106TH CONGRESS
2d Session

SENATE

REPORT
106–513

AMENDING THE COLORADO UTE INDIAN WATER RIGHTS SETTLEMENT ACT OF 1988 TO PROVIDE FOR A FINAL SETTLEMENT OF THE CLAIMS OF THE COLORADO UTE INDIAN TRIBES, AND FOR OTHER PURPOSES

DECEMBER 15 (legislative day, SEPTEMBER 22), 2000.—Ordered to be printed

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Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2508]

The Committee on Indian Affairs to which was referred the bill (S. 2508) amending the Colorado Ute Indian Water Rights Settlement Act of 1988 to provide for a final settlement of the claims of the Colorado Ute Indian Tribes, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 2508 is to make amendments to the Colorado Ute Indian Water Rights Settlement Act, P.L. 100–585, to fulfill the Federal government's obligation to the Southern Ute and Ute Mountain Ute Indian tribes in the manner contemplated by the recently completed Animas La Plata Project Final Supplemental Impact Statement, July, 2000 and the Department of Interior's Record of Decision, September 25, 2000.

BACKGROUND

Through successive 19th century treaties, the Federal government guaranteed a permanent tribal homeland for the Ute Indians. By the 1880's, the various bands of the Ute Indians had been settled on three reservations, one in Utah and two in Colorado. In the mid-1970's, the Federal government filed as a reserved water right claim on behalf of the Ute Mountain Ute and Southern Ute Indian Tribes of Colorado (Ute tribes). The principle of reserved water rights was first articulated in the Supreme Court's decision in Winters v. United States, 207 U.S. 564 (1908). These "Winters" rights have the same priority as the date the reservation is established. Because a number of significant rivers and streams run through

the Southern Ute and Ute Mountain Ute Indian reservations, such rights would be senior to a large number of existing water rights. The prospect of such senior rights would threaten existing water uses in three ways. First, even as inchoate and unquantified claims they would place a cloud on all water rights established since at least as far back as the 1868 Ute Treaty. Second, as the tribal reserved rights claims are being adjudicated they would cloud other water rights. Finally, the quantified water rights would threaten existing rights and uses, even if the Ute tribes were unable or unwilling to begin using the water associated with their reserved water rights. The economic impact and social dislocation associated with this reallocation prompted all of the interested parties to try to reach a negotiated settlement of the tribal water rights claims.

In 1988, through the Colorado Ute Indian Water Rights Settlement Act, P.L. 100–585 (Settlement Act), Congress ratified the Colorado Ute Indian Water Rights Settlement Agreement of December 10, 1986 (Settlement Agreement). Under the terms of the Settlement Act, the Ute tribes were guaranteed a water supply to satisfy the tribe's municipal, industrial, and agricultural water needs. Like a number of other Indian water rights settlements, the parties relied on newly developed water supplies to satisfy tribal water rights claims. Such undeveloped water is available from the facilities authorized by the Colorado River Basin Project Act of 1968 (P.L. 90–537), which authorized the Animas-La Plata Project (ALP or Project) as a participating project under the Colorado River Storage Act of 1956, Act of April 11, 1956, 70 Stat. 105.

Under the terms of the Settlement Agreement, the United States must supply specified quantities of water to each of the Ute tribes at the specified locations. If water is not supplied by January 1, 2000, the Ute tribes may elect to return to court and litigate their reserved water right claims. This right to return to court lapses on January 1, 2005. Each of the parties have different reasons for supporting a deadline. A deadline ensures that the Ute tribes will not wait indefinitely for the completion of the Project. It also ensures that existing water users can look forward to the elimination of senior tribal reserved water rights claims.

Construction of the ALP, however, has been delayed by a number of factors, mostly related to Federal environmental laws. The Animas River is a part of the San Juan River watershed, which is a tributary of the Colorado River. Although the proposed project would divert water from the Animas River, concerns were expressed about the effect of these diversions on the San Juan River. Pursuant to the Endangered Species Act, 16 U.S.C. 1531 et seq. (ESA), in 1990, the U.S. Fish and Wildlife Service (Service) issued a draft Biological Opinion indicating that under certain circumstances, diversion from the San Juan watershed might jeopardize downstream listed species. After consultation between various agencies over "reasonable and prudent alternatives," the Service incorporated the proposed alternative into a final Biological Opinion. This 1991 alternative limited construction of the ALP to certain facilities, restricted annual water depletions, and provided for a seven year study of river flows and their effect on recovery efforts for listed species. The alternative provided for construction of the diversion works and off-stream reservoir, but prevented fur-

ther construction of ALP components until the study was completed.

In 1992 a lawsuit was filed to prevent construction of any part of the ALP. This suit raised claims under several statutes, including the ESA, but not with respect to the Pikeminnow (formerly referred to as the "Squawfish".) Those parts of the suit based on the ESA were dismissed as premature. However another part of the suit asserted that the 1980 environmental impact statement was inadequate because it did not address new circumstances, including changes in the Project. In response to this claim the United States began preparing a Supplemental Environmental Impact Statement, which was completed in 1996. As outlined in the Supplemental EIS, the A–LP would be devised into two phases and each of these would be divided into two stages. The initial stage of Phase I would include the following project features: Durango Pumping Plant, Ridges Basin Inlet Conduit, Dam, and Reservoir, Durango, Shenandoah, and La Plata Rural M&I Pipelines. These components would be constructed to accommodate increased water deliveries from other project features. With respect to the remaining project features, the Supplemental EIS included the following: "Based on the * * * 7-year research study of endangered fish in the San Juan River, the size of the dam and reservoir would be determined and the dam and pumping plants could be sized accordingly." 1996 Final Supplemental EIS, S–4.

