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April 20, 2000

VIA E-MAIL /FACSIMILE/FIRST CLASS MAIL

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

Re: **Comments of the Jicarilla Apache Tribe on the Draft Supplemental Environmental Impact Statement for the Animas-La Plata Project**

Dear Mr. Schumacher:

On behalf of our client, the Jicarilla Apache Tribe, we submit the following comments on the January 2000 Animas-La Plata Project ("ALP") Draft Supplemental Environmental Impact Statement ("DSEIS"). The Jicarilla Apache Tribe supports a structural alternative that satisfies, and thereby settles, the water rights claims of the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe (collectively the "Colorado Ute Tribes"). The Jicarilla Apache Tribe is concerned, however, that the Bureau of Reclamation ("Reclamation") has not adequately analyzed or mitigated the impacts on the Jicarilla Apache Tribe's own water rights. Thus, with the necessary revisions to the analysis and commitments to mitigation as discussed herein, the Jicarilla Apache Tribe supports Refined Alternative 4.

In the DSEIS, Reclamation deemed Refined Alternative 4 to be the Preferred Alternative. Of primary importance to the Jicarilla Apache Tribe, however, is the fact that both the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe endorse Refined Alternative 4. See, e.g., Margo MacFarland, "Ute Leader Visits D.C. to Push A-LP Project," Durango Herald, Feb. 9, 2000 (containing statement of support for Refined Alternative 4 by Southern Ute Indian Tribe); see also Tom Sluis, "Dam Proves Unpopular at A-LP Hearing," Durango Herald, Feb. 16, 2000 (containing statement of support for Refined Alternative 4 by Ute Mountain Ute Tribe). The Jicarilla Apache Tribe fully supports the sovereign rights of the Colorado Ute Tribes to make their

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own determinations as to which alternative posed in the DSEIS would settle their senior water rights claims through the assurance of a long-term water supply. Moreover, the Jicarilla Apache Tribe supports the Colorado Ute Tribal governments' determinations that Refined Alternative 6 is fraught with too many legal uncertainties to meet the overarching commitments already made to them in their previously-enacted Indian water rights settlement.

The Jicarilla Apache Tribe also respects the Navajo Nation's desire to provide a reliable water supply to its members in the eight chapters in the Shiprock, New Mexico area. Of the two alternatives selected for detailed study by Reclamation in the DSEIS, only Refined Alternative 4 provides the Navajo Nation with water to serve the municipal and industrial demands of those chapters. Refined Alternative 6 does not address this unmet, basic need, nor any other water needs of either the Navajo Nation or the Jicarilla Apache Tribe.

For the foregoing reasons, and because Refined Alternative 6 does not even meet the purpose and need for the DSEIS, the Jicarilla Apache Tribe advocates that Refined Alternative 6 be given no further serious consideration by Reclamation. Consequently, these comments focus on the Jicarilla Apache Tribe's concerns with the analysis and mitigation for Refined Alternative 4.

While the Jicarilla Apache Tribe supports a structural alternative to fulfill the United States' commitments to the Colorado Ute Tribes, the Jicarilla Apache Tribe remains concerned about the deficient analysis of impacts to its trust assets. Some of the analysis is flawed simply because information about the Jicarilla Apache Tribe's water development plans was not available to Reclamation when the DSEIS was issued. Other portions of the analysis do not pass muster, however, because less weight is given to impacts on the Jicarilla Apache Tribe's adjudicated water rights (and the Navajo Nation's proposed Navajo-Gallup Water Supply Project) than to non-Indian water rights, and impacts on the Jicarilla Apache Tribe's trust assets are not explicitly addressed or mitigated. In addition, certain hydrologic modeling assumptions are not realistic.

1 To comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA") and Reclamation's trust responsibility, the Final Supplemental Environmental Impact Statement ("FSEIS") must include the most recent information about the Jicarilla Apache Tribe's water development plans, give full weight to impacts on the Jicarilla Apache Tribe's trust assets, and explicitly address and fully mitigate those impacts. If certain erroneous hydrological modeling assumptions and analyses are corrected, any perceived conflict between fully mitigating impacts to Jicarilla Apache Tribe and meeting Reclamation's trust responsibility to the other three tribes should be significantly lessened, if not eliminated.

TR1-1 The proposed Navajo River Water Development Plan has been incorporated into the FSEIS in Section 4.3.3 and project impacts to this proposed plan are evaluated in Section 4.6.4 of the FSEIS under Indian Trust Assets.

1. THE JICARILLA APACHE TRIBE'S WATER RIGHTS IN THE SAN JUAN BASIN

The Jicarilla Apache Indian Reservation, straddling the Continental Divide in northwestern New Mexico, was created by a series of Executive Orders between 1874 and 1908. The only perennial stream on the reservation is the Navajo River, which is tributary to the San Juan River. Despite the Tribe's efforts, the Jicarilla Apache Tribe was not originally included as a beneficiary of any federal water resource development project, although two such projects were in close proximity to the Reservation. See Attachment 1, "Contract Between the United States and the Jicarilla Apache Tribe" (executed December 8, 1992) ("Settlement Contract") at 1. Once operational, the San Juan-Chama Project, authorized in 1962, diverted fifty-two percent (52%) of the average annual flow of the Navajo River upstream from the Tribe's Reservation. See id; see also *San Juan-Chama Project: Hearing Before the Subcomm. On Energy Research and Water Resources of the Senate Comm. on Interior and Insular Affairs*, 94th Cong. 84 (1975)(BIA Reconnaissance Report, Water Resources Inventory). The Navajo Reservoir, authorized in 1956, impounded water downstream from the Reservation.

Beginning in 1975, the Tribe filed a number of lawsuits against the United States to protect its water rights. The Tribe claimed, among other things, that the United States and the State of New Mexico had ignored the Tribe's water rights in planning for future use of the waters of the San Juan River Basin. Settlement negotiations between the Tribe and the United States began in 1985. That same year, the United States filed an Indian reserved water rights claim for 119,460 acre-feet per year ("afy") of water on the Tribe's behalf in the San Juan River general stream adjudication. The State of New Mexico later joined the negotiations.

Central to the negotiation effort was an updated hydrology study which resulted in the Secretary of the Interior submitting, and Congress ultimately adopting, a new hydrologic determination for the Upper Colorado River Basin. See Settlement Contract at 2. This hydrologic determination added 22,500 acre-feet of depletions to New Mexico's permanent allocation, thereby making this water available for development through the Secretary of the Interior. This additional water supply was not already committed to any other user, thus providing a major contribution to the settlement of all of the Jicarilla Apache Tribe's federally reserved water rights claims. In October 1992, the Jicarilla Apache Water Rights Settlement Act became law. See Attachment 2, Jicarilla Apache Tribe Water Rights Settlement Act, Pub. L. No. 102-441, 106 Stat. 2237 (1992), *as modified by* Pub. L. No. 104-261, 110 Stat. 3176 (1996) and Pub. L. No. 105-256, 112 Stat. 1896 (1998) ("Settlement Act").

In April of 1999, the Jicarilla Apache Tribe, in conjunction with the United States and the State of New Mexico, fulfilled all the preliminary requirements set forth in the Settlement Act.

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Those requirements included, among other things, the entry of a partial final decree adjudicating 2,194.58 afy of the Tribe's historic and existing federal reserved water rights in the San Juan River Basin. According to the Settlement Act, once the preliminary requirements of the Act were fulfilled, the Tribe became entitled to the benefits of a perpetual Settlement Contract between the Tribe and the Secretary of the Interior. See Settlement Act at §§ 5(a)-(c) ; see also Settlement Contract at 3-4.

The Settlement Contract, as ratified by Congress, provides that the Tribe may divert up to 40,000 afy of federal project water through the two federal water project facilities from which the Tribe historically had been excluded. See Settlement Act at §§ 3(1) and 5(a)-(c); see also Settlement Contract at 1. The Settlement Contract also strikes a balance between "[preserving] opportunities for Indian reservation development while at the same time allowing for other economical water resource development." Settlement Contract at 1. This is achieved by allowing the Tribe to lease its water rights to third-party users if the Tribe "does not or cannot put the water supply secured to it under [the Settlement Contract] to use." Id. The settlement also granted the Tribe a six million dollar water rights development trust fund. See Settlement Act at § 8.

For the San Juan River Basin, in addition to the Tribe's adjudicated historic and existing federal reserved water rights, the Settlement Act provides the Tribe the right to deplete 32,000 afy from the basin, 25,500 afy of which may be depleted from the Navajo Reservoir supply or directly from the Navajo River as it crosses the Jicarilla Apache Indian Reservation.[1] In the Settlement Contract, the Jicarilla Apache Tribe agreed to subordinate its relatively senior priority date for its "future use" federal reserved water rights in return for the authorized, perpetual right to deplete up to 25,500 afy from either the Navajo Reservoir supply or the Navajo River. The Tribe did not subordinate its 1880 priority date, however, for its 2,194.58 afy of San Juan River Basin historic and existing use federal reserved water rights.

2 [1] On page 4-2, the DSEIS correctly notes that Jicarilla perpetual "future use" depletions became an authorized purpose of Navajo Reservoir. However, no such acknowledgment is in the discussion of Navajo Reservoir, which is a connected action to ALP. See DSEIS at C-7.

TR1-2 The FSEIS has been modified in Section 4.2.1 to clarify that the implementation of the Jicarilla Apache Tribe Water Rights Settlement utilizes water from Navajo Reservoir to fulfill parts of the Settlement and such use is within the authorized purposes of the Navajo Unit of the Colorado River Storage Project.

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The Jicarilla Apache Tribe is the only water rights claimant in the San Juan River Basin general stream adjudication with water rights that are fully and finally adjudicated. Since the completion of the adjudication and the fulfillment of the other prerequisites of the Settlement Act, the Tribe has been pursuing a variety of development options for those water rights, including potential third-party water leases and on-reservation water use. To date, no third-party lease has been executed or has completed the necessary approvals from the Secretary of the Interior, through his designee, the Bureau of Reclamation. Federal approval of such third-party leases from the Navajo Reservoir supply is subject to compliance with Section 7of the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in scattered sections of 16 U.S.C.) ("ESA").[3]

In addition, in accordance with the intent of the Settlement Contract, the Tribe has adopted a plan to use some of its 25,500 afy San Juan River "future use" depletions on the Jicarilla Apache Indian Reservation through direct diversion and conveyance from the Navajo River. The Jicarilla Apache Navajo River Water Development Plan would deplete 6,000 afy of the Tribe's adjudicated federal reserved water right to provide for the irrigation of approximately 2,400 acres of Reservation land which have, in part, been previously irrigated by the Tribe. See Attachment 3. In addition to increasing agricultural development, implementation of the Navajo River Water Development Plan will provide for increased recreation and additional fish and wildlife habitat on Tribal lands. Implementation of the Plan, adopted by the Jicarilla Apache Tribal Council on April 7, 2000, by Resolution No. 2000-R-169-04 will begin immediately through the initiation of a contract to complete the diversion site investigation and preliminary design work. See Attachment 4. The Tribe anticipates that the contract will be let by mid-May 2000.

2. RECLAMATION HAS A TRUST DUTY TO THE JICARILLA APACHE TRIBE TO PROTECT THE TRIBE'S WATER RIGHTS, AND MUST EXPLICITLY ADDRESS THE PROPOSED ACTION'S IMPACTS ON THE TRIBE'S WATER RIGHTS AND FULLY MITIGATE OR AVOID THOSE IMPACTS

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[3] However, it is inaccurate for Reclamation to state unconditionally that use of the full quantum of the Jicarilla Apache Tribe's 25,500 afy of "future use" depletions in the San Juan River Basin must be subject to a Section 7 consultation. See DSEIS at 4-5. As discussed above, the Tribe has the right to take delivery of its water rights directly from the Navajo River as it crosses the Jicarilla Apache Indian Reservation, and not necessarily from a federal water project. Thus, some smaller portion of the Jicarilla Apache Tribe's 25,500 afy could be depleted by the Tribe directly from the Navajo River without a federal nexus that would trigger a Section 7 consultation.

TR1-3 Section 4.2.3 of the FSEIS has been modified to reflect that some of the Jicarilla Apache Tribe's settlement water may be used without Section 7 consultation.

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Reclamation, as an agency of the federal government, has a trust responsibility to all Indian tribes and tribal members, including the Jicarilla Apache Tribe and its members:

> The United States has an Indian trust responsibility (trust responsibility) to protect and maintain rights reserved by or granted to Indian tribes or Indian individuals by treaties, statutes, and executive orders, which rights are sometimes further interpreted through court decisions and regulations. This trust responsibility requires that all Federal agencies, including Reclamation, take all actions reasonably necessary to protect trust assets.

See Attachment 5, Bureau of Reclamation, Indian Trust Asset Policy (Aug. 31, 1994) in Protection of Indian Trust Resources (notebook on file with the Department of Interior) ("Reclamation Indian Trust Asset Policy").[1]

4 The Indian Trust Assets ("ITAs") entitled to protection under the trust responsibility include water rights. See id. Thus, Reclamation has a trust responsibility to take all actions reasonably necessary to protect the Jicarilla Apache Tribe's water rights, including its "future use" water rights and historic and existing water rights.

