shall be
17 construed to alter, amend, or modify the authority
18 or discretion of the Secretary or any other Federal
19 official under the National Environmental Policy Act
20 of 1969 (42 U.S.C. 4321 et seq.) or any other Fed-
21 eral law.

22 “(2) DETERMINATION OF CONGRESS.—Subject
23 to paragraph (3), in any defense to a challenge of
24 the Final Environmental Impact Statement prepared
25 pursuant to the Notice of Intent to Prepare a Draft

1 Environmental Impact Statement, as published in
2 the Federal Register on January 4, 1999 (64 Fed
3 Reg 176–179), or the compliance with the National
4 Environmental Policy Act of 1969 (42 U.S.C. 4321
5 et seq.) or the Federal Water Pollution Control Act
6 (33 U.S.C. 1251 et seq.), and in addition to the
7 Record of Decision and any other documents or ma-
8 terials submitted in defense of its decision, the
9 United States may assert in its defense that Con-
10 gress, based upon the deliberations and review de-
11 scribed in paragraph (9) of section 1(b) of the Colo-
12 rado Ute Settlement Act Amendments of 2000, has
13 determined that the alternative described in such
14 Final Statement meets the Federal government’s
15 water supply obligations to the Ute tribes under this
16 Act in a manner that provides the most benefits to,
17 and has the least impact on, the quality of the
18 human environment.

19 “(3) APPLICATION OF PROVISION.—This sub-
20 section shall only apply if Alternative #4, as pre-
21 sented in the Draft Supplemental Environmental
22 Impact Statement dated January 14, 2000, or an al-
23 ternative substantially similar to Alternative #4, is
24 selected by the Secretary.

1 “(4) NO EFFECT OF MODIFICATION OF FACILI-
 2 TIES.—The application of this section shall not be
 3 affected by a modification of the facilities described
 4 in subsection (a)(1)(A)(i) to address the provisions
 5 in the San Juan River Recovery Implementation
 6 Program.”.

7 **SEC. 4. COMPLIANCE WITH THE ENDANGERED SPECIES**
 8 **ACT OF 1973.**

9 Section 6 of the Colorado Ute Indian Water Rights
 10 Settlement Act of 1988 (Public Law 100–585; 102 Stat.
 11 2975), as amended by section 3, is amended by adding
 12 at the end the following:

13 “(j) COMPLIANCE WITH THE ENDANGERED SPECIES
 14 ACT OF 1973.—

15 “(1) AUTHORITY.—Nothing in this section shall
 16 be construed to alter, amend, or modify the author-
 17 ity or discretion of the Secretary or any other Fed-
 18 eral official under the Endangered Species Act of
 19 1973 (16 U.S.C. 1531 et seq.) or any other Federal
 20 law.

21 “(2) DETERMINATION OF CONGRESS.—Subject
 22 to paragraph (3), in any defense to a challenge of
 23 the Biological Opinion resulting from the Bureau of
 24 Reclamation Biological Assessment, January 14,
 25 2000, or the compliance with the Endangered Spe-

1 cies Act of 1973 (16 U.S.C. 1531 et seq.), and in
2 addition to the Record of Decision and any other
3 documents or materials submitted in defense of its
4 decision, the United States may assert in its defense
5 that Congress, based on the deliberations and review
6 described in paragraph (9) of section 1(b) of the
7 Colorado Ute Settlement Act Amendments of 2000,
8 has determined that constructing and operating the
9 facilities described in subsection (a)(1)(A)(i) meets
10 the Federal government's water supply obligation to
11 the Ute tribes under that Act without violating the
12 Endangered Species Act of 1973 (16 U.S.C. 1531 et
13 seq.).

14 “(3) APPLICATION OF PROVISION.—This sub-
15 section shall only apply if the Biological Opinion re-
16 ferred to in paragraph (2) or any reasonable and
17 prudent alternative suggested by the Secretary pur-
18 suant to section 7 of the Endangered Species Act of
19 1973 (16 U.S.C. 1536) authorizes an average an-
20 nual depletion of at least 57,100 acre-feet of water.

21 “(4) NO EFFECT OF MODIFICATION OF FACILI-
22 TIES.—The application of this subsection shall not
23 be affected by a modification of the facilities de-
24 scribed in subsection (a)(1)(A)(i) to address the pro-

1 visions in the San Juan River Recovery Implementa-
 2 tion Program.”.

3 **SEC. 5. MISCELLANEOUS.**

4 The Colorado Ute Indian Water Rights Settlement
 5 Act of 1988 (Public Law 100-585; 102 Stat. 2973) is
 6 amended by adding at the end the following:

7 **“SEC. 15. NEW MEXICO AND NAVAJO NATION WATER**
 8 **MATTERS.**

9 “(a) ASSIGNMENT OF WATER PERMIT.—Upon the
 10 request of the State Engineer of the State of New Mexico,
 11 the Secretary shall, in a manner consistent with applicable
 12 State law, assign, without consideration, to the New Mex-
 13 ico Animas-La Plata Project beneficiaries or the New
 14 Mexico Interstate Stream Commission any portion of the
 15 Department of the Interior’s interest in New Mexico Engi-
 16 neer Permit Number 2883, dated May 1, 1956, in order
 17 to fulfill the New Mexico purposes of the Animas-La Plata
 18 Project, so long as the permit assignment does not affect
 19 the application of the Endangered Species Act of 1973
 20 (16 U.S.C. 1531 et seq.) to the use of the water involved.

21 “(b) NAVAJO NATION MUNICIPAL PIPELINE.—The
 22 Secretary may construct a water line to augment the exist-
 23 ing system that conveys the municipal water supplies, in
 24 an amount not less than 4,680 acre-feet per year, of the
 25 Navajo Nation to the Navajo Indian Reservation at

1 Shiprock, New Mexico. The Secretary shall comply with
2 all applicable environmental laws with respect to such
3 water line. Construction costs allocated to the Navajo Na-
4 tion for such water line shall be nonreimbursable to the
5 United States.

6 “(c) PROTECTION OF NAVAJO WATER CLAIMS.—
7 Nothing in this Act shall be construed to quantify or oth-
8 erwise adversely affect the water rights and the claims of
9 entitlement to water of the Navajo Nation.

10 **“SEC. 16. TRIBAL RESOURCE FUNDS.**

11 “(a) ESTABLISHMENT.—

12 “(1) AUTHORIZATION OF APPROPRIATIONS.—

13 There is authorized to be appropriated to carry out
14 this section, \$20,000,000 for fiscal year 2001 and
15 \$20,000,000 for fiscal year 2002. Not later than 60
16 days after amounts are appropriated and available
17 to the Secretary for a fiscal year under this para-
18 graph, the Secretary shall make a payment to each
19 of the Tribal Resource Funds established under
20 paragraph (2). Each such payment shall be equal to
21 50 percent of the amount appropriated for the fiscal
22 year involved.

23 “(2) FUNDS.—The Secretary shall establish
24 a—

1 “(A) Southern Ute Tribal Resource Fund;
2 and

3 “(B) Ute Mountain Ute Tribal Resource
4 Fund.

5 A separate account shall be maintained for each
6 such Fund.

7 “(b) ADJUSTMENT.—To the extent that the amount
8 appropriated under subsection (a)(1) in any fiscal year is
9 less than the amount authorized for such fiscal year under
10 such subsection, the Secretary shall, subject to the avail-
11 ability of appropriations, pay to each of the Tribal Reserve
12 Funds an adjustment amount equal to the interest income,
13 as determined by the Secretary in his or her sole discre-
14 tion, that would have been earned on the amount author-
15 ized but not appropriated under such subsection had that
16 amount been placed in the Fund as required under such
17 subsection.

18 “(c) TRIBAL DEVELOPMENT.—

19 “(1) INVESTMENT.—The Secretary shall, in the
20 absence of an approved tribal investment plan pro-
21 vided for under paragraph (2), invest the amount in
22 each Tribal Resource Fund in accordance with the
23 Act entitled, ‘An Act to authorize the deposit and in-
24 vestment of Indian funds’ approved June 24, 1938
25 (25 U.S.C. 162a). The Secretary shall disburse, at

1 the request of a Tribe, the principal and income in
2 its Resource Fund, or any part thereof, in accord-
3 ance with a resource acquisition and enhancement
4 plan approved under paragraph (3).

5 “(2) INVESTMENT PLAN.—

6 “(A) IN GENERAL.—In lieu of the invest-
7 ment provided for in paragraph (1), a Tribe
8 may submit a tribal investment plan applicable
9 to all or part of the Tribe’s Tribal Resource
10 Fund.

11 “(B) APPROVAL.—Not later than 60 days
12 after the date on which an investment plan is
13 submitted under subparagraph (A), the Sec-
14 retary shall approve such investment plan if the
15 Secretary finds that the plan is reasonable and
16 sound. If the Secretary does not approve such
17 investment plan, the Secretary shall set forth in
18 writing and with particularity the reasons for
19 such disapproval. If such investment plan is ap-
20 proved by the Secretary, the Tribal Resource
21 Fund involved shall be disbursed to the Tribe to
22 be invested by the Tribe in accordance with the
23 approved investment plan.

24 “(C) COMPLIANCE.—The Secretary may
25 take such steps as the Secretary determines to

1 be necessary to monitor the compliance of a
2 Tribe with an investment plan approved under
3 subparagraph (B). The United States shall not
4 be responsible for the review, approval, or audit
5 of any individual investment under the plan.
6 The United States shall not be directly or indi-
7 rectly liable with respect to any such invest-
8 ment, including any act or omission of the
9 Tribe in managing or investing such funds.

10 “(D) ECONOMIC DEVELOPMENT PLAN.—
11 The principal and income derived from tribal
12 investments under an investment plan approved
13 under subparagraph (B) shall be subject to the
14 provisions of this section and shall be expended
15 only in accordance with an economic develop-
16 ment plan approved under paragraph (3).

17 “(3) ECONOMIC DEVELOPMENT PLAN.—

18 “(A) IN GENERAL.—Each Tribe shall sub-
19 mit to the Secretary a resource acquisition and
20 enhancement plan for all or any portion of its
21 Tribal Resource Fund.

22 “(B) APPROVAL.—Not later than 60 days
23 after the date on which a plan is submitted
24 under subparagraph (A), the Secretary shall ap-
25 prove such investment plan if the Secretary

1 finds that the plan is reasonably related to the
2 protection, acquisition, enhancement, or devel-
3 opment of natural resources for the benefit of
4 the Tribe and its members. If the Secretary
5 does not approve such plan, the Secretary shall,
6 at the time of such determination, set forth in
7 writing and with particularity the reasons for
8 such disapproval.

9 “(C) MODIFICATION.—Subject to the ap-
10 proval of the Secretary, each Tribe may modify
11 a plan approved under subparagraph (B).

12 “(D) LIABILITY.—The United States shall
13 not be directly or indirectly liable for any claim
14 or cause of action arising from the approval of
15 a plan under this paragraph, or from the use
16 and expenditure by the Tribe of the principal or
17 interest of the Funds.

18 “(d) LIMITATION ON PER CAPITA DISTRIBUTIONS.—
19 No part of the principal contained in the Tribal Resource
20 Fund, or of the income accruing to such funds, or the rev-
21 enue from any water use contract, shall be distributed to
22 any member of either Tribe on a per capita basis.

23 “(e) LIMITATION ON SETTING ASIDE FINAL CON-
24 SENT DECREE.—Neither the Tribes nor the United States
25 shall have the right to set aside the final consent decree

1 solely because the requirements of subsection (c) are not
2 complied with or implemented.

3 **"SEC. 17. COLORADO UTE SETTLEMENT FUND.**

4 “(a) ESTABLISHMENT OF FUND.—There is hereby
5 established within the Treasury of the United States a
6 fund to be known as the ‘Colorado Ute Settlement Fund.’

7 “(b) AUTHORIZATION OF APPROPRIATIONS.—There
8 is authorized to be appropriated to the Colorado Ute Set-
9 tlement Fund such funds as are necessary to complete the
10 construction of the facilities described in section
11 6(a)(1)(A) within 6 years of the date of enactment of this
12 section. Such funds are authorized to be appropriated for
13 each of the first 5 fiscal years beginning with the first
14 full fiscal year following the date of enactment of this sec-
15 tion.

16 “(c) INTEREST.—Amounts appropriated under sub-
17 section (b) shall accrue interest, to be paid on the dates
18 that are 1, 2, 3, 4, and 5 years after the date of enactment
19 of this section, at a rate to be determined by the Secretary
20 of the Treasury taking into consideration the average mar-
21 ket yield on outstanding Federal obligations of comparable
22 maturity, except that no such interest shall be paid during
23 any period where a binding final court order prevents con-
24 struction of the facilities described in section 6(a)(1)(A).

1 **"SEC. 18. FINAL SETTLEMENT.**

2 “(a) IN GENERAL.—The construction of the facilities
3 described in section 6(a)(1)(A), the allocation of the water
4 supply from those facilities to the Tribes as described in
5 that section, and the provision of funds to the Tribes in
6 accordance with sections 16 and 17 shall constitute final
7 settlement of the tribal claims to water rights on the
8 Animas and La Plata Rivers in the State of Colorado.

9 “(b) STATUTORY CONSTRUCTION.—Nothing in this
10 section shall be construed to affect the right of the Tribes
11 to water rights on the streams and rivers described in the
12 Agreement, other than the Animas and La Plata Rivers,
13 to receive the amounts of water dedicated to tribal use
14 under the Agreement, or to acquire water rights under the
15 laws of the State of Colorado.

16 “(c) ACTION BY THE ATTORNEY GENERAL.—The At-
17 torney General shall file with the District Court, Water
18 Division Number 7, of the State of Colorado, such instru-
19 ments as may be necessary to request the court to amend
20 the final consent decree to provide for the amendments
21 made to this Act under the Colorado Ute Indian Water
22 Rights Settlement Act Amendments of 2000.

23 **"SEC. 19. STATUTORY CONSTRUCTION; TREATMENT OF**
24 **CERTAIN FUNDS.**

25 “(a) IN GENERAL.—Nothing in the amendments
26 made by the Colorado Ute Settlement Act Amendments

1 of 2000 shall be construed to affect the applicability of
2 any provision of this Act.

3 “(b) TREATMENT OF UNCOMMITTED PORTION OF
4 COST-SHARING OBLIGATION.—The uncommitted portion
5 of the cost-sharing obligation of the State of Colorado re-
6 ferred to in section 6(a)(3) shall be made available, upon
7 the request of the State of Colorado, to the State of Colo-
8 rado after the date on which payment is made of the
9 amount specified in that section.”.

○

The CHAIRMAN. Before I go on I would make a point for members of the committee that Senator Domenici, as we all know, is in the hospital. He is in our thoughts. He has sent some information in that he would like to be included in the record. We look for his speedy recovery. He has always been a very, very strong supporter of this project and a strong supporter of Indian rights, too.

[Prepared Statement of Senator Domenici appears in appendix.]

The CHAIRMAN. With that, Senator Inouye, the vice chairman, do you have an opening statement?

STATEMENT OF HON. DANIEL K. INOUE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUE. Thank you very much, Mr. Chairman.

Before proceeding, Senator Dorgan wanted to be here for this hearing. He is unable to be here so he apologizes. He is at a leadership meeting at this moment.

When I assumed the chairmanship of this committee in 1987, one of the first and most controversial initiatives we were challenged with addressing was the measure which the bill before us today proposes to amend. At that time, there was considerable discussion and debate with our counterparts on the Senate Energy Committee as to the nature of an Indian water right and whether that right would be subject to State laws, including abandonment and forfeiture.

In the West, the "use it or lose it" doctrine of water rights as established by State law had never been applied to water that was reserved for Federal purposes, for instance where the water was reserved for the national parks or forests or for military or Indian reservations. So a battle of some considerable dimension was waged in the Senate over this issue and, indeed, over the advisability of building the Dolores and the Animas-La Plata water projects. Ultimately, I was gratified that the Congress focused on the critical need for water in the areas that would be affected by the bill, and that the parties to the settlement, both Indian and non-Indian, stood their ground and refused to be divided into opposing camps.

Recalling that time, Mr. Chairman, I cannot even begin to imagine the frustration you and the two affected tribes as well as the non-Indian communities affected by the act must feel today. Twelve years later, we find it necessary to continue to address the fact that the water that Settlement Act promised would be delivered no later than the year 2000 has yet to reach these areas that are so desperately in need.

And so, Mr. Chairman, I commend you for your perseverance and your patience, as well as the patience and the commitment of your constituents in seeing this matter through.

The CHAIRMAN. I thank you.

We are also joined today by Senator Bingaman, our colleague and friend from New Mexico, and my colleague from the State of Colorado, Senator Allard.

Senator Bingaman, did you have a statement you would like to make?

**STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM
NEW MEXICO**

Senator BINGAMAN. Thank you very much, Mr. Chairman, I do have a statement. First of all, I want to thank you for bringing this bill forward. I know it does represent a great deal of hard work by you and your staff, but also by many of the people from your State and my State as well. So I think it is major progress that we are where we are. I do think that we may be on the threshold of actually settling this issue, the water rights of the Ute Mountain and Southern Ute Indian tribes, and providing the additional water resources that this bill contemplates for Shiprock, NM, and Farmington and Durango, CO.

The concept has come to be referred to now as Animas Lite. This concept mitigates or avoids all the major environmental stumbling blocks that plagued the project before. It also greatly reduces the Federal cost, as you indicated. My understanding is that Secretary Babbitt has endorsed the concept of the project on the scale and with the physical components that are contemplated in this bill. I know we are about to hear from the department. And while there have been some concerns raised by the Administration, I believe we can work through those.

I want to work with you and the other members of the Senate to see that we get a bill passed and sent to the President. I do agree with you this may be our last best chance to go ahead and get this issue resolved. I hope we can seize that opportunity here before Congress adjourns.

The CHAIRMAN. Thank you, Senator Bingaman.
Senator Allard.

**STATEMENT OF HON. WAYNE ALLARD, U.S. SENATOR FROM
COLORADO**

Senator ALLARD. Thank you, Mr. Chairman. It is a real pleasure for me to be here today with your committee. As you know, I support your efforts to fulfill the Federal Government's obligation to the Ute Indian Tribes. I want to compliment you on your leadership on this issue which I think is instrumental in getting us where we are today.

I have supported you all along. I know you have fought for this project for most of your political career and I have seen it grow from a project that I thought would have been substantial for the Four Corners area to be dwindled down to what I would refer to as an ultra lite plan that you have now. I know that you have fought very hard to get the water necessary to at least meet the treaty obligations to the Ute Tribes in the area.

I am a cosponsor of S. 2508, the Colorado Ute Settlement Act Amendments of 2000, and strongly support your efforts and those of the Colorado Ute Indian Tribes in trying to resolve this issue.

After 130 years, I think the time has come for the United States to finally do the right thing and meet its treaty obligations. I would like personally to commend you again, Senator Campbell, for your tireless efforts from your days in the House to your current time here in the Senate and through those three different presidential Administrations in trying to fulfill our Nation's treaty obligations.

There is strong support I think for this project from citizens and locally elected officials. After 130 years, in my view, it is time that the Congress and the Administration recognize that it is time to build the project. I encourage our colleagues to support this bill. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

And with that we will hear from the first panel, which will be David Hayes, the deputy secretary of the Interior, Department of the Interior, Ernest House, chairman of the Ute Mountain Ute Tribe, and John E. Baker, Jr., the chairman of the Southern Ute Tribe.

Gentlemen, if you would please take your seats. You may proceed Mr. Hayes.

STATEMENT OF DAVID HAYES, DEPUTY SECRETARY OF THE INTERIOR, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. HAYES. Thank you, Senator. Mr. Chairman and members of the committee, Senator Bingaman, it is a pleasure to be here today to speak on behalf of the Administration on S. 2508, a bill to modify the Colorado Ute Water Right Settlement Act of 1988 to provide a final settlement of the claims of the Colorado Ute Tribes. I want to thank the Chairman, in particular, and Senator Allard for introducing this bill and holding this hearing.

It is no secret, as the Chairman alluded to, that ALP has been extraordinarily controversial through the years and implementation of a final settlement of the tribal claims has been long delayed. We think there is a historic opportunity now to resolve this issue once and for all and to implement the tribal trust that we have to settle this water rights claim.

The bill that the Chairman has introduced, S. 2508, has a close resemblance to the Administration's proposal of a couple of years ago that, as the Chairman pointed out, has been discussed at great length among the tribes in particular and also other proponents of the project, both in Colorado and New Mexico. I am here to state today that the Administration will support S. 2508 if it is amended to address specific concerns that we have raised in our testimony that is being filed today. I would ask that that testimony be entered into the record, Senator.

The CHAIRMAN. Without objection, the complete testimony will be included in the record.

Mr. HAYES. Thank you, Senator. What I would like to do is to briefly give a general perspective on the Administration's position and then identify a handful of issues that are mentioned at greater length in my written statement which we would like to work on with the committee and other interested parties to reach closure and hopefully a mutually acceptable conclusion here.

First, by way of perspective. The Administration shares the chairman's view that the time has come to solve this problem. The two tribes clearly have a senior water right. We are facing continued years of uncertainty and litigation, not to mention the absence of the fulfillment of the trust right that the tribes have to their water, if we do not solve this problem.

The project that is behind the Senate bill that we are talking about today is a smaller project that is focused on the tribes' rights to water. It is an environmentally sound project. It is sized with consideration to the needs of the Endangered Species Act. It has been subject to full and probably more compliance under the National Environmental Policy Act than any other project I have ever had occasion to deal with. We feel also that the component of the project that deals with the municipal water supplies for northern New Mexico and for southwestern Colorado are appropriate based on the principal of non-subsidized M&I water.

As a conceptual matter, we are fully behind the concept that is in this bill. Some of the issues that we would like to have further discussion with the committee on and work through include the issue of environmental compliance.

It is our view that we have done it right this time. We have sized the project with an eye toward the Endangered Species Act, and we have done a supplemental environmental analysis that specifically looks at all reasonable alternatives including the two alternatives that came out of the Romer-Schoettler process of a few years ago, and also the proposal that is in essence the proposal that is behind S. 2508.

We are confident that this full environmental analysis that has been the subject of intensive effort on all sides is going to withstand judicial scrutiny. We do not think it is appropriate or necessary to include language in this bill that would obviate the normal review opportunities on the environmental side.

Let me also mention if I can, in addition to the environmental issue, another issue that has been discussed at length is the issue of private cost contributions toward the project. It is a basic principal of the Administration proposal that non-Indian Animas-La Plata partners should fully absorb the cost associated with their share of the project in accordance with reclamation law and Administration policy.

We are concerned about an up front financial contribution that has no final cost allocation. We think it is appropriate to build on the agreement that was reached in 1986, the cost-sharing agreement that has all parties engaged in the cost allocation so that if there are cost overruns which may not be the fault of the Government or, frankly, any party, that the U.S. taxpayer is not solely left to deal with them. So we would like to talk through those issues with the committee as well.

Another important issue that we would like to have a further dialogue with the committee about is the issue of deauthorization. The Administration has explained that we feel it is important to close the book on ALP. This should be the final chapter. There should not be any ambiguity about the potential for some of the original project features, which frankly do not make sense in the context of this kind of a final solution, to be potentially available for later implementation without congressional change. Frankly, we think there should be a way to accommodate our views on that with the committee's interests as well.

Two other issues I will mention. This bill also calls for the construction of a new municipal pipeline for the Navajo Nation that would provide drinking water from Farmington to Shiprock. We are

pleased that S. 2508 considers the water needs of the Navajo people as they may be affected by the proposed project and are pleased that this feature is part of the bill.

Finally, I will mention here that we would like to also work with the committee on some of the appropriations schedule for the project. The legislation anticipates that appropriations would have this project constructed over a 5-year period. We are concerned that may not be realistic and we want to have a financing and appropriation package that will mesh with a construction cycle that is more reasonable. We agree of course with the proponents of the bill that it is important to have this project in place as soon as practicable and would like to work toward that end.

There are a number of other specifics that I will leave for consideration and to work through with the committee that are mentioned in my written testimony.

I would like to conclude by simply saying that we think that S. 2508 represents an opportunity, perhaps the last one, to recover from the unfortunate circumstances which have stymied implementation of the Colorado Ute Indian Water Rights Settlement. This is an opportunity for the Federal Government to fulfill its trust responsibility. We are prepared to work closely with you, Mr. Chairman, with Senator Allard, with Senator Bingaman, other interested parties, and of course with the tribes in particular to reach closure on this legislation this year. Thank you.

[Prepared statement of Mr. Hayes appears in appendix.]

The CHAIRMAN. I thank you for your willingness to work with us. I will have some questions for you in 1 minute.

We are now joined by our colleague from the House, Congressman McInnis, who represents the third congressional district, who introduced the House version of this bill. I know he is between meetings on the House side. I am wondering if you have some comments you would like to make, Scott.

STATEMENT OF HON. SCOTT McINNIS, U.S. REPRESENTATIVE FROM COLORADO

Mr. McINNIS. I appreciate the courtesy, Mr. Chairman. I also appreciate the courtesy of your recognizing the voting schedule that we have.

Mr. Chairman, you and I have known each other for almost 20 years. We first met in an orientation line while we were waiting to be sworn in as new State legislators and we talked then about the Animas-La Plata. You have been dedicated to that project the entire time I have known you. I also share that concern about the project.

As we know the history of this project, the Indians were first in the plains and shoved out by the frontiersmen as we needed to possess the land. Theoretically, possession is nine-tenths of the law, and so on. So they shoved the tribes into the mountains. Then when they discovered that the buffalo were rare and that gold was pretty plentiful, they took the Indians and shoved them down into the southwestern corner into what was then conceived to be no man's land, a desert. Thank God, somebody had enough mercy to say we ought to at least give them some water. And as you know, that is where this originated.

Time and time again, in my opinion, the Native Americans have been cheated out of what is rightfully theirs. For gosh sakes, something as basic as water, which fundamentally belongs to those people, it is time for us to face up to it.

I want to thank Senator Allard of course from Colorado. The commitment of both Senators from our State is unquestionable. I also want to thank the Administration, Mr. Chairman. They have stepped forward on this. This is how we are going to make this work.

A couple of other brief points. I would point out that in 1986 when I served in the State legislature, where I was also chairman of the Agriculture Committee, we sat down in the State legislature and made an agreement to get this Animas-La Plata bill. At that point in time no environmental organization in the State of Colorado objected to the settlement. Every environmental organization in Colorado who was then involved in this project or objected to this project sat at that settlement table or offered their approval to that settlement in 1986, only to be followed 2 years later by I think it was the National Sierra Club that rejected their own State Sierra Club recommendation and filed lawsuits.

I should also note that the groups that are objecting to this, to the best of my knowledge, there is not one group objecting to this new bill, not one group out there that has ever in their history of their organization supported a water storage project. So we have organizations who are fundamentally opposed to water projects whether it is this project or any other project. I think that should be taken in mind.

Finally, I think it is very important to understand that this bill is a significant, in my opinion, step down from what the Native Americans are entitled to. The people who have given and given and given are the Native Americans. Frankly, my recommendation 1 year ago was that they not accept this type of an agreement that you have worked so hard on, Mr. Chairman, but that they go ahead and sue in the Federal courts because I thought they had given enough. But they decided to go one more step under your leadership. That is exactly what has happened. I think we have an excellent bill.

I would conclude with one remark. What has really got me agitated, Mr. Chairman, is some people think it is time for a little payola; let's just pay them off and tell them to go about their way, here is some money, here is a few hundred million, now just get out of our way. The tribes do not want payola. They want water that runs through their hands. I saw today in some newspaper article that as if now we have some right to object to how they use the water. Somebody now is bringing up a golf course. I can just see this concept in some of these organizations. It is the tribes' water and they are entitled to have it run through their hands.

Mr. Chairman, in conclusion, obviously I am in full support of what you have done. I want to commend you specifically, Mr. Chairman, along with Senator Allard, for what you have done. I commend you for your actions and you will have full support in the House, full bipartisan support. I can tell you that one of the leading Democrats, Vic Fazio, of course he stepped down after great service to this country, but he would be very, very proud of what

you have done today, Mr. Chairman. I support your bill. Thank you for the courtesy of allowing me to speak.

The CHAIRMAN. Representative Fazio was from California, as many of you remember, but he was a great friend of the two Ute Tribes. In fact, he made a special trip to Colorado to look over the area where this project is supposed to go.

Thank you for your comments.

Mr. Hayes, I don't know if you spend much time out in that southwest area, but if you do, you probably know that we have to store between 80 and 90 percent of our water. Congressman McInnis makes an important point. The easy way I suppose would be to say we will give you Indian people a bundle of money, go away. That is not the right thing to do, the fair thing to do, and that is not what they want and it is not what we want. The people that question the use of their water, water is a property right, they can do anything they want with it as far as I am concerned. It is their water. If they want to plant crops, that is great. If they want to let it just run down the creeks, that is great. It is their water. Everybody else in the west understands property rights of water and I do not think we should put limitations on what they can do with theirs or question how they are going to use their water.

Let me ask you a few questions. I might say that I think in you have probably made a statement that is much more conducive to working with Congress than I have heard in the past, where it is to literally tell us that the Administration supports something and then when we take testimony they go the other way, which has been a huge surprise to us and certainly to both of the tribal chairmen. These chairmen have been here before but they were not the first. There have been to my knowledge three chairmen from the Ute Mountain Tribe and five from the Southern Ute Tribe who have all come back here to testify in favor of fairness to their people for water.

Now I know, at least through the grapevine, that the Clinton administration would like this to be part of its legacy on fulfilling promises to Indian people, and I certainly commend that and I hope it will work. But as you probably know, under the agreement in 1988, they can go back to court at the end of this year.

Some years ago there was a group called the Colorado Forum, it was really a business group in Colorado, and I asked them years ago if they would do a cursory study about the cost of not building the thing. They estimated even twelve years ago that the cost of not building it would be much more than the cost of building it. So when we talk about relative costs, I think if you factor in lost crop production, the cost of going to court in which the Federal Government will have to be on both sides of that issue—the DOJ will be required to defend the tribes because of the trust responsibility, the Bureau of Reclamation will be the defendants I guess. Taxpayers' money will pay for all the litigation on both sides. That is dumb it seems to me when we know we can work some kind of an agreement. But I happen to think that if you just talk about dollars and cents, it is cheaper to build the thing than not to build it.

The cost benefit, as long as I am on that subject, the traditional notions of cost benefit analysis, is it really applicable when you try to evaluate the construction costs associated with Indian water

rights and in fact generally when we know how scarce water is and how expensive it is getting, year by year costing more?

Mr. HAYES. Senator, we feel strongly that certainly in the context of resolving a reserved water right that tribes have as a matter of Federal law that we cannot rely on a slavish traditional cost benefit analysis approach. What we are doing is fulfilling our trust responsibility to supply the water that the United States promised when these reservations were created. The tribes, as has been mentioned by you and others, have come to the table and this settlement amounts to a compromise of their water right. In return, they are looking for some wet water, for some stored water, for water that will be meaningfully available to the tribes. You cannot value that in the same traditional context as though this were a project to be repaid on a dollar-for-dollar basis.

