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H.R. 3112, TO AMEND THE COLORADO UTE INDIAN WATER RIGHTS SETTLEMENT ACT TO PROVIDE FOR A FINAL SETTLEMENT OF THE CLAIMS OF THE COLORADO UTE INDIAN TRIBES, AND FOR OTHER PURPOSES

HEARING

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

MAY 11, 2000, WASHINGTON, DC

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CONTENTS

	Page
Hearing held May 11, 2000	1
Statement of Members:	
Doolittle, Hon. John T., a Representative in Congress from the State of California	1
Prepared statement of	1
McInnis, Hon. Scott, a Representative in Congress from the State of Colorado, prepared statement of	4
Statement of Witnesses:	
Baker, Jr., John E., Chairman, Southern UTE Indian Tribe, Ignacio, Colorado	23
Prepared statement of	25
Hayes, David J., Deputy Secretary, Department of Interior, Washington, DC.	2
Prepared statement of	10
House, Chairman, Ernest, UTE Mountain UTE Tribe, Towaoc, Colorado	33
Prepared statement of	35
Remington, Sage Douglas, Director, Southern UTE Grassroots Organization, Ignacio, Colorado	39
Prepared statement of	41
Additional Material Supplied:	
Black, Michael, with Taxpayers for the Animas River, prepared statement of	65
Griswold, Richard K., President of the Animas-La Plata Water Conservancy District, prepared statement of	46
Kroeger, Fred V., President of the Southwestern Water Conservation District, prepared statement of	61
San Juan Water Commission in New Mexico, prepared statement of	56
Turney, Thomas C., State Engineer with the State of New Mexico, prepared statement of	52

HEARING ON: H.R. 3112, TO AMEND THE COLORADO UTE INDIAN WATER RIGHTS SETTLEMENT ACT TO PROVIDE FOR A FINAL SETTLEMENT OF THE CLAIMS OF THE COLORADO UTE INDIAN TRIBES, AND FOR OTHER PURPOSES

THURSDAY, MAY 11, 2000

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WATER AND POWER,
COMMITTEE ON RESOURCES,
Washington, DC.

The subcommittee met, pursuant to other business, at 2:48 p.m., in room 1334, Longworth House Office Building, Hon. John T. Doolittle (chairman of the subcommittee) presiding.

STATEMENT OF HON. JOHN T. DOOLITTLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. DOOLITTLE. We will now proceed to the hearing on Animas-La Plata. I thank the members. Let me invite our witnesses to come forward. This is a legislative hearing on H.R. 3112.

May I ask you to please rise and raise your right hands. Do you solemnly swear or affirm under the penalty of perjury that the testimony given will be the whole truth and nothing but the truth?

Mr. HAYES. I do.

Mr. BAKER. I do.

Mr. HOUSE. I do.

Mr. REMINGTON. I do.

Mr. DOOLITTLE. Thank you. Let the record reflect that each answered affirmatively. We are very happy to welcome you here, gentlemen, and we will begin hearing from the Deputy Secretary of Interior, Mr. David Hayes. Welcome.

[The prepared statement of John T. Doolittle follows]

STATEMENT OF HON. JOHN T. DOOLITTLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

H.R. 3023, Greater Yuma Port Authority
H.R. 4132, Water Resources Research Act
S. 1211, Colorado River Basin Salinity Control Act

Legislative Hearing on:

H. R. 3112, "to amend the Colorado Ute Indian Water Rights Settlement Act to provide for a final settlement of the claims of the Colorado Ute Indian Tribes, and for other purposes.

Today we will first markup the following three bills, followed by a legislative hearing on H.R. 3112, the Animas La Plata Project. The bills to markup include:

1. H.R. 3023, Greater Yuma Port Authority

To convey to the Greater Yuma Port Authority an area of land currently controlled by the Bureau of Reclamation consisting of approximately 330 acres, at fair market value, just east of the City of San Luis, for the construction of a commercial Port of Entry.

2. H.R. 4132, Water Resources Research Act

To reauthorize grants for water resources research and technology institutes established under the Water Resources Research Act of 1984.

These state water resource research institutes, under the authority of the Water Resources Research Act, have established an effective federal/state partnership in water resources, education and information transfer. They work with state and federal agencies and water resources stakeholders in their home states while acting as a network for the exchange of water resources research and information transfer among the states. I am pleased that among the 17 cosponsors we already have, many of them are members of this Subcommittee, on both sides of the aisle. I look forward to the rest of you joining us in cosponsoring this bill.

3. S. 1211, Colorado River Basin Salinity Control Act

To increase the current Colorado River Basin Salinity Control Act authorization from $75 million to $175 million. In addition, the legislation requires the secretary to file a report to address salt contributions from Bureau of Land Management lands.

Prior to 1995, Reclamation's efforts to reduce salinity were costing between $70 to more than $100 for each ton of salt that was controlled. One of the important steps we took in reforming this program in 1996 was the introduction of private parties and the use of market forces to bring those costs down. It is a testament to the use of entrepreneurial methods that I can now report that costs for salt removal are around $30 per ton. In addition, for every $100 spent by the federal government, an additional $43 is spent by the Basin States.

H.R. 3112, an amendment to "the Colorado Ute Indian Water Rights Settlement Act to provide for a final settlement of the claims of the Colorado Ute Indian Tribes."

Two years ago, this Subcommittee held a hearing to address issues raised by the Romer-Schoettler process regarding what direction to take with the Animas La Plata Project, and to hear testimony from project proponents, opponents, and the Administration. During the hearing, then Counselor to the Secretary of the Interior, David Hayes indicated the desire of the Administration to address additional issues. On August 11, 1998, the Secretary of Interior presented an Administration Proposal to implement the Settlement Act. H.R. 3112 is an attempt by project beneficiaries to implement these negotiations and come to a final Settlement Act.

Since the hearing the Tribes, and other project beneficiaries have agreed to a much smaller ALP Project. In fact, if you consider the full cost of project, as anticipated in 1968, in 1999 dollars, the project would have an estimated price of $754 million. The bill before us today, specifically regarding the ALP project, is estimated to costs between $180 and $240 million. This is a drastic reduction in the project cost.

I commend the Project beneficiaries for their continuing flexibility to work with the Administration to draft legislation that meets their demands, and one that provides an equitable settlement to the tribes. I would also just like to note the municipal and industrial water beneficiaries commitment to fully fund their portion of the capital investment—in full and up front.

I look forward to hearing the testimony and discussing the issues with the witnesses.

STATEMENT OF DAVID J. HAYES, DEPUTY SECRETARY, DEPARTMENT OF INTERIOR, WASHINGTON, DC.

Mr. HAYES. Thank you, Mr. Chairman and members of the committee. I have submitted a written statement that I would appreciate being entered into the record, Mr. Chairman.

In my oral comments, I would like to just briefly review some of the highlights of what has brought us here to this hearing today on H.R. 3112. This hearing, as the chairman noted at the outset, is on a bill that is intended to provide a final settlement for the

claims of the Colorado Ute Indian Tribes in Southwestern Colorado and Northern New Mexico. Those remaining claims exist in the Animas and La Plata river basins in Southeastern Colorado and their resolution also requires a resolution of issues associated with the Animas-La Plata project that was originally authorized in 1968 and which has not been built. We are very interested in resolving these very difficult issues once and for all and we thank Congressman McInnis for introducing the bill.

[The prepared statement of Mr. McInnis follows:]

SCOTT McINNIS
3D DISTRICT, COLORADO

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WRITTEN TESTIMONY REGARDING

H.R. 3112, the Colorado Ute Settlement Act Amendments

Committee on Resources
Subcommittee on Water and Power

Congressman Scott McInnis (CO)

May 11, 2000

Mr. Chairman, I would like to thank you and the members of the Subcommittee for your prompt attention to this legislation which I introduced in October of 1999. More importantly, I would like to commend you on your continued involvement in this process as we work to satisfy the terms of the Colorado Ute Indian Water Rights Settlement Act. As you know, today's hearing is a crucial step that must be taken to ensure that the federal government does not fail to fulfill the commitment we have made to the Ute Indian tribes.