The Department of the Interior and Reclamation have adopted policies and procedures to ensure that their actions comply with the trust responsibility, which is "one of the Department's most important legal obligations." Transmittal memo to Protection of Indian Trust Resources. The Department's policy states:

> It is the policy of the Department of Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a

[1] In February 1996, Secretary of the Interior Babbitt and Assistant Secretary Deer transmitted to Interior employees a compilation of the policies and procedures adopted by the bureaus and offices of the Department of Interior relating to trust protection practices. This compilation notebook is referred to herein as "Protection of Indian Trust Resources."

TR1-4 Reclamation agrees that a water right is considered an Indian Trust Asset.

> government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety.

512 DM 2.2 (Dec. 1995).

The Department's procedures implementing this policy require that "[a]ny effect [on Indian trust resources] must be explicitly addressed in the planning/decision documents, including, but not limited to . . . Environmental Impact Statements. . . ." 512 DM 2.4(A) (emphasis added). Such documents "shall . . . [e]xplain how the decision will be consistent with the Department's trust responsibility." Id.

In its Indian Trust Asset Policy, Reclamation states:

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> Reclamation will carry out its activities in a manner which protects trust assets and avoids adverse impacts when possible. When Reclamation cannot avoid adverse impacts, it will provide appropriate mitigation or compensation.

Reclamation Indian Trust Asset Policy.

Reclamation's procedures implementing this policy require that the assessment of impacts on ITAs cover "[a]ctions that could impact the value, use or enjoyment of the ITA." Bureau of Reclamation, Indian Trust Asset Policy and NEPA Implementing Procedures: Questions and Answers About the Policy and Procedures (hereinafter "ITA Q&A"), Section IV-4 at 9 (Aug. 31, 1994) in Protection of Indian Trust Resources. "Such actions could include interference with the exercise of a reserved water right." Id. "[A]ll impacts, both positive or negative, should be analyzed and discussed." Id. Unavoidable impacts should be fully mitigated:

> The first strategy should be to avoid causing significant adverse impacts. When this is not possible, an attempt should be made to minimize such impacts. If adverse impacts do occur, the next step is to identify mitigation or compensation measures to offset adverse impacts so that there is no net loss to the Indian beneficial owners of the asset.

ITA Q&A, Section V-1 at 13.

5 Thus, the DSEIS must explicitly address the proposed action's impacts on the Jicarilla Apache Tribe's water rights and explain how the proposed action will be consistent with Reclamation's responsibility to protect these water rights. To the extent that significant adverse impacts from the proposed action cannot be avoided, mitigation must be implemented to ensure that there is no interference with the Tribe's ability to exercise its water rights.

While Reclamation has implemented its trust policy through NEPA for administrative convenience, Reclamation's legal duties with respect to ITAs extend beyond the procedural requirements of NEPA. NEPA requires, as a procedural matter, that an environmental impact statement "shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. The trust duty, however, is a substantive obligation and requires more than informed decisionmaking. Under the trust duty, Reclamation must protect the water rights of the Jicarilla Apache Tribe. Therefore,
6 the proposed action should include sufficient mitigation to ensure that the Jicarilla Apache Tribe's water rights are protected.

TR1-5 Mitigation measures for impacts to Jicarilla Apache Tribe water rights are provided in Section 4.6.4 of the FSEIS.

TR1-6 Mitigation measures for impacts to Jicarilla Apache Tribe water rights are provided in Section 4.6.4 of the FSEIS.

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3. THE DSEIS' ANALYSIS OF IMPACTS ON THE JICARILLA APACHE TRIBE'S WATER RIGHTS AND PROPOSED MITIGATION DOES NOT COMPLY WITH RECLAMATION'S TRUST DUTY OR NEPA

A. The DSEIS Uses an Improper Standard for Measuring the Significance of Impacts on the Jicarilla Apache Tribe's ITAs

7 Although Chapter 4 of the DSEIS acknowledges that impacts on non-Ute ITAs are significant (see DSEIS at 4-19 to 4-23), Chapter 3 of the DSEIS erroneously and inconsistently concludes that these impacts are only "potentially significant." DSEIS at 3-22 to 3-23. This conclusion arises from the adoption in Chapter 3 of a standard for measuring the significance of impacts on the Jicarilla Apache Tribe's adjudicated water rights (and on the Navajo Nation's proposed water projects) that defies the trust responsibility and the policies and procedures for evaluating ITA impacts.

Chapter 3 asserts that "[i]mpacts to these trust water rights have less significance than the other categories" and "would carry less weight than those [impacts] to existing or approved uses." DSEIS at 3-16. The "other categories" and "existing or approved uses" consist of non-Indian existing water uses, non-Indian "identified future uses for which valid water rights and environmental clearances are in place" and apparently also "all [non-Indian] depletions that could occur without further federal action (primarily exercise of state water rights not presently being used as identified by Colorado and New Mexico)." Id. at 3-5 and 3-12. The only explanation the DSEIS offers for giving less weight to impacts on Jicarilla Apache ITAs than to those on non-Indian water rights and uses is that "the impact is not to any immediate need or identified use and there is reasonable probability that additional water will be made available in the future." Id. at 3-16. See also id. at 3-23 (asserting that hydrology impacts to non-Ute ITAs are "reduced to potentially significant" because "the flow recommendations may change in the future, the Navajo Dam operating rules are not optimized and a portion of the impacted water rights have no identified uses")(emphasis added). Neither of these reasons withstands scrutiny.

First, assuming for purposes of discussion that Reclamation can give less weight to impacts on ITAs, the impact here is to an immediate need. As discussed above, the Jicarilla Apache Tribe's Navajo River Water Development Plan will utilize 6,000 afy of the Tribe's 25,500 afy settlement water rights, with plan implementation commencing in 2000, to support agriculture, fisheries, wildlife habitat, and recreation on the Jicarilla Apache Reservation. See supra at 5; see also Attachments 3 and 4. The DSEIS could not, of course, consider this plan because it was adopted by the Jicarilla Apache Tribal Council after the DSEIS was issued. Now that information about the plan

TR1-7 Chapter 3 of the FSEIS has been revised to provide consistency between Chapters 3 and 4 in describing the significance of impacts associated with ITA water rights.

has been provided to Reclamation, the plan must be considered in the FSEIS in analyzing the proposed action's impacts on ITAs.

8 Second, regardless of whether Reclamation characterizes any of the Jicarilla Apache needs as "immediate" or "identified," giving less weight to impacts on Jicarilla Apache and Navajo ITAs violates the trust duty and the requirements for analysis of impacts on ITAs. As recognized by Reclamation's Indian Trust Asset Policy, unexercised Indian federal reserved water rights are ITAs and interference with the exercise of a Tribe's federal reserved water right is an impact. See supra Section II.[8] Thus, there is no basis to treat these federal reserved water rights with less weight than non-Indian water rights that are currently in use. To give less weight to impacts on these ITAs is discriminatory and thwarts the purpose of considering ITA impacts--to ensure that these kinds of impacts are given the same careful evaluation as impacts on non-Indian resources and that they are mitigated in accordance with the highest fiduciary standard.

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[8] In fact, pursuant to Winters v. United States, 207 U.S. 564 (1908), and its progeny, Indian federal reserved water rights need not have identified, immediate uses to justify a duty of protection by the United States government. See, e.g., DSEIS at 2-2 ("The ultimate use of the remaining project water . . . [besides the portion allocated to the Navajo Nation and non-Indian interests] by the Colorado Ute Tribes would be more specifically defined by those Tribes as future needs develop.") Pursuant to the "Winters Doctrine," Indian federal reserved water rights are property rights which are intended to meet the present and future needs of Indian tribes and which vest no later than the establishment of the reservation, regardless of whether those rights have been adjudicated or otherwise formally permitted. See Arizona v. California, 373 U.S. 546, 598-600 (1963). In addition, these rights do not depend upon beneficial use for their initial or continued existence. See, e.g., Cappaert v. United States, 426 U.S. 128, 143-145 (1976).

TR1-8 The Navajo River Water Development Plan has been incorporated into the FSEIS in Chapter 4 under Cumulative Effects and project impacts evaluated under Indian Trust Assets.

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9 Third, the possibility that the flow recommendations "may be modified" and the operating rules "may be optimized" to provide additional water that might be available to the Jicarilla Apache Tribe is too tenuous a string of contingencies to lessen the significance of these impacts. As discussed in the following section, Reclamation needs to explicitly commit to measures that will provide real mitigation for the proposed action's impacts on the Jicarilla Apache Tribe's ITAs.

B. The DSEIS Fails to Explicitly Address the Significance of the Impacts on the Jicarilla Apache Tribe's ITAs and Proposes Insufficient Mitigation

10 Although the DSEIS correctly concludes in Chapter 4 that Refined Alternative 4 will have significant impacts to the Jicarilla Apache Tribe's ITAs, the DSEIS fails to provide the discussion of these impacts necessary for decisionmakers and the public to understand the extent of these impacts and the insufficiency of the proposed mitigation. As discussed above, Reclamation is required to "explicitly address" the impacts on ITAs and to avoid or fully mitigate those impacts. The DSEIS explicitly addresses the nature and extent of the impacts on the other three tribes and makes unequivocal mitigation commitments to address those impacts. However, the DSEIS downplays comparable impacts on the Jicarilla Apache Tribe's ITAs, and proposes ambiguous, inadequate mitigation.

11 The inconsistency of the DSEIS's approach to analyzing the ITA impacts begins with the failure to view the Jicarilla Apache Tribe's water rights through the lense of an Indian water rights settlement. See supra at Section I. The DSEIS discusses, in relationship to the Colorado Utes only, how important the actual provision of "wet water" is to a Tribe's settlement of its Winters Doctrine water rights claims. See DSEIS at 2-23; id. at 4-14; id. at 5-2. In that discussion, Reclamation specifically notes the fact that the Colorado Utes' partial subordination of their senior priority date for their Winters' rights in exchange for federal project water was a concession. See id. at 4-14. The DSEIS also discusses, again in relationship to the Colorado Utes only, how federal project "wet water" from an Indian water rights settlement can benefit a tribe and "improve the living conditions and the health and welfare of tribal members" through the development of "reliable water supplies and income from the [lease] of water." Id. at 3-203 and 3-204. All of these important, expected, and valuable benefits of an Indian water rights settlement apply in equal force to the Jicarilla Apache Tribe's settlement of its Winters Doctrine water rights claims, and the DSEIS should discuss them when evaluating impacts to the Jicarilla Apache Tribe.

12 Although the DSEIS does not treat the Jicarilla Apache Tribe's water rights settlement comparably to the Colorado Ute Tribes' water rights settlement, the DSEIS does recognize that "[d]evelopment of the project would impact the Jicarilla Apache Tribe and the Navajo Nation in that it would be more difficult to develop more water from the San Juan River," and that "[d]ecreasing

TR1-9 Mitigation measured for impacts to Jicarilla Apache Tribe water rights are provided in Section 4.6.4 of the FSEIS.

TR1-10 Mitigation measures for impacts to Jicarilla Apache Tribe water rights are provided in Section 4.6.4 of the FSEIS.

TR1-11 Section 4.6.3 of the FSEIS has been revised to provide a better background of the Jicarilla Apache Tribe's water rights settlement.

TR1-12 Attachment F of the FSEIS has been modified based on the most recent information available to describe the relationship of modifying the Project pumping plan and identification of any additional water depletions within the San Juan River Basin.

12 (con't) the pumping rates during certain spring runoff periods [under Refined Alternative 4] could lessen the impact of additional water development on the endangered fish in the San Juan River Basin and lessen the impact to Jicarilla Apache and Navajo Nation water development." DSEIS Tables 2-12 and 2-18 (incorporated by reference in the ITA impact summary in Table 2-21). Yet, the DSEIS never explicitly addresses the extent of the impact on the Jicarilla Apache Tribe or whether the proposed mitigation would, in fact, mitigate the impacts on the Jicarilla Apache Tribe.

13 The DSEIS avoids explicitly addressing the impacts and mitigation for the Jicarilla Apache Tribe lumping together the Jicarilla Apache Tribe's adjudicated water rights and the Navajo Nation's proposed water projects in the analysis. The DSEIS assumes a total of 69,920 afy of non-Ute Indian trust water rights for purposes of analyzing ITA impacts. See DSEIS at 3-16. These include the Jicarilla Apache Tribe's 25,500 afy depletion settlement water rights, the proposed Navajo-Gallup Water Supply Project that would deplete 28,000 afy (including 7,500 afy to the City of Gallup),[3] and 16,420 afy of historic water rights that were previously transferred from the Hogback Project to NIIP. See id. The DSEIS also assumes, on the basis of the hydrological modeling, that only 20,000 of the 69,920 afy could be delivered if Navajo Reservoir were operated to meet the flow recommendations under the baseline condition (without the Animas-La Plata Project). See id. at 3-23. With Refined Alternative 4, the DSEIS states that only 6,000 afy of the 69,920 afy of depletion required for the Jicarilla Apache Tribe's adjudicated rights and the Navajo Nation's proposed projects can be delivered, for an impact of 14,000 afy. See id. at 3-23 and 4-21.