Now I will mention that as far as the municipal component of this project is concerned, and we recognize the parties' interest in having some municipal water supply for Durango and Farmington, and working with the tribes, there is room in the project for some of that water and that will be part of it and there is an expectation of full repayment for that. So we obviously continue to follow that principle for the non-Indian component. But when it comes to the tribes, it is a different matrix, as you have alluded to.

The CHAIRMAN. I appreciate those comments because I happen to agree with them completely. The fundamental question is, what does justice cost? I do not think you can use a barometer or some kind of a measuring stick like you can on just buying and selling commodities. This is a little different deal. Fairness and justice do not have a measuring stick except to get it done.

And speaking of cost as a barometer, Secretary Babbitt has indicated that if Congress does not enact these amendments to the 1988 Settlement Act, it will be difficult to convince other States and Indian tribes to settle their disputes through negotiations. I happen to agree. I have seen what happened in Wyoming prior to the Animas-La Plata and the cost to the State of Wyoming and the tribes when they had to fight out water resources and the allocation of water in the Wyoming settlement. We do not want to go through that. I think the Secretary is absolutely right that we are going to set the tone. Why should any tribes enter into any agreements with the Federal Government if the Federal Government is going to keep breaking them? I think the Animas-La Plata is, at least from that standpoint, a barometer of what other tribes might expect.

Mr. HAYES. I agree and I re-endorse what the Secretary said on that score. These settlements are extraordinarily difficult to reach in the first place and then to have implemented. This is an important test in that regard, to see if we can follow through and work together to get it implemented.

I should say, as you are alluding to, Senator, the flip side if we fail is a tremendous problem—huge uncertainty, long litigation. The water situation in southwest Colorado will remain uncertain for many years. And there is the potential for many non-Indians, who in good faith have developed an economy based on water that they have been using for many years, to have the potential dislocation associated with the senior water rights coming in front of it.

So it is very important that we show that working together consensus-based solutions can be implemented.

The CHAIRMAN. I read your testimony completely, in fact I read it twice today. I just want to comment on a few things and ask you to clarify some things since you did not go through it word for word.

In sections 2, 3, and 4 we talked a little bit about what some people call sufficiency language. I do not call it that at all. It seemed to me that, based on past performance, what is going to happen if we reach an agreement and the President signs this into law is that the opponents, based on past performance, will go back to court and will try to sue again based on the fact that we have not complied with the NEPA process or that we have not done something, even though that is pretty moot testimony about what we have already done. I want a section in this bill that does not diminish the authority of the Secretary, that does not tell the courts that they must do anything, but that itemizes basically what we have already done so the courts can look at it and at least know the intent of Congress. Different people have different words for that. I call it clarifying language. Some people call it sufficiency language.

Since it does not require the courts to do anything and I do not think it diminishes the Secretary's authority either, it would seem to me that we ought to be able to find some kind of language to put into the bill so the courts know what we have done up to this point because I am convinced it is going to be back in the courts. The opponents are not going to give up. They have not done so yet and I do not think they have any intention of doing that.

So I would like to say that I want to work with you on some kind of language that would get that done, to still make sure that the authority of the Secretary is intact and that we do not try and sway the courts one way or the other. But if you would help us with that, I would appreciate it.

I would also tell you that my intent is to move through this thing as fast as we can. So if you can help us along with that, we would appreciate it.

Mr. HAYES. Sure.

The CHAIRMAN. Let me also say on the repayment contract, when the Federal Government builds something we sign a contract with the guys who are going to build it, private contractors. We sign that. We get an estimate of what it is going to cost. If they have a cost overrun, we haggle about that a little bit but at least we have some initial contract that says you will build this structure and we will pay you to build that. If a private citizen goes out and has a house built, he does the same thing with a contractor. He asks what is the contractor going to charge me to build my house, they reach an agreement, and that is it.

Mr. HAYES. Right.

The CHAIRMAN. What is wrong with that concept with this too when you talk about repayment? I worry that if we have an open-ended, no ceiling or no parameters of a repayment plan, the people who are required to repay, I do not know, maybe the Bureau will transfer funds or hire a bunch more people to do something else that we do not have any idea about and we end up with this open-ended, no cap on the repayment. Where does that leave us?

Mr. HAYES. Right. Well, Senator, I think we can work together on this. We certainly agree that there needs to be accountability. There should not be open-endedness in terms of the sky is the limit. It is a license to waste money. We have a shared sense that whatever happens the folks on the ground need to be accountable, cost-effective, and mindful that folks are paying the bill. Congressional oversight I think can be helpful in that regard.

We would just like to work through the notion that at the end of the day the appropriate folks are paying the appropriate amounts of money and we do not want to pre-judge what that might be. So we are willing to work with you, Mr. Chairman, toward that end.

The CHAIRMAN. Okay. And the third thing, at the bottom of page 5 you recommend certain changes. My original concern in drafting this bill is I have seen the Federal Government back out so many times on the tribes and I wanted something in there that has some continuity. When I originally talked to the Secretary he wanted to deauthorize the existing project before we proceeded. I felt that was a real danger to the tribes. If we submitted something to deauthorize the present impoundment and then somehow we could not get the next one passed, where would that leave the tribes? It would leave them with absolutely zilch, nothing.

So I wanted to hook the two together. And the approach we took was that it would be automatically deauthorized at the completion of the next one. But you suggest on page 5 different language: "If constructed, the facilities described in subparagraph 1(a) will constitute the full extent of the Animas-La Plata project." I think that is okay.

Mr. HAYES. It is a similar concept to yours.

The CHAIRMAN. Yes; a similar concept. I think it does what we both want to do. So I want to thank you for that suggestion.

I am going to try to mark this thing up next week, if I can. But certainly, if we can have our staff sit down with you and try and work out these last few differences of opinion, we are going to try and do that and I will try to refine that bill so that we can move ahead, if you will commit to helping us with it.

Mr. HAYES. We will commit to working closely with you, Senator.

The CHAIRMAN. All right. I appreciate that.

Mr. HAYES. Thank you.

The CHAIRMAN. I would like now to turn to our two Chairmen. Perhaps we will start with Chairman Ernest House and then we will go to Chairman John Baker. I went ahead and finished the questioning because I didn't know if you had a time constraint or not.

Mr. HAYES. I do. The hearing got changed and I apologize to the tribal chairmen that I need to leave.

The CHAIRMAN. Other members of the committee may have some written questions. If you get them and could get back to us as soon as you could, that would be appreciated.

Mr. HAYES. Okay. Thank you very much.

The CHAIRMAN. Thank you for appearing.

Mr. Chairman, go ahead.

**STATEMENT OF ERNEST HOUSE, CHAIRMAN, UTE MOUNTAIN
UTE TRIBE, TOWAOC, CO**

Mr. HOUSE. Thank you very much. Senator Allard, Senator Bingaman, and honorable Senators that have come up for the meeting in support, good afternoon. It is an honor to be here. My name is Ernest House, Sr. I am the chairman of the Ute Mountain Ute Tribe located in Towaoc, CO.

I want to thank our U.S. Senator, Ben Nighthorse Campbell, for all of his years of hard work and great courage in implementing the Colorado Ute Water Rights Settlement Agreement of 1986. I was a signatory to that agreement in 1986. It was a great day for the Ute Mountain Ute Tribe when President Reagan signed in 1988 the Colorado Ute Water Rights Settlement Act.

Throughout this long effort, Senator Campbell has been a beacon of strength and hope for the Colorado Ute Tribes. He has consistently provided leadership, and he has insisted that a resolution of the Ute Tribal Water Rights in southwest Colorado be done in a manner which protects our non-Indian neighbors and provides the tribes with a reliable water supply. We are indeed indebted to you, Senator Campbell. We pray and trust that your effort today will bring finality to this long overdue matter.

We know that there exists several unresolved issues which must be addressed to allow the 2000 amendments to be presented to the Congress with the full agreement of the Clinton administration and the Colorado and New Mexico citizens. The Ute Mountain Ute Tribe urges all parties to this agreement to promptly finalize these matters.

We have watched Senator Campbell work hard on our behalf for 15 years. We have also watched the Clinton administration aggressively move to finalize these difficult issues over the last 2 years. Everyone we talk to agrees that now is the time to finalize this matter. The Ute Mountain Ute Tribe remains available to assist in any way to accomplish this goal.

In conclusion, the Ute Mountain Ute Tribe and its members thank this committee and thank the U.S. Senate for their long support for the tribe and for the settlement. We look forward to Senator Campbell once again leading the charge and having this matter put to rest so that the tribal and non-tribal citizens in southwest Colorado and northwest New Mexico can plan their futures and the treaty rights of the Colorado Utes can be preserved.

I thank you very much, Senator, for this opportunity to testify.

The CHAIRMAN. Thank you.

Chairman Baker.

**STATEMENT OF JOHN E. BAKER, JR., CHAIRMAN, SOUTHERN
UTE TRIBE, IGNACIO, CO**

Mr. BAKER. Thank you, Mr. Chairman. Good afternoon, ladies and gentlemen. My name is John E. Baker, Jr. My father is John E. Baker, Sr. He is a member of the Southern Ute Indian Tribe. My mother Gladys Black Baker is a member of the Ute Mountain Ute Tribe. I am the Chairman of the Southern Ute Indian Tribe. On behalf of the Tribal Council, I offer unqualified support for the enactment of S.2508, a bill to amend the Colorado Ute Indian

Water Rights Settlement Act of 1988. We hope that the bill can be promptly enacted into law.

Senator we appreciate all the work you have done on this matter which is so important to my tribe and all of southwest Colorado. The tribal council is elected to lead the Southern Ute Indian Tribe. Over the years, the council has sought a firm and reliable supply of water to serve as a foundation for tribal economic growth as we move into the new century.

Senator you are part of our country. We know that you understand the importance of a firm water supply. The Southern Utes need water whether the future of the tribe includes continued success in natural resource development or reflects the recreation and tourist industry that is now an important part of our economy. With an ever-growing tribal membership, we also need houses and domestic water supplies on the west side of our reservation, no matter what economic enterprises the tribe undertakes.

Now is the time for the United States to carry out those commitments. This project is important. It is important that it be constructed under the present legislation which is different from the original ALP. It is much different than Phase I of the project, which was to be constructed under the terms of the original settlement. It is also much different than ALP Lite, which was proposed only two years ago. All of the changes have been made in response to arguments by the project opponents. Despite these major changes to the project, there is still opposition. Do not be misled, the opponents will oppose any water project, no matter how small its impact and no matter who gets the benefits.

The opponents also continue to argue that alternatives are available. They are wrong. The proposal that the tribe should buy land and the accompanying State water rights is not a solution to the tribal water rights claims. It is widely opposed within the region. The water users on the streams in question thought that they had resolved the differences with the tribe. The proposal would be a nightmare to implement. The purchased water rights would be subject to State law and would also not have the protections afforded under Federal law that protect against abandonment and forfeiture. Moreover, the land itself would be subject to State taxes and State jurisdiction.

Based on the studies in the draft EIS, we know that the storage is required to provide the tribe with a reliable water supply. The United States promised the tribe would have such a water supply in 1868 when it created the Ute Reservation. It confirmed that promise in 1988 when, under your leadership, it passed the 1988 Water Rights Settlement Act.

Mr. Chairman, finally, there is no assurance that a reliable supply of water would be obtained. In fact, in our water short area, the idea sounds like rotating the four bald tires on your car. Only after 30 years would we know whether the supposed settlement would actually work. In short, the proposal would simply continue the present controversy over the tribal rights in a different form. That is not a settlement. It is not acceptable to the tribal council.

In summary, Congress should move forward to carry out the promises made to the Ute Tribes. This bill is a good solution to a very difficult problem. It remains true to the principle that has al-

ways guided the settlement—provide the tribes with a reliable water supply while respecting the rights of the existing users. The bill should be passed.

Mr. Chairman, I want to express my appreciation for your long years of work on this matter. You have always supported the parties to the settlement and stood up for the tribes. We also want to say thank you to Secretary Babbitt, Deputy Secretary Hayes, and the Department of the Interior. They have worked hard on these matters over the last two years. Most importantly, we want to state our appreciation for the sacrifices made by our non-Indian neighbors who have never wavered in their insistence that the United States should honor its promises to the two Ute Tribes. They are honorable people. Above all, the two Ute Tribes of Colorado have been more than compromising and have sacrificed for decades, for we are honorable citizens, too. Thank you. God bless each and every one of you.

[Prepared statement of Mr. Baker appears in appendix.]

The CHAIRMAN. I thank you and I commend the uncommon patience that both tribes have shown in this matter.

I believe it is correct that collectively the two tribes represent perhaps between 5,000 and 6,000 people, the enrollment of both tribes. There must be hundreds of communities in the United States that have between 5,000 and 6,000 people. Can you imagine the unmitigated hell they would raise if their community had to wait 132 years for water. They would be up here tearing down the walls of this place. And yet, the Ute Tribes have shown the patience to try to work with their neighbors and try to work with Congress in waiting that long for water. So I do want to commend you for that.

Let me ask you a couple of questions. The year 2000 is kind of a key word not only because it is the millennium, but that project was supposed to be built by now, as both of you chairmen remember. It has not even turned a blade of ground yet. We had kind of a ceremony about 6 or 8 years ago in which we tried to get it started and we could not because we were sued. I say "we" because I am just a shameless supporter of it and don't mind who knows that.

If we cannot get this thing going or it falls apart for some reason and we cannot pass it, and if it does not look like there is any hope to passing it, then if there is no legislative settlement, how are you going to secure your water rights? Do you intend to go back to court? Have you reached that bridge yet, Chairman House?

Mr. HOUSE. Mr. Chairman, I think the question that is lying out in front of us, there are a lot of unresolved issues that we need to take care of. I think when we talk a little bit about the number of tribal members that we have, the Ute Mountain Ute Tribe has right now approximately 2,700 membership. When we actually started talking about this Animas-La Plata project 36 years ago, probably the tribal membership was right around about 600-700.

The CHAIRMAN. So it has quadrupled or more.

Mr. HOUSE. Right. So what has happened to the tribe is that the water is going to bring our economical base. When you talk about what are the tribes going to do if we do not get any kind of a settlement, most likely the way we will approach it is we will try to pur-

sue every avenue that we possibly can and work with the Department of the Interior, work with the various parties involved with it. If we are not successful, then the final part of it would be to go to court. I do not think the two Ute Tribes, especially the Ute Mountain Ute Tribe, as leader of the Ute Mountain Tribe, I would not want to do that. It would not only cost a lot of bucks, but also, just like you mentioned earlier, there is no win-win situation to that type of approach. So we will work with them as much as we can and hope to come up with a solution. But if not, then I think the only way we can handle that is to finally have our say in court.

The CHAIRMAN. Chairman Baker, would you like to comment on that?

Mr. BAKER. Yes, Mr. Chairman; going to court is always an option for any society. That is the last resort that I want to pursue. However, I think everyone in this building knows all of the alternatives and all of the options that are available to us.

My father was here testifying for this project in years past and he is 83 years old now. My uncle is in his seventies. I have a long list of relatives who have been here supporting this project. As you noted earlier, five different chair individuals have been here. Now I am pursuing what they dreamed about many years ago—to have this project and be able to supply the water and have the water available.

We have a population of 1,300 tribal members and, as I stated in my testimony, we are continuing to grow. And as populations grow, we are aware that the needs of people grow, including the Southern Ute Indian Tribe. Yes, we have discussed options and you are well aware of what they are.

The CHAIRMAN. I hope that you will be the last chairmen that have to come back and fight this fight. Maybe we can get the thing done.

I would like to ask both of you, as you know, we have limited time so we have people that testify but anyone can submit written testimony for the record, which we do study and try to factor in. We have heard from an individual or two claiming to represent the Ute Indians who are opposed to this project. I would like to ask if that settlement within the tribe, I realize you are both elected by popular vote which I assume does not mean 100 percent support, just like it is with me or anyone on this committee, but how widespread is that opposition within the tribes? Is it just a few people, or is it rather broad? Chairman House?

Mr. HOUSE. Senator Campbell, the individual that you are talking about really does not have any influence on the Ute Mountain Reservation other than the concerns that he had as far as the project continuing. As you are well aware, the two Ute Tribes or any Indian reorganization tribe has a constitution and by-laws that they operate under. Under our constitution, it says the elected leaders now will be elected by the tribal membership and they will be the spokesperson on any issues that relate to tribal matters, whether it be water, health, or education. These are the individuals who are going to be talking about it.

So when you talk about somebody who is out there trying to do whatever it is they want to do, they certainly are allowed to say whatever they want, but officially, as a tribal official elected by its

membership, they really do not have any ground to stand on other than just saying what he or she feels about some of the issues that relate to things as far as the tribe. So I really do not have any concern about the things that he is saying. A lot of the things that he is talking about simply do not fit the way we want to lead our tribe, the way we see the Animas-La Plata project. We see that it is going to be a great financial base for the tribe. So that is where I stand and that is what we advocate for the membership of the Ute Mountain Ute Tribe.

The CHAIRMAN. And with the Southern Utes, is there mostly support for the project?

Mr. BAKER. Mr. Chairman, as you are well aware, you and others in your capacity were elected by a certain percentage of the people to represent the United States of America. You are the policymakers for this great Nation of ours. I, coming from a small tribe with a population of 1,300, am also elected by my membership through a democratic process, the process of electing the person most qualified to do the job. I, too, share the same responsibilities as you do. I am a policymaker for the Southern Ute tribal membership. And as you all know, in this country we have freedom of speech. Any individual on our reservation can express their thoughts and their opinions.

The person you may be referring to, in my view, in the last 1½ years since I moved back home to my community, I attended a meeting and the only reason people showed up was to come and see me because I was running council at the time. There is a so-called group in our community and, in my view, that "group" consists of one member. One member is not going to influence the voting majority of the Southern Ute Indian Tribe. There is support for John Baker and his position. I support the project and I have the membership's support as well.

The CHAIRMAN. The unfortunate part about that is the media rarely carries the positive impact of the many. It usually carries in the headlines the opposition of the few. If you do not believe that, come to some of our town meetings. You can carry on with all kinds of good projects and good discussions within the group, and if one guy is outside with a protest sign, guess what is in the newspapers on the front page—the guy with the protest sign. So I understand that very well.

Thank you. We may have some further questions as we try to frame this. I invite you to stay through the rest of the testimony, if you can, Chairman Baker and Chairman House. Thank you for being here.

Mr. HOUSE. Thank you very much.

Mr. BAKER. Thank you.

The CHAIRMAN. We now move to panel II, Kent Holsinger, assistant director, Department of Natural Resources for the State of Colorado; Wendy Weiss, the first assistant attorney general, Office of the Attorney General, State of Colorado; and Thomas Turney, State engineer, Office of the State Engineer, State of New Mexico. If you folks would come to the table, please.

We will begin in the order as listed on the hearing notice, starting with Kent first, then we will go to Wendy, and Thomas last. You complete written testimony will be included in the record so

you do not need to read it verbatim. If you would like to abbreviate your statement, that would be fine.

Kent.

**STATEMENT OF KENT HOLSINGER, ASSISTANT DIRECTOR,
COLORADO DEPARTMENT OF NATURAL RESOURCES, DEN-
VER, CO**

Mr. HOLSINGER. Thank you, Mr. Chairman. It is a great pleasure and a great honor to be here before the committee today on behalf of Governor Owens in support of S. 2508, the Colorado Ute Indian Settlement Act Amendments of 2000. The State of Colorado very much appreciates your long-standing leadership on this issue. We appreciate your introduction of the bill and Senator Allard's co-sponsorship as well.

If I could summarize briefly Colorado's position on moving forward with this legislation in finally completing what has been long due to the tribes, it would be in just a few words. Those would be: It is about time. It is about time the Federal Government fulfilled its commitment to the tribes. It is about time we buried the broken promises. It is about time we built the Animas-La Plata project.

This project, as you pointed out, Mr. Chairman, has been through decades of exhaustive environmental and legislative reviews. The conclusion of all of those reviews, particularly the most recent, is that this is the only way to fulfill our commitments to the tribes without destroying communities, displacing families, and entering protracted litigation. That would be a terrible result for everyone involved. If we fail in these efforts, the tribes can have the courts take up the issue. Again, that is something, Mr. Chairman, that no one can win if this all comes to the courts to resolve.

I would like to point out as far as environmental compliance, the scaled-down project has the blessing of the San Juan River Recovery program, the very program set up to recovery the endangered fish in the San Juan River. We have slimmed down the project to the point where it could even have benefits to the endangered fish in dry years. It is going to give us some additional flexibility to manage with that we would not have otherwise.

There has been criticism that this project could affect elk habitat, trout fishing, and recreation. Actually, there will be very minimal impacts. In fact, in Colorado we have so many elk the Division of Wildlife are having trouble managing them. They are literally eating themselves out of house and home. So any impacts are going to be negligible there.

As to the fishery, the project will not only create a new fishery, but it will give us additional flexibility that we can use in dry years to help water supplies for the endangered species and for sport fish alike. So there is a real benefit there as well.

Even with those benefits, there is also mitigation for the project. There will be 200 acres of wetlands, and 3,000 acres of wildlife habitat preserved through purchase, lease, or acquisition that we would not otherwise have. There are many, many good reasons to support this project.

To touch on one last issue: Deauthorization, the State of Colorado is very much opposed to the Administration's view. But we are encouraged that Mr. Hayes' testimony reflected a willingness to

work on that. We feel this is not the place or the time for the Administration to tamper with that complex array of State laws and treaties that make up the law of the Colorado River. So that is an important issue for us as well, Mr. Chairman.

In summary, I would just like to say that the State of Colorado greatly appreciates the tribes' long patience and outstanding perseverance for this issue. We thank their non-Indian neighbors for their willingness to compromise. And we thank you again for your great leadership. We hope to see this project and the settlement completed once and for all. Thank you, Mr. Chairman.

[Prepared statement of Mr. Holsinger appears in appendix.]

The CHAIRMAN. Thank you.

Wendy, if you would like to proceed?

STATEMENT OF WENDY WEISS, FIRST ASSISTANT ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL, STATE OF COLORADO, DENVER, CO

Ms. WEISS. Thank you, Mr. Chairman. Good afternoon. I am Wendy Weiss from the Colorado Attorney General's Office, representing Attorney General Ken Salazar. Thank you, Senator Campbell, for the opportunity to testify today. Thank you for your leadership in sponsoring this bill, yours and Senator Allard's. It is a privilege and a pleasure to be able to testify on behalf of this historic legislation.

As you have said, the clock is running on our opportunity to resolve the tribes' claims without litigation. Achieving that final settlement is very important to Colorado. I think you will see from our testimony that the Governor and the attorney general speak with one voice on this. Without settlement, as you have pointed out, the State, the water users, the United States, and the tribes appear headed for years of costly litigation that would pit neighbors against neighbors and destroy years of cooperation and good relations that have existed in southwest Colorado. And if the tribes prevailed, existing non-Indian farmers and ranchers would lose their water and the entire agricultural community would suffer.

We thought we had settled the tribes' claims with the passage of the 1988 Settlement Act. But the Animas-La Plata project, as it was then conceived, was unable to meet the requirements of the Endangered Species Act and the Clean Water Act and raised cost concerns.

S. 2508 resolves those issues. It authorizes a drastically reduced project that completely eliminates irrigation in order to comply with the Clean Water Act, it reduces project depletions to comply with the Endangered Species Act, it costs less than half of the original project, it allocates two-thirds of the project water to the Indians, and the remainder of the water will go to growing cities in Colorado and New Mexico who will pay their full share. Finally, it helps preserve the existing agricultural economy of the region in two ways. First, it satisfies the tribes' claims so they will not be taking water away from the existing water users, and, second, it relieves much of the pressure to dry up farms and ranches to provide water for the growing cities.

There are no longer any good reasons to oppose this project. It has been studied extensively, as you have pointed out, and every

alternative has been explored. This is the only feasible way to satisfy the tribes' claims with certainty and in a reasonable time and still comply with all the Federal environmental statutes. It also respects the tribes' right to self determination and their choice in this.

This bill generally incorporates the recommendations of the Administration, but they have expressed reservations in three areas. I would like to discuss those just very briefly.

The first is environmental compliance. As the Administration has recognized, this bill does explicitly require the Secretary to comply with all the national environmental laws. I am very encouraged by the dialogue between you, Senator Campbell, and Deputy Secretary Hayes on that today. It looks like that can be resolved.

The deauthorization issue is a very important one to Colorado. Deauthorization would raise issues involving the Colorado River Storage Project Act and the Colorado River Basin Project Act that should not be addressed piecemeal in narrow tribal settlement litigation when it could have far-reaching implications for the law of the Colorado River. This bill addresses the fear that the downsized project is an opening wedge for a larger project by explicitly stating that no additional project facilities will be built without the passage of additional legislation, which, in effect, requires a whole new authorization and does not raise these complex law of the river issues. Our office and the State are certainly committed to working with Congress and the Administration to resolve that issue.

Finally, on the issue of repayment, we agree with the Administration's principle that the non-Indian project partners should pay their fair share of the costs. S. 2508 would allow them the option of satisfying their repayment obligations up front and achieving some certainty. That is something that the State supports. Again, we are very encouraged by the dialogue that we hear.

In conclusion, this bill authorizes a very different project from previous versions of Animas-La Plata. It will provide environmental justice to the tribes in an environmentally responsible way and at a reasonable cost. I hope you will not let this opportunity slip away. Attorney General Salazar is very committed to working with Congress and the Administration to achieve final settlement this session. Thank you very much.

[Prepared statement of Mr. Salazar appears in appendix.]

The CHAIRMAN. The Attorney General comes from an area of Colorado where water is life itself, so I know his background and his interest in water projects.

Ms. WEISS. Extremely strong. Thank you.

The CHAIRMAN. Thank you.

Mr. Turney.

STATEMENT OF THOMAS C. TURNEY, STATE ENGINEER, OFFICE OF THE STATE ENGINEER, STATE OF NEW MEXICO, SANTA FE, NM

Mr. TURNEY. Mr. Chairman and committee members, thank you for the opportunity to testify on S. 2508. I testify this afternoon on behalf of the State of New Mexico.

S. 2508 authorizes the Secretary of the Interior, acting through the Bureau of Reclamation, to construct, operate, and maintain cer-

tain water diversion and storage facilities under the Animas-La Plata project authorized by Public Law 90-537, approved September 30, 1968. It is our understanding that the facilities authorized for construction by S. 2508 would be operated consistent with the provisions of the Animas-La Plata Project Compact, which was approved by Congress in Public Law 90-537.

We support this bill as it proposes to amend the Colorado Ute Indian Water Rights Settlement Act of 1988 to provide for final settlement of the claims of the Ute Indian Tribes. The bill authorizes a smaller, reconfigured project than originally contemplated at the time of the 1988 Act.

The project has significant benefits for many communities in northwest New Mexico. The need for a dependable water supply for northwest New Mexico has long been recognized. Communities along the Animas River divert water from a river which has historically, during periods of extended drought, run dry. Upstream raw water storage must be provided so that water can be released into the river when the river approaches a low flow stage. If water is not available in the river, communities will simply run short of water for drinking or bathing or other municipal purposes. But doing without water is not really an option. People cannot survive without water. Wet water in a dry State such as New Mexico is a necessity, not a luxury.

The reconciled Animas-La Plata project is designed to provide a source of wet water during these periods of low river flow for both Indian and non-Indian communities in New Mexico. New Mexico must strongly support a project that provides dependable wet water for its citizens.

S. 2508 is the result of laborious negotiations. The bill creates a reconciled project which, while providing wet water to New Mexico, also contains many additional features. The reconciled project significantly reduces project costs; it reduces river depletions to a level that will provide protection for an endangered species; and it provides protection for senior New Mexico water right holders. The bill further provides for an assignment of portions of the water right permit, earlier endorsed by the State Engineer to the Department of Interior, to New Mexico project beneficiaries who have or will actually put the water to beneficial use.

The bill includes language to ensure that the Animas-La Plata project can deliver wet water to the Navajo communities in the area of Shiprock, NM. Over the past two decades Shiprock's population has swelled. The conveyance pipeline contained within the bill, as a non-reimbursable feature, is essential to address the public health and safety of these Navajo communities. Our support of this Navajo municipal pipeline assumes that the Navajo Nation will not file additional claims against the New Mexico non-Indian beneficiaries of the project.

It is important, not only to New Mexico water users but to all water users in the San Juan River system, that storage of the Animas flows be implemented in order to make the water supply available from the San Juan River system usable for development of the water apportioned to the States of Colorado and New Mexico by the Upper Colorado River Basin Compact. Further, storage and regulation of Animas River flows, in concert with the regulation af-

forded by Navajo Reservoir, can enhance the success of the San Juan River Basin Recovery Implementation Program to achieve its goals to conserve endangered fish species as well as to proceed with water development in the San Juan Basin.

In closing, S. 2508 will aid in providing a dependable water supply for Indian and non-Indian communities in northwest New Mexico. Northwest New Mexico is growing and it is important to provide an adequate water supply for the area's future.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Thank all of you for appearing. Let me make a comment about each of your testimony.

Kent, are you an attorney, by the way?

Mr. HOLSINGER. Yes, Mr. Chairman.

The CHAIRMAN. In Colorado, I do not know of anybody who runs for public office that is not asked somewhere along the line about water. It is totally different back here. They store about 15 percent of their water needs in the East and we store 80 to 90 percent out there. I guess you could get through any kind of a campaign back here talking about the subways or education or whatever and not ever mention water. But out there, if you are not concerned about water, you are not going to serve in office. That is how our people believe. Am I right about that? I think I am.

Mr. HOLSINGER. Yes; absolutely, Mr. Chairman.

The CHAIRMAN. Let me mention a couple of things because you did mention the elk and how some people say that developing this might destroy the habitat or the elk routes. Are you familiar with the Durango area?

Mr. HOLSINGER. Yes, Mr. Chairman; vaguely.

The CHAIRMAN. You know that there is a huge elk herd that beds down every winter literally among the houses on a development called the Ranches up valley. They do not even move if you are right out among them. We have a ranch down by Ignacio and we have elk on the ranch every winter. I will tell you something about elk; they do not run from people, they run from danger. If you do not bother them, they just sort of move over. If you go over by Ouray and you drive down from Ouray to Ridgeway, there is a huge elk herd that stays all winter right in that valley. They are there all the time. People stop their cars and take pictures of them and lean over the fence and watch them and the elk just watch them back. Nobody runs from anybody because they do not feel in danger.

So when people tell me, oh, gosh, you cannot do this, you will destroy the whatever and you will scare off the elk, I do not believe that because I have been around elk my whole life and as long as they are not in danger and they do not feel they are being hurt, they can coexist pretty darn well. I think, frankly, people like that, too. It is one of the great attractions of Colorado, that you can actually see the elk herds right out of the window in many places. I just wanted to point that out. I do not believe it.

If the Ute Tribes were given a bunch of money, say \$100 million, to purchase water rights, would environmental groups have the legal right to challenge the tribes' application to change or how that water was being used?

