

Organizations

APR 18 2000

April 17, 2000

Mr. Pat Schumacher
Four Corners Division Manager
Bureau of Reclamation
835 East 2nd Street, Suite 300,
Durango CO 81301-5475

Dear Pat:

These are our further observations after rereading the latest Animas-La Plata EIS. Please add them to the testimony we made at the Durango and Denver hearings earlier this year.

A. INDIAN WATER RIGHTS AND RELATED MATTERS

The discussion of the 1986 Settlement Agreement is perfunctory, at best. Significantly greater effort must be devoted to discussing how the water quantities for the various proponents were arrived at under this Agreement since they are held up in the EIS as having almost biblical sanctity. This is particularly critical in the case of the Indian water rights since it is popularly believed that the Indians have been waiting centuries, on parched and blighted land, for water from an uncaring public. This popular perception, generated as a fail-safe defense by project proponents, is an absurd and ugly lie as you all know. Government's unwillingness, on both the state and federal level, to vigorously counter this deception, as we have requested, makes both subject to the suspicion of complicity in an obvious attempt to hoodwink the public and silence debate. The EIS must make an open and complete disclosure of existing Indian water assets, even if it means the Department of Interior must reclaim its fiduciary and trust responsibilities to the American people by producing the final EIS, rather than the Utes.

In this regard, the first table in the document, Table 1-1, page 1-6 must be corrected. The table is deceptive, for it fails to come to an even modest accounting of the water the Utes have in the Pine River. The table leaves the impression that their holdings on that river are incidental and not worth reporting. In fact, the United States reserved the first 213 cfs of direct flow rights in that river for Ute allottees in 1930. With the re-establishment of the reservation in 1938, the Tribe received another 20,000 AF of stored water from Vallecito Reservoir. The public and its decision makers should also be made aware that this reservoir was built at public expense to offset the impact on non-Indian farmers on the Pine River from the United States' 1930 actions on behalf of the Indians. Overall, the two Tribes, at a cost of hundreds of millions in public funds, control approximately 150,000 acre feet of water, though this certainly couldn't be gleaned from the table or any discussions in the EIS. Comparatively, they number a little over 3000 people. Yet, they have a water supply adequate for the residential needs of almost a million people. The value of even one half of this water (70,000 AF) on the open market through leasing might reasonably be \$28 million annually (70,000 AF x \$400 per AF). An open discussion of how this water is presently being used, how much revenue it generates for the Tribes, and why

OR1-1 Table 1-1 in Chapter 1 of the FSEIS has been revised to reflect the allocation of water under the Settlement Act.

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this astoundingly valuable asset still does not satisfy the "purposes of the reservation" under the Winters Doctrine must be included in any EIS that even pretends to adequately address the requirements of full disclosure and public involvement. Indeed, how can the public and its decision makers be intelligently involved if relevant information is willfully withheld?

Eight months ago, in anticipation of release of this latest EIS, the Citizens' Progressive Alliance (CPA) made a FOIA request concerning Indian water rights and present use. After months of delay, our request was denied on several bases, one of which was that we did not have the resources to make the information available to the public. Notwithstanding the fact that we have been successful in getting information on ALP and other water projects in the national press, including *Time*, *The National Catholic Reporter*, *Roll Call*, *National Public Radio*, and *CounterPunch*, just for starters, we respectfully request that this EIS be used as the vehicle for these necessary public disclosures. Additionally, *the technical basis for settlement amounts accorded the Indians in the 1986 Settlement Agreement needs to be fully documented in the EIS*. We, along with others, have requested this information in FOIA requests to the Department of Interior and Open Records Act requests to the state of Colorado. All of these requests have been denied on the basis that someday someone may have to go to court over these documents. By denying the public's legal right to know, a more self-fulfilling prophecy has never been uttered.

The EIS asserts that if ALP isn't built that the Indians will go to court to satisfy their water right claims and that those rights would carry an 1868 priority date, disrupting the general tranquillity of the area. We have already discussed the questionableness of the Utes having another 60,000 AF of rights under the Winters Doctrine, given that they already enjoy the benefit of 150,000 acre feet.

The 1868 priority date is equally questionable and should be seriously addressed in relationship to the following factual information.

Largely from the efforts of the United States, the Indians have approximately 150,000 acre feet of water at their disposal, but none of it carries an 1868 priority date based on Winters Doctrine claims.

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for The Supreme Court denied the Utes any further claims before the United States the loss of the 1868 reservation, dissolved in 1880 and reestablished as the Ute Mountain Ute and Southern Ute Reservations in 1938, in a decision written for the court by Justice Brennan. The reasoning was that the Utes had already received compensation on several occasions and were therefore forever barred from making further claims. The present-worth value of those claim settlements has been estimated at \$800 million.

In a more recent court decision the Southern Utes once again tried to use the 1868 date for the reservation. Though the Utes were successful in asserting there ownership of gas emanating from the coal beds in the area, the value of which has been reported to be in the billions of dollars, they acquiesced in the court's ruling that their reservation was extinguished in 1880. Thus, they have no 1868 reserved

OR1-2 Refer to General Comment No. 14 for a discussion of the water rights of the Colorado Ute Tribes.

water rights either. But they have gained billions of dollars in gas assets, and still have something in the range of 150,000 AF of water for use on the reservation which on the open market might also be worth billions more.

B. ECONOMICS AND RELATED MATTERS

In the Executive Summary at page ES-4, the Utes and their contractors assert that the EIS evaluates 10 alternatives in terms of:

Potential environmental impacts
Meeting the ALP Project purpose and need
Technical and economic

As stated above, the second evaluation criterion is revealing in its honesty, and may be one of the few assertions we can unreservedly endorse in this EIS. Indeed, the EIS is about constructing ALP, and little else. The fiction or pretense that it is for the purpose of satisfying Indian water rights under the Winters Doctrine through a full arraying and comparison of all reasonable alternatives is laid bare. The claim of economic evaluation is also a fiction. Some of the more glaring shortcomings of the so-called "economic" evaluation are as follows:

1. There is no economic evaluation except for a desultory attempt with CPA's alternative, Alternative 9. There is some attempt to show the public costs under the various scenarios, but even these are badly low balled. On the other hand, there is absolutely no attempt to measure benefits in any rigorous way across alternatives. And no wonder, the economic studies mandated under various federal statutes have simply not been done so there is no way of measuring benefits. Further complicating any attempt to measure benefits is the fact that uses for most of the water have not been identified. The EIS presents only nonbinding speculative uses for Ute water which are so sketchy that their feasibility is unknowable. Disturbing to us is the rumor that back-room deals are being cut so that Congress will be asked to approve the Secretary's Preferred Alternative without the benefit of an evaluation of alternatives under the "Economic and Environmental Principles and Guidelines for Water and Related Land Implementation Studies" (P&G). These guidelines are required to be observed by the Department of Interior for the purpose of protecting the public against economically and environmentally stupid or wasteful water projects of which there are far too many already.

2. Although, economic evaluation is not a requirement of an EIS, the CEQ guideline strongly encourage such benefit/cost analyses, particularly when they could weigh heavily on the public debate and adoption of a reasonable alternative. Therefore, we strongly urge this administration to back away from any participation in trying to undercut federal statutes and planning requirements. Moreover, before a final EIS and ROD are written an economic analysis from an National Economic Development (NED) standpoint for all reasonable alternatives must be available for public comparison, review, and inclusion, if only by reference, in the EIS.

OR1-3 Refer to General Comment No. 1 for Reclamation position on the appropriateness of a benefit-cost analysis for the ALP Project.

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3. We recommend adding an incremental development scenario for Indian water rights, whatever they legitimately are, since repayment of public costs by the Indians is deferred under the Agreement until uses can be found and implemented. Such an approach would greatly enhance the benefits under an NED account. Such an approach is also very compatible with CPA's Alternative.

4. To the cost scenarios for all the structural alternatives, the costs of salinity increase through depletion, and the replacement cost of energy consumed by the project must be calculated as a project cost even if they are not to be borne by project beneficiaries, but the public. They are still very much costs of the project and must be so identified and accounted for.

5. The cost allocations shown in the EIS are incomplete. The planning cost do not show, we believe, the costs of this latest EIS, rumored to be in the 10 to 13 million dollar range. Neither, apparently, does it show the costs of F&WS studies under Section 7 consultation. We think these are fully reimbursable as legitimate planning costs. Also, we think the releases from Navajo Reservoir needed to mask the impact of ALP depletions of 57,000 AF need to be costed out and shown as an annual operating cost of the project to be repaid by project beneficiaries. Any attempt to make these nonreimbursable costs under Section 8 of the CRSPA is sleight of hand, punishing the taxpayers for costs which are clearly an annual operating cost of the project. These releases were originally estimated to be 300,000 AF annually. These costs alone should make any reasonable person look more closely at an array of nonstructural alternatives. Only if the proponents are successful in transferring these costs to the public as fisheries mitigation do the costs of the project become acceptable to those who advocate its construction.

6. Sensitivity analysis should be done on the reliability of projected construction costs of Ridges Basin Reservoir and associated project features since cost overruns of at least 300 percent were the rule on the last three major projects undertaken by Reclamation: the Central Arizona Project, the Dallas Creek Project, and the Dolores Project. Other major public works projects also seem almost axiomatically subject to these kinds of inexplicable cost overruns. For example Denver's DIA cost about four times its original estimate. Similarly, the Boston Harbor tunnel is reportedly coming in at over six times its original cost estimate, reaching in excess of \$13 billion. It is our opinion, based on the relevant facts, that any structural alternative will cost much more than the estimates used to get the project funded. A thorough discussion of this likelihood must be developed in the EIS with supportable data on the willingness of project proponents to pay these inevitable increases. This discussion should include likely scenarios for alternative water supplies at the various cost thresholds.

7. The EIS still asserts that project M&I water contractors will have to pay all construction costs with interest. For the Indians these costs are deferred until actual use under the 1986 Agreement and 1988 ratifying Act. At the same time much information is being circulated in the form of memoranda and proposed legislation, some of it from self-proclaimed fiscal conservatives in the Colorado delegation, that would transfer all of the costs for Indian water to the taxpaying public and limit the costs to other M&I users. These scenarios nullify long-standing federal law disallowing subsidies to M&I water users. The reasoning seems to be that the Utes cannot afford the exorbitant costs of this project, whereas the rest of can and should. The EIS should address

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the Utes financial resources in the context of their ability to pay. For example, we have already touched on the value of their gas and existing water resources which can be measured for value in the billions of dollars. Recent reports in state and local newspapers disclose that the Southern Utes alone have an investment portfolio which Tribal leaders expect to exceed one billion dollars within the first decade of this century. Add to this that the Utes have other substantial assets in land, minerals, real estate, gambling, and timber which in total make them among the wealthiest groups of people in the state. Clearly, they should not be punished for their rare good fortune, but neither should the common belief that all Indian Tribes are poor be used as an excuse for transferring costs away from those who can and should pay for any M&I developed for the Indians under ALP or its various alternatives.

8. Under the Secretary's Preferred Alternative, the O&M costs are greatly underestimated since a power rate of 8 mills is used, see page 2-122. The CRSP rate is at or near 23 mills, we believe. The rate has been increasing radically over the last decade or so. Thus, some discussion as to how sensitive these rates are to new expenses in CRSP operations must be explored in the EIS. This is in addition to correcting the projected O&M costs for power.

9. The legal costs of the no-action alternative are apparently so unthinkable that they cannot be reported. The Department of the Interior should attempt the unthinkable so that the reasonable cost of this alternative can be ascertained and compared with the other alternatives. Could they possibly be any greater than the \$85 million or so the public has been asked to throw at ALP in assorted planning documents over the last twenty years in a repeated effort to save Ridges Basin Reservoir, the so-called last of the big Reclamation construction Projects?

C. ALTERNATIVES

The assertion in Table 2-48 that Alternative 9, a severely truncated version of CPA's recommended alternative, would have little impact on the environment exposes a total lack of understanding about the alternative and its relative merits in relationship to the structural alternatives. Since it would result in ALP water being left in the river, at least over the short term, the environmental benefits are the greatest of any reported on in the EIS. We nominate it as the environmentally preferable alternative for the ROD. We think the no-action alternative is the second best environmentally preferable alternative since it too would result in protection of the present river environment on the Animas and San Juan Rivers and so nominate it as such for the ROD.

OR1-4 Comment noted.

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Again the explanations given in Table 2-43 that Alternative 9 fails the test of "practicability" is almost laughable when compared to the Secretary's recommended alternative, since the latter is the same old project they've tried unsuccessfully to build for the last 20 years, only this time dressed up in some new language, but still at a cost of hundreds of millions.

For the benefit of the EIS preparers, the power generated by the CRSP belongs to the public, not the users as you seem to assert in the Table. Those rates can and are increased to cover costs with each new contract opportunity. So it is not impracticable for the United States to collect from users the value of the power that would be lost with the project. Under the reliability

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section, the preparers seem to think that Navajo Reservoir, as a CRSP storage reservoir created to help ensure that the upper basin states could meet all lower basin compact demands even with full development within the upper basin, has no capacity to store any water beyond present allocations. Actually, only a small portion of the reservoirs capacity has been allocated to long-term use, namely Navajo Irrigation. Sales have been made to local users, but their is still significant capacity left according to statements strung out throughout the EIS document. Threatening utility of the Reservoir is the Bureau's agreement to release 300,000 AF from Navajo to mask the effect of 57,000 AF of depletions from ALP. The reoperation of the reservoir under the Recovery Program also will effect utility. It is for these reasons and others we continue to ask that Navajo Reservoir be evaluated as a source of satisfying legitimate Indian claims. That the Ute Indian leadership declared in the Denver hearings last year that Navajo Reservoir was unacceptable to them probably helps explain why the reservoir still has not been fully and systematically evaluated in the EIS.

The prepares of this EIS totally misunderstand our alternative.. Alternative 9 is but a pale image of it. What we were trying to show to both Indian and nonIndian was that their water had tremendous value in the river. It is a common sense matter, but one the traditional development interests seem quick to forget. We hope that the full alternative will be restored in the final EIS. The alternative costs the taxpayer nothing when netted out against what would be lost with the project. By deleting the Colorado portion of the alternative, the preparers have hidden one of our main objectives--to find a nonstructural way for the people of Colorado to realize some economic benefit for their water that is both environmentally benign and fiscally neutral.

We will not belabor the point, but the Ute leadership's assertion in public meetings that storage in Navajo Reservoir was unacceptable to them, that only Ridges Basin would do, should have disqualified them to manage this EIS. Since when does anyone have the right to write their own meal ticket at public expense?

Sincerely,

Phillip T. Doe
Chair
Citizens Progressive Alliance



EARTHJUSTICE
LEGAL DEFENSE FUND

April 20, 2000

File: 442

Mr. Pat Schumacher
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Dear Mr. Schumacher:

These comments on the February 1999 Animas-La Plata Draft Environmental Impact Statement ("DEIS") are submitted on behalf of the Sierra Club, Four Corners Action Coalition, and Taxpayers for the Animas River. We appreciate the opportunity to comment on the DEIS. Unfortunately, that document has flaws that run so deep that we do not believe it meets the legal mandate of the National Environmental Policy Act, or the other fiscal and environmental laws governing the project.

Many of these problems stem from one basic flaw. The Bureau clearly determined in advance that this DEIS would find that Alternative 4 was the only practicable alternative, and that Alternative 6 was not a practicable alternative. As you are aware, Mr. David Hayes of the Department of the Interior clearly stated that this NEPA process was intended to be used "defensively," and that any analysis would demonstrate that the non-structural alternative would not work. Since the Bureau set out to find that a non-structural alternative would not work, that is what it found. That finding comes, however, at the expense of an analysis that comports with the law.

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I. PROJECT ECONOMICS AND BENEFIT/COST ANALYSIS

A. Failure to perform and disclose a benefit/cost analysis.

A benefit/cost analysis ("BCA") is not "beyond the scope" of, or not required by, the DSEIS, as alleged in the document; in fact, its omission violates NEPA for at least three independent reasons. First, the 1980 EIS relied upon, and incorporated as an appendix, the Bureau's 1979 Definite Plan Report (DPR) for ALP. See, e.g., 1980 EIS at 1-234. The DPR contained a benefit/cost analysis for the project. The NEPA regulations mandate that "[i]f a benefit/cost analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences." 40 C.F.R. § 1502.23 (emphasis added). In 1995, at the request of citizens' groups, the Bureau completed an Economic Analysis Update containing a revised BCA and disclosed it to the public. Having included a benefit/cost analysis in the original EIS, the Bureau has concluded that a BCA is "relevant" within the meaning of the regulation. Therefore, the Bureau must now update the BCA to enable the public to evaluate the environmental consequences of the revised ALP in light of the new and different benefit/cost analysis which has resulted from changed costs and changed benefits since 1979. See also comments of Professor Dale Lehman.

Second, even if the just-quoted language in 40 C.F.R. §1502.23 did not require an updated BCA, another provision in that section mandates that result: "In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision." *Id.* In order to comply with NEPA's requirements for a full consideration of issues relevant to a decision to go forward with a project, the Bureau must discuss the economics of the project,¹ even if it refuses to do a formal BCA. The DSEIS fails to do so in many important respects. To cite just one of the most important examples here, the failure to discuss whether the participants will repay their respective shares of the cost of the project, and upon whom the investable cost overruns and cost of inflation will fall. To satisfy NEPA, the Bureau must discuss the economics of the project and explain how factors such as the ones just cited affect the fiscal status of the project.

Third, the BCA must be updated because of new information and legal requirements mandating the use of the current discount rate and market rates for electrical power. As to the former, because non-federal interests participating in the project did not enter into cost-sharing agreements until 1986 or later, the old rate of 3-1/4% does not apply. See 42 U.S.C. § 1962d-17.

¹ The Bureau's discussion of ALP's economics must include the project's cost, with a complete breakdown of that cost; an explanation of what parties will bear which costs, and when; a quantification of the project's alleged benefits; and other economic information.

OR2-1 There is no NEPA requirement that a benefit-cost analysis must be included in an EIS. CEQ regulations under NEPA are clear that this is a discretionary decision by the lead federal agency. Reclamation does not intend to prepare a benefit-cost analysis for the ALP Project SEIS. Please refer our response to General Comment No. 1 for further discussion of this position.

We have revised Attachment E in Volume 2 to reflect the most current cost estimate of the preferred alternative and an allocation of those costs to the beneficiaries of the project.

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The current discount rate (approximately 8%) would reduce gross benefits by at least half. As to the latter, the Bureau must update the project's BCA using the currently applicable, and more realistic, market rates for power. The Bureau's use in 1979 of WAPA's power rate instead of market rates resulted in far lower cost figures than would actually apply if the up-to-date guidelines were followed today. See Environmental and Economic Principles and Guidelines for Water Resources Implementation Studies, Section 2.12.2, U.S. Water Resources Council, U.S. Department of Interior (1983) (mandating use of market power rates in benefit/cost evaluations). Even if use of WAPA power rates were permissible, these have increased dramatically since 1979, and the original BCA is obsolete.

The Bureau performed a BCA in the past, notwithstanding the settlement of Indian water rights claims via the project. This illustrates that the Bureau's newfound rationale for refusing to do a BCA is flawed.

Further, even if the Bureau had a proper basis to forego the BCA to the extent the project is intended to facilitate the Indian settlement, the Bureau has no legal basis to forego full economic disclosure as to the costs, cost-benefit, repayment provisions, and other economic issues affecting the non-tribal project participants.

Had Reclamation performed a benefit/cost analysis, the results would counsel that the project should not be built. Attached is an analysis of the project by EcoNorthwest Consultants, which based on the information in the DEIS and other readily available information finds that benefits from the project are likely to be near zero. Even using the most optimistic assumptions in the DEIS yields benefits that are still far outweighed by the costs. By contrast, the non-structural alternative would have benefits for all parties.

B. Failure to Disclose and Describe Other Economic and Financial Data Relevant to the Project.

The DSEIS fails to disclose not only the BCA but also the provisions for repayment, use of repayment contracts or other instrument, cost-sharing, project feasibility, applicable discount rate, etc. As has consistently been the case with ALP, the proposed project threatens the violation of numerous laws designed to protect the taxpayer, including but not limited to the Reclamation Projects Act of 1939 (providing for a report to Congress and the President on cost, feasibility, repayment, etc.), the Water Supply Act (making state and local entities responsible for local water development), the Water Resources Development Act, 42 U.S.C. § 1962d-17 (mandating use of present-day discount rate where financial assurances have not been received, as here); and the Principles and Guidelines, cited above.

OR2-2 Sections on Project Cost Allocation and Project Repayment in Attachment E of Volume 2 have been revised to reflect provisions for construction cost repayment, up-front cost sharing, and applicable discount rates for capitalizing operation and maintenance costs. Project beneficiaries will be responsible for paying federally funded portions of the project and the associated operation, maintenance, and replacement in accordance with Reclamation Law.

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II. PURPOSE AND NEED FOR THE PROJECT

Both NEPA and the Clean Water Act require the Bureau to describe and analyze the purpose and need for a project. See 40 C.F.R. § 230, Subpart B; 40 C.F.R. § 1502.13. The DSEIS gives only hypothetical, non-binding use scenarios as the purposes of the project, along with satisfying a portion the Indian water right claims.

A. The Indefinite Purpose and Need for the Project Violates NEPA, The Clean Water Act, and the Principles and Guidelines, and is Inconsistent with Sound Public Policy.

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

[T]o implement the [Colorado Ute Indian Water Rights] Settlement Act by providing the Ute Tribes an assured long-term water supply and water acquisition fund in order to satisfy the Tribes' senior water rights claims as quantified in the Settlement Act, and to provide for identified M&I water needs in the project area.