14 Yet the DSEIS fails to explicitly address the impacts on the Jicarilla Apache Tribe's ITAs by failing to acknowledge the magnitude of this impact on the Jicarilla Apache Tribe and the gross insufficiency of the proposed mitigation. Refined Alternative 4 reduces the water available for development by 14,000 afy or 70% from the assumed baseline condition with Navajo Reservoir operated to implement the flow recommendations. This impact would remain significant with the proposed mitigation of 2,000 afy or a 60% reduction from the assumed baseline condition. In the analysis of socioeconomic impacts, for example, the DSEIS treats a 10% change as a significant impact. See DSEIS at 3-191. By contrast, the DSEIS fails to acknowledge that the substantially larger impacts on the Jicarilla Apache Tribe's ITAs would remain significant with the proposed mitigation, even if the entire 8,000 afy projected to be available for development were earmarked

15 [3] Oddly, the City of Gallup's portion of the proposed Navajo-Gallup water project is treated as an ITA. The 7,500 afy for Gallup's portion of the proposed project should not be considered in the ITA analysis.

TR1-13 The FSEIS in Chapter 4 includes more detailed discussions of the projected impacts to the Jicarilla Apache Tribe's water rights and mitigation measures

TR1-14 The FSEIS in Chapter 4 includes more detailed discussions of the projected impacts to the Jicarilla Apache Tribe's ITA's and mitigation measures.

TR1-15 Section 4.6.3 of the FSEIS has been modified to reflect that the City of Gallup's portion of the Navajo-Gallup water supply is not an Indian Trust Asset.

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16 for the Jicarilla Apache Tribe.[6] The socioeconomic impacts to the Jicarilla Apache Tribe that would result from the inability to utilize these valuable water rights are completely ignored.[7]

Reclamation's proposal to mitigate impacts on the Jicarilla Apache Tribes ITAs by facilitating discussions with interested federal agencies, the other tribes and private parties with existing contracts to deplete from Navajo Reservoir is well-intended. See DSEIS at 4-21 and 5-17. However, it does not actually protect any of the Jicarilla Apache Tribe's adjudicated water rights.

Finally, the mitigation that Reclamation proposes for the impacts on the Navajo Nation's ITAs exacerbates the impact on the Jicarilla Apache Tribe's ability to exercise its future use water rights. Reclamation commits to work with the Navajo Nation and the City of Gallup to "continue development" of the proposed Navajo-Gallup Water Supply Project and describes the entire 2,000 afy of depletion to be provided in mitigation as being available for the Navajo-Gallup Project. See DSEIS at 4-20. Indeed, after the issuance of the DSEIS, Reclamation issued notice that it intends to prepare an environmental impact statement evaluating alternatives for the construction and operation of the pipeline project. See Navajo-Gallup Water Supply Project, 65 Fed. Reg. 16,219 (Dep't. Interior 2000)(notice of intent to prepare DEIS). Reclamation has stated that this
17 environmental review document will act as the final planning report to support a request for construction authorization. See id. In light of this commitment to the Navajo-Gallup Project, it is

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18 [6] For purposes of this analysis, unless and until a binding lease agreement between PNM and the Jicarilla Apache Tribe is executed and completes all necessary federal approvals, Reclamation cannot meet its duty to protect the Tribe's ITAs by assuming that the portion of the Jicarilla Apache Tribe's Navajo Reservoir depletion rights that could be leased to PNM (16,200 afy) would, in fact, be given the status of an existing use.

[7] Similarly, there is no mention of the Jicarilla Apache Tribe's cultural resources in the cultural resources impacts analysis.

TR1-16 The socioeconomic impacts resulting from the inability of the Tribe to utilize its water rights are described in the FSEIS commensurate with what we know of the Tribe's future use of such water rights.

TR1-17 Comment noted.

TR1-18 The impact analysis section of Chapter 4 of FSEIS includes recognition that all future Indian water uses may be competing for a currently limited quantity of water depletions.

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18 (con't) disingenuous to assert that the 2,000 afy also would be available to meet the Jicarilla Apache Tribe's needs, as the DSEIS does on page 4-21.

Similarly, the proposal to mitigate impacts by optimizing operating rules for Navajo Dam to more efficiently deliver the flows recommended for the endangered fish is not quantified and is ambiguously directed to both the Jicarilla Apache Tribe and the Navajo Nation. See DSEIS at 4-21 and 5-17. Because of the Jicarilla Apache Tribe's water rights settlement, the United States must assume, for purposes of protecting the rights other than the 6,000 af of depletions from the Navajo River (see Attachments 3 and 4), that the Jicarilla Apache Tribe could elect to take the remainder of its "future use" San Juan River depletions from Navajo Reservoir. Pursuant to the Tribe's Settlement Act, those rights are now an authorized purpose of Navajo Reservoir. See Settlement Act at § 6(a).

19 To comply with its trust duty to the Jicarilla Apache Tribe and to ensure that Navajo Reservoir is operated consistently with this authorized purpose, Reclamation should quantify the amount of water that would be made available by optimizing Navajo Reservoir operations and expressly commit to make this amount available to meet the Jicarilla Apache Tribe's authorized use.

20 The Jicarilla Apache Tribe emphasizes that it is not opposed to the Navajo-Gallup Project and is sensitive to the Navajo people's water supply needs. Our point is simply that Reclamation has failed to acknowledge in the DSEIS that its commitment to the Navajo-Gallup Project, together with the Animas-La Plata Project, will have a significant impact on the Jicarilla Apache Tribe's ability to exercise its Congressionally-authorized future use water rights that is not made less significant by the proposed mitigation.

TR1-19 Attachment F in Volume 2 has been updated to reflect the most current understanding of any additional water depletions identifiable beyond currently modeled

TR1-20 The FSEIS includes recognition that all future Indian water uses may be competing for a currently limited quantity of water depletions and addresses an appropriate level of mitigation.

4. IF ERRONEOUS ASSUMPTIONS IN THE HYDROLOGICAL MODELING AND ANALYSIS ARE CORRECTED, THEN THERE MAY BE SUFFICIENT WATER AVAILABLE FOR THE JICARILLA APACHE TRIBE TO FULLY EXERCISE ITS RESERVED WATER RIGHTS, AND RECLAMATION SHOULD COMMIT TO MAKE THIS WATER AVAILABLE TO THE JICARILLA APACHE TRIBE

21 The DSEIS makes several erroneous assumptions in the hydrological modeling and analysis. Although model documentation has not been provided for review with the DSEIS,[8] the Jicarilla Apache has determined from the information available in the DSEIS and by conferring with members of the hydrology task group for the Navajo Reservoir SEIS that these erroneous assumptions appear to substantially underestimate the water available to mitigate the proposed action's impacts on the Jicarilla Apache Tribe. Reclamation needs to take a hard look at these assumptions in the modeling and analysis. By reviewing and correcting these errors, Reclamation may be able to eliminate any perceived conflict in protecting the Jicarilla Apache Tribe's ITAs while meeting its trust responsibility to the Colorado Ute Tribes and the Navajo Nation.

22 A. If the Unrealistic Assumption of an Overall 50% Efficiency for the Colorado Ute Tribes' Nonbinding Uses Were Corrected to Reflect More Likely Efficiencies, Then Substantially More Water May Be Available For Use by the Jicarilla Apache Tribe and the Navajo Nation

Much of the impact analysis in the DSEIS revolves around underlying assumptions built into the "non-binding uses" for the Colorado Utes' water rights. Because the Colorado Utes are settling Winters federal reserved water rights claims, the two tribes need not commit to actual uses in order

[8] A draft model documentation was provided to the Navajo Reservoir hydrology task group on March 27, 2000, with a request for comments on May 1, 2000. The Jicarilla Apache Tribe's hydrologist is still reviewing that draft and will provide comments as requested. Initial review of the draft indicates that it may not provide key information about the model, including methods used to obtain natural flows and sensitivity analyses of assumed variables.

TR1-21 The model input, output, and assumptions have been reviewed in the past and are in continuous review as updates and improvements to the model progress. Reclamation is actively involved in the modeling effort and it' systematic modifications and improvements.

TR1-22 Although it is true that with a higher efficiency factor, less water would be required to be diverted from the Animas River by the Colorado Ute Tribes, the average flow at a selected point downstream would essentially remain the same. What would be affected would be the timing of those flows. This is primarily a function of the return flows that return to the Animas River from diversions and uses upstream. Section 2.1.1 of the FSEIS has been modified to provide the overall rational for the 50% depletion factor.

for their water rights to be validated. See n. 4 supra (discussing nature of a Winters Doctrine right). However, having proposed non-binding uses for purposes of the NEPA analysis, such uses should be based upon more realistic assumptions. Employing more realistic assumptions could assist Reclamation in meeting its trust responsibility to all four tribes.

The DSEIS states that the modeling for the Colorado Ute Tribes' non-binding uses assumed fifty percent (50%) efficiency at each of the demand locations specified for each non-binding use. In other words, each of the non-binding uses would divert twice as much water as would be depleted for the uses. Such a low overall efficiency assumption overestimates the diversion amounts for the uses. It also overestimates return flows to the La Plata River. For instance, the DSEIS describes how the 50% efficiency used for the non-binding uses "enhances" streamflow to the La Plata River by 15,500 afy. See DSEIS at 3-25. The DSEIS then concedes that if more "appropriate" (i.e., commonly-used or realistic) efficiencies were assumed for the non-binding power plant and golf course uses, the "enhanced" streamflow in the La Plata would be closer to 1,400 afy instead of 15,500 afy. See id.

22 (cont')

The DSEIS acknowledges that "[t]he efficiency typically associated with the various non-binding uses results in a smaller diversion than would occur if the water was put to a different M&I use." Id. at 3-5. The modeling assumed, however, that larger diversions (meaning, lower efficiency rates) than those typically associated with the given uses in order to "present the highest impact situation" in the analysis. Id.; see also id. at Technical App. 2, 2-11. By not assuming more realistic efficiencies, the DSEIS unnecessarily lessens the amount of water available to mitigate impacts to Jicarilla Apache ITAs.

If a more realistic (i.e., higher) overall efficiency rate was assumed for the non-binding uses, the La Plata would have less return flow in it. By having less return flow to the La Plata, less water would need to be pumped during the spring by the Durango Pumping Plant, in the Animas River, to store in Ridges Basin for use in the La Plata. Consequently, the Animas River could provide more water to meet the San Juan River Recovery Implementation Program ("SJRRIP") flow recommendations, by providing more water to meet peak releases for the endangered fishes. If more water is available in the Animas River because less water is being diverted out of the Animas than the modeling has assumed, then less water needs to be released from Navajo Reservoir to meet the SJRRIP flow recommendations. Consequently, more water should be available in Navajo Reservoir for use by the Jicarilla Apache Tribe.

The FSEIS should include a thorough quantitative analysis of the change to the amount of water available for use in Navajo Reservoir that results from assuming more realistic efficiencies.

If such analysis demonstrates that additional water is available, then a sufficient amount should be committed to mitigation for the Jicarilla Apache Tribe.

B. If the Analysis Accounted for the Location of Use of the Proposed Navajo Nation Projects, Then Those Projects Would Require Far Less of the Available Supply in the Navajo Reservoir Than the Analysis Assumes

23

In the mitigation discussion for the proposed Navajo-Gallup pipeline, the DSEIS briefly notes that:

> [a]n alternate project design that would take water from the San Juan River below its confluence with the Animas River would increase the potential yield for the project while protecting flows for endangered fish. In this case, releases from Navajo Dam would be supplemental to river flows, leveraging the limited storage volume available and making use of times when there are flows in excess of fish needs in the river.

DSEIS at 4-20.

This brief statement underscores how important the location of a proposed water use is to the analysis of ITA impacts. Since the DSEIS was issued, statements have been made in the Navajo Reservoir EIS hydrology task group meetings that indicate that this "leveraging effect" stated above could allow for two to four times the amount of water to be depleted at the Navajo Nation's Hogback diversion than the amount that could be used from, or above, Navajo Reservoir.

The amount that could be "leveraged" from Navajo Reservoir should be quantified and more thoroughly explained in the FSEIS. If, in fact, one acre-foot from Navajo Reservoir is actually "worth" up to four acre-feet if used at a Navajo Nation downstream location, then it may be easier to mitigate ALP's effect on the unmet water needs of both the Jicarilla Apache Tribe and the Navajo Nation. However, in order for such leveraging to be relied upon for mitigation, the FSEIS will need to quantify this effect and provide sufficient supporting analysis.

C. If Natural Flows Assumed for the Model Were Underestimated, then the Amount of Water Available to Mitigate ITA Impacts Could Be Significantly Greater

24

The natural flow data set assumed for the hydrologic modeling in the DSEIS was based on Reclamation estimates. For natural flow data prior to 1971, however, there is no documentation concerning the details and assumptions used by Reclamation to develop these flows. The basis for the natural flow estimates is critical, since the natural flow estimates are the "input" source of the water for the project analysis. If these flows are overestimated or underestimated, even by small percentages, then the available water for future development will change significantly.