Mr. HOLSINGER. Yes, Mr. Chairman; I think it could be a complete administrative nightmare, not only for the tribes, but for the communities. We are dealing with issues where our State laws would apply to existing water rights and the tribes just would not have the flexibility to use that. In fact, they might not even be able to use it except for certain times of the year, for example, the irrigation season. So I really do not think that situation could ever be workable for the tribes or for the communities.

The CHAIRMAN. I do not either. I kind of thought you might believe that way but I needed to ask for the record.

Wendy, you mentioned the cost from the standpoint of lost good will and loss of agricultural and so on. I heard one time that if the tribe did have to go back to court and they won their law suit, which I believe that they have a very strong case, that roughly one-fourth to one-fifth of all ranchers in the Mancus Valley would lose their water rights. Have you heard that?

Ms. WEISS. What I have heard, Senator Campbell, is that on the La Plata River, which is already very, very water short and fully apportioned between Colorado and New Mexico, that the tribes would have the most senior rights on the river and that they could displace all the existing irrigators, basically take all the water of the La Plata River, if they were to prevail in court.

The CHAIRMAN. Can you imagine the lost good will and the "hate Indian" resentment for a rancher who was trying to raise his family and put his life's savings in a piece of ground and suddenly find out he has a piece of desert because he lost his water to an Indian claim. That is what all the people in the southwest really want to avoid. We know that in many cases there just simply is not enough water. The only way we can share it is to store it. We cannot keep going the way we have been.

Let me also ask you, do you believe the opponents of the project have any reasonable basis to challenge this bill as threatening to the environment, health, or welfare of citizens? We hear the scare stuff a lot.

Ms. WEISS. Absolutely not. I think this latest draft EIS indicates that this is the most environmentally satisfactory way to resolve the claims. I think one of the things that is indicative of how little people have to complain of is kind of the nitpicking criticisms that are being leveled at this legislation. They are not real solid environmental criticisms, they are kind of procedural things. They are very petty.

The CHAIRMAN. You probably know that this is not the first area that has been studied. I see a couple of gentlemen out in the audience, including Fred Crager from Durango, who were dealing with this 30 years before I ever got interested in it, and there were other people before them. This is not the first one. This is probably the 50th one looked at.

I remember when I first got involved in this some years ago people told me how environmentally damaging it was. It would seem to me that where it is, which is sort of a natural bow out of the stream, is less environmentally damaging than if you tried to block a stream, as most traditional dams have been. All of the things I have read based on when they would pump, during flood stage, nighttime and so on, would not affect the rafters, would not de-

crease the volume in the daytime. It would seem to me that a lot of the safeguards have been built in.

I am not an expert on this, but maybe there is no impoundment that is in perfect harmony with the environment, unless God put it there. But impoundments are made by nature even now; 25 years ago there was a landslide over in western Colorado and it created a new lake. It got so big they were worried about it washing out so they cut a ditch in it to let some of the water out. But that lake is still there and I do not think that has been environmentally damaging. So lakes get created.

Ms. WEISS. Senator, I just wanted to add that it is disturbing that people still talk about it as if this were a project to dam the Animas River and do not realize it is not, and then, of course, they complain about the cost of pumping water uphill. But that is because it is not damming the Animas River and it is going to have such a minimal effect.

The CHAIRMAN. One of the problems with this in the 20 years I have been fooling with it is there is a lot of misinformation floating around, which does not come as a surprise to me.

Mr. Turney, first let me commend you on having two very fine Senators who have always been there for Native people. Senator Domenici and Senator Bingaman have always been right at the front when we talk about Indian education or fairness for Indian people.

The State of New Mexico does support the bill, as I understand it. Have you seen anything in the bill that you would recommend be changed?

Mr. TURNEY. Yes, Mr. Chairman; there are two minor changes. One makes reference to what was called the Animas-La Plata Project Compact which was actually within the original 1968 authorizations. The other deals with the transfer language of the permit from the State Engineer to the beneficiary users who will actually put the water to beneficial use in New Mexico. Again, those are just minor changes.

The CHAIRMAN. If you would give those to us in writing, we will see if we can fit those into the language of the bill.

Mr. TURNEY. Yes, sir; we would be glad to do that.

The CHAIRMAN. I would appreciate it.

We have heard a number of practical benefits for the Indian tribes, including the Navajos that live around Shiprock. What practical benefits to the State of New Mexico would be accrued? It basically would be water for Farmington as municipal water, is that right?

Mr. TURNEY. Yes; the municipal water supply for the city of Farmington, Bloomfield, and Aztec, as well as about 13 rural water associations in the Farmington-Bloomfield-Aztec area.

The Navajo Indian Reservation begins west of Farmington. There is an existing pipeline that is undersized and cannot adequately serve the area west from Farmington to Shiprock. What will be done as a part of this proposed Animas-La Plata project will be the construction of a pipeline which will serve communities basically beginning at Farmington and going west all the way to the Navajo community of Shiprock. So there will be literally tens of thousands of New Mexicans who will benefit from the proposed project.

The CHAIRMAN. Clarify this for me. We do the same thing with Colorado. In the original 1988 settlement bill, the State of Colorado was required to put in a pipeline from the Dolores project to the Ute Mountain Ute Tribe. The State of Colorado financed that pipe. This particular one you are talking about in New Mexico, is that being financed in the bill or is the State of New Mexico pay for that pipeline?

Mr. TURNEY. Chairman, that will be within the bill as a non-reimbursable cost.

The CHAIRMAN. I see.

Thank you. I have no further questions. But, as with the other panel, we may have some written questions from the committee that they may send you which we would ask you to respond to. The problem with this place is we all have to do three things at the same time, so we are spread a little thin here.

Thank you very much for appearing today.

The CHAIRMAN. We will now move to panel III. Robert Wiygul, managing attorney, Rocky Mountain Office, Earthjustice Legal Defense Fund, Denver, CO, and Jill Lancelot, Taxpayers for Common Sense, Washington, DC.

As with the other panels, we shall proceed in that order with Robert first and then Jill. Welcome to the committee.

**STATEMENT OF ROBERT WIYGUL, MANAGING ATTORNEY,
ROCKY MOUNTAIN OFFICE, EARTHJUSTICE LEGAL DEFENSE
FUND, DENVER, CO**

Mr. WIYGUL. Chairman Campbell, members of the committee, I appreciate the opportunity to be here with you today.

Over the years I have given advice about the Animas-La Plata project to a number of different groups—the Four Corners Action Coalition, the Sierra Club, Taxpayers for the Animas River, and others. As Mr. Hayes stated earlier, this project has been steeped in controversy over the years, there is no question about that. It remains steeped in controversy today. I am afraid that it falls to me today to make concrete that controversy in this hearing today.

This project has changed over the years. It is smaller than it used to be and about two-thirds of the project is now dedicated to the Colorado Ute Tribes. Unfortunately, Animas-La Plata still has environmental impacts and it has very few identifiable economic, environmental benefits against which to balance those things. In addition, it has significant uncertainties about its environmental impacts in the future. For these reasons the organizations must continue to oppose S. 2508 as well as the Administration's proposal which is quite similar.

First, let me address this. With respect to the Administration's claim that the current proposal has fewer environmental impacts than past versions, that is true. The proposal as it stands now is simply for facilities to pump water up into a reservoir in Ridges Basin. There are no delivery facilities associated with that, and there are no end uses associated with that.

Clearly, in the past when there was irrigation and the other things associated with the project there was more to look at. However, the Ridges Basin Reservoir, and whatever comes out of that, still has environmental impacts. The draft Environmental Impact

Statement, which has just come out, does state that downstream into New Mexico in dry years there will be de-watering if the Animas River significantly impacts on fish habitat, which cannot be mitigated according to that statement in the Animas River.

It will impact up to 3,000 acres of upland habitat. That is significant. I must disagree with those who believe that it is not. That is a large amount of upland habitat to be impacted. Those are real impacts. It uses a lot of power to pump water uphill into a reservoir, for which, at this time, there are no identified uses. I believe that is significant. I believe it is fair to say that that is significant.

In addition, the impacts of projects like this are not always known fully. These are complex systems. Let me give you an example of Windy Gap Reservoir on the Colorado River. It is a small reservoir. I am sure that you folks are familiar with it up there. At the time that Windy Gap was put into place, no one knew that it was going to become a reservoir of whirling disease later in time. These things are not always known.

Now, against what are we to balance these sorts of impacts, smaller though they are.

The Administration proposal at this time provides only for a reservoir, essentially at the top of the hill, and the only place the water can go is back downhill into the river. Just about 2 years ago, Commissioner Martinez, in testifying on Animas-La Plata, asked this question:

How is the Secretary of the Interior expected to deliver water to the tribes for M&I purposes with only these three facilities and no pipelines?

And he went on to ask,

How is environmental impact analysis to be performed without knowing what will follow this initial facility?

Those remain good questions which I believe it is fair to ask in the context of the analysis of this project.

The failure to look at what uses the water in this project will have has real world implications. First, this remains a reclamation project. Under the original Settlement Agreement it was stated that NEPA would apply to this project, and all of those laws do apply to the project and those things do call for a cost-benefit ratio to be prepared. Based on the documentation that we have seen from the Bureau about this version of the project, we do not believe that a positive cost-benefit ratio can be shown, largely because there are no identified uses for the water at this time.

In addition, we do believe that the Clean Water Act, through section 404 and its requirement of analysis of reasonable alternatives, requires that uses of the water be identified so that reasonable alternatives that address those uses can be reviewed. We do believe that those are fair statements and fair questions to ask.

Again, just a couple of years ago Commissioner Martinez testified that he thought a planning report on a project like Animas-La Plata should address economic feasibility and financial viability. I would say that is particularly true with respect to the one-third of the project which is currently dedicated to non-Ute interests.

I do want to address the question, because it has been stated passionately and it deserves an answer, of whether it is correct to say what will this water be used for if it is to go to the Colorado

Ute Tribes. The question deserves an answer. And I believe the answer to that must be, yes. Winters Doctrine rights, such as the tribes' hold, we have no say, and no one has any say, about what they would wish to do with these rights. These are project water rights. The original Settlement Agreement indicated that this project was going to go through the usual process for these kinds of settlements. Under reclamation laws, we believe that it is appropriate, and under the National Environmental Policy Act we think it is appropriate.

I'm sorry, do you have a question, Senator?

The CHAIRMAN. I just had to clarify something. I will ask it as soon as you finish.

Mr. WIYGUL. Okay. Another way to put this is given that reservoirs and taking significant amounts of water out of streams does have impacts on the stream from which the water is taken, on the place where the reservoir is built, and uses of that water have impacts. You have probably heard the saying that it is necessary to break a few eggs to make an omelet. It is also fair I think to ask that if you are going to break eggs, will there be some kind of omelet at some point in the future. And that is what looking at uses and looking at costs and benefits that flow from building the project and those uses that come from it will show you.

The bill as it stands does I believe contain what is sufficiency language. It is clearly intended to influence in some fashion the outcome of judicial proceedings relating to this project. We continue to believe that that kind of language is not appropriate. We hope that the Administration will continue to oppose that kind of language. We think that if a project like this is to go forward, it should go forward on its own merits and without any sort of thumb on the scales when that time comes.

In closing, I would like to state again for the record that the conservation and taxpayer groups which have opposed the Animas-La Plata project and looked for different alternatives do not oppose the Ute Tribes. I believe it is possible for people of good will and good faith to ask whether there are other alternatives that can work in this situation. I recognize there is passionate opposition to that idea. One could not help but recognize that after listening to the debate over this project over the years. However, those groups did propose a market-based alternative, which they were not required to do, which they did at considerable expense, and which they did because it was the right thing to do at that time. I do not believe that that alternative should be seen, as has been often characterized, as a pay-off. That was an attempt to find a solution. We believe that solution has a great deal of merit as a market-based solution. We do not believe that it is infeasible or too complicated. We think it should be given a hard look.

With respect to some of the testimony that you have heard here today and the information that is in the Bureau's draft Supplemental Environmental Impact Statement, this time around it indicates that a non-structural alternative would have more impact on wetlands than alternative 4, the Administration proposal. We do not believe that is correct. I believe that it is based upon incorrect assumptions about whether water would be moved off the land, and when water would be moved off the land, whether those losses

can be properly mitigated, and what those losses should be balanced against.

Again, I appreciate the opportunity to be here today to give the committee our views. I am afraid that this entire controversy and process has been characterized over the years by perhaps sharp opinions on both sides, and I want to make it clear that I do appreciate this opportunity.

[Prepared statement of Mr. Wiygul appears in appendix.]

The CHAIRMAN. I thank you.

Ms. Lancelot.

STATEMENT OF JILL LANCELOT, TAXPAYERS FOR COMMON SENSE, WASHINGTON, DC

Ms. LANCELOT. Thank you, Mr. Chairman. I, too, want to thank you for this opportunity for us to give our views on this project. My name is Jill Lancelot. I am co-founder and legislative director of Taxpayers for Common Sense. We are a non-profit, non-partisan advocate for American taxpayers. I just want to make it clear that we are not an environmental group but we do work with environmental groups. We are part of the "Green Scissors" campaign where taxpayers and environmentalists work together to cut wasteful Government spending that environmentalists see as harmful.

Since its founding in 1995, we have been consistently opposed to Animas-La Plata because of its cost to taxpayers. We remain opposed to this project as it is embodied in S. 2508.

I also want to make it very clear up front that we recognize the commitment made to honoring the water rights of the Ute Tribes and we agree that obligation to the tribes must be met. However, we believe there are ways to accomplish that goal that cost less and make more sense.

We are opposed to S. 2508 because it shifts a portion of costs from beneficiaries to taxpayers, it violates reclamation law, and the bill does not deauthorize the original ALP project.

The Reclamation Act of 1939 requires that the Secretary of the Interior submit a report to Congress addressing the costs, the probability of repayment, and feasibility of the proposed project. No such report has been provided to Congress or the public in this instance.

We also have serious concerns with the financing scheme in S.2508 which requires non-tribal municipal and industrial beneficiaries to repay their capital obligations in one lump sum, of an undetermined amount, in advance of construction. This one time pre-construction payment is not adequate to protect taxpayers. And that is what Taxpayers for Common Sense are about. We are here to protect taxpayers.

The financing scheme is contrary to Federal reclamation law, and flies in the face of current financial reforms in Federal cost sharing. There are two fundamental principles behind the current policy: First, to assist Congress in assuring the true need for the project by requiring that non-Federal interests pay the full cost of M&I water supply for multiple purpose projects, and second, to assure the direct involvement of those non-Federal interests in controlling project costs.

Federal agencies have a long and notorious history for building projects that end up with large cost overruns. By using the lump sum payment approach, the Department of the Interior also evades the requirement of public participation and public hearings on repayment contracts.

Additionally, there are a number of hidden costs—pumping the water uphill, salinity control. The legislation also defers operation and maintenance and replacement costs until the tribes use the water. And since the Bureau of Reclamation predicts that much of that water will not be used for the next 30 to 100 years, it is the Federal taxpayers who will pay these millions of dollars for the unused project for decades to come.

S. 2508 attempts to obligate the Federal Government to prematurely financing construction of ALP. It is not possible to determine whether the project would be beneficial to taxpayers without a cost-benefit analysis.

Not only does this project lack a full description of the potential costs, but the uses for the water are hypothetical. In fact, speculated uses for the water—golf courses, dude ranches and the like—we feel reveal that there is really no market for the water. Federal taxpayers should not be required to pay for a project that has no real identified needs and purposes.

With respect to deauthorization, this bill does not deauthorize the other features of the ALP project contained in the 1988 Settlement Agreement. The legislation does not resolve the controversy associated with this project particularly since it still maintains authorization to construct the irrigation and other features of the project. We would oppose, and would urge members of the committee and Congress to oppose, any legislation which fails to explicitly deauthorize the remainder of the project.

In conclusion, I would like to say that we do not believe that it is necessary to craft legislation in this form in order to meet the obligation to the tribes. Organizations that have opposed the project, including SUGO, the Southern Ute Grassroots Organization, have all urged the Department of the Interior to develop an approach that would provide water to the tribes through re-operation of existing storage facilities and the purchase of available water rights that can be accomplished on a schedule that would satisfy the need for water as it arises. Thus, the Federal taxpayer would avoid the enormous up front costs that are now associated with the current proposal.

We encourage Congress to oppose any legislation that makes Federal taxpayers sign a blank check, that violates Bureau of Reclamation law, that fails to deauthorize the original project, and sets a dangerous precedent for future taxpayer subsidies. Thank you.

[Prepared statement of Ms. Lancelot appears in appendix.]

The CHAIRMAN. Thank you.

I have several questions. Let me start with you, Jill. I was jotting notes down here as fast as I could so I may skip around. Where did you get your figures about salinity control? I do not know of salinity as being a big problem in that area, frankly.

Ms. LANCELOT. I will let Mr. Wiygul respond. Again, this is a taxpayer-environmental coalition. But I understand that as the

water goes downstream it is going to pick up salt and bring it downstream. That is my understanding.

The CHAIRMAN. That may be true at the mouth of the Colorado as it goes into Baja or somewhere. I am not a water expert, but I have never heard of salinity being a big problem in headwaters. It is usually the further it gets down stream.

Would you like to say something about that, Mr. Wiygul?

Ms. LANCELOT. And I think that is what we are talking about. As the water comes into New Mexico, I believe that is where—

The CHAIRMAN. But whether it is an impoundment or running right down the river, the problem would be the same with salinity, would it not, if there were some building up as it went down stream?

Ms. LANCELOT. If you would let me refer to my colleague.

The CHAIRMAN. Yes; please.

Mr. WIYGUL. I do not know those figures. I know at one time there was a look at what the salinity control impacts or additional costs associated with impounding water out of the system would have. I could get you a citation for that.

The CHAIRMAN. Okay. If you could, I would appreciate that.

Jill, you mentioned a timeframe for the tribe not using their water of between 30 and 100 years. Did I hear you say that?

Ms. LANCELOT. That is correct.

The CHAIRMAN. How do you know that?

Ms. LANCELOT. That is right from the draft Environmental Impact Statement. It says in that draft EIS that the speculation is that it is very possible that the tribes would not use it from 30 to 100 years. Just right out of the Environmental Impact Statement.

The CHAIRMAN. That may be a speculation, but I have never heard the tribes say that at all. I think they want to use it as quickly as they can get it, frankly.

Ms. LANCELOT. I just took it from the Bureau of Reclamation's figures.

The CHAIRMAN. I have never been considered a big spender. When you talked about spending taxpayers' money, I had one of my staff run up to my office and look up three awards I got 3 years running by a group called the Watch Dogs of the Treasury for opposing frivolous spending. I thought I would tell you that.

Ms. LANCELOT. Congratulations. I am glad to hear it.

The CHAIRMAN. I am very proud of that. I have never considered myself a guy that is going to throw money around. I just think some things have got to be paid for.

You are absolutely right when you talk about people being very emotional about this. I have to say, though, when you tell an Indian person who has waited 132 years for water that you are not opposed to him, that he is a nice guy and you want to help him, however, you are not going to give him his water, I do not know what kind of response to expect other than some kind of an emotional response. It is an emotional thing.

Water in our part of the country, as I mentioned earlier, water is life and people are right on the edge. Mark Twain had a great saying years ago, he said "Whiskey is for drinkin' and water is for fightin'." I think that adage is still alive in some parts of the west.

Ms. LANCELOT. May I respond?

The CHAIRMAN. Yes; please.

Ms. LANCELOT. Well, I just want to remind all of us that this is not just an Indian only project. One-third of this project is going for non-tribal use. That certainly is the issue that we are most concerned with, that the taxpayer will be subsidizing those people. And let me also say that we actually have been silent about the fact that the tribes will not be paying for any construction. The tribes, under this bill, would get this constructed basically for free, and we have been silent about that.

The CHAIRMAN. Subsidizing is not new around here. We subsidize subways and airports and all kinds of stuff where money goes out. But sometimes we subsidize things I think based on need rather than whether it is cost-effective or not.

Ms. LANCELOT. We are here as an advocate for taxpayers. We believe that we should not be subsidizing programs and projects that beneficiaries should be paying for. And that is also the law. The reclamation law says that non-tribal interests should be paying their fair share.

The CHAIRMAN. I do not want to get rhetorical, but do you believe in subsidizing the poor, the homeless, things of that nature?

Ms. LANCELOT. Let me answer that by saying we believe in government and we believe in good government. Our organization is narrowly focused on cutting waste in the Federal Government. We know and appreciate and support the fact that there are many other organizations all over the country and the world that are helping the poor and helping those folks that are needy. That is not the focus of our organization. We have a very narrow focus where we just simply say we cut wasteful Federal spending. So we do not go to the other part of that.

The CHAIRMAN. I appreciate your comments.

I was in Kosovo recently. We were told by General Clark it is going to cost us another \$1.4 billion to get through the remainder of the year for what the President basically thrust us into, and that is just in Kosovo. In Kosovo we are replanting their farms, we are reopening their mines, we are reopening their factories, we take them shopping and to church, both the Albanians and the Serbs, to prevent them from killing each other. We do all kinds of stuff that I guess if you were going to measure from just a dollar and cents standpoint, we probably should not do. But I think when you look at it in a bigger picture, there are other factors that just are not cost-effective. I try to think in those terms. But I appreciate your comments.

Ms. LANCELOT. And I appreciate the way that you are looking at this.

The CHAIRMAN. Let me ask you something maybe a little more focused. The Federal Government has trust obligations to the Indians based on treaties, as you know. It is a little bit like treaties that we sign with foreign countries. We have that obligation. But that is something that does not evaluate cost very well. How do you factor that in associating the cost with a treaty obligation that we have?

Ms. LANCELOT. My understanding is that this is not a treaty, this was a Settlement Agreement. And my understanding again is that when the tribes traded their Winters Doctrine rights, and as

Mr. Wiygul said, we have no jurisdiction over Winters Doctrine rights, that is correct, but as I understand it, in 1986 and then the 1988 settlement, the tribes traded their Winters Doctrine rights for this project. Under that agreement, all parties agreed that this project would be subject to all laws—environmental laws, reclamation laws, cost-effectiveness, all laws. And that is where I see the difference.

The CHAIRMAN. We have a law, that is what 1988 is about. We passed a bill, the President signed it into law, and under that law it was to construct a larger project at maybe the cost of \$750 million. It has gone up every year. When I first got involved with this years ago, it seems to me it was around \$180 or \$200 million project. Every year it goes up. Part of the reason it has gone up is because of the delays; not only the increased costs of construction, but if you factor in all of the different parts of this thing, it goes up every single year. So this is an effort to get the cost down.

Did your organization in 1988 oppose the 1988 Act too, or do you know?

Ms. LANCELOT. My organization was not founded until 1995.

The CHAIRMAN. It was not there. Okay. It was in 1995?

Ms. LANCELOT. My organization is Taxpayers for Common Sense. I was with another organization, but Taxpayers for Common Sense was founded in 1995.

The CHAIRMAN. Do you know the term to "grandfather" in things?

Ms. LANCELOT. I know that term.

The CHAIRMAN. If Federal obligations to the tribes are not satisfied and they return to court, the cost is going to be terrific. Did your organization consider the economic costs of the law suits and all the stuff that will attend to that?

Ms. LANCELOT. Here is the problem, we do not know what those costs are, we also do not know the real cost of this project. The law suits could be considerably less than this project. The problem is that we do not have a cost-benefit analysis, we do not have a report to Congress. We really do not know what the costs are. Until we know what the costs are, we cannot make that determination.

The CHAIRMAN. You are concerned mostly with taxpayers' money and the costs, I understand that. Do you have a suggestion or an option whereby we could implement this without using taxpayers' funds?

Ms. LANCELOT. As I mentioned in my testimony, we have supported the alternative 6, which is re-operating existing reservoirs and buying property on a willing basis, so that the tribes could actually use that water when it becomes necessary rather than having water sit in a bucket as I call it, allowed to evaporate without any specified uses at this particular time.

If you reconfigure the water, in fact, if you reconfigure the water, according to the draft Environmental Impact Statement, just re-operating the existing reservoirs would give you more acre feet than the tribes are going to get under this bill. They would get over 36,000 acre feet just coordinating operation of existing reservoirs with stream flows in the San Juan River Basin for more efficient utilization of the water supplies. That is from the DEIS which shows that just re-operating those reservoirs would give more

water to the tribes than this particular configuration of Animas-La Plata.

The CHAIRMAN. Maybe they would be able to use that water and maybe not. In that draft Supplemental Environmental Impact Statement, on page 61, let me quote a little bit of this perhaps in rebuttal to your concerns: "Thus, in order to change the type and place of use, applications must be made to the Colorado State Water Court. Such applications typically involve a long and burdensome judicial process undertaken in a public setting where many of the affected parties would have the right to oppose." It goes on with a good deal of information, but it says that it might take as much as eight years, and finishes, in the last sentence: "This process, therefore, adds elements of risk, uncertainty, unqualified costs to the successful completion of the non-structural components of refined Alternative 6."

So I guess there is something to be said for and against it.

Ms. LANCELOT. I just want to add one little thing and then I will turn to Mr. Wiygul. The most I heard from that was 8 years. I have great sympathy for the long wait the tribes have had, but it seems to me that another 8 years—and I heard Mr. Hayes testify today that although the bill designates 5 years, he is not sure that it could get built in 5 years. So, it sounds to me that 8 years, if we really could do it in the right way that would give the tribes the water that they need, that they want, and that they should have, and at less cost to taxpayers, it seems to me that it might be advantageous to try to do that in that period of time.

The CHAIRMAN. Let me move to Mr. Wiygul. I am not a water attorney. But as I understand the Winters Doctrine, it does not quantify uses, it qualifies a right. Is that correct or not?

Mr. WIYGUL. That is correct.

The CHAIRMAN. Because as I understand the testimony, you said something about the tribes have not determined what they want to use the water for.

Mr. WIYGUL. The point that I was trying to make with respect to Winters Doctrine rights, none of us has anything to say about what the tribes want to do about that. That was the only point I was trying to make there.

The CHAIRMAN. None of us has anything to say about what the tribes use the water for, is that what you said?

Mr. WIYGUL. I am not aware of anything.

The CHAIRMAN. Well they do in some cases, because as I understand Colorado law, as an example, if the tribes wanted to sell the water out of State, they cannot do that without permission by the State of Colorado. Is that correct?

Mr. WIYGUL. I do not know that that is true about Winters Doctrine rights. I know there has been some writing on that subject fairly recently which indicates that those rights should not be subject, and, in any case, the Federal Government would have the ability to make sure that they could do that. That is my understanding.

The CHAIRMAN. Let me ask you about Earthjustice a little bit. Are there any circumstances where any of the entities you represent would support any water project involving an impoundment on the Animas River?

Mr. WIYGUL. I have posed that question. That is a question that I have posed to many people, including the folks that I have worked with in the Durango area, and their response has been that if there were a proven need for that and an indication that the environmental impacts would be minimal, that it is something they would consider.

The CHAIRMAN. Do you represent the Sierra Club?

Mr. WIYGUL. Yes.

The CHAIRMAN. Can you tell me any water impoundment that they have actively supported? I have been here 16 years and I do not know of a single one they have supported. They generally oppose every one. In fact, aren't they advocating that the Secretary tear down some dams instead of building some?

Mr. WIYGUL. No; I am not aware of any that they have supported.

The CHAIRMAN. You did mention the impact. Clearly, I agree, there is going to be an impact. But, to me, impacts have two sides; there may be some bad impact, there may be some good impact. We have to balance all that. Maybe it will be some impact on the rafters. There might in turn be some good impact on the increase of waterfowl with an impoundment. There are two sides of that coin. So it is just difficult for me to say it is all going to be good or all going to be bad. I do not see things in that light.

Are you familiar with the act of Congress in the 1970's which provided money for the State of New Mexico and I believe to Colorado, too, to kill the fish in the San Juan Basin.

Mr. WIYGUL. Senator, I believe I have seen reference to that.

The CHAIRMAN. Do you know if the Sierra Club took a position on that?

Mr. WIYGUL. I do not know if they did or not.

The CHAIRMAN. Well they poisoned 90 miles of waterways, as you probably know. What in those days were called "trash fish," which were, as I remember, the humpback chub, the squaw fish, and something else, they threw them up on the bank and let them rot and used them for fertilizer and so on. They killed all that waterway. Then, lo and behold, years later we say they are endangered. Well, yes, we killed them. What did we expect. We replaced them, somebody in their infinite wisdom around this place, we replaced them with trout and fish that could live in that water, particularly after the Navajo dam was built and the water was colder coming out of the bottom of that dam, the trout liked the colder water, and now many places in that area are what are called "gold medal" fishing streams.

When the supporters of the project were sued some years ago under the Endangered Species Act part of it was because of the demise of these trash fish. I was involved in that and I remember to this day the supporters called a series of meetings to try to work out a way that they could get the project built and save the fish too—restock them, do whatever—which is darn hard because if you put those fish back in with trout, the trout eat the little fish, the little suckers, the little trash fish. On the other hand, those fish eat the eggs of the trout. It is tough to get them to live together. So it looks like we have one or the other.

I was also told in those days that the only way we could really do that, since the water temperature changed downstream because the water now comes out of the bottom of the dam, is that you would literally have to tear down the dams and that way the temperature of the water would change back to its former natural state. And under the Endangered Species Act habitat is important, so we have to tear all those dams down so that those suckers could live there again. Nobody is going to do that. That is really kind of pie in the sky thinking that we would tear down the dams, like Glen Canyon, Navajo, or so on so those fish could live. So I do not think that is in the realm of possibility.

But I do remember to this day that when we had a series of meetings—in fact, I suggested that we try to develop in-stream fish hatcheries for those fish just to see if they could survive—not one environmental entity sent one single member to one single meeting. I developed the attitude from then on that they were not really interested in saving the fish, they were interested in stopping the project. Nobody showed up to help us on how we save the fish and get the project built, both. I came away with the attitude that the real goal is not the fish, it is to stop the project. Now I may be wrong on that, but it is an attitude I have held.

Let me ask you something about the water fund. The organizations you represent support the creation of a water rights acquisition fund, is that correct?

Mr. WIYGUL. That is correct, Senator.

The CHAIRMAN. And that is to buy water in lieu of building an impoundment, to buy it from whomever wants to sell it, ranchers or somebody, and turn that over to the tribe. I understand the concept. Would that be under a willing buyer/willing seller? What if they did not want to sell?

Mr. WIYGUL. That would be under a willing buyer/willing seller principle. We believe that given a market out there, there will be willing sellers.

The CHAIRMAN. If the tribe were to acquire water rights under that kind of a plan, by buying it, what would be the position of the group you represent if the tribe then wanted to change the place or the type of use of that water that they then own?

Mr. WIYGUL. It is anticipated that that is something that might occur.

The CHAIRMAN. So you would not be opposed to that if they wanted to use it, say, for coal development when the original plan might have been for irrigating crops?

Mr. WIYGUL. If that were the eventuality that occurred, then that would be within the Ute Tribes' rights to try to get that change of use, yes, under the scenario that has been proposed.

I might note also, Senator, if I could, in the original proposal for a market-based program of water rights acquisition, it was proposed that those rights would be exempted from the non-use doctrine under Colorado law. That is something that I believe was raised here today that the folks that I have worked with thought was significant and ought to be taken into account.