SEIS at 1-8.

This statement of purpose is legally inadequate or incorrect for several reasons. First, the proposed project does not implement the Settlement Act. Instead it proposes an entirely different configuration of the water development originally proposed. Settling Indian water rights claims may be a purpose, but implementing the 1988 settlement agreement clearly is not.

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

Notably lacking from this formulation -- and indeed, from the SEIS as a whole -- is any specification of how the Ute Tribes will actually use their water. According to the SEIS, "[t]he ultimate use of . . . project water (about three-fourths of the total water supply) by the Colorado Ute Tribes would be more specifically defined by those tribes as future needs develop." SEIS at 2-2. The SEIS lists a number of "non-binding" different water uses that the tribes may or may not decide to pursue in the future. See SEIS at 2-3 to 2-8. Nowhere, however, is there a discussion of firm tribal plans. Given that these "non-binding" uses are not even sufficiently certain to merit detailed analysis at this time, the only use that appears presently foreseeable is tribal water marketing. We address this use in detail below.

OR2-3 The purpose and need statement is very specific in describing what it is that the federal action is seeking to achieve. Primarily, the action is to finalize implementation of the 1988 Settlement Act. It is true that the specific terms of the original settlement are being altered. Nonetheless, the action here is intended to fully resolve the remaining Colorado Ute Tribes' water rights claims by providing an assured water supply and other benefits consistent with the rights quantified in the original Act. In addition, the action will provide a small amount of water to other non-Ute water users in the four corners region. This supply does not change the primary purpose of the modified ALP, that being to finalize the 1988 Settlement. In fact, the Tribes consider the non-Indian supply necessary to secure agreement and support for the Settlement. It is very important to explain that the purpose and need is not simply to supply some quantity of M&I water to the Colorado Ute Tribes. Instead, the water and other benefits being supplied are intended to fully resolve the water rights claims of the Tribes, and therefore the associated litigation in Colorado District Court. The action ultimately selected must therefore satisfy the criteria set forth in Chapter 5, Section 5.2. It is also important to note that settling Indian Water rights by negotiation as opposed to litigation is recognized as sound public policy. See Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act, Pub. L. No. 106-163, § 2 (1999); Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (1990)].

With respect to the identification of end uses of the Tribal water supply, it is important to understand the nature of the water rights claims being settled. These claims are based on the Winters doctrine which states 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 date of the reservation. This reserved quantity of water is therefore sufficient to satisfy both present and future needs. In settling Indian water rights claims, the federal government has articulated a goal of seeking to ensure that Indians receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement. 55 Fed. Reg. 9223. Accordingly, a settlement should provide Tribes a long-term supply of water and respect the Tribes sovereign right to determine the specific uses for which the water supply will be applied.

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

This failure to specify actual water uses is not remedied by the speculative, "non-binding" uses offered in the SEIS. While several of these may have merit at some point in the future, others (notably including the single-largest water use proposed for the project, a coal fired power plant² are wholly speculative and painfully strain even the most optimistic assumptions about future development in the four corners region.³ No private sector investor -- whether for-profit or not-for-profit -- would ever direct resources into such a fanciful scheme, regardless of the beneficiaries.

Because Reclamation fails to specify the ultimate uses to which project water will be put, it fundamentally fails to meet the most elementary of NEPA's requirements: determining what it is the federal action seeks to achieve, so that potentially better alternatives may be meaningfully examined. Given this failure, the only credibly foreseeable use for the majority of each tribes' ALP water is marketing or leasing. If this is indeed the primary goal of the tribes for the foreseeable future, however, the ALP project will actually prove a burden, not an asset.

² See SEIS at 2-9.

³ The suggestion that the Ute Tribes would construct and operate a coal mine and coal-fired power plant near Ridges Basin reservoir ignores multiple realities: first, that coal reserves on the Southern Ute Reservation lie too deep to be economically mined; second, that the proposed site for the power plant would place it upwind of the Class I airshed in Mesa Verde National Park; and third, that technological change in the electrical power industry has resulted in a shift from coal to natural gas generation.

The single-largest use proposed for the Ute Mountain Ute Tribe -- the La Plata Basin Resort, with a water use requirement of 4,600 acre-feet -- seems similarly unlikely, if for different reasons. Delivery of water from Ridges Basin to the La Plata Basin would necessitate construction of lengthy and extremely costly delivery facilities similar (albeit on a smaller scale) to those proposed for the original Animas-La Plata project. Setting aside altogether the initial question of whether the tribe would find it financially sound to make the capital investment required to construct these works, as the original ALP project demonstrated, delivery of water to the La Plata basin from Ridges Basin reservoir would require a series of pumping stations. Concomitant operation and maintenance costs for delivery of water to the La Plata basin would almost certainly render such uses prohibitively expensive, even if one disregards the highly costly delivery works that would be required in the first instance (and for which the tribe would itself be responsible).

OR2-3 Con't Notwithstanding the Tribes' right to determine the specific end uses of water consistent with applicable law, the Tribes' have identified non-binding uses for the settlement supply which are included in Chapter 2 of the SEIS. These potential uses are used within the SEIS to provide a reasonable overview of possible impacts that would be associated with certain uses. Any future use scenarios will be subject to NEPA review at the time they are proposed.

Finally, the assertion that the tribes do not need the settlement to market their water rights over-simplifies the issues surrounding the marketing of reserved water rights. The Department of the Interior supports the leasing of tribal water resources. Nonetheless, off-reservation use of Indian water rights presents complex legal issues which have not yet been completely resolved in judicial decisions.

In 1994, the Department proposed Draft Regulations for Administering Entitlements to Colorado River Water in the Lower Colorado River Basin ("Draft Regulations"). Within the preamble to the Draft Regulations, the Department expressed a preliminary conclusion that "in the context of the Lower Basin it is permissible, without additional authority from Congress, to allow for the use of Indian reserved right water off the reservations." This preliminary conclusion was based on (a) 25 U.S.C. 415, (b) 25 U.S.C. 2 and 9, and (c) relevant portions of the law of the Colorado River, particularly the Boulder Canyon Project Act of 1928, 43 U.S.C. 617 et seq. The latter authority does not apply to the Upper Colorado River Basin and does not therefore provide authority to support marketing by the Colorado Ute Tribes. In addition, a significant number of responses to the Draft Regulations expressed a strong view that there is no existing authority to support the use of Indian reserved rights off-reservation [See e.g. Letter to Reclamation from the Upper Colorado River Commission (Jan. 27, 1995) ("The Commission is particularly concerned about provisions in the Draft Regulations that would allow interstate leasing ... and banking-marketing ... of Indian reserved water rights ...[T]he Commission is not convinced that any of the statutes discussed grant authority for interstate leasing or banking-marketing of water.")]. The fact that no agreement exists on the off-reservation use of reserved water rights illustrates the value of resolving the issue in negotiated settlements. The marketing authority specified in the 1988 Settlement Act represents a very valuable provision to the Colorado Ute Tribes, one that is not subject to legal challenge.

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1. To the Extent that Tribal Water Marketing is a Project Purpose, Animas-La Plata Harms Tribal Interests.

The tribes do not need the ALP project in order to market their water. Tribal reserved rights, unlike state-law based appropriative water rights, require neither diversion nor "beneficial use" to be valid. See *Arizona v. California*, 373 U.S. 546, 600 (1963). Accordingly, assuming the tribes and other parties to the settlement agreement consented to the quantification of their water rights specified in the Settlement Act, they could begin marketing their water today. The only question is how the Interior Department can and should best assist them in their efforts to do so.

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

2. Construction of ALP will, under the Settlement Act, subject the tribes' water rights to Colorado state law, which bars interstate water marketing.

Because tribal reserved rights are derived from and governed by federal law, they are not subject to state-based restraints on alienation. See *Seldin, Interstate Marketing of Indian Water Rights: The Impact of the Commerce Clause*, 87 Calif. L. Rev. 1545, 1579 (1999). Consequently, were the Ute Tribes' reserved water rights not subjected to the limitations imposed by converting their water to ALP project reserved rights, it appears likely that they could sell or lease their water to out-of-state markets.

There are two potential barriers to marketability of tribal reserved water rights: (1) the federal Non-Intercourse Act, 25 U.S.C. 177, and (2) barriers imposed by state law.

While the non-Intercourse Act does not by its terms apply to water rights, even if it would bar off-reservation marketing, it need not detain the tribes here. Congress willingly waived application of the Non-Intercourse Act in the 1988 Settlement Act, and there is no reason to believe it would not freely agree to do so in future legislation authorizing alternatives to the ALP project. Moreover, Interior has already expressed its belief vis-a-vis other tribes that it has the authority to administratively waive application of the Non-Intercourse Act. See *Garner and Ouellette, Future Shock: The Law of the Colorado River in the Twenty-First Century*, 27 Ariz. St. L.J. 469, 495 (1995) (discussing Bureau of Reclamation's Draft Regulations for Administering

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Entitlements to Colorado River Water in the Lower Colorado River Basin (May 6, 1994)). Thus, (again assuming that the Non-Intercourse Act even applies to water rights) Congressional action may well be unnecessary.

As a recent article notes, it appears likely that tribal reserved water rights by their very nature are immune from provisions of state law that would bar tribal efforts to market their water across state lines. See Seldin, *supra*. Regardless of whether this is true, however, Interior has the authority to administratively authorize tribal marketing, and may thus preempt state efforts to hinder interstate marketing of tribal reserved rights. In its 1994 Draft Regulations for Administering Entitlements to Colorado River Water in the Lower Colorado River Basin, Interior stated its belief that it had authority under 25 U.S.C. sections 2, 9, and 415 to authorize tribes to lease their water off-reservation. When an agency has authority in a particular area of law, it can "promulgate regulations pre-empting local legislation . . . with relative ease." *Hillsborough County v. Automated Med. Lab., Inc.*, 417 U.S. 707, 721 (1985). Because Interior has the power to authorize the Ute Tribes to market their water across state lines, it could enable the tribes to command the best prices and terms available. Interior's failure to mention this option in the SEIS -- especially given Interior's own articulation of its powers in a previous departmental document -- is irresponsible given the restrictions on tribal water marketing imposed by the ALP project.

In contrast to the favorable marketing conditions enjoyed by tribal reserved rights, the Settlement Agreement provides that the tribes' rights to water from the ALP project shall be "project reserved rights." The Agreement specifies that any leasing of these project reserved rights will be constrained by the requirements of state law. See Settlement Agreement section V(B), at 60. Colorado law prohibits marketing water beyond state lines. See section 37-81-101, 10 C.R.S. (1999). Consequently, if the ALP project is constructed, the Ute tribes will be unable to market their water outside of Colorado, and thus will lose the vast majority of favorable markets for their water. Moreover, the Settlement Act specifically prohibits the tribes from marketing ALP project water to the states of the Lower Colorado River Basin unless non-Indian water rights holders could do so. See P.L. 100-585 section 5(b), 102 Stat. 2973, 2974. For the purposes of marketing, therefore, the ALP project forfeits the unique value of tribal reserved rights, and thus seriously constrains the markets which will be available to the tribes.

3. Because the Tribes will be responsible for, at a minimum, ALP project O&M costs, they will essentially face a heavy tax on any water they market.

The SEIS acknowledges that the tribes will be responsible for ALP project O&M costs when they use their water. See SEIS at 2-11. Thus, whenever a tribe executed a contract to market its "project reserved water rights" associated with the ALP project, it would be forced to subtract from the contract price per acre/foot the O&M charges associated with the ALP project. Since the costs of pumping water uphill into Ridges Basin reservoir will be extremely high, this

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will mean that each acre/foot of marketed tribal water will suffer a considerable incremental charge.

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

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

A related point is the DSEIS's failure to examine the purpose and need for the project if facilities to convey water to the Indian reservations are never built. It is not speculative to assert that such conveyance facilities will never be built; the "non-binding use scenarios" are off-reservation, regional marketing types of uses.

If settlement of Indian water right claims is truly a purpose of the project, as the DSEIS asserts, then the DSEIS must take up the subject of tribal water leasing or sale out of state.⁴ Former CWCBC Director David Walker has noted that since delivery facilities to the reservations are not likely to be built, "the Indian water will be for uncertain future uses unless the Tribes seek to lease or sell water out of state." David Walker Memorandum of August 27, 1991 at 4. (attachment 1 to Oct. 16, 1991 Notice Letter to Bureau of Reclamation by SCLDF). Further, the DSEIS should examine the purpose and need for construction of the project facilities if the tribes' purposes and needs would be met by water leasing or sales and that water could be stored in Lake Powell, where excess capacity exists.

The NEPA regulations and the Bureau's NEPA Handbook require the Bureau to describe the purposes and needs for which a project is designed. 40 C.F.R. § 1502.13; the Bureau NEPA Handbook at 4-8. The Handbook gives an example relevant to the new, changed ALP:

⁴ On or about June 20, 1992, the tribes with water rights in the Colorado River Basin submitted to the seven states in the Basin the "Position Paper of the Ten Indian Tribes with Water Rights in the Colorado River Basin," suggesting leasing as a viable alternative.

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For example, in a project designed for municipal and industrial purposes, the existing available water supplies and existing and future water needs in the service area should be described.

Bureau NEPA Handbook at 4-8. The Bureau must analyze the changes in Animas-La Plata's purposes occasioned by the revised proposal revealed in the DSEIS.

B. One Actual Purpose and Need is Protecting Existing Senior Rights Holders, and That Purpose and Need is Never Evaluated or Discussed

What appears to be the actual purpose of the project is defined shortly after the passage quoted above. There it is acknowledged that the need for the Ute Indian Settlement is "to protect existing water users from senior water rights claims." DEIS at 1-8. Since this is the underlying purpose of the project, the Bureau cannot simply stop at stating that it is implementing an Indian settlement agreement. Rather, it must evaluate the true purpose which is protecting non-Indian water users. This has significant implications for the cost-benefit analysis associated with the project, as well as the evaluation of the no-action alternative. The actual costs and benefits of the no action alternative must be evaluated, since this will tell what costs and benefits are associated with protecting senior water rights holders. The DEIS simply dismisses the no action alternative without analysis, other than to say that it is hard to analyze. This is clearly insufficient under NEPA.

III. THE PROJECT DOES NOT QUALIFY FOR A 404(r) EXEMPTION, AND THE 404(b)(1) ANALYSIS IS BASED ON INCORRECT INFORMATION AND ANALYSIS

A. ALP Is Not A "Federal Project" Within the Meaning of 4 404(r).

Due to the cost-sharing agreement signed in 1986, which for the first time required significant non-federal cost contributions, ALP does not qualify as a "Federal project" within the limited meaning of § 404(r). See 33 U.S.C. § 1344(r). The EIS fails to explicitly inform the public of the amounts of repayments/cost sharing to be borne by the state and local entities, but it is indisputable that some such contributions must be made. The Bureau thus must acquire § 404 permits for all project features the construction of which would require discharge of dredged or fill material.

B. A Project Involving Toxic Pollutants Cannot Qualify For An Exemption Under § 404(r).

The exemption contained in § 404(r) does not apply to projects that involve toxic pollutants. See, e.g., August 27, 1979 Solicitor's Opinion, 86 Interior Decisions 400, 420 (1979).

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OR2-4 The discussion of alternative 10, the No-action Alternative, has been expanded See Section 2.3.2. The potential range of outcomes if there were litigation in the future of Colorado Ute Tribes' water rights, including the impacts to existing water uses, is discussed.

OR2-5 The modified ALP Project which is part of Revised Alternative 4 is a federal project designed primarily to settle the water rights claims of the Colorado Ute Tribes. A small portion of the project water supply will also be provided by contract to non-Indian water users. As is typical in many Indian water rights settlements, the Tribes' share of project construction costs are anticipated to be non-reimbursable and therefore, fully financed by the federal government. The non-Indian water users, however, will be expected to provide full repayment for their share of project water. Nonetheless, federal funding is significant and potentially comprehensive, subject to some percentage of repayment.

The Department of Interior Solicitor has determined that a Federal Project can receive contributory/cost sharing funds from non-federal entities. Outside contributions to a Federally mandated undertaking (one that requires authorization and/or appropriation from Congress and an EIS that provides environmental impacts to Congress) does not jeopardize the Federal status of a project.

The Solicitor's 1983 Opinion (90 Int. Dec. at 257) states:

"Within the meaning of section 404(r) of the Act, a Federal project is one for which, prior to its authorization or appropriation of funds, an EIS was prepared and submitted to Congress which set forth the environmental impacts of the project. The preparation of the EIS will generally denote a Federal project subject to the section 404(r) exemption. Financial participation by state or local governments does not disqualify a project from being a "Federal project" qualifying for the section 404(r) exemption."

Therefore, for the purpose of this undertaking the ALP Project is considered a Federal Project.

OR2-6 The uranium mill tailings at Bodo Canyon will not be disturbed by the project, and any material excavated at the proposed pumping plant site, at the former Uranium Mill location, would not be placed, either as fill or dredged material, within the aquatic ecosystem. Any potential discharge to the "waters of the United States" from upslope construction activities would comply to the restrictions on discharge as embodied by Section 401 of the Clean Water Act.

The uranium mill tailings were removed from the uranium mill site by the Department of Energy and Colorado Department of Health under the Uranium Mill Tailings Radiation Control Act (UMTRA) in 1990. The Bodo Canyon UMRCA Disposal Site will not be disturbed by the project, and no materials from the site, including ground water, would enter the Ridges Basin reservoir.

Any material excavated at the proposed pumping plant site at the former uranium mill location, will be tested and dealt with according to mitigation plans included in the FSEIS. Section 3.14.4 discusses the impacts and mitigation, and Section 5.4.14 discusses Reclamation's commitments.

The proposed pumping plant intake structure would be located separate from the former uranium mill site, and no uranium tailing contamination is anticipated to be encountered. However, prior to any discharge of fill or dredged material into the river, the soils and groundwater at the intake structure site will be sampled to confirm this. In the unlikely event that testing is positive, appropriate mitigation will be implemented to prevent placing fill or dredged material within the aquatic ecosystem.

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Uranium is a toxic pollutant. Because uranium mill tailings were until recently located at the site of the proposed diversion from the Animas River, and the tailings are now located one-quarter mile from the site of the proposed Ridges Basin Reservoir, a toxic pollutant is implicated in this case; and the exemption under 33 U.S.C. § 1344(r) is inapplicable to this project.

C. The Bureau Has Failed To Comply With the Requirements of § 404 (r)

Even if Animas-La Plata fell into the category of projects that could qualify for an exemption under § 404(r), the Bureau has failed to comply with that section of the statute.

1. Inadequate EIS for Project.

To qualify for an exemption under § 404(r), the Bureau must submit an adequate SEIS to Congress. See 33 U.S.C. § 1344(r). For all of the reasons discussed in these comments, and those incorporated by reference herein, the DSEIS is inadequate; ALP therefore does not qualify for an exemption under § 404(r), and the Bureau cannot proceed with any aspect of project construction without obtaining the necessary §404 permits.

2. Failure to Analyze Practicable Alternatives.

Under the (b)(1) guidelines, the Bureau must establish that there are no practicable alternatives to its current proposal for Animas-La Plata that would have less adverse impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a). The Bureau has not done so.

Our discussion above concerning the Bureau's inadequate NEPA alternatives analysis applies with equal force here, and we incorporate that section in its entirety here. The nonstructural alternatives are practicable and would have a less adverse effect on the aquatic ecosystem. The Bureau's failure to choose the nonstructural alternative violates 40 C.F.R. § 230.10(a), 33 U.S.C. §§ 1344 and 1311(a), and other relevant provisions of the Clean Water Act and its implementing regulations.

The Bureau has failed to support its choice of the structural alternative with evidence. *Id.* at 17. The Bureau's failure to support with evidence its finding of no practicable alternatives violates 40 C.F.R. § 230.10(a), 33 U.S.C. §§ 1344 and 1311(a), other relevant provisions of the Clean Water Act and its implementing regulations, and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* See, e.g., *Friends of the Earth v. Hall*, 693 F. Supp. 904, 946-47 (W.D. Wash. 1988) (rejecting as unsupported by evidence agency's practicable-alternatives analysis and findings).

OR2-7 Reclamation has developed the 404(b)(1) Evaluation (see Attachment B in Volume 2) to meet the regulatory requirements of the CWA, and in so doing, addresses the points you raise in Section C of your comments. In addition, detailed responses to the comments of Hydrosphere, Inc. are provided below.

- (1) The FSEIS fully meets NEPA compliance requirements, as set forth in CEQ and BOR procedures.
- (2) The FSEIS contains a detailed evaluation of alternatives, including support for selection of a preferred alternative (see Sections 5.2 and 5.3).
- (3) The wetland evaluation has been expanded in the FSEIS and 404(b)(1) to incorporate an analysis of functions and values of potential wetland impacts and wetland mitigation (see Section 3.4 and Attachment B).
- (3)(i) Impacts to recreational boating on the Animas River would be less than significant (see Section 3.11.4). The discussion on potential impacts to native fisheries, and mitigation commitments, has been expanded in the SEIS (see Section 3.6.3).
- (3)(ii) A full series of public scoping meetings, public hearings, newsletters, a website on the internet, and other public informational activities have taken place which fully meet NEPA public involvement requirements (see Section 6.2).
- (4) Reclamation has been in consultation with Colorado and New Mexico water quality agencies, and if deemed appropriate by them, will acquire Section 401 and 402 CWA permits (see Section 7.5 and Attachment B).