Despite this thorough environmental review, opposition to the project continued. In an effort to provide a process for resolving the conflict between the A–LP's opponents and proponents, the State of Colorado sponsored an effort to mediate between the two sides. Unfortunately, a consensus was not possible. The Ute tribes were amenable to negotiations over the quantity of water to be stored on their behalf. Through successive tribal elections, however, both Ute tribes remained steadfast in their view that they would not agree to any settlement that did not provide them with a stored water supply. Opponent of the ALP were strident in their view that they would only support an approach that did not include the construction of any part of the ALP. According to the tribes, there were at least three strong arguments to support their position that negotiations should be premised on the construction of at least some of the ALP. First, since 1988, Federal law explicitly assured them a newly developed water supply. Second, successive environmental studies demonstrated that such a project can be constructed on the Animas River in a manner consistent with applicable laws. Third, Federal policy encourages Indian tribes to exercise self-determination with respect to their natural resources.[1]

Experience teaches that Indian tribes are due a significant amount of deference when deciding how to resolve conflicts over their natural resources. Tribal governments are often in the best position to weigh the tangible and intangible factors that make various options more or less risky.[2] For example, both Ute tribes have serious concerns about the uncertainty inherent in proposals to ex-

[1] See, e.g, *Arizona* v. *California,* 460 U.S. 605, 615 (rejecting an attempt to prevent tribal intervention in a general stream adjudication where the tribes were already represented by the United States.)

[2] For the same reason, the Committee notes the support for the bill from both the Navajo Nation and the Jiracilla Indian Tribe. Both tribes recognize that their own interests are served by a legislative proposal that fully finally, and fairly resolves the Ute tribal water rights claims.

change their reserved rights claims for financial resources to acquire additional water rights. The Animas-La Plata Project, Final Supplemental Environmental Impact Statement (July 2000) (hereinafter July 2000 Final EIS) describes many of the technical limitations that are inherent in the acquisition option. In addition, the tribes are concerned about the short and long term effects of this approach will have on neighboring individuals and governments. Unlike the advocates of such acquisition-oriented proposals, Indian tribes do not have the luxury of analyzing this alternative in a vacuum. The actual implementation of a long-term program of acquiring land and water rights could easily embroil the tribes in equally protracted disputes with local governments and private parties over questions of taxation, jurisdiction, and regulatory control over such resources. Also, the Tribes would be required to apply to the State of Colorado for *permission* to transfer any water rights to new uses. Ironically, the proponents of the acquisition program would be free to oppose any tribal application to change the type, manner or place of use; leaving the tribe with the legal right to water, but no effective control over its use. In light of these considerations, the Committee is not surprised by the tribal opposition to the proposals that rely solely on water acquisition and reallocation.

Negotiations with the ALP opponents also faltered because of disagreements on how to account for the non-tribal participation in the project. Because the original ALP included Indian and non-Indian beneficiaries, the Ute tribes refused to support any proposal to construct facilities that would only develop a tribal water supply. The Tribes argued that the Colorado River Storage Project Act assured non-Indians in the region a comprehensive, multi-purpose reclamation project. The tribes could see no reason why non-tribal project beneficiaries would agree to a settlement of tribal water rights that de-authorized the project and offered no reciprocal benefits to non-tribal project beneficiaries. The project opponents refused to see the project in this manner. Because the project opponents insisted on some form of project de-authorization, the Tribes knew that the project must include enough benefits to secure non-Indian support. By contrast, the project opponent seemed to expect the non-Indians simply allow the use of the settlement to upset non-Indian expectations. This expectation was especially unrealistic because the non-Indian beneficiaries include the State of Colorado.

Nevertheless, the Ute tribes and the other project beneficiaries faced the prospect that compliance with Federal environmental policies might prolong the completion of the components needed to fulfill the Federal obligation under the Settlement Act. The first deadline was rapidly approaching because the United States had not fulfilled its obligations under the 1988 Settlement Act, on January 1, 2000, the Ute tribes could return to court to assert their reserved water rights claims. The Tribes have until January 1, 2005 to assert these claims.

During the 105th Congress, Chairman Ben Nighthorse Campbell introduced S. 1771. At a June 28, 1988 hearing, the Administration acknowledged that the bill called for a "scaled down" version of the facilities needed to fulfill the Federal government's responsibility to the Tribes. However, the Commissioner of the Bureau of Reclamation testified in "strong opposition" to the bill. This position left the

administration without a proposal for how to comply with the 1988 Settlement Act and without an approach for settling the tribal claims. The Administration appeared to be uncomfortable with its inability to comply with either the 1988 Settlement Act or the Federal government's trust responsibility to Ute tribes.