Last year, I introduced H.R. 3112 to amend the Colorado Ute Indian Water Rights Settlement Act, which will finally honor the bargain with the Ute Indian tribes dating back to 1868. This legislation lives up to the original intent of the Settlement, but calls for a modified project which provides two-thirds of its water for the Tribes and the remainder for communities near their reservations. As you will hear in their statements today, both Tribes unanimously support this modified project even though they have agreed to accept less water than the original agreement provided in order to resolve and finally settle their claims.

PRINTED ON RECYCLED PAPER

While I was reluctant to support a drastic reduction in the project size, I am encouraged that the Administration has put its imprimatur on the concept that a storage facility to provide a new supply of water for the Tribes is necessary and appropriate. After all, the premise of the 1988 Settlement Act was to provide the Tribes with the water they were promised more than a century ago without taking any water from their non-Indian neighbors.

I think it's time for all parties to come forward and support this Indian water rights settlement. Opponents have argued the original project proposal was too big and did not meet environmental requirements and reviews. With contentious issues, resolution often requires compromise. The Tribes have clearly compromised as have their non-Indian neighbors, the time has now come for the environmental community to reciprocate. H.R. 3112 is an obvious testament to those compromises. At the foundation of this legislation is the construction of a significantly scaled-back project, gone is the irrigation component of the project, gone is a large reservoir. What is left is a down-sized, off-stream reservoir that satisfies the heart of the Tribes' water rights and honors the promise this country made to the Tribes.

There are many reasons to support this legislation and this project. Many of them are complicated, scientific and technical. It has often been said that the simplest of reasons are always the best. The best reason is simply that this project should be supported because it is the duty and treaty obligation of the United States to the Ute Indian Tribes.

Mr. Chairman, Members of the Subcommittee, I close by urging the Congress to act without delay to pass this important measure for the Colorado Ute Indian Tribes. Thank you, Mr. Chairman, for considering my comments.

THE SECRETARY OF THE INTERIOR

WASHINGTON

FEB 15 2000

Mr. Carl Pope
Executive Director
Sierra Club
85 Second St.
San Francisco, CA 94105

Dear Mr. Pope:

I am writing in response to your recent letter expressing opposition to the Administration's proposals for implementation of the Colorado Ute Water Rights Settlement.

As you are aware, in 1988, Congress enacted the Colorado Ute Water Rights Settlement Act which secured for the Ute Tribes a specific quantity of water from Animas-La Plata (ALP) to settle their water rights claims in the Animas and La Plata River basins. Implementation of this settlement has been long-delayed, thus 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. The delay has triggered a clause in the settlement agreement which now necessitates a decision – whether to honor the fundamental tenets of the settlement or force the Tribes to litigate their water right claims.

In August 1998, I presented an Administration proposal to finalize implementation of the 1988 Colorado Ute Water Rights Settlement Act. At that time, I made it clear that we would not take environmental short-cuts in resolving this issue. Accordingly, our proposal was downsized to satisfy our responsibilities under the Endangered Species Act. In addition, we committed to submit our proposal, as well as competing proposals to settle the Tribes' water rights claims, to an environmental review process under the National Environmental Policy Act (NEPA). The preliminary results of the NEPA analysis were made available on January 14 with the release of a draft Supplemental Environmental Impact Statement (SEIS). The draft SEIS recommended a modified version of the Administration Proposal as the best alternative to resolve the Tribes' water rights with the least environmental impacts.

Our proposal bears no resemblance to the massive ALP project that has been opposed by the environmental community for many decades. Gone is the irrigation component of the project, which called for much more water than the Animas River could support, and which would have brought with it serious water quality concerns. Gone is an oversized reservoir that would create a continuing incentive to divert more water from the Animas River than the river system can tolerate. What is left is a down-sized off-stream reservoir that satisfies the bulk of the Tribes' water rights, and which stores a limited amount of unsubsidized municipal water for the growing communities in the Durango and Farmington areas. The balance of the Tribes' water rights would be secured through market purchases of water rights, an approach that many environmental groups have advocated.

I particularly want to emphasize my concern that we honor our obligation to the Ute Tribes by carrying through on commitments that were made in the 1988 settlement. In order to get this matter settled, the Tribes have made significant concessions in response to environmental concerns and it is now time for us to reciprocate.

Justice Black once admonished, "Great Nations, like great men, should keep their word." The time has come to fulfill our trust responsibility to the Tribes. I am committed to follow through on this responsibility by working with the Congress to enact legislation in this session.

An identical letter has been sent to all the signatories of the February 2, 2000, letter.

Sincerely,

Mr. HAYES. The administration supports H.R. 3112 with some modifications that are identified in my testimony. The reason we support passage of this legislation is that we feel strongly that it is time to resolve the longstanding claims of the Colorado Ute Tribes, the Southern Utes and the Mountain Utes. In 1986, Congress passed the Colorado Ute Indian Water Rights Final Settlement Agreement, which identified the legal rights of the two tribes to reserve water under the Winters doctrine. It anticipated that those legal rights would be implemented through the construction of the Animas-La Plata project that originally was authorized in 1968.

Unfortunately, however, that project could not be implemented in the form in which it was authorized in 1968, and, in fact, this administration identified serious problems both with the original project and also with the project commonly known as "ALP Lite", which emerged out of the Romer-Schoettler process that the chairman referred to earlier in his comments. The administration was concerned that even ALP Lite was too large a project, raised significant environmental concerns and financial concerns.

Yet Secretary Babbitt and the administration appreciated the fact that it was necessary to bring closure to the tribal water rights and we proposed in August 1998 that a further scaled-down project that was geared toward the tribal water right proceed for full environmental review. That review has been undertaken and it is because the review has been undertaken with full public process that we are here today believing it is time to go forward and write the final chapter of Animas-La Plata.

The bill that Congressman McInnis has introduced is, in essence, a consensus bill among the tribes, the administration, and the project proponents. It eliminates the irrigation component of the original ALP project, which was a serious concern for environmental purposes and also cost effectiveness purposes. It is a much scaled-down reservoir, off-stream facility, that still allows the Animas River to remain free-flowing.

Thirdly, it incorporates non-structural concepts and anticipates that the tribes will purchase some of their water rights while also having a structural facility for certainty for the bulk of their water rights. And it is premised on full environmental review, full implementation under the Endangered Species Act and under NEPA. And it finally anticipates that some water would be available for municipalities in the area, but only unsubsidized water for M&I uses only.

And most importantly, it will finally resolve the Ute Tribes' water rights. We think that is important not only because of the trust responsibility that we owe to the tribes, but also because resolution of those water rights will avoid the uncertainty of water rights in the entire Southwestern Colorado and Northern New Mexico area. If we do not bring closure here, the Settlement Act of 1968 will go by the wayside, litigation will commence, and potentially very significant senior water rights claims will be brought against current non-Indian water users in Southern Colorado and Northern New Mexico. We think a consensual solution along the lines of what has been developed among the parties and with the

administration's help as reflected in Congressman McInnis's bill is the way to go.

A final point, we do think it is important to deauthorize the ALP project and make it clear that this is the final chapter. We also think it is important to reflect the concept of full repayment for the M&I users. We think there is a way to do this that will be consistent with the needs of the water users and the interests of all parties.

Finally, I will note that an important feature of this bill and the administration's proposal is a drinking water pipeline for the Navajo Nation between Farmington and Shiprock, a much needed replacement of an important municipal water supply that the current pipeline of which has lived beyond its useful life.

Thank you, Mr. Chairman, for holding this hearing and providing the opportunity to testify.

Mr. DOOLITTLE. Thank you.

[The prepared statement of Mr. Hayes follows:]

STATEMENT OF
DAVID J. HAYES, DEPUTY SECRETARY OF THE INTERIOR,
BEFORE THE HOUSE RESOURCES COMMITTEE
SUBCOMMITTEE ON WATER AND POWER
ON H.R. 3112,
the "COLORADO UTE SETTLEMENT ACT AMENDMENTS OF 1999"

MAY 11, 2000

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to appear today to testify for the Administration on H.R. 3112, 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). H.R. 3112 aims to resolve this matter once and for all. We thank Congressman McInnis 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. H.R. 3112 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 H.R. 3112, 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 and Record of Decision, which we plan to complete this summer. 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 Subcommittee 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 H.R. 3112, 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 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." Notwithstanding our support for developing a settlement alternative which would supply wet water to the Tribes, the Administration could not support the ALP Lite bills due to a number of concerns. Most notable was the fact that the bills, while purporting to represent a down-sized project, would have enabled the original project to be

built at some point in the future when and if additional water could be developed consistent with endangered species concerns. Of equal concern was a provision intended to circumvent critical environmental laws, including the Endangered Species Act, Clean Water Act, and the National Environmental Policy Act (NEPA). We also were concerned about short-circuiting requirements of Reclamation law and Administration policy related to sound economic and financial analysis, planning, and project structure.