As a final matter, Reclamation's balancing of environmental impact of Refined Alternatives 4 and 6 are not skewed in favor of Refined Alternative 4. Reclamation's analysis applies the same assumptions to each alternative. For example, Refined Alternative 4 contemplates the acquisition of approximately 10,300 acres of land for which the appurtenant water rights will stay on the land. This same assumption applies to Refined Alternative 6. Of the estimated 20,640 acres of land which need to be acquired under that alternative, only 10,340 acres are contemplated to be subject to a change in location/use. In contrast, the comment suggests that Refined Alternative 6 should be viewed more favorably since no water will need to be taken off the land for the foreseeable future. We disagree with that assessment of how the Colorado Ute Tribes will use their water and believe that the Tribes will begin to utilize their water much sooner. Nonetheless, even if that non-use assumption is applied, it must equally apply to an analysis of Refined Alternative 4. If Tribal uses are not immediate, then average annual depletions will not approach 57,100 af per year and impacts to the river and associated fishery will be minimal, particularly since the dam and reservoir are offstream.

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In Commissioner Martinez's testimony to the Senate Committee on Energy and Natural Resources and Senate Committee on Indian Affairs (June 24, 1998), the Bureau took the position that an Indian-only alternative must be analyzed:

For example, Reclamation knows that the cost of Ridges Basin Dam as provided for in S. 1771 could be reduced by as much as one-half if a reservoir sufficient to hold only the Indian M&I water were created. Such a reservoir may not provide certain fish and wildlife or recreation benefits, but the Administration believes that such a change to the modified Animas-LaPlata Project proposal should be analyzed in light of its potential cost savings. There appears to be a need to allow for exploration of a variety of alternatives means to deliver water to the Tribes, including alternative dam sizes, pumping capacities, and various configurations as well as possible non-structural alternatives and other tools available to meet the Tribes' needs, so that potential trade-offs and opportunities can be understood by Congress and the public at large.

3. Failure to Consider the Project Adequately Under the § 404(b)(1) Guidelines.

The DSEIS and its 404(b) attachment purport to constitute an analysis of wetlands issues sufficient to meet the requirement in § 404(e) of the Clean Water Act ("consideration of the guidelines developed under subsection (b)(1) of this section"). They do not do so. See also the incorporated comments of Hydrosphere, Inc., with respect to incorrect factual assumptions in the 404(b)(1) analysis. The Bureau therefore does not qualify for an exemption from § 404 of the Clean Water Act and must obtain individual permits from the Corps of Engineers.

We must note again that many of the flaws seem to stem from the Bureau's determination that Alternative 4 must be found to be superior. This leads to blatantly erroneous statements concerning the environmental impacts of Alternatives 4 and 6. For example, The 404 analysis fails to acknowledge that Alternative 4 will result in impacts to refuges and sanctuaries, and will result in degradation of pool and riffle complexes and significant impacts to native fish. In addition, the project will affect up to 3000 acres of upland game habitat. Although the 404 analysis states that these impacts of Alternative 4 are speculative, in fact the DEIS states that they will occur, and it is unknown whether they can be mitigated. By contrast, the projected loss of wetlands from the non-structural alternative is not going to occur at all, since no water will be taken off the land at any time in the foreseeable future. If water were taken off the land, as detailed in the Hydrosphere letter mitigation would not be a problem. Thus the balancing of environmental impacts of Alternatives 4 and 6 are skewed in favor of Alternative 4. The Hydrosphere report details many such problems.

Another example is that the 404(b) analysis fails to consider that there are no immediate uses for the water to be purchased, and therefore no impacts to wetlands will occur until some

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point in the far distant future. Thus any loss will not occur for a long time, and any mitigation could be performed incrementally. This strongly militates in favor of Alternative 6. In addition, the analysis provides no basis whatsoever for the claim that large amounts of wetlands will be impacted.

(i) The (b)(1) guidelines prohibit discharges which will have significant adverse effects on recreational values. 40 C.F.R. § 230.10(c)(4). As described in detail elsewhere in this letter, in incorporated comments, and in our comments on the 1992 DSEIS, ALP will have such an effect on recreational boating in both the Animas river below Durango and on the San Juan river between Bluff, Utah and Lake Powell, on the Gold Medal Trout Fishery in the Animas, and on recreational uses of Ridges Basin.

(ii) Neither the DSEIS, its Attachment 1, nor the 1992 Special Report on Wetlands makes the requisite factual findings and determinations under 40 C.F.R. § 230.11 and .12; nor has the Bureau engaged in an adequate public interest review process with sufficient public notice and comment on these factors. See incorporated comments by Hydrosphere, Inc., and San Juan Citizens' Alliance. This does not suffice to meet the standards of the (b)(1) guidelines.

4. Failure to Obtain State Water Quality Certification Under 33 U.S.C. § 1341.

The Bureau has announced its intention not to acquire state water quality certifications, as required under § 401 of the CWA. This failure to acquire these certifications violates 33 U.S.C. § 1341.

Apparently the Bureau rests its refusal to acquire these certifications on the theory that it needs no federal licenses or permits for Animas-La Plata because it claims an exemption from the CWA § 404 permitting process. Even if the Bureau's claim of exemption from § 404 were legally adequate -- as it is not -- it simply is not true that the Bureau needs no federal licenses or permits to move forward on Animas-La Plata. For example, the U.S. Fish and Wildlife Service's no-jeopardy opinion under section 7 of the Endangered Species Act on the Bureau's so-called "reasonable and prudent alternative" for Animas-La Plata is a federal license or permit within the meaning of CWA § 401, as the Bureau would be barred by the ESA from moving forward with any portion of Animas La Plata in the absence of this no-jeopardy opinion.

Because it needs federal licenses and permits to move forward with the project, the Bureau is required to acquire state water quality certifications for Animas-La Plata under 33 U.S.C. § 1341. Its failure to do so violates that section of the CWA.

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IV. THERE IS SIGNIFICANT NEW INFORMATION RELATING TO IMPACTS OF POWER TRANSMISSION FACILITIES

The SEIS indicates that WAPA will supply the power needed to run the Durango Pumping Plant. The SEIS purports to delay analysis of impacts resulting from extensions of service required for the DPP, however, to a later date, with NEPA analysis to be completed by WAPA.

The NEPA analysis provided for the power lines in the 1980 FEIS is now out of date. Significant new information is available concerning the areas that would be affected by such extensions. Especially notable is the significant residential development that has taken place since 1980, development that now will likely be negatively impacted by facilities needed to power the DPP. Wildlife habitation patterns have themselves been altered by development, and may be further infringed upon by power facility extensions.

Because the DPP cannot run without power, construction of the power facilities needed for the DPP is inextricably interwoven with the ALP project. NEPA thus forbids deferring analysis of impacts from the power facility extensions needed for the DPP. Reclamation's failure to identify and analyze these impacts in the SEIS is illegal.

V. FAILURE TO ANALYZE THE IMPACTS OF REOPERATION OF NAVAJO RESERVOIR AS A CONNECTED ACTION

The Bureau has committed to reoperation of Navajo Dam and Reservoir as part of the mitigation connected to the ALP. Further, the Bureau has stated that reoperation is a direct result of the Endangered Species Act consultation over ALP. Letter of March 4, 1991, from Roland Robison/Rick Gold to Galen Buterbaugh. Because it is a critical part of ALP and purported ALP mitigation, the Bureau must disclose and describe the proposed reoperation of Navajo, and reoperation's impacts, in the DSEIS. In addition, to the extent that NEPA analysis and consultation under the ESA have not been completed for Navajo reoperations, connected actions such as ALP cannot go forward. The Bureau must also analyze whether this long-term commitment can be made consistent with the authorizing legislation for Navajo, 43 U.S.C. § 620.

VI. IMPACTS TO DOWNSTREAM WATER RIGHTS SETTLEMENTS

The DEIS apparently concludes that a non-structural alternative would be undesirable for environmental justice reasons, because it would use the remaining available capacity of Navajo Reservoir for storage. This statement is incorrect. There has been no showing that capacity in Navajo would be necessary, since the use of the water is unlikely to change. This is especially so since the Bureau has used lower depletion amounts in order to assure a firm supply of water from

OR2-8 The discussion of electric power transmission facilities has been expanded in the FSEIS (see Section 2.5.1). WAPA would be the lead federal agency in future NEPA compliance when a new connector line is proposed and would tier off the ALP Project FSEIS.

OR2-9 Consideration of Navajo Reservoir operation issues and impacts (e.g., flow regimes, riparian impacts, reservoir levels, reservoir recreation issues, trout fishing and habitat issues) are included in the FSEIS using existing data. However, the FSEIS does not serve as the environmental compliance document for Navajo Reservoir operation issues. Reclamation has initiated the environmental compliance for Navajo Reservoir operations, which is separate from, but coordinated with, the ALP Project FSEIS. This information can be found in Volume 1, Chapter 4 and Volume 2, Attachment C of the FSEIS.

OR2-10 For Refined Alternative 4, current modeling does not indicate any additional water available while meeting the flow recommendations as they now stand. With Refined Alternative 6 the flow recommendations cannot be fully met for the proposed level of depletion, so no additional water would be available.

Reclamation cannot say with certainty the actual amount of water for future development. That will depend on the nature and location of the proposed project, refinements to the San Juan River Basin hydrologic model, and the current status of the endangered fish species in the river. These items are discussed in the FSEIS.

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the land purchased. The Bureau states that using Navajo would result in approximately 20,000 acre feet less capacity being available to implement water settlements with the Jicarilla Apache and the Navajo. Alternative 4, however, would result in 14,000 acre feet less being available for the downstream Indian water rights settlements. DEIS at 4-7. It would be useful if the DEIS could explain why the 6,000 acre foot difference makes any difference with respect to environmental justice questions.

VII. OVERESTIMATION OF RECREATION BENEFITS

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The DSEIS overstates the expected recreation benefits attributable to the Ridges Basin reservoir. The DSEIS uses McPhee Reservoir to estimate user visits. We have obtained the actual usage figures for McPhee, however. Use in 1999 totaled 23,245 visits. Moreover, it is likely, given the proximity of Ridges Basin to McPhee (and to other nearby reservoirs including Navajo), that recreational use will simply be spread differently among the various reservoirs, not increased. Therefore the figure the DSEIS uses for projected visitor usage fails to account for the concomitant drops to be expected in visitor usage elsewhere in the project area.

In sum, the DEIS seems to be intended not to inform the public and policy makers, but to force the choice of Alternative 4. This is a disingenuous and ultimately destructive use of the NEPA process, and the Bureau should rethink its choice to do so.

Very truly yours,

Robert B. Wiygul

RBW/II

OR2-11 Even though Ridges Basin Reservoir may compete for visitors with the other reservoirs within the regional area, it is doubtful that overall visitation at other areas will decrease. Visitation estimates for the proposed Ridges Basin Reservoir are based on the many independent studies that show that there is an increased demand for flat water recreation opportunities, both nation-wide and within the State of Colorado. As detailed in Chapter 3 under Project Area Reservoir Recreation, Reclamation used visitation estimates at Ridgway Reservoir (near Ridgway, Colorado) to help predict the visitation at the proposed Ridges Basin Reservoir. Because both reservoirs have similar attributes (see Table 3.11-2), Reclamation estimates that Ridges Basin Reservoir would have comparable visitation use figures.

April 20, 2000

Mr. Robert Wiygul
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Dear Mr. Wiygul:

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

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

Levels of Diversions are Inconsistent with the Settlement Agreement

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

The Purpose and Need for the proposed action is to

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

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OR2-12 The discussion of water diversions and depletions have been expanded to clarify the terms - these are discussed in Chapter 2 and in Attachment F. A discussion of the rationale for using a 50% depletion factor for M&I uses has been added (see Section 2.1.1). Allowable depletion volumes vary. The 79,050 acre-foot diversion has a depletion of 39,960 afy. This depletion plus the 13,000 afy depletion of the non-structural component will result in a depletion of 52,960 afy. This is essentially the same depletion as the 62,200 acre-foot diversion. This depletion amount is 53,200 afy for the two Colorado Ute Tribes.

In the 1986 Settlement Act, water uses consisted of both irrigation and M&I which have different depletion percentages. The present ALP Project has only M&I use which necessitates a higher diversion to yield the same depletion. Hence there is no violation of the total depletions allowed under the 1986 Settlement Act and the depletions contained in this FSEIS. They are both set at 53,200 acre-feet per year.

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

The Settlement Act states:

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

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

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

Table 1. Water Allocations

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

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

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

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

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(con't)

OR2-12 The 1986 Settlement Agreement specifically set different depletion percentages for M&I and irrigation (see Attachment A). By properly applying these depletion percentages to the identified irrigation and M&I uses which total 62,200 acre-feet for both Tribes, you will arrive at a rounded depletion for each Tribe of 26,600 acre-feet. This adds to a total depletion of 53,200 acre-feet for the two Tribes. This overall is equivalent to about a 85.5% depletion percentage. There is no discrepancy between the depletion percentage of 85.5% and that of 50%, however. The uses in the FSEIS are considered to be "non-binding" and a rigid set of depletion percentages would not be appropriate for each different use. The ALP project is now an all-M&I project with the elimination of the irrigation component. A commonly accepted "rule of thumb" for depletions associated with M&I projects is approximately 50%. This means a diversion of 79,050 acre-feet which results in a depletion of 39,960 acre-feet (plus the 13,000 acre-feet depletion associated with the non-structural component) is required to achieve essentially the same depletion of 53,200 acre-feet associated with 62,200 acre-feet diversion as specified in the 1986 Settlement Agreement.

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

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

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

Water Uses are Inconsistent with the Settlement Agreement

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

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

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

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(con't)

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OR2-13 Irrigation is no longer a component of the ALP Project. Please refer to the response to your third comment (OR2-3) for information on how the removal of irrigation is being rectified with the provisions of the Settlement Act.

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(con't)

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OR2-14 The depletion factor of 1.4 acre-feet per acre represents the historic dry-year conditions. A depletion factor of 1.5 acre-feet per acre as used in Refined Alternative 6 represents average conditions. To use 2.0 acre-feet per acre would be a very optimistic and risky approach. In reality, it is likely that there would be a lack of senior water rights to be purchased. This would then require purchases of land with lower priority water rights resulting in a declining depletion per acre and requiring greater amounts of lands to be purchased to acquire a given amount of water rights. This uncertainty of the firm yield that could be obtained from the purchase of water rights is one of the several identified reasons for selecting Refined Alternative 4 over Refined Alternative 6 (see Sections 5.2 and 5.3).

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OR2-15 The river basins and irrigation districts identified for land acquisition were selected based on the following criteria: (1) average depletions; (2) seniority of water rights; (3) location regarding storage (necessary for change of use to M&I purposes); and (4) hydrologic modeling. Additionally discussions were held with Reclamation personnel, county engineers, county water commissioners and irrigation district managers pertaining to diversions, depletions, water users, canal management and perceptions. A thorough understanding of water rights was incorporated into the hydrologic model and seasoned with socio-cultural parameters which led not only to a selection of sites, but identification of specific illustrative canals within an irrigation district. These illustrative canals were walked, as far as possible, to observe turn outs, farming practices, wetlands and physical properties from which impacts from possible drying out were deduced. All of the above data and observations were contributory to determining those sites selected for land acquisition judged having the highest probability of providing the volume of water rights required to satisfy the Tribe's settlement claims. The acreage estimates on the Pine River were based on this analysis, as well as the analysis contained in Attachment D of land costs and water rights.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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(con't)

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

Base Land Costs are Overstated

1999 land costs were estimated based on average prices for June 1999 listings. There is no evidence that an analysis of recent sales was made. Land prices were set at the average value of the June 1999 listings and were \$4,584 for La Plata County and \$2,487 for Montezuma County. Actual listings ranged from \$1,290/acre to \$20,779/acre in La Plata County and from \$930/acre to \$5,000/acre in Montezuma County. This large range of values is probably due to different potential for residential development among the properties.

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

Land Cost Escalation is Arbitrary and Overstated

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

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

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

OR2-16 Refer to response for comment letter OR2-17.

OR2-17 The 8% land escalation used in the land acquisition model was reasonable and even conservative. Support for this conclusion comes from real estate sales data for the last two years for La Plata and Montezuma county available in the Multiple Listings and further supported by the La Plata County Assessor who was quoted (Durango Herald, May 10, 1999) that over the last two years..."Agricultural properties increased an average of 30 percent for dry farm land, 18 percent for irrigated farm land, and 3-4 percent for grazing land." Overall land values for the county rose 10 percent from 1996 to 1997. It is also supported by the general plan for Montezuma county which recognizes and identifies a trend toward higher rural population density.

It is further mentioned in the comment letter that..."Returns to land from agricultural operations are unlikely to support this level of appreciation." The fact is there is little evidence to support an economic connection between agricultural returns and land prices for properties under 200 plus acres. With average returns for irrigated acreage of approximately \$60 per acre in either La Plata or Montezuma county current farm prices are not in line with production values. With a capitalization rate of 10% land should be selling for \$600 per acre. This is not happening. What is happening is that price pressures have moved ownership into the residential/hobby farm realm with the trend toward splitting larger farms into smaller acreage which in turn drives the cost per acre up.

There is no indication that this trend will reverse and while an 8% escalation factor may not be straight lined it nonetheless seems a reasonable average figure to use given the supportable data, observations and trends.

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

17
(con't)

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

Raising Lemon Reservoir is Economically Infeasible

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

OR2-18 The costs to raise Lemon Dam were included as part of Refined Alternative 6 to show a range of the costs and water supply that could potentially be developed. If, based on the Record of Decision, Refined Alternative 6 became the Preferred Alternative then additional analysis would focus on developing the least costly components of Refined Alternative 6.

Wetland Impact is Overstated

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

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

OR2-19 The analysis of wetland impacts related to water transfers in the FSEIS and 404(b)(1) Evaluation recognizes the requirements of existing water law that any water that has been flowing to wetlands incidental to the irrigation of crops would revert back to the stream if the beneficial crop use were transferred away from the land. In short, the diversions which have resulted in developing wetlands incidental to irrigation would no longer continue. Less water would be available to wetlands, and impacts to both natural and artificially maintained systems would result. We believe that our wetland impact projections associated with transferring water off the land are conservative, not overstated.

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

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(con't)

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

Wetland Maintenance Program Should be Revised

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

Comparative Risk is Overstated

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

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

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

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

Benefits are not Recognized

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

OR2-20 Comment noted. An expanded analysis of wetland values has been incorporated in the 404(b)(1) Evaluation and FSEIS (see Attachment B and Section 3.4). Natural and artificially maintained wetlands are intermixed on the Pine River, and are often sizeable. There are advantages, it is true, of larger block of wetland mitigation under some circumstances, and were Refined Alternative 6 implemented, would be considered in developing wetland mitigation measures. Mitigation, however, is not a factor which influences the selection of the least damaging practicable alternative.

OR2-21 Reclamation recognizes that state water laws, federal laws and interstate compacts would apply with implementation of the identified potential uses of water. Land acquisition is addressed in Attachment D of Volume 2.

OR2-22 Comment noted. The analyses of impacts associated with Refined Alternatives 4 and 6 were made using available information. We are not aware of any information that would quantify the potential reduction of salt loading by converting irrigation water to M&I use in the Pine River area.

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

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

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

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

Sincerely,
Hydrosphere Resource Consultants, Inc.

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

ORGANIZATIONS AND COMPANIES

OR2

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

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

HISTORY OF THE ANIMAS-LA PLATA PROJECT

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

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

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

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

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

The proposed version of Animas-La Plata no longer contains any provision for irrigation water being delivered to the La Plata drainage. The only physical facilities

now proposed include a reservoir of approximately 120,000 acre-foot capacity, to be built in Ridges Basin near Durango, and a pumping plant and inlet conduit to draw water from the Animas River and pump it uphill to the reservoir. No facilities for delivering water to users are included in the proposed project.

The project outlined in HR 3112 and the DEIS would deplete a total of 57,100 acre-feet of water annually from the Animas River.³ As outlined in Figure 1 below, about two-thirds of the water from the project would be allocated to the Ute Mountain Ute tribe and the Southern Ute tribe. The remainder would be allocated to various other non-Ute entities, or would be lost to evaporation. Figure 1 presents a table from the DEIS explaining the intended uses of the water to be stored in Ridges Basin Reservoir.

Figure 1: Intended Uses of ALP Project Water

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

Source: DEIS, p. 2-25.

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

THE PROPOSED PROJECT'S ECONOMIC COSTS AND BENEFITS

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

³ An acre-foot of water is the amount of water that would cover one acre of ground, one foot deep. It is equal to about 325,839 gallons.

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

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

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

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

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

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

The DEIS also shows, on page E-43, that the present value of the annual costs for operation, maintenance, and replacement expenditures associated with the federal investment in the dam, reservoir, and other facilities is \$44.8 million.⁵ Because the

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

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

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

DEIS did not develop the relevant estimates, this amount does not include the annual costs associated with the Navajo Nation Municipal Pipeline.

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

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

^a DEIS, page 2-124

^b DEIS page E-43.

The DEIS also estimates the costs that an as-yet-undefined party would incur to develop recreational facilities at the reservoir. The discounted, present values are \$12 million for the construction costs, and \$8.7 million for the operation, maintenance, and replacement costs.

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

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

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

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

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

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

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

Component of Benefits	Discounted Present Value (Million)
Reservoir recreation	Unknown, but probably near zero*
Total	Unknown, but probably near zero*

* See text for reasoning underlying this conclusion.

It is reasonable, however, to conclude that the net value is small. Economists count the net value of a recreational visit to such a reservoir by measuring the incremental

reduction in travel costs relative to nearby reservoirs. Given the small population likely to visit Ridges Basin Reservoir, and the close proximity of other, similar recreational sites, it is quite likely that the net benefit from recreation would not even exceed the cost of installing, operating, maintaining, and replacing the recreational facilities.