TR1-23 Attachment F in Volume 2 has been updated to reflect present understanding of any additional water depletions identifiable beyond currently modeled depletions.

TR1-24 As part of the continuing process to improve the reliability of the hydrology model, the natural flow estimates are now under review. The possibility of yielding additional water from this analysis is unknown at this time.

24 (con't)

Preliminary review of the data from the Colorado River Decision Support System ("CRDSS") indicate that natural flows for the Animas-La Plata model may be underestimated. The natural flow data for the CRDSS, which is a different model than that used for the DSEIS, is documented both prior to and after 1971, and is available to Reclamation. Reclamation needs to take a hard look at its natural flow assumptions for the FSEIS. If the results of such a careful analysis justify revising the natural flows assumptions to reflect higher natural flows, then Reclamation would have a sound basis for estimating additional available water for future development. Of course, Reclamation would still need to make a commitment to the Jicarilla Apache Tribe commensurate to its commitment to work for the accomplishment of the Navajo Nation's proposed projects for such additional available water to translate to meaningful mitigation.

5. CONCLUSION

The Jicarilla Apache Tribe does not wish to unduly delay the FSEIS for ALP. Indeed, the Tribe supports Refined Alternative 4 as the best alternative to meet the needs of the Colorado Ute Tribes and the domestic needs of the Navajo Nation in the Shiprock area. However, the Jicarilla Apache Tribe believes it is essential that Reclamation fully address the above-described issues regarding water modeling, projected uses, disclosure of impacts and sufficiency of mitigation for the FEIS to meet the intent and the legal requirements of NEPA and the trust responsibility. The Jicarilla Apache Tribe would welcome the opportunity to meet with Reclamation to discuss these comments and their resolution.

Very truly yours,

NORDHAUS, HALTOM, TAYLOR,
TARADASH & FRYE, LLP

Jessica R. Aberly
Susan G. Jordan

JRA\slg

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4/20/00 6:30 AM

Attachments (No attachments will be sent by e-mail; only Attachment 3 will be faxed. All attachments are submitted with the hard copy):

1) Contract Between the United States and the Jicarilla Apache Tribe.

2) Jicarilla Apache Tribe Water Rights Settlement Act.

3) Jicarilla Apache Navajo River Water Development Plan.

4) Jicarilla Apache Tribal Council Resolution No. 2000-R-169-04.

5) Reclamation Indian Trust Asset Policy and Protection of Indian Trust Resources Compilation Notebook.

DRAFT

NAVAJO RIVER WATER DEVELOPMENT PLAN

For the

JICARILLA APACHE TRIBE

Prepared by

The Office of Water Administration
Natural Resources Department
Jicarilla Apache Tribe

April 2000

ATTACHMENT 3

Navajo River Water Development Plan
For the Jicarilla Apache Tribe

DRAFT 4/17/00

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Navajo River Water Development Plan
For the Jicarilla Apache Tribe

DRAFT 4/17/00

Introduction

The Jicarilla Apache Tribe (Tribe) agreed to a water rights settlement with the United States resulting in the Jicarilla Apache Water Rights Settlement Act (Act) approved by Congress and signed into law by the President on October 23, 1992. The Act provides for the Tribe to divert up to 40,000 acre-feet per year with a maximum depletion of up to 32,000 acre-feet within the San Juan River basin. The Jicarilla Apache Tribal Council adopted this Navajo River Water Development Plan (Plan) to provide the Tribe with opportunities for agricultural development, increased recreation, and additional fish and wildlife habitat on Tribal lands.

Background

The Tribe is developing its comprehensive water management strategy through its office of Water Administration. Previous activities centered on negotiations and settlement of water rights; working through stream adjudications resulting in final partial decrees establishing the Tribe's priority dates within the San Juan and Rio Chama basins; development of the Water Code establishing the Water Commission, the office of Water Administration, and the associated authorities and requirements of these governing sub-agencies of the Tribe. With the completion of these activities, the Tribe has hired its Water Administrator and is now in a positive position to begin implementing its water rights development strategy.

As part of the settlement, the Tribe received a $6 million water development fund. In addition, the Tribe is aggressively pursuing marketing opportunities within the San Juan and Rio Grande basins to establish an additional cash flow source for the Tribe.

Plan Summary and Objectives

To implement the Plan, the Tribe will build a Navajo River diversion and conveyance system to effectively divert up to 12,000 acre-feet of the river's flow regime between March and October of each year. This water will be transported, via a pumping and pipeline system, to two existing reservoir sites that would be enhanced for additional storage to benefit fisheries and recreation while providing sufficient re-regulation space for irrigation of approximately 2,400 acres that have been, in part, previously irrigated for subsistence agricultural use by the Tribe. The Plan will result in the beneficial consumptive use of up to 6,000 acre-feet of the Tribe's federal reserved water rights under the Act and would further the Tribe's objectives for the long-term economic and social well being of its members. The Tribe further desires to provide its population with a degree of self-sufficiency that this Plan begins to address. The map on page 8 illustrates the overall location and the specific locations of pipelines and use areas within the Reservation.

Navajo River Water Development Plan
For the Jicarilla Apache Tribe

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Plan Details

The Plan consists of two distinct phases. Phase I will focus on the completion of additional site investigation and design work and Phase II will focus on construction of the facilities. Following is a detailed description of the Navajo River Water Development Plan.

Navajo River Diversion System: The Tribe will conduct additional on-site investigations during spring of 2000 to conclude data collection needed to determine the preferred river diversion system and irrigation systems. Preliminary investigations conclude that the shallow (less than 30 feet) alluvial strata in direct connection with the river will support either a parallel French drain-type collection system or horizontal collector wells along the Navajo River near Dulce, New Mexico. The study will also determine how the existing surface diversion and settling pond system could be integrated into the diversion options.

Construction of either of these systems would occur outside of the active channel of the Navajo River. The existing location of the domestic water supply pumping plant would be expanded. The water diversion and pump stations will be located outside the river, pond areas, or other water features that could fall within a Section 404 regulatory jurisdiction. Wetlands will be avoided regardless of whether the water is pumped from the ponds or from the adjacent alluvial material.

Navajo River Hydrology: The sub-surface/surface diversion system would be in operation during times of relatively high flows between the months of March and October of each year. The following table illustrates the estimated diversion pattern to achieve the supply requirements.

Table 1
Navajo River Surface Flows with Planned Diversions

Month	March	April	May	June	July	August	Sept.	Oct.
Diversions (acre-feet)	600	1000	2000	2200	2200	1800	1000	400
Diversions (cfs/month)	10.0	16.7	33.3	36.7	36.7	30.0	16.7	6.67
Mean Daily (cfs/month)	59.5	57.4	129	155	92.5	54.8	61.1	54.8
1971-1998 Min. Flows cfs/d (year occur)	32.0 (1977)	37.5 (1973)	86.9 (1996)	44.7 (1972)	40.2 (1972)	28.1 (1972)	28.4 (1978)	26.3 (1981)

Note: The data presented in the table illustrates data from the gage below Oso Diversion Dam for the period of record from 1971 to 1998 inclusive of historical San Juan-Chama diversions. A more detailed analysis is being performed using the entire period of record of several gages on both the Navajo and Little Navajo from 1935 to present with full San Juan-Chama diversions overlain to reflect the theoretical flows at the Reservation boundary some 12 miles below Chromo, CO. The above table conservatively illustrates that the proposed diversions are feasible and that sufficient flows exist to maintain minimum in-stream flows in the Navajo River as it flows through the Reservation.

Navajo River In-Stream Flow: The Tribe desires to maintain an active fishery and riparian habitat within the Navajo River as it passes through tribal lands. The Tribe is evaluating a minimum in-stream flow of 20 cfs and an operational target of leaving approximately 70% of the flows in the

river most of the time to achieve fish and wildlife management objectives. This requirement can be met under most flow regimes. However, looking at flow duration analyses and assuming that the US Bureau of Reclamation operates its upstream San Juan-Chama Project diversion dams to divert all but minimum bypass during low flow periods, some daily and monthly shortages exist during low flow periods, as illustrated in Table 1, within the period of record. These shortages will result in reduced or no diversions on some days to maintain minimum flows. Minimum in-stream flows will take priority over irrigation diversions during low flow periods. This result is common to most irrigation projects within the arid southwest.

Conveyance Systems: From the Navajo River at 6,635 feet, the water will be pumped through a steel 36-inch pipe over a 7,166-ft. ridge, to flow back down to Dulce at 6,740 feet. This pipeline is oversized for the potential expansion of the system for future projects. This pipeline would end at a pump station manifold near the intersection of US 64 and the J-8 Road. From this point, a 16-inch pipe system will convey water south by southwest near US 64 to Dulce Lake and continue south in a 12-inch pipeline near US 64 to NM 537 and into La Jara Lake.

The Dulce Lake conveyance system would generally follow the direction of US 64, for approximately four miles south to the Dulce Reservoir Area. The pipe will convey water into Dulce Reservoir, which sits at 7,062 feet. The reservoir and associated irrigation water consumption would include approximately 741 af/yr for crop production on 322 acres, 89 af/yr for recreation and wildlife use, and 153 af/yr for supplementing the levels within the existing Dulce Lake.

The La Jara Lake conveyance system would follow the direction of US 64 for approximately 5 miles and then follow the direction of NM 537 for approximately five miles and terminate at the existing La Jara Reservoir at 7,300 feet. This water will be utilized to irrigate approximately 2,315 acres within La Jara Canyon with an estimated consumptive use of 4,635 af/yr and 347 af/yr for recreation and wildlife with 61 af/yr of additional surface evaporation on La Jara Lake.

The planning efforts to date indicate that the conveyance pipelines for this Plan can be located near or within existing roadways and embankments with upland conditions, thereby avoiding wetland impacts.

Reservoirs: Currently, two reservoir areas are proposed for water storage. Each reservoir area will contain two actual reservoirs, for a total of four new reservoirs. These reservoirs will range in size from ten acres to 93 acres and will be constructed entirely on Tribal reservation lands. Landscape and topographical features limit their size. The reservoirs have been designed so they do not exceed two meters (6.6 feet) in depth. The following text, accompanying sketchs and the attached Table 3 detail the components of each reservoir area.

Dulce Lake: The Dulce reservoir area is located adjacent to the existing Dulce Lake, along U.S. 64. There will be two reservoirs in this area; one approximately ten acres and the other approximately 23 acres. The ten-acre reservoir will be created by building up an existing berm. There are no distinct drainages in this area; therefore, no sheet piles will be needed in the construction of this reservoir. The 23-acre reservoir will be constructed by placing sheet piles across a narrow, intermittent drainage. A new berm will be built off of the existing stock pond berm and will connect to the adjacent slopes. This berm will be approximately 300 feet in length and approximately nine feet high and will be constructed outside of wetland conditions. The benefits to

the Tribe from the creation of these two reservoirs include recreation, wildlife habitat, regulating reservoirs for the existing Dulce Lake and storage for adjacent agricultural areas.

La Jara Lake: The La Jara area is located on the east side of NM 537, south of U.S. 64. There will be two reservoirs created in this area; the surface area of one will be approximately 93 acres, the other will be approximately 72 acres in size. The lower reservoir will be constructed by heightening the existing five-foot berm (which was constructed for an existing stock pond) placing sheet pile across the 27-foot swale extending from the pond, and berming the upland area to connect to the adjacent slope. Approximately four feet will be added to the existing berm for a total berm height of nine feet. The total length of the impoundment structure will be approximately 825 feet. The upper reservoir will be established by raising an existing berm that traverses north to south across the La Jara Creek Canyon. The benefits to the Tribe from the creation of these reservoirs include recreation, wildlife habitat, regulating reservoirs for the existing La Jara Lake and storage for agricultural areas.

The placement of a sheet pile retention structure at the base of the drainages for all of the new reservoirs would effectively contain water, without the placement of fill as defined under federal guidelines. The placement of fill within a drainage or wetland generally requires a Section 404 (wetlands) permit, however, the placement of a sheet pile structure, as proposed, should not require a permit. The reservoirs will be shallow (less than 2 meters in depth) and will be designed to avoid conversion of existing wetland habitats to deep water or non-wetland conditions.

Preliminary Cost Summary

Completion of investigations and preliminary design being conducted this spring by Collector Wells International is estimated to cost approximately $100,000. This will develop the approach and the basic data necessary to prepare bid documents for a design/construct project that will include the collection system, pumping plant and pipeline to the storage reservoir. Work associated with the reservoir area enhancements and irrigation systems will either be performed through force account or by separate contract.

The proposed costs for the collection system, pumping plants, conveyance pipelines and reservoir improvements are estimated at this time to fall in the range between $6.2 million and $7.3 million depending upon the collection system selected and the final alignment of the conveyance pipeline. The most conservative estimates are presented below which include design, engineering and all associated construction costs. Savings may accrue depending upon final diversion system selected and how much work will be performed by Tribal force account.

