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

JUNE 7, 2000

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

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

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

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

Background

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

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

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

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

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

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

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

Importance of Resolving the Ute Tribes' Water Rights Claims

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

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

As noted earlier, the Tribes' water rights were quantified in the 1986 Settlement Agreement. The 1986 Agreement contained a contingency in the event ALP was not constructed. That contingency allows the Tribes a five year window beginning January 1, 2000, to 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.

S. 2508

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

Environmental Compliance - Sections 2, 3, and 4

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

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

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

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

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

Authorization for Tribal Water Allocations

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

Deauthorization

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

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

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

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

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

The Administration Proposal established the principle that the non-Indian ALP partners should fully absorb the costs associated with their share of the project in accordance with Reclamation law and Administration policy. An up-front financial contribution with no final cost allocation, even when that contribution is negotiated in good faith and based on conservative cost estimates, would shift the risk of 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 few weeks.

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

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

Section 5 Miscellaneous

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

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

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

With respect to the timing for appropriations to the Tribal Resource Funds, we recommend a five year payout starting in the fiscal year after S. 2508 is enacted. Additionally, the Administration is concerned about Section 16(b) providing Tribes with interest income if the full amount of appropriations authorized for specific year is not provided by Congress. It is not appropriate to penalize taxpayers and the Federal Treasury if Congress does not appropriate funds according to 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
S. 2508 specifies that construction of the down-sized project and an appropriate allocation of project water, coupled with the appropriation of funds authorized in the bill, shall constitute final settlement of the Ute Tribes' water rights claims on the Animas and LaPlata Rivers in the State of Colorado. This provision should be changed to include as a prerequisite to final settlement, the issuance of an amended final decree by the District Court, Water Division Number 7, of the State of Colorado.

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

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

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

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

Conclusion

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

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

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