The CHAIRMAN. Now I guess I am a little confused here. As I understand what you have just told me, you would not oppose them acquiring the water rights in anticipation of different uses. But as

I understand your testimony, you believe the water should not be developed in anticipation of those uses.

Mr. WIYGUL. If you are going to build an impoundment of the sort which you are proposing and a Federal facility, yes, the uses of the impoundment should be something that should be looked at.

The CHAIRMAN. So you are saying if they acquired it through this water rights acquisition fund, they should be able to do what they want, change the uses, but if it is from an impoundment, they should not. Is that what I am hearing you say?

Mr. WIYGUL. They should within the existing law be able to change the uses, yes.

The CHAIRMAN. Well, if we had complied with the existing law, that thing would have been built by now.

What would your position be about land instead of water? If we wanted to give back a piece of land to the tribe, would your group also oppose returning the land unless they knew ahead of time what they were going to use it for? That is a property right just like water is.

Mr. WIYGUL. Yes; it was anticipated that one thing that might come out of a program of land and water acquisition is that some of that land could potentially be incorporated back into the reservation.

The CHAIRMAN. I appreciate your appearance. I have no further questions. I would say that we are going to try to move forward with this thing. We will leave the record open for a week because I hope to bring this for a markup if we can get some kind of an agreement. I appreciate your testimony. If there is anything you would like to get to us in the next few days, please feel free to do so. Thank you for appearing.

Mr. WIYGUL. Thank you, Senator.

Ms. LANCELOT. Thank you very much.

The CHAIRMAN. This committee is adjourned.

[Whereupon, at 4:33 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. KENT CONRAD, U.S. SENATOR FROM NORTH DAKOTA

Mr. Chairman. Thank you for holding this hearing. I share your commitment to meeting the water needs of Native Americans and appreciate the work that the committee has done in resolving some of the issues which, in the past, have not allowed this bill to go forward.

As a Nation, we in the United States have started to realize that basic human rights are fundamental to democracy. This includes not only the freedoms that we seek but also the rights to the basic necessities of life. And this includes clean water.

The four Indian tribes in North Dakota, for instance, have significant needs that have been well documented by the Bureau of Reclamation and the Indian Health Service. Here is a sample of the water quality in these areas. [Sample] Those needs exceed \$200 million for providing municipal, rural and industrial water systems.

We North Dakotans feel that the tribes are due this water. We North Dakotans realize that without the sacrifices of these Native Americans we would not have the luxury of clean water in much of our State. And we North Dakotans will work tirelessly to insure that their water needs are met.

The Standing Rock Sioux Tribe and the Three Affiliated Tribes held significant amounts of prime bottomland along the Missouri River that was flooded by the construction of the Garrison and Oahe Dams. They gave up that bottomland so that these great flood control water resource projects could be constructed. They deserve to reap some of the benefits. And their sacrifices will not be forgotten.

With the changes coming in the Dakota Water Resources Act, Native American families in North Dakota will finally have the access they need. For the tribes in North Dakota, we are working with the Senate Energy and Natural Resources Committee and the Administration to pass the Dakota Water Resources Act. We understand that tribes in other parts of the country are also waiting for legislation to provide water to meet the unmet needs of Native Americans.

Mr. Chairman, I fully support the bill before us, S. 2508 the "Colorado Ute Settlement Act Amendments of 2000." I understand that the Administration has worked out the details for full environmental compliance. And like the progress we have made with the Dakota Water Resources Act, I believe that the current legislation reflects the input of many diverse stakeholders.

And I hope that this final settlement to the water rights claims of the Colorado Ute Tribes will be able to be passed by Congress and signed into law by the President.

PREPARED STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM NEW MEXICO

I regret that I am unable to appear today in person, but I would like to welcome the New Mexico State Engineer Tom Turney, and thank the chairman for allowing him to testify on this important legislation.

I also thank Chairman Campbell for introducing this critical legislation, and am proud to cosponsor. He and I have faced many a battle regarding this issue over the years. However, I believe that this legislation reflects the cooperative efforts among the parties to secure needed water supplies in Colorado and New Mexico, and can finally become law.

Passage of this legislation will settle negotiated claims by the Colorado Ute Tribes on the Animas and La Plata Rivers, while safeguarding irrigators and other water users. In New Mexico, it will also provide needed water for the Navajo Community of Shiprock and protect San Juan-Chama project water, on which tribes, towns, and cities along the Rio Grande rely.

I recognize that some technical corrections to this legislation may be necessary to protect some of New Mexico's water interest. I believe these changes will be acceptable to all the parties, and I stand ready to work within the Committee to achieve them.

I do have some concerns about changes suggested by the Administration in testimony before the House on H.R. 3112, but I am hopeful that this legislation will nonetheless move quickly and finally see the Animas-La Plata Project become a reality.

I ask that the committee leave the record open for a time for other New Mexicans to submit testimony.

It is long past time this important legislation became law, and I certainly hope we will see the passage of this legislation before the end of the Congress.

Thank you.

**STATEMENT OF
DAVID J. HAYES, DEPUTY SECRETARY OF THE INTERIOR,
BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE
ON S. 2508,
the "COLORADO UTE SETTLEMENT ACT AMENDMENTS OF 2000"**

JUNE 7, 2000

Mr. Chairman and members of the committee, thank you for the opportunity to appear today to testify for the Administration on S. 2508, a bill to modify the Colorado Ute Water Rights Settlement Act of 1988 to provide for a final settlement of the claims of the Colorado Ute Indian Tribes. Those remaining claims exist in the Animas and LaPlata River basins in Southeastern Colorado and their resolution also requires a resolution of issues associated with the Animas-La Plata project (ALP). S. 2508 aims to resolve this matter once and for all. Thank you Mr. Chairman and Senator Allard for introducing the bill.

It is no secret that this settlement and its relation to ALP has been an extremely controversial matter. As a result, implementation of the settlement has been long-delayed, denying the Tribes the benefit of the agreement they reached with their non-Indian neighbors, the State of Colorado, and the United States in the mid-1980s. Although a significant number of concerns with the original ALP were valid and needed to be addressed, that project no longer exists. Instead, the Department of the Interior is currently completing analysis of a new, greatly slimmed-down project. S. 2508 bears strong resemblance to the preferred alternative plan for this project mapped out in Interior's Draft Supplemental Environmental Impact Statement. Thus, while the Administration is still reviewing environmental, economic and policy matters related to many of the bill's specific provisions, we welcome this bill as providing an appropriate vehicle for bringing much needed finality to the matter of Animas.

The Administration will support S. 2508, if it is amended to address several concerns discussed below, as well as any additional issues and findings that might be identified in our final Supplemental Environmental Impact Statement (SEIS) and Record of Decision. The final SEIS is due to be filed and distributed in July of this year. We appreciate Congress' interest in moving ahead on Animas, and urge them to continue to focus on the issue this year. We look forward to working with the Committee to ensure that the necessary changes are made so that legislation amending the Colorado Ute Water Rights Settlement can be enacted into law this session.

Before discussing the specifics of S. 2508, I would like to briefly provide some background and context to highlight the importance of this legislation and the need for resolution of the matter this year.

Background

In 1988, Congress enacted the Colorado Ute Indian Water Rights Settlement Act of 1988 (Public Law 100-585) which ratified the 1986 Colorado Ute Indian Water Rights Final Settlement Agreement. In committing the United States to this settlement, Congress agreed that resolution of the Colorado Ute Tribes' water rights claims could be accomplished in a manner which included providing the Tribes a water supply from ALP, a Bureau of Reclamation project authorized by the Colorado River Basin Project Act of September 30, 1968 (Public Law 90-537), as a participating project under the Colorado River Storage Project Act of April 11, 1956 (Public Law 84-485). All parties recognized that construction of ALP would depend upon compliance with other applicable laws, including the National Environmental Policy Act (NEPA) and Reclamation statutes.

The original ALP would have diverted the flows of the Animas, La Plata, and San Juan Rivers (by exchange) for primarily irrigation and municipal & industrial (M&I) purposes. More specifically, the Project would have utilized an average water supply of 191,230 acre-feet (af) annually. This amount included 111,130 af of irrigation water to be used on 17,590 acres of non-Indian land currently being irrigated, and 48,310 acres of Indian and non-Indian land not presently being irrigated. The balance of the 191,230 af supply would have provided a 40,000 af annual M&I supply to non-Indian communities in Colorado and New Mexico while 40,100 af of M&I water would be provided to the Southern Ute Tribe, Ute Mountain Ute Tribe, and the Navajo Nation. The size and scope of the original project is more fully described in a 1979 Bureau of Reclamation (Reclamation) Definite Plan Report, a 1980 Final Environmental Impact Statement, a 1992 Draft Supplement to the Final Environmental Statement, and a 1996 Final Supplement to the Final Environmental Statement.

Notwithstanding the prompt implementation of other elements of the Colorado Ute Water Rights Settlement, construction of ALP was not initiated. Initially, the existence of endangered species in the San Juan River basin raised a number of issues which needed resolution. Subsequently, other environmental, cultural resource, financial, economic, and legal concerns served to stymie project construction and therefore settlement implementation.

In 1996, in an attempt to resolve the continuing disputes surrounding the original project, Colorado Governor Roy Romer and Lt. Governor Gail Schoettler convened the project supporters and opponents in a process intended to seek resolution of the controversy involved in the original ALP and to attempt to gain consensus on an alternative approach to finalizing the settlement. Although the Romer/Schoettler Process did not achieve consensus, the process produced two major alternatives, one structural and one non-structural. The structural alternative was the basis for proposed legislation introduced in 1998, which was known as "ALP Lite."

The Administration objected to the ALP Lite bill on a number of grounds, but we remained committed to continuing a dialogue with the Ute Tribes and their non-Indian partners in pursuit of an appropriate means to obtain a just and final settlement for the Tribes. To facilitate this dialogue, the Administration developed a proposal to finalize implementation of the Colorado Ute water rights

settlement (Administration Proposal) This proposal was presented to the Tribes and other ALP stakeholders at a meeting hosted by Governor Romer in August 1998

The Administration Proposal was developed in accord with the United States' trust responsibility to the Colorado Ute Tribes and intended to ensure that the Tribes receive benefits commensurate with those that they negotiated for in the original settlement. Intrinsic to implementation, of course, is the need to address a number of long-standing concerns associated with ALP. For this reason, the proposal recommended elimination of the irrigation component of ALP and a reduction in the size of the reservoir to support only the maximum depletions currently allowable under the Endangered Species Act. Specifically, the reservoir is less than half the size originally contemplated and is an off-stream facility which allows the Animas River to remain free flowing. The proposal also incorporated non-structural concepts by utilizing water acquisition to supply the balance of the Tribes' settlement water rights. Most importantly, the Administration Proposal was premised on full environmental review, including a review of competing non-structural proposals to settle the Tribes' water rights claims. To ensure that the review was timely, we began the process in January 1999 and released a draft Supplemental Environmental Impact Statement (SEIS) on January 14 of this year. The draft SEIS recommends a modified version of the Administration Proposal as the best alternative to resolve the Tribes' water rights claims with the least environmental impacts.

Importance of Resolving the Ute Tribes' Water Rights Claims

It is well established by the Winters doctrine that the establishment of an Indian Reservation carries with it an implied reservation of the amount of water necessary to fulfill its purposes with a priority date no later than the creation of the reservation. Indian reserved water rights are unique in character and not subject to State water law. In addition, they typically are very early in priority and sizable in quantity since they are premised on sufficient water being reserved to ensure full utilization of Indian reservations, both presently and in the future. Given these reserved water rights traits and the problems they present for the States and local water users desiring certainty in water management, Indian water rights settlements have become extremely important in the arid western United States.

The Colorado Ute Tribes' reserved water rights arise from an 1868 Treaty with the United States which established the Ute Reservation in Southwestern Colorado. Opponents of the settlement have asserted that the Tribes' 1868 water rights were extinguished by an 1880 Act of Congress which allotted a significant part of the Southern Ute Reservation. The Solicitor of the Department of the Interior, however, recently issued a legal opinion concluding that the Ute Tribes' water rights retain their 1868 priority date.

As noted earlier, the Tribes' water rights were quantified in the 1986 Settlement Agreement. The 1986 Agreement contained a contingency in the event ALP was not constructed. That contingency allows the Tribes a five year window beginning January 1, 2000, to reinstate the adjudication of their water rights claims if water from ALP is not available. Exercise of that contingency, however, is in no one's best interests. First, the intent of the 1986 Agreement should be honored. It was essentially

a package deal providing significant water supplies to the Tribes but also subordinating certain water rights on the expectation that federal water supplies would be made available. Second, with well over 50,000 acres of arable lands on the Ute Reservations in the LaPlata and Animas River basins and a combined annual average flow of over 500,000 acre-feet per year, a sizable claim would be made on behalf of the Tribes in any reinitiated adjudication. If the 1986 Settlement is not implemented, a lengthy, expensive, and acrimonious proceeding which will adversely affect the citizens of two states will commence, placing a cloud on water supplies throughout southwestern Colorado and northern New Mexico.

S. 2508

To finalize the original water rights settlement, S. 2508 authorizes the Secretary to construct a smaller ALP designed to provide for an annual average depletion of 57,100 af to be used for M&I purposes. If constructed, this down-sized project would include an inactive storage pool and recreation facilities determined appropriate per an agreement between the Secretary and the State of Colorado. Of the project's available depletions, the Ute Tribes would receive 16,525 af each. The Ute Tribes also would share a \$40 million Tribal Resources Fund to be expended for water acquisition and/or resource enhancement. These Tribal benefits provided under S. 2508 would constitute a final settlement of Tribal water rights to the Animas and LaPlata Rivers in Colorado. To a large extent, S. 2508 mirrors the Administration Proposal. Differences do exist, however, and those differences as well as the common ground are discussed below.

Environmental Compliance - Sections 2, 3, and 4

A threshold issue concerns the several provisions which address environmental compliance activities important to the structure of S. 2508, is subsection 2(a)(1)(B) which expressly conditions project authorization on compliance with federal laws related to the protection of the environment. The bill makes clear that it is not to be construed as predetermining the outcome of analyses being conducted pursuant to those laws. Given that full environmental compliance is a fundamental principle of the Administration Proposal, this concept is critical to Administration support of S. 2508.

We understand that the Ute Tribes have exercised their sovereign prerogative and support the specific project authorized here. Furthermore, we agree that no settlement alternative is viable at this time unless the Tribes are in agreement. Nonetheless, we believe that preserving the Secretary's discretion in conducting environmental compliance is extremely important. We are pleased that the Committee, the Tribes, and the other settlement proponents agree.

Although S. 2508 properly preserves the Secretary's discretion, it contains objectionable language addressing environmental compliance that is unnecessary. Section 3 states that in the event of litigation challenging the sufficiency of Interior's environmental compliance documents, the United States may assert that Congress has determined that the recommended alternative in the final SEIS "meets the Federal government's water supply obligations to the Ute tribes under [the Settlement

Act] in a manner that provides the most benefits to, and has the least impact on, the quality of the human environment " Section 3 then specifies that the Congressional determination applies only in the event that alternative number 4, as identified the draft SEIS, is ultimately selected in a Secretarial record of decision The Administration is concerned that this language could be interpreted to preclude meaningful judicial review of Interior's compliance with NEPA and the Clean Water Act. We have every confidence that Interior's activities are in full compliance with all environmental laws and will withstand judicial scrutiny At the same time, it is extremely important to preserve citizens' ability to meaningfully challenge the government's compliance with environmental laws in a judicial forum Accordingly, we do not believe that this language is appropriate or necessary, particularly since it applies to only one of the alternatives being considered in the NEPA analysis These same comments apply equally to section 4 of the bill which addresses Endangered Species Act compliance

Section 2 - Amendments to Section 6 of the Colorado Ute Indian Water Rights Settlement Act of 1988

Authorization for Tribal Water Allocations

As described earlier, section 2 (which amends section 6 of the 1988 Act) authorizes the Secretary to construct a limited-size ALP to settle the Colorado Ute water rights claims This project, for the most part, is in broad terms consistent with the preferred alternative in the Department of the Interior draft SEIS One exception, however, is the amount of water allocated to the Ute Tribes S 2508 provides approximately 6,000 acre-feet less M&I water than the Administration Proposal Once again, the Administration respects the Tribes' exercise of self-determination in negotiating with their non-Indian neighbors To the extent the Ute Tribes support this reallocation of water, the Administration is willing to consider it subject to additional analysis as part of preparing its final SEIS

Deauthorization

The Administration Proposal also sets forth the principle that construction of a down-sized project would represent full and final implementation of the Colorado Ute Water Rights Settlement and that authorization of additional ALP project features would be rescinded While S 2508 requires subsequent Congressional authorization for any additional facilities to be used in conjunction with the facilities provided in this legislation, the Administration objects to the fact that the bill lacks a provision more clearly eliminating the extensive number of project features previously authorized but not currently contemplated.

We recommend that paragraph 2(a)(1)(C) be revised to state "If constructed, the facilities described in subparagraph (1)(A) shall constitute the full extent of the Animas-LaPlata Project Any other previously authorized project features shall not be constructed without further authorization from Congress."

Finally, it should be noted that S 2508 contemplates an assignment of the Department of the Interior's interest in the New Mexico water permit to fulfill the New Mexico purposes of ALP In

concert with the language we suggest above, this provision helps to effectuate a limitation on the scope of the original project in New Mexico

Repayment

S 2508 provides that in lieu of a typical repayment contract under Reclamation law, the non-Indian municipal and industrial water capital repayment obligations may be satisfied upon the payment in full of such obligations prior to the initiation of construction activities. That repayment obligation is to be determined pursuant to an agreement between the Secretary and the appropriate non-Indian entity.

The Administration Proposal established the principle that the non-Indian ALP partners should fully absorb the costs associated with their share of the project in accordance with Reclamation law and Administration policy. An up-front financial contribution with no final cost allocation, even when that contribution is negotiated in good faith and based on conservative cost estimates, would shift the risk of unforeseen cost increases to federal taxpayers and is therefore not in accord with Reclamation law and policy. The Administration does not support this approach.

As an alternative, we believe the approach taken in the 1986 Cost-Sharing Agreement which provides for up-front financing of project development and a final allocation of construction costs is consistent with Reclamation law and policy and should therefore be replicated here. This approach also includes the specification of a repayment ceiling to provide some certainty as to the financial exposure of the repayment entities.

The draft SEIS contains a preliminary version of the cost allocation for the modified project but that information is being updated. We have been encouraged by all interested parties to develop, as soon as possible, a specific cost-share approach. The Administration has been working on this issue and we expect to have a specific proposal for consideration by Congress and interested parties within the next few weeks.

As a contingency, in the event that no final agreement on cost-share is reached, we recommend an additional provision be added to section 2. This new subsection should specify that in the event the project is to be constructed and an agreement on cost-share is not reached with each of the non-Indian entities provided an allocation of project water by March 1, 2001, that the Colorado entity or entities' allocation of reservoir storage shall be reallocated and distributed to the Colorado Ute Tribes. This provision is particularly important because the Colorado repayment entities may reject an allocation of project water so that they can instead obtain the use of water through an agreement with the Ute Tribes. The New Mexico parties, however, may be concerned that some depletions which would otherwise occur in New Mexico may be reallocated to the Colorado Ute Tribes. To address this concern, the Secretary also could be given the discretion to down-size the reservoir even further so that only storage for Colorado and the Navajo Nation's depletion allowance is constructed if cost-share agreements with the New Mexico entities are not secured. Since the trust fund concept set forth in the Administration Proposal and authorized in section 5 of S 2508, was premised on the

need to provide additional water or other benefits to the Ute Tribes due to the limited amount of water available in the down-sized reservoir, we would propose a commensurate readjustment of the size of the trust fund which was intended to purchase additional water

Section 5 Miscellaneous

Assignment of Water Permit

S. 2508 directs the Secretary to assign the Department of the Interior's water rights under New Mexico Engineer Permit Number 2883 for the New Mexico portion of ALP to the original project beneficiaries or the New Mexico Interstate Stream Commission. While S. 2508 specifies that the assignment shall be in accord with State law, it also should make clear that such assignment will be undertaken in compliance with all applicable federal environmental laws. While the Administration has no fundamental objection to this provision, particularly under the conditions specified in section 5 of the bill, we need to ensure that this provision not be interpreted to circumvent the application of any federal environmental laws.

Navajo Nation Municipal Pipeline

S. 2508 would authorize the Secretary to construct a pipeline to deliver the Navajo Nation's allocation of ALP project water to the community at Shiprock, New Mexico. Although this pipeline was not part of the original Administration Proposal, it is part of the modified proposal which is now the preferred alternative in the DSEIS. It also was added to the non-structural alternative in the draft SEIS. The Administration is pleased that S. 2508 considers the water needs of the Navajo people as they may be affected by the proposed project.

Tribal Resource Funds

The Administration Proposal, as noted earlier, included a water acquisition/development trust fund to compensate for the down-sized project providing the Colorado Ute Tribes with the amount of water originally contemplated in the 1986 settlement. Accordingly, if stored water supplies are shifted from the non-Indian entities back to the Ute Tribes as a result of a failure to reach agreement on cost-sharing, there should be some proportionate reduction in the \$40,000,000 authorized to be appropriated to the Tribal Resource Funds. This could be done by having the Secretary report the final storage allocation to the Ute Tribes after the proposed March 1, 2001 deadline for reaching a cost-share agreement. Congress, in its discretion, could then reduce the authorization and actual appropriations accordingly. In no circumstances, however, should the trust fund be reduced below \$10,000,000. Maintaining some amount of the trust fund is warranted since the Tribes have indicated their intent to utilize some of this fund to deliver at least a portion of the settlement water supplies.

With respect to the timing for appropriations to the Tribal Resource Funds, we recommend a five year payout starting in the fiscal year after S. 2508 is enacted. Additionally, the Administration is concerned about Section 16(b) providing Tribes with interest income if the full amount of appropriations authorized for specific year is not provided by Congress. It is not appropriate to penalize taxpayers and the Federal Treasury if Congress does not appropriate funds according to

specific authorized schedule. Finally, as is typical in water rights settlements, the legislation should make clear that the funds authorized to be appropriated to the Tribal Resource Funds shall not be available for expenditure by the Ute Tribes until the requirements for Final Settlement have been met. In the event that no Final Settlement is secured within an appropriate time frame (e.g. ten years, taking into account construction schedules), all appropriated funds, together with all interest earned on such funds shall revert to the general fund of the Treasury.

Final Settlement

S. 2508 specifies that construction of the down-sized project and an appropriate allocation of project water, coupled with the appropriation of funds authorized in the bill, shall constitute final settlement of the Ute Tribes' water rights claims on the Animas and LaPlata Rivers in the State of Colorado. This provision should be changed to include as a prerequisite to final settlement, the issuance of an amended final decree by the District Court, Water Division Number 7, of the State of Colorado.

Authorization of Appropriations

S. 2508 authorizes appropriations for ALP construction over a five year period so that construction may be completed within six years of the date of enactment of the amendments. Section 2(a)(1)(A) also authorizes construction of ALP facilities prior to January 1, 2005. We believe that this time frame is unrealistic based on Reclamation's projected seven-year construction schedule. We understand that there is concern over the present settlement deadline of January 1, 2005, the date by which the Tribes must elect whether to go back to water court to pursue their original claims in the Animas and LaPlata Rivers. Nonetheless, we believe that the proper accommodation of that concern is to make some provision for an extension of that deadline, rather than relying on an unrealistic construction schedule.

Additionally, the Administration objects to section 17(c) and recommends that it be deleted. This section would require the Federal Government to award interest on appropriated monies in the Colorado Ute Settlement fund until the funds are spent. As a matter of general fiscal policy, the Administration does not award interest on appropriated funds awaiting outlay. Finally, to provide accountability and cost control over time, the authorization of appropriations in Section 17(b) should be amended upon completion of the Administration's NEPA review and decision-making process to specify the exact funding level authorized for project construction.

Statutory Construction (Section 19)

Section 19(a) specifies that "[n]othing in the amendments made by the Colorado Ute Settlement Act Amendments of 2000 shall be construed to affect the applicability of any provision of this Act." While the Administration is in agreement that a substantial number of the provisions in the original 1988 Act need to remain in place, there are several provisions within the original section 6 of the Act which are not amended but no longer apply. The status of those provisions should be addressed here to avoid future confusion. For example, the references to ALP agricultural irrigation water in section 6(b) should no longer apply. In addition, section 6(c) and 6(g) are no longer needed and should therefore be removed from the statute. Also, to clarify the intent of the language and avoid

unnecessary problems in implementation, we suggest as a technical adjustment adding the phrase "other than those provisions amended" to the end of subsection 19(a)

Conclusion

S. 2508 represents an opportunity, perhaps the last one, to recover from the unfortunate circumstances which have stymied full implementation of the Colorado Ute Indian Water Rights Settlement. In particular, this is an opportunity for the federal government to fulfill its trust responsibility to the Tribes by honoring the commitments that were made to them back in 1988. The Tribes have made significant concessions in response to environmental concerns and it is now time for us to reciprocate.

Although we have a number of recommended changes to the bill and are still in the process of completing our final SEIS, we believe that the majority of our concerns will not be objectionable to the parties and will improve the chance for the final settlement to take hold. We are prepared to work closely with you Mr. Chairman, Senator Allard, the Committee, the Tribes, and the other settlement proponents on this legislation.

Settlements such as this remain the best approach to resolving contentious water rights issues in the West. The Administration is prepared to work with the Congress to ensure that this one is not lost.

**Testimony of
John Baker, Jr., Chairman
Southern Ute Indian Tribe**

Good Afternoon. My name is John Baker, Jr. I am the Chairman of the Southern Ute Indian Tribe. Thank you for the opportunity to testify today. On behalf of the Tribe and the Tribal Council, I offer unqualified support for the enactment of S. 2508, a bill to amend the Colorado Ute Indian Water Rights Settlement Act of 1988. We hope that the bill can be promptly enacted into law.

As you know, Senator, the resolution of the tribal water claims has been a long and painful process. Working with the State of Colorado and our neighbors, we have successfully settled our claims on all but two of the rivers that cross our reservation. Those successes could not have occurred without your help. But, as you understand, Senator, the construction of the Animas-La Plata Project is at the heart of the Colorado Ute settlement. We have always sought to settle the tribal claims without taking water from our non-Indian neighbors. This legislation and the proposal that was advanced as the preferred alternative in the draft Supplemental Environmental Impact Statement remain true to that principle. We, of course, are disappointed that the project envisioned in the 1988 legislation will not be constructed. We are especially troubled that the present compromise will not provide our neighbors with the water which they need for their farms and ranches. Nevertheless, the bill accomplishes what we all need -- even if it does not include everything that we want -- because it provides the Tribes with a firm water supply and respects the existing water rights of our neighbors. The legislation needs to go forward so that this chapter of the history of southwest Colorado can be completed.

Last fall, I was elected Chairman of the Tribe on a platform that included a new approach to tribal government. A lot has changed since I took office but one thing has not -- the strong tribal support for the Animas-La Plata Project. I know that even in its reduced form, ALP is the best and only way to provide the Tribe with a water supply to meet its present and future needs. The Tribal Council continues to support that approach, just as the prior Tribal Council did when my father, John Baker, was chairman, just as the Council did when my uncle, Chris Baker, was Chairman and the Colorado Ute Indian Water Rights Final Settlement Agreement (Dec. 10, 1986) was signed, just as the Council did when my predecessor, Clement Frost was Chairman, and just as the Council did during the many years of Leonard Burch's leadership.

The Tribal Council is elected to lead the Southern Ute Indian Tribe. Over the years, the Council has sought a firm and reliable supply of water to serve as the foundation for tribal economic growth as we move into a new century. The present Council, like past Councils, understands that economic success in the arid southwest requires a dependable water supply. We know that you understand the importance of a firm water supply, Senator, but that lesson is lost on many of our opponents. Water will be needed whether the future of the Southern Ute Indian Tribe includes continued success in natural resource development or reflects the recreation and tourist industry that is now an important part of the economy of the Four Corners region. And, of course, with an ever-growing tribal membership, we need houses and a domestic water supply on the west side of our reservation, no matter what economic enterprises the Tribe ultimately undertakes. Based on the studies in the draft Supplemental Environmental Impact Statement, we know that storage is required to provide the Tribe with a firm and flexible supply

of water. The United States promised that the Tribe would have such a water supply in 1868 when it created the Ute Reservation. It confirmed that promise in 1988 when it passed the Colorado Ute Indian Water Rights Settlement Act of 1988, 102 Stat. 2973. Now is the time for the United States to carry out those commitments.

The project that would be constructed under the present legislation is much different than the originally proposed ALP. It is much different than Phase I of the Project which was to be constructed under the terms of the 1986 Settlement Agreement and 1988 Settlement Act. It is much different than ALP Lite which was proposed only two years ago. All of the changes that have been made respond to arguments by the project opponents.

First, the Project is now unquestionably an Indian water rights project. Approximately two-thirds of the Project water supply will be allocated to the Tribes. Previous configurations envisioned two-thirds of the water supply going to the non-Indian community. Now as the draft EIS states, the purpose of the Project is to settle the tribal water rights.

Second, the major environmental issues associated with irrigation and the Endangered Species Act have been eliminated. There are no irrigation facilities and, unlike ALP Lite, there is no storage capacity for irrigation water. Thus, the water quality and other issues related to the irrigation components are gone. The Project has been designed around the depletion limits previously endorsed by the Fish and Wildlife Service and will operate within the flow requirements that have been developed for the endangered fish. As a result, there is no conflict with endangered species. Mitigation is provided for the remaining impacts which are minor in nature.

Third, the cost of the Project has been greatly reduced. ALP in its original configuration would cost over \$700 million today. The preferred alternative in the draft EIS would cost \$366 million, including \$40 million to the two Tribes for resource development as provided in the bill. It also includes \$24 million for the Navajo pipeline and \$75 million in sunk costs.

Fourth, the Project passes muster under the Clean Water Act and the Endangered Species Act. The Project has been studied and restudied under the National Environmental Policy Act. Because of those studies, Congress knows that it is authorizing a small project that will have a small effect on the environment but which will settle a longstanding controversy by providing water to the two Tribes for present and future uses. The cost and impact of the settlement are substantially reduced from those authorized in the 1988 Settlement Act. If Congress passes this Act, it will know exactly what is doing. Moreover, it will be acting in accordance with the preferred alternative in the draft EIS.

Despite these major changes to the Project, there is still opposition. Now that there are no longer any meaningful environmental reasons to oppose the Project, the arguments have taken on a more offensive note.

Many of the opponents now directly attack the Tribe's entitlement to water under the 1986 Settlement Agreement and 1988 Settlement Act. That argument is wrong, as the Solicitor of the Department of the Interior determined last year. It also comes far too late in the day. The

consent decrees recognizing the tribal water rights were entered in 1991 by the Colorado Water Court. Those who object to the recognition of reserved water rights for the benefit of the Tribes had the opportunity to challenge our rights at that time. They did not do so, perhaps because they knew that their challenges to the tribal rights would not survive in court. Whatever the reason for failing to raise this argument in court, there is no doubt of the validity of the tribal rights today. The tribal rights have been acknowledged by the Executive Branch, approved by the courts, and were acknowledged by Congress in 1988. No reason exists to reexamine that question now.