Thirty-six inch pipe is estimated conservatively (in place and remote conditions) at $95/linear foot (lf) while 16-inch pipe is estimated conservatively at $28/lf. The following table is based upon these cost estimates.

Navajo River Water Development Plan
For the Jicarilla Apache Tribe

DRAFT 4/17/00

Table 2
Preliminary Cost Estimates

Facility/Structure	Unit Cost	# Units	Cost Estimate
Two Pumping plants plus (ponds + infiltration gallery)			~$3,900,000
36" pipe, ponds to junction	~$95.00/lf	~11,000 lf	~$1,045,000
16" pipe, junction to Dulce Lake	~$28.00/lf	~21,120 lf	~$591,360
12" pipe, Dulce to both ag areas	~$22.50/lf	~6,000 lf	~$135,000
12" pipe, junction to La Jara Lake	~$22.50/lf	~52,800 lf	~$1,188,000
12" pipe, La Jara to W ag lands	~$22.50/lf	~10,000 lf	~$225,000
Sheet pile placement and berm construction			~$200,000
Grand Total			~$7,284,360

Note: These costs are conservatively estimated to reflect the most expensive diversion system option and if all the work is contracted. Savings could accrue if a lower cost diversion system is selected and some or all of the work is performed by Tribal force account.

Irrigation Systems: While the diversion and conveyance infrastructure is targeted for completion during 2001, the irrigation system development would be phased over a period of three to five years. It is estimated that a high efficiency, drip method irrigation system will provide for the highest possible crop yields within the identified arable soil groups within the project area. The cost is estimated to be approximately $1,500 per acre to construct these systems adding an additional $3.6M to the total cost of the project. These costs, however, will be spread over three to five years and can be funded through water lease revenues over the phasing schedule.

Projected Schedule

Phase I: It is anticipated that additional site investigation and preliminary design work will be under contract to Collector Wells International by May 15, 2000 and should be completed by July 31, 2000. This portion of the project will provide the appropriate information to determine the most feasible diversion alternatives and the operating constraints. Additional hydrology analyses to verify available flows within the reservation boundary will also be completed during this period.

Phase II: Based on the outcome of Phase I, a design/build firm will be selected to complete final designs and to prepare bid documents for fast-track construction which would be managed by the design/build firm. Under this approach, the majority of the diversion and conveyance work would be completed during 2001. During the same period, construction of the reservoir sites at Dulce and La Jara lakes would proceed to complete Phase II of the project.

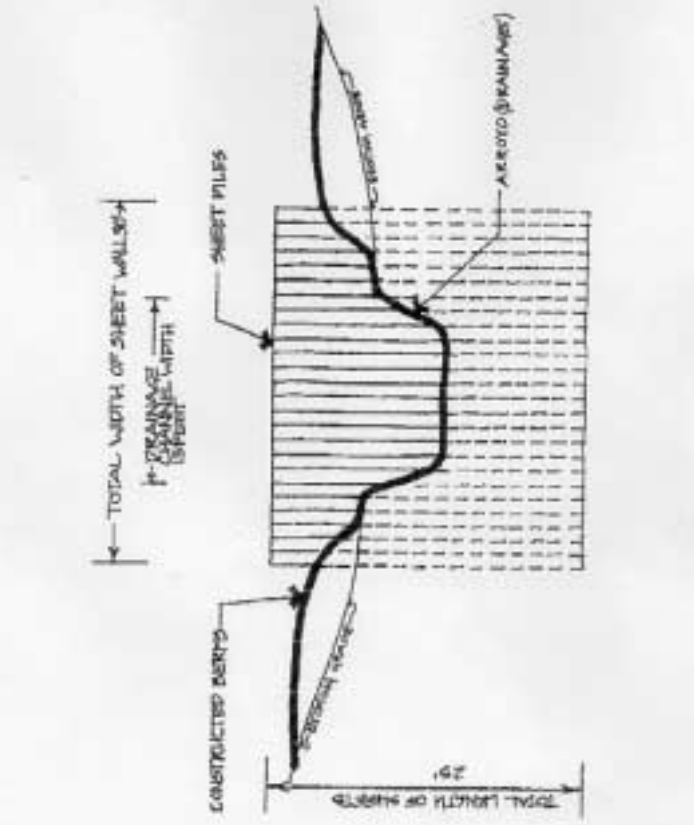
7

Jicarilla Apache Reservation
Navajo River Water Development Plan
Legend:
Existing Water Bodies
Potential Agricultural Areas
Proposed Pipe
Major Rivers
Continental Divide
Miles
1:200000

8

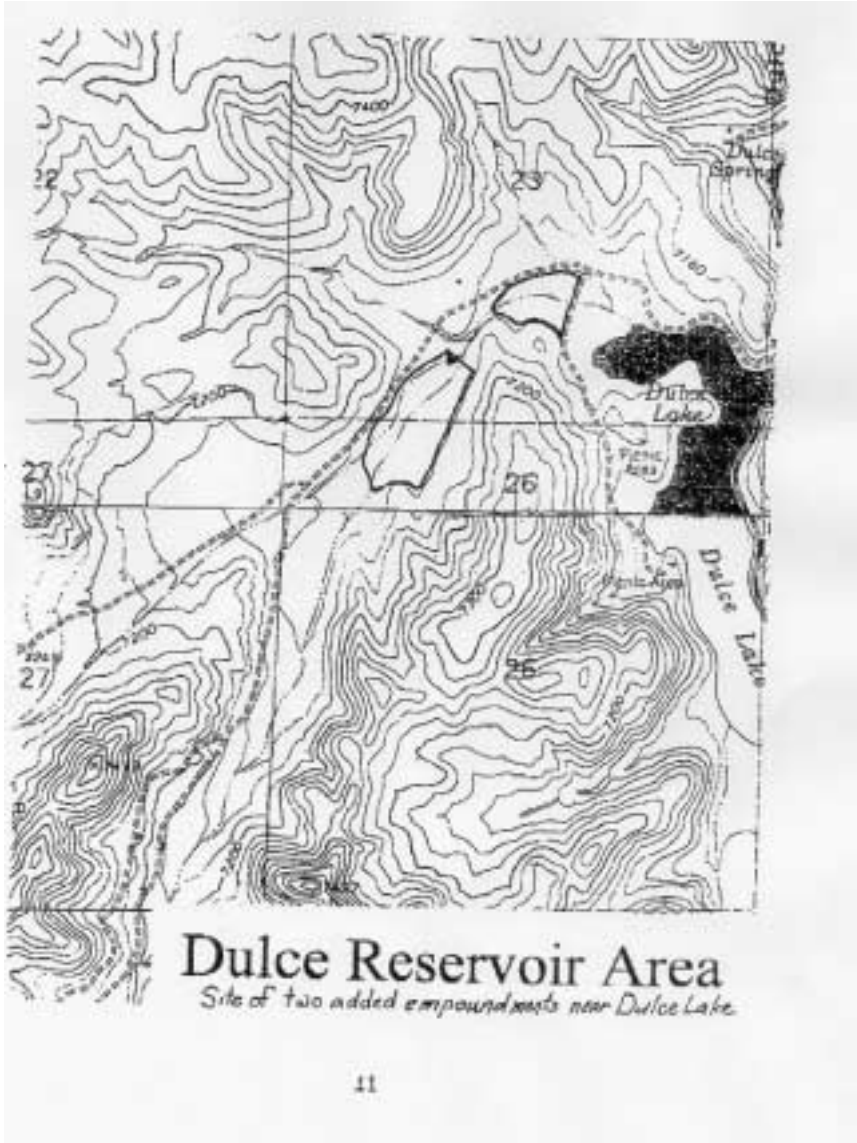
NAVAJO RIVER WATER DEVELOPMENT PLAN
RESERVOIR, AGRICULTURE, RECREATION AND WILDLIFE HABITAT DEVELOPMENT
Table 3
Consumptive Use Estimates

BENEFIT/FEATURE	SURFACE AREA	ANNUAL CONSUMP. USE	NOTES
	ACRES	ACRE-FT/YR	
Supplementing Existing Reservoirs			
Delco	85	153	Evaporation & Evapotranspiration estimated @ 1.8 af/yr (drop water)
La Jara	34	61.2	Evaporation & Evapotranspiration estimated @ 1.8 af/yr (drop water)
		214.2	
New Regulating Reservoirs/Wildlife Habitat			
Delco	37	66.6	Initial use = 237 ac. 3' avg. depth, 2 & 17 est. @ 2.1 af/yr (shallow water)
La Jara	193	346.8	Initial use = 488 ac. 3' avg. depth, 8 & 87 est. @ 2.1 af/yr (shallow water)
		413.4	
New Agriculture			
Below Lake Area	302	740.0	Adults demand estimated @ 2.3 af/yr using drip irrigation systems.
La Jara Canyon	2016	4934.1	Potential ag area = 3,172 acres, used 2016 as of best suit. Reserving 301 ac for wildlife
		5674.1	
TOTAL ESTIMATED CONSUMPTIVE USE		6303.1	



CROSS-SECTION OF SHALLOW
RESERVOIR RETENTION DESIGN

10


Dulce Reservoir Area
Site of two added empoundments near Dulce Lake
Dulce Lake
Dulce Spring
Picnic Area
Picnic Area
22
23
26
27
25
7400
7100
7200
7000
11

La Jara Reservoir Area
Site of two added empoundments near La Jara Lake
Creek
La Jara
La Jara
12

THE NAVAJO NATION
DEPARTMENT OF JUSTICE

TELECOPIER COVER LETTER

TO	:	Patrick J. Schumacher Southern Division Manager Bureau of Reclamation 970/385-6539
FROM	:	Stanley M. Pollack, Water Rights Counsel Natural Resources Unit, Dept. of Justice
DATE	:	April 17, 2000
TOTAL PAGES	:	This page and the attached 7 pages.

RE: Navajo Nation Comments on Draft Supplemental Environmental Impact Statement for the Animas-La Plata Project, Colorado and New Mexico

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Should you encounter any problems during this transmission, please contact the Navajo Nation Department of Justice at the number below for assistance. Thank you.

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THE
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KELLEY A. BEGAYE
PRESIDENT

DR. TAYLOR McKENZIE
VICE PRESIDENT

April 17, 2000

VIA TELEFAX: 970/385-6539 & VIA email: ALPDSEISComments@uc.usbr.gov

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

Subject: Comments on Draft Supplemental Environmental Impact Statement for the Animas-La Plata Project, Colorado and New Mexico

Dear Mr. Schumacher:

These comments on the Draft Supplemental Environmental Impact Statement (DSEIS) for the Animas-La Plata Project (Project), were prepared by the undersigned representatives from the Navajo Nation Department of Water Resources - Branch of Water Management and Department of Justice on behalf of the Navajo Nation.

CRITICAL ASSUMPTIONS

In the DSEIS, Reclamation mistakenly makes a number of assumptions with respect to the interests of the Navajo Nation. These mistaken assumptions are repeated throughout the document which result in flawed analyses. These mistaken assumptions include:

1 1. **The Navajo Nation's water development interests are not limited to the Navajo Indian Irrigation Project (NIIP), the Navajo-Gallup Pipeline (NGP), and the Shiprock Farm Projects (Hogback, Cudei, and Fruitland).** The DSEIS correctly reflects the fact that the Navajo Nation's water rights have not been quantified; however, the impacts on Navajo water resources attributable to the Project go beyond impacts to the above-specified interests.

a. Section 4.6.3.2 Affected Environment, Navajo Nation (Page 4-13)

This section accurately identifies the breadth of Navajo water interests in the basin; however, it is not accurate to say that the Navajo Nation's "direct link" to the project is the proposed municipal pipeline. Every acre-foot of water utilized in this project directly affects the ability of the Navajo Nation to develop its water resources.

TR2-1 The impacts to Navajo water resources were projected based on existing information that Reclamation currently has. Wording has been inserted into the FSEIS to reflect that these uses are not inclusive of all future Navajo Nation development needs.

1 (con't)

b. Section 4.6.3.5.2 Affected Environment - Water, Navajo Nation (Pages 4-15 to 16)

The DSEIS accurately recognizes that the full Navajo reserved water right has not been quantified. The DSEIS clearly does not attempt to analyze impacts on future water development other than NIIP, NGP and the Shiprock Farm Projects. The absence of any analysis on other Navajo water development interests should not imply that such impacts do not exist or are not insignificant.

2

c. Section 4.6.4.3.1 Refined Alternative 4 (Page 4-20)

Reference is made to the fact that Alternative 4 reduces the water available out of Navajo Reservoir. The statement that "This limited supply also affects the potential supply for the Jicarilla Apache Tribe and the completion of the Hogback Project" should be expanded to identify the limitation on all other future Navajo water development.