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

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

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

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

Costs with hypothetical market conditions. Table 3 summarizes information about the costs of providing water to meet hypothetical demands. The DEIS does not, however, estimate the additional costs, beyond those in Scenario #1, above, that would be required to convey the water to satisfy the hypothetical demands. Presumably, somebody—the federal government, tribes, or water users—would have to construct, operate, and maintain a water-conveyance system. The costs of such a system would be substantial. The DEIS does, however, calculate the cost, \$2,246 per acre-foot, of building and maintaining storage capacity in the Ridges Basin Reservoir (p. 3-204). In other words, it would cost \$2,246 per acre-foot, to build and maintain the long-run capacity to store water in the reservoir.

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

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

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

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

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

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

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

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

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

CONCLUSION

The DEIS fails to provide a full description of the potential costs of the proposed Animas-La Plata project, and conjures up hypothetical benefits. Even so, it is clear that, even if hypothetical demands similar to those that exist in California's Central

Valley were to materialize, the costs of the Animas-La Plata project would exceed the benefits by as much as 500 percent. Under current market conditions, which can be expected to persist for decades, the project would yield zero benefits for federal costs exceeding \$344 million.

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

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4/17/00

Comments In Reference to the Draft Supplemental Environmental Impact Statement for the
Animas-La Plata Project

Opening Statement

A careful analysis of the DSEIS clearly shows that it does not fairly present or evaluate alternatives to building the Animas-La Plata Project. The DSEIS displays a pervading and unfounded bias against non-structural alternatives to a structural version of Animas-La Plata. From the explication of the Purpose and Need to the final evaluation of alternatives, the DSEIS fails to present the facts. The Bureau should study and implement the following recommendations when preparing a Final Supplemental Environmental Impact Statement. With further refinement and modification, Refined Alternative 6 clearly best meets the federal government's obligations under the 1988 Settlement Act in the least costly and most environmentally sound manner.

Purpose and Need

According to the DSEIS, the stated purpose and need for this federal action is:

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

To summarize the above quote, there are two reasons for this action:

- (1) To implement the Settlement Act
- (2) To provide for "identified regional M&I needs"

Unfortunately, the Bureau does not actually investigate how best to achieve either of these goals in the DSEIS. The actual provisions and water quantities stipulated in the Settlement Act are largely ignored, and the nominal depletions specified in the Administration proposal are substituted for an amount that is clearly quantified in the Settlement Agreement.¹ Regional M&I water needs are also vastly overstated in the DSEIS, giving a false impression of the water needs in the area.

¹ Point of clarification: The Settlement Act of 1988 references the 1986 Settlement Agreement, in which the Ute Tribal water rights were quantified. For the purpose of this discussion, the Settlement Act is assumed to include the Settlement Agreement.

Discrepancies Between the Settlement Act Provisions and the DSEIS Water Allocations

Tribal Water Allocations

The DSEIS fails to clearly show both the diversions and corresponding depletions due to the Tribes under the Settlement Act. Table 1-1, Vol. 1, shows the diversions specified in the Settlement Act. It states that the Ute Mountain Ute Indian Tribe (UMUIT) is to receive 6,000 af of M&I water and 27,200 af of Agricultural water from the ALP Project. The Southern Ute Indian Tribe (SUIT) is to receive 26,500 af of M&I water and 3,400 af of Agricultural water. These numbers are understood to be diversions, a fact which can be verified in the Settlement Agreement, though this is not stated in Table 1-1. The section proceeds to present Table 1-2, which quantifies the water allocations in the Administration Proposal. These stated depletions are subsequently used to evaluate all alternatives. It is important to note that the quantities listed in this table are depletions, not diversions. No diversions are specified, and the connection between Table 1-1 and 1-2 is unclear. Another table showing the relation between the diversions and depletions is appropriate:

Ute Tribes Water Rights as Quantified in the 1986 Settlement Agreement

Ute Tribe	Type of Water	Diversion (afy)	Consumptive Use (%)	Depletion (afy)
Ute Mountain Ute	M&I	6000	100%	6000
Southern Ute	M&I	26,500	90.5%	23982.5
Ute Mountain Ute	Ag.	26,300	80.1%	21066.3
Southern Ute	Ag	3,400	78.8%	2679.2
Total:		62,200		53,728

The above consumptive use ratios are found in the Settlement Agreement and their application yields approximately the same water quantity as is specified in the Administration Proposal. Table 2-26 of Vol. 1 specifies a total depletion of 53,200 afy, which roughly corresponds to the 53,728 shown above. The Administration Proposal includes 39,960 afy in depletions for the Tribes from the structural portion of ALP and provides 13,000 afy in depletions non-structurally, generating a total of 52,960 in depletions.

At this point, however, it becomes very difficult to follow the Bureau's logic. The total diversions and depletions from the structural portion of the project are specified next in Table 2-2. Without any explanation, the consumptive use ratios from the Settlement Agreement have been discarded and replaced across the board with a 50% use ratio. Rather than base the new water depletions on the diversion, however, the diversions have instead been increased to achieve the specified depletion. As a result of this circular reasoning, the diversions received by the Tribes are now 79,050 (Table 2-2), instead of the 62,200 specified under the Settlement Act. If the 26,000 afy of water the Tribes are scheduled to receive through the non-structural component is then added to the 79,050 allocated from the structural component, the final result is a total diversion of 105,050 acre feet, 68% more water than the Tribes were to receive under the Settlement Act.

OR3-1 Section 2.1.1 of the FSEIS has been modified to explain the relationship between diversion and depletions. Section 1.2 (Table 1.1) has been modified to better define the information presented.

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Although the depletion amount is obviously a key factor in determining the water due to the Tribes, the consumptive use ratios were precisely specified in the Settlement Agreement (to the 10th of a percent, actually). To totally disregard this aspect of the Settlement Agreement and then arbitrarily substitute a 50% use ratio makes no sense. To then use the new use ratio to derive an exaggerated depletion is completely wrong.

The diversion is an extremely important number in the Settlement Agreement. In fact, consumptive use ratios are buried in the middle of the document. The diversions, however, are specified at the beginning of the sections referencing each Tribe's water rights. The Agreement states:

The project reserved water right shall entitle the [Ute Mountain Ute] Tribe to receive and beneficially use...the following allocations of water from the Animas-La Plata Project, as measured at Ridges Basin Dam and Reservoir or at the point on the Animas River where diversions are made to the Durango Pumping Plant...

- (i) a *maximum* of 6,000 acre-feet per annum of municipal and industrial water; and
- (ii) a *maximum* of 26,300 acre-feet per annum of agricultural irrigation water.

The project reserved water right shall not exceed the total of the above allocations³

The Agreement is clear that the Tribes will receive a maximum of these diversions. They have the right to beneficially use up to the corresponding depletion amounts, but they are not entitled to a higher diversion if they fail to consume their maximum allowable depletion.

The diversion is extremely important in this project for the following reasons:

- (1) The diversion is the amount pumped. By increasing the Tribal project diversion to 79,050 afy, the Bureau proposes to pump an additional 16,850 afy, or 15% of the total project water.
- (2) Given the assumption that the Tribes are owed water in addition to the 79,050 already provided in the reservoir, the Bureau proposes to supply the Tribes with a development fund of \$40 million in lieu of or for the purchase of 26,000 additional acre feet of water. This 26,000 acre feet is obviously far in excess of what they were due under the Settlement Act.
- (3) The diversion is the amount stored. Storing more water means more evaporation, thus more waste and loss. Having to store more water also adds to the size and cost of the project.
- (4) The diversion is the amount extracted from the river between the intake and the project return flow at Basin Creek. Consequently, the section of river between the intake and Basin Creek will be depleted by the full amount diverted. Increasing the diversion the Tribes receive consequently has a negative impact on the river between intake and Basin Creek, whether or not the water is eventually consumed.

³ Page 16, 1988 Settlement Agreement, in Vol. 2, DSEIS. Emphasis mine. This is the section on the SUIT, the section on the UMUT is verbatim, except for the water quantities, which are correspondingly different. The UMUT allocations can be found on page 27 of the same document.

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Conversion of Agricultural to M&I Water

In the Settlement Act, the UMUIT was given predominately Ag water. They received 26,300 afy of Ag water and 6,000 afy of M&I water. Inexplicably, and without any justification, this fact is ignored by the Bureau in the DSEIS. All water allocations have been converted to M&I. Although there are references to the Tribes' willingness to accept this use change, there is no concrete documentation in the DSEIS to support this assumption.³ Again, it is obvious that the DSEIS does not evaluate methods of properly implementing the Settlement Act.

Changing the Ag water to M&I is problematic for at least two reasons. First of all, farming and agriculture have been a mainstay of the local lifestyle for over a century and the values associated with farming benefit the community. The agricultural lifestyle should be supported and encouraged as much as possible. For this reason, the community would certainly prefer Ag water.

Secondly, conversion to M&I use makes the implementation of a non-structural alternative more problematic and difficult for several reasons which are adequately addressed in the DSEIS. The change to M&I unfairly prejudices a non-structural approach to water delivery. The Bureau should go back to the Settlement Act and recognize the water rights as they were specified in the Congressional Act.

Regional M&I Water Needs

The Bureau's projections of future regional water needs are poorly supported by factual evidence. Anyone reading the section on future water uses might be deluded into thinking that the Four Corners desperately needs water. To the contrary, Durango's water needs are well taken care of far into the future, and the Farmington area's future needs will be better met by future local reservoirs, or Navajo.

Figure 2-1 in Vol. 1 is a graph showing a correlation between water use and population growth. It covers the years from 1970 to 2100 and links population and water use by the nationwide average per-capita per day water use of 179 gallons*. This graph exaggerates future water needs and is flawed in several aspects.

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- (1) A 2% growth rate is assumed. There is no reason to think that population will continue to grow at that rate for the next 130 years. If the population grows at that rate, there will be a metropolis the size of Denver in the Four Corners. There is no economic base to support long-term population growth at that rate.
- (2) Per capita water use is projected to remain the same over the 130 year period. In fact, per capita water use will likely decline as population density increases and people move to a more urban living situation, with fewer and smaller lawns to water.
- (3) It is clearly impossible to project water needs 130 years in the future. It is difficult to project water needs 10-15 years into the future. Per capita water use will almost certainly change and population trends are unpredictable. There is no way to predict the growth of the region or its water use over this extended period.

³ In Vol 1, 2-41 it is stated that the Ute Tribes agree to receive a total depletion of 33,050 afy of presumably M&I water. There is no concrete information that the Tribes will accept the Preferred Alternative's water allocations, though the presumption seems to be that they will.

OR3-2 Refer to General Comment No. 12 concerning regional water needs. Projected water needs, the use of 179 gallons per capita per day, and future demand for municipal water was based on a report done for Durango by Gronning Engineers.

The Bureau should do a careful analysis of the actual water needs of the local municipalities in the near future. The Bureau should also distinguish between the need for storage and the need for water. Let us not forget that the municipalities in question border several rivers. Under normal conditions, the municipalities divert water directly from the river. Additional storage is necessary only during extreme drought conditions or equipment failure.

There is no documentation in the DSEIS which verifies any legitimate water needs in the Four Corners area. All the information is anecdotal or "projected", with little or no factual basis. The Bureau should include pertinent sections of the Gronning Report (1994) and Cielo (1995) showing what the actual water needs are, and the minimum storage capacity needed to assure this supply'. The Purpose and Need requires that the DSEIS determine and provide for "identified" regional M&I needs. The Bureau has not identified needs, rather it has conjectured and postulated what needs might be far into the unforeseeable future.

Summary of the Problems with the DSEIS Analysis of Purpose and Need

- (1) The Purpose and Need is ignored in the DSEIS because the impacts of implementing the Settlement Act are not addressed. The Bureau should go back to the Settlement Act and make recommendations which meet the Purpose and Need.
- (2) The Regional M&I water needs are not properly analyzed. There is no factual basis for the projected water needs stated in the DSEIS, and long term projections are not realistic.

Exaggerated Municipal Water Uses and the Problem with Ute Indian "Non-Binding" Water Uses

If ALP is built, various governmental entities will spend several hundred millions of dollars to build a dam and reservoir which is nothing but an over priced insurance policy. Previously, when ALP supplied Agricultural irrigation water, there was at least a use for the water stored in the project. An analysis of the DSEIS, however, shows that there is now no use for the vast majority of the water. The City of Durango probably doesn't even want its share'. Along with Durango, New Mexican municipalities receive water directly from the river system now; ALP will simply assure them a more firm water supply.

As the "Non-binding" water uses show, there is no concrete or realistic need for the vast majority of ALP Ute Tribal water. Of the approximately 105,050 af of water allocated to the Ute Tribes in the combined structural and non-structural components of ALP, about 5,000 af can be used by the Tribes for feasible development. Another 30,000 af goes toward coal and gas-fired power plants and mines, while 44,000 af of water will, according to the "non-binding" use scenario, be used to supply regional M&I needs'. The Bureau fails to specify uses for the additional 26,000 af provided to the Tribes non-structurally in both alternatives 4 and 6.

We recognize that the Ute Tribes find themselves in a difficult position needing to specify uses for water before the water is delivered. Lack of water, however, is not preventing development on the reservations today, nor has it ever. Nearly all of the developments proposed as non-binding uses

*These reports are referenced in Vol. 1, 2-3, but they are not included, nor are any statistics from the reports referenced.

*The City of Durango has decided to stay neutral and not to endorse ALP as a storage project. The City almost certainly has less expensive options for water storage.

*These amounts are approximate and are derived from numbers given in Table 2-2, DSEIS Vol. 1, 2-9.

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could be supplied more easily with current water resources. Take the SUIT Florida Mesa Housing development for example. To supply water for this housing development, water will be diverted from the Animas, pumped into Ridges Basin Reservoir, allowed to flow back down into the Animas, then pumped again many miles and up several hundred feet to a the housing complex on Florida Mesa which is a stone's throw from the Florida River! The SUIT currently possesses sufficient rights on the Florida for this development. The lack of ALP is not preventing the SUIT from building needed housing, nor from building golf courses and casinos.

ALP does not provide needed water. It provides a vast amount of water for speculative uses such as coal plants and water marketing. The federal government in its role as trustee has the duty to ensure that the Ute Tribes have water necessary for growth and development on their reservations. The Ute Tribes, however, understood when they signed the Settlement Agreement of 1986 that ALP and the water that flowed from ALP had to comply with "Bureau of Reclamation procedures, which shall include, among other things, NEPA compliance". In addition, they were never given a "guarantee" that ALP would be constructed. The Settlement Act allowed for litigation in the case that ALP was not constructed, for whatever reason, and the failure to complete a structural version of ALP will not constitute a "broken promise" to the Tribes.

NEPA clearly requires that water uses for this type of project be stated prior to implementing a federal action. Given that "non-binding" or unspecified water use scenarios comprise over 95% of the Tribal water, it is obvious that NEPA process has not been met.

Evaluation of Alternatives

No Action Alternative

Two pages are devoted to Alternative 10, the No Action Alternative, in the DSEIS. The Bureau has not given more space to the development of Alternative 10, it says, because:

It is difficult to develop an analysis on the outcome of this election due to the fact that two of the three choices that would be before the Tribes' at that time involve processes (negotiation and litigation) which outcomes would be impossible to predict."

OR3-3 Additional analysis has been provided in the FSEIS in Section 2.3.

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This DSEIS, however, is a document which is supposed to analyze and predict these very outcomes. Ignoring Alternative 10 simply because it is difficult to predict the outcome of litigation is unacceptable.

The Settlement Act postulates that litigation will occur if ALP is not constructed. The Tribes retain the right to litigate their water claims if ALP is not finished by 2005. Given that supporters of ALP have been trying to build the project for over 30 years, it is likely that it will not be built by then. Thus, it is essential to know what the likely result of Alternative 10 may be.

The Bureau and DOI are the organizations best suited for determining what the likely outcome of litigation is. They should make public all documents pertaining to the Settlement Agreement of 1986 and assess what Winters Doctrine rights the SUIT and UMUIT hold on the Animas river and what rights they would have, absent the Settlement Act.

ALP proponents have commonly mischaracterized the Tribes' water rights. Their favorite strategy is to threaten local water users and the City of Durango with the Ute claims. They argue that the Utes will "dry up" Durango if ALP is not constructed. It is important to clarify what the rights the Tribes possess on the Animas if ALP is not built. Although predicting the outcome of this

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litigation might be difficult, by going back to the facts the Bureau could make a legitimate and documented analysis. This analysis would be helpful to all parties considering how best to settle the Ute claims and which alternative to support.

If the Utes do stand to deprive some local users of water then it is important to know how much the federal government is prepared to spend to protect the questionable water rights of a few individuals. We wonder why the Bureau is recommending the expenditure of hundreds of millions of dollars to protect these few individuals' water rights. If the Utes genuinely have rights to water that is currently being used by others, then the water should be turned back over to the Tribes. The local users should consider themselves lucky for having received "free" water for so long. Since the Utes currently have no identified uses for their water, the current local users could logically lease the water from the Tribes. This scenario would avoid the building of new costly infrastructure until the time the Tribes wished to put their water to use in another manner.

Finally, as it is clear that the Tribes have no identified uses for water, the idea that they could "dry up" anyone who is currently using "their" water is ludicrous. First of all, beneficial use of water is required in Colorado, as in most states. Until the Tribes can show a beneficial use for water, they can not deprive any current consumer of the water. Thus it would be illegal for them to take water unless they had a beneficial use for it. As the "non-binding use" scenarios in the DSEIS show, there are no beneficial uses for the vast majority of Ute water.⁷ The Bureau is right in stating that the Tribes' Winter's Doctrine rights can not be lost by disuse, however we are unaware of any legal precedent which would allow them to exercise these rights to deprive other users of water if they can claim no beneficial use. If the Bureau has reason to believe otherwise, it should explain further.

Alternative 4: The Preferred Alternative

Preferred Alternative Does Not Meet Purpose and Need

- (1) The Preferred Alternative does not fulfill the terms of the Settlement Act, as was described in detail above.
- (2) The Preferred Alternative goes far beyond supplying any identified regional needs. It supplies water for speculative and hypothetical purposes based on grossly inaccurate and unsubstantiated projections of water needs.
- (3) The Preferred Alternative provides far more water than can be used in the project area at any time in the foreseeable future. For example, if Durango were to receive the full LPWCD allocation coupled with the water the Ute Tribes are projected to sell to Durango, then the City would receive a total of 15,338 afy⁸. Durango currently uses less than 4,000 acre feet per year. It is extremely unlikely that Durango will ever need a total of over 19,000 acre feet of water. Similar observations can be made for the municipalities down the line, from Florida Mesa to Aztec.

The Preferred Alternative Violates NEPA

- (1) The speculative "non-binding" water uses must undergo scrutiny under NEPA process.

⁷ See Table 2-2, Vol 1, 2-9 for the complete schedule of "Non-Binding" tribal uses. The uses described in the table are improbable at best and impossible at worst. The table makes it clear that there is no identified use for tribal water now or in the foreseeable future.

OR3-4 Please refer to General Comment No. 6 and General Comment No. 7.

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- (2) The water uses may violate the Clean Water Act. §404 of the Clean Water Act requires an analysis of the impacts of a project on important aquatic areas such as fish habitat. This analysis can not be completed without a thorough examination of water uses and the location and quality of return flows. "Non-binding" water uses, by definition, cannot be analyzed. §404 requires examination of actual, not hypothetical, purposes and needs. Not one actual use for the water has been identified by the Bureau of Reclamation. Only a small portion of the "non-binding" uses are even feasible.
- (3) NEPA clearly requires a description of the need for and impacts of a federal action such as Animas-La Plata, as well as analysis of costs and benefits. As was shown above, there is no present use for the water and the DSEIS presents a set of hypothetical future uses for the water in order to analyze the impacts of the project. The original Animas-La Plata agreement requires that the project comply with all environmental laws, including the National Environmental Policy Act.
- (4) The largest single "non-binding" water use (almost 28,000 afy) is dedicated to supplying a coal fired power plant on the SUTT reservation. The coal plant is probably infeasible and using water for this purpose would almost certainly be in violation of NEPA. A full NEPA analysis of the coal fired power plant is appropriate at this point to determine if a coal plant is a feasible and NEPA compliant user of such a huge quantity of water.

Alternatives Must be Evaluated Through Cost Benefit Analysis

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(1) A Cost Benefit Analysis (CBA) must be included in the DSEIS. CBA has always been part of the EIS process in the past for ALP and is standard procedure for Reclamation projects. In addition, it is required by the Water Resources Planning Act, 42 U.S.C. § 1962 et seq. The Bureau has included a CBA in the past and should include one with this project. Apparently, the Bureau and the DOI believe that a CBA is not necessary because the majority of water is dedicated to Indians⁴. This reasoning is flawed for the following reasons:

- The DSEIS allocates approximately 73% of the ALP water to the Ute and Navajo Tribes. HR 3112, the legislation supposedly endorsed by DOI lessens this allocation to about 60%. At what point is a Cost Benefit Analysis not appropriate? The Bureau should explain exactly what quotient of Indian water a project must contain to preclude CB analysis and why.
- The Settlement Act states that "the water supplied to the Tribes from the Animas-La Plata Project...shall be subject to Federal reclamation laws..."⁵. Reclamation law requires a CBA.
- Whether or not the Bureau believes a CBA is required by law it should be included if only to provide perspective on the real costs and benefits of the various alternatives. The purpose of CBA is to provide legislators and the public with a guideline for the expenditure of taxpayer funds. Taxpayers and the legislators who are appropriating federal funds must know what benefits result from public expenditures. Obviously Congress may chose to spend a great deal of money with little economic return if it

OR3-5 Refer to General Comment No. 1 for a discussion of Reclamation's position on the need for a benefit-cost analysis for the ALP Project.