In the face of repeated Congressional and tribal concerns, the Department commenced an effort to develop an approach for developing and resolving this untenable situation. In August 1998, the Administration presented its proposal for fulfilling the Federal government's obligations to the Ute tribes. On January 4, 1999, the Department announced its intent to prepare a supplemental environmental impact statement to evaluate the impacts and alternatives to this "Administration Proposal." 64 Fed. Reg. 176 (January 4, 1999). According to the Federal Register notice: "At the heart of the proposal is a modified ALP which is limited to a smaller dam and reservoir designed to supply municipal and industrial water to the Colorado Ute Tribes, Navajo Nation, and non-Indian entities in the local area." The process employed by the Department in completing the environmental review of the Administration Proposal provides the Committee and the Congress with a comprehensive analysis of the impacts and alternatives to the Administration Proposal. Because of the extensive public involvement in the process, each of the alternatives and refinements has also under gone an extra-ordinary level of scrutiny and commentary, which greatly assisted the Committee in its consideration of how it should proceed. Indeed, Section 404(r) of the Clean Water Act, P.L. 92–500, as amended, requires the submission of the analysis under section 404(b)(1) to Congress. The Department's environmental analysis was especially helpful because it recognized the unique circumstances present in this case, where the Department is seeking to fulfill its trust responsibility to the Colorado Ute tribes by carrying out the mandate of the 1998 Settlement Act in a manner consistent with Federal law, especially Federal environmental laws.

SUMMARY OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

Section 1. Short title

Subsection (a) cites the short title of the bill as the Colorado Ute Settlement Act Amendments of 2000."

Subsection (b) provides several Findings. Most of the Findings address the need to amend the 1988 Settlement Act in light of existing circumstances, without disturbing the benefits of the historic Settlement Agreement. As Findings 2 and 3 explain, 1988 Settlement Act settled the Colorado Ute water rights claims without reallocating water from existing users, while providing the tribes with a firm water supply, including water for irrigation purposes. At the present time, however, it is impractical to assume that the ALP will include the irrigation component contemplated in 1988. The United States cannot fulfill its obligations under the Settlement Act unless it provides irrigation water and other benefits to the Ute tribes within the time-frames established by the Act. However, the environmental review process reveals that the United States can provide comparable benefits to the Tribes by constructing those parts of the ALP needed to provide municipal water

supplies, waiving a tribal repayment obligation for this water supply, and providing resources to the Ute tribes.

The Findings also point out that the Federal courts have considered the nature and extent of Congressional involvement with a project when reviewing Federal compliance with the National Environmental Policy Act. This is not to say that Congress has a formal role in the NEPA process or that courts are under any obligation to take Congressional involvement into account. Although this Finding does not compel any entity to take Congressional deliberations into account, it would not be unprecedented for this to occur.

Subsection (c) provides five definitions used in S. 2508.

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

As described in the Findings, the S. 2508 seeks to provide the Ute tribes with comparable benefits to those provided under the 1988 Settlement Act. Under S. 2508 as reported by the Committee, however, the Ute tribes will no longer receive an irrigation water supply component under favorable repayment terms. In order to provide comparable benefits, S. 2508 amends subsection 6(a) of the Settlement Act to eliminate the tribal repayment obligation for municipal water supplied by the ALP. Also, neither of the Ute Tribes are responsible for the annual operation, maintenance, and replacement cost applicable to any increment of their water supply until that increment is used by the tribe or pursuant to a contract with the tribe.

The 1988 Settlement Act was premised on the imminent completion of most of the authorized components of the ALP. The recent environmental review of the ALP calls this assumption into question and provides a more reliable indication of which ALP components are likely to actually be constructed. The reconfigured settlement relies on these components for satisfying the Federal government's obligation to the Ute tribes. Hewing very closely to the Final EIS and the Record of Decision, the Committee amendment specifies that tribal water rights claims are to be satisfied with only "a reservoir, a pumping plant, a reservoir inlet conduit, and appurtenant facilities with sufficient capacity to divert and store water from the Animas River to provide for an average annual depletion of 57,100 acre-feet of water * * *." Most of the developed water supply from these facilities are allocated to the Ate tribes.

This proposed change to the 1988 Settlement Act also addresses two collateral concerns affecting the use of the ALP to settle tribal water rights claims. First, based on the breadth and depth of the environmental review of the project, there is no reason to place any limit on the application of Federal environmental statutes. Therefore, [section] 6(a)(1)(B) of the Settlement Act, as amended by S. 2508 provides: "Nothing in this Act shall be construed to predetermined or otherwise affect the outcome of any analysis conducted by the Secretary or any other Federal official under applicable laws."

Second, the proposed changes resolve apparent concern over how completing those parts of the project needed to settle the tribal water rights will affect or prevent a decision on how or whether to complete other parts of the project. It would be quite unfortunate for the Ute tribes, the United States, and other interested parties if this distraction was allowed to prevent the consummation of a

freely negotiated Indian water rights settlement. The committee amendment resolves this issue because it requires further, express authorization from Congress before additional ALP components may be constructed. The project proponents understandably insist that this provision will not take effect until and unless the construction and operation of the facilities described above. Some of the testimony proffered to the Committee argued in favor of making this "de-authorization" provision effective immediately, whether or not any facilities are actually constructed. Both Ute tribes expressed concern about such a change in the delicate balance achieved by this provision. As the Tribes point out, this provision allows those opposed to construction of the entire project to support those elements needed to satisfy tribal water rights claims without alienating the support of either the State of Colorado or those who wish to leave open the option of constructing the larger project. The proponents of a larger project have certainly made an important concession by agreeing to condition any further project construction on additional legislation. A number of essential parties to this settlement indicate that requiring any additional concessions in this regard will cause them to rethink and very possibly withdraw their support for the settlement. In addition, such a change would entangle this settlement agreement in complex interstate negotiations that may require years or even decades to complete.