Other opponents continue to think that they, not the Tribal Council, know what is best for the Tribe. The Tribe is told by these self-appointed spokesmen for tribal interests that the Project will not benefit the Tribe because the reservoir is not located on the Reservation and does not include delivery facilities. We know that. After all, the 1988 Settlement Act called for the construction of irrigation delivery facilities to deliver water to tribal lands. Of course, we would prefer that the settlement include the construction of delivery facilities but we understand that the cost of the settlement is an issue. The Tribal Council -- the elected leadership of the Tribe -- understands that the first step in obtaining a reliable water supply is to build the bucket to store the water. The fact that we will have to wait to build the delivery facilities is an acceptable price to pay to ensure that the facilities needed to store water for the Tribe's benefit are built. The argument that the reservoir is not on the Reservation is even more ridiculous. Reservoirs are built where the geography permits. We know that we can benefit from a reservoir above the Reservation. There is no merit to the argument that the reservoir must be built on tribal lands to benefit the Tribe. Indeed, the Tribe benefits from the Vallecito Reservoir which is above the Reservation on the Pine River.

The opponents also continue to argue that alternatives are available. As the draft EIS demonstrates, that is not true. The proposal that the Tribe should buy land and the accompanying state water rights is not a solution to the tribal water right claims. It is widely opposed within the region where the water users on the streams in question thought that they had resolved their differences with the Tribe in 1988. The proposal would be a nightmare to implement. The purchased water rights would be subject to state law and would not have the protections afforded under federal law and the original settlement that protect against abandonment and forfeiture. Moreover, the land itself would be subject to state taxes and state jurisdiction. Finally, there is no assurance that a reliable supply of water would be obtained. In fact, the idea sounds suspiciously like rotating the four bald tires on your car. Only after 30 years would we know whether the supposed settlement would actually work. In short, the proposal would simply continue the present controversy over the tribal rights in a slightly different forum for another 30 years. That is not a settlement and it is not acceptable to the Tribal Council.

Finally, the opponents sometimes argue that the Tribe should just lease its water out of state and into the lower basin of the Colorado River. That is not what the Tribe wants. It wants to use the water for economic development on its Reservation and in the vicinity of the Reservation so that the Tribe can share in the resulting benefits in jobs and opportunities. The Tribal Council, unlike the project opponents, does not believe that the only good use of water is in California. The Tribe has accepted the terms of the 1988 Settlement Act which subjects use

of water off its Reservation to state law. We are not here today to revisit that issue. Congress has spoken as to the controlling principles on this sensitive issue and there is no reason to think that a different answer would be acceptable today.

In closing, Mr. Chairman, I want to express my appreciation for your long years of work on this matter. You have always supported the parties to the settlement and stood up for the United States keeping its word to the two Ute Tribes. We appreciate your hard work and support over the last 15 years. We also want to say thank you to Secretary Babbitt, Deputy Secretary Hayes, and the Department of the Interior. They have worked very hard on these matters and have recognized that the United States must honor its commitments to the two Ute Tribes. We also want to state our appreciation of the sacrifices made by our non-Indian neighbors who have never wavered in their insistence that the United States should keep its promises to the two Ute Tribes.

Statement of Kent Holsinger
Assistant Director
Colorado Department of Natural Resources

REGARDING S. 2508, THE COLORADO UTE SETTLEMENT ACT AMENDMENTS
OF 1999.

[Colorado Ute Indian Water Rights Settlement Act Amendments of 2000]

United States Senate
Committee on Indian Affairs

June 7, 2000

Introduction

The State of Colorado appreciates the opportunity to submit these comments in support of S. 2508, the Colorado Ute Settlement Act Amendments of 2000. This legislation, introduced by U.S. Senator Ben Nighthorse Campbell and cosponsored by U.S. Senator Wayne Allard provides for the final settlement of long-standing tribal water rights issues in the "Colorado Ute Indian Water Rights Settlement Act of 1988" (Settlement Act) ratified by Congress. With this legislation, Colorado and the Ute Tribes are simply seeking to complete what has long been promised.

To understand the need for S. 2508, one must appreciate the long struggle of the Colorado Ute Tribes and their non-Indian neighbors along with the States of Colorado and New Mexico to provide the Tribes with a reliable water supply without taking water away from their neighbors.

We have history on our side. Despite the controversy and divisiveness that has been generated by the Animas-La Plata Project (ALP), there exists an extraordinary partnership between the States of Colorado and New Mexico, and the Indian and non-Indian communities in southwestern Colorado and northwestern New Mexico. Together, we have successfully quantified Tribal reserved rights claims, and implemented most of the Settlement Agreement, in a unique way that serves as a national model. More than that, however, is a genuine sense of pride that exists between the Indian and non-Indian communities in the area over shared use and development of water and mineral resources, economic opportunity, and preserving the quality of life and environmental heritage of the area.

Through this legislation, we have avoided protracted, expensive and divisive litigation. We have preserved non-Indian economics and provided for stable development of Tribal economies. We have avoided the social disruption resulting from the enforcement of reserved rights claims. We have integrated the administration of Indian and non-Indian water rights.

Accomplishing these results has required vision, extraordinary leadership, respect for the needs of all sides, a willingness to listen to and explore new solutions, and a commitment to stay at the table until a solution is reached.

Historical Context

The original Ute Reservation was established by treaty in 1868, prior to the arrival of non-Indian settlers to the area. The arrival of non-Indians resulted in conflicts, and reconfiguration of the Reservation lands. In 1895, Indians living on the Reservation were given the option of settling on 160-acre allotments, or moving to the western portion of the Reservation. Non-Indians were able to acquire some of these allotments as well. In 1934 this homesteading process was closed. The result was the present configuration of checkerboard Indian and non-Indian lands on the Southern Ute Reservation and the contiguous block nature of the Ute Mountain Ute Reservation. These lands are downstream from non-Indian development in Colorado. Almost every river in southwestern Colorado passes through one or both of the Reservations.

The rights of Indian Tribes to reserved water are based on the date of the reservation.¹ In the late 1800's non-Indian irrigation was beginning upstream from the Reservation, on the Pine River. The Southern Ute Tribe filed claims for irrigation purposes in 1895, and water litigation ensued until 1930, when a federal court awarded the Indian claimants the number one water right on the Pine River. This created a severe water shortage for the non-Indian irrigators, and resulted in the construction of Vallecito Dam in 1941, to serve both Indian and non-Indian lands.

In contrast, the Mancos Project was developed on the Mancos River by 1950. Although the Mancos River is the primary river through the Ute Mountain Ute Reservation, the Tribe did not receive the benefit of water service from the Project. In fact, the town of Towaoc did not even have a potable water supply until 1990, under the implementation of the 1986 Settlement Agreement.

Plans were also moving forward for comprehensive water development throughout the Upper Colorado River Basin. In 1956, Congress enacted the Colorado River Storage Project Act.² This Act authorized the construction of initial CRSP units – Curecanti, Flaming Gorge, Navajo and Glen Canyon; participating projects – including the Florida Project; and the preparation of planning reports – including the Animas-La Plata and Dolores Projects. The Florida Project was completed to serve lands on Florida Mesa in 1963, which included some Indian lands but which did not completely meet Indian needs.

The CRSP Act also established a mechanism for assisting in the funding of construction of these and other projects, through the creation of the Upper Colorado River Basin Fund (the "Basin Fund"). In short, hydroelectric power revenues generated from the CRSP are credited to the Fund to pay for certain construction, operation and maintenance costs of the initial CRSP units. The balance of any revenues are credited to each of the upper basin states to pay for that portion of the construction costs of participating projects allocated to irrigation, that are beyond the

¹ *Winters v. United States*, 207 U.S. 564 (1908)

² P.L. 84-485; 70 Stat. 105, 43 U.S.C. 620

ability of irrigation contractees to repay. Additionally, participating projects can take advantage of favorable rates for CRSP power.

In 1968, Congress enacted the Colorado River Basin Project Act (CRBP).³ Among other things, the CRBP Act authorized the constructions of the Animas-La Plata and Dolores Projects, concurrent with the completion of the Central Arizona Project. The authorization for the Animas-La Plata project was for a configuration substantially different than the presently proposed configuration.⁴ However, the Project was always contemplated to serve both Indian and non-Indian municipal, industrial and irrigation needs.⁵

Thus, as of the late 1960's, there was some resolution of Tribal claims, and a good deal of water development undertaken and contemplated in the San Juan River Basin. Some but not all of this development benefited the Tribes. However, quantification of Tribal claims, and their impact on non-Indians, were certainly open questions. The United States Supreme Court⁶ established a test for the amount of such claims, based on practicably irrigable acreage, which included both present and future irrigation needs.

Quantification of the Tribal claims in Colorado commenced in 1972, when the United States Department of Justice filed reserve rights claims on behalf of the two Ute Tribes in federal

³ P.L. 90-537; 82 Stat. 885; 43 U.S.C. 1505

⁴ Section 501(c) of the 1968 CRBP Act provides that the A-LP Project be constructed "in substantial accordance with the engineering plans set out in the report of the Secretary transmitted to the Congress on May 4, 1966, and printed as House document 436, Eighty-ninth congress..." In contrast to the present configuration, the Project then contemplated the construction of Howardsville Reservoir above Silverton, a diversion from the Animas River near Electra Lake above Durango, Animas Mountain Reservoir, and extensive facilities in the La Plata Basin, including Hay Gulch Reservoir, Three Buttes Reservoir and Ute Meadows Reservoir.

⁵ Changes in the proposed configuration of the Project were made in the 1966 Report included in House Document 436, to increase municipal and industrial supplies, and decrease irrigation supplies. A summary of the proposal water supply and depletions as of the 1968 CRBP Act is as follows:

| Animas-La Plata Project Water Supply -- 1968 | | | | | |
|---|-----------------------|-------------------------------------|-------------------------|----------------------------|--|
| | Irrigation (af/yr) | Municipal and Industrial (af/yr) | Total Supply (af/yr) | Total Depletion (af/yr) | |
| Colorado | 138,900 | 62,700 | 201,600 | 112,300 | |
| New Mexico | 50,000 | 13,500 | 63,500 | 34,100 | |
| Total | 188,900 | 76,200 | 265,100 | 146,400 | |
| Ute Mountain | 21,730 | 23,500 | 45,230 | 22,100 | |
| Ute Tribe | | | | | |
| Southern Ute | 1,370 | 30,000 | 31,370 | 22,700 | |
| Tribe | | | | | |
| Total (Included in state's share above) | 23,100 | 53,500 | 76,600 | 44,800 | |

⁶ Arizona v. California, 373 U.S. 546 (1963)

district court. The state of Colorado and other parties intervened, and moved to dismiss on the grounds that under the McCarren Amendment⁷ jurisdiction belonged in state water court. The United States Supreme Court⁸ ruled that state court was the most appropriate forum in which to achieve integrated adjudication of reserved right claims. Immediately thereafter, the United States filed extensive claims in state water court.⁹

The Tribal claims encompassed the potential irrigation of some 93,000 acres, in over 25 stream systems. Most of these lands were in the La Plata and Mancos River Basins, which were water-short and over-appropriated. Success by the Tribes would totally eliminate existing non-Indian irrigation, disrupting local economies and creating hostility.

The 1986 Settlement Agreement and Subsequent Legislation

In April 1985, many parties, public and private, convened negotiations to address the issues raised by the Tribe's reserved rights claims. The State of Colorado's negotiating position was based on several principles:

vested property rights held by owners of state decreed water rights would not be compromised;

existing economies should be protected;

existing uses should be protected by a "no injury" standard;

reserved rights claims should be quantified by state water court, not by Congress or in federal courts; and

the Tribes' legitimate needs, such as the lack of a potable water supply for Towaoc, should be met.

After intense and complex negotiations, an agreement in principle was reached that included a binding cost-sharing agreement for construction of the Animas-La Plata Project. This agreement was titled the "Agreement in Principle Concerning the Colorado Ute Indian Water Rights

⁷ 43 U.S.C. 666. The McCarren amendment consents to the joinder of the United States as a defendant in any suit for the adjudication of water rights where the United States owns or is acquiring such rights.

⁸ *Akun v. United States*, 424 U.S. 800 (1976)

⁹ These claims were originally filed as one pleading in the water court for Division No. 7, and Case No. W-1603-76, and sought confirmation of the reserved rights held by the United States in trust for the Ute Mountain Ute and Southern Ute Tribes, individual Indians owning trust allotments on the Southern Ute Reservation, and the Bureau of Indian Affairs. Subsequently, the application was amended and eleven separate applications were filed, each amended applications asserting water rights associated with a specific river: W-1603-76 (Navajo River); W-1603-76A (Blanco River); W-1603-76B (San Juan River); W-1603-76C (Piedra River); W-1603-76D (Pine River) W-1603-76E (Florida River); W-1603-76F (Animas River); W-1603-76G (Mancos River); W-1603-76H (Dolores River); W-1603-76I (McElmo Creek); and W-1603-76J (La Plata River).

Settlement and Binding Agreement for Animas-La Plata Project Cost Sharing." By signing the Agreement in Principle, the Secretary of Interior certified that the non-federal cost share contributions were reasonable, allowing for the federal release of the first \$1 million for construction of the Project. In addition to the cost-sharing element of the Agreement, the parties to the state water court litigation agreed to a set of principles that established the parameters for settlement of the reserved rights claims.

After six months of negotiations. The Colorado Ute Indian Water Rights Final Settlement Agreement was signed on December 10, 1986. The Settlement Agreement contains six major elements.¹⁰

1. In each of the drainage basin, the reserved rights of the Tribes were quantified. (See addendum.)
2. The Tribes waived ancillary breach of trust claims against the United States.
3. The Tribes agreed to specific conditions concerning the administration and use of reserved water rights, so as to integrate such administration into administration of non-Indian water rights. These conditions included beneficial use as a limiting condition, monitoring of water usage, sharing of streamflow data, and judicial change in use proceedings in Colorado state water court when required. The state court was given jurisdiction over all water in the Reservations not decreed to the tribes as reserved water rights, including both unappropriated water and state appropriative rights. The parties agreed to the entry of consent decrees in state water court.
4. The Tribes received commitments to obtain \$60.5 million in Tribal Development Funds, to enable the development of water and assist in economic self-sufficiency.¹¹
5. The non-federal parties agreed to significant cost sharing of the Animas-La Plata Project and Tribal Development Funds.¹² The parties agreed to seek Congressional deferral of

¹⁰ The following is a summary of the Agreement, and shall not be construed to interpret any of its provisions, or be binding on any of the parties thereto.

¹¹ Of this amount, \$20 million was to be earmarked for the Southern Ute Tribe, and \$40.5 million for the Ute Mountain Ute Tribe. The Funds were created by the following contributions: \$5 million from the State of Colorado Department of Natural Resources \$6 million from the state of Colorado in the form of the construction of the Towaoc Pipeline and a domestic water distribution system for the Ute Mountain Ute Tribe. (The actual amount spent by Colorado was \$7.8 million.) \$49.5 million from the United States, in three installments.

¹² The state of Colorado committed to the expenditure of \$60.8 million toward these purposes. This money has either been spent, or is on deposit as restricted funds. The state has spent \$7.8 million in the construction of the Towaoc Pipeline, \$5 million to the Tribal Development Fund, and \$300,000 towards a portion of the construction of the Animas-La Plata Project. The state has committed in restricted funds \$42.4 million held by the Colorado Water and Power Development Authority for the cost share toward phase I of A-LP, and \$5.3 million held in the construction fund of the Colorado Water Conservation Board toward cost share of the Ridges Basin Reservoir.

Tribal repayment of certain project costs until the water from the projects was actually put to beneficial use.

6. The parties agreed to seek Congressional relief from the Non-Intercourse Act¹³ limitations on Congressional oversight over the use of reserved water rights. The tribes were allowed to sell, exchange or lease water outside the Reservations, within or outside the state of Colorado, subject to state and federal law, interstate compacts and the law of the Colorado River.

The Settlement Agreement specified certain contingencies that had to be met before the settlement became final. The parties agreed to submit consent decrees to the Division 7 water court for judicial approval. A stipulation setting forth this commitment was filed, but was subject to legislative enactments by the United States Congress and Colorado legislature prior to becoming final.

Federal legislation was introduced, and was enacted in 1988.¹⁴ The Act approved the settlement and contained all the provisions contemplated by the parties, except for those relating to the interstate marketing of water. The legislation as introduced reflected the neutral nature of the Settlement Agreement concerning the legality of interstate marketing of reserved water rights under the Law of the River. However, Lower Colorado River Basin states adamantly opposed the provision, and demanded that the Tribes be flatly prohibited from applying for any out of state changes in place of use. Other western states objected to the potential reservation. The final act therefore limited use of Tribal rights in the Lower Colorado River Basin until final court order or agreement of all seven Colorado River Basin States has allowed such right for non-federal, non-Indian water rights. Moreover, the Act provides that any use of water off Reservation will result in the right being changed to a state of Colorado water right for the term of such use.

The Colorado General Assembly also enacted the legislation contemplated by the Settlement Agreement. This legislation appropriated \$5 million to the Tribal Development Funds, so much as needed for the Towaoc Pipeline, and \$5.6 million for the Ridges Basin cost sharing.

In December 1991, the Water Court approved the consent decrees that had been submitted to it based on the stipulations entered pursuant to the Settlement Agreement, and following the enactment of necessary federal and state legislation.

In summary, all of the conditions of the settlement have been satisfied, except for the construction of the Animas-La Plata Project, and the Agreement remains in effect.

1. The Settlement Agreement also established specific conditions concerning the administration and use of the water rights of the Tribes consistent with state law, including

¹³ 25 U.S.C. 177. The Non-Intercourse Act requires Congressional approval of the transfer of Indian trust property

¹⁴ The Colorado Ute Indian Water Rights Settlement Act of 1988, P.L. 100-585, 102 Stat. 2973.

agreements concerning changes in use both on and off the reservations. Those agreements are critical to the integrated administration of Indian and non-Indian water rights.

2. Under the Settlement Agreement, the Tribes have the right to receive the following amount of water, through the Project, from the Animas and La Plata Rivers:

Ute Mountain Ute Tribe: 6000 af/yr for m&i
26,300 af/yr for irrigation

Southern Ute Tribe: 26,500-af/yr m&i
3,400 af/yr irrigation

These are maximum amounts, subject to shortage sharing provisions.

3. Under the Settlement Act, the Tribes received several benefits, including Congressional relief from the Non-Intercourse Act and economic relief by relieving the obligation of the Tribes' repayment obligation until water is beneficially used.

4. The State of Colorado has complied with the requirements of the Settlement Agreement for significant cost sharing with, and financial responsibility to, the Tribes. The state has deposited \$5 million into the Tribal Development Fund, has spent \$7.8 million to construct the Towaoc Pipeline and domestic water distribution system, has spent \$300,000 toward cost-sharing for the Animas-La Plata Project, and has committed \$47.7 million toward cost-sharing for the Project.

5. The Project is the beneficiary of Colorado River Storage Project power revenues, both for the repayment of certain capital costs and for pumping costs.

6. Vested rights have been created under Colorado law to water rights in all of the various streams and rivers which are the subject of the Settlement Agreement. Extensive economies have developed in reliance on those rights.

The failure of all the parties to reach resolution of the Tribes' reserved rights claims on the Animas and La Plata Rivers may result in prolonged, expensive and divisive litigation.

Conclusion

The Settlement Act requires delivery of ALP water to the tribes by January 1, 2000, a date now past. If ALP is not approved and implemented by January 1, 2005, the Tribes have the option of commencing destructive litigation or renegotiating their reserved right claims. Further delays in finalizing the Settlement Agreement can no longer be tolerated.

At the foundation of the Settlement Agreement and this legislation is the construction of a significantly scaled-back Animas-La Plata Project (ALP) to provide water supplies to the Southern Utes and Ute Mountain Utes and the adjacent non-Indian communities in both Colorado and New Mexico. The State of Colorado endorses the modified structural alternative as described in S. 2508, which is fully compatible with the findings of extensive environmental reviews.

The alternative proposed is the 120,000 acre foot Ridges Basin Reservoir and a \$40 million development fund for use by the Tribes. The reduced project would provide only municipal and industrial water to the Ute Tribes, the Navajo Nation and the local cities and water districts. No irrigation water will be provided.

The potential impacts of ALP have been fully evaluated through exhaustive environmental reviews which are now nearing completion. In addition, the San Juan Recovery Implementation Program for endangered fish species has evaluated the project along with existing and future depletions. They concluded that the projects can be implemented while meeting suggested flow recommendations for the recovery of endangered fish in the San Juan basin.

The substantial reductions in this proposed project have not come without a price. The elimination of the originally contemplated facilities in the La Plata River drainage represents the loss of a significant opportunity for non-Indian water users in southwestern Colorado. Remaining non-Colorado Ute uses are limited to the San Juan Water Commission, Navajo Nation, the Animas-La Plata Water Conservancy District and the City of Durango. But the cost of proposed project has been cut by approximately 60% from previous project configurations and costs are within the ability of municipal and industrial users to repay.

The State of Colorado appreciates the Colorado Ute Indian Tribes' continued efforts to ensure that Tribal claims are resolved in a way that avoids taking water from other water users and ensures a reliable water supply for all residents of the area. We also commend the non-Indian project supporters for their willingness to compromise despite the great sacrifice to irrigators.

The State of Colorado has fulfilled its responsibilities arising from the Settlement Agreement and the Settlement Act of 1988. It is now time for the federal government to fulfill its commitment. The State strongly supports Senator Campbell's legislation. Let us bring this long-standing controversy to closure by passing S. 2508. Thank you for considering the State of Colorado's comments on this very important legislation.

ADDENDUM

A summary of the quantification in the various basins is set forth below:

Ute Mountain Ute Tribe

| | |
|----------------------------|--|
| Mancos River | Project reserved water right from the Dolores Project, up to 1000 af/yr m&i, 23,300 af/yr irrigation and 800 af/yr fish and wildlife development. Non-project reserved water right for direct flow and/or storage of 21,000 af/yr for irrigation of 7200 acres. |
| Animas and La Plata Rivers | Project reserved water right from the Animas-La Plata Project, up to 6000 af/yr m&i, 26,300 af/yr irrigation. Navajo Wash Non-project reserved water right for diversion of 15 c.f.s., or 4800 af/yr for irrigation of 1200 acres. |
| San Juan River | Non-project reserved water right for diversion of 10 c.f.s., or 1600 af/yr for the irrigation of 640 acres. |

Southern Ute Tribe

| | |
|----------------------------|--|
| Animas and La Plata Rivers | Project reserved water right from the Animas-La Plata Project, up to 26,500 af/yr m&i, 3,400 af/yr irrigation. |
| Pine River | The Tribe retained its right as quantified in the 1930 federal decree and the 1934 state decree, and a 1/6 interest in Vallecito Reservoir. |
| Florida River | 563 af/yr for water from the Florida Project for the irrigation of 4 specified parcels. 6.81 c.f.s., or 1090 af/yr of non-project water right for the irrigation of specified parcels. |
| Stolsteimer Creek | Non-project reserved water right for 1850 af/yr fill and refill in Pargin Reservoir, Non-project reserved water right for 2 c.f.s., Non-project reserved water right for 3.5 c.f.s., all for the irrigation of 60 acres. |

| | |
|--------------------|--|
| Piedra River | Non-project reserved water right for 8.9 c.f.s., or 1595 af/yr, for the irrigation of 535 net acres. |
| Devil Creek | Non-project reserved water right for 183 af/yr for the irrigation of 61 acres. |
| San Juan River | Non-project reserved water right for 1530 af/yr for irrigation of 510 net acres. |
| Round Meadow Creek | Non-project reserved water right for 975 af/yr for the irrigation of 325 net acres. |
| Cat Creek | Non-project reserved water right for 1372 af/yr for the irrigation of 482 net acres. |
| Navajo River | No reserved rights. |

STATEMENT OF KEN SALAZAR
ATTORNEY GENERAL OF COLORADO
ON S. 2508
COLORADO UTE SETTLEMENT ACT AMENDMENTS OF 2000
SUBMITTED TO THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

JUNE 7, 2000

I offer this statement to express my strong support for S. 2508, which amends the Colorado Ute Indian Water Rights Settlement Act of 1988 to provide for a final settlement of the Southern Ute and Ute Mountain Ute Tribes' reserved right claims. S. 2508 authorizes the construction of a modified Animas-La Plata Project that will be much smaller and less expensive than the original project and will fully comply with all applicable federal environmental laws. If S. 2508 or a substantially similar bill is not enacted, we appear headed for years of costly, bitter litigation that will pit the State of Colorado against the United States and the Tribes against the non-Indian water users of southwestern Colorado.

I would like to give you some history on the state-federal commitment to build Animas-La Plata for the Tribes. In *Winters v. United States*, 207 U.S. 564 (1908), the U.S. Supreme Court held that when the United States enters into a treaty with an Indian tribe creating a reservation, it impliedly reserves sufficient water to irrigate the reservation lands. These reserved water rights have a priority based on the date the reservation was created, which makes them senior to non-Indian water rights appropriated after that date.

Based on the *Winters* doctrine, in 1976, the United States Department of Justice filed reserved water right claims in Colorado water court¹ on behalf of the Ute Tribes. The original Ute Reservation was established by treaty in 1868 (with some later additions), making the claimed rights the most senior rights on the river.² Thus, if successful, the Tribal claims would preempt the long-standing water rights of non-Indian water users. In the more water-short river basins, such as the La Plata River basin, the Tribal claims have the potential to exceed the entire available water supply, thereby drying up family farms and ranches that have existed for generations and disrupting the local agricultural communities.

As the parties began preparing for trial in the mid-1980s, it became clear that there were many contested issues, including the priority dates of the claimed rights, the amounts of water to which the Tribes were entitled,³ the purposes for which the water could be used, whether the water could be used off the reservations, and how and by whom the rights

¹ The Department of Justice originally filed the claims in federal district court in 1972. The United States Supreme Court ruled that, under the McCarran Amendment, 43 U.S.C. § 666, the case should be heard in state court. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

² The United States actually claimed a priority date of time immemorial for the original reservation, but an 1868 priority would have the same practical effect.

³ Indian reserved rights are generally quantified on the basis of "practically irrigable acreage." *Arizona v. California*, 373 U.S. 546, 598-601 (1963). This number was very much in dispute.

would be administered. Rather than pursuing lengthy, expensive, and divisive litigation, all the parties sat down together to negotiate and, in 1986, they signed the Colorado Ute Indian Water Rights Final Settlement Agreement. Two years later, Congress passed the Colorado Ute Indian Water Rights Settlement Act of 1988, Public Law 100-585, affirming the federal commitment to build Animas-La Plata. However, the project was unable to meet the requirements of the Endangered Species Act and the Clean Water Act and raised cost concerns.

S. 2508 resolves those issues. The parties to the settlement and representatives of various environmental organizations have considered virtually every possibility for satisfying the Tribes' claims. The Bureau of Reclamation has thoroughly studied the settlement options. Its draft supplemental environmental impact statement (DSEIS), issued this past January, shows that a reservoir at Ridges Basin is the only way to provide a reliable water supply that will settle the Tribes' water claims and fulfill the United States' trust responsibilities to the Tribes. The Tribes have repeatedly stated that they want the dependable, flexible water supply that only storage can provide. Southern Ute Tribal Chairman Baker testified before the House Subcommittee on Water and Power that the proposal to give the Tribes money to try to buy land and the accompanying water rights from their neighbors "would be a nightmare to implement." The DSEIS shows that Chairman Baker is right.

The DSEIS also shows that there is an environmentally and fiscally responsible way to provide that storage. The scaled-back version of Animas-La Plata eliminates the irrigation component to comply with the Clean Water Act and reduces allowable project depletions to comply with the U.S. Fish and Wildlife Service's biological opinion issued under section 7 of the Endangered Species Act. S. 2508 also explicitly requires federal agencies to comply with all applicable federal environmental laws, including the National Environmental Policy Act, the Endangered Species Act, and the Clean Water Act.

S. 2508 represents a compromise among the Ute Tribes, the Navajo Nation, and water users in Colorado and New Mexico that is acceptable to the Tribes as a final settlement of their legal claims to water from the Animas and La Plata Rivers. Animas-La Plata is now a truly Indian project, with two-thirds of the project's water allocated to the Ute Tribes and the Navajo Nation. The remaining water will be available, at cost, for municipal uses in Colorado and New Mexico. Although the project no longer includes water for irrigation, it will protect existing agricultural water users in Colorado who would lose their water supplies if the Tribes were to prevail in litigation. Moreover, by providing needed water to growing cities in the region, the project will reduce the pressure to convert farms and ranches to subdivisions.

I appreciate the Administration's commitment to supporting legislation to resolve the Tribes' claims this year. However, there are three issues that we still need to resolve: environmental compliance, project deauthorization, and non-Indian repayment.

Environmental compliance. The Administration previously testified that preserving the Secretary of the Interior's discretion in conducting environmental compliance is

extremely important. S. 2508 does this. This bill very explicitly requires the Secretary to comply with all national environmental laws. While S. 2508 includes certain *Congressional* determinations about the project's environmental adequacy, it affirms the independent authority and discretion of the Secretary and other federal officials under applicable environmental statutes.

Deauthorization. This issue is important to the State of Colorado. The Administration has stated that settlement legislation should deauthorize those features of the Animas-La Plata Project that were previously authorized but are not currently contemplated. Tribal settlement legislation is not the place to make changes in federal law that could have far-reaching implications for the law of the Colorado River. Deauthorization of a Colorado River Storage Project Act/Colorado River Basin Project Act project should not be addressed piecemeal here. S. 2508 is a compromise. It stops short of deauthorization, yet addresses the concern that the downsized project is the opening wedge for a larger project by explicitly stating that the facilities described in this bill cannot be used in conjunction with any other facility authorized as part of the Animas-La Plata Project *without express authorization from Congress*. This provision ensures that no additional project facilities will be built without the passage of additional legislation – in effect, requiring a whole new authorization. And, of course, any additional facilities would be subject to the full spectrum of environmental review. This "delinking" approach is a reasonable way to address a specific concern, without raising complex "law of the river" issues having far-reaching repercussions.

Repayment. I agree with the Administration's principle that the non-Indian project partners should pay their share of the costs. S. 2508 would allow the non-Indian entities the option of satisfying their capital repayment obligations by payment in full prior to the initiation of construction. I support an approach to repayment that allows the repayment entities to obtain certainty regarding their financial exposure.

Some project opponents question the Ute Tribes' decision to insist that the United States live up to its part of the bargain and build a reservoir, rather than giving them money to buy water rights. These groups presume to tell the Tribes that they are making a bad deal because the modified project does not include water delivery facilities. As Chairman Baker previously testified, the Tribes would prefer to have delivery facilities included in the project, as agreed in the Settlement Agreement and the 1988 Act, but they elected to defer those facilities in order to obtain storage. Project opponents fail to respect the Tribes' long struggle to secure a reliable water supply for their future. Instead, they seek to penalize the Tribes for compromising by forcing them to take money in place of the water to which they are entitled. The Tribes' choice deserves your respect.