Notwithstanding the Administration's objections to ALP Lite, 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 the Tribes the benefits they negotiated 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 contained a number of controversial points, including 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 are typically 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 reinitiate 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.

H.R. 3112

To finalize the original water rights settlement, H.R. 3112 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 H.R. 3112 would constitute a final settlement of Tribal water rights to the Animas and LaPlata Rivers in Colorado. To a large extent, H.R. 3112 mirrors the Administration Proposal. Differences do exist, however, and those differences as well as the common ground are discussed below.

Section 3 - Amendments to Section 6 of the Colorado Ute Indian Water Rights Settlement Act of 1988

Environmental Compliance

As just described, section 3 (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. H.R. 3112 provides approximately 6,000 acre-feet less M&I water than the Administration Proposal. 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.

Important to the structure of H.R. 3112, is the provision expressly conditioning the 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 H.R. 3112.

Once again, 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 Subcommittee, the Tribes, and the other settlement proponents agree.

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 H.R. 3112 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 deauthorizing the extensive number of project features previously authorized but not currently contemplated.

We recommend that paragraph 3(a)(3) be revised to state: "If constructed, the facilities described in paragraph (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 H.R. 3112 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 deauthorization of the scope of the original project in New Mexico.

Repayment

H.R. 3112 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 unforseen 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 month.

As a contingency, in the event that no final agreement on cost-share is reached, we recommend an additional provision be added to section 3. 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 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. Since the trust fund concept set forth in the Administration Proposal and authorized in section 4 of H.R. 3112, 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 4 Miscellaneous

Assignment of Water Permit

H.R. 3112 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 H.R. 3112 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 4 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

H.R. 3112 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 H.R. 3112 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 H.R. 3112 is enacted. Additionally, the Administration is concerned about Section 15(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 a 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

H.R. 3112 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

To provide accountability and cost control over time, the authorization of appropriations in Section 16(b) should be amended upon completion of the Administrations's NEPA review and decision-making process to specify the exact funding level authorized for project construction.

Conclusion

H.R. 3112 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 Congressman McInnis, the Subcommittee, 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.

Mr. DOOLITTLE. We are in the middle of a vote, but I think we have time to take the testimony of one more person before that happens, so we will hear from Mr. John E. Baker, Jr., chairman of the Southern Ute Indian Tribe, Ignacio, Colorado.

STATEMENT OF JOHN E. BAKER, JR., CHAIRMAN, SOUTHERN UTE INDIAN TRIBE, IGNACIO, COLORADO

Mr. BAKER. Thank you very much, Mr. Chairman. I want to thank each and every one of you for allowing me this opportunity to speak on behalf of my tribe.

Good afternoon. My name is John E. Baker, Jr. I am the chairman of the Southern Ute Indian Tribe. On behalf of the tribe and the Tribal Council, I offer unqualified support for the enactment of H.R. 3112. We hope that the bill can be promptly enacted into law.

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 support for the Animas-La Plata project. ALP is the only way to provide the tribe with a water supply to meet its present and future needs. The Tribal Council continues to support ALP just as a prior Tribal Council did when my father, John E. Baker, Jr., was chairman, just as the council did when my uncle, Chris A. Baker, Sr., was chairman, just as the council did when my predecessor, Clement J. Frost, was chairman, and just as the council did during the many years of leadership under Leonard C. Burch.

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 and we as we move into the new century. The present council, like past councils, understands that economic success in the arid Southwest requires a dependable water supply. 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. With an ever-growing tribal membership, we also need houses and domestic water supply on the west side of our reservation no matter what economic enterprises the tribe ultimately undertakes.

Based on the studies of the draft EIS, 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 in 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 the 1988 Settlement Act. It is also much different than the ALP Lite project, which was proposed only 2 years ago. All of the changes that have been made respond to arguments by the project opponents.

First of all, the project is now unquestionably an Indian water rights project.

Second, the major environmental issues associated with irrigation and the Endangered Species Act have been eliminated by downsizing the project.

Third, the cost of the project has been greatly reduced.

Fourth, the proposed legislation contains no short cut to environmental compliance.

Despite these major changes to the project, there is still opposition. The opponents would oppose any water project, no matter how small its impact and no matter who gets the benefits. Congress should not be swayed by the arguments that are raised against the project but should move forth to carry out the promises made to the two Ute Tribes. The bill is still a good solution to a very difficult problem. It should be passed.

In closing, Mr. Chairman, I want to express my appreciation for your work on this matter. I also want to note Congressman McInnis's leadership on this difficult issue. We appreciate his hard work and support.

Finally, we want to say thank you to Secretary Babbitt, Deputy Secretary Hayes, and the Department of the Interior for their work on these matters. We also 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 commitments to the two Ute Tribes.

In closing, I sit here as a veteran of this country and I believe that we live in the greatest country of the world and I think it is only honorable that we honor the agreements made between the United States and the Southern Ute Indian Tribe. Thank you.

Mr. DOOLITTLE. Thank you.

[The prepared statement of Mr. Baker follows:]

Testimony of

John Baker, Jr., Chairman

Southern Ute Indian Tribe

Before the Committee on Resources

U.S. House of Representatives

Washington, D.C.

May 11, 2000

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. On behalf of the Tribe and the Tribal Council, I offer unqualified support for the enactment of HR 3112, 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.

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. 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, 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 proposed legislation contains no shortcut to environmental compliance. 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. With all due respect, Mr. Chairman,, 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 work on this matter. I also want to note Congressman McInnis' leadership on this difficult issue. He has always supported the parties to the settlement and stood up for the United States keeping its word to the two Ute Tribes. We appreciate his hard work and support. We 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.

EXHIBIT

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

SEP - 9 1999

MEMORANDUM

TO: Acting Deputy Secretary

FROM: Solicitor

RE: Southern Ute Tribe's Water Rights Priority Date

You have requested that this Office evaluate the validity of the Southern Ute Tribe's water rights claims, as a result of issues raised during the NEPA process associated with the Administration proposal for final implementation of the Colorado Ute Water Rights Settlement. Specifically, you requested an analysis of whether the Tribe has reserved water rights with an 1868 priority date or whether such rights were extinguished by the Act of June 15, 1880. For the reasons explained below, we conclude that the Southern Ute Tribe's water rights have a priority date of 1868.

As a threshold matter, it is important to note that the Southern Ute Tribe's 1868 priority date was judicially established through approval of Consent Decrees on December 19, 1991, by Colorado District Court, Water Division 7. Under the 1986 Settlement Agreement, as implemented by Congress through the 1988 Settlement Act, all tribal water rights claims in the Animas and LaPlata rivers, including the priority date of those water rights, were properly before the Court in 1991 and included in the order of the Court accepting the Consent Decree. Accordingly, further judicial review on the propriety of the 1868 priority date is now barred by the doctrine of res judicata. Danielson v. Vickroy, 627 P.2d 752, 761 (Colo. 1981) (an issue is res judicata if it was before the court in proceedings which resulted in a decree.). Thus, even if we were to find a basis upon which to question the validity of the Tribe's priority date, which for reasons explained below we do not, the time to raise this issue has long since passed.

Notwithstanding the jurisdictional bar to raising such an issue at this time, the Southern Ute Tribe never lost its 1868 priority date. The Tribe's reserved water rights arise from its 1868 Treaty with the United States which established the Ute Reservation in southwestern Colorado. It is well-settled that establishment of an Indian reservation carries with it an implied reservation of the amount of water necessary to fulfill the purposes of the reservation with a priority date no later than the date of creation of the reservation. See Winters v. United States, 207 U.S. 564, 576-77 (1908); see also Arizona v. California, 373 U.S. 546, 599-601 (1963); United States v. Winans, 198 U.S. 371 (1905).