2. **The Navajo Nation does not waive its claims to Project water.** Throughout the DSEIS, the water availability analyses assume that the water used by Project beneficiaries would not be available for use by the Navajo Nation. In the absence of a quantified water right for the Navajo Nation, it should not be assumed that the Navajo Nation would not have a superior claim to Project water currently allocated to other Project beneficiaries. Specific sections of concern include:

3

a. Permit Transfer, Alternative 5 (Page 2-39)

The last paragraph in section 2.3.2.5.1 refers to the contingency in the Reconciliation Plan for the transfer of ownership of the diversion right of New Mexico Permit No. 2883. Previously, the Navajo Nation expressed concerns about the proposed permit transfer and requested Reclamation to include an analysis of the permit transfer in the EIS. See: *Letter from Navajo Nation President Kelsey A. Begaye to Pat Schumacher, re Notice of Intent to Prepare DSEIS*, February 16, 1999. The DSEIS is devoid of any analysis of the possible consequences of the permit transfer on the water right claims of the Navajo Nation or on its ability to utilize the water subject to the permit. Navajo Nation support for any alternative that includes the permit transfer is contingent on a satisfactory analysis of this issue.

4

b. Future Water Development, Section 4.3.3 (Page 4-7)

References are made here and elsewhere that completion of ALP limits the water available for future development. The Navajo Nation is not waiving its right to develop water, either from the undeveloped water available in the basin or from water previously developed, *including* water that could be developed under ALP. This is true under all alternatives; however, Alternative 6 would be particularly detrimental to Navajo interests because no future water development could occur for Navajo without jeopardizing other interests.

TR2-2 Your comment has been incorporated into the referenced statement in Section 4.6.5 of the FSEIS.

TR2-3 The permit transfer is a component of proposed legislation and is outside the scope of the FSEIS.

TR2-4 Comment noted.

5

3. **The proposed Navajo Nation Municipal Pipeline (NNMP) does not have sufficient capacity to meet projected future demands in the Shiprock Area.** The sole criterion for the design capacity of the NNMP was for 4,680 afy (2,340 afy depletion), the water available from the Project. The DSEIS is inconsistent on this point in several sections. For example:

a. Executive Summary, ES - 3, Second full paragraph

The NNMP is not adequate "to meet growth projections and future M&I requirements" of the eight Navajo Nation chapters identified in the second full paragraph. The capacity for the NNMP was not based on the projected water needs in the Shiprock area. This mistatement is also repeated throughout the DSEIS and in the Summary Document at S-41.

b. Page 2-3, Second full paragraph

The DSEIS, at 2-3, accurately notes that this water supply is only adequate to meet a portion (less than 50 percent) of the 2040 municipal water demand, not including potential industrial development.

c. Page 2-105

The second paragraph in section 2.5.1.3.3, erroneously states that "4,560 af of water represents growth projections and future M&I requirements" for the eight Navajo chapters in the NNMP service area. The reference to growth projections should be modified to reflect that the Animas-La Plata water supply is only adequate to meet a portion (approximately 50 percent) of the Shiprock municipal water supply.

d. Volume II, Attachment E, Page E-34

The design data in Table 6-1 is based on seriously flawed assumptions concerning per capita water use. Projections of future water use are based on critical assumptions concerning a population, growth rate, and per capita use. With respect to population, the DSEIS should rely on the data submitted to Reclamation in the Navajo Nation's technical memorandum. See: Navajo Nation Department of Water Resources, *Technical Memorandum, An Appraisal Level Study of the Proposed Farmington to Shiprock Municipal Waterline*, June 19, 1998. The DSEIS based its projections of future water use for the Navajo Nation in the Project service area based on *current* levels of Navajo water use. Current levels of water use do not provide an accurate basis for the prediction of future water demand because many of the homes in the existing service area are not yet connected to the municipal water supply system. The lack of an infrastructure, the lack of economic development, and the sustained poverty on the Navajo Nation are closely connected. If the data from the Navajo Technical Memorandum is utilized, such data should be updated since it relied on the 1990 U.S. Census data. We understand that the 1990 Census is estimated to have undercount Navajo people by 13 percent.

TR2-5 The FSEIS has been modified to reflect that 4,560 acre-feet represents about 50% of the future demand of the seven chapters. The Navajo Nation Municipal Pipeline has been designed to deliver this 4,560 acre-feet on an annual basis. This is the allocation to the Navajo under the ALP Project. Facilities to provide water for unmet demands would be the responsibility of other entities. It was estimated that per capita water demand would be approximately 179 gallons per capita per day. This would be sufficient to meet future municipal demands of the Navajo Nation with an allowance for the increase in per capita per day demand for water that would be expected from future lifestyles.

The assumption used in Table 6.1 concerning the 2.48% growth rate is consistent with the Navajo Technical Memorandum. The caveat that the growth rate may be too high is not consistent with the water supply planning efforts underway by the Navajo Nation and the Bureau of Reclamation on other projects. (See, e.g., *Gallup-Navajo Indian Water Supply Project, New Mexico - Arizona - Utah, Part II Draft Environmental Statement*, January 1984, Summary at c. ("The increase is attributed to a projected normal growth rate of 2.5%.").

With respect to per capita water use, Table 6.1 also hides the fact that existing per capita water uses are low because of the current low economic standard of living. The DSEIS should not condemn future generation of Navajos to continued poverty by utilizing existing water use levels as the basis for projecting future needs. The Navajo Technical Memorandum projected future water uses at 160 gallons per capita per day as the Navajo population achieves parity of water use with other non-Indian communities in rural northern Arizona and New Mexico.

ADDITIONAL COMMENTS

6 Page 2-12, Paragraph 2

In addition to the Navajo Nation and Bureau of Indian Affairs, the Indian Health Service would most likely be involved in the enlargement or extension of the Navajo delivery system.

7 Page 2-19, Table 2-5

Table 2-5 does not accurately reflect the allocation of water for the Navajo Nation under Alternative 7 as proposed in the 1996 FSFES. The Project water supply for the Navajo Nation under the Administration Proposal (Alternative 1) is 2,340 afy. The water supply for the Navajo Nation under the 1996 FSFES Recommended Action (Alternative 7) is 3,800 afy; however, Table 2-5 indicates that the 1996 FSFES Recommended Action includes the same quantity of water for the Navajo Nation as the Administration Proposal. The water supply for the Navajo Nation under Alternative 1 is approximately 60% of the supply under Alternative 7.

8 Page 2-29, Map 2-3

The map on page 2-20, depicting the location of irrigated agricultural lands within the ALP Project Area, does not show any irrigated lands in the Shiprock area.

9 Page 2-59, Table 2-33

The Non-Structural Proposal (Alternative 6) will negatively impact the Navajo Nation's Indian Trust Assets, but Table 2-33 does not identify any impacts to the Navajo Nation. For example, the reduction of irrigation return flows upstream from the Navajo Nation will affect the hydrologic flexibility downstream. These changes will impact the Navajo Nation's ability to provide additional municipal water.

TR2-6 Comment noted.

TR2-7 Comment noted. Section 2.5 of the FSEIS has been modified to clarify the water supply to the Navajo Nation under Alternatives 1 and 7.

TR2-8 The irrigated agricultural lands indicated on Map 2-3 represent lands that could be purchased by the Colorado Ute Tribes for the acquisition of water rights associated with the non-structural component of certain alternatives under consideration. Irrigated agricultural lands within Indian reservations, including those near Shiprock, New Mexico, are not shown as they would not be considered for acquisition. For clarification in the FSEIS, the title of Map 2-3 has been changed to "Location of Irrigated Agricultural Lands with Potential to be Purchased for Acquisition of Water Rights" and a footnote has been added to Map 2-3 to further explain and to clarify apparent discrepancies associated with reservations boundaries.

TR2-9 Comment noted.

Navajo Nation Comments on DSEIS for the Animas-La Plata Project
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10 Page 2-63

With respect to Alternative 8, reference is made to the Navajo Nation share of 3,310 af in the proposed Aztec Reservoir. It is unclear what this allocation refers to.

11 Pages 2-106, 2-109, and 2-112

Under Alternative NNMP-1, Reclamation suggests that the existing municipal intake and treatment plant in Shiprock is unnecessary and will be closed (2-106, first full paragraph; 2-109, sixth full paragraph; 2-112, bottom paragraph). However, because the proposed ALP water supply will only meet a portion of the municipal demand, the Shiprock facilities may need to remain in operation to provide backup treatment or treatment of the supplemental water supply. Table 2-54 at page 2-112 should not include the closure of the Shiprock plant for Alternative NNMP-1.

12 Page 2-110, Shiprock Water Treatment

Under Alternative NNMP-2 much of the Shiprock area water supply would be diverted and treated near Shiprock. Reclamation previously determined that a municipal water supply diversion at Shiprock was fatally flawed due to water quality concerns. See: *Gallup-Navajo Indian Water Supply Project, New Mexico - Arizona - Utah. Part II Draft Environmental Statement*, January 1984 at E-2 ("While the Shiprock diversion plan could conceivably meet project objectives, studies were discontinued fairly early during plan formulation because of downstream progressive water quality deterioration and excessive pumping costs....The Shiprock diversion scheme was determined nonviable and eliminated for further consideration. A more favorable diversion site with considerably lower dissolved salts and nutrients is located upstream near Farmington above the Animas River confluence.") The Shiprock diversion cite is below the Chaco Wash which contributes large volumes of suspended sediment for weeks at a time to the San Juan River. During these periods, the NTUA system relies almost entirely on the Farmington water supply. PNM and BHP report that their pumps are only able to operate 60 to 70 percent of the time. These water quality challenges could be mitigated by constructing a small reservoir so that the river diversions can be discontinued for weeks at a time. This approach was not considered in the DSEIS since the cost of this facility does not appear to be included in NMMP-2.

13 Page 2-110, Existing Facilities

Under NNMP-2 a portion of the current service area will only be served with the existing pipeline. The comparison between NNMP-1 and NNMP-2 should include the reduced life cycle of utilizing facilities that are already more than thirty years old.

14 Page 2-111, NNMP-2.

Reclamation suggests that the solid material that is sluiced out of the river can be readily sluiced back into the river or it can be readily hauled away. Sluicing the material back into the river may pose environmental challenge. Hauling the material away may increase the plant's operating costs. In additional sluicing material back into the river may raise water quality concerns, particularly with respect to concentrations of sulfates and dissolved solids which will increase in the future.

TR2-10 With Alternative 8, Aztec Reservoir would be the storage location for water supplied to all New Mexico entities (San Juan Water Commission and Navajo Nation) from the ALP Project.

TR2-11 Comment noted. Section 2.5 of the FSEIS has been modified to reflect that the Shiprock plant will remain in operation.

TR2-12 An option has been added in Section 2.5 of the FSEIS for Alternative NNMP-2 that would include an alternative intake location upstream of the Chaco Wash to avoid the problems described in the comment. The alternative location would be located at the Hogback Diversion.

TR2-13 Section 2.5 of the FSEIS has been modified to state more clearly that NNMP-2 uses the existing 30-year old pipeline when comparing the characteristics of the alternatives.

TR2-14 Comment noted.

Navajo Nation Comments on DSEIS for the Animas-La Plata Project
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Page 2-111, NNMP-3.

15 Under Alternative NNMP-3 the water will be conveyed through the NIIP facilities and stored at a cite near the proposed Galleos Reservoir. According to NIIP's recent Biological Assessment, water conveyed through the NIIP canal facilities is subject to a 10 percent conveyance loss. In addition, seepage and evaporation losses from the new storage facility should be included. Based on NAPI's recent operation and maintenance report, the average cost of conveying water through the NIIP facilities is approximately 50 dollars per acre-foot. NAPI's current conveyance fee to other water users is about 300 dollars per acre-foot. The comparison between NNMP-1, NNMP-2 and NNMP-3 should include these costs.

Page 2-112

16 Under Alternative NNMP-3, the existing municipal intake and treatment plant in Shiprock will need to remain open for the same reasons identified for NNMP-1 above. The first full paragraph at 2-112 states that these facilities would be closed. Table 2-54 at page 2-112 should not include the closure of the Shiprock plant for Alternative NNMP-3.

Page 4-6

17 Reference is made to the Navajo-Gallup Water Supply Project (NGP) as a project that will "Provide water to areas of the Navajo Reservation which currently do not have a domestic water supply." While this is true for many Navajo communities in the Eastern Navajo Agency, the NGP will not provide water to water-short areas outside of the proposed service area for the pipeline. Vast areas of the reservation do not have adequate domestic water supplies and will not be provided with water from this pipeline.

Page 4-6, 4-20 throuh 4-24

18 References are made "the completion of the Hogback Project." These references should refer to the restoration of the water for the Hogback Project, not the completion of the project.

Page 4-21 through 4-24

19 Repeated suggestions were made that the impact of the various alternatives on Navajo water development could be mitigated by not completing NIIP. This is not an appropriate form of mitigation. First, NIIP was authorized and promised to the Navajo Nation almost forty years ago. Second, reducing the size of NIIP is a zero sum game. By reducing water from NIIP to make water available for other projects, the Navajo Nation's interests in the completion of NIIP are seriously compromised. What would Reclamation suggest is the appropriate mitigation for the lost development at NIIP?

Volume II, Attachment E, Page E-36, Table 6-2.