This section also provides for an up-front repayment of the non-Indian municipal and industrial capital repayment obligation. This section also points out that Federal law does not provide a basis for allocating costs related to ALP irrigation components to the municipal and industrial water uses or to Colorado River Storage Project power customers. Allocating such costs would require an explicit change to Federal law. As the July 2000 EIS recognizes, in the absence of such a change in the law, those "sunk costs" that are attributed to project features that are not part of the Department's Preferred Alternative are non-reimbursable.

Section 3. Compliance with the National Environmental Policy Act of 1969

This section is not drafted to establish a binding determination concerning Federal compliance with NEPA. To the extent that Congressional deliberations and determinations about the options and benefits under consideration, there is an obvious value in memorializing these efforts and conclusions in as clear and articulated a fashion as possible.[3] The continuing Congressional effort to settle tribal water rights claims and address regional water quality needs within the area to be served by the ALP demonstrates Federal efforts to accomplish the "hard look" called for by NEPA. As approved by the Committee this section does not call upon any other branch of the Federal government to take any action. To the extent is addressed to any part of the government, it only provides the Ex-

[3] For example, in *Environmental Defense Fund* v. *Hoffman,* 566 F.2d 1060 (8th Cir. 1977), the 8th Circuit Court of Appeals made the following finding: "There is nothing in the legislative history to suggest that Congress made a binding determination on the adequacy of the EIS and its compliance with NEPA." Nevertheless, the court found that Congressional consideration of the adequacy of the mitigation plan was relevant, in fact dispositive: "We note moreover that in light of the mitigation plan *and the extraordinary executive and congressional review process,* it would be singularly inappropriate for this Court to substitute its judgment for that of Congress as to the impact of the project on migratory waterfowl and the adequacy of the mitigation plan." (emphasis supplied).

ecutive Branch with the option of proffering potentially-relevant information concerning Congresses part in these efforts.

Section 4. Compliance with the Endangered Species Act of 1973

This section is modeled after Section 3. Like Section 3, this section does not compel any action or decision by any other branch of the Federal government. Under Section 4, the Executive Branch has the option of providing information concerning Congressional deliberations and decisions. This provision would only be applicable if the ALP is allowed to diver at least 57,100 af/y in a manner consistent with the ESA.

Section 5. Miscellaneous

This section adds 5 new sections to the 1988 Settlement Act.

Section 15. *New Mexico and Navajo Water Matters.*—This new section of the Settlement Act authorizes the Secretary to assign some or all of the Department's interest in a water permit. The assignment of the Department's interest in New Mexico State Engineer Permit Number 2883 back to the New Mexico Interstate Stream Commission or the New Mexico ALP beneficiaries is necessary to put the State of New Mexico and its citizens on an equal footing with their Colorado neighbors, who directly hold their permits for water from the ALP. Because the Navajo Nation may not choose to hold its interest in the ALP directly, so the provision allows for only part of the Department's interest to be assigned. The Committee anticipates that the State Engineer may request an assignment back of all of the permit except for the portion allocated by agreement among the beneficiaries to the Navajo Nation, which is proper and necessary to equalize the positions of the two states. The Committee encourages the Secretary to complete the assignment expeditiously. This new Section also authorizes the Secretary to construct a municipal water supply pipeline to convey at least 4,680 af/y to Shiprock, New Mexico, on the Navajo Indian Reservation.

Section 16. *Tribal Resource Funds.*—This section provides for the establishment of tribal resource development funds for each of the Ute tribes. These funds will assist the tribes with their effort to develop their resources. These funds are especially important because S. 2508 seeks to equalize the benefits provided under its provisions with those provided under the 1988 Settlement Act. Consistent with the Department's EIS, each tribe will receive $20 million to assist with these efforts. The funds are to be used in a manner consistent with an economic development plan which must first be approved by the Secretary.

Section 17. *Colorado Ute Settlement Fund.*—This fund will include the appropriations provided for the construction of the facilities needed to complete construction of the facilities needed to satisfy the Federal government's obligation to the Ute tribes.

Section 18. *Final Settlement.*—This section provides that the construction of the required facilities and the appropriation of funds under sections 16 and 17 constitute final settlement of tribal claims on the Animas and La Plata Rivers in the State of Colorado. Also, the Attorney General may file appropriate amendments to ensure that the changes to the Settlement Act are reflected in the ongoing

litigation concerning the reserved water rights claims filed by the United States.

Section 19. *Statutory Construction, Treatment of Certain Funds.*—This section confirms that the amendments made to the Settlement Act do not affect is applicability. Also, this section confirms that the uncommitted portion of the cost-sharing obligation from the State of Colorado shall be made available to the State upon its request.

LEGISLATIVE HISTORY

S. 2508 was introduced on May 4, 2000, by Senator Ben Nighthorse Campbell, and referred to the Committee on Indian Affairs. Senators Pete Domenici and Wayne Allard were joined as cosponsors of the bill. A joint hearing on the bill was held with the Committee on Energy and Natural Resources' Subcommittee on Water and Power on June 7, 2000.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on June 14, 2000, the Committee on Indian Affairs, by a voice vote, adopted the bill and ordered it reported without amendment. On June 26, 2000, by unanimous consent agreement, the bill was referred to the Committee on Energy and Natural Resources, for a period not to exceed 30 calendar days.