⁴ Pat Schumacher has been quoted as saying this in the Durango Herald, and administration officials, including Mike Connor of DOI and Bonnie Galvin of OMB have reiterated this opinion.

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decides this is warranted in the interest of settling Indian water claims. Therefore, a positive CBA is not required for construction of the project. Part of the purpose of the DSEIS, however, is to provide the public and legislators with information to help them decide which alternative to support. It is impossible to make an intelligent, reasoned evaluation of alternatives without a CBA showing the costs and benefits of each. The CBA should be included at a minimum for Alternatives 4, 6, and 10. Note that a clear distinction should be made between economic and financial costs in the CBA. A CBA for Alternative 4 will show great economic costs with scant benefits.

(2) Much speculation has been circulating regarding the obligations of local municipal entities to repay the appropriate project cost allocation. Local project proponents have suggested that the water districts will not be obligated to pay for any amounts in addition to the existing repayment contracts⁹. The Bureau should make it clear that local project participants must negotiate contracts that fully repay the current project costs allocated to them. Not to do so is a violation of the Water Supply Act, which prohibits federal subsidies for local water development. The repayment contracts for ALP must represent the full costs of non-tribal municipal water supplies, in order to comply with the Water Supply Act, 43 U.S.C. § 390.

Operations Costs are Understated in the DSEIS

Operations and Maintenance and opportunity costs resulting from the operation of the Preferred Alternative are understated or omitted in the DSEIS. The Bureau shows what the actual financial cost of operating the project will be, but neglects to reveal the true economic cost of operation for the Preferred Alternative.

OR3-6 Comment noted. Operation costs presented in the FSEIS are intended to guide the water user agency in developing budgets and determining water users' rates and fees.

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(1) The WAPA discounted power rate of 8.1 mills per kWh is used to compute power costs⁹. The proper economic cost of this power is the market value of the power, regardless of any subsidized rate the Bureau might obtain for this particular project. Taking the power generation cost cited in the Bureau's 1995 ALP EIS and updating it for inflation from 1993 dollars to 1999 dollars yields a real cost of 46 mills/kWh. This change in power cost augments the pumping costs from the stated \$1.099 million to approximately \$5.75 million per year.

(2) The Bureau omits the increased salinity and decreased power costs downstream in the Colorado Basin. These may not be part of the financial obligations in the cost sharing agreement, but they are certainly relevant economic costs of the structural alternative. These costs were examined in the evaluation of Alternative 9, where these costs are shown as savings of \$5.9 million/year⁹.

(3) Below is a summary of real costs the Bureau should show in an economic analysis of annual operating costs:

Salinity Treatment:	\$3.00 million
Hydropower Lost Revenue:	\$2.90 million
Real Power Cost:	\$5.75 million
Other Operating Costs ⁹ :	\$.42 million
Total Operating Costs:	\$12.07 million

⁹ Fred Kroeger suggested that this would be the case before the Durango City Council.

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The DSEIS Recommendations and the Preferred Alternative Violate the Colorado River Compact, Colorado State Laws, Federal Laws, and Standard Bureau of Reclamation Procedures

- (1) The out of State water sales included in the "non-binding" water uses are not compliant with the Colorado River Compact or Colorado State Law. The Settlement Act makes it abundantly clear that water uses must be compliant with State and Federal Law¹⁰. The Colorado River Compact prohibits out of State water sales. Colorado State law also restricts out of state water sales. Thus, the largest "non-binding" use of water will be in violation of State law and the Colorado River Compact, and, accordingly, in violation of the Settlement Act.
- (2) The Preferred Alternative will be in violation of the Colorado River Compact, Article III (c). The Compact states, "The states of the Upper Division shall not withhold water and the states of the Lower Division shall not require the delivery of water, which cannot be reasonably be applied to domestic and agricultural uses."

The Bureau must address these concerns in the Final EIS. It should research these statutes and determine to what degree the Preferred Alternative will violate these laws. The Bureau should also determine whether a lawsuit brought by states of the Lower Basin could be brought against the State of Colorado for withholding water without a beneficial use. The legal implications of withholding water for which there is no use or is no use aside from selling it out of State must be fully explored before the Bureau makes a recommendation in support of the Preferred Alternative.

Additional Non-Ute Allocations

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Contrary to the stated allocations in the DSEIS, the Bureau implies that allocations may be shifted to other users. A cryptic statement in Vol. 1 of the DSEIS notes, "Comments received from the ALP Project scoping process indicate that the Colorado Ute Tribes may be willing to allow an additional 6.010 afy from their allocation to be reallocated for M&I use by the State of Colorado and by non-Ute Indian parties in New Mexico."¹¹ No further references for this statement are provided, and this re-allocation would run contrary to all data provided in the DSEIS regarding water quantification and uses. Indeed, HR 3112, the bill carried in the House to construct ALP manifests this re-allocation. The Bureau needs to show how this re-allocation can be justified in the context of the Settlement Act as well as show the beneficial use for this water and follow all applicable NEPA review process merited by the reallocation. Again, water end-uses and impacts must be evaluated to comply with the law. Cost allocations for the project should also be re-worked appropriately, with the new recipients bearing the share of the applicable project construction costs.

The Cost for the Non-structural Portion is Understated

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The stated cost for the non-structural portion, or land acquisition fund, for the Preferred Alternative is \$40 million¹². This amount is significantly less than the amount stated in the section in Vol. 2, titled "Land Acquisition Analysis". The Land Acquisition Analysis says, "The present value derived for Refined Alternative 4 was \$56,978,768 and for Refined Alternative 6 was \$195,426,421".¹³ The Bureau notes the Alt 6 price correctly in the summaries, showing it to be

¹⁰ See the Settlement Agreement of 1986, p. 60 for a discussion of restrictions on off reservation and out of State water use. It states that water may be used out of State "to the extent permitted by any : State law, Federal law; interstate compact; or international treaty".

¹¹ This value is stated many times in the DSEIS, it can be found specifically in Vol. 2 E-41.

OR3-7 Section 2.1.1 has been modified to clarify the possible reallocation of water by the Colorado Ute Tribes. The Settlement Agreement will be modified to show any changes in the allocation of water to the Tribes. Any future changes of water use from that identified in this FSEIS would serve as a trigger for additional environmental compliance. Attachment E in Volume 2 of the FSEIS has been updated to reflect the applicable projected construction cost that should be allocated to the non-Ute entities.

OR3-8 The "Land Acquisition Analysis" in Attachment D of Vol.ume 2 of the DSEIS served as an illustrative example to estimate present value of irrigated agriculture land acquisition, given a set of working assumptions, to satisfy the non-structural component of the Preferred Alternative of 13,000 afy of water. The latest negotiations and the current Administration position is that an agreement has been reached with the Colorado Ute Indian Tribes in which a figure of \$40M in discretionary funds has replaced the 13,000 afy of water for the non-structural component. These funds can be used at the discretion of the tribes to purchase land, undertake economic development or perform a combination of these. It is this figure of \$40M representing the non-structural component that is used in determining that portion of the project cost. In order to provide similar treatment in Refined Alternative 6, the acquisition of land having an associative 13,000 afy of water rights was eliminated from the model and replaced with a fixed amount of \$40M. This \$40M was then added to the estimated present value of the remaining acquired irrigated acreage to derive a total present value for Refined Alternative 6 for that component associated with the settlement of water rights from land acquisition.

\$19.5 million, but discounts the Preferred Alternative price by almost \$17 million. This discrepancy should be corrected in the Final EIS.

Cost of Structural Component May be Understated

Although the DSEIS asserts that the cost of the structural components of the Preferred Alternative have a "high degree of confidence", the Bureau has rarely brought its construction projects in on budget. A comparison of cost projections and final costs for some recent Bureau construction projects should be provided in the DSEIS. The variance between projected and actual costs might raise doubt that the structural components of ALP can be constructed on budget. It is arbitrary and unfounded to state that the cost of the Preferred Alternative is fixed and without risk.

Environmental Impacts of the Preferred Alternative may not be Mitigable

The DSEIS concedes that Animas-La Plata will have immediate, significant impacts on stream flows and key fish habitat in the Animas River. According to the DEIS, ALP will impact habitat by:

- Reducing available food through the dewatering of productive riffles and edge of channel areas.
- Providing greater risk of disease through increased environmental stress based upon elevated water temperatures in dry water years.
- Concentrating adult fish in the remaining suitable habitats.
- Reducing the ability of fish to navigate shallow riffles".

The DSEIS shows that the Bureau does not believe it can mitigate these impacts. Four years of study are contemplated, but the Bureau admits,

The potential impact of the ALP Project on native fishes will be difficult to mitigate on the Animas River...it is expected that the operation of the Durango Pumping Plant will chronically reduce native fish populations and associated habitat...Unfortunately, this impact cannot be effectively mitigated in the Animas River".

Bioaccumulation of heavy metals in raptors as a result of their feeding in Ridges Basin is also of concern to the Bureau. Yet again, study, not mitigation is proposed".

These impacts are significant, and are made even more so by the lack of acceptable mitigation, yet they are not mentioned on any of the summary sheets as significant environmental impacts or concerns. The lack of acceptable mitigation for these impacts is worrisome, yet it seems to be of minor concern to the Bureau.

Ridges Basin Reservoir is Distant from the UMUIT Reservation

The DSEIS does not acknowledge the tremendous problem created by the distance between Ridges Basin Reservoir and the UMUIT Reservation. Originally, water was originally going to be delivered to the La Plata river through federal facilities, as was contemplated in the Settlement Act. This infrastructure would have made it possible for the UMUIT to receive ALP water. As it stands now, there is no feasible way for the Tribe to get water to its reservation. Although there is a

OR3-9 The cost estimates for the project features are "feasibility estimates". As such there are uncertainties in the quantities of excavation and construction materials, site conditions, construction methods, and design changes that may be required. The 20 percent construction contingencies are intended to the estimated construction costs to account for non-construction costs. These include costs to evaluate geological conditions, perform the engineering design work, prepare specifications, and administer construction contracts. This added amount is reasonable in relation to other similar projects where safety to the public is involved. It is not appropriate to make a comparison of cost projections and final cost for other projects in the FSEIS.

OR3-10 Reclamation does not believe that the specific impacts to downstream aquatic resources in the Animas River can be directly mitigated. The chronic reduction of flow in the Animas River causes a reduction in physical habitat. Changing pumping operations simply would only change the time and magnitude of impacts to other times within the year. It should be reiterated that Reclamation does not expect catastrophic impacts to the downstream aquatic resources and it has committed to seasonal minimum bypass flows as measured at the Durango Pumping Plant. Although not directly related, other mitigation options may be available that would benefit the significant native sucker population currently existing in the Animas River. That plan is discussed in response to Comment FA1-4 to the U.S. Fish and Wildlife Service.

OR3-11 The cost to deliver or sell water from Ridges Basin would be the responsibility of the ColoradoUte Tribes.

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possibility that the Tribe could use development funds to build a conveyance system, it is unlikely that any water uses could economically justify such an expensive delivery system or would be able to support the tremendous pumping and operations cost which would accompany the delivery of water.

The Bureau should recognize the superiority of non-structural alternatives in delivering water to the UMUTT reservation and make it clear that conveying water from Ridges Basin to the UMUTT reservation is infeasible.

Treatment of the Non-Structural Alternative: Refined Alternative 6

A pervading bias against the non-structural alternative, Refined Alternative 6 (Alt 6), is apparent in the DSEIS. Simple logic can eliminate the primary drawbacks of the alternative, and a fair and unbiased analysis shows that Alt 6 is superior in many respects to the DSEIS Preferred Alternative.

Alt 6 Also Fails to Fulfill Provisions of the Settlement Act

In the same manner as the Preferred Alternative, Alt 6 fails to fulfill the water allocations specified in the Settlement Act. The alternative should be re-worked to meet the provisions of the Act. The primary change needed to make it compliant would be to restore the 26,300 afy of Ag water to the UMUTT and 3,400 afy to the SUIT. When the Ag water is restored, it becomes obvious that a non-structural approach will best meet the Tribes' water needs.

The DSEIS concludes that a tremendous quantity of water is available through irrigation improvements, especially in the Montezuma Valley. The DSEIS asserts that 34,000 afy could be provided through irrigation system improvements in the Montezuma Valley for a cost of \$71 million and 16,000 afy could be provided in the Florida Valley for \$67 million¹⁰⁰.

These methods of obtaining water are eliminated because they don't provide firm yields in dry years, when M&I water is obliged to share no shortages. Were the allocations agricultural, corresponding shortages would be shared amongst the irrigators. Since delivery of M&I water is guaranteed, however, irrigation improvements are ruled out as an option for providing water. The Settlement Act is clear on the intent that the Tribes share in water shortages: "The agricultural irrigation water allocations as quantified in the DPR shall share shortages on a pro rata basis even if changed to other beneficial uses¹⁰⁰". Obviously, the signers of the Settlement Agreement were clear in their intention for the Tribes to share in water shortages. Because of the subsequent manipulations in the Agreement, however, they have apparently been exempted from this requirement.

The cost of land purchases yielding the needed 30,432 afy in depletions is shown in Table 2-69 to amount to \$6,400 per acre-foot. By contrast, improving irrigation systems to provide the needed Ag water described above would cost only \$2,323 per af, a savings of \$4,077 per af, or \$69 million dollars. Furthermore, the water would be provided in Montezuma county where the UMUTT could use it, and in or near the SUIT on the Florida or Pine rivers.

It is paramount that the Bureau make clear the extreme cost that accompanies the conversion of water from Ag to M&I. The administration, when it acknowledged the change to M&I water, probably never considered the tremendous cost that was associated with this decision. It seems unlikely that they would support such a change were they to understand the fiscal implications.

OR3-12 As per the Settlement Agreement, the use of water developed by the ALP Project is now to be utilized for M&I use with the exception of the 13,000 afy of depletions which may be used for agriculture purposes. Alternative 6 was reworked to provide the same amount of water as Alternative 4. Modifications to the Settlement Agreement have been made to reflect the shortages associated with an M&I project. The water available from water conservation, with a 50 percent shortage in the critical dry year, would be approximately 19,800 acre-feet per year which is considerably short of the required water supply. Comment is noted concerning the cost of an agricultural project with shortages versus an M&I project with no shortages.

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The undesirable cultural and socioeconomic impacts resulting from this change were already stated above.

Bureau Should Include Least Costly Non-structural Components

The above discussion touches on one of the primary deficiencies with the Bureau's version of Refined Alternative 6: it fails to utilize the least costly and environmentally damaging methods of providing water. In fact, it seems that the Bureau attempted to drive the appraisal level cost of Alt 6 as high as possible by recommending the most expensive methods of providing water rather than pursuing the least costly options.

For example, the raising of Lemon Dam is included as a component of Alt 6 despite its astronomical price tag and the accompanying negative environmental impacts, at least two of which are listed as significant. Any rational person would have eliminated the raising of Lemon Dam for these reasons, however the Bureau inexplicably left it in. The cost per acre-foot of the additional water yield is \$56,000, while the average per acre foot cost in Alt 6 is \$2,873, nearly twenty times less. Obviously the Bureau should substitute other water acquisition scenarios and reject the raising of Lemon Dam.

The Bureau has also ignored 1999 Scoping Comments which would have supported the viability of Alt 6. Comments were made in the 1999 Scoping Process requesting that the Bureau investigate the possibility of replacing or repairing the radial gates at Vallecito reservoir to permit the storage of additional water, or to facilitate the change of use to M&I¹³. Apparently this request was entirely ignored, for not one word regarding the repair or upgrade of these gates is included in the DSEIS. Pat Schumacher agreed that the gate repairs might be a good idea and would probably facilitate the delivery of water year-round, which will be necessary if water use is changed to M&I¹⁴. The Bureau must analyze this option and discuss how it would aid in the storage and delivery of water under Alt 6.

Bureau Should Identify any Water Available for Sale from Existing Projects

There have been numerous recent newspaper articles demonstrating that M&I water is or soon will be for sale from Vallecito Reservoir. Currently, 2,000 acre feet is being marketed by PRID¹⁵. The DSEIS should identify the quantity and price of water for sale, specifically from Lemon and Vallecito Reservoirs. The fact that this water is clearly on the market shows that there are currently excess water reserves available to meet some of the Ute water rights.

Depletions Available from Land Purchases are Understated

The depletions available from land transfers are also conservative, thus the projection of the amount of land necessary for purchase to yield the necessary depletions is exaggerated. First, the Bureau states that an average depletion for all the affected river basins is 1.4 af per acre¹⁶. No supporting data is included, and intuitively this figure seems low. Apparently an even lower figure,

¹³ "We think by redesigning the gated spillway at this facility additional storage might be possible. We understand that drawdown in the fall is extreme because of the Bureau's legitimate safety concerns about the spillway gates becoming frozen and therefore unworkable during early spring runoff. We would appreciate a sincere look at the possibility of increasing carryover storage and overall yield with redesign of the spillway gates." Scoping Comments of Phil Doe, CPA 2/19/99, p. 7

¹⁴ Conversation with Pat Schumacher and Dylan Norton, on or about 2/2/00.

¹⁵ Durango Herald, Friday March 3, 2000. Advertisements for this water frequently appear in the classified sections.

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OR3-13 The raising of Lemon Dam was included as a component of Refined Alternative 6 to allow a closer evaluation of this method of providing water - by modifying existing facilities. It is true that it ends up being an extremely expensive component.

OR3-14 The 2,000 acre-feet of municipal water to be supplied under a pressurized system is not excess water but rather, it's intended to replace existing municipal water that is presently being pumped from groundwater wells in the Pine River Basin.

OR3-15 The rationale for use of depletion factors is more fully described in Section 2.1.1 of the FSEIS. The depletion factor of 1.4 af/acre represents the historic dry-year conditions. A depletion factor of 1.5 af/acre as used in Refined Alternative 6 represents average conditions. To use 2.0 acre-feet per acre would be a very optimistic and risky approach. In reality, it is likely that there would be a lack of senior water rights to be purchased. This would then require purchases of land with lower priority water rights resulting in a declining depletion per acre and requiring greater amounts of lands to be purchased to acquire a given amount of water rights. This uncertainty of the firm yield that could be obtained from the purchase of water rights is one of several identified reasons for selecting Refined Alternative 4 over Refined Alternative 6.

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of 1.262 or 1.251 afy was used in the Land Acquisition Analysis". As this number is used for the basis of the entire land-water right acquisition program, the Bureau should research and justify the average depletion carefully. In addition, the Bureau fails to recognize that the regional free evaporation percentage should be added to this historical amount, when the water use is changed from Ag to M&I and is no longer used on the land. Based on regional free surface evaporation, it is reasonable to expect that depletions would be on the order of 2 af/acre/year.

The Bureau rightly notes that, "The historical depletion is the measure of the water right in terms of the amount of water that can be consumed under a transfer to a new use without causing injury to other water rights". Therefore, the argument goes, it is never possible to remove more of than the historical depletion from the land when water rights are transferred. This assumption is incorrect. Often, more than the historical depletion will be available for transfer for the very reason stated above: often there will be no other affected users and the entire diversion will be available for transfer. The assumption that historical depletions only can be transferred in every case further understates the water supply available from land acquisition.

The effect of using conservative depletion levels is to overstate the amount of land required for purchase. Given the above commentary, it is reasonable to assume that a depletion factor of 2 af/acre is a more realistic gauge for calculating land requirements for Refined Alternative 6. Using the 2 af/acre figure would reduce necessary land purchases by about 25% or 5,000 acres. The savings realized would be on the order of \$30,000,000¹⁵.

The Cost for Land Acquisition in the DSEIS is Overstated

In Table 2-66 the sources and amounts of water to be obtained by purchase of water rights are specified^{xxii}. By this schedule, 10,000 acres of land would be acquired in the Pine River Basin, to achieve a water yield of 15,114 afy. Apparently the Bureau has found it necessary to acquire so much water in the Pine River Basin to fulfill the projected non-binding uses.¹⁶ Although it is logical to acquire water rights that will fulfill legitimate needs, given that non-binding uses are purely speculative, this pattern of acquisition doesn't make much sense. The chief non-binding use projected for the Pine River water is to provide water for "the regional demand centers". Although it is not explained as such, geographically the only centers which would serve are New Mexican municipalities.^{xxiii} To supply these entities, water from the Piedra, San Juan, Pine, Florida, or Animas Rivers would function. Inexplicably, the Bureau relies on the Pine River Basin for the entirety of these water rights acquisitions. Although the original Citizens' Alternative suggested that properties with rights on the Piedra also be considered, properties on the Piedra were not included in the DSEIS. The Bureau should explain why the lands with water rights to the Piedra and San Juan were not considered for acquisition and further explain why it is necessary to acquire so much acreage in the Pine.

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The requirement that so much acreage be acquired in the Pine River Basin makes the land acquisition program problematic. "The land acquisition would take place over a 30-year period. This longer time frame is required because of the large purchase of 10,000 acres in the Pine River Basin."¹⁷ Later it is noted:

The much larger Pine River program would require overcoming numerous issues and constraints and would likely encounter extreme opposition from other water rights holders. The opposition

¹⁵ 5,000 acres at approximately \$6,000 per acre.

¹⁶ "The projected possible M&I uses are to be met by water rights acquisitions within the basin where the use will occur", DSEIS Vol. 1, 2-144.