No congressional action has done anything to change the priority date of the Tribe's water rights. Two statutes did, however, substantially affect the Tribe's land ownership. In 1880, Congress passed an act to allot the Southern Ute reservation. See Act of June 15, 1880, ch. 223, 21 Stat. 199 (1880). Under this Act, all "surplus" lands of the Reservation (lands not allotted) were deemed to be public lands of the United States, available for entry by non-Indians. Then in 1934, the Indian Reorganization Act (IRA), 25 U.S.C. § 463 et seq. (1994), officially ended the allotment era and authorized the Secretary to restore unclaimed "surplus" lands of any Indian reservation to tribal ownership. Restoration of the present Southern Ute Reservation occurred on September 14, 1938. See 3 Fed. Reg. 1425 (1938).

The 1880 Act did not extinguish the Tribe's rights in "surplus" lands and did nothing to affect the Tribe's water rights for unclaimed "surplus" lands later restored to tribal ownership under the IRA. Termination or diminution of treaty rights "will not be lightly inferred," Solem v. Bartlett, 465 U.S. 463, 470 (1984), and requires express legislation or a clear inference of congressional intent gleaned from surrounding circumstances and legislative history. Bryan v. Itasca Cty., 426 U.S. 373, 392-93 (1975). The 1880 Act did not contain clear congressional intent to change the boundaries of the Tribe's reservation and did not provide the Tribe with full compensation for the land ceded, the combination of which might have indicated that the reservation had been diminished. See Solem v. Bartlett, 465 U.S. at 469-70. Similarly, the 1880 Act's complete silence on the issue of water rights must be interpreted as leaving in place, not terminating, these valuable rights. Although much tribal land did, in fact, become divested from tribal ownership, the overwhelming majority of land which now makes up the Southern Ute Indian Reservation was retained in federal ownership and never conveyed to non-Indian parties.

Because lands declared "surplus" by the 1880 Act could be sold only under certain conditions, including for the benefit of the Ute bands, the Tribes retained an interest in the unsold land. This interest included all property rights not specifically divested. As the Department has noted previously, during the time between allotment in 1880 and restoration of unclaimed lands in 1938, the United States became a "trustee in possession" for the disposal of the ceded land and the Tribe retained an equitable interest until it received payment for the land. Restoration to Tribal Ownership - Ute Lands, I Dep't of Interior, Op. Solicitor 832, 836-37 (1938). The promise of payment created a trust between the United States and the Tribe. See Minnesota v. Hitchcock, 185 U.S. 373, 394-95 (1902); Ash Sheep Co. v. United States, 252 U.S. 159, 164-66 (1920).

The decision of the Supreme Court in United States v. Southern Ute Tribe, 402 U.S. 159 (1971) has been put forth as a reason why the Southern Ute's water rights were extinguished. However, this Supreme Court decision is not relevant to the current inquiry. Southern Ute discussed the res judicata effect of the Tribe's claims in front of the Indian Claims Commission (ICC). The ICC claims at issue, however, concerned "surplus" lands which had passed into private ownership or were reserved for other federal purposes, not, as is the case here, unclaimed lands which were later restored to tribal ownership. Some have suggested that the Southern Ute decision also affected the water rights claims of the Ute Mountain Ute Tribe. However, the western half of the pre-1880 reservation, which is today's Ute Mountain Ute Reservation, was never allotted. See Southern Ute, 402 U.S. at 171. Neither the 1880 Act nor any subsequent congressional action affected the Ute Mountain Ute's water rights which also retain an 1868 treaty date priority.

All cases which have addressed the issue conclude that the original treaty-date priority to water applies to unclaimed "surplus" lands which are restored to tribal ownership. See United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984); In re Big Horn River System, 753 P.2d 76 (Wyo. 1988) (Big Horn I), aff'd without opinion by an equally divided court; and In re Big Horn River System, 899 P.2d 848 (Wyo. 1995) (Big Horn IV). Anderson developed a three-prong test for extinguishment of a Winters right; namely, there must be: 1) cessation of the reservation, 2) opening of that land to homesteading, and 3) conveyance into private ownership. Anderson, 736 F.2d at 1363. While the Ninth Circuit held that no Indian reserved water rights exist "on those reservation lands which have been declared public domain, opened to homesteading, and subsequently conveyed into private ownership," id. at 1363 (emphasis added), it left in place the district court's decision which awarded a treaty-date priority for water rights to "lands opened for homesteading which were never claimed." Id. at 1361 (emphasis added). In the case of the Utes, the land restored to the Southern Ute Indian Reservation was never conveyed into private ownership. Since the land was never conveyed into private ownership, the 1868 priority date was never affected.

The Wyoming Supreme Court reached the same conclusion when it found a treaty-date priority for "all the reacquired lands on the ceded portion of the [Wind River] reservation." 753 P.2d at 114 (Big Horn I). Similarly, Big Horn IV held that a treaty-date priority for reserved water rights extends to "restored, retroceded, undisposed of, and reacquired lands owned by the Tribes; fee lands held by Indian allottees; and lands held by Indian and non-Indian successors to allottees." 899 P.2d at 855.

The Department notes that Big Horn IV also held that the reservation purpose and reserved water rights "no longer existed for lands acquired by others after they had been ceded to the United States for disposition." Id. at 854 (emphasis added). This reasoning, which comports with Anderson's three-prong test, was used by the Court to conclude that non-Indian settlers, under the Homestead Act and other land-entry statutes, did not have a treaty-date priority. This holding, however, does nothing to alter the fact that lands ceded by the Southern Ute Tribe, which were opened to settlement but unclaimed by settlers and later restored to tribal ownership, retain water rights with a treaty-date priority. Anderson, Big Horn I, and Big Horn IV stand for the proposition, and the Department concludes, that the Tribe retains its original 1868 priority date for all restored "surplus" lands.

John D. Leshy

Mr. DOOLITTLE. The committee will now recess for the votes, which I think there are two, so we should be back here in about 20 minutes.

[Recess.]

Mr. DOOLITTLE. The subcommittee will reconvene and we will hear from Mr. Ernest House, chairman of the Ute Mountain Tribe in Colorado. Mr. House?

STATEMENT OF ERNEST HOUSE, CHAIRMAN, UTE MOUNTAIN UTE TRIBE, TOWAOC, COLORADO

Mr. HOUSE. My name is Ernest House, Sr. I am the tribal chairman for the Ute Mountain Ute Tribe. I am honored to testify today in support of H.R. 3112, the Colorado Ute Settlement Act Amendment of 1999.

It is difficult to describe my tribe's long-term commitment to obtain a fair and just settlement of our water claims in Southwest Colorado and Northwest New Mexico. I thought the best way to do so might be to introduce you to my father, Thomas House, Sr., who served on the Ute Mountain Ute Tribal Council more than a quarter of a century ago.

I also wanted to demonstrate to the chairman and members of the committee that the real reason we have remained so committed in spite of the many years which have passed and delays which have been endured. The Ute Mountain Tribe and our sister tribe, Southern Utes, entered into a settlement and have patiently waited for its implementation for the future of our tribe. Joining me today are my son and daughter, the picture of our future generation who will benefit from this firm supply of water. I ask you to welcome my son, Ernest House Jr. and my daughter, Michelle House.

I was a young tribal member, like them, in 1968 when my grandfather, the late Chief Jack House appeared before the House Interior and Insular Affairs to testify in support of the Animas-La Plata project. I was also a tribal chairman in 1986 when the Southern Ute Tribe and Ute Mountain Ute Tribe signed the original settlement agreement with the State of Colorado. The agreement eventually became the Colorado Ute Indian Water Rights Settlement Act of 1988, which was passed by Congress and signed into law by President Ronald Reagan. Needless to say, the Ute Mountain Ute people rejoiced with the Southern Ute people and our non-Indian neighbors because we thought we had finally won the long battle to acquire a firm water supply to meet the present and future needs of our Indian people of Southwest Colorado.