SECTION-BY-SECTION ANALYSIS OF S. 2508 AS REPORTED BY THE COMMITTEE

Section 1. Short title, Findings and Definitions.

Section 2. Amendments to Section 6 of the Colorado Ute Indian Water Rights Settlement Act of 1988.—Section 2 of the bill amends Section 6, subsection (a) of the Colorado Ute Indian Water Rights Settlement Act of 1988, authorizing the Secretary of the Interior, through the Bureau of Reclamation, to construct a reservoir and appurtenant facilities for storing water from the Animas River. This section also specifies the allocation of water (average annual depletions) to be diverted from the river into the reservoir, the relevant laws pertaining to the construction of the reservoir, and limitations on construction costs.

Section 3. Compliance with the National Environmental Policy Act of 1969.—Section 3 of the bill outlines how the reservoir ALP will comply with the National Environmental Policy Act of 1969.

Section 4 of the bill outlines how the reservoir project will comply with the Endangered Species Act of 1973.

Section 5 of the bill introduces the new sections (Section 15 to Section 19) to be added to the Colorado Ute Indian Water Rights Settlement Act of 1988.

Section 15 of the bill authorizes the Secretary to convey New Mexico State Water Rights Permits to certain individuals or entities and authorizes the Secretary to construct a facility to deliver water to parts of the Navajo Nation.

Section 16 of the bill establishes the Southern Ute Tribal Resource Fund and the Ute Mountain Ute Tribal Resource Fund, and authorizes appropriations for FY2001 and FY2002 to be deposited in these funds. This section also provides for investment of tribal resource funds, except in case the tribes provide their own invest-

ment plans, and calls for each tribe to submit an economic development plan, for which the Tribal Resource Fund will be used. This section also places a limitation on per capita distributions and a limitation on setting aside the final consent decree.

Section 17 of the bill establishes the Colorado Ute Settlement Fund, authorizes the appropriation of such funds as are necessary to complete the reservoir project within six years of the date of enactment, and specifies how interest should accrue to this fund.

Section 18 of the bill states that this act constitutes the final settlement of the tribal claims to the water rights on the Animas and La Plata Rivers in Colorado. This section also empowers the Attorney General to file the necessary instruments to amend the final consent decree.

Section 19 of the bill provides a rule of construction concerning the effect of these amendments and making the uncommitted parts of its cost-sharing obligation available to the State of Colorado.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 2508, as calculated by the Congressional Budget Office, is not presently available. It will be included as soon as it is provided to the Committee.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 2508 will have only *de minimis* regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The following letters on S. 2508 were received by the Committee from the Deputy Secretary of Interior on September 18, 2000.

THE DEPUTY SECRETARY OF THE INTERIOR,
Washington, DC, September 18, 2000.

Hon. BEN NIGHTHORSE CAMPBELL,
U.S. Senate,
Washington, DC.

DEAR SENATOR CAMPBELL: I am writing to address two ongoing concerns that have been raised with respect to S. 2508, the bill to amend the Colorado Ute Indian Water Rights Settlement Act of 1988. These concerns appear to question whether the federal government should remain committed to resolving the remaining tribal water rights claims through the Settlement. We think it appropriate and helpful to provide our views on these matters, as you and your colleagues consider moving S. 2508 towards enactment.

The first issue concerns the validity of the Colorado Ute Tribes' water rights claims. Some opponents continue to assert that those rights have never been properly established and that the settlement violates existing law. These allegations were first raised during the public scoping meetings associated with the NEPA analysis conducted on the various alternatives for final implementation of the settlement. I have attached a copy of our response. It describes with particularity the senior water rights of the Southern Ute and

Ute Mountain Ute tribes, as confirmed by Congress, and subsequently by the Colorado District Court.

The second issue raised is a concern that implementing the Colorado Ute Settlement may impinge on the water rights of two downstream tribes, the Navajo Nation and the Jicarilla Apache Tribe. This concerns also is misplaced. It is the failure to resolve the ALP matter that would put the downstream tribes' water rights most at risk. Without a settlement, the Southern Ute and Ute Mountain Ute tribes would move forward with a large claim for senior water rights, creating the prospect for a conflict with the water rights of downstream tribes. A scaled-back project avoid this conflict. It also avoids the conflict that a larger project would create with respect to the downstream tribes' water rights. The ALP settlement also sets aside a block of water for the Navajo Nation and funds construction of a Farmington to Shiprock drinking water system for its benefit. It is not surprising, therefore, that all of the potentially affected tribes recently have confirmed their support for implementation of the modified settlement through a joint letter to the Department. Notwithstanding the concerns expressed by others on their behalf, the Navajo Nation and the Jicarilla Apache Tribe can speak for themselves, and they have.

This Administration believes that the implementation of the Colorado Ute Water Rights Settlement is long overdue. We will therefore continue to press forward with our efforts to bring this matter to conclusion. While we are still concerned with certain aspects of S. 2508, as outlined in our testimony, we believe that those issues can and should be resolved. We look forward to working with you toward that end.

Sincerely,

DAVID J. HAYES.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, September 10, 1999.

Mr. PHIL DOE,
Chairman, Citizens' Progressive Alliance,
Littleton, CO.

DEAR MR. DOE: This letter is in response to your request that the Department of the Interior evaluate the validity of the Southern Ute Tribe's water rights, specifically 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. Your request was made during the public scoping meetings associated with the NEPA analysis being conducted on the Administration proposal and various alternatives for final implementation of the Colorado Ute Water Rights Settlement.