OR3-16 The results of the hydrology analysis coupled with the water rights analysis per river basin indicated the location and the amount of land that would be required to be purchased to satisfy the non-structural components of the Preferred Alternative and Refined Alternative 6. Determination was made that a settlement fund of \$40M would be used in lieu of an analysis of land acquisition costs for the Preferred Alternative. This was an amount agreed upon between the Administration and the Colorado Ute Indian Tribes. The amount is discretionary and could be used for land acquisition for water rights, or for any other purposes. This same amount was applied to Refined Alternative 6 and the remaining land purchases required to provide water rights to satisfy the settlement agreements (47,000 af) were analyzed under a set of purchase assumptions to derive a present value. The hydrology model specified the amount of irrigated land that needed to be purchased in the various river basins and what would be done with the resulting water rights. A land purchase model was developed using average listed per acreage prices for irrigated agriculture land and average farm sizes per county in order to establish a base cost case. The model further refined costs based on estimated escalation of land prices which were a function of market competition on all but the Pine River where the level of land purchase would necessarily drive the market away. It was estimated that within the Pine River Irrigation District approximately 15,000 af of water rights would be required from the purchase of 10,000 acres of land, and that all of these water rights would be removed from the land through a change of use permit for identified M&I purposes at another site. This purchase and subsequent drying up of almost one third of the Pine River Irrigation District represents a significant and costly event, with the attendant risk that it may not be a feasible undertaking. In the land acquisition cost analysis (emphasizing the Pine River) there is a tri-level of cost elements incorporated into the model: the perceived windfall of initial willing sellers, the reluctance and resistance of recalcitrant sellers, and the complexities of dealing with the water court in obtaining Change of Use permits. These factors were recognized in the escalation of prices and duration of acquisition. The result was a present value that was considered to be a reasonable estimate of a potential real world occurrence and if the model is in error it is in understating not overstating the cost.

would stem from the fact that the 10,000 acres, with appurtenant water rights, proposed for acquisition constitutes about one-third of the estimated 30,000 acres of existing non-Indian irrigated lands in the Basin and the water would be used for M&I purposes outside the Pine River Basin.”

The Bureau argues that it will be difficult to acquire this large quantity of acreage in the Pine and that buying such a large proportion of the land in the Pine River Basin imports significant risk to Alt 6.

As was stated above, the speculative “non-binding” uses which supposedly necessitate the purchases in the Pine can be supplied through re-operation of reservoirs and through land purchases in other basins, therefore, the requirement that 10,000 acres of land be purchased in the Pine should be eliminated.

When this requirement is eliminated, the cost of land acquisition will also plummet. In order to create a market incentive, an escalation factor of 20% or 25% is added to the land cost in the Pine for 5 years during the 30 year life of the purchase program. The surging prices in the Pine bring the per acre cost of land to \$87,960 by the end of the program” The 25% escalation rate was also applied to the lands in the Florida and Animas basins twice over the 15 year acquisition period for these lands, “to reflect impacts from the land values on the Pine River Basin and market reactions on remaining land in these particular river basins””. These sky-high land prices are certainly inflated and the escalation factor is entirely arbitrary. In any case, the point should be moot, as we showed above that there is no reason to acquire this much land in the Pine.

Using an escalation rate of 8% certainly overstates the appreciation value of farm land. There is no data to support this escalation rate, and it is hard to believe that farm land could appreciate consistently at this level. The assumed appreciation rate is inconsistent with regional economics. The land to be purchased for water supply purposes is irrigated agricultural land. Returns to land from agricultural operations are unlikely to support this level of appreciation. Historical data should be provided to justify this escalation rate, or a more reasonable figure, such as 3% or 4% should be used.

I have owned my house in Durango for 4 years. I live in a downtown district where lots are practically unobtainable, and homes sell for a premium. I also am a contractor and landlord and am well acquainted with the local real estate market. In the past four years I would estimate that in-town home values have appreciated at the rate of 3%-4% per year, while agricultural county lands are probably simply holding their value or at most appreciating at 1% to 2% per year. There is little demand for these properties aside from their development potential. The Bureau should somehow justify the 8% escalation rate used in the Land Acquisition Analysis or lower it to a conservative, but reasonable rate.

The DSEIS also states that few suitable agricultural properties are on the market currently and that it will take a very long time, up to 30 years perhaps, to acquire the amount of land necessary to supply the Ute water allocation. This determination seems extremely conservative. The main reason that few properties are currently available is that there are few willing buyers. It is certain that many prospective sellers would come forward if they knew there were a buyer who could pay a reasonable price for their land. Information supporting this assumption is provided in the DSEIS. In the purpose and need summary, the DSEIS states, “The La Plata County active listings of farm and ranches in April 1999 totaled 37 properties, or 2 percent of all real estate listings; only 1 had sold in 1999 by that date””. It is probable that the reason only one of these properties had sold is that there were no willing buyers to complete more sales.

16
(con't)

ORGANIZATIONS AND COMPANIES

OR3

Base Land Costs are Overstated

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1999 land costs were estimated based on average prices for June 1999 listings. Land prices were set at the average value of the June 1999 listings and were \$4,384 for La Plata County and \$2,487 for Montezuma County. Actual listings ranged from \$1,290/acre to \$20,779/acre in La Plata County and from \$930/acre to \$5,000/acre in Montezuma County. This large range of values is probably due to different potential for residential development among the properties. The average values adopted for use in the DSEIS are skewed by including the more expensive parcels. Simply by purchasing the least expensive 50% of the properties offered in June of 1999 over 5,000 acres of irrigated crop land could have been acquired at an average per-acre cost of about \$2,300.

Value of the Land is not Stated as an Asset

18

The DSEIS ignores the fact that the properties acquired will have value in at least two important respects. First of all, the SUTT is a patchwork because of a mix of Ute and non-Indian landholders. It would be of great value to the SUTT to acquire some of the non-Indian land around and within their reservation in order to gain continuity in their land holdings and to expand their reservation. Secondly, owning these additional lands would give the tribe the flexibility to market the land for residential or open-space use if they wished. Even without the agricultural water rights, the land has a value in itself. This value is never recognized in the DSEIS, which is obviously a major oversight.

Distinction Between Economic and Financial Costs

19

The Bureau makes no distinction between economic and financial costs in the DSEIS. This distinction is extremely important as regards the comparison of the Preferred Alternative and Alt 6. Virtually no economic costs accompany Alt 6, which means that there is no drain on the resources of our society from its implementation. The costs for Alt 6 are practically all financial, involving little labor; they result from the transfer of resources from one party to another. The money spent in construction or operation of the Preferred Alternative, however, will represent the commitment of real natural resources and labor that could be put to better use in another constructive manner. This distinction makes the cost of Alt 6 much less significant in terms of its impact on our nation and our nation's resources.

30 Year Period of Land-Water Rights Acquisition is a Benefit of Alt 6

20

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

The DSEIS shows that nearly all projected water uses are speculative and "non-binding". Using a non-structural approach makes great sense under such a scenario. As water uses develop over the years, the Tribes may use their acquisition fund to purchase land and water rights in the areas that they need water.

OR3-17 The base line costs were developed by reviewing the current real estate multiple listings in La Plata, Montezuma counties in Colorado and San Juan county in New

Mexico. There was a review also of sales prices over the previous two years to determine trends. Additionally local real estate sales people were interviewed as to perceptions of prices and trends. A determination was made to use prices on current listings as a base for land costs rather than historical sales price due to the "willing buyer/willing seller precept that was referenced in the Settlement Agreement. While review of sales records indicated an approximate 5 percent discount to listing price throughout the counties this criteria, while certainly important in determining listing prices using a comparative sales basis, nonetheless was abrogated by the precept of the willingness duality. This listing price was considered to be the determining factor for the base land cost. The range in variation was not so much a consequence of residential development as land size, location, associated water rights and sellers expectations. Indeed, a comparison of dry land listings to irrigated and indicated a built in \$2,000 per acre premium placed on high quality senior water rights. Thus, if the land acquisition model were to have purchased the least expensive 50 percent as suggested in the comment letter (there seems to be some confusion with median versus average pricing when referring to the least expensive 50 percent of properties), the water rights associated with these least expensive irrigated properties are considered junior and yield less than the average depletion per river basin. The end result of using this approach would necessitate purchasing greater quantities of land than shown in the land acquisition model in order to satisfy the water rights settlement.

OR3-18 No attempt was made to value the acquired properties since there was no cost-benefit analysis associated with this study. This comment mentions that it would be great value to the SUTT to acquire some of the non-Indian land around and within their reservation in order to gain continuity in their land holdings and to expand their reservation. It should be noted there has been no indication from either of the Ute Mountain Ute or Southern Ute Tribes that they wish to use funds from the water rights settlement to expand their reservations.

OR3-19 Strictly speaking economic costing was used for neither the Preferred Alternative nor Refined Alternative 6. By this it is meant that shadow pricing, border pricing and societal opportunity costs were not estimated. If what the comment letter is referring to is funds allocated for a project by the federal government and resources (labor and materials) expended, then both alternatives have expressed economic as well as financial costs. Mention is made of money and materials expended on the Preferred Alternative that represent economic costs as they could be put to use elsewhere (opportunity cost). Indeed federal funds are put to use to acquire water rights from land purchases through Refined Alternative 6, wetlands are destroyed through drying up of the land and are mitigated either through physical measures or purchase into a wetland bank, materials and labor are used in the Change of Use permits to transfer water to an M&I use. All of these can represent economic costs associated with Refined Alternative 6.

OR3-20 Comment noted.

Alt 6 Will Provide Wet Water to the Tribes

A non-structural alternative is the most efficient and practical way to deliver water to the Tribal reservations themselves. In fact, the Preferred Alternative will not deliver one drop of water to the reservations themselves. Although the DSEIS does mention the superiority of Alt 6 to the Preferred Alternative in this regard, it is not listed as a major benefit. If the purpose of this federal action is to "provide the Ute Tribes an assured long-term water supply", it seems that the ability of an alternative to actually deliver water to the reservations would be a major consideration in its effectiveness.

Operations and Maintenance Costs of Preferred Alternative are Benefits of Alt 6

21

Above we showed a total of \$12.07 million in yearly operations costs for the Preferred Alternative. Although there would be some ongoing costs for maintenance of Alt 6, these costs are significantly lower. The only operational cost listed in the DSEIS is dedicated to wetlands avoidance, and is scheduled to cost \$677,100 per year^{xxx}. The difference between these O&M expenses is over \$11 million per year.

Downstream salinity will also decline as agricultural water is changed to M&I use and water is taken off the land as is contemplated in Alt 6. The benefit of this decrease in salinity is not addressed, though it certainly has a fixed and measurable value. This benefit of Refined Alternative 6 should be identified and quantified in the DSEIS and 404(b)(1) Evaluation.

Complexity of Acquisition is Overstated in DSEIS

22

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

Impacts to Indian Trust Asset Impacts are Overstated

23

The Bureau states repeatedly that the non-structural alternative may compromise water rights settlements for the Jicarilla and Navajo Tribes. This concern is not realistic, because a great deal of water can easily be freed-up in each of the river systems by irrigation improvements. Any reasonable quotient of agricultural water could be provided to these tribes through these improvements. Table 2-30 shows a total of 109,000 afy to be available through irrigation system improvements^{xxx}. The DSEIS claims that 8,000 acre feet may be needed to ensure the water rights of the tribes in question^{xxx}.

Wetland Impact is Overstated

24

The DSEIS and 404(b)(1) Evaluation provide insufficient information to assess the methods used to quantify potential wetlands impacts from Alt 6. The DSEIS and 404(b)(1) Evaluation imply that some wetlands adjacent to and depending on ditches would be eliminated as a consequence of

OR3-21 Comment noted.

OR3-22 The complexity of land acquisition on the scale indicated in Refined Alternative 6 is indeed complex and has a high degree of risk associated with being able to satisfy the full complement of water rights from land acquisition and transferring the water from irrigated agriculture to M&I at another locale through a Change of Use Permit. The complexities are further exacerbated in the Pine River Irrigation District where fully one third of the currently irrigated properties will be purchased and dried up under a Change of Use Permit.

OR3-23 It is true that water conservation measures could be used to supply additional water, however, conservation measures will only work if: a supply that would guarantee a good water supply (firm yields) can be obtained; storage is available to store the water when there is excess water in the system; a change to state water law and river compacts would be required if Jicarilla Apache and Navajo Nation water needs in New Mexico are satisfied with water involving water rights in Colorado (where a compact does not provide the authority); and, mitigation for affected wetlands can be achieved. Water conservation measures do not always yield additional water. In fact, water conservation measures yield very little firm water due to dry year shortages. This is why Table 2-30 shows a firm yield of only 19,800 afy when it is assumed that irrigators would limit diversions to 50% of their demand and zero acre feet per year when the irrigations would exercise all their rights during the dry year. During the dry year it is a good possibility that any saved water would be needed for wetlands. This type of water conservation was also projected to cost in the range of \$392 million.

OR3-24 The potential loss of wetland vegetation along irrigation ditches or dependent on such ditches is only one component of the impact analysis. Conversion of irrigated lands to non-irrigated lands would also alter the existing vegetation cover in naturally occurring wetlands, and those that have been enhanced and maintained by irrigation return flows.

24
(con't)

conversion of agricultural water rights to M&I use. This would not be the case unless all of the lands served by the ditch were taken out of production and the ditch abandoned.

A properly designed acquisition program would avoid this impact. Most of the impact to wetlands associated with land acquisition under could be avoided if the 29,700 af of water which has been converted to M&I use in the DSEIS were restored to the Agricultural water which was originally specified in the Settlement Act.

Wetland Mitigation Program Should be Revised

The DSEIS and 404(b)(1) Evaluation include a program to mitigate wetland losses from Refined Alternative 6. This program assumes that each wetland will be mitigated at its current location. In order to do this, the DSEIS includes provisions to deliver water to each wetland associated with an agricultural parcel. These systems are costly to build and maintain. The "mitigation in place" assumption also appears to be the reason that the DSEIS and 404(b)(1) Evaluation conclude that one half of wetlands impacts from Refined Alternative 6 are not "accessible" and therefore cannot be mitigated.

The wetlands that would be mitigated under Refined Alternative 6 are artificial wetlands created by application of irrigation water to agricultural lands. These wetlands are typically small and fragmented and adjacent to or surrounded by cultivated lands. Thus they are of a relatively poor value to wildlife which would benefit from continuous wetlands which would constitute a higher quality habitat. It makes more sense to consolidate mitigation parcels and create new or support existing wetlands that have greater biological significance because of size, location or other characteristics. A carefully planned program of this type would provide more biological value for the same amount of water at a lower construction and operation cost.

This is the same type of mitigation that is planned to replace the lost upland vegetation and wetlands which will be sacrificed to Ridges Basin Reservoir in the Preferred Alternative. Applying this same principle to the wetlands mitigation for Alt 6 is logical. If necessary, more money, and thus more water and other resources, should be made available for mitigation of wetland impacts.

In order to mitigate wetlands impacts resulting from improvements in irrigation ditches, a small amount of water would be left on the land adjoining the newly improved ditches. Through these careful mitigation procedures, wetlands impacts from Refined Alternative 6 can probably be completely or nearly completely mitigated.

It is also important to note that it is likely that many of these wetlands will disappear on their own accord, and will not be subject to federal environmental review if the non-structural alternative is not implemented. Many of the land-water use changes contemplated in Alt 6 are inevitable as land is taken out of production and is subdivided for residential use. These water use changes will dry up wetlands in the same manner as Alt 6, however, these private actions will not be subject to environmental review or mitigation.

Comparative Risk is Overstated

The Bureau concludes that a significant degree of risk threatens the viability of a non-structural approach to resolving Ute water claims. This risk can be lessened by making the changes suggested in this section. The greatest risk concern seems to be the uncertainty of being able to

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OR3-25 The origins of wetlands that are considered under Alternative 6 are both natural and man-induced. These include: (1) natural wetlands associated with water channels and topographic depressions on naturally occurring sediments or within the hydrologic influence of water channels, streams, and creeks; and (2) those created by and maintained by agricultural return flows, or the leaking of man-made ditches and canals. These include a range of vegetation cover types, from wet meadows consisting of grasses, sedges, and rushes, to emergent cattails, and willow/cottonwood riparian habitats. Regardless of origin, all of these wetland types are functionally important to wildlife. Reclamation is in agreement that it would be of greater ecological value to consolidate the compensatory mitigation of wetlands within a larger area. Such efforts would be difficult to implement, however, given the unpredictability of the distribution and location of these lands within the basin. The mitigation for losses would involve a large program of water and land acquisition from willing sellers to provide the elements needed to create replacement wetlands. Assuming one-half of the wetland impacts could be avoided and a mitigation ratio of 1.5:1 for the remainder lost, approximately 900 acres of wetlands (assume 2,700 acres of total land) would need to be developed. The ratio of 1.5:1 assumes restoration of the hydrology that supports wetlands. The mitigation ratio and the lands required for compensation, however, would vary depending on the type of requirement negotiated with federal agencies. The mitigation ratios approved by the EPA, U.S. Fish & Wildlife Service, and other agencies typically are: 3:1 for enhancement, 2:1 for creation, 1.5:1 for hydrologic restoration, and 1:1 for physical restoration. The ratios are negotiated on a case-by-case basis. Based on the range of ratios, to mitigate for the loss of 600 acres of wetlands, it is expected that a range of 600 acres to 1,800 acres of wetlands compensation would be required.

OR3-26 Comment and suggestions are noted. Irrigation is no longer a component of the Animas La Plata Project except for the water rights purchased to provide 13,000 af of depletion. The Settlement Agreement has been modified to describe the M&I nature of the ALP. Please refer to Section 2.3.2 for a discussion of the depletion of 1.4 af per acre used in this FSEIS versus 2.0 af per acre. For land escalation factors refer to the response provided for OR4-6.

purchase 10,000 acres of land in the Pine River Basin. By following the suggestions outlined here, risk can be practically eliminated.

Summary of Improvements and Changes Which Need to be Made to Alt 6

- (1) The 29,700 afy in the Settlement Act of Ag water should be reinstated.
- (2) Irrigation improvements should be utilized to provide all or the majority of the Ag water.
- (3) The available depletion per acre for water transfers should be 2 acre-foot per acre.
- (4) The least costly properties, not the average property, should be acquired.
- (5) The land price escalation factor should be reduced to 4% per annum.
- (6) The value of the land should be shown as a benefit of Alt 6.
- (7) Wetlands impacts should be more comprehensively and rationally mitigated.

Revised Non-Structural Alternative:

If Alt 6 were revised with the above considerations, the following conceptual, non-structural alternative would be feasible:

Yield	Source	Type	Cost	Vol. and Page
26,300 afy	Irrigation improvements in Montezuma Valley	Ag	\$55 million	(Vol 1, 2-55)
3,400 afy	Irrigation improvements in Pine or Florida	Ag	\$14 million	(Vol 1, 2-55)
32,500 afy	Coordinated operation of reservoirs	M&I	\$0	(Vol 1, 2-140)
0	Mitigation, wetlands development	N/A	\$10 Million	(Estimated)
0	Contingency (20%)	N/A	\$16 Million	(Estimated)
Sum: 61,200	Various (most cost effective)	As per Settlement	\$95 Million	

The above table describes how all the water due to the Tribes can be provided to their reservations without building a dam. Some facilities might be necessary to re-work the pattern of delivery to M&I use, but this should be a manageable problem. Given this approach, land purchases are not even necessary. It is also important to note that the total depletions shown above are in excess of the depletions due the Tribes by the Settlement Act (53,728 by our calculations). In fact, the excess totals 8,472 acre feet, which is more than the amount that the DSEIS claims may be necessary to meet the government's obligation to provide water for the Jicarilla and Navajo Tribes.¹⁷ We propose that the \$10 million for wetlands mitigation be devoted to the purchase of land and water to replace and construct biologically significant wetlands to replace the poor-quality wetlands that will be lost as a result of the irrigation improvements.

¹⁷ See DSEIS Vol. 3, 5-6. The authors conclude that "the impact to these Indian trust water requirements is at least 8,000 afy greater [under Alt 6] than under Refined alternative 4".

Summary and Conclusions

The Bureau should reevaluate the conclusions reached in the DSEIS. It is obvious that many of the problems with the Preferred Alternative have been understated while drawbacks of Alt 6 were exaggerated. An objective analysis will show that the merits of Alt 6 make it the clear choice for settling Ute Indian water claims. Local municipalities should rely on their own resources to develop water storage as necessary to fulfill their own needs. Developing local M&I water resources is not the job of the federal government and is contrary to law and precedent.

Respectfully Submitted,



Dylan Norton
San Juan Citizens Alliance

cc. Wes Warren, OMB
George Frampton, CEQ
John Podesta, Office of the President
Mike Connor, DOI
David Hayes, DOI
Steve Lannik, House Resources Committee
Jill Lancelot, Taxpayers for Common Sense
Mark Udall, US House of Representatives

- ¹ DSEIS, Vol. 1, 1-8.
- ² DSEIS, Vol. 1, 2-9.
- ³ DSEIS, Vol. 1, 2-8.
- ⁴ Settlement Agreement of 1986, p. 10.
- ⁵ DSEIS, Vol. 1, 2-72.
- ⁶ DSEIS, Vol. 1, 2-72.
- ⁷ DSEIS, Vol. 1, 2-9.
- ⁸ Settlement Act, Sect 4, Subsection b.
- ⁹ DSEIS, Vol. 2, E-33.
- ¹⁰ DSEIS, Vol. 1, 2-69.
- ¹¹ DSEIS, Vol. 1, 2-122.
- ¹² DSEIS, Vol. 1, 1-7.
- ¹³ DSEIS, Vol. 2, D-16.
- ¹⁴ DSEIS, Vol. 1 3-99.
- ¹⁵ DSEIS, Vol. 1, 3-98.
- ¹⁶ DSEIS, Vol. 1, 3-287.
- ¹⁷ DSEIS, Vol. 1, 2-55.
- ¹⁸ Settlement Agreement of 1986, p. 17.
- ¹⁹ DSEIS, Vol. 1, 2-55.
- ²⁰ DSEIS, Vol. 2, D-9.
- ²¹ DSEIS, Vol. 1, 2-43.
- ²² DSEIS, Vol. 1 2-140.
- ²³ DSEIS, Vol. 1 2-44.
- ²⁴ DSEIS, Vol. 1, 2-148.
- ²⁵ DSEIS, Vol. 2, D-5.
- ²⁶ DSEIS, Vol. 2, D-17.
- ²⁷ DSEIS, Vol. 2 D-17.
- ²⁸ DSEIS, Vol. 2, 5-3.
- ²⁹ DSEIS, Vol. 1, 2-147.
- ³⁰ DSEIS, Vol. 1, 2-55.
- ³¹ DSEIS, Vol. 2, 5-6.