Two years ago when we came before the subcommittee in support of legislation to implement the Colorado Ute Indian Water Rights Settlement Act, the Clinton administration refused to support our cause. Today, however, I understand, hopefully, that the Clinton administration will support H.R. 3112, along with the State of Colorado, New Mexico, and sister tribe, the Southern Ute Indians. H.R. 3112 will provide for the final settlement of the water rights claims of the Southern Ute Indian and Ute Mountain Ute Tribes in Southwestern Colorado. The legislation creates substantial new water supply to the Ute Tribes and supplemental supplies to the non-Indian communities in our area.

We urge you to promptly consider and approve the legislation so that at the conclusion of our environmental process, the Secretary of the Interior can move forward with a record of decision and construction of this crucially needed water supply project.

As a tribal leader on the national, State, and local level for several years, I have witnessed on many occasions major confrontation and battles between Indians and non-Indians on various issues affecting tribal sovereignty, tribal natural resources, social and economic issues.

Finally, I would like to thank on behalf of the Ute Mountain Ute tribe and our other tribal and non-tribal partners in Colorado and New Mexico, both the Congress and the Clinton administration for their leadership. Through the efforts undertaken different times with different styles, a commitment has emerged from both the U.S. Congress and the Clinton administration to resolve once and for all this lengthy struggle to find a legally and scientifically supportive solution. We are indeed fortunate that the elected leaders from the tribes, La Plata and Montezuma Counties, and the States of Colorado and New Mexico, and elected and non-elected officials in Denver and Washington, DC., have put aside their differences and worked to develop a rational and equitable solution.

It is time to move forward. I want my father to see this project in his lifetime and I am hopeful my children will be able to focus their efforts on other important tribal issues and will not 10 years from now be sitting here where I am today asking for the water for my people.

I thank you, Chairman, for the time that you have allowed me. Also, for the record, I would like to say that the State of Colorado has submitted their support and it is in the record, to let the committee know that the State of Colorado also supports the water project. Thank you very much.

Mr. DOOLITTLE. Thank you.

[The prepared statement of Mr. House follows:]

STATEMENT
OF
ERNEST HOUSE, Sr.
CHAIRMAN
UTE MOUNTAIN UTE TRIBE
BEFORE THE
WATER AND POWER SUBCOMMITTEE
OF
THE HOUSE COMMITTEE ON RESOURCES

MAY 11, 2000

STATEMENT
OF
ERNEST HOUSE
CHAIRMAN
UTE MOUNTAIN UTE TRIBE

BEFORE THE
WATER AND POWER SUBCOMMITTEE
OF
THE HOUSE COMMITTEE ON RESOURCES

MAY 11, 2000

My name is Ernest House, Sr. I am Chairman of the Ute Mountain Ute Tribe. I am honored to testify today in support of HR 3112, the Colorado Ute Settlement Act Amendment of 1999. It is difficult to describe my Tribe's longterm commitment to obtaining a fair and just settlement of our water claims in Southwestern Colorado and Northwestern New Mexico. I thought the best way to do so might be to introduce you to my father, Thomas House, Sr., who served on the Ute Mountain Ute Tribal Council more than a quarter of a century ago.

I also wanted to demonstrate to the Chairman and members of the Committee the real reason we have remained so committed, in spite of the many years which have passed and delays which have been endured. The Ute Mountain Tribe, and our sister Tribe the Southern Utes, entered into this settlement and have patiently waited for its implementation because of the future of our Tribes. Joining me today are my son and daughter — the picture of our future generation who will benefit from this firm supply of water. I ask you to welcome my son, Ernest House, Jr. and my daughter, Michelle House.

I was a young tribal member, like them, in 1968, when my grandfather, the last hereditary chief of the Ute Mountain Ute Tribe, Jack House, appeared before the House Interior and Insular Affairs and testified in support of the Animas-La Plata Project. I was also Tribal Chairman in 1986, when the Southern Ute Indian Tribe and Ute Mountain Ute Tribe signed the original settlement agreement with the State of Colorado. That agreement eventually became the Colorado Ute Indian Water Rights Settlement Act of 1988, which was passed by the Congress and signed into law by President Ronald Reagan. Needless to say, the Ute Mountain Ute people rejoiced with the Southern Ute people and our non-Indian neighbors because we thought that we had finally won our long battle to acquire a firm water supply to meet the present and future needs of the Indian people of Southwestern Colorado.

We did not understand then, as we do now, the many obstacles that would be placed in front of us as we tried to carry out the most important part of the Settlement Agreement, the construction of the Animas-La Plata Project.

Two years ago, when we came before this Subcommittee in support of legislation to implement the Colorado Ute Indian Water Rights Settlement Agreement, the Clinton Administration refused to support our cause. Today, however, I understand and am hopeful that the Clinton Administration will support HR 3112, along with the States of Colorado and New Mexico and our sister Tribe, the Southern Ute Indians.

HR 3112 will provide for a final settlement of the water right claims of the Southern Ute Indian and Ute Mountain Ute Tribes in Southwestern Colorado. The legislation will create substantial new water supplies to the two Ute Tribes and supplemental supplies to the non-Indian communities in our area.

Although the Indian Tribes and our non-Indian neighbors have compromised time and again, the amendments which you are considering today provide the authority for the Secretary of the Interior to settle the remaining tribal claims with a greatly reduced Project -- a Project which at this time appears to be the preferred alternative under the extensive environmental studies which have recently been released by the Bureau of Reclamation. The environmental studies will not be finalized until some time in June and the legislation does not compel the Secretary to settle the Tribal claims under the terms described in the legislation, but merely provides the authority for him to do so should that be his decision.

We urge you to promptly consider and approve the legislation so that at the conclusion of the environmental process, the Secretary of the Interior can move forward with a Record of Decision and construction of this critically needed water storage project.

As a tribal leader on a national, state and local level for several years, I have witnessed on many occasions major confrontations and battles between Indians and non-Indians on a variety of issues affecting tribal sovereignty, tribal natural resources and social and economic issues. It is at times difficult to for me to understand why so many obstacles have been placed in our path with regard to the Animas-La Plata Project. For over twenty years the Ute Indian Tribes and their non-Indian neighbors have worked together as a team, setting aside historic differences and ideas in order to achieve what we all recognize as a beneficial result - additional storage of water resources in our water short area so that the Indian tribes are not put in a position of taking water away from our non-Indian neighbors, the communities, and the farmers and ranchers who have been using the existing supplies for generations. Common sense tells us that that is a reasonable solution to our problems. Storage is the key to this solution. This legislation will allow the Indian tribes to receive a firm water supply for their present and future needs consistent with the promises made in the 1988 Settlement Act. This water supply will not be taken from existing users and the Indian claims will be settled rather than bitterly litigated for decades, at a great cost to everyone involved.

Finally, I would like to thank on behalf of the Ute Mountain Ute Tribe and our other Tribal and non-Tribal partners in Colorado and New Mexico, both the Congress and the Clinton Administration for their leadership. Through their efforts, undertaken at different times and with different styles, a commitment has emerged from both the United States Congress and the Clinton Administration to revolve once and for all this long and lengthy struggle to find a legally

sound and scientifically supportive solution. We are indeed fortunate that elected leaders from the Tribes, La Plata and Montezuma Counties, and the States of Colorado and New Mexico, and elected and non-elected officials in Denver and Washington, D.C., have put aside their differences and worked to develop a rational and equitable solution.

It's time to move forward. I want my father to see this project in his lifetime, and I am hopeful my children will be able to focus their efforts on other important tribal issues and will not 10 years from now be sitting where I am today, asking for water for their people.

Mr. DOOLITTLE. Our next witness is Mr. Sage Douglas Remington, Director of the Southern Utes Grassroots Organization from Colorado. I might note, it is my understanding that Mr. Remington has been quite ill and has spent a good deal of time here today waiting for us to get through this hearing, so we hope you are feeling better and I appreciate your patience. Mr. Remington?

STATEMENT OF SAGE DOUGLAS REMINGTON, DIRECTOR, SOUTHERN UTE GRASSROOTS ORGANIZATION, IGNACIO, COLORADO

Mr. REMINGTON. Thank you. My name is Sage Douglas Remington and I am a representative of the Southern Ute Grassroots Organization, which represents Southern Ute Tribal members who are deeply concerned about the Animas-La Plata project and its long-term effect on water resources of the Southern Ute Tribe.