The Solicitor has evaluated your request and, for the reasons explained in the attached opinion, finds no justification to question the Tribe's 1868 priority date for water rights in the Animas and LaPlata rivers. Since it is the position of the Department that the Southern Ute and Ute Mountain Ute Tribes never lost their 1868

reserved water rights, we will continue to move forward with the ongoing NEPA analysis.

Sincerely,

DAVID J. HAYES,
Acting Deputy Secretary.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, DC, September 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 statues 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 of 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.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXXVI of the Standing Rules of the Senate, the Committee notes the following changes in existing law (existing law proposed to be omitted is enclosed in black brackets, new matter printed in italic):

SEC. 6. REPAYMENT OF PROJECT COSTS.

[(a) MUNICIPAL AND INDUSTRIAL WATER.—

(1) The Secretary shall defer, without interest, the repayment of the construction costs allocable to each Tribe's municipal and industrial water allocation from the Animas-La Plata and Dolores Projects until water is first used either by the Tribe or pursuant to a water use contract with the Tribe. Until such water is first used either by a Tribe or pursuant to a water use contract with the Tribe, the Secretary shall bear the annual operation, maintenance, and replacement costs allocable to the Tribe's municipal and industrial water allocation from the Animas-La Plata and Dolores Projects, which costs shall not be reimbursable by the Tribe.

(2) As an increment of such water is first used by a Tribe or is first used pursuant to the terms of a water used contract with the Tribe, repayment of that increment's pro rata share of such allocable construction costs shall commence by the Tribe and the Tribe shall commence bearing that increment's pro rata share of the allocate annual operation, maintenance, and replacement costs.]

(a) RESERVOIR; MUNICIPAL AND INDUSTRIAL WATER.—

(1) FACILITIES.—

(A) IN GENERAL.—After the date of enactment of this subsection, but prior to January 1, 2005, the Secretary, in order to settle the outstanding claims of the Tribes on the Animas and La Plata Rivers, acting through the Bureau of Reclamation, is specifically authorized to—

(i) complete construction of, and operate and maintain, a reservoir, a pumping plant, a reservoir inlet conduit, and appurtenant facilities with sufficient capacity to divert and store water from the Animas River to provide for an adverse annual depletion of 57,100 acre-feet of water to be used for a municipal and industrial water supply, which facilities shall—

(I) be designed and operated in accordance with the hydrologic regime necessary for the recovery of the endangered fish of the San Juan River as determined by the Sam Juan River Recovery Implementation Program;

(II) include an inactive pool of an appropriate size to be determined by the Secretary following the completion of required environmental compliance activities; and

(III) include those recreation facilities determined to be appropriate by agreement between the State of Colorado and the Secretary that shall address the payment of any of the costs of such facilities by the State of Colorado in addition to the costs described in paragraph (3); and

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

(I) with an average annual depletion not to exceed 16,525 acre-feet of water, to the Southern Ute Indian Tribe for its present and future needs;

(II) with an average annual depletion not to exceed 16,525 acre-feed of water, to the Ute Mountain Ute Indian Tribe for its present and future needs;

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

(IV) with an average annual depletion not to exceed 10,400 acre-feet of water, to the San Juan Water Commission for its present and future needs;

(V) with an average annual depletion of an amount not to exceed 2,600, acre-feet of water, to the Animas-La Plata Conservancy District for its present and future needs;

(VI) with an average annual depletion of an amount not to exceed 5,230 acre-feet of water, to the State of Colorado for its present and future needs; and

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

(B) APPLICABILITY OF OTHER FEDERAL LAW.—The responsibilities of the Secretary described in subparagraph (A) and subject to the requirements of Federal laws related to the protection of the environment and otherwise applicable to the construction of the proposed facilities, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the Clean Water Act (42 U.S.C. 7401 et seq.), the Clean Water Act (42 U.S.C. 7401 et seq.), and the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.). Nothing in this Act shall be construed to predetermine or otherwise affect the outcome of any analysis conducted by the Secretary or any other Federal official under applicable laws.

(C) LIMITATION.—

(i) IN GENERAL.—If constructed, the facilities described in subparagraph (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.

(ii) CONTINGENCY IN APPLICATION.—If the facilities described in subparagraph (A) are not constructed and operated, clause (i) shall not take effect.

(2) TRIBAL CONSTRUCTION COSTS.—Construction costs allocable to the facilities that are required to deliver the municipal and industrial water allocations described in subclauses (I), (II) and (III) of paragraph (1)(A)(ii) shall be nonreimbursable to the United States.

(3) NONTRIBAL WATER CAPITAL OBLIGATIONS.—Under the provisions of section 9 of the Act of August 4, 1939 (43 U.S.C. 485h), the nontribal municipal and industrial water capital repayment obligations for the facilities described in paragraph (1)(A)(i) may be satisfied upon the payment in full of the nontribal water capital obligations prior to the initiation of con-

struction. The amount of the obligations described in the preceding sentence shall be determined by agreement between the Secretary of the Interior and the entity responsible for such repayment as to the appropriate reimbursable share of the construction costs allocated to that entity's municipal water supply. Such agreement shall take into account the fact that the construction of facilities to provide irrigation water supplies from the Animas-La Plata Project is not authorized under paragraph (1)(A)(i) and no costs associated with the design or development of such facilities, including costs associated with environmental compliance, shall be allocable to the municipal and industrial users of the facilities authorized under such paragraph.