Construction of a scaled-back Animas-La Plata Project remains essential to the settlement. The Ute Tribes have until January 1, 2005 to elect whether to go back to water court to pursue their original claims in the Animas and La Plata Rivers. Unless Congress acts now to meet the federal government's commitment to the Tribes, I fear they will look to the courts for relief. Reopening of the Ute Tribes' claims would trigger litigation among the

Tribes, the United States, the State of Colorado, and water right holders. As discussed above, the Tribes' reserved rights claims raise complex legal and factual issues and threaten the livelihoods of farmers and ranchers who rely on the already water-short La Plata River. Such litigation would involve virtually all water users in the Animas and La Plata basins, take many years of trial and appeals, and cost millions of federal, state, and local taxpayer dollars.⁴ Southwest Colorado has a history of cooperation between Indians and non-Indians, of which we are justly proud. S. 2508 will allow us to continue down that path.

The project before you in S. 2508 is far different from previous versions of Animas-La Plata. It is a whole new kind of water project, designed to provide environmental justice to the Ute Tribes in an environmentally responsible way and at a reasonable cost. The Administration has stated its willingness to work with Congress to ensure that this settlement is not lost. I appreciate that commitment. I too am committed to working with Congress and the Administration to achieve final settlement this year.

⁴ The Big Horn River adjudication in Wyoming, which litigated the reserved rights claims for the Wind River Reservation illustrates how long and costly such litigation can be. That adjudication began in 1977 and was decided by the Wyoming Supreme Court for the first time in 1988. *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988). The case then went to the U.S. Supreme Court. *Wyoming v. United States*, 492 U.S. 406 (1989). Since then, the case has been to the Wyoming Supreme Court four more times. *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 803 P.2d 61 (Wyo. 1990); 835 P.2d 273 (Wyo. 1992); Docket Nos. 93-48 & 93-49 (Oct. 26, 1993) (unreported order dismissing appeal); 899 P.2d 848 (Wyo. 1995). All told, the State of Wyoming and the United States spent tens of millions of dollars litigating the Wind River Reservation claims for more than twenty years, and the result is continuing mistrust and conflict.

Testimony of Robert Wiygul on Behalf of the Sierra Club, Four Corners Action Coalition, Taxpayers for the Animas River and Earthjustice Legal Defense Fund

I appreciate the opportunity to offer this testimony on S. 2508. I am an attorney with the Earthjustice Legal Defense Fund in Denver, Colorado, and I have for some years advised a number of grassroots organizations, including Taxpayers for the Animas River, the Sierra Club, and the Four Corners Action Coalition with respect to the Animas-La Plata project and its compliance with federal laws. These organizations oppose S. 2508.

The Animas-La Plata project has a long history of controversy. It began as a massive irrigation project, which due to its poor economics and high environmental costs could not be built. In the mid-1980's it became a proposed solution to the perceived problem of Winters Doctrine water rights claims by the Southern Ute and Ute Mountain Ute tribes. The concern was that these Winters Doctrine claims could impact senior water rights holders in the Four Corners area. During the 1990's it became clear, however, that the project still provided few benefits at a very high cost, and had unacceptable environmental impacts.

The version of the Animas-La Plata project proposed in the pending legislation, and the companion legislation in the House is smaller than past versions, and it gives more of the water in the project to the Ute tribes. Unfortunately, however, it shares with past versions the problem that it provides few benefits at a high cost. Let me identify for you several basic remaining problems with the project.

First, the environmental impacts from drawing substantial amounts of water from the Animas river remain, and the impacts associated with potential (since there are no actual) uses have never been examined. At pages 3-97 and 3-98 of its Draft Environmental Impact Statement (DEIS), the Bureau of Reclamation states that downstream impacts of the water withdrawals from the Animas River will have significant impacts on native fish in the river. The DEIS also concedes that up to 3000 acres of upland habitat will be affected. Large amounts of power will be used to pump water uphill for no identified purpose. It is also true that forecasting the impacts of projects like this one is an inexact science, and the true impacts may not become clear until after the project is built.

These impacts are clearly less than those associated with the older versions of Animas-La Plata, but they are nonetheless real. These impacts are particularly problematic in that there are no benefits against which to measure these impacts. The Administration takes the position that no cost/benefit analysis of the project is necessary either under NEPA or the reclamation statutes. This is simply not correct. There is no legal precedent for this position with respect to Indian water rights settlements. Even if the Administration's position that Indian water rights settlements are exempt from this requirement, about a third of the water in the project as proposed goes to non-Ute entities. Clearly these entities must abide by the law, and the law requires that federally funded projects such as this have a cost/benefit analysis.

It is also clear that some use for the water must be identified if alternatives are to be given a fair evaluation under Section 404 of the Clean Water Act. The evaluation found in the draft EIS for the Administration proposal does not identify any uses, but simply assumes that

providing municipal and industrial water is the goal. This will not pass muster under the Clean Water Act.

To be honest, it appears that the reason the Administration takes the position that no uses must be identified, and that no cost/benefit ratio need be prepared, is that it knows that there are no identified uses associated with the project, and as a result there are no identifiable economic benefits flowing from it. An economic study commissioned by Earthjustice and the Sierra Club found that based on the information in the DEIS, it appeared that there were no economic benefits associated with the project.

S. 2508 does, of course, contain sufficiency language, which is clearly aimed at insulating this project and its compliance with NEPA and other statutes from judicial review. We obviously oppose any such language very strongly, and we believe the Administration should stand by its position and oppose this legislation because it contains such language.

We also would urge to committee not to prematurely accept, through this sufficiency language, the analysis under Section 404(r) the Department of the Interior has prepared. That analysis does not accurately analyze the environmental impacts of either the Administration proposal or the non-structural alternative that various conservation interests have proposed. For example, it assumes that large amounts of wetlands will be destroyed by the non-structural alternative, but it gives no specific support for this conclusion. It also assumes that these assumed losses – which are of wetland created by irrigation, not natural wetlands – cannot be mitigated, and that what mitigation can be done must be at a very high cost. None of these assumptions are correct, and they fatally undermine the Department of the Interior's 404 analysis.

In closing, let me state again for the record that the Four Corners Action Coalition and the other groups opposing the Animas-La Plata project do not oppose the Ute tribes. We believe their water rights should be respected. We believe it is unfortunate that senior water rights holders in the Four Corners area have not respected those rights. We continue to believe, however, that there are better ways to recognize those rights than building Animas-La Plata. We have proposed in good faith a non-structural alternative which is feasible, and which we believe, given a fair analysis, would be superior to the Administration proposal or the project proposed in S. 2508.

June 5, 2000

Mr. Robert Wiygul
Earthjustice Legal Defense Fund
1631 Glenarm Place, Suite 300
Denver, CO 80202-4303

Dear Mr. Wiygul:

Earthjustice Legal Defense Fund asked Hydrosphere to review the Draft Supplemental Environmental Impact Statement ("DSEIS") for the Animas la Plata Project ("ALP"). Our review indicates that there are a number of deficiencies in the DSEIS. In our view, correction of these deficiencies would eliminate the most important objections related to environmental impact and practicability to Refined Alternative 6 and reduce the cost and complexity of that alternative. Of particular significance, the assumption of wetland impact from land acquisition is not consistent with the water law governing water rights transfers. Our comments address issues related to inconsistencies between the Settlement Agreement and the DSEIS and formulation and evaluation of Refined Alternative 6.

In preparing the following comments I have reviewed the DSEIS and its supporting documents as well as other related documents. I have also conferred with my colleagues at Hydrosphere in areas related to water rights engineering and the specific practices used in making water rights transfers. I am a registered Professional Engineer with nearly thirty years of experience in water resources planning and management and water quality. My resume is attached to this letter.

Levels of Diversions are Inconsistent with the Settlement Agreement

The DSEIS contemplates diversions substantially in excess of the levels set by the Settlement Agreement. Because the Settlement Agreement apparently sets no upper limit on the amount of project deliveries that may be consumed, depletions under Refined Alternative 4 could be substantially greater than those evaluated in the DSEIS. Because the depletions possible under Refined Alternative 4 are greater than those allowed under the Biological Opinion procedures for limiting depletions should be defined in the DSEIS.

The Purpose and Need for the proposed action is to

"...implement the Settlement Act by providing the Ute Tribes an assured long-term water supply and water acquisition fund in order to satisfy the

Tribe's senior water rights claims as quantified by the Settlement Act, and to provide for identified M&I water needs in the Project Area."

The Settlement Act states:

"The Secretary is authorized to supply water to the Tribes from the Animas-La Plata and Dolores Projects in accordance with the [Settlement] Agreement..."

Thus, the Settlement Agreement defines the quantities of water to be provided to the Tribes.

The Settlement Agreement sets out the maximum amounts of water to be supplied to each Tribes for specific uses in terms of diversions. These amounts are shown in the Table 1 below.

| Tribe | Use | Diversion (af/year) | Depletion at 100% (af/year) | Nominal Depletion Fraction (%) | Depletion at Nominal Fraction (af/year) |
|------------------|-------|---------------------|-----------------------------|--------------------------------|---|
| Ute Mountain Ute | M&I | 6,000 | 6,000 | 100% | 6,000 |
| Southern Ute | M&I | 26,500 | 26,500 | 90.5% | 23,983 |
| Ute Mountain Ute | Ag | 26,300 | 26,300 | 80.1% | 21,066 |
| Southern Ute | Ag | 3,400 | 3,400 | 78.8% | 2,679 |
| | Total | 62,200 | 62,200 | | 53,728 |

The Settlement Agreement does not appear to set an upper limit on the amount of depletion allowed from these water supplies. The agreement defines the nominal fraction of consumptive use to be used in lieu of historical data as the basis for changes of use. These depletion fractions and the corresponding depletion amounts are shown in Table 1.

The DSEIS sets the depletions for the two Ute Tribes that would be provided by the Administration Proposal at 52,960 af/year (DSEIS, 1-7). This is approximately equal to the amount of annual depletion contemplated by the Settlement Agreement at the nominal depletion rates. (The DSEIS does not explain how the water supply requirements are calculated.)

The DSEIS contemplates diversions for water to be used by the two Ute Tribes totaling 79,050 af/year from Refined Alternative 4 (DSEIS, 2-96, Table 2-53). This amount exceeds the amount set out in the Settlement Agreement by 16,850 af/year. The diversions set out in the DSEIS appear to be calculated based on the depletions attributed only to the structural portion of Refined Alternative 4 using a nominal depletion fraction of 50%. Including the diversions associated with the non-structural component of the Refined Alternative 4 results in a total diversion for tribal uses of 105,050 af/year, almost 43,000 af/year greater than the maximum levels set out in the Settlement Agreement.

Thus the DSEIS is not consistent with the Settlement Agreement and with the statement of purpose and need for the project.

If the structural component of Refined Alternative 4 actually delivers 79,050 af/year to the Ute Tribes, the Tribes might be free to consume all this water as the Settlement Agreement appears to set no upper limit on the consumptive use of water. Arguably, the Ute Tribes would be limited to fully consuming the 62,200 af/year of diversions contemplated in the Settlement Agreement. Under that scenario the consumptive use allowed on the remaining 16,850 af/year of diversions from the structural components would be limited by Reclamation Law or Colorado state law. Assuming a nominal 50% consumption, an additional 8,425 af/year of depletions would occur. Total depletions attributable to water supplies to the Ute Tribes would be 70,625 af/year under these assumptions, compared to 39,525 af/year stated in the DSEIS (DSEIS, 2-96, Table 2-53). Impacts from this higher level of depletions have not been addressed in the DSEIS.

The Final Biological Opinion on the Animas La Plata Project defined a Reasonable and Prudent Alternative that limits depletions to 57,100 af. Based on my analysis of the Settlement Agreement and the DSEIS, new depletions from Refined Alternative 4 could be substantially higher than that. In order for the DSEIS to be consistent with the Biological Opinion the DSEIS should define operational procedures for Refined Alternative 4 that would limit project depletions to the levels specified in the Biological Opinion.

Water Uses are Inconsistent with the Settlement Agreement

A second inconsistency with the Settlement Agreement is in the types of use specified for water. The Settlement Agreement provides for a total of 32,500 af/year diversion to M&I uses and 29,700 af/year of diversion to agricultural uses. At the nominal depletion rates set out in the Settlement Agreement the depletions contemplated for M&I were 29,983 af/year and for agriculture were 23,746. The DSEIS adopted the following change to the 1996 FSES and 1980 FES:

"The project water allocations would be restricted to M&I uses only, removing the irrigation water uses proposed in the 1996 FSES and 1980 FES." (DSEIS, 1-9)

This change is inconsistent with the Settlement Agreement and thus is inconsistent with the purpose and need for the project. The change directly affects the comparison between Refined Alternative 4 and Refined Alternative 6. Under Refined Alternative 6, water rights yielding 17,432 af/year of depletions would be acquired from existing agricultural lands. (This component of Refined Alternative 6 replaces part of the structural component of Refined Alternative 4. Both alternatives include a non-structural component consisting of acquisition of water rights yielding 13,000 af/year of depletions to be used for agricultural purposes.) The effect of the change adopted in the DSEIS is to require that the agricultural water rights acquired under the "structural component" of Refined Alternative 6 be changed to M&I use. This increases the cost of acquiring this water supply because of the need to "re-shape" depletions to meet M&I use patterns.

The DSEIS claims wetlands impacts associated with Refined Alternative 6 because of the necessity to change water from agricultural to M&I use. If the use assignments in the Settlement Agreement were adopted, essentially all of the water supply from the "structural component" of Refined Alternative 6 would remain in agricultural use. Any impact to wetlands from a change of point of use would be offset by creation of wetlands at the new point of use. Under the use assignments in the DSEIS the water supply from the "structural equivalent" component of Refined Alternative 6 must be changed to M&I uses, which the DSEIS argues leads to wetlands impacts.

Allowable Depletions from Changes of Use are Low

Both Refined Alternative 4 and Refined Alternative 6 include water rights obtained from purchases of existing agricultural lands. These water rights would be changed to provide for use of the water at different locations and for different uses. Such changes of point of diversion and type of use are limited by the principle that a change in use cannot harm other existing water rights.

In addition, the assumed values of consumptive use are probably low. In calculating the amount of land that must be purchased for Refined Alternative 6 the DSEIS estimated the amount of historical depletions on lands in the area as ranging from 1.4 through 1.6 af/acre/year (ft/year) (Table 4, 2-140). The regional free surface evaporation in the project area is approximately one-third higher than that in the Front Range of Colorado. Based on the considerable body of experience in the Front Range and the relative evaporation rates, it is our view that it would be reasonable to expect that depletions would be on the order of 2 ft/year in the project area. It is possible that lower depletion levels were assumed to reflect historic dry-year conditions. However, dry-year depletions for senior rights (which would likely be the subject of acquisition) may not be lower than average depletions and could be higher. Although the actual amount of consumptive use that can be transferred from a water right must be determined on a case-by-case basis, it is our view that the levels assumed in the DSEIS are low.

The effect of using conservative depletion levels is to overstate the amount of land required for purchase. Assuming that values of 1.5 af/acre were actually used in calculating land requirements for Refined Alternative 6, use of a value of 2 af/acre would reduce land requirements by about 25% or 5,000 acres.

Sites for Land Acquisition are Arbitrary

The DSEIS sets out in Table 2-66 (DSEIS, page 2-140) the sources and amounts of water to be obtained by purchase of water rights. The DSEIS specifies that 10,000 acres of land would be acquired in the Pine River Basin, for a yield of 15,114 af/year of depletions. The DSEIS offers no justification for purchase of this amount of land in this single basin. Table 2-27 (DEIS, 2-45) shows 14,590 af of depletions in the Pine River basin. However, neither Tables 2-53 or 2-67 (DSEIS, 2-96, 2-141), which set out the water uses and locations for Refined Alternative 4 and Refined Alternative 6, show any depletions or return flows in the Pine River basin. Nevertheless, this large purchase requirement is

widely cited in the DSEIS and 404(b)(1) Evaluation as a factor in the increased cost and risk of Refined Alternative 6:

"The implementation costs of Refined Alternative 6 include purchase of irrigated land, cost to transfer water rights...the land acquisition cost is the largest cost component of the alternative...The land acquisition would take place over a 30-year period. This longer time frame is required because of the large purchase of 10,000 acres in the Pine River Basin." (DSEIS, 2-148)

"The length of the acquisition program would also extend the programs of wetlands impact avoidance and mitigation, cultural resources, and administrative procedures including conversion of water rights from irrigation to M&I use." (DSEIS, 2-149)

"The much larger Pine River program would require overcoming numerous issues and constraints and would likely encounter extreme opposition from other water rights holders. The opposition would stem from the fact that the 10,000 acres, with appurtenant water rights, proposed for acquisition constitutes about one-third of the estimated 30,000 acres of existing non-indian irrigated lands in the Basin and the water would be used for M&I purposes outside the Pine River Basin." (DSEIS, Vol 2, D-5)

"A premium of 20% was attributed to Pine River Basin lands to create an incentive over current market prices in order to acquire sufficient land to meet the water right requirement." (DSEIS, Vol 2, D-12)

"However, under Refined Alternative 6, acquisition of 10,000 acres of irrigated land is anticipated in the Pine River Basin where there are a total of 30,000 acres serviced for irrigation, and where the average size of land holding is 153 acres. There are two procurement alternatives [sic] could occur, both of which would disrupt the market as it currently stand and would move it toward a speculative market....This scenario could be mitigated, however, if the buyer were to schedule acquisitions to take place over a sufficiently long period of time so as to not [sic] affect the market. The negative factor to the buyer of lengthening the acquisition period includes increased costs associated with the escalation of land prices over time." (DSEIS, Vol 2, D-13)

"The present and future values of land acquisition from Refined Alternative 6 are based on the following assumptions:

- 20,647 acres purchased
- 30 year purchase schedule
- land escalation of 8 percent (real)

- 2.06 discount factor
- emphasis on purchases on the Pine River Basin which entail a premium of 20% over current average listed per acre cost, a periodic 25 percent increase in land value to reflect decreasing land availability and resistance on remaining acreage in the basin.
- a periodic 25 percent increase in land values on the Animas/Florida river basins to reflect impacts from the land values on the Pine River Basin and market reactions on remaining land in these particular river basins." (DSEIS, Vol 2, D-16)

For comparison purposes, the acquisition assumptions for Refined Alternative 4 are:

"The present and future values of land acquisition from Refined Alternative 4 are based on the following assumptions:

- 10,300 acres purchased
- 15 year purchase schedule
- land escalation of 8 percent (real)
- 2.06 discount factor
- an orderly market, with a willing buyer/willing seller principle" (DSEIS, Vol 2, D-16)

See also Volume 2, page D-18 for further discussion of this issue.

The result of the compounding deleterious effects of the large block purchase in the Pine River basin is that for Refined Alternative 4 the land acquisitions for the non-structural alternative costs \$56,978,768 while that for Refined Alternative 6 costs \$195,426,421 (Vol 2, Tables 9 & 10, D-17). The respective per-acre costs are \$5,500/acre for Refined Alternative 4 and \$9,500/acre for Refined Alternative 6.

The allocation of this large block of land in the Pine River is not supported by rationale in the DSEIS. It is possible that the rationale is the potential to use Vallecito Reservoir for storage of yield and redistribution of the use pattern from the agricultural pattern to that of M&I. As we have pointed out above, this redistribution would not be necessary if the DSEIS conformed to the Settlement Agreement with regard to uses of tribal water supplies. Since no M&I uses have been identified in the Pine River basin, redistribution probably could be accomplished in Navajo Reservoir.

Other than this possible justification, the allocation of a large block of land to the Pine River Basin appears to be arbitrary and inconsistent with good engineering practice. This decision is puzzling given the clear opinion of the preparers of the DSEIS that the Pine River purchases dramatically increased the cost of Refined Alternative 6. It is even more puzzling given the availability of alternatives. For example, it is possible to reduce the amount of land purchased in the Pine River Basin by almost 50% simply by increasing purchases in other basins to the levels used in Refined Alternative 4 (Vol 2, D-9, Table 1).

Further, the total amount of land required for purchase for Refined Alternative 6 is probably overstated because the level of transferrable depletions is low. Reduction in the total land requirement would allow further reduction of acquisitions in the Pine River basin.

Base Land Costs are Overstated

1999 land costs were estimated based on average prices for June 1999 listings. There is no evidence that an analysis of recent sales was made. Land prices were set at the average value of the June 1999 listings and were \$4,384 for La Plata County and \$2,487 for Montezuma County. Actual listings ranged from \$1,290/acre to \$20,779/acre in La Plata County and from \$930/acre to \$5,000/acre in Montezuma County. This large range of values is probably due to different potential for residential development among the properties.

The average values adopted for use in the DSEIS are skewed by the more expensive parcels. Simply by purchasing the least expensive 50% of the properties offered in June of 1999 over 5,000 acres of irrigated crop land could have been acquired at an average per-acre cost of about \$2,300. A valuation study conducted for the U.S. Bureau of Reclamation in 1997 supports lower land values (Basic Data and Valuation Range Analyses, Arnie Butler and Company, July, 1997).

Land Cost Escalation is Arbitrary and Overstated

The DSEIS adopts a "estimated land escalation factor" of 8%. No factual basis is provided for this assumption. The arbitrary nature of the assumption is further demonstrated by the assumption of a single appreciation rate for an area covering two counties and exhibiting a wide diversity of economic and demographic characteristics.

The assumed appreciation rate is inconsistent with regional economics. The land to be purchased for water supply purposes is irrigated agricultural land. Returns to land from agricultural operations are unlikely to support this level of appreciation. In areas adjacent to urbanizing or developing areas appreciation at this level is possible, but it is unlikely that appreciation at this rate of growth could be sustained for decades. At the same time, land outside the developing areas would be available for purchase and would exhibit lower rates of appreciation.

The justification for these high land appreciation rates might be the assumption that land throughout the two counties will be converted to rural residential use. Conversion of water rights from irrigated agricultural land would not substantially reduce the value of the land for rural residential uses. In some cases it might be practical to leave some portion of the water with the land to support low-level agriculture associated with rural residential development. In other cases, it would be sufficient to base development on domestic wells. Thus, if the tribes elected to purchase land with value for residential development, the initial cost of this land would be higher, but they would retain a substantial land asset that offset part of the higher cost. The DSEIS does not account for

the value of land holdings or for the possibility that these lands can be sold without water rights.

In addition to the general escalation rate, several episodic price increases were assumed for land in the Pine River, and Animas/Florida basins. An initial "premium" of 20% was assigned to properties in the Pine River basin, along with 25% price increases in years 6, 11, 16 and 21 in both areas. No factual basis or analysis has been provided to support the timing or amount of these episodic escalation factors. Further, the rationale for including these "premiums" is also arbitrary--the allocation of a large block of land for purchase in the Pine River basin. Because no substantial basis for the assumed land cost escalation factors has been presented these assumptions must be considered inconsistent with good engineering practice.

Raising Lemon Reservoir is Economically Infeasible

Refined Alternative 6 includes 500 acre-feet of yield from raising Lemon Reservoir. The cost of this yield is \$28 million or \$56,000/acre-foot. Given the much lower (more than ten times lower) unit cost of land acquisition, inclusion of this component cannot be considered good engineering practice. This component of the alternative should be eliminated and replaced with additional land acquisition. Eliminating this component would also eliminate three impacts categorized as Significant or Potentially Significant.

Wetland Impact is Overstated

The DSEIS and 404(b)(1) Evaluation provide insufficient information to assess the methods used to quantify potential wetlands impacts from Refined Alternative 6. Supporting references that may help understand the methods used were not available at the time of this review.

Fundamentally, the assumption in the DSEIS that any wetlands impacts would arise from water rights transfers is inconsistent with the principles that govern such transfers under Colorado water law. The amount of consumptive use that may be transferred from one use to another is limited by that amount that has been put to historical beneficial use in the original place and type of use, subject to the non-injury principles addressed above. Consumptive use associated with wetlands cannot be transferred and should, thus, be maintained at historical levels and locations. The Refined Alternative 6 as defined in the DSEIS includes structural provisions to deliver water to historical wetlands associated with agricultural lands from which water rights are to be transferred. The DSEIS characterizes these measures as mitigation, but such facilities and management practices are actually required by Colorado water law in order to maintain historical return flow regimes to prevent injury to other water rights. With these facilities all post-transfer surface and sub-surface conditions should remain as they were historically, so that even the "regional" wetlands identified by the DSEIS would be maintained at historical levels.

Further, the facilities required to "re-shape" agricultural depletions to M&I water use patterns would themselves provide a wetlands benefit. Though we think the DSEIS may have overstated the amount of storage required to re-shape agricultural depletions, some

will be required if water is to be changed to M&I uses. These facilities could be designed to provide for creation of new wetlands. Thus, Refined Alternative 6 would result in a net increase of wetlands.

Wetland Maintenance Program Should be Revised

We disagree that wetlands mitigation is required for Refined Alternative 6, but assuming that a wetlands maintenance program is desired, the effectiveness of the program set out in the DSEIS can be substantially improved, thus increasing the wetlands benefit of the alternative. The wetlands that would be maintained under Refined Alternative 6 are artificial wetlands created by application of irrigation water to agricultural lands. These wetlands are typically small and fragmented and adjacent to or surrounded by cultivated lands. Instead of maintaining these wetlands in place a better approach would be to consolidate water supplies used for wetlands maintenance and apply them to new or existing wetlands that have greater biological significance because of size, location or other characteristics. A carefully planned program of this type could provide more biological value for the same amount of water at a lower construction and operation cost.

Comparative Risk is Overstated

The DSEIS and 404(b)(1) Evaluation find that the Refined Alternative 6 entails more risk than Refined Alternative 4. The uncertainties that are cited in the DSEIS include the following:

Cost of land Acquisition--Elsewhere in this letter we address the factors that lead us to conclude that the cost of land for Refined Alternative 6 is substantially overstated.

Complexity of Acquisition--The DSEIS depicts the land and water acquisitions, and subsequent water rights change cases, as risky. These types of transactions are routine occurrences. Evidence of this is the substantial industry of water rights engineers and lawyers who specialize in handling water rights change cases. If the land acquisition program is handled competently it entails a very low risk. In fact, the very fact that the acquisition program would involve a substantial number of modestly-sized properties serves to reduce its risk. This is because any single mistake in acquisition is unlikely to have a large impact on the overall property and water portfolio. Further, because of the active market in land and water rights, properties can be resold.

Water law constraints--The DSEIS raises a number of issues related to constraints on use of water from Refined Alternative 6 that are not raised for Refined Alternative 4. However, the Settlement Agreement expressly states that the Tribes will abide by all state water laws, federal laws and interstate compacts when using project water off of the reservations.

Benefits are not Recognized

Some benefits of Refined Alternative 6 were not recognized by the DSEIS and 404(b)(1) Evaluation.

Robert Wiygul

June 05, 2000

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Salinity--Conversion of water use from agricultural use to M&I use will under most circumstances result in a reduction of salt loading. This benefit of Refined Alternative 6 were not identified and quantified in the DSEIS and 404(b)(1) Evaluation.

Flexibility--Refined Alternative 6 provides substantially more flexibility than Refined Alternative 4. The water supply from the structural component of Refined Alternative 4 is located at Ridges Basin or the Animas River diversion point, a location that cannot be changed. On the other hand, water supplies from the equivalent component of Refined Alternative 6 can be dispersed throughout the region to better serve tribal water uses or leases. In addition, the land and water acquired under Refined Alternative 6 is fungible so that if conditions change in the future the configuration of the project can be changed.

Present Perfected Rights--The Colorado River Compact recognizes present perfected rights that are not subject to administration in the event of a compact call. The U.S. Supreme Court in *Arizona v. California* defined these rights as those applying water to beneficial use on June 25, 1929. The storage rights for the Animas La Plata Project are not present perfected rights and thus would be subject to administration under a compact call. Depending on the severity of a compact call and the procedures adopted by the Colorado State Engineer to administer water rights in the face of a compact call, these rights might have no yield or a reduced yield. Under the "structural component" of Refined Alternative 6 water rights can be purchased that are present perfected rights, which would provide for a more reliable water supply.

Please don't hesitate to contact me if you have any questions about this letter.

Sincerely,
Hydrosphere Resource Consultants, Inc.

by: _____
Benjamin L. Harding, P.E.

**AN ECONOMIC ASSESSMENT OF THE PROPOSED
ANIMAS-LA PLATA PROJECT**

W Ed Whitelaw, Ph D

April, 2000

HR 3112, introduced by Representative Scott McInnis (R-CO), would authorize the most recent version of the Animas-La Plata (ALP) project, a large water-development project near Durango, in southwestern Colorado. A similar proposal has been advanced by the Department of the Interior, and reviewed in a Draft Environmental Impact Statement (DEIS) released on February 14, 1999. The two proposals have some slight differences but, for purposes of economic comparisons, they are essentially identical.¹ This report uses the information in the DEIS to assemble a cost-benefit analysis for the current ALP proposal.

The evidence clearly shows that, under market conditions likely to exist into the foreseeable future, the expenditure of federal funds, with a discounted, present value of \$323.4 million, would yield benefits with a gross value close to zero. Additional costs, such as degradation to the natural environment of the Animas River, would add to the total. The conclusion that the benefits would be near zero rests on observations that there currently is no demand for water flowing in the Animas River: water available for use remains unclaimed and owners of senior water rights who want to sell them find no buyers. The DEIS hypothesizes that some demands might materialize sometime in the future, but concedes that the discussion is entirely speculative and presents no evidence allowing one to conclude that the probability is greater than zero.

The DEIS assumes that an as-yet-undefined entity would incur costs with a discounted, present value of \$20.7 million to enhance recreational opportunities at the reservoir. Although the DEIS does not estimate the value of these opportunities, it is reasonable to conclude that their net value would be near zero, given the area's low population and the existence of other, similar recreational sites nearby. Most recreational use of the Ridges Basin Reservoir would not constitute an expansion in recreational use—and, hence, a net economic benefit—but a transfer of use from other, similar sites. Benefits accruing to local, reservoir-related businesses would come at the expense of those linked to these other sites.

The DEIS hypothesizes that new demands for water, commensurate with what exists in California's Central Valley, might materialize, but offers no evidence of the forces that would bring this about. Speculations in the DEIS estimate that hypothetical golf courses, resorts, and residential users would be willing to pay \$25 for each acre-foot of water, while a hypothetical coal-fired, electricity generator, would be willing to pay \$50-100 for each acre-foot. In contrast, construction and operating costs associated with the reservoir—exclusive of other costs, such as environmental damage, and the construction and operation of a system for delivering the water—would total \$148 per acre-foot, or 50-500 percent higher than the hypothetical users' willingness to pay for the water.

¹ The Interior Department's proposal differs from HR 3112 by including a fund of \$40 million to be used, at the tribes' option, for the purchase of land and water rights or for economic-development projects, including the construction of infrastructure.

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In another speculation, the DEIS imagines local users would pay \$2,000 for a 20-year contract to deliver one acre-foot per year. Looking just at the costs quantified in the DEIS, however, shows that creating storage capacity in the reservoir would cost more than this amount: at least \$2,246 per acre-foot.