First of all, a number of groups that are concerned about the ALP water project are not present because verbal testimony has been limited to one representative. Therefore, I am not in a position to address or cover their issues of concern.

Our main concern is that there has been little communication between the Southern Ute Tribal membership and the Tribal Council about the long-term benefits of the Animas-La Plata water project. We are not opposed to ALP. What we are opposed to is the autocratic attitude of the Southern Ute Tribal Council.

The ALP water project does not meet the legal mandate of NEPA or other fiscal and environmental laws and the Bureau of Reclamation has ignored the alternative proposed by the opponents to the project. The indefinite purposes and needs for the project violates NEPA, the Clean Water Act, and is not consistent with sound taxpayer public policy.

The SEIS states that the purpose of and the need for the preferred ALP alternative is to implement the Colorado Ute Water Rights Settlement Act by providing the Ute Tribes with an assured long-term water supply and water acquisition fund in order to satisfy the tribes' senior water rights claims as quantified in the Settlement Act and to provide for identified M&I water needs in the project area.

What the concerned members of the tribe believe is that the proposed project does not implement the Settlement Act. Instead, it proposes an entirely different configuration of the water development as originally proposed. Settling Indian water claims may be a purpose, but implementing the 1988 Settlement Agreement clearly is not.

The Bureau's position is that no uses of the water must be identified because it implements an Indian water rights settlement. The proposed action does not, however, identify any need for non-Indian water in the project. As a matter of fact, it does not even justify why non-Indian water is needed, if needed at all. There is no valid comparison of the alternatives if the purpose of the project is not clearly defined.

Absent is any specification of how the Ute Tribes will actually use their water. According to the SEIS, the ultimate use of project water, about three-fourths of the total water supply, by the Ute Tribes would be more specifically defined by those tribes as future

needs develop. The SEIS lists a number of non-binding different water uses that the tribes may or may not decide to pursue in the future. Noticeably absent is a discussion of firm tribal plans to utilize their water. It appears that the only presently foreseeable use is tribal water marketing.

The failure to identify actual uses for tribal water is a fundamental law that infects the analysis undertaken by the Bureau of Reclamation in the SEIS. Without knowing how Ute water will be used, it is difficult to rationalize whether or not the proposed reservoir is necessary. Other than providing water uses proximate to the proposed reservoir or within the Animas basin, it is difficult to see what advantages the Ridges basin reservoir will achieve that could not be accomplished by exchange using the numerous other Federal storage facilities in the greater project area. The end uses of the water are connected and interdependent actions and NEPA on them must be completed before the project can be approved.

The failure to specify actual water uses is not remedied by the speculative non-binding uses offered in the SEIS. While several of these may have merit at some point in the future, others, notably the single largest water use proposed for a project, a coal-fired power plant which the tribal membership does not know anything about, are speculative and painfully strain even the most optimistic assumptions about future development in the Four Corners region. No private sector investor, whether for-profit or not-for-profit, would ever direct valuable resources into such a pipe dream regardless of the beneficiaries.

The Animas-La Plata project is not needed to facilitate tribal water marketing and will impose serious legal and economic penalties on the tribal attempts to market water. Because the SEIS offers no foreseeable use for the majority of tribal water other than marketing, Interior and other Federal departments have failed to justify any actual need for the Animas-La Plata project.

The membership of SUGO feels that if the settlement of the Indian water rights claim is truly a purpose of the project, then the issue of tribal water leasing or sale out of State must be considered. Thank you.

Mr. DOOLITTLE. Thank you.

[The prepared statement of Mr. Remington follows:]

Testimony of Sage Douglas Remington
Southern Ute Grassroots Organization (SUGO)
Southern Ute Indian Reservation, Colorado
Regarding H.R. 3112
Submitted to the House Resources Committee
Subcommittee on Water and Power

May 11, 2000

My name is Sage Douglas Remington and I am a representative from the Southern Ute Grassroots Organization (SUGO), which represents Southern Ute tribal members who are deeply concerned about the ALP water project and its long-term effect on the water resources of the Southern Ute Indian Tribe.

First of all, a number of groups that are concerned about the ALP water project are not present because verbal testimony has been limited to one representative. Therefore, I am not in a position to address or cover their issues of concern.

There has been little communication between the Southern Ute tribal membership and the Tribal Council about the long-term benefits of the ALP Water Project to the tribal membership.

The ALP water project does not meet the legal mandate of the National Environmental Policy Act and other fiscal and environmental laws, and the Bureau of Reclamation has ignored the alternative proposed by the opponents to the project.

The Indefinite Purposes and need for the project violates NEPA, the Clean Water Act, and is not consistent with sound taxpayer public policy.

The SEIS states that the purpose of and need for the preferred ALP alternative is:

To implement the Colorado Ute Indian Water Rights Settlement Act by providing the Ute Tribes an assured long-term water supply and water acquisition fund in order to satisfy the Tribes' senior water rights claims as quantified in the Settlement Act, and to provide for identified M&I water needs in the project area.

What the concerned members of the Southern Ute Indian Tribe believe is that the proposed project does not implement the Settlement Act. Instead it proposes an entirely different configuration of the water development as originally proposed. Settling Indian water rights claims may be a purpose, but implementing the 1988 settlement agreement clearly is not.

The Bureau's position is that no uses of the water must be identified because it implements an Indian water rights settlement. The proposed action does not, however, identify any need for the non-Indian water in the project. As a matter of fact, it does not

even justify why non-Indian water is needed, if it is needed at all. There is no valid comparison of the alternatives if the purpose of the project is not clearly defined.

Absent is any specification of how the Ute Tribes will actually utilize their water. According to the SEIS, "the ultimate use of...project water (about three-fourths of the total water supply) by the Ute Tribes would be more specifically defined by those tribes as future needs develop."

The SEIS lists a number of "non-binding" different water uses that the tribes may or may not decide to pursue in the future. Notably absent, is a discussion of firm tribal plans to utilize their water. It appears the only presently foreseeable is tribal water marketing.

The failure to identify actual uses for tribal water is a fundamental flaw that infects the analysis undertaking by Reclamation in the SEIS. Without knowing how the Ute water will be used, it is difficult to rationalize whether or not the proposed Ridges Basin reservoir is necessary. Other than providing for water uses proximate to the proposed reservoir or within the Animas Basin, it is difficult to see what advantages the Ridges Basin reservoir will achieve that could not be accomplished by exchange using the numerous other federal storage facilities in the greater project area. The end uses of the water are "connected and interdependent actions" and NEPA on them must be completed before the project can be approved.

The failure to specify actual water uses is not remedied by the speculative, "non-binding" uses offered in the SEIS. While several of these may have merit at some point in the future, others (notably the single-largest water use proposed for the project, a coal fired power plant) are speculative and painfully strain even the most optimistic assumptions about future development in the four corners region. No private sector investor-- whether for-profit or not-for-profit—would ever direct valuable resources into such a pipe dream, regardless of the beneficiaries.

Because the project supporters fail to specify the ultimate uses to which project water will be utilized, it fails to meet the most elementary of NEPA's requirements: determining what it is the federal action seeks to achieve, so that potentially better alternatives may be examined. Given this failure, the only foreseeable use for the majority of each tribe's A-LP water is marketing or leasing. If this is the primary goal of the tribes for the foreseeable future, however, the A-LP project will prove to be a burden, not an asset to the tribal membership.

SUGO firmly believes that the Ute Tribes' do not need the ALP project to market their water. Tribal reserved rights, unlike state-law based appropriative water rights, require neither diversion nor "beneficial use" to be valid. Assuming the tribes and other parties to the settlement agreement consented to the quantification of their water rights specified in the Settlement Act, they could begin marketing their water today. The only question is how the Interior Department can and should be assist them in their efforts to do so.

Building the ALP project is one of the least helpful things Interior can do to encourage tribal water marketing. Because the tribes will relinquish the privileged status of their reserved water rights when the ALP project is constructed, which will severely constrain the markets in which they might lease or sell their rights; and second, because ALP project O&M costs will impose incremental financial burdens on water that the tribes seek to market, a marginal cost which is likely to cut deeply into the profits that the tribes could realize from leases or sales of their water.