(4) TRIBAL WATER ALLOCATIONS.—

(A) IN GENERAL.—With respect to municipal and industrial water allocated to a Tribe from the Animas-La Plata Project or the Dolores Project, until that water is first used by a Tribe or used pursuant to a water use contract with the Tribe, the Secretary shall pay the annual operation, maintenance, and replacement costs allocable to that municipal and industrial water allocation of the Tribe.

(B) TREATMENT OF COSTS.—A Tribe shall not be required to reimburse the Secretary for the payment of any cost referred to in subparagraph (A).

(5) REPAYMENT OF PRO RATA SHARE.—Upon a Tribe's first use of an increment of a municipal and industrial water allocation described in paragraph (4), or the Tribe's first use of such water pursuant to the terms of a water use contract—

(A) repayment of that increment's pro rate share of those allocable construction costs of the Dolores Project shall be made by the Tribe; and

(B) the Tribe shall bear a pro rata share of the allocable annual operation, maintenance, and replacement costs of the increment as referred to in paragraph (4).

* * * * * * *

(i) COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.—

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

(2) DETERMINATION OF CONGRESS.—Subject to paragraph (3), in any defense to a challenge of the Final Environmental Impact Statement prepared pursuant to the Notice of Intent to Prepare a Draft Environmental Impact Statement, as published in the Federal Register on January 4, 1999 (64 Fed. Reg. 176–179), or the compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) or the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), and in addition to the Record of Decision and any other documents or materials submitted in defense of its decision, the United States may assert in its defense that Congress, based upon the deliberations and review described in paragraph (9) of section 1(b) of the Colorado Ute Settlement Act Amendments of 2000, has determined that the alternative described in such Final Statement meets

the Federal government's water supply obligations to the Ute tribes under this Act in a manner that provides the most benefits to, and has the least impact on, the quality of the human environment.

(3) APPLICATION OF PROVISION.—This subsection shall only apply if Alternative #4, as presented in the Draft Supplemental Environmental Impact Statement dated January 14, 2000, or an alternative substantially similar to Alternative #4, is selected by the Secretary.

(4) NO EFFECT OF MODIFICATION OF FACILITIES.—The application of this section shall not be affected by a modification of the facilities described in subsection (a)(1)(A)(i) to address the provisions in the San Juan River Recovery Implementation Program.

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

(1) AUTHORITY.—Nothing in this section shall be construed to alter, amend, or modify the authority or discretion of the Secretary or any other Federal official under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or any other Federal law.

(2) DETERMINATION OF CONGRESS.—Subject to paragraph (3), in any defense to a challenge of the Biological Opinion resulting from the Bureau of Reclamation Biological Assessment, January 14, 2000, or the compliance with the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and in addition to the Record of Decision and any other documents or materials submitted in defense of its decision, the United States may assert in its defense that Congress, based on the deliberations and review described in paragraph (9) of section 1(b) of the Colorado Ute Settlement Act Amendments of 2000, has determined that constructing and operating the facilities described in subsection (a)(1)(A)(i) meets the Federal government's water supply obligation to the Ute tribes under that Act without violating the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(3) APPLICATION OF PROVISION.—This subsection shall only apply if the Biological Opinion referred to in paragraph (2) or any reasonable and prudent alternative suggested by the Secretary pursuant to section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) authorizes an average annual depletion of at least 57,100 acre-feet of water.

(4) NO EFFECT OF MODIFICATION OF FACILITIES.—The application of this subsection shall not be affected by a modification of the facilities described in subsection (a)(1)(A)(i) to address the provisions in the San Juan River Recovery Implementation Program.

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SEC. 15. NEW MEXICO AND NAVAJO NATION WATER MATTERS.

(a) ASSIGNMENT OF WATER PERMIT.—Upon the request of the State Engineer of the State of New Mexico, the Secretary shall, in a manner consistent with applicable State law, assign, without consideration, to the New Mexico Animas-La Plata Project beneficiaries or the New Mexico Interstate Stream Commission any portion of the Department of the Interior's interest in New Mexico Engineer Permit

Number 2883, dated May 1, 1956, in order to fulfill the New Mexico purposes of the Animas-La Plata Project, so long as the permit assignment does not affect the application of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) to the use of the water involved.

(b) NAVAJO NATION MUNICIPAL PIPELINE.—The Secretary may construct a water line to augment the existing system that conveys the municipal water supplies, in an amount not less than 4,680 acre-feet per year, of the Navajo Nation to the Navajo Indian Reservation at Shiprock, New Mexico. The Secretary shall comply with all applicable environmental laws with respect to such water line. Construction costs allocated to the Navajo Nation for such water line shall be nonreimbursable to the United States.

(c) PROTECTION OF NAVAJO WATER CLAIMS.—Nothing in this Act shall be construed to quantify or otherwise adversely affect the water rights and the claim of entitlement to water of the Navajo Nation.

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SEC. 16. TRIBAL RESOURCE FUNDS.

(a) ESTABLISHMENT.—

(1) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this section, $20,000,000 for fiscal year 2001 and $20,000,000 for fiscal year 2002. Not later than 60 days after amounts are appropriated and available to the Secretary for a fiscal year under this paragraph, the Secretary shall make a payment to each of the Tribal Resource Funds established under paragraph (2). Each such payment shall be equal to 50 percent of the amount appropriated for the fiscal year involved.