In sum, under current market conditions the U.S. economy would get no benefits from the expenditure of hundreds of millions of dollars on the proposed Animas-La Plata project. Even under the most optimistic scenario, the costs still would exceed the hypothetical benefits, perhaps by as much as 500 percent.

HISTORY OF THE ANIMAS-LA PLATA PROJECT

The concept of the Animas-La Plata project was originally proposed in the early 20th century, and it was formally proposed by the Bureau of Reclamation in the late 1960s. As originally proposed, Animas-La Plata's primary purpose was to divert water from the Animas River to the La Plata River drainage for agricultural use. The La Plata drainage is often referred to locally as the "Dry Side," because it has far less water than the Animas drainage available for irrigation and other consumptive uses. The original proposal included a large off-stream reservoir, pumping facilities to divert water from the Animas River into the reservoir, and additional facilities to pump the water from the reservoir to the La Plata drainage.

In the mid-1980s, the Ute Mountain Ute and Southern Ute Indian tribes agreed to accept water from the Animas-La Plata project as part of a settlement of tribal water claims. The settlement was needed because water rights in several southern Colorado drainages were awarded to non-Indian settlers without recognition of the tribes' prior claim to the water. There was concern on the part of the state of Colorado and local government and businesses that a judicial recognition of the Ute tribes' Winters Doctrine rights might disrupt local water rights. This settlement was later memorialized, with some changes, in federal legislation.

For various reasons, including constraints imposed by the Endangered Species Act, the original version of the Animas-La Plata project was never built. In more recent years, other configurations of the project have been proposed. The most recent of these proposals is contained in HR 3112, and the Administration's current DEIS.

Although documentation of the earlier proposals contained cost-benefit analyses, such analysis is missing from both HR 3112 and the DEIS. According to published reports, the Bureau of Reclamation takes the position that no cost-benefit analysis is required because the project is intended primarily to effectuate an Indian water rights settlement. Whether Reclamation or other laws require it or not, a cost benefit analysis is not addressed in this report. Whatever the legal requirement, however, a cost-benefit analysis is necessary to determine whether the project represents a socially beneficial use of limited resources.

MAJOR ELEMENTS OF THE ANIMAS-LA PLATA PROJECT, AS PROPOSED IN HR 3112 AND THE ADMINISTRATION'S DEIS

The proposed version of Animas-La Plata no longer contains any provision for irrigation water being delivered to the La Plata drainage. The only physical facilities now proposed include a reservoir of approximately 120,000 acre-foot capacity, to be built in Ridges Basin near Durango, and a pumping plant and inlet conduit to draw water from the Animas River and pump it uphill to the reservoir. No facilities for delivering water to users are included in the proposed project.

The project outlined in HR 3112 and the DEIS would deplete a total of 57,100 acre-feet of water annually from the Animas River.² As outlined in Figure 1 below, about two-thirds of the water from the project would be allocated to the Ute Mountain Ute tribe and the Southern Ute tribe. The remainder would be allocated to various other non-Ute entities, or would be lost to evaporation. Figure 1 presents a table from the DEIS explaining the intended uses of the water to be stored in Ridges Basin Reservoir.

Figure 1: Intended Uses of ALP Project Water

| Table 2-6 Alternative 1 Allocation of ALP Project Water for M&I Purposes | |
|--|---------------------------|
| Entity | Depletion Allowance (afy) |
| Southern Ute Indian Tribe | 19,980 |
| Ute Mountain Ute Tribe | 19,980 |
| Navajo Nation | 2,340 |
| Animas-La Plata Water Conservancy District | 2,600 |
| San Juan Water Commission | 10,400 |
| Subtotal | 55,300 |
| Allowance for Reservoir Evaporation | 1,800 |
| Total Depletion | 57,100 |

Source: DEIS, p. 2-25

All of the potential, economic uses of the water are entirely speculative and hypothetical. Neither HR 3112 nor the DEIS identifies any pre-determined uses of the water to be diverted to the reservoir. The DEIS lays out what it terms a "non-binding scenario" for use of ALP water, but states that actual uses for project water are not known at this time. The table found at pages 2-9 and 2-10 of the DEIS lists various hypothetical uses of the project water. The DEIS specifically states that these uses are only hypothetical.

² An acre-foot of water is the amount of water that would cover one acre of ground, one foot deep. It is equal to about 325,839 gallons.

THE PROPOSED PROJECT'S ECONOMIC COSTS AND BENEFITS

A cost-benefit analysis is useful for determining if the proposed project would increase or decrease the value of goods and services available for use by the nation's economy. If the project's costs exceed its benefits, then, relative to other alternatives—including doing nothing—proceeding with the project would reduce Americans' overall economic well-being.

In this instance, one must consider two scenarios: one with current market conditions in which there is no demonstrable demand for the water that would be diverted into the reservoir from the Animas River, and another with the hypothetical emergence, foreseen by the DEIS, of demands sometime in the future.

SCENARIO #1: CURRENT MARKET CONDITIONS, WITH NO DEMAND FOR THE WATER, OTHER THAN DEMAND FOR RESERVOIR RECREATION

This scenario represents the known costs and benefits of the proposed project.

Costs with current market conditions. The costs include the values of the cement, land, labor, and other inputs to the construction and the operation and maintenance of the reservoir and the infrastructure to divert water into it. The DEIS, between pages 2-98 and 2-124, describes the so-called structural components of the project, which include:

- Durango Pumping Plant and Ridges Basin Inlet Conduit
- Ridges Basin Dam and Reservoir
- The Navajo Nation Municipal Pipeline
- Relocation of electrical and gas transmission lines
- Mitigation of impacts on wetlands and wildlife
- Treatment of archaeological and other cultural resources

Construction of the pumping plant, inlet conduit, dam, and reservoir would be spread over five years and have a discounted, present value of \$195 million.³ Adding the discounted, present values of the other structural components that would be built by federal funds raises the total to \$238.6 million. In addition, the proposed project described in the DEIS includes \$40 million for the tribes to use for land and water rights owned by others or "for on-farm development, water delivery infrastructure, and other economic development activities."⁴ (page 2-124). The DEIS calls the expenditure of these funds "non-structural" but this label seems inappropriate insofar as the money could be used for the construction of infrastructure not unlike what the DEIS calls structural. Hence, as shown in Table 1, the total, federal construction cost identified in the DEIS is \$278.6 million.

³ Actual dollar expenditures would be larger. The discounted, present value is a lump sum equivalent in value to the anticipated stream of expenditures in the future. The calculation of a discounted, present value accounts for the cost of capital and society's general preference for the certainty of having one dollar today rather than the promise of having a dollar tomorrow.

⁴ The use of these funds would not diminish the value of the goods and services available to the nation's economy—and, hence, they would not be considered a cost—if they were used to transfer ownership of ranches and water rights from current owners to the tribes, and if the transfers were voluntary and the transfer resulted in no changes in the operation of the ranches.

The DEIS also shows, on page E-43, that the present value of the annual costs for operation, maintenance, and replacement expenditures associated with the federal investment in the dam, reservoir, and other facilities is \$44.8 million.⁵ Because the DEIS did not develop the relevant estimates, this amount does not include the annual costs associated with the Navajo Nation Municipal Pipeline.

Table 1: Costs Associated with Current Market Conditions, in Which There is No Demand for the Water, Other than Demand for Reservoir Recreation

| Component of Costs | Discounted Present Value (\$million) |
|--|---|
| Costs Identified in the DEIS | |
| Costs To Be Borne by the Federal Government | |
| Construction of dam, reservoir, inlet conduit, and pumping plant ^a | \$195.0 |
| Other initial investment ^a | 83.6 |
| Operation, maintenance, and replacement costs ^b | 44.8 |
| Subtotal | \$323.4 |
| Costs To Be Borne by Others | |
| Construction of recreation facilities at reservoir ^a | \$12.0 |
| Operation, maintenance, and replacement costs of recreation facilities ^b | 8.7 |
| Subtotal | \$20.7 |
| Costs Ignored in the DEIS | |
| Operation, maintenance, and replacement costs for the Navajo Nation Municipal Pipeline | Unknown |
| Environmental Costs | Unknown |
| Desalination Costs | Unknown |
| Forgone river recreation | |
| Others??? | Unknown |
| Subtotal | Unknown |
| Total Costs | Greater than \$344.1 |

^a DEIS, page 2-124

^b DEIS page E-43

The DEIS also estimates the costs that an as-yet-unidentified party would incur to develop recreational facilities at the reservoir. The discounted, present values are \$12 million for

⁵ Elsewhere, e.g., page 3-204 and D-22, the DEIS states that the discounted, present value of the annual costs for operation, maintenance, and replacement would be \$29.6 million. It offers no explanation for this estimate, however, so we use the estimate that is developed in the "Feasibility Design and Estimate" (Attachment E).

the construction costs, and \$8.7 million for the operation, maintenance, and replacement costs.

There would be additional costs besides those estimated in the DEIS. These include the annual costs associated with the Navajo Nation Municipal Pipeline, which the DEIS does not estimate (p. E-42). In addition, analyses offered in support of previous versions of ALP indicate that this one probably would require additional costs to cope with increased salinity downstream. The DEIS also states that opportunities for river-based recreation, such as rafting would be diminished, and concludes that the loss would be insignificant.

Perhaps the largest category of costs for which the DEIS estimates no values are the environmental costs. According to the DEIS, the proposed version of Animas-La Plata would harm the downstream environment in several ways, including these:

- Reduction in available food for fish and other aquatic fauna through the dewatering of productive areas.
- Increase in risk of disease through increased environmental stress based upon elevated water temperatures in dry water years.
- Concentration of adult fish in the remaining suitable habitats.
- Reduction in the ability of fish to navigate shallow riffles.

The DEIS also indicates that approximately 3,000 acres of upland wildlife habitat will be impacted by the construction of the reservoir and associated recreation facilities. Insofar as these environmental changes would reduce the productivity of the river's aquatic habitats, diminish the amenities associated with a naturally flowing river, or decrease the habitat for local species, the Animas-La Plata project would impose real costs on those Americans who care about such things.

Each of these types of impacts is capable of being quantified and assigned a value in calculating the costs of the project. I do not attempt to quantify those costs here, but they are real and should be a part of any full analysis of the costs and benefits of the project.

Benefits with current market conditions. Table 2 summarizes information about the potential economic benefits associated with building a reservoir under existing market conditions. In the current, and foreseeable economic environment, there is no demand for the water that would be stored in Ridges Basin Reservoir, other than limited demand for reservoir recreation. The DEIS does not estimate the value of these recreational benefits. Instead, it estimates the amount of money recreationists would spend in association with their activities on the reservoir. The DEIS fails to consider the extent to which these expenditures related to Ridges Basin Reservoir would come at the expense of reductions in expenditures associated with other, similar sites. The DEIS also fails to discuss the difference between gross expenditures on a recreational activity and the activity's net value. These errors are serious and inexcusable, for the implications of these types of errors are addressed in introductory textbooks.

Table 2: Benefits Associated with the Current Situation, in Which There Is No Demand for the Water, Other than Demand for Reservoir Recreation

| Component of Benefits | Discounted Present Value (\$million) |
|-----------------------|--------------------------------------|
| Reservoir recreation | Unknown, but probably near zero* |
| Total | Unknown, but probably near zero* |

* See text for reasoning underlying this conclusion.

It is reasonable, however, to conclude that the net value is small. Economists count the net value of a recreational visit to such a reservoir by measuring the incremental reduction in travel costs relative to nearby reservoirs. Given the small population likely to visit Ridges Basin Reservoir, and the close proximity of other, similar recreational sites, it is quite likely that the net benefit from recreation would not even exceed the cost of installing, operating, maintaining, and replacing the recreational facilities.

SCENARIO #2: HYPOTHETICAL DEMAND FOR THE WATER MATERIALIZES BY THE TIME THE PROJECT IS COMPLETED

The DEIS speculates that, although there currently is no demand for the water that would be stored in Ridges Basin Reservoir, demand might materialize after the five-year construction period. In particular, it considers several scenarios in which water users would be willing to buy reservoir water. Lacking a non-zero price locally, the Department of Interior borrows some from California's Central Valley. The DEIS, however, offers no rationale for why one would reasonably expect that local users, who currently are not willing to pay anything for more water, would in the future be willing to pay the price prevailing in the Central Valley, one of the most productive agricultural centers in the world, and a region where large, rapidly growing metropolitan areas are major factors determining the price of water.

In contrast, the Animas-La Plata area has low-value agriculture and no large metropolitan area. Indeed, the fact that users have not secured all the water currently available under Colorado's water laws, indicates that current water users in the area would not be willing to pay anything for an additional acre-foot of water, if the tribes put it up for sale. This is confirmed by the fact that, according to local water authorities, there is currently no market in senior water rights on the Animas River.

Even though there seems to be no justification for the hypothetical demands incorporated into the DEIS, I examine their implications for the costs and benefits of the Animas-La Plata project.

Costs with hypothetical market conditions. Table 3 summarizes information about the costs of providing water to meet hypothetical demands. The DEIS does not, however, estimate the additional costs, beyond those in Scenario #1, above, that would be required to convey the water to satisfy the hypothetical demands. Presumably, somebody—the federal government, tribes, or water users—would have to construct, operate, and maintain a water-conveyance system. The costs of such a system would be substantial. The DEIS does, however, calculate the cost, \$2,246 per acre-foot, of building and maintaining storage

capacity in the Ridges Basin Reservoir (p. 3-204). In other words, it would cost \$2,246 per acre-foot, to build and maintain the long-run capacity to store water in the reservoir.

Table 3: Costs Associated with the Hypothetical Situation, In Which New Demand for the Water Materializes

| Component of Costs | Discounted Present Value (\$ per acre-foot, long-term contract) |
|---|---|
| Cost of storing water in the reservoir | \$2,246* |
| Cost of conveying water from the reservoir to users | Unknown |
| Total | Greater than \$2,246 |

* Does not include costs not addressed in the DEIS, such as environmental damage and loss of river-related recreation

Benefits with hypothetical market conditions. Table 4 summarizes information about the potential economic benefits associated with providing water from Ridges Basin Reservoir to potential users assumed to exist under hypothetical conditions considered in the DEIS. The DEIS considers several alternative, hypothetical situations. In the one most advantageous to the tribes, they would be able to sell the water under a 20-year contract for a one-time payment of \$2,000 per acre foot of annual delivery. In other words, users would pay \$2,000 for the assurance that the tribes would deliver one acre-foot of water per year for two decades.

In contrast, the DEIS estimates that building and operating storage capacity in Ridges Basin Reservoir would cost \$2,246 per acre foot. That is, it would cost \$2,246 to build and maintain the long-run capacity to store water for which hypothetical users would be willing to pay \$2,000. Thus, if one considers storage costs, alone, the costs would outweigh the benefits by more than 12 percent, even with the most extreme hypothetical demand imagined in the DEIS. Adding in the environmental and other costs the DEIS does not consider would make the discrepancy even larger.

Table 4: Potential Benefits Associated with the Hypothetical Situation, In Which New Demand for the Water Materializes

| Current and Hypothetical Market Conditions | Value (per acre-foot) |
|---|-----------------------|
| Current market conditions | \$0 |
| If local market conditions were the same as those in Central Valley, California | |
| If water were sold under a 20-year contract (\$ per acre-foot, one-time payment) | \$2,000 |
| If water were sold by the acre-foot, and demand arose from the development of golf courses, resorts, and residential users (\$ per each acre-foot of water) | \$25 |
| If water were sold by the acre-foot, and demand arose from coal-fired electricity generators (\$ per each acre-foot of water) | \$50-100 |

In its discussion of other hypothetical demands, the DEIS assumes that water would be sold on a per-acre-foot basis, rather than by long-term contract. In one case, the DEIS assumes that users would be willing to pay \$25 per acre-foot for golf courses, resorts, and residential use, as well as \$50 per acre-foot to cool a coal-fired electricity generator. In another, it assumes owners of the generator would be willing to pay \$100 per acre-foot and the other demands would remain priced at \$25.

In contrast, however, the DEIS estimates (p. 3-204) that the cost per acre-foot of water would be \$148. In other words, the cost would exceed the users' willingness to pay for the water by 50-500 percent.

CONCLUSION

The DEIS fails to provide a full description of the potential costs of the proposed Animas-La Plata project, and conjures up hypothetical benefits. Even so, it is clear that, even if hypothetical demands similar to those that exist in California's Central Valley were to materialize, the costs of the Animas-La Plata project would exceed the benefits by as much as 500 percent. Under current market conditions, which can be expected to persist for decades, the project would yield zero benefits for federal costs exceeding \$344 million.

This conclusion stands in stark contrast to the net benefits potentially attainable from a non-structural alternative that would enable the tribes to secure water for their needs by giving the tribes funds to purchase water rights from willing sellers. Such transactions would not diminish the value of the goods and services available to society, as would the proposed ALP project. Instead, the non-structural alternative would merely transfer the ownership of goods and services. Since the transactions would occur voluntarily, the tribes would obtain water only whenever the value they place on it exceeds the seller's value.

**PREPARED TESTIMONY OF JILL LANCELOT, LEGISLATIVE DIRECTOR
TAXPAYERS FOR COMMON SENSE**

My name is Jill Lancelot. I am co-founder and Legislative Director of Taxpayers for Common Sense (TCS). Taxpayers for Common Sense is a non-partisan advocate for American taxpayers. We are dedicated to cutting wasteful spending and subsidies in order to achieve a responsible and efficient government that lives within its means.

We thank the Committee for giving us this opportunity to present our views regarding the Animas-La Plata (ALP) project. Since its founding in 1995, TCS has consistently opposed ALP because of its costs to taxpayers. Although there are a variety of reasons to oppose the ALP project, TCS remains opposed to the proposed project because it is too expensive and it is unnecessary.

We are here today to state our reasons for our opposition to S.2508, the Colorado Ute Settlement Act Amendments of 2000.

TCS recognizes the commitment made to honoring the water rights of the Ute tribes. We agree that the obligation to the Tribes must be met, however, we believe that there are less costly ways to accomplish that goal.

ALP HISTORY

ALP was authorized by Congress in 1968 when gargantuan water projects were still in vogue. Later, recognizing that the project would be a waste of public funds, Congress never gave the green light to this project. Consequently it has never been built.

PROBLEMS WITH S. 2508

Taxpayers for Common Sense believes that the latest proposal for this project, embodied in S. 2508, although downsized from the original massive project, still has many of the same problems as the original version.

FAILURE TO REPORT TO CONGRESS

The Reclamation Project Act of 1939 requires the Secretary of the Interior to submit a report to Congress before seeking funds to build a new water project. That report must address the costs, probability of repayment, and feasibility of the proposed project. No such report has been provided to Congress or the public in this instance. TCS believes that this omission may be

a result of the extremely poor benefit-cost ratio of ALP, or the fact that the Secretary has failed to enter into repayment contracts, or any of a number of reasons related to the extremely poor economic justification for the project. None of these is a sufficient reason to disregard existing law and the requirement of a report to Congress, however. In fact, the report is most needed in situations like this, where the spotlight of public scrutiny on the report may cause Congress to look before it leaps to fund an uneconomical project.

COSTS AND SUBSIDIES

S. 2508. would write a blank check for this uneconomical project. TCS is deeply concerned with the financing scheme included in S. 2508. This legislation simply requires non-Tribal municipal and industrial (M & I) beneficiaries to repay their capital obligations in one lump sum, in advance of construction. Furthermore, the legislation does not identify the amount to be repaid, but instead, leaves that to a future agreement between the Secretary of the Interior and project beneficiaries. Yet because this agreement is to be established in advance of project construction, it leaves the federal taxpayer in the position of shouldering all risks of potential cost overruns. This one-time pre-construction payment is not adequate to protect taxpayers.

This financing scheme is contrary to federal Reclamation law, and flies in the face of current financial reforms in federal cost sharing. These reforms require local users to pay full costs for local M & I water supply projects. The two fundamental principles behind the current policy are:

1. To assist Congress in assuring the true need for the project by requiring that non-federal interests pay the full costs of M & I water supply for multiple purpose projects, and
2. To assure the direct involvement of those non-federal interests in controlling project costs.

Federal agencies have a long and notorious history for building projects that end up with large cost overruns. For example, the Central Arizona Project originally slated to cost about \$832 million, ended up costing over \$4 billion. The Tennessee-Tombigbee waterway's original estimate was in the neighborhood of \$300 million and wound up costing almost \$2billion. Indeed, for years the ALP project has had significant controversy over what ultimate construction costs likely would be and it is probable that a number of the those questions will not be resolved until construction is well underway.

In addition, the legislation appears to sidestep longstanding Reclamation law requiring that repayment contracts be in place and include provisions for price indexing, inflation and cost overruns to be allocated to participants. In short, S.2508 violates Reclamation law that requires local sponsors to bear the burden of full cost repayment for M & I water development. S. 2508 shifts a considerable portion of that payment to the federal taxpayer, creating a whole new class of subsidies.

By using the lump-sum repayment approach, the Department of the Interior also is evading the requirement of public participation and public hearings on repayment contracts, in disregard

of existing federal law. Congress passed the Reclamation Reform Act of 1982 to prevent the Interior Department from doing just what it is doing here -- fixing the terms of repayment in Washington instead of involving the local people in the affected area.

TCS is in agreement with Eluid Martinez, Commissioner, Bureau of Reclamation in his testimony before this Committee on June 24, 1998 when he stated,

“(S.1771) would exempt the modified Animal-La Plata from the basic requirements of Reclamation laws that are designed to ensure economic feasibility and appropriate financing of Reclamation water projects. The Administration strongly opposes the waiver of these requirements.”

Although, the Commissioner was testifying in regard to the version of ALP that was presented in 1998, his statement applies to the current project as configured in S. 2508.

Additionally, there are a number of costs that are not readily apparent. Taxpayers will be saddled with millions of dollars annually for the costs of pumping water up hill, as well as salinity control. The legislation also defers operation and maintenance and replacement costs until the Tribes use the water. Since the Bureau of Reclamation predicts in the Draft Supplemental Impact Statement (DSEIS) that much of the water will not be used for 30-100 years in the future, it is the federal taxpayer who will pay these millions of dollars for an unused project for decades to come. This is not an acceptable use of hard-earned taxpayer dollars.

COSTS/BENEFIT ANALYSES

S.2508 attempts to obligate the federal government to finance construction of ALP entirely prematurely. The Bureau of Reclamation has not conducted an analysis of the feasibility or viability of the project from an economic and financial viewpoint, which is required by law. It is not possible to determine whether the project would be beneficial to taxpayers without such an analysis.

Although previous proposals contained cost-benefit analyses, this has been omitted from the latest version. In 1995, the Bureau of Reclamation showed the originally configured project returned only thirty-six cents on each taxpayer dollar. There have been two recent independent economic assessments on the latest version of the project that show an even worse return.

Dr. Ed Whitelaw from ECONorthwest of Eugene, Oregon presents evidence that shows that under the foreseeable future's market conditions, the projects' benefits would be near zero. He bases that conclusion on observations that there is no demand for the water. Although the Draft Environmental Impact Statement hypothesizes that perhaps in the future demands might materialize, it concedes that that scenario is entirely speculative.

Dr. Dale E. Lehman, an economist from Durango, Colorado claims that the ALP project will return less than twenty-two cents for every dollar spent, excluding externalities.

Not only does this project lack a full description of the potential costs, but the uses for the water are hypothetical. In fact, the speculated uses for the water -- golf courses, dude ranches, resorts and a coal fired power plant -- reveal that there really is no market for this water. Federal taxpayers should not be required to pay for a project that has no real identified needs and purposes. Certainly hard-earned taxpayer dollars should not be squandered on unnecessary and uneconomic projects meant to subsidize private interests.

The Bureau of Reclamation has stated that a cost-benefit analysis is not required in the case of Animas-La Plata because the project beneficiaries are primarily Native Americans. The status of the water recipients should not preclude the inclusion of an economic analysis. A cost benefit analysis allows decision makers to judge the merits of alternatives on the basis of their real costs and benefits to society. Independent analyses have shown that practical alternatives to this legislation will fulfill the government's obligation to the Ute Tribes at a lower cost than Animas-La Plata. Congress and the Administration cannot make an informed decision on this legislation and its alternatives without a complete cost benefit analysis and one should be prepared despite the status of the project beneficiaries.

DEAUTHORIZATION

S.2508 does not deauthorize other features of the ALP project contained in the 1988 Settlement Agreement. The Clinton Administration has given repeated assurances that they will not support legislation that does not specifically deauthorize all of the remaining components and facilities of ALP contained in the 1988 Settlement Agreement.

On August 11, 1998, the Administration's "Proposal for Final Implementation of the Colorado Ute Settlement Act", stated that "other project features contemplated in the original [Settlement] Act, including the construction of additional irrigation conveyance facilities, will be deauthorized." Commissioner Eluid Martinez made a similar assurance in testimony before the Senate Committee on Indian Affairs and Energy and Natural Resources in June 24, 1998.

And on January 4, 1999 the Federal Register notice of the Draft Supplemental Environmental Impact Statement described the Administration proposal as "bring[ing] final resolution to the ALP issue by restricting the project to construction of a defined number of facilities centered around a down-sized storage facility limited to municipal and industrial water uses. Other previously contemplated project features would be deauthorized."

This legislation does not resolve the controversy associated with this project particularly while still maintaining authorization to construct the irrigation and other features of the project. TCS would oppose and would urge members of this Committee and Congress to oppose any legislation which fails to explicitly deauthorize the remainder of the project.

CONCLUSION

We do not believe that it is necessary to craft legislation in this form in order to meet the obligation to the Tribes. Organizations that have opposed the ALP project, including the Southern Ute Grassroots Organization (SUGO), have urged the DOI to develop an approach that

would provide water to the Tribes through re-operation of existing storage facilities and the purchase of available water rights that can be accomplished on a schedule that would satisfy the need for water as it arises. Thus, the federal taxpayer would avoid the enormous up front costs that are now associated with the current ALP proposal. Alternatives have not been given a fair consideration in part because a variety of local interests as well as the Bureau of Reclamation and the Department of the Interior have long approached this issue from a mind-set to build a reclamation dam, without being mindful of the cost to the taxpayer.

Congress should insist upon sound program planning principles that ensure projects are financially feasible and ensure that public interests are not compromised by the vested interests. TCS asks that Congress insist on a full report including a new calculation of benefit-cost ratio for ALP as well as the citizens' alternative.

We encourage Congress to oppose any legislation that makes federal taxpayers sign a blank check, that violates Bureau of Reclamation laws, that fails to deauthorize the original project and sets a dangerous precedent for future taxpayer subsidies.



C A W . QUOTH THE RAVEN. "NEVER MORE ANIMAS-LA PLATA"

TO: The Honorable Ben Nighthorse Campbell, Chair
Senate Indian Affairs Committee
Senate Hart Office Building, Room 838
Washington, D.C. 20510

3 June 2000

SUBJECT: S2508, Written Testimony
With Reasons for Rejection

FROM: Steve Cone and Verna Forbes Willson
Post Office Box 2778
Farmington, NM 87499-2778

SUMMARY

1. Perhaps Chairman Campbell is not entirely familiar with the terms of the 1986 Colorado Ute Indian Water Rights Settlement Agreement. The Settlement, in Section 7, paragraph H, states that, "This Agreement may only be modified with the joint consent of the parties."
 - S2508 proposes amendments to the 1988 Colorado Ute Indian Water Rights Settlement Act which necessitate basic modifications to the 1986 Agreement. The amendments set forth in this Bill are the product of covert negotiations which have excluded not only junior water users and other stakeholders, but also the majority of the fifteen (15) signatory parties (including the Justice Department) to that Agreement.
 - Section 3(i)(3) of the Bill refers to Alternative #4 of the Draft Supplemental EIS (DSEIS), dated January 14, 2000, for the Animas-LaPlata Project (Project). Table 7-2 on page 7-9 in Volume I of the DSEIS lists both the 1986 Agreement and 1988 Act as "subject to amendment".

2. S2508 is modelled on Alternative #4. However, such modelling does not take into account the many flaws of that Alternative and its inherent incompatibility with sections of the Bill.
 - For example: the New Mexico Interstate Stream Commission has submitted nineteen (19) pages of specific comments on the DSEIS to the Bureau of Reclamation (BOR). That respected Commission, on behalf of the New Mexico State Engineer's Office, cites discrepancies, omissions, miscalculations and other problems related to preferred Alternative #4's ability to fulfill the Project's stated Purpose and Need.
 - The Chairman will, no doubt, be pleased to provide copies of that and all other pertinent "Letters of Comment" to this Committee prior to any subsequent action on S2508.

3. A paramount mandate of the United States Congress is to protect the American People and Native American Sovereign Nations. Exposure to proposals or projects with inherent flaws which could result in major cost overruns and potential catastrophic environmental consequences would betray the Federal Government's basic trust responsibilities to these citizens.
 - Rushing any ill-conceived scheme through Congressional channels in order to respect the misguided, albeit innocent, intentions of an honorable colleague, is apt to backfire, harming the reputation of Congress and that of the sponsoring Member.
 - Such fiascos become part of the Public's long-term collective memory as they are played out in the Press. We trust that this Committee, in all its wisdom, will accept these words of caution in the spirit in which they are offered.

ectors Concerned about Animas Water

COMMENTS

- 1 Section 1(b)(3) - S2508 offers the non-Indian communities of northwest New Mexico no guarantee or assurance that, in dry years, sufficient Animas River water will be available below the State line to satisfy both senior and junior water rights for municipal and industrial (M&I) and irrigation uses in San Juan County, New Mexico
- 2 Section 1(b)(6) - The assertion that S2508 establishes a legal basis for "equivalency" in its substitute benefits has not been substantiated by the Office of Management and Budget.
- 3 Section 1(b)(7) - In this Finding, S2508 clearly repudiates the Constitutional guarantee of the right to judicial due process. Does such language constitute Congress' intent to invade the exclusive province of the Courts?
- 4 Section 1(b)(8) - Federal Court rulings have indicated that the Project, as currently authorized by Congress, violates Reclamation and Environmental laws
- 5 Section 1(b)(9) - This Finding is obviously designed to short-circuit the National Environmental Policy Act of 1969. The January 2000 DSEIS is now under significant revision by BOR, and a Final SEIS is incomplete and not available for Congressional review.
- 6 Section 2(a)(1)(A)(i)(II) - Discrepancies in Alternative #4, related to a required mitigation of significant impacts to New Mexico Indian Trust Assets, indicate that the Secretary's sizing of an inactive pool could result in unforeseen economic and environmental consequences
- 7 Section 2(a)(1)(A)(ii) - None of the Project components referred to in clause (1) are designed to deliver water to project beneficiaries unless the pumps are reversible. The feature of reversibility is not included in the pump design described in Alternative #4. Both the method and means of delivery must be delineated in order to assure Statutory beneficial usage
- 8 Section 2(a)(1)(A)(ii)(VI) - The State of Colorado has no legal authority to own water rights, let alone any other real property. It acts only through its agencies and no agency is named in this Bill. Also, no precedent exists for any State agency to file as an applicant for water rights in the Colorado water court. Who is actually going to receive this water? For what beneficial use?
- 9 Section 2(a)(1)(A)(ii)(VII) - Section 1(b)(4) of S2508 states that "the provision of irrigation water can not presently be satisfied." The LaPlata Conservancy District of New Mexico deals only in irrigation water. It has no legal right to receive or use the 780 acre feet per year (afy) allocation of M&I water. Furthermore, this District is not a member of the San Juan Water Commission. Who is actually going to receive this water? For what beneficial use?