Construction of ALP will, under the Settlement Act, subject the tribes' water rights to Colorado state law, which bars interstate water marketing. Because tribal reserved rights are derived from and governed by federal law, they are not subject to state-based restraints on alienation. Consequently, were the Ute Tribe's reserved water rights not subjected to the limitations imposed by converting their water to ALP project reserved rights, it appears likely that they could sell or lease their water to out-of-state markets.

There are two potential barriers to marketability of tribal reserved water rights, the federal non-Intercourse act, and barriers imposed by state laws.

While the non-Intercourse Act does not by its terms apply to water rights, even if it would bar off-reservation marketing, it need not detain the tribes. Congress willingly waived application of the Non-Intercourse Act in the 1988 Settlement Act, and there is no reason to believe it would not freely agree to do so in future legislation authorizing alternatives to the ALP project. In addition, Interior has expressed its belief vis-à-vis other tribes that it has the authority to administratively waive application of the Non-Intercourse act.

Tribal reserved water rights by their very nature are immune from provisions of state law that would bar tribal efforts to market their water across state lines. Interior has the authority to administratively authorize tribal marketing, and may thus preempt state efforts to hinder interstate marketing of tribal reserved rights and enable the tribes to command the best prices and terms available. Interior's failure to mention this option in the SEIS is irresponsible given the restrictions of tribal water marketing imposed by the ALP project.

In contrast to the favorable marketing conditions enjoyed by tribal reserved rights, the Settlement Agreement provides that the tribes' rights to water from the ALP project shall be "project reserved Rights." The Agreement specifies that any leasing of these project reserved rights will be constrained by the requirements of state law. Colorado law prohibits marketing water beyond state lines. Consequently, if the ALP project is constructed, the Ute tribes will be unable to market their water outside of Colorado, and thus will lose the vast majority of favorable markets for their water. Moreover, the Settlement Act specifically prohibits the tribes from marketing ALP project water to the states of the Lower Colorado River Basin unless non-Indian water rights holders could do so. For the purposes of marketing, therefore, the ALP project forfeits the unique value of tribal reserved rights, and thus seriously constrains the markets that will be available to the tribes.

Since the Tribes will be responsible for ALP project O&M costs, they will essentially face a heavy tax on any water they market. Thus, whenever a tribe executed a contract to market its "project reserved water rights" associated with the ALP project, it would be forced to subtract from the contract price per acre/foot the O&M charges associated with the ALP project. Pumping water uphill into the Ridges Basin reservoir will be extremely high, and this means that each acre/foot of marketed tribal water will suffer a considerable incremental charge.

The tribes would not endure such a charge if their water rights were not tied to the ALP project. Unless the tribes intend to market their water only in the concentrated area of the Animas River Basin below Ridges Basin, there is no need to regulate delivery of marketed water with the Ridges Basin reservoir. This is because of the extensive network of federal reservoirs that already exist in the project area. Even if the tribes only intended to market water within the San Juan Basin, the Lemon, Vallecito, and Navajo reservoirs could facilitate the exchanges needed to ensure deliveries of marketed tribal water. If the tribes were interested in marketing their water to the Lower Colorado River Basin (where they would receive the most favorable prices and terms for their reserved rights), they could ensure deliveries through releases from Lake Powell. Interior controls all of these reservoirs.

The ALP project is not needed to facilitate tribal marketing, and will impose serious legal and economic penalties on tribal attempts to market water. Because the SEIS offers no foreseeable use for the majority of tribal water other than marketing, Interior has therefore failed to justify any actual need for the ALP project!

If the settlement of Indian water rights claims is truly a purpose of the project, then the issue of tribal water leasing or sale out of state must be considered.

Mr. DOOLITTLE. It seems to me over the 10-years I have been on this committee, I have heard several hearings on Animas-La Plata, so hopefully we will actually make this happen this time.

I would like to include in the record statements from Richard K. Griswold, President of the Animas-La Plata Water Conservancy District; Thomas C. Turney, State engineer with the State of New Mexico; the San Juan Water Commission in New Mexico; Fred V. Kroeger, President of the Southwestern Water Conservation District; and Michael Black with the Taxpayers for the Animas River.

[The prepared statement of Mr. Griswold follows:]

STATEMENT OF
RICHARD K. (MIKE) GRISWOLD, PRESIDENT
ANIMAS-LAPLATA WATER CONSERVANCY DISTRICT
BEFORE THE SUBCOMMITTEE ON
WATER AND POWER
OF THE COMMITTEE ON RESOURCES
OF THE U.S. HOUSE OF REPRESENTATIVES
REGARDING H.R. 3112
THE COLORADO UTE SETTLEMENT ACT
AMENDMENTS OF 1999

ROOM 1324 LONGWORTH HOUSE OFFICE BUILDING
MAY 11, 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 H.R. 3112 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 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 it represents, 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.

Two years ago, the Administration took issue with our compromise; but it ultimately 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 modification, that proposal is included in the provisions of H.R. 3112.

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 opponents of H.R. 3112 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 H.R. 3112.

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 H.R. 3112. 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 H.R. 3112 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 the Bill's sponsor, Congressman Scott McInnis.

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 seems grossly unfair to us 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. 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.

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 should not become a platform to punish us further. H.R. 3112 provides that no other features of the Animas-LaPlata Project are to be built without further Congressional action and that limitation should be sufficient.

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 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 H.R. 3112. 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.

Thank you for the opportunity to present this testimony.

[The prepared statement of Mr. Turney follows:]

STATE OF NEW MEXICO

OFFICE OF THE STATE ENGINEER

Statement
Of
Thomas C. Turney
State Engineer
State of New Mexico
Before the
House of Representatives
Subcommittee on Water and Power
Of the
House Committee on Resources
On
H.R. 3112, *To Amend the Colorado Ute Indian Water Rights Settlement Act*

May 11, 2000

Mr. Chairman and Committee members—thank you for the opportunity to testify on H.R. 3112. I testify on behalf of the State of New Mexico. H.R. 3112 authorizes the Secretary of the Interior, acting through the Bureau of Reclamation, to construct, operate and maintain certain 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 H.R. 3112 would be operated consistent with provisions of the Animas-La Plata Project Compact, which was approved by the 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 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.

H.R. 3112 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 capital 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. It further provides for an assignment of portions of the water right permit, issued by the State Engineer to Reclamation, to NM project beneficiaries who have or will actually put the water to beneficial use.

The bill includes language to insure that the Animas- La Plata project can deliver wet water to the Navajo Nation communities in the area of Shiprock. 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 Nation municipal pipeline assumes that the Navajo Nation will not file additional claims against the New Mexico non-Indian beneficiaries of the project.

Comments have been made by one of my sister agency's to Reclamation's Draft Supplemental Environmental Impact Statement,

relating to water quality and the impact on stream bottom deposits. Stream bottom deposits are a part of surface water quality standards promulgated by the New Mexico Water Quality Control Commission -- a Commission upon which I sit as a constituent agency. The State does not believe that such a violation would be a necessary result of the project, or that such an impact from the project would necessarily preclude the project from going forward. We are hopeful that Reclamation has additional information that can be used to answer these concerns. Alternatively, we anticipate Reclamation will be able to provide various mitigation measures, perhaps implemented through ongoing operation and maintenance practices. New Mexico stands ready to work with the project beneficiaries to identify approaches, founded on sound science, to ensure that the reconciled project meets New Mexico Standards for Interstate Surface Waters.

It is very important, not only to New Mexico water users, but to all water users of the San Juan River system, that storage of Animas River 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 afforded by Navajo Reservoir, can enhance the success of the San Juan River Recovery Implementation Program to achieve its goals to conserve endangered fish species and to proceed with water development in the San Juan Basin.

In closing, H.R. 3112 will aid in providing a more 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.

[The prepared statement of the San Juan Water Commission follows:]

Statement

from the

San Juan Water Commission, New Mexico

(800 Municipal Drive, Farmington, New Mexico 87401 ◊ Telephone (505) 599-1462)

to the

Subcommittee on Water and Power of the House Resources Committee

on

H.R. 3112

May 11, 2000

The San Juan Water Commission urges your support for H.R. 3112. The Commission has long valued the leadership you and your subcommittee have shown regarding water resources essential to the health and well being of our western citizenry. 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 has enabled us to serve the best interests of the region and the nation while preserving the environment and allowing for economic and cultural stability.