COLORADO RIVER
TASK FORCE

4/17/2000

Mr. Pat Schumacher
Bureau of Reclamation
P. O. Box 640
Durango, Colorado 81301
970 385-6539 (fax)

Re: Draft Supplemental EIS of the Animas-LaPlata Project; Colorado - New Mexico

Dear Mr. Schumacher:

Thank you for the opportunity to submit comments on the recent draft EIS prepared for the Animas-La Plata Project. These comments are submitted on behalf of High Country Citizens' Alliance and the Sierra Club for its SW Regional Conservation Committee and its Colorado River Task Force. HCCA is a local grassroots environmental organization in Gunnison County with over 800 members. The Sierra Club is a national organization with over 600,000 members of which over 40,000 live in the 4-corner states. Members of both organizations live and/or recreate within the region of the Animas and La Plata Rivers and would be affected by actions proposed in the DSEIS.

We do not support the preferred alternative identified in the DSEIS and continue to support Alternative 6, the Animas River Citizens' Coalition proposal. We suggest that the DSEIS has distorted information to rationalize Alt. 4.

To prevent any final choice from being just a phased project, the Record of Decision for this DSEIS must deauthorize any other potential component of this project.

The use of non-binding potential future uses to meet the requirement to identify Purpose and Need is very troubling. Several future uses imply the transfer of tribal water to non-tribal users. There is no consideration of how these future transfers would comply with Reclamation law regarding repayment obligations. Do non-tribal water users get a free ride with the use of non-reimbursable water development?

OR4-1 The use and repayment of project water would comply with existing Reclamation law, unless changed by new legislation. Based on the proposed HR3112, Reclamation does not anticipate any repayment from the three tribes for their water.

2 | To implement a new preferred alternative will require an appearance in Colorado water court to amend the project rights. How does Interior expect the court to respond to a likely claim that without concrete demonstration of beneficial use, this project is based on speculation?

3 | The assumption that all potential future uses will deplete 50% of diverted water is wrong. Some uses deplete less and some deplete more. Without knowing which of the potential uses are actually perfected, it is impossible to know how much water will be depleted and what the impacts will be with the use of the depleted water.

4 | Another troubling deficiency of the DSEIS is the insufficient acknowledgment and assessment of indirect and off-site impacts. With the use of non-binding potential future uses, it is impossible to predict the full range of potential impacts and to what extent they need to be mitigated. This "externalization" of these impacts is unacceptable.

5 | With the uncertainty of whether non-tribal interests can afford the cost of project water or the possibility that some projected end-users may elect to develop alternative sources, how will the reimbursable cost repayment be met? Will federal taxpayers be asked to meet all the costs of projected users who do not exercise their rights to use project water? Does Interior expect federal taxpayers to shoulder the cost of unexpected cost overruns? This project is too speculative to ask federal taxpayers to be responsible for.

6 | It defies logic to suggest that Alt. 6 will not allow a future settlement of Jicarilla Apache Tribe or Navajo Nation water right claims. In reality, it is the preferred alternative that will prevent the full settlement of claims by the two aforementioned tribes.

Finally, it is an insult to the American people to have legislation prepared to implement the preferred alternative before the NEPA process has been completed. It was improper, if not illegal, for the administration to have participated in negotiating with the proponents of this project prior to issuance of the Record of Decision.

Sincerely,



Steve Glazer
 High Country Citizens' Alliance, Water Q/Q program coordinator
 Sierra Club, Rocky Mountain Chapter, Water Resources Committee, Chair.
 Sierra Club, Southwest Regional Conservation Committee, Chair.
 Sierra Club, Colorado River Task Force, Chair.

OR4-2 The Colorado Ute Tribes' 1868 federal reserved water rights are not subject to the beneficial use doctrine of Colorado water law, and the two tribes are not required by the Settlement Act or federal law to have preset uses for their water. Studies conducted for this FSEIS have shown that there is a need for the non-Colorado Ute Indian water to meet future M&I growth in the project area. The Animas-La Plata Water Conservancy District now holds the conditional water rights for the project. Once the project is in place the District would go to the Colorado Water Court and make absolute a portion of the water rights necessary for the project.

OR4-3 An overall depletion factor of 50 percent represents a conservative estimate of future depletions of the ALP Project. It is acknowledged that depletions for a power plant could approach 100 percent and that depletions for municipal use could be 50 to 70 percent. However, the uses by the Ute Tribes are considered to be non-binding and a depletion of 50 percent represents the maximum impacts that could occur with implementation of the ALP Project.

OR4-4 Refer to General Comment No. 6 for a discussion of future water uses and non-binding uses of water.

OR4-5 The costs for non-tribal water is anticipated to be within the contract limits and either less than or equal to any single purpose alternative for this water. If any water is not taken by a non-tribal user, this water could be allocated to one of the tribes for settlement of their remaining water right entitlement in lieu of a payment from the water acquisition fund. Except for any costs for the tribal water which is considered non-reimbursable, the federal taxpayer would not shoulder any cost increases since any appropriate costs would be allocated to the non-tribal water users.

OR4-6 Hydrology studies conducted in the process of completing the FSEIS have shown that less water will be available for future development with Refined Alternative 6 than with Reclamation's Preferred Alternative (Refined Alternative 4) and still meet the flow recommendations for the San Juan River Basin Endangered Fish Recovery Program.

ORGANIZATIONS AND COMPANIES

OR4

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Jill Lancelot
Legislative Director
Taxpayers for Common Sense
COMMENTS TO THE DRAFT
SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT
FOR THE ANIMAS-LA PLATA PROJECT

April 17, 2000

Taxpayers for Common Sense (TCS) is a non-profit, nonpartisan advocate for American taxpayers. We are dedicated to cutting wasteful government spending and subsidies in order to achieve a responsible and efficient government that lives within its means. We reach out to citizens of all political perspectives and transcend ideological differences. Taxpayers for Common Sense is the lead taxpayer group in the Green Scissors Campaign, a joint effort with Friends of the Earth and U.S. Public Interest Research Group. The Green Scissors Campaign marries fiscal conservatism with ecological economics by opposing subsidies for environmentally harmful activities.

Since its founding in 1995, TCS has consistently opposed the Animas-La Plata (ALP) project because of its costs to taxpayers. TCS remains concerned that the Draft Environmental Impact Statement (DEIS) regarding the ALP project does not adequately protect U.S. taxpayers.

Previous documentation of the ALP project contained cost-benefit analyses. Yet, cost-benefit analysis is missing from the current DEIS. Previous cost-benefit analysis of the project determined that the project returned 36 cents of benefits for every dollar spent. The Inspector General of the Department of Interior stated that the project was neither "economically nor financially feasible." Although the DEIS ignores weighing the costs and benefits of the project, two independent economists forecast a very dismal return for the taxpayer. Dr. W. Ed Whitelaw in an analysis for Earth Justice Legal Defense Fund declared that the benefits would be near zero and Dr. Dale E. Lehman states that the new ALP could return as little as 22 cents per dollar of investment.

Omitting cost-benefit analyses is contrary to the requirements of current Reclamation law. The issue of cost has always been at the core of the ALP debates; it is disturbing that cost is not fully addressed in the DEIS.

Furthermore, TCS is concerned that other provisions of Reclamation law may be ignored. Specifically, Reclamation law requires that the costs of federally developed municipal and industrial water must be fully repaid with interest by project beneficiaries.

HR 3122, a bill introduced by Representative Scott McInnis (R-CO), would authorize the most recent version of the ALP project and it is our understanding that

OR5-1 The Bureau's position on the appropriateness of a benefit-cost analysis for the ALP Project is discussed in General Comment No. 1.

ORGANIZATIONS AND COMPANIES

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1 | the Department of the Interior is largely supportive of the basic concepts of this
(con't) | legislation. Yet, H.R. 3112, in direct conflict with Reclamation law, would cap
repayments for project costs at a very low level, and place all cost overruns squarely
on federal taxpayers.

2 | TCS is also concerned that the original authorization remains, in effect holding open
the possibility that the bigger and even costlier ALP project could be built in its
entirety.

TSC acknowledges and respects the commitment to ensure that Tribal water rights
are honored. However, we believe that these obligations should be fulfilled with the
most cost effective alternative.

Mailed to:
Mr. Pat Schumacher
Bureau of Reclamation
P.O. Box 640
Durango, CO 81301

OR5-2 The implementation of the Preferred Alternative as well as the deauthorization
of any purpose of the ALP Project requires legislative action. The FSEIS has
been modified to reflect the most current understanding of proposed legislation
that has been introduced simultaneously with the development of the FSEIS.

ORGANIZATIONS AND COMPANIES

OR6

APR - 6 2000

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Durango, Colorado 81302

April 6, 2000

Dear Mr. Schumacher,

Enclosed are my comments which were submitted for the Animas La Plata Project scoping process.

Since none of the issue I brought up for the scoping process were addressed in the Draft SEIS I am resubmitting them for the DSEIS process.

Sincerely,



Michael Black

OR6-1 Your comments made on behalf of TAR during the Scoping process were noted and considered in the evaluation of the various issues you raised, including the need for a benefit-cost analysis, future water uses, impacts to wildlife, fisheries, and recreation.

1

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Mr. Pat Schumacher, Manager
Southern Division of the Western Colorado Area Office
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The Administration should be applauded for taking a new look at the Animas La Plata Project. However their ALP Ultralite has as many problems as earlier versions. And a rational inspection of the proposal finds it fatally flawed.

TAR supports the administrations concept of deauthorizing all the irrigation features of the original Animas La Plata project.

TAR supports the concept that the Ute water rights are the only Federal issue that needs to be resolved.

TAR also supports the concept that all Municipal and Industrial water costs should be repaid 100% of the costs plus interest. This is a long standing federal policy and any version of the ALP should not be exempted.

Purpose and Needs

Neither the new proposal nor the ALP Lite proposal address the Purposes and Needs for the water stored in Ridges Basin.

Without stating up front what the water will be used for, it is impossible to examine the effects or the benefits of the proposal. It is not satisfactory to say that the Purpose and Needs are to settle the Ute water claims. There must be an examination of the end use of the water included in the proposal.

It is not sufficient to say that the water will be leased out of state or off reservation.

This goal clearly contradicts long standing federal law and policy as well as state law and policy. It is not acceptable to build a project on the speculation that some time in the future laws and policies may change.

The laws and policy should be changed before a massive federal investment is made.

The proposal to store water in Ridges Basin without a described end use for that water appears to violate the Upper Colorado River Compact Article III (2) (b) (2) which states:

“Beneficial use is the basis, the measure and the limit of the right to use.”

Unless the proposal can demonstrate a beneficial use for the water it should not be considered.

The proposal to store water in Ridges Basin without a clear use for that water also appears to be in violation of the Colorado River Compact in Article III (e) which states:

“The states of the Upper Divisions shall not withhold water and the states of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.”

The Ultralite proposal as well as ALP Lite clearly anticipates withholding water which cannot be applied to domestic and agricultural uses.

The original ALP proposal delivered a substantial amount of irrigation water to both Ute Tribes. The Ultralite proposal deletes this water so that only M&I water will be delivered.

This change requires new legal action in water court. Until a substantive use for the water is described it is not legally possible to change the use from irrigation to M&I.

Both the Ultralite or ALP Lite proposals anticipate building a reservoir miles from either Ute reservation with no means of delivering that water to the Ute lands. And without a stated use for that water.. A look at a map will show no viable way of getting water to the Ute reservations. And a look at the same map will show that the amount of water anticipated would be far more than could ever be used in the Animas Valley in Colorado.

That water must be consumed in the 20 mile reach of the Animas valley. Considering the ALP Ultralite proposal anticipates storing enough water for a minimum population of 1/4 million people (there are only 40,000 people in the county today) the proposal is clearly absurd.

An examination of ways to get water to the Ute reservations where there is an actual use for that water must be made.

Ridges Basin

Ridges Basin was chosen as a reservoir site in order to be a conduit for pumping water to the La Plata River Valley. Delivering water to the La Plata is no longer the goal and as a result Ridges Basin makes no sense as a reservoir site. Other reservoir sites must be examined.

The administration proposal envisions pumping water 500 vertical feet into Ridges Basin. This is a very expensive proposition, both financially and environmentally. Without an identified end use, pumping water great distances and elevations should not be considered as a rational alternative.

Ridges Basin was bought by the Nature Conservancy and held for the Colorado Division of Wildlife in the 1970's because it was considered to be the number one elk habitat in the state at the time. Its value as wildlife habitat has only increased in the past 25 years.

Ridges Basin consists of 7,000 acres of low elevation meadows and woodlands. It is the type of area favored by suburban developers in La Plata County. Ridges Basin has discreet boundaries which make it easy to

manage for wildlife habitat. In addition it borders on the Durango city limits. There are few other areas in Colorado where such prime wildlife habitat is in such close proximity to urban areas. It should not be sacrificed for a water project which does not even have a described use for the water.

The proposed federal action will gut Bodo State Wildlife Area. It will destroy nearly half of the wildlife area and make the rest impossible to manage as wildlife habitat.

When the ALP in all its manifestations proves unfeasible the Bureau of Reclamation land in Ridges Basin should revert back to the Colorado Division of Wildlife.

Alternatives

A comprehensive look at existing water projects in the San Juan Basin should be undertaken to examine possibilities for settling the Ute claims. Specifically, Navajo Reservoir, Jackson Reservoir, Vallecito Reservoir, McPhee Reservoir, Lemon Reservoir should be examined to determine amounts of water which could be delivered to the tribes. In addition an examination of water conservation and efficiency measures should be undertaken in order to reveal opportunities to deliver water to the tribes.

In addition an examination should be made of existing reservoirs as alternatives to M&I water supplies for the cities of Durango, Aztec, Farmington and Bloomfield.

For example. The city of Durango presently takes the majority of its water from the Florida River. Durango's intake structures are 7 miles downstream from the federally constructed Lemon reservoir. There are no engineering problems that would prohibit Durango from storing water for future needs in Lemon Reservoir, only paper problems.

As suburban development proceeds in the Florida Project area water

that was formerly used for irrigation will be converted to M&I uses. An examination of this trend will reveal that this water will be converted in the same time frame that Durango needs additional storage. Examination of this situation is crucial.

It makes no sense to build a massive and expensive water project to serve the needs of a community which could be better served by an existing and cheaper federal water project.

A similar situation exists on the San Juan River with the federally financed Navajo Project lying upstream from the New Mexico cities. An examination of opportunities of storing New Mexico M&I water must be made

Recreation

It has been proposed that the reservoir in Ridges Basin should be increased from 90,000 to 120,000 af for the Ultralite project.

An honest search for alternatives will reveal many opportunities for solving the Utes water rights issue without any reservoir in Ridges Basin. However an examination of the Ridges Basin reservoir proposal should not take seriously an increase in the reservoir size for recreation.

It is clear from the statements of the proponents that they wish to increase the recreational opportunities and reservoir size simply in order to get greater federal subsidies for the project. Recreational costs are non reimbursable. The federal taxpayer should not be responsible for costs which are designed primarily to increase the cost to the federal taxpayer.

Other cities go to great lengths to protect their drinking water supply. By increasing recreation in the proposed reservoir at Ridges Basin it will insure that the water will be contaminated.

Public Participation

An effort must be made to ensure an open and public process resulting from the scoping process.

ORGANIZATIONS AND COMPANIES

OR6

The proponents of the ALP negotiated their Animas La Plata Lite in total secrecy. No public hearings were held, no public discussions resulted.. And no information was released about the proposal except carefully crafted press releases.

The administration has been meeting in secret to negotiate terms of the Ultralite proposal.

This process of secrecy must be halted. The expenditure of tax money should be done in public view, not behind closed doors.

There is much distrust with the Scoping process because of past incidence of secrecy. Interior and the Administration should take steps to ensure the public participation and the honest collection and distribution of data from the process.

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April 15, 2000

Re: Comments Draft Supplemental Environmental Impact Statement April
2000

The Animas La Plata Project Draft Supplemental Environmental
Impact Statement is not sufficient on a number of grounds.

The Bureau of Reclamation seems to believe that an Environmental
Statement should be graded on it's weight and the amount of dollars
expended in producing it. In fact it should be graded on the quality of the
information it reveals. This latest attempt to comply with the National
Environmental Policy Act is an abject failure.

NEPA requires that an environmental impact statement provide full
disclosure to the public. To be usable, a statement has to be readable.
According to 40 CFR 1502.2 " The document should be written in a clear,
concise fashion. . . "

The ALP DSEIS fails miserably. It is, practically speaking, unreadable
and far from concise. It is designed to obfuscate the facts, not reveal them.
The format is confusing in the extreme. It forces the reader to wade
through confusing documentation in order to discover the costs and
impacts of the proposal.

40 CFR 1502.2 also states " The text and appropriate graphics should
be presented so the decision makers and the public can readily understand
them." The DSEIS fails this requirement of law.

An environmental impact statement is supposed to be a decision

making document. NEPA Handbook, Bureau of Reclamation, sec 4-2 states: " The document should not be written in such a way that it appears to justify decisions already made or to promote an alternative."

It is obvious that the decisions regarding the DSEIS have already been made, that the DSEIS is written to justify these decisions. Much information has been left out of the document, other information has been intentionally skewed in order to make the Bureau's favored proposal look more practical.

Economic analysis needs to be included in the DSEIS, specifically a Benefit/Cost Analysis. B/C analysis was done on earlier proposals. The Bureau offers no justification for deleting the analysis in the most recent document.

But the reason for the lack of B/C analysis is clear. An honest analysis will show that the present ALP plan lacks any semblance of justification. Simply put: there are no benefits.

This is acknowledged by the Bureau in their use of "Nonbinding Use Scenarios" rather than describing actual use for the water.

The ALP has been on the drawing board for over 40 years, and in that time the Bureau has been unable to find a legitimate use for the vast bulk of M&I water associated with the project.

If the M&I water is not used, there can be no benefits associated with that water. And if a use is not made, the Federal taxpayers will be forced to subsidize massive expenditures for no benefit.

The value of water is, like the value of any other commodity, what the users are willing to pay.

The value of the ALP water is clear from the latest ALP proposal. The federal government will pick up all the construction costs for tribal water. In addition, the federal government will subsidize the Operation, Maintenance and Replacement costs for the water, leaving a 100% subsidy

OR7-1 Refer to General Comment No. 1 for Reclamation's position on the appropriateness of a benefit-cost analysis for the ALP Project.

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to the Tribes.

In other words, the benefiting entities, the Ute Tribes, are willing to invest nothing into the project. Which shows conclusively their opinion of the value of the water.

2

Federal reclamation law requires that M&I water be paid for 100% of its cost plus interest. That rule should apply to the ALP, in any configuration.

The Purpose and Needs described in the DSEIS do not justify the environmental damage and great cost of the proposal. It is not sufficient to simply state that the Purpose and Needs is "provide for identified M&I water needs in the Project area." Those Needs have to be identified.

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For openers, the DSEIS identifies very few M&I water "needs." Instead it identifies "Nonbinding Use Scenarios", which in no way are sufficient to justify the expense of the Project.

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The Bureau should disclose legal precedent for using "nonbinding use scenarios" in the NEPA process.

If the potential water uses are as far into the future as the Bureau discloses, this cannot justify construction of the ALP today.

Western water law is based on the doctrine of use. One does not own the water, rather, one owns a right to use that water. This doctrine applies to all water users, including Native American water users. Without a use the water should not be developed.

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The ALP as described in the DSEIS is a system to deliver water to a certain point, Ridges Basin. Yet despite years of study the Bureau has failed to substantiate a use for vast majority of the water at that point.

The Bureau claims that most of the water in the ALP will go for a "regional water supply." This appears to be synonym for water marketing of tribal water across state lines, perhaps from the Upper Colorado River

OR7-2 Repayment of project costs allocable to the Colorado Tribes is subject to legislative actions currently being contemplated by Congress. Attachment E of the FSEIS (see Volume 2) has been updated to reflect the current understanding of costs to be reimbursed.

OR7-3 Refer to General Comment No. 12 for a discussion of future water uses. A projection of future water uses that may be implemented by the Colorado Ute Indian Tribes is included in the FSEIS to comply with NEPA guidelines to provide as much information about future related events as feasible. If and when any of these future water uses are implemented, a NEPA analysis will be conducted, tiering from this FSEIS. A discussion of NEPA "triggers" is included in Section 2.5.2.

OR7-4 The FSEIS has considered reasonable alternatives to the federal action being considered, and a range of possible future water uses by the Colorado Ute Tribes is provided for illustrative purposes only. NEPA does not require a detailed analysis into every possible use of water, only a brief discussion describing future developments and their potential environmental effects as well as a discussion of reasonable alternatives not within the jurisdiction of the lead agency. ((NRDC v. Morton, 458 F. 2d. 827, 837 (DC Cir 1972)). However, implementation by the Colorado Ute Tribes of any of these non-binding water uses, or other water uses, would trigger NEPA compliance (see Section 2.1.1 of the FSEIS). Refer also to the discussion of future water uses in General Comment No. 6.