COMMENTS (continued)

10 Section 2(a)(1)(C)(i) - The facilities described in subparagraph (A) are insufficient and incapable of delivering water as required by clause (ii). Therefore, construction and use of a functional delivery system would (in accordance with this limitation) require additional express authorization from Congress. To this end, S2508 proposes an irreversible commitment of resources without fulfilling its stated purposes. [reference: Section 2(a)(1)(A)(ii) above]

11. Section 2(a)(2) - Long-standing Reclamation law and Federal policy require repayment by ALL beneficiaries for construction of Federal M&I water projects, yet S2508 proposes to waive that requirement for Colorado's two tiny Ute Indian Tribes.

- ~ Such a charitable act would be most understandable if these Utes were impoverished Native Americans living off the land at subsistence levels. Nothing could be farther from the truth.
- ~ These Tribes, comprising a total of fewer than 3,000 individuals, own two flourishing casinos, the fifth-largest natural gas production company in Colorado, a gas transmission company, vast high grade coal deposits worth hundreds of millions of dollars, and have recently publicized their intent to open their own bank.
- ~ In addition, through the construction of various other Federal projects and implementation of most of the 1988 Settlement Act, these two Colorado Tribes currently enjoy access to water in excess of 100,000 afy.
- ~ While the Utes' enterprise is worthy of praise, it most certainly does not necessitate further investment of American taxpayers' dollars. Congress should not be in the business of creating a special class of people exempt from State and Federal laws.

12. Section 2(a)(3) - 43 U.S.C. 485h(c) addresses the Secretary's authority to contract for Municipal water supplies. Under Provision (1), any such contract shall require repayment to the United States with interest not to exceed 3-1/2% per annum, starting once construction is complete and the water is first delivered.

- ~ An arrangement for upfront payment prior to completion of construction (whether privately negotiated, or otherwise) is not within the scope of 43 U.S.C. 485h or Section 9 of the Reclamation Project Act of August 4, 1939.
- ~ S2508 addresses Tribal obligations for a pro rata share of the allocable annual operation, maintenance and replacement (OM&R) project costs. However, no mention is made in the Bill of corresponding OM&R payments by the nontribal M&I water users.

13 In general, S2508 effectively revokes each of the various existing repayment contracts between the Secretary of the Interior and, severally, the San Juan Water Commission, LaPlata Conservancy District, Animas-LaPlata Conservancy District and the State of Colorado.

- ~ Congress does not have jurisdiction to legislate such revocations of those contracts, and, in the process, to ignore legal requirements for public participation in such contracting.

CONCLUSION

S2508 is an inadequate vehicle in that it fails to accomplish its stated purpose - a final settlement of the claims of the Colorado Ute Indian Tribes. Those who drafted the Bill are responsible for certain obvious errors of both commission and omission, such as covert negotiations which intentionally excluded vital parties from joint participation in modifications to the Settlement Agreement. Consequently, S2508 is fatally flawed and should not receive the support of Congress.

The above comprises our written testimony regarding S2508, and is respectfully submitted for inclusion in the formal hearing of the Senate Indian Affairs Committee on that Bill.

Signed Steve Cone and Verna Forbes Willson

FROM: Steve Cone and Verna Forbes Willson
Post Office Box 2778
Farmington, NM 87499-2778

Please be advised that, in our letter dated 3 June 2000, Subject: S2508, Written Testimony Regarding, in paragraph 8 of Comments, one word was inadvertently omitted.

The third sentence of paragraph 8 should read as follows:

"Also, no precedent exists for any State agency to file as an applicant for these water rights in the Colorado water court."

We trust that no serious confusion was caused by this typographical oversight.

Sincerely,

Signed Steve Cone and Verna Forbes Willson

STATEMENT OF
RICHARD K. (MIKE) GRISWOLD, PRESIDENT
ANIMAS-LAPLATA WATER CONSERVANCY DISTRICT
BEFORE THE INDIAN AFFAIRS COMMITTEE
OF THE SENATE OF THE UNITED STATES
REGARDING S. 2508
THE COLORADO UTE SETTLEMENT ACT
AMENDMENTS OF 2000

ROOM SH-838 HART OFFICE BUILDING
JUNE 7, 2000

My name is Mike Griswold. I am the President of the Board of Directors of the Animas-LaPlata Water Conservancy District. This statement is submitted on my behalf and on behalf of the Board of Directors of the ALP District. The Board consists of fifteen citizens of LaPlata County, Colorado who serve without compensation. Many of the Board members have devoted almost twenty years to pursuing the development of the Animas-LaPlata Project and the settlement of the reserved water right claims of the two Colorado Ute Indian tribes.

Your hearing today on S. 2508 offers, once again, an opportunity for the Congress of the United States to resolve the Colorado Ute water right claims in a manner that is acceptable to the two tribes and fair to the non-Indian community in the Four Corners Region of our country.

For many years we in southwestern Colorado have pursued the construction of the Animas-LaPlata Project. The Project, as originally envisioned, was supposed to move precious water from the water-rich Animas River basin, which has only limited irrigable land, across a ridge into the LaPlata River basin, which is blessed with abundant irrigable ground, but almost no water supply to irrigate it. Some of that arid irrigable ground is owned by the two Colorado Ute Indian tribes. The tribes' interest and that of their non-Indian neighbors was to secure a water supply for those lands, and for municipal and industrial purposes in southwestern Colorado and northwestern New Mexico. The original Animas-LaPlata Project accomplished all those purposes. Unfortunately, over the years the national environmental organizations have been successful in delaying the construction of the Animas-LaPlata Project, and before long the cost of the Project had become overwhelming.

As the cost of the Project escalated through the combination of delay and inflation, other environmental concerns arose, and habitats conducive to several endangered fish species were identified downstream in the San Juan River. After intensive studies and

consultations, the U.S. Fish and Wildlife Service determined that the Animas-LaPlata Project could only be constructed if the depletions for the Project did not exceed 57,100 acre-feet and the water supply was not used for irrigation purposes. The realization that the Animas-LaPlata Project, declared the foundation for the settlement of the Indian claims on the Animas and LaPlata Rivers, and which would provide needed irrigation water for the LaPlata River drainage, would not come to pass in the near term was a devastating blow to our Board members and the citizens we serve. In addition to dashing the hopes and dreams of several generations of Coloradans, the scope of the Project acceptable to the Fish and Wildlife Service did not fulfill the requirements of the Colorado Ute Indian Water Rights Settlement Act of 1988.

There have been five years of intense negotiations among the Federal Government, the local water user community, the Indian tribes, and the State of Colorado leading up to the introduction of S. 2508 and its companion in the House of Representatives, H.R. 3112. Over three years ago, then Colorado Governor Romer and then Colorado Lieutenant Governor Schoettler organized and led a process that was designed to include not only the supporters of the Animas-LaPlata Project and the citizens desirous of reaching an acceptable settlement of the Ute Indian water right claims, but also the opponents of the Project and of a settlement acceptable to the two Colorado Ute Indian tribes. After a year of frustrating meetings, the Romer-Schoettler process came to a close with two proposals being submitted by the opposing parties. The tribes, my Board and the citizens who we represent, together with the San Juan Water Commission in New Mexico, made a proposal quite similar to the one before you today. It allocated the available depletions accepted by the U.S. Fish and Wildlife Service among the various entities requiring a water supply by greatly downsizing the size of the Project facilities, eliminating all irrigation features and the trans-basin facilities necessary to deliver water to the LaPlata River Drainage.

In 1998, this Committee considered a bill that embodied our proposal from the Romer-Schoettler Process. However, two years ago, the Clinton Administration appeared before this Committee and took issue with the provisions of our compromise. Fortunately, the Administration, subsequent to that hearing, made a proposal of its own that contained many features that were acceptable to those of us who support a resolution of the Colorado Ute Indian water right claims in a manner acceptable to the tribes. With some modifications and additions, the Administration's proposal is included in the provisions of S. 2508.

The Bill which you are considering today presents the only viable solution to the Colorado Ute Indian water right claims. The Animas-LaPlata Water Conservancy District Board of Directors strongly supports this resolution to the claims. After a thorough and exhaustive process, the Bureau of Reclamation has completed a Draft Supplemental

Environmental Impact Statement which has determined that the preferred alternative for resolving the water resource issues in southwestern Colorado involves the construction of a reservoir at Ridges Basin and the provision of storage for the two Indian tribes. The preferred alternative described in the DSEIS represents the solution that will permit the reserved water rights of the two Colorado Ute tribes to be satisfied. The Bill before you today gives deference to that ongoing environmental evaluation and recognizes that it is not yet final. But, S. 2508 recognizes the extensive, time consuming and costly environmental analysis that has already taken place. We believe that we are in agreement on this issue. We have agreed to seek, and S. 2508 requires, full environmental compliance by the Secretary. We understand that some environmental groups contend that S. 2508 does not require full environmental compliance. That is just not true. S. 2508 very explicitly requires the Secretary of the Interior to comply with all national environmental laws. While S. 2508 includes certain *Congressional* determinations about the project's environmental adequacy, it affirms the independent authority and discretion of the Secretary of the Interior and other federal officials under applicable environmental statutes. That is as it should be, and claims that S. 2508 contains a Congressional determination that existing environmental determinations are sufficient so as to preclude the Secretary's discretion finds no support in the actual language of the Bill, the opposite is actually true.

The opponents of S. 2508 and the proposed reservoir will tell you that there is another alternative that is preferable. It is the same proposal they made during the Romer-Schoettler Process. They will argue strenuously that the appropriate resolution of the Ute Indian claims is to provide them with money and allow them to buy water rights from non-Indians. They will call it the "non-structural" alternative. In their statements before this Committee, they will not tell you the whole story. They will not disclose to you that the only water rights that could conceivably be purchased by the Indian tribes are irrigation water rights. They will not tell you that those irrigation water rights are not available on a year-round basis, but are limited in their use to the irrigation season in southwestern Colorado and to the location where the rights are used today. They will not tell you that if the Indian tribes were to attempt to change these irrigation water rights to the municipal and industrial purposes that the original settlement promised them, it would be necessary to construct new water storage facilities. They will not tell you that the tribes would have to gamble on the availability of irrigation water supplies for sale nor that the ultimate resolution of the tribal claims might take as long as thirty years to reach fruition, instead of being settled once and for all with the construction of a greatly downsized dam at Ridges Basin as contemplated in S. 2508.

In their zeal to promote a settlement that has been roundly rejected by the two Tribal Councils, they will also fail to mention that in order for the Indian water rights claims to be settled, it will be necessary to amend the Colorado Ute Indian Water Rights

Settlement Agreement and to obtain the acceptance of a new settlement by the water users in southwestern Colorado represented by my Board, as well as by the State of Colorado. I can assure you that there will be no Ute Indian water rights settlement if the settlement is based upon the Project opponents' suggestion that the Federal Government fund a water rights purchase program whereby the water that is the foundation of our economy is ultimately purchased and transferred from non-Indian to Indian ownership. The concept that the economy of one group of Americans should be sacrificed for the benefit of another is contrary to our notion of good government and fairness, and we openly, firmly, and adamantly reject the environmental community's much touted alternative. We are parties to the settlement and we will not agree to the nonstructural alternative.

The statewide elected officials of the State of Colorado, the officials elected to represent our region of the State of Colorado, the majority of our local officials, and all of the water resource agencies within our portion of the state strongly support the proposal to settle the Colorado Ute Indian water right claims encompassed within S. 2508. We ask that you recognize the sacrifice and the suffering that has occurred within our community over this issue. We ask that you support us in a resolution which will create the minimum amount of controversy, the minimum amount of litigation, and the maximum amount of benefit to the Ute Indian people and to their non-Indian neighbors.

There are slightly different allocations of water supply and depletion contained in S. 2508 and in the Administration's proposal considered in the Draft Supplemental Environmental Impact Statement prepared by the Bureau of Reclamation. The issue of how those supplies should be allocated and paid for has not yet been completely resolved. However, the parties will be able to do so and will so advise Senator Campbell.

I would like to now turn to the topic of cost of water from this project. In order for the non-Indian community to participate in the use of water supplies from the Animas-LaPlata Project, those supplies must represent a reasonable cost effective source of water. It is our sincere hope that the Bureau of Reclamation will be able to construct a project in a cost effective manner and will be able to allocate those costs in a fair and reasonable way. We must tell you that there are significant sunk costs already burdening this project. A significant percentage of those costs have been devoted to environmental compliance activities for the large irrigation project that was originally contemplated. It would be grossly unfair to have those costs included within any amount that might be considered an obligation of our District given the fact that the Administration and the Congress have been, and are, unwilling to construct an irrigation project at this time. S. 2508 recognizes this inequity and provides that these costs shall not be included in any calculation of the non-tribal water capital obligation. This is only fair. The project that is under consideration before you today is not the Animas-LaPlata Project which we originally supported, but is a project that is designed to solve the Indian water right claims and

provide a modest amount of municipal and industrial water for the local non-Indian community.

It should also be noted that S. 2508 would allow the non-Indian recipients of project water the option of satisfying their capital repayment obligations by payment in full prior to the initiation of construction. For a variety of reasons, the opportunity to pay the capital repayment obligations up front is important to the Animas-LaPlata District. We ask that you support the provision of S. 2508 that will allow us to do so.

Some who testify here today may propose that the remaining features of the Animas-LaPlata Project should be de-authorized. This proposal is not acceptable to the citizens we represent. Because we have been willing to compromise to secure a water supply for our Indian neighbors, this legislation should not become a platform to punish us further. S. 2508 provides that no other features of the Animas-LaPlata Project are to be built without further Congressional action and that limitation should be sufficient. The approach taken in this legislation avoids the more complicated issues which surround the law of the Colorado River and the status of Colorado River Storage Project Act/Colorado River Basin Project Act projects. Calls for actual deauthorization of unbuilt features of the Animas-LaPlata Project should be ignored.

At this point in time, we come before you to ask that you take the steps necessary to honor the promises made to the Colorado Ute Indian tribes, our neighbors. We are here to express our continued admiration for their perseverance and their great patience in awaiting the delivery of the water that was, and should have been, theirs over one hundred years ago, and was promised to them again by the Federal Government a dozen years ago. The tribes are entitled to a settlement that is acceptable to them. That settlement is defined and authorized by S. 2508. We sincerely request that the Committee give favorable consideration to this Bill. It exemplifies the spirit of cooperation and agreement between the Indian and non-Indians and provides resolution of the reserve water right claims of the two tribes, and it fulfills the government's trust obligations to the tribes and its obligations to their non-Indian neighbors. Finally, we would like to express our appreciation to the Secretary, his Deputy and their staff for their ongoing efforts to reach a consensus with us on the points of difference in our positions.

Thank you for the opportunity to present this testimony.

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WRITTEN STATEMENT
OF
FRED V. KROEGER
PRESIDENT
SOUTHWESTERN WATER CONSERVATION DISTRICT OF COLORADO
BEFORE THE
INDIAN AFFAIRS COMMITTEE
OF
THE
SENATE OF THE UNITED STATES

REGARDING S. 2508
THE COLORADO UTE SETTLEMENT ACT AMENDMENTS OF 2000

WASHINGTON, D.C.
JUNE 7, 2000

My name is Fred Kroeger. I am President of the Board of Directors of the Southwestern Water Conservation District of Colorado and a member of the Board of Directors of the Animas-La Plata Water Conservancy District. I was a member of the Colorado Water Conservation Board for 21 years and have appeared before congressional committees for more than 30 years to seek support for construction of the Animas-La Plata Water Resource Development Project

I am here today to urge your support for enactment of S. 2508, the Colorado Ute Settlement Act Amendments of 2000. Passage of this legislation will enable the Indian and non-Indian water users in Southwestern Colorado and Northwestern New Mexico to settle, once and for all, the reserved water right claims of the two Colorado Ute Indian Tribes. Enactment of this legislation represents the final compromise in our decades-long fight to have the Tribes' water claims resolved by negotiation instead of litigation. Enactment of the legislation and construction of the Project will bring to closure what has long been promised to the Indian and non-Indian water users in the San Juan Basin of Colorado and New Mexico.

The history of the Animas-La Plata Project demonstrates that despite the controversy that has surrounded the Project, the two Colorado Ute Indian Tribes and their non-Indian neighbors in Colorado and New Mexico, as well as both states, have maintained an extraordinary cooperative

relationship which has enabled them to once again present a plan for your consideration which would provide the Tribes with a reliable water supply without depriving non-Indian water users of water which they have been using for almost 100 years.

The most recent history of the Animas-La Plata Project started 32 years ago with the passage of the Colorado River Basin Projects Act. In the past 32 years, the Indians and non-Indians in our community have compromised time and time again in an effort to comply with federal environmental laws, most of which were enacted after Congress had authorized the Animas-La Plata Project for construction. The most significant compromise was made over two years ago, when the non-Indian irrigators agreed to remove from the proposed Project all of the facilities which would be needed to deliver irrigation water supplies from the Animas River to the La Plata River drainage. In other words, after 30 years the irrigation component of the Project, which many felt was the most important part of the Project, was totally removed from the Project's plan.

Nevertheless, the two Colorado Ute Tribes and the non-Indian water users have worked together to gain a resolution of the Tribes' reserved water right claims in a manner which would be beneficial to both the Indian and non-Indian communities. That cooperation, which is still in place today after more than three decades, speaks to the mutual respect and trust between the two Indian Tribes and their non-Indian neighbors. The proposed Project which is before you today has changed dramatically and can now be most accurately described as an Indian water rights settlement project. Although there is much needed municipal and industrial water for the communities in both Colorado and New Mexico, the primary purpose of construction of a storage reservoir is to provide a method by which the Indian water right claims can be settled. The national environmental organizations will, as they have always in the past, claim that the greatly reduced Project violates the environmental laws of this country. What the environmental organizations are doing is changing the emphasis of environmental violation from those environmental issues which were previously associated with irrigated agriculture to now trying to make major environmental issues out of environmental problems which have been studied and re-studied and at the end of the day will be mitigated under the provisions of the National Environmental Protection Act. All the problems associated with

irrigated agriculture, including the Clean Water Act and the Endangered Species Act, have been eliminated as a result of the reduction in size of the Project. Twelve years after passage of the 1988 Colorado Ute Indian Water Rights Settlement Act, we are on the threshold of moving forward to implement that landmark legislation. Although the 12 years of delay drove up the cost of the original Project to the point that the water users and the Tribes were required to make further compromises and sacrifices, I am pleased to say that those compromises and sacrifices have been reached and as a result the cost of the Project has been significantly reduced. Although we are not happy about many of the compromises and sacrifices which have been made, we recognize that they were necessary if we were to secure a new water storage facility, which is absolutely necessary to accomplish our goal of honoring the Indians' legitimate water right claims without taking water away from non-Indian water users who have been using that water supply for over 90 years. The Project which is before you for consideration today, if constructed, will comply with the Endangered Species Act and the Clean Water Act. The legislation proposed by Senator Campbell recognizes the exhaustive environmental analysis that has been undertaken on the Project; however, the legislation does not prejudge the outcome of the environmental analysis, but requires full environmental compliance by the Secretary. You can anticipate that the national environmental groups will seize upon this recognition of the environmental process in Senator Campbell's legislation and attempt to claim that somehow the language can be read to mean that the legislation is waiving environmental requirements. This is not so. S. 2508 clearly requires that all national environmental laws be complied with. Although I would like to tell you that enough is enough with the environmental compliance, we recognize that the process must, under existing law, continue if we are to avoid a court challenge to the adequacy of the environmental procedures. It is in the best interest of the proponents of the Project that the environmental compliance be as thorough and complete as possible. Nothing in S. 2508 would in any way detract from a full and complete environmental analysis of the Project.

The non-Indian ranchers and farmers support this legislation as it will settle all of the Tribes' reserved water claims in the San Juan Basin. This legislation and construction of the Project will remove any remaining threat to the non-Indian water users of our area. The legislation will provide

a much needed domestic supply of water for the growing communities in Colorado, including the City of Durango and communities in Northwestern New Mexico. And finally, the legislation fulfills the federal government's trust obligations to the Colorado Ute Indian Tribes.

One of the most astonishing things about the history of the Animas-La Plata Project is the fact that the Ute Indian Tribes and their non-Indian neighbors are again in front of Congress presenting a united front in support of legislation, and are once again demonstrating that they have worked diligently and cooperatively with each other, the governments of Colorado and New Mexico and the federal government, to overcome all of the many hurdles which have faced the Project. The Project has undergone agonizing environmental examination, repeated consultations under the Endangered Species Act and the removal of all irrigated agriculture in order to comply with the Clean Water Act. Despite all of the compromises, and the delays and modifications, the Project continues to have broad-based bipartisan support from local and state officials. Your passage of this legislation will enable us to proceed with construction of the Project and finally settle the Indian water right claims. Construction of the Project is the right way to solve this problem. It is the right solution, at the right time and for the right reasons.

Stat ment

from the

San Juan Water Commission, New Mexico

(800 Municipal Drive, Farmington, New Mexico 87401 • Telephone (505) 599-1462)

to the

Committee on Indian Affairs

on

S. 2508**June 7, 2000**

The San Juan Water Commission urges your support for S. 2508. The Commission recognizes the leadership you and your committee have shown regarding water resources essential to the Tribes and their neighbors. You have recognized the cooperative, rather than combative, effort by the Tribes, States, and local water agencies to solve the competing needs for secure water supplies. This cooperation continues to serve the best interests of the region and the nation while preserving the environment and allowing for economic and cultural stability in our community.

In 1986, the Cities of Aztec, Bloomfield and Farmington, the San Juan County Rural Domestic Water Users, and San Juan County recognized the water needs of New Mexicans would be served by securing the storage in the Animas La Plata Project. New Mexico water dedicated to the project will be stored for times of shortage. These farsighted leaders organized the Commission to further this and other water interests of its members.

NEW MEXICO NEEDS AN ASSURED WATER SUPPLY

New Mexico and San Juan County is a high desert region, and, simply put, water is in short supply. However, San Juan County has a river that could provide adequate water supplies. The problem is, most of the water flows past in a period of three months. An assured supply for the regional needs is only accomplished by storing that spring runoff.

Commission member entities, serving some 25,000 families, are today using the water allocated to the Animas La-Plata Project (ALP.) This use is possible under the terms of our existing Repayment Contract. Almost all of the 14 member entities are depending on that water. The problem is that, without storage, when we have another drought, a water year like 1977 or 1996, that water would simply not be available. According to the U.S. Census Bureau, during the 1999 fiscal year, 59 percent of New Mexico's growth was in San Juan County. Water demand usually increases faster than population, and with the growth in San Juan County continuing, climbing over 110,000 people, the resulting water demand will only heighten the shortage of another dry period. Clearly, the local economy is strong enough to provide opportunity of additional workers and their

families, but planning must occur to meet their needs, particularly water needs, in this arid region. This year, if we experience a year similar to 1977, San Juan County could be short of real wet water as early as June, and the shortage could last through October.

Most of New Mexico domestic water users depend on groundwater supplies. In San Juan County, by contrast, we are blessed by a renewable surface water supply on which we depend. In fact, numerous studies, most recently the Navajo/Gallup Pipeline proposal, have indicated that our groundwater supply is limited and of a poor quality. We are in a Region whose annual precipitation is less than 9 inches, which would be a wet week in Washington, D.C

The crisis created by water shortages is why we need the ALP storage facilities. Other sites, some in New Mexico, do exist to store water, but they would annually evaporate more water and cost more environmentally and economically to construct than the Ridges Basin (ALP) site. The cost difference is significant. While the ALP supply is our first response to the shortage crisis, the Commission recognizes there is a need for storage to secure our other existing supplies. The Commission entities may need 15,000 acre feet of storage, in addition to ALP, to ensure against that future crisis. We must protect the water interests of the estimated 109,899 people that depend, in some part, on the San Juan Water Commission member entities for their water. Therefore, we must store water when the snow melts, for the times it does not snow or no summer rain comes.

Construction of storage is not an option, it is a necessity. Will it be done with the least harm to the environment and least cost? The decision is yours.

S. 2508 ADDRESSES TRIBAL ISSUES

This amendment to the Colorado Ute Indian Water Rights Settlement Act of 1988, when completed, will settle the negotiated claims by the Colorado Ute Tribes on the Animas and La Plata Rivers. This is important to New Mexico, from the La Plata and Animas River irrigators who will be assured of their current water rights, to the entire state of New Mexico, which needs Animas River water to have any hope of fully developing its essential allocation of Colorado River water. The legislation further safeguards other New Mexico water, notably the San Juan-Chama Project water, which is dedicated to the Jicarilla Apache Tribe and the pueblos, towns and cities of the Rio Grande corridor.

Similarly, the Navajo Nation is benefited by final settlement of the Colorado Ute claims. In S. 2508 the domestic needs for reliable, clean water supplies for the Shiprock area are addressed. The needed water supply is provided by the pipeline authorized by the legislation, compensating for the water lost by the Nation due to the limits imposed by the Endangered Species Act compliance. The Navajo Nation Community of Shiprock needs, and will receive, a depletion of 2,340 AFY from the ALP New Mexico supply and an authorization to construct a pipeline to supply potable water. This secures the community's water supply and fulfills the ALP water commitment to the Nation.

More important, we hope that the project will allow the Navajo Nation to continue, to conclusion, its joint effort with New Mexico to quantify and settle its water claims. From a practical viewpoint, all of us must honor and complete the Ute Indian Water Rights Settlement, if we expect to reach settlement of the Navajo claims. If the Congressionally approved Ute settlement cannot be fulfilled, the Navajo Nation will lose its incentive to continue negotiations.

PROPOSED NEW MEXICO AMENDMENTS

Technical corrections are needed dealing with New Mexico issues in the proposed legislation. The Commission requests the following changes:

Section 2. (a), (1), (A) (I)

Change existing (II) to (III)

Change existing (III) to (IV)

Insert as a new (II) *"be operated in accordance with the Animas La Plata Project Compact approved by Congress in Public Law 90-537, September 30, 1968.*

In the new (III) strike "an" and insert "a reservoir" between *include* and *inactive*.

These changes are needed to make clear that the Animas La Plata Compact, P.L. 90-537, continues in force, providing equal priority between New Mexico and Colorado on the water supplies developed under the Animas La Plata Water Development Authorization.

Section 15. (a)

Insert "to" following "beneficiaries or"

Insert "in accordance with the request" between *Commission* and *any*.

Insert "State" between *Mexico* and *Engineer*.

These changes are needed to clarify that the transfer of the interest in New Mexico State Engineer Permit Number 2883 will be based on the request of the New Mexico State Engineer.

Section 15 (b)

Delete "of the Navajo Nation" between *year* and *to*.

This change is needed to correctly state that the current municipal water supply is owned by a non-Navajo entity and that the statute contemplates using the Navajo Nation supply for the pipeline. These technical corrections are needed to clarify the intent of the Parties, and we ask that they be incorporated into the legislation.

BRINGING AN END TO DECADES OF CONTROVERSY

In January 1990, the citizens of San Juan County spoke clearly supporting the ALP – they voted overwhelmingly in favor of our participation. The original ALP

represented a common-sense way to provide the water storage needed in the dry times in an economical and environmentally responsible way. This area is an arid region blessed with renewable water accessed only by storage. However, times have changed and we must deal with the constraints imposed today. The Commission and other beneficiaries have sought solutions that settle the Colorado claims by the two Ute Tribes and secure reasonable benefits to all in the San Juan Basin. Both the original authorized ALP and the project contemplated in the Amendment, S. 2508, meet urgent New Mexico water supply needs.

When the ALP was originally conceived, irrigation dominated the Project, not municipal and industrial (M&I) use. In 1979, the Project's M&I portions of the project were expanded, recognizing the changing region. The San Juan Water Commission was not yet in existence. Seeing the importance of this water supply and the need to cooperatively address the water resource issues, community leaders formed the Commission in 1986. Now the Commission, in its mission to assure the M&I water supplies for its members, must pursue the missing resource - storage. Storage is critical to meet the daily wet water needs in the coming dry time. In addition to the construction of storage to meet a part of our wet water needs, other items in this legislation will assist New Mexico water users. The legislation directs the return of the interest held by the Secretary in State water permits, held for the New Mexico beneficial users by the Department of Interior. All interests are to be assigned, upon the request by New Mexico, to those who will beneficially use the water. This permit assignment will place the New Mexico entities on a footing similar to the Colorado parties. Today, New Mexicans are depending on the New Mexico ALP permits for their current use in compliance with our repayment contract, a relationship that must be recognized. Common sense leads reasonable people to recognize the return of the permit to New Mexico and more directly to the people who are dependent, as the right thing to do.

In the past, the contractual obligations of the Department of Interior Bureau of Reclamation have been ignored. The San Juan Water Commission has an existing Contract (No. 0-07-40-R1080) recognized by the New Mexico Supreme Court, outlining the Commission's and the Bureau's obligations. The Commission has positively moved to meet its obligations. Incorporated in the Contract is a clear commitment to pay a reasonable cost for benefits received from the project. Both parties recognize that the cost contemplated in this revised project proposal is as yet undetermined, but the Bureau must honor the limits incorporated in the existing contract. The Commission anticipates that the terms applicable to the redesigned project proposed will be honored. The suggestion, in recent testimony, to force agreement on the final cost determination by threatening the loss of the storage benefit contributes little. The Commission's continued support of the Ute Settlement does not embrace the changes provided by the Administration in its testimony in the House on H.B. 3112, because of the need to have a reasonable way to control costs. The original repayment mechanism, which provided for an upfront payment and a final cost allocation after construction, no longer applies, in part because of the change in construction management from Reclamation to the tribes, who may not

have the same incentives to save costs. Thus, the support by the Commission for this legislation is contingent on the availability of storage to meet our wet water supply needs at a reasonable cost to the citizens of San Juan County. The Commission is eager to seek a solution on this issue based on a level playing field.

Two years ago, an economic estimate by the New Mexico State University suggested Northwestern New Mexico has already lost as much as \$740 million from the failure to develop the water incorporated in the ALP permit. If that water had been developed, our New Mexico water would have benefited the Nation, the State and ourselves.

The San Juan Water Commission is charged with securing stable water supplies for 110,000 New Mexicans. We have compromised and sacrificed in the best interests of our Region, but the sacrifice has limits. The Commission has looked at and found no viable alternative water storage site that will meet our and our neighbors' needs more economically, or that will comply with the enormous federal, state, and local requirements as well as Ridges Basin will. We will be that much further ahead in avoiding a crisis if we start construction, now. 2000 may be a dry year; recently a scientist studying tree rings predicted we are in the early stages of a dry period similar to the 1950s. Even if the prediction is inaccurate, at some point a shortage of water will cause a crisis in the arid Four Corners. If the storage is not available, where will the water for our New Mexico communities be found? Keep the federal promise, not only to the Tribes, but also to all of us.