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. Water dedicated to the project from New Mexico's supply 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 becoming dependent 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 through October.

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.
Most of New Mexico domestic water users are dependent 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. 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.

HR 3112 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 water, which is dedicated to the Jicarilla Apache Tribe and the pueblos, and the towns and cities of the Rio Grande corridor.

Similarly, the Navajo Nation is benefited by final settlement of the Colorado Ute claims. In H.R. 3112, the urgent domestic needs for reliable clean water supplies for the Shiprock area are addressed. The needed increase in water supply is provided by the pipeline authorized by the legislation, replacing 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 AMENDMENT

A technical correction is needed in the section dealing with Nontribal Water Capital Obligations, found in Section 3(a)(a)(5) of the proposed legislation. The Commission requests that the introductory phrase of the section be struck. This change would delete the current phrase, which reads: "In lieu of a repayment contract." The next word, "under," should then be capitalized to begin the sentence, "Under section 9 of the Reclamation Project Act of 1939..." The remainder of the paragraph remains the same.

This technical correction is needed to clarify the intent of the parties that the nontribal parties may select this option to satisfy their capital obligations, but that existing repayment contracts do not need to be replaced in their entirety. The parties do not need the introductory phrase to provide the option of meeting their capital obligations through a payment in full, and thus it should be eliminated in the interest of streamlining the legislation as much as possible.

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 secures reasonable benefits to all in the San Juan Basin. Both the original authorized ALP and the project contemplated in the Amendment, H.R. 3112, 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 is as yet undetermined, but the Bureau must honor the limits incorporated in our existing contract. The Commission anticipates that the terms applicable to the redesigned project proposed will be honored.

Two years ago, an economic estimate by the New Mexico State University suggested Northwestern New Mexico has lost as much as $740 million from the failure to develop the water incorporated in the ALP permit, due to delays. 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. The Commission has looked at and found no viable alternative water storage site, that will meet our and our neighbors' needs more economically, and will comply with the enormous federal, state, and local requirements as well as Ridges Basin. 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 to all of us.

[The prepared statement of Mr. Kroeger follows:]

WRITTEN STATEMENT
OF
FRED V. KROEGER
PRESIDENT
SOUTHWESTERN WATER CONSERVATION DISTRICT
SUBMITTED TO THE
WATER AND POWER SUBCOMMITTEE
OF
THE HOUSE COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.
MAY 11, 2000

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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 HR 3112, the Colorado Ute Settlement Act Amendments of 1999. This legislation will settle once and for all the reserved water right claims of the two Colorado Ute Indian Tribes in Southwestern Colorado. 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.

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 30years 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 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.

[The prepared statement of Mr. Black follows:]

Taxpayers for the Animas River
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The Honorable John Doolittle
Subcommittee on Water and Power
1522 Longworth House Office Building
Washington, DC 20515
Attn: Diana Giddeon

Dear Chairman Doolittle,

Thank you for the opportunity to comment on HR 3112, the bill to amend the 1988 Ute Indian Water Rights Settlement Act.

This latest version of the Animas La Plata Project fails to substantiate a need for the water to be developed. This failure constitutes a violation of both the Clean Water Act and the National Environmental Policy Act. The lack of a substantiated Purpose and Need for the water development goes far beyond environmental issues. It would set a precedent which would threaten the entire structure of the Colorado River Compacts and the Law of the River. The latest version of the ALP is designed to bring water marketing across state lines and between the Upper and Lower Colorado River Basins. This should be of great concern to all Colorado River Compact states as well as all water users in the West.

The Draft Supplemental Environmental Impact Statement (DSEIS) for the ALP fails to describe any beneficial use for the vast majority of Municipal and Industrial Water (M&I) to be developed for the Southern Ute and Ute Mountain Ute Tribes. Instead the document describes "Nonbinding Use Scenarios." One of these "Nonbinding Use Scenarios" clearly violates the Colorado River Compacts and the Law of the River. Up to 79,050 acre feet of diversion or 39,525 acre feet of depletion in the

proposed project, is designated as future "Regional Water Supply" (pg 2-6 DSEIS). Using Colorado Ute tribal water to sell or lease downstream of the Colorado state line clearly involves interstate water marketing.

It has long been the policy of the state of Colorado to oppose water marketing or leasing water across state lines. In fact, Colorado fired their former state engineer for even talking about the possibility.

According to the New Mexico State Water Engineer, Tom Turney, as articulated at the Farmington N.M hearing on the DSEIS, the use of the water for "Regional Water Supply" is another word for interstate water marketing and is opposed by the state of New Mexico.

Yet the ALP is designed specifically for this eventuality. There is no conceivable use for the vast majority of the water in the Project. The water in the ALP will have to be leased across state lines or outside of the Upper Colorado Basin, if any use is to be made of the water.

A simple look at a map will show this to be true.

The ALP envisions storing water in Ridges Basin, just south of the city of Durango. From Ridges Basin, the only delivery point for that water would be at Basin Creek, where Ridges Basin Dam would be located.

From the point where Basin Creek enters the Animas River, it is only 14 miles by road to the New Mexico state line. All the Ute water in the Project, enough to supply over 400,000 people, must be used in this narrow corridor. That is impossible.

A look at the same map will reveal that the Ute Mountain Ute Tribe owns no land in the Animas Valley. In order to deliver water to the UMU Reservation the water must be pumped over two watersheds, or it must flow 2,000 vertical feet downstream past the confluence of the San Juan River to UMU lands in the vicinity of the Four Corners. Neither scenario is practical.

That leaves the only use for the vast quantities of water in the ALP

to be at some location below the Colorado state line.

The DSEIS attempts in the "Non Binding Use Scenarios' to describe water use in the La Plata Basin for portions of the Tribal allocations. But these "Scenarios" are clearly impractical and are not seriously examined. But even if these scenarios come to fruition, the major portion of the water would still be dedicated to a "Regional Water Supply."

While water marketing is a concept which should be explored as the situation in the Colorado River Basin changes, water marketing should not be instituted in a back door manner as part of HR 3112. The pros and cons of the proposal should be honestly and openly debated.

The latest version of the ALP will force the issue onto the Basin States because there is simply no other practical use for the tremendous amounts of M&I water which the Animas La Plata Project will develop.

This latest version of the ALP is a Trojan Horse to institute water marketing in the Colorado River Basin by back door means.

Sincerely,

Michael Black
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Mr. DOOLITTLE. Mr. Hayes, it has been implied that this legislation impedes the tribe from interstate water marketing and I wondered if you agree that the tribe has given up any right to market their water or would they be required in any case, with or without this bill, to abide by State law in marketing their water.

Mr. HAYES. Mr. Chairman, the marketing constraints have been identified in the existing Animas-La Plata legislation and the proposed amendments would not affect that in any way. So the status quo in terms of authorization would continue in place, and there are some restrictions on interstate marketing in the current authorization.

Mr. DOOLITTLE. So we are not making anything worse in that regard by the present legislation?

Mr. HAYES. There is no change.

Mr. DOOLITTLE. There is language in this bill, I think, intended to address the administration's concern about the desire to deauthorize the project; it is on page seven at the bottom, paragraph three, which says, "if constructed, the facility described in paragraph 1(a) shall not be used in conjunction with any other facility authorized as part of the Animas-La Plata project without express authorization from Congress." Does that legislation meet your concern and cause you to support the bill, Mr. Hayes?

Mr. HAYES. On this issue, the language that have set forth would address the issue satisfactorily from the administration's perspective, Mr. Chairman.

Mr. DOOLITTLE. Thank you. This project is much reduced from what it was. Personally, I would have preferred the larger version, but perhaps some of you would, too. In any event, this is where we are. It has been a long, difficult process. I appreciate the patience you have had with our committee. It really would not have taken very long if we had not been delayed by those votes.

The subcommittee is pretty familiar, I think, with this project because of the number of times it has been before us. I would hope we could go to markup fairly soon after this hearing and go from there and hopefully it can move through the Senate side expeditiously.

I would like to thank all of you for your attendance today. We may have further questions and I would ask you to respond expeditiously to those that we would tender following the hearing. With that, the hearing is adjourned.

[Whereupon, at 4:19 p.m., the subcommittee was adjourned.]