STATEMENT OF WENDY WEISS,
FIRST ASSISTANT ATTORNEY GENERAL, STATE OF COLORADO
ON S. 2508
COLORADO UTE SETTLEMENT ACT AMENDMENTS OF 2000
SUBMITTED TO THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

JUNE 7, 2000

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

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

Based on the *Winters* doctrine, in 1976, the United States Department of Justice filed reserved water right claims in Colorado water court[1] on behalf of the Ute Tribes. The original Ute Reservation was established by treaty in 1868 (with some later additions), making the claimed rights the most senior rights on the river.[2] Thus, if successful, the Tribal claims would preempt the long-standing water rights of non-Indian water users. In the more water-short river basins, such as the La Plata River basin, the Tribal claims have the potential to exceed the entire available water supply, thereby drying up family farms and ranches that have existed for generations and disrupting the local agricultural communities.

As the parties began preparing for trial in the mid-1980s, it became clear that there were many contested issues, including the priority dates of the claimed rights, the amounts of

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

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

water to which the Tribes were entitled,[3] the purposes for which the water could be used, whether the water could be used off the reservations, and how and by whom the rights would be administered. Rather than pursuing lengthy, expensive, and divisive litigation, all the parties sat down together to negotiate and, in 1986, they signed the Colorado Ute Indian Water Rights Final Settlement Agreement. Two years later, Congress passed the Colorado Ute Indian Water Rights Settlement Act of 1988, Public Law 100-585, affirming the federal commitment to build Animas-La Plata. However, the project was unable to meet the requirements of the Endangered Species Act and the Clean Water Act and raised cost concerns.

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

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

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

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

and ranches to subdivisions.

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

Environmental compliance. The Administration previously testified that preserving the Secretary of the Interior's discretion in conducting environmental compliance is extremely important. S. 2508 does this. This bill very explicitly requires the Secretary to comply with all national environmental laws. While S. 2508 includes certain *Congressional* determinations about the project's environmental adequacy, it affirms the independent authority and discretion of the Secretary and other federal officials under applicable environmental statutes.

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

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

Some project opponents question the Ute Tribes’ decision to insist that the United States live up to its part of the bargain and build a reservoir, rather than giving them money to buy water rights. These groups presume to tell the Tribes that they are making a bad deal because the modified project does not include water delivery facilities. As Chairman Baker previously testified, the Tribes would prefer to have delivery facilities included in

the project, as agreed in the Settlement Agreement and the 1988 Act, but they elected to defer those facilities in order to obtain storage. Project opponents fail to respect the Tribes' long struggle to secure a reliable water supply for their future. Instead, they seek to penalize the Tribes for compromising by forcing them to take money in place of the water to which they are entitled. The Tribes' choice deserves your respect.

Construction of a scaled-back Animas-La Plata Project remains essential to the settlement. The Ute Tribes have until January 1, 2005 to elect whether to go back to water court to pursue their original claims in the Animas and La Plata Rivers. Unless Congress acts now to meet the federal government's commitment to the Tribes, I fear they will look to the courts for relief. Reopening of the Ute Tribes' claims would trigger litigation among the Tribes, the United States, the State of Colorado, and water right holders. As discussed above, the Tribes' reserved rights claims raise complex legal and factual issues and threaten the livelihoods of farmers and ranchers who rely on the already water-short La Plata River. Such litigation would involve virtually all water users in the Animas and La Plata basins, take many years of trial and appeals, and cost millions of federal, state, and local taxpayer dollars.[4] Southwest Colorado has a history of cooperation between Indians and non-Indians, of which we are justly proud. S. 2508 will allow us to continue down that path.

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

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