OR7-5 Ridges Basin is intended to serve a storage function, not an end use.

6

Basin to the Lower Colorado River Basin.

Such water marketing is contrary to the long stated policies of the states of Colorado and New Mexico as articulated by the New Mexico State water engineer at the Farmington N.M hearing on the DSEIS. In addition it is contrary to the Colorado River Compact, the Upper Colorado River Compact, reclamation law and reclamation policy as well as the Ute Indian Water Rights settlement Act of 1988.

The Bureau should disclose just what federal and state laws must be changed in order to achieve water marketing, as proposed. It should disclose what federal and state policies must be changed in order to make water marketing achievable.

It is not the Bureau's responsibility to change those laws and policies, but full disclosure of the facts is their responsibility and the purpose of the DSEIS. The Bureau must make clear what laws and policies need to be changed, in order for the proposal to go forward.

On pg. 1.1 It is stated "However, not all such uses (of M&I water) are currently know (sic).

This admission by the Bureau is justification in itself to reject the DSEIS and the Project.

The Evaluation of Alternatives described in section 2.3 is insufficient and should be rejected. It appears that the Bureau has intentionally mischaracterized the non-structural alternatives.

The Romer/Schoettler Process identified 64 different alternatives to the ALP. The DSEIS only investigates 2 nonstructural alternatives.

The Bureau failed to completely investigate Alt 9, Citizens Progressive Alternative, dismissing it out of hand without disclosing the benefits that might accrue from this plan. The plan may or may not be politically feasible. But an analysis of the benefits of the proposal would give the public and decision makers a baseline to compare the other

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OR7-6 Chapter 3 states that some of the actions proposed for the non-binding scenarios would require changes or modifications to some interstate water agreements and state water law regulations before the actions could take place. Although these depletions, enhancements, and streamflow modifications would affect the water resources of the region, all interstate water agreements and state water law regulations must be followed. Attachment D in Volume 2 of the FSEIS also discusses water right considerations and what would be required if the Colorado Ute Tribes were to use some of their water in New Mexico.

OR7-7 The Citizen's Progressive Alternative was evaluated equally at the appraisal level with the other nine alternatives.

proposals.

The Bureau has made a number unwarranted assumptions regarding Alt. 6, the Animas River Citizens Conceptual Alternative. These assumptions appear designed to make this alternative appear as bad as possible in the analysis.

As the title stated, Alt 6 was a "conceptual" alternative. Yet the Bureau failed to contact any of the people involved in developing Alt 6 in order to further refine it. Their lack of communication is a clear indication they were uninterested in honestly evaluating it. Rather, they sought to sink it.

The ARCC Alternative was an alternative to the entire ALP, which included providing irrigation water to the tribes. By converting all of the water to M&I purposes the Bureau has increased the impacts and decreased the benefits. Alternative 6 never intended to use the water strictly for M&I purposes and should not be analyzed in that manner. The bureau needs to investigate the benefits of Tribal water being used for irrigation purposes.

The Bureau admits that if the water is left on the land the impacts would be minimal.

Alternative 6 envisioned the water use to remain unchanged, that is to continue to irrigate the land, until such time as other uses were found for that water. The admission by the Bureau, by using "nonbinding use scenarios" and that future uses of M&I water are unknown, shows that the conversion of irrigation water to M&I water would not occur until far into the future, if ever.

By continuing to irrigate tribal land through the purchase of land and or water, the tribe could receive the benefit of that water either through tribal members becoming farmers or through leasing the land to non-tribal members.

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OR7-8 The limited time afforded to develop more definition to the various alternatives required Reclamation to unilaterally develop the definitions. An objective process was followed to refine Alternative 6 to modify it so that if implemented, it could satisfy the purpose and need of the project. This is explained in Section 2.3 of the FSEIS.

OR7-9 It was necessary to restrict the use of water in Refined Alternative 6 to assure that the alternative would meet the project's purpose and need.

This alternative should not be opposed by local farmers because it would keep the land in agricultural production. Southwest Colorado needs to maintain a critical mass of agricultural land for the benefit of all farmers. Converting the land to tribal lands would not harm the agricultural base in any way. To suggest otherwise is to make racist claims that the Ute people are incapable of farming.

The DSEIS shows that the local tax loss in converting land and or water rights to tribal land and water would be minimal.

The Bureau failed to adequately investigate Navajo Reservoir as a water source for New Mexico communities and the Ute Tribes. They failed to describe water exchanges which are practical between the Animas and San Juan Rivers. Such exchanges are envisioned as a practical way of delivering ALP water to the City of Bloomfield, which is sited on the San Juan.

Such exchanges involving Animas river water, can be accomplished for the other New Mexico entities as well. The bureau failed to investigate this crucial portion of the ARCC Alternative and the DSEIS is incomplete until such analysis is done.

In a similar manner, the Bureau has failed to investigate the possibilities of delivering Florida River water to the city of Durango.

Such evaluation must be completed.

Analysis of delivering water from the Pine River Project must also be completed. It is our understanding that the latest proposal for Pine River Irrigation Project M&I delivery system envisions delivering water to the Grandview area, just east of the Durango City limits. This point of delivery is higher in elevation than Durango and could serve as a future water supply for the City.

An analysis of this option needs to be thoroughly explored.

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OR7-10 Reclamation evaluated, under Refined Alternative 6, the potential to better utilize the waters of Navajo Reservoir and other streams in the upper San Juan River Basin. These results are described in this FSEIS. Although water exchanges were not specifically addressed, both Refined Alternative 4 and Refined Alternative 6 have significant water right purchases.

OR7-11 The potential for obtaining water on the Florida River from water conservation was evaluated and included in Section 2.5.2. The purchase of water rights in the Florida River Basin is a component of both Refined Alternative 4 and Refined Alternative 6.

OR7-12 The M&I system for the Pine River would replace water that is presently being pumped from wells and would total approximately 2,000 afy. As noted in the supplement, water from Vallecito was investigated as a source of M&I water (see Section 2.4.1).

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The impacts of construction of a reservoir in Ridges Basin have not been adequately described. The text is very confusing.

On pg 3-82 it is stated that "The combined adverse impact would be approximately 3,000 acres of wildlife habitat." yet the Bureau acknowledges that in fact all of Ridges Basin Wildlife Area will be significantly impacted.

Ridges Basin consisted of over 7,000 acres of land bought in the 1970's for wildlife habitat. Since that time the Bureau has condemned approximately 3,000 acres of that land for the reservoir site. At present time that Bureau land has been managed as wildlife habitat.

In fact, all 7,000 acres of the original Bodo Wildlife Area will be significantly impacted by the proposal. The DSEIS should reflect this and state that fact in unambiguous terms.

14

The description of Ridges Basin recreation on pg 3-174 is absurd. To begin with, Jane Zimmerman of the Durango Area Chamber Resort Association is recognized by no one as an expert on area recreation and her opinions that "more superior opportunities" for recreation should not have been included. The value of Ridges Basin for hunting should be acknowledged.

Secondly, the fact that relatively little recreation, aside from hunting, is occurring in Ridges Basin is an added benefit for a wildlife area. Recreation is often incompatible with wildlife habitat, something which should be recognized in the analysis.

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And the value of protected wildlife habitat in close proximity to an urban area needs to be revealed, not dismissed out of hand.

OR7-13 Working with the U.S. Fish and Wildlife Service, Reclamation estimated that direct impacts to wildlife habitat at Ridges Basin would occur on approximately 1,500 acres. Another 1,200 to 1,400 acres would be indirectly affected. This is considered a significant impact and mitigation is included in the project plan. The impact at Ridges Basin could be much greater than predicted if recreation use, vehicular access, and other factors are not controlled. The project plan includes measures to prevent this from happening. For example, recreation developments will not be permitted on the west or south shores of the reservoir and migration corridors will be protected. Mitigation commitments to wildlife are described in Section 5.4.5 of the FSEIS. The land that Reclamation purchased in Ridges Basin was not obtained through the condemnation process.

OR7-14 Reclamation agrees that "more superior opportunities" for certain activities are available at areas other than the proposed site of Ridges Basin Reservoir. Reclamation acknowledges that hunting is one of the primary activities mentioned as wildlife observation. Impacts to wildlife and wildlife habitat caused by construction of the proposed Ridges Basin Reservoir and proposed mitigation measures are not discussed in the Recreation section. See Section 3.5 of the FSEIS for potential impacts to wildlife and their associated habitats.

OR7-15 Reclamation agrees that the Ridges Basin area is a valuable wildlife habitat. Urbanization surrounding the area does not detract from the value through increased traffic, human disturbance, and other factors; however the values are significant and need to be protected. Mitigation measures to replace lost habitat and protect remaining habitat are included in the project plan.



David Nickum
Western Water Project
Colorado Office

April 17, 2000

Mr. Pat Schumacner
U.S. Bureau of Reclamation
835 East 2nd Avenue, Suite 300
Durango, Colorado 81301
Via Fax: 970-385-6539 (hard copy to follow)

Dear Mr. Schumacher:

I am pleased to provide these comments on the Animas-La Plata Draft Supplemental Environmental Impact Statement (DSEIS) on behalf of Trout Unlimited (TU). TU's 119,000 members, including over 6,800 in Colorado, are dedicated to preserving, protecting, and restoring coldwater fisheries and their watersheds. Our members fish and are actively involved in conservation efforts on southwest Colorado waters that would be affected by the Animas-La Plata project.

Alternatives. TU's primary concern is protection of aquatic resources. This means maintaining flow regimes and physical habitat that will sustain aquatic communities over the long term. This is especially important for the Animas River's Gold Medal fishery - the only Gold Medal fishery in southwest Colorado (i.e., the San Juan and Dolores basins). Gold Medal fisheries are marked both by good total biomass (at least 60 lbs. per acre) and by the presence of larger "quality size" trout (at least 12 fish >14 inches per acre), and therefore are uniquely valuable aquatic resources. If the project - under any alternative - leads to a reduction in the fishery below Gold Medal standards, the Bureau should adjust operations and mitigate to restore this unique trout fishery. The Bureau's preferred alternative (Refined Alternative 4), as outlined in the DSEIS, does not provide adequate protection for aquatic life in the Animas River or maintenance of its Gold Medal fishery. Therefore, the Bureau must either modify this alternative to better protect the fishery or select a less-damaging alternative.

Hydrology/bypass flows. We are pleased that, for its preferred alternative, the Bureau would require bypass flows for the Animas River (160 cfs October-November, 125 cfs December-March, 225 cfs April-September). However, it is far from clear that these flows are adequate to sustain aquatic life, including the unique Gold Medal fishery, in a river that has an average monthly flow of 792 cfs under baseline conditions (Table 3.2-4). We understand that the Colorado Division of Wildlife's historic analysis using R2CROSS (the method used for establishing minimum instream flow quantities by the State of Colorado) recommended a winter flow of 160 cfs. The R2CROSS method calculates a minimum flow. Yet, it is important to consider not just minimum flows, but the overall flow regime. Maintaining only minimum flows can substantially reduce the health of aquatic communities. See, Poff, N., et al., "The Natural Flow Regime" 47 BIOSCIENCE 769 (1997). Using 792 cfs as an approximation of mean annual flow, the Tennant method would recommend winter (October - March) flows of approximately 160 cfs to maintain "good" habitat quality - or 240 cfs to maintain "excellent" habitat, as befits a Gold Medal fishery. In contrast with the Bureau's preferred alternative, Alternative 6 - would

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OR8-1 Three seasonal bypass flows of 225, 160 and 125 cfs are predicted to be sufficient to maintain most downstream aquatic resource values, especially the artificially maintained trout fishery. This artificial designation and the standards that were derived for this designation are largely controlled by the State of Colorado. Reclamation believes that sufficient downstream trout habitat will be available to maintain this designation but that would depend mostly on how the state of Colorado applies fish management techniques including stocking practices, availability of trout and through regulatory practices.

OR8-2 While Reclamation acknowledges and supports the concept of a "Gold Medal" trout fishery on the Animas River, Reclamation believes that factors currently exist that severely limit natural reproduction and recruitment of trout in the system. These limiting factors are independent of the proposed project, and Reclamation believes that these cannot be alleviated through project mitigation. Historically, trout reproduction did not occur in the Animas River below Durango, and it is not surprising that significant reproduction does not currently take place with the hatchery - maintained fishery. That does not mean that project operations would effect the ability of the State to maintain this classification. Identifying a 792 cfs average monthly flow is misleading. The Animas River has, and would continue to be, a river providing flow in a natural manner. In the western United States this means an extreme variability in flow. For example, it is typical for the Animas River to range from 5,000 cfs to nearly 100 cfs as measured in Durango. Also, flow in the Animas River is subject to rapid, extreme fluctuations that negatively impact the existing trout fishery. Spring run-off now limits habitat for trout as well, especially for smaller life stages. Natural and man-induced water quality problems also negatively impact the trout fishery, in particular successful trout spawning. This is primarily impacted by suffocation of eggs within spawning redds caused by natural accumulation of sediment that reduces, or eliminates, required dissolved oxygen supply to the incubating eggs, thereby killing them. These limiting factors identified are not related to the effect of project operations. In fact, Reclamation believes these limiting factors to be far more significant in their cumulative adverse impact to the Animas River trout fishery. Your reference to the Tennant Method is inappropriate in the case of the Animas River. Natural river flow in the Animas River falls well below the 160 cfs level during most winters. Also, as expressed above, there are other, much more significant factors that reduce the effective carrying capacity of the Animas River for trout. Alternative 6 would not have any effect on the Animas River although it could have significant impact on the Pine River aquatic ecosystem depending on how it was implemented.

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Mr. Pat Schumacher
 April 17, 2000
 Page Two

maintain flows below the Durango Pumping Plant in the Gold Medal reach at appropriate levels. See, Table 3.2-8.

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While fishery impacts are discussed elsewhere in the DSEIS, TU is disturbed that in assessing the significance of impacts on water resources (significance criteria, 3.2.2.2) the Bureau has ignored resident aquatic life. Criteria only address existing and future water uses, impacts on flow recommendations for endangered fish in the San Juan, and impacts to Indian trust water rights. It is difficult to believe there would not be significant impacts to resident aquatic life under a Refined Alternative 4 that would reduce mean monthly flow below the Durango Pumping Plant by more than 20% in seven months of the year, and by more than 30% in the "shoulder" months of October and March (Table 3.2-4). Yet, because resident aquatic life is ignored in the hydrology analysis, the Bureau concludes that there would be "less than significant" impacts and no mitigation is proposed. The Bureau must honestly and fairly examine the hydrologic impacts to the existing fishery prior to issuing a final SEIS.

OR8-3 Reclamation has revised its analysis in Section 5.4.6 of the FSEIS to more firmly commit to mitigation measures for aquatic resources to include effects on trout habitat.

4

Aquatic Resources Criteria. In determining whether impacts to aquatic resources are significant, the DSEIS uses a criterion of 15% decrease in average depth or in wetted perimeter. However, no biological basis for a 15% threshold is provided – making this criterion appear quite arbitrary. The DSEIS offers no data on changes in "weighted usable area" among alternatives (a measure of habitat availability for fish), nor does it couple its review of depth and wetted perimeter with the third criterion – velocity – used by the State of Colorado in developing instream flow recommendations. Even with the limited criteria used for the DSEIS, the Bureau's preferred alternative would result in decreases in average depth that would not meet the criteria below the Durango Pumping Plant. Decreases over 15% in riffle habitat are noted in October, November, March, April, and August, and for run habitat in October, March, April, and August (average year figures – Technical Appendix 5). Yet for these months, the DSEIS dismisses the very criterion that it established for "significance" by shifting to a new criterion for absolute depth (one foot depth in riffles). Even so, average depths do not meet either this criterion or the 15% criterion in average years for October, November, or March. Nonetheless, the DSEIS acknowledges only "less than significant" impacts for Refined Alternative 4, and only for the month of October. In the final SEIS, the Bureau should not only use an appropriate set of criteria by which to judge the impact of the alternatives, but the Bureau must also admit the significance of the impacts that these criteria measure for the preferred (and other) alternatives. Only with this analysis can the Bureau prepare an adequate mitigation plan.

OR8-4 As described above, Reclamation has revised Section 5.4.6 of the FSEIS to more fully commit to mitigation for affected aquatic resources in the Animas River.

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Mitigation. The DSEIS indicates that the Animas River is predominantly a stocking-dependent fishery, and appears to downplay the importance of habitat protection as a result. This is reflected by the proposal for implementing a stocking program to compensate for reduced trout habitat (Mitigation for Refined Alternative 4 Aquatic Resources Impact 1). This approach is completely inadequate because it overlooks three vital issues: (1) natural reproduction, (2) improving water quality and (3) the existing stocking strategy and habitat needs for stocked fish.

OR8-5 There are no data that demonstrates that natural reproduction and recruitment of trout in the Animas River is significant. On the contrary, information collected over the last thirty years clearly shows the dependence of the trout fishery on regular stocking. Water quality in the upper Animas River watershed has improved to allow for trout and other aquatic life to exist in streams that once were devoid of life. This improvement in water quality upstream of Durango has not been shown to significantly improve conditions downstream, to include any significant increase in successful natural reproduction and recruitment. Reclamation does not agree that a self-sustained wild trout fishery can be established in the Animas River. Reclamation has provided mitigation for the Animas River to include minimum seasonal bypass flows, minimizing entrainment and impingement of small fish at the Durango Pumping Plant and has committed to stocking trout from the pumping plant to Bondad for the life of the project. Reclamation believes these mitigation commitments fully offset the effects of the project on trout and their habitat within affected portions of the Animas River. These commitments are consistent with the mitigation recommendation made to Reclamation by the U.S. Fish and Wildlife Service under the Fish and Wildlife Coordination Act.

First, natural reproduction, though limited, has been documented for the Animas River consistently in recent years. Whichever alternative and mitigation package the Bureau finally

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chooses must maintain and encourage the river's wild trout fishery. Thus, the Bureau must revise its mitigation package in the final SEIS to include such measures.

Second, ongoing efforts to address water quality problems in the watershed should allow for enhanced natural reproduction in the future – if flow changes do not preclude such improvements. The enhanced brown trout fishery of the Arkansas River stands as a model for how self-sustaining fisheries can rebound under improved water quality conditions. In the final SEIS, the Bureau cannot ignore the likelihood of continuing water quality improvement and how that will foster the nascent wild fishery.

Finally, even for stocked fish, maintaining adequate habitat is important. Stocking in the Animas relies on the “put-and-grow” approach, in which fingerling trout are introduced and then allowed to grow in the river (including growth in adult fish up to “quality size”). This stocking strategy thus relies on continued habitat for juvenile and adult trout. Simply expanding fish stocking programs fails to address these issues and is not adequate mitigation.

The final SEIS must describe a mitigation program that takes into account the wild fishery, improving water quality and the existing stocking strategy. The Bureau should focus its mitigation on the root cause of the problem: changes in the flow regime that impair trout habitat. To this end, the final SEIS must require substantially increased bypass flows—to preserve Gold Medal quality habitat—or a change of alternative to one that will not impair trout habitat.

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Ramping Rates. The DSEIS proposes ramping rates of 50 cfs per hour (upramp) and 100 cfs per hour (downramp). During the lower flow season (August through March), these rates would allow for a substantial change each hour. For example, a reduction of 100 cfs in flow in October would represent a drop in approximately 40% based on the mean monthly flow (Table 3.2-4). It would represent an even larger percentage change for other winter months. The Bureau must revisit the issue of ramping rates prior to issuing its final SEIS to ensure that the rates do not result in stranding fish.

In short, TU is concerned that the Bureau's preferred alternative does not provide adequate protection to a unique fishery resource. The proposal does not address flow impacts beyond the issue of base flow protection, and even the proposed bypass flows are inadequate. Ramping rates (100 cfs per hour downramp) appear to allow for rapid and significant changes in stage during lower-flow periods, resulting in the risk of fish stranding. Proposed mitigation for the trout fishery – increased stocking – fails to address the naturally reproducing populations, the future potential of the fishery as water quality improvements continue, and the need for juvenile and adult fish habitat even under stocking-based strategies. The Bureau should either modify its alternative to address these shortcomings or select a less damaging alternative for meeting tribal water entitlements.

OR8-6 The purpose for establishing ramping rates was to minimize stranding of both native fishes and trout during drawdown (increased pumping), as well as to minimize impacts to aquatic communities. An increase in pumping not to exceed 50 cfs/hr (stage decrease) and a decrease in pumping not to exceed 100 cfs/hr (stage increase) would not result in significant stage changes during flows above approximately 500 cfs (i.e., 50 cfs/hr equals 10% and 100 cfs/hr equals 20% of 500 cfs). Reclamation acknowledges that at lower flows, these ramping rates could substantially change river stage. Based on TU's concern, Reclamation has refined ramping rates at less than, or equal to, 500 cfs, such that an increase in pumping will not exceed 25 cfs/hr and a decrease in pumping will not exceed 50 cfs/hr (i.e., 25 cfs/hr equals 10% and 50 cfs/hr equals 20% of expected normal low flow of approximately 250 cfs).

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Thank you for this opportunity to comment.

Sincerely,

A handwritten signature in cursive script that reads "David Nickum". The signature is written in black ink and is positioned above the printed name.

David Nickum

cc: Bruce Babbitt, Secretary of Interior
Representative Scott McInnis
Senator Ben Nighthorse Campbell
Greg Walcher, Director, Colorado Department of Natural Resources
John Mumma, Director, Colorado Division of Wildlife
Steve Malloch, TU Western Water Project, Virginia
Melinda Kassen, TU Western Water Project, Colorado
Maggie Lockwood, TU
Tom Krol, Colorado Trout Unlimited