(2) FUNDS.—The Secretary shall establish a—

(A) Southern Ute Tribal Resource Fund; and

(B) Ute Mountain Ute Tribal Resource Fund.

A separate account shall be maintained for each such Fund.

(b) ADJUSTMENT.—To the extent that the amount appropriated under subsection (a)(1) in any fiscal year is less than the amount authorized for such fiscal year under such subsection, the Secretary shall, subject to the availability of appropriations, pay to each of the Tribal Reserve Funds an adjustment amount equal to the interest income, as determined by the Secretary in his or her sole discretion, that would have been earned on the amount authorized but not appropriated under such subsection had that amount been placed in the Fund as required under such subsection.

(c) TRIBAL DEVELOPMENT.—

(1) INVESTMENT.—The Secretary shall, in the absence of an approved tribal investment plan provided for under paragraph (2), invest the amount in each Tribal Resource Fund in accordance with the Act entitled, "An Act to authorize the deposit and investment of Indian funds" approved June 24, 1938 (25 U.S.C. 162a). The Secretary shall disburse, at the request of a Tribe, the principal and income in its Resource Fund, or any part thereof, in accordance with a resource acquisition and enhancement plan approved under paragraph (3).

(2) INVESTMENT PLAN.—

(A) IN GENERAL.—In lieu of the investment provided for in paragraph (1), a Tribe may submit a tribal investment

plan applicable to all or part of the Tribe's Tribal Resource Fund.

(B) APPROVAL.—Not later than 60 days after the date on which an investment plan is submitted under subparagraph (A), the Secretary shall approve such investment plan if the Secretary finds that the plan is reasonable and sound. If the Secretary does not approve such investment plan, the Secretary shall set forth in writing and with particularity the reasons for such disapproval. If such investment plan is approved by the Secretary, the Tribal Resource Fund involved shall be disbursed to the Tribe to be invested by the Tribe in accordance with the approved investment plan.

(C) COMPLIANCE.—The Secretary may take such steps as the Secretary determines to be necessary to monitor the compliance of a Tribe with an investment plan approved under subparagraph (B). The United States shall not be responsible for the review, approval, or audit of any individual investment under the plan. The United States shall not be directly or indirectly liable with respect to any such investment, including any act or omission of the Tribe in managing or investing such funds.

(D) ECONOMIC DEVELOPMENT PLAN.—The principal and income derived from tribal investments under an investment plan approved under subparagraph (B) Shall be subject to the provisions of this section and shall be expended only in accordance with an economic development plan approved under paragraph (3).

(3) ECONOMIC DEVELOPMENT PLAN.—

(A) IN GENERAL.—Each Tribe shall submit to the Secretary a resource acquisition and enhancement plan for all any portion of its Tribal Resource Fund.

(B) APPROVAL.—Not later than 60 days after the date on which a plan is submitted under subparagraph (A), the Secretary shall approve such investment plan if the Secretary finds that the plan is reasonably related to the protection, acquisition, enhancement, or development of natural resources for the benefit of the Tribe and its members. If the Secretary does not approve such plan, the Secretary shall, at the time of such determination, set forth in writing and with particularity the reasons for such disapproval.

(C) MODIFICATION.—Subject to the approval of the Secretary, each Tribe may modify a plan approved under subparagraph (B).

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

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

(e) LIMITATION ON SETTING ASIDE FINAL CONSENT DECREE.—Neither the Tribes nor the United States shall have the right to set aside the final consent decree solely because the requirements of subsection (c) are not complied with or implemented.

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SEC. 17. COLORADO UTE SETTLEMENT FUND.

(a) ESTABLISHMENT OF FUND.—There is hereby established within the Treasury of the United States a fund to be known as the "Colorado Ute Settlement Fund".

(b) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to the Colorado Ute Settlement Fund such funds as are necessary to complete the construction of the facilities described in section 6(a)(1)(A) within 6 years of the date of enactment of this section. Such funds are authorized to be appropriated for each of the first 5 fiscal years beginning with the first full fiscal year following the date of enactment of this section.

(c) INTEREST.—Amounts appropriated under subsection (b) shall accrue interest, to be paid on the dates that are 1, 2, 3, 4, and 5 years after the date of enactment of this section, at a rate to be determined by the Secretary of the Treasury taking into consideration the average market yield on outstanding Federal obligations of comparable maturity, except that no such interest shall be paid during any period where a binding final court order prevents construction of the facilities described in section 6(a)(1)(A).

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SEC. 18. FINAL SETTLEMENT.

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

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

(c) ACTION BY THE ATTORNEY GENERAL.—The Attorney General shall file with the District Court, Water Division Number 7, of the State of Colorado, such instruments as may be necessary to request the court to amend the final consent decree to provide for the amendments made to this Act under the Colorado Ute Indian Water Rights Settlement Act Amendments of 2000.

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SEC. 19. STATUTORY CONSTRUCTION; TREATMENT OF CERTAIN FUNDS.

(a) IN GENERAL.—Nothing 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.

(b) TREATMENT OF UNCOMMITTED PORTION OF COST-SHARING OBLIGATION.—The uncommitted portion of the cost-sharing obligation

of the State of Colorado referred to in section 6(a)(3) shall be made available, upon the request of the State of Colorado, to the State of Colorado after the date on which payment is made of the amount specified in that section.

○