20 The per unit costs in Table 6-3 appear to be low. The unit pipe costs of the 16, 20, and 24 inch diameter pipelines are not consistent with other Reclamation pipe schedules for installed pipes. The references for these values should be included in the table so that they can be compared with other sources. The Navajo Technical Memorandum includes more realistic unit cost data.

TR2-15 The cost of conveyance through the NIIP has been included in the cost estimate of treated water under NNMP-3 in the FSEIS. See Section 5 of the FSEIS.

TR2-16 Comment noted. Section 2.5 of the FSEIS has been modified to reflect that the Shiprock plant would also remain open under Alternative NNMP-3.

TR2-17 Comment noted. Section 2.5 of the FSEIS has been modified to reflect that the Navajo-Gallup Water Supply Project will only provide water to some areas of the Navajo reservation which currently do not have a domestic water supply.

TR2-18 Comment noted, and changes made to the FSEIS.

TR2-19 Mitigation measures for impacts to Navajo Nation water development are provided in Section 4.6.4 of Chapter 4.

TR2-20 Unit prices employed for pipe material and installation were based on recent Reclamation experience in New Mexico as reported in the referenced Technical Review of 1999. FSEIS estimated unit prices range from $3.20 to $3.80 per inch diameter per foot of installed pipe for sizes from 16 inches to 34 inches. This compares conservatively with the cost of $3.31 per inch per foot for the 3.3 mile, 30-inch diameter ductile iron pipeline completed last year for the City of Durango, Colorado. Smaller diameter per footunit prices trend lower.

Volume II, Attachment E, Page E-37, Table 6-3

21 Table 6-3 includes the treated cost of water as reflected in the purchase of water from the City of Farmington. If the Navajo Nation is to acquire the treated ALP water supply from the City of Farmington, the City's treatment facilities will at some point in the future need to be enlarged. The prorated cost of the enlarged treatment plant needs to be determined. The current City facilities will not need to be enlarged for many years. Under NNMP-2, the treatment facilities will need to be enlarged immediately. Consequently, to ensure the NNMP1, NNMP2, and NNMP3 are accurately compared, the present value of the sequential enlargements, taking advantage of the joint economy of scales should be determined.

Based on the analyses conducted by the Navajo Department of Water Resources and Reclamation, the Navajo Department of Water Resources concurs with Reclamation's selection of NNMP-1 as the preferred alternative for the municipal pipeline.

Please ensure that these comments are made part of the administrative record and are addressed in the Final EIS.

Respectfully submitted,

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TR2-21 For each alternative various environmental effects have been described along with an estimate of construction cost and average year operation cost. It was assumed that selection of the Preferred Alternative would be based on considerations of reliability, adaptability to future changes (such as construction of a Navajo-Gallup treatment plant), degree of operational control, environmental acceptability and other user preferences rather than an economic analysis that would involve assumptions of future actions of others.

April 17, 2000

Mr. Pat Schumacher *VIA E-MAIL AND U.S. MAIL*
Four Corners Division Manager
Bureau of Reclamation
835 East 2nd Street, Suite 300
Durango, Colorado 81301-5475

Re: Animas-La Plata Project Draft SEIS

Dear Mr. Schumacher:

1 As you know, I serve as special counsel to the Southern Ute Indian Tribe on matters related to their water rights. Attached are comments submitted on behalf of the Tribe related to the Draft Supplemental Environmental Impact Statement for the Animas-La Plata Project (Jan. 2000). You and your staff are to be commended for an outstanding job in completing the document in a timely and professional manner.

Sincerely,

Scott B. McElroy

SBM/dav

cc: John Baker Jr.
Sam Maynes
David Robbins
Don Israel
Stanley Pollack
Jessica Alberly
Wendy Weiss
Christine Arbogast
Randy Kirkpatrick

enc. *Comments on Behalf of the Southern Ute Indian Tribe Re Draft Supplemental Environmental Impact Statement for the Animas La Plata Project*

TR3-1 Comments noted.

COMMENTS ON BEHALF
OF THE SOUTHERN UTE INDIAN TRIBE
RE DRAFT SUPPLEMENTAL ENVIRONMENTAL
IMPACT STATEMENT
FOR THE ANIMAS-LA PLATA PROJECT

These comments are submitted on behalf of the Southern Ute Indian Tribe ("Tribe") in response to the Draft Supplemental Environmental Impact Statement ("DSEIS") for the Animas-La Plata Project ("ALP" or "Project"). The Bureau of Reclamation ("BUREC") is to be commended for its timely completion of an excellent document.

I. COLORADO UTE INDIAN WATER RIGHTS SETTLEMENT

A. INTRODUCTION.

ALP is a critical component of the settlement of the Tribe's reserved rights claims. The Colorado Ute Indian Water Rights Final Settlement Agreement (Dec. 10, 1986) ("1986 Settlement Agreement"), requires the construction of certain portions of the Project, as described in the 1979 Definite Plan Report, to resolve the Tribe's claims, as well as those of the Ute Mountain Ute Indian Tribe (referred to collectively as the "two Tribes") to water in the Animas and La Plata Rivers. Congress endorsed the use of the Project to provide water to the two Tribes for those purposes when it enacted the Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973 ("1988 Settlement Act"). However, since 1988 the application of certain environmental laws has halted the construction of the Project as authorized in 1968 and contemplated in the 1986 Settlement Agreement.

B. BACKGROUND

The Tribe has entered into a comprehensive agreement to settle its claims to water in southwest Colorado. The Ute Mountain Ute Indian Tribe, the United States, the State of Colorado, and the major water users in the area are parties to the Settlement Agreement. Congress implemented portions of the 1986 Settlement Agreement when it enacted the 1988 Settlement Act. Final consent decrees were entered in state court on December 19, 1991, and the State and the United States have appropriated the necessary tribal development funds. Problems involving endangered species that confronted the Animas-La Plata Project have been addressed. *See* part IV, *infra*.

The longstanding controversy over the nature and extent of the two Tribes' rights to water culminated in litigation in the early 1970's in both state and federal court. Ultimately, the United States Supreme Court determined that the matter should be heard in state court. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). The parties then prepared for the lengthy, bitter and divisive lawsuit that would be required to ascertain the tribal rights. Similar lawsuits in which tribes have claimed the right to share in scarce natural resources have resulted in tremendous antagonism and hostility towards the tribes. Although such efforts inevitably confirm the tribes' legal entitlement, the affected tribes have not always reaped practical benefits as a result.

In 1985, the parties began the negotiations that resulted in the present Settlement. The 1986 Settlement Agreement was multifaceted, seeking to resolve all anticipated issues between the parties. It has essentially four parts:

1. The provision of developed water supplies to the two Tribes through the use of the Dolores and Animas-La Plata Projects;

2. The recognition of the two Tribes' legal entitlement to defined water rights in the other streams on their respective reservations;

3. State and federal endowment of tribal development funds; and

4. Detailed provisions for the administration of the tribal rights.

The 1988 Settlement Act endorsed the 1986 Settlement Agreement, ratified the use of the two projects as contemplated by the Agreement, authorized the federal contribution to the development funds, and confirmed, with significant modifications to the provisions controlling the use of water outside the boundaries of the reservations, the administrative provisions to which the parties agreed.

Over the last few years, the two Tribes and other signatories to the 1986 Settlement Agreement have engaged in discussions concerning appropriate modifications to the Settlement that would allow a storage project to be constructed in compliance with the applicable environmental laws. The Tribe has carefully considered the advantages and disadvantages of modifications to the 1986 Settlement Agreement and the 1988 Settlement Act, and determined that certain modifications can be made that will allow the Tribe to receive a firm supply of water from storage that can be used to meet the present and future needs of the Tribe without taking water from its non-Indian neighbors. The Tribe has adopted Resolution No. 99-137 acknowledging HR 3112 as being in the Tribe's best interest. A copy of that Resolution is attached as Attachment 1.

Congress has appropriated the tribal development funds and the funds have vested with the two Tribes. The State also contributed $5 million to the two funds and completed

construction of the Towaoc Pipeline, at a cost of about $6 million. The Pipeline provides potable drinking water to the Ute Mountain Ute Indian Tribe.

The most troublesome issue facing the Settlement is construction of ALP. Although the Settlement became "final" upon entry of the consent decrees in 1991, the two Tribes may revive their claims on the Animas and La Plata Rivers because the facilities required to deliver their water in accordance with the terms of the 1986 Settlement Agreement have not been completed. Under the 1986 Settlement Agreement, the two Tribes must either (1) accept whatever benefits are available from the ALP by January 1, 2005 or (2) litigate their reserved rights on the Animas and La Plata Rivers.

The Project was the physical and political catalyst for the Settlement. If upheld in court, the tribal claims on the La Plata River would displace numerous ranchers, farmers and communities who, over the last century, have come to depend on the scarce supplies available in that stream. The Project provides the two Tribes with a more reliable water supply which is particularly beneficial for their anticipated municipal and industrial development. At the same time, it does not require displacement of the existing non-Indian users or an accompanying disruption of the non-Indian economy.

Upon review of Refined Alternative 4 ("RA 4") and Refined Alternative 6 ("RA 6"), Refined Alternative 4 is the appropriate choice. This alternative is the only viable alternative that would allow the Tribe to receive a firm supply of water from storage that can be used to meet the present and future needs of the Tribe without taking water from its non-Indian neighbors. The tribal leadership has consistently embraced that objective. RA 6, on the other hand, is not practicable. *See* Part III, *infra*.

4

II. SECTION 404(r) EXEMPTION

BUREC intends to seek an exemption under § 404(r) of the Federal Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.C. § 1344(r), from Congress for this Project. Under the Act, a discharge of any pollutant by any person is prohibited except in accordance with other relevant statutory provisions. 33 U.S.C. § 1311. One such exception is provided in § 404, 33 U.S.C. § 1344, which allows the Secretary of the Army to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Section 404(r), in turn, exempts from this permit requirement any,

> Federal project specifically authorized by Congress, . . . if information on the effect of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement . . . and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

33 U.S.C. § 1344(r). The § 404(r) exemption from the dredge and fill permit requirement is a narrow one that, "applies only to discharges integral to construction of designated federal projects." Monongahela Power Co. v. Marsh, 809 F.2d 41, 51 n.92 (D.C. Cir.), *cert. denied*, 484 U.S. 816 (1987). "The purpose of this narrow exemption is not to relieve certain Federal projects from substantive compliance with the Clean Water Act, but rather the intention is to avoid costly delays for Federal construction of environmentally sound projects after they have been authorized by Congress." *Federal Water Pollution Control Act – Sec. 404 Compliance for Projects Funded in Part by State and Local Entities*, 90 Int. Dec. 255, 256 (June 2, 1983) ("Solicitor's 1983 Opinion") (citing 123 Cong. Rec. S19,676 (daily ed., Dec. 15, 1977)).

Seven requirements must be met before Congress will grant a § 404(r) exemption: (1) the proposed discharge cannot contain any toxic pollutants; (2) the project must be "fully Federal" which includes all planning, financing and construction of the project;[1] (3) there must be a specific congressional authorization of the project; (4) a legally adequate EIS must be submitted to Congress; (5) the EIS must fully consider the § 404(b)(1) Guidelines; (6) Congress must receive the EIS before any discharge into the waters of the United States occurs; and (7) Congress must receive the EIS prior to either: (a) authorization of the project; or (b) appropriations of funds for its construction. *Permit Requirements for Discharge of Dredged or Fill Material Under Sec. 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344*, 86 Int. Dec. 400, 420-421 (Aug. 27, 1979) ("Solicitor's 1979 Opinion").

A. SECTION 404(r) AND THE STATE COST SHARING AGREEMENT.

The Sierra Club contends that the § 404(r) exemption "may be given only when a project is completely federally funded . . . ." *Facts about the Animas-La Plata Project* <http://www.rmc.sierraclub.org/alp/alpfacts.html> (visited Mar. 24, 2000) ("ALP Facts"). The Sierra Club is wrong. Even though the ALP may involve a cost sharing agreement between the federal government and the States of Colorado and New Mexico, or require payment or repayment of the share of the costs allocated to that portion of the water supply received by non-Indian entities, the ALP qualifies for the § 404(r) exemption.[2]

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[1]The meaning of this requirement was addressed by the Solicitor's 1983 Opinion, 90 Int. Dec. at 256.

[2]Under the Administration proposal of August 11, 1998, as well as HR 3112, the tribal water supply is to be nonreimbursable.

There is nothing in the regulations, the CEQ 404(r) Memorandum,[3] or the minimal case law construing § 404(r) that removes a federal project from § 404(r) eligibility because non-federal entities, such as the States of Colorado and New Mexico or non-Indian water users, contribute funding to the Project.[4] Moreover, the Solicitor previously determined that the § 404(r) exemption is available for a federal project which is receiving contributory financing from state or local entities, provided that the other conditions for the exemption are met and the project remains in federal control.

> 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.

Solicitor's 1983 Opinion, 90 Int. Dec. at 257. Thus, as long as ALP satisfies the other requirements, which it does, it qualifies for the § 404(r) exemption. *See* Part II(B), *infra*

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[3]Council on Environmental Quality, *Memorandum for Heads of Agencies: Guidance on Applying Section 404(r) of the Clean Water Act to Federal Projects which Involve the Discharge of Dredged or Fill Materials into Waters of the U.S., including Wetlands* (Nov. 17, 1980).

[4]The only § 404(b)(1) guidelines mention of § 404(r) is:

> The Guidelines are applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States. Sites may be specified through: . . . (5) Federal construction projects which meet criteria specified in section 404(r) of the Act.

40 C.F.R. § 230.2(a)(5).

B. REQUIREMENTS FOR THE § 404(r) EXEMPTION.

The key requirements of a § 404(r) exemption compel BUREC to submit an EIS to Congress which addresses the impact of the discharge, with particular reference to the guidelines promulgated pursuant to subsection 404(b)(1), prior to either the authorization or the appropriation of funds for construction. Solicitor's 1983 Opinion, 90 Int. Dec. at 256. This will ensure that Congress has the "full information on the impacts of the discharge of dredged or fill material associated with a project when it determines whether or not to authorize the project or to appropriate funds for its construction." Id. If BUREC complies with these requirements, the § 404(r) exemption will not be lost due to a cost sharing agreement between the federal government and the States of Colorado and New Mexico or the payment of costs by the non-Indian recipients of project water.

BUREC either has or will satisfy the remaining requirements set forth in the Solicitor's 1979 Opinion for the § 404(r) exemption. First, the proposed discharge does not contain any toxic pollutants, as uranium mill tailings were removed from the project under the Department of Energy's supervision. Second, Congress has specifically authorized the ALP under the Colorado River Basin Project Act of September 30, 1968, Pub. L. No. 84-485. DSEIS attachment 1, Part 2 of 2. Third, BUREC submitted a legally adequate EIS to Congress in 1980, 1980 Final Environmental Statement ("1980 FES"), and will do so again when the Final SEIS is complete. Fourth, the 1980 FES as well as the 1996 Final Supplement to Final Environmental Statement fully considered the § 404(b)(1) Guidelines. The Final SEIS, incorporating the comments submitted by various interested parties, will also fully consider the § 404(b)(1) Guidelines. *See* Part III, *infra*. Fifth, no discharges have taken place as no construction has yet commenced.

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Finally, although it might be argued that Congress has appropriated funds for the construction of ALP as originally configured,[7] Congress has not yet authorized an exemption from the § 404 permit process for the present configuration of the Project nor has Congress appropriated funds for that configuration.

BUREC must also indicate when such authorization will be sought:

> If the agency plans to utilize Section 404(r) to obtain an exemption from the Section 404 permit process for such discharge, the EIS shall provide an estimate of when such authorization will be sought. The possibility of a project becoming exempt under Section 404(r) remains open in such cases as long as the discharge has not occurred, provided that the EIS can be revised to contain adequate information within the meaning of Section 404(r) related to the Section 404(b)(1) guidelines and that the project is consistent with the Section 404(b)(1) guidelines.

Council on Environmental Quality, *Memorandum for Heads of Agencies: Guidance on Applying Section 404(r) of the Clean Water Act to Federal Projects which Involve the Discharge of Dredged or Fill Materials into Waters of the U.S., including Wetlands* at 4 (Nov. 17, 1980). BUREC must provide that information in the Final SEIS. Because no discharge has yet occurred, the possibility of an exemption for ALP under § 404(r) remains open.

C. RECOMMENDATION.

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[7]On August 15, 1985, Congress appropriated monies for the design and construction of the ALP. Pub. L. No. 99-88, 99 Stat. 293. This appropriation was based on the design contemplated in the 1980 FES. At that time, a 1979 biological opinion of the Fish and Wildlife Service allowed construction and operation of ALP. Again, on November 13, 1995, Congress appropriated additional monies for construction of ALP in conformance with the subsequent biological opinion issued in 1991. Pub. L. No. 104-46, 109 Stat. 402. However, Congress has not appropriated funds for the ALP as currently proposed and no construction has been initiated on any aspect of the Project.

BUREC must comply with the Solicitor's specific requirements for securing the exemption. In addition, BUREC should provide an estimate in the Final SEIS of when it intends to seek authorization of the § 404(r) exemption from Congress.

III. SECTION 404(b)(1) EVALUATION

A. BACKGROUND

As previously indicated, in order to obtain the exemption provided in § 404(r), BUREC must specifically consider the relation of the proposed Project to the § 404(b)(1) Guidelines. 33 U.S.C. § 1344(b). Indeed, "[t]he depth and quality of discussion of the effects of discharges, including consideration of the (b)(1) guidelines are crucial to the operation of subsection (r)." 86 Int. Dec. at 418 (citing 123 Cong. Rec. S19,653-54 (daily ed. Dec. 15, 1977)). The guidelines, which are found at 40 C.F.R. Part 230, provide a presumption against filling aquatic areas by prohibiting the discharge of dredged or fill material into waters "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a). A § 404(b)(1) evaluation is a technical evaluation based on numerous factors that are evaluated in light of the Project's purpose and need. BUREC's § 404(b)(1) analysis correctly included: (1) defining the Project's purpose and need; (2) identifying the range of Project alternatives; (3) identifying practicable alternatives; and (4) identifying the environmental impacts of the practicable alternatives.

1. Project's Purpose and Need.

A determination of the Project's purpose is central to evaluating practicable alternatives. National Wildlife Federation v. Whistler, 27 F.3d 1341, 1345 (8th Cir. 1994). Within the context of the stated purpose, BUREC studies and develops those alternatives which

"satisfy approximately the same needs as the chosen site and . . . disclose[s] the environmental impacts of those sites so that a reasoned environmental choice may be made." Miller v. United States, 492 F. Supp. 956, 963 (E.D. Ark. 1980). Whether a practical alternative exists is determined to a substantial extent by the Project's purpose.

In the DSEIS, BUREC states the Project's purpose is:

> [T]o 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.

DSEIS at 1-8 (quoting Federal Register Notice, January 4, 1999).

2. **Project Alternatives.**

After determining the Project's purpose, BUREC must consider alternatives that are available and capable of being implemented after taking into consideration "cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2). BUREC evaluated ten separate alternatives, including nine action alternatives and one no-action alternative, to determine their relative value in terms of: (1) potential environmental impacts; (2) capability to meet the Project's purpose and need requirements; and (3) technical and economic merits.

The no action alternative, Alternative 10, should be ruled out immediately because it has a fatal flaw -- it does not meet the purpose and need of the Project. Under this alternative, no activities would be undertaken to implement the 1988 Settlement Act. Thus, under this alternative, the two Tribes must commence litigation of their pending reserved water rights claims. Based on water right adjudications in other states, it seems clear that if the two

Tribes were to commence litigation, considerable hostility would arise between the Indian and non-Indian communities. *See, e.g.*, Truckee-Carson Irrigation District v. Secretary, 742 F.2d 257 (9th Cir. 1984); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972), *rev'd*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); New Mexico *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993 (D.N.M. 1985); In re the General Adjudication of All Rights to Use Water in Big Horn River, 753 P.2d 76 (Wyo. 1988), *aff'd without opinion by an equally divided court sub nom.* Wyoming v. United States, 492 U.S. 406 (1989). Each of these cases reflects the fact that litigation of tribal water rights has a poisonous effect on the relationship between tribes and their non-Indian neighbors.

Congress was aware of this fact when it implemented the 1986 Settlement Agreement:

> The Congress finds that--
>
> (1) The Federal reserved water rights claims of the Ute Mountain Ute Indian Tribe and the Southern Ute Indian Tribe are the subject of existing and prospective lawsuits involving the United States, the State of Colorado, and numerous parties in southwestern Colorado.
>
> (2) These lawsuits will prove expensive and time consuming to the Indian and non-Indian communities of southwestern Colorado.

1988 Settlement Act.

The State of Colorado and the two Tribes have cooperated in proceeding along the existing settlement track. If the Tribe was forced to litigate its claims to water rights from the Animas and La Plata Rivers, it is questionable whether the State would maintain its cooperative attitude in working out issues between the Tribe and the State. Moreover, if the Tribe's water

rights are at risk, the Tribe would have no reason to support other water uses in the area. In particular, the Tribe would have to reevaluate its position of strong support for the San Juan River Basin Recovery Implementation Program As a strategic matter, the Tribe would be forced to take whatever action was necessary to make sure that others were not developing water that could ultimately be awarded to the Tribe either through settlement or litigation. Although such a strategy would adversely affect the Tribe's relationship with its neighbors and the State, the Tribe has an obligation to protect and assert its rights to the fullest extent possible.

In short, the no action alternative does not "satisfy approximately the same needs as the chosen site . . . ." Miller, 492 F. Supp. at 963. Rather, it creates a whole host of new problems. Thus, since the no action alternative does not meet the purpose and need of the Project, no further analysis of this alternative is required.

3. **Practicable alternatives.**

Practicability is defined as:

> An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall Project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the Project activity may be considered.

40 C.F.R. § 230.10(a)(2). The Preamble to the § 404(b)(i) Guidelines states "[w]e consider implicit that, to be practicable, an alternative must be capable of achieving the best purpose of the proposed activity." 45 Fed. Reg. 85,339. BUREC took into account cost, technology, and logistics and determined that alternatives 1, 2, 3, 5, 7, 8 and 9 were not practicable. Alternative 6 also is not practicable and should be treated as such in the analysis.

> Alternative 6 was rated as low to moderate because of the lack of practicability and acceptability of purchasing water rights for lands in excess of 43,000 acres, which represents about 27% of the non-Indian irrigated lands in La Plata and Montezuma Counties. . . . The practicability of mitigating for the loss of a large amount of wetlands is also questionable.

DSEIS at 2-82, 83, Table 2-49. *See also* DSEIS at 2-79. Nonetheless, BUREC identified Alternatives 4 and 6 as warranting further consideration. Id. at 2-85. "Although Alternative 6 presented significant problems from its ability to meet all the elements of an Indian water rights settlement," BUREC refined Alternative 6 in an attempt to render it capable of meeting the Project's purpose and need. Id. at 2-79, 92-93.

Alternative 6, however, is not practicable because of its dependence on water acquisition as the sole source of water supply for settlement. Too many uncertainties surround the acquisition of a water supply by such an untested and controversial method to deem it an acceptable method for the settlement of the Tribe's rights. Indeed, the Tribe rejected the concepts contained in Alternative 6 because it

> will not meet the tribal objectives that were to be accomplished under the 1986 Settlement Agreement and the 1988 Settlement Act because among other things, that proposal does not provide the Tribe with certainty that it will receive a firm supply of water from a reliable source that can be used to meet its present and future needs on the west side of the Reservation.

Resolution of the Southern Ute Indian Tribe, Resolution No. 97-160 at 2 (Oct. 7, 1997), a copy of which is attached as Attachment 2.

4. **Environmental Impacts.**

After BUREC examined the potential environmental impacts, it correctly found that Refined Alternative 4 ("RA 4") would comply with the § 404(b)(1) Guidelines and is the

least damaging practicable alternative. DSEIS at B-2. Indeed, BUREC found that Refined Alternative 6 ("RA 6") could cause a large impact to wetlands because over 1,200 acres of wetlands/riparian vegetation may be lost by dewatering of irrigated lands.* Thus, the DSEIS confirms what the Tribal Council knew intuitively regarding RA 6 -- it is not practicable. This issue is discussed in greater detail in Part II(B), *infra*.

B. BUREC'S SELECTION OF RA 4 IS APPROPRIATE.

RA 4 is the appropriate choice. RA 4 includes both structural and non-structural elements. The structural component would include an off-stream storage reservoir with a conservation pool for recreation and water quality of approximately 30,000 acre-feet; a pumping plant; a reservoir inlet conduit; and a pipeline designed to transport and deliver treated municipal water to several Navajo communities. All structural facilities would be designed to deplete no more than an average of 57,100 acre-feet per year which is consistent with the 1996 Biological Opinion and the March 31, 2000, Preliminary Draft Biological Opinion issued by the U.S. Fish and Wildlife Service. In addition, a water acquisition fund would be established for the two Tribes to allow them to purchase approximately 13,000 acre-feet per year of historical depletions, in addition to depletions available from the structural portion of the Project. DSEIS at 2-93. Although RA 4 contemplates the acquisition of water, this is very different from a settlement that

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*Although § 404 delineation criteria exclude irrigation-induced wetlands, in other words, irrigation-induced wetlands are non-jurisdictional, BUREC determined they are important because they provide the same wetland habitat functions and values as jurisdictional wetlands. DSEIS at B-41. BUREC "may, in its discretion and on a case-by-case basis, determine that a body of water within this category [irrigation-induced wetlands] is within its jurisdiction." Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 996 (9th Cir. 1993) (citing 51 Fed. Reg. 41,217, § 328.3 (1986)).

depends entirely on the acquisition of water rights. The 13,000 acre-feet per year represents less than one-half of the water necessary to satisfy the two Tribes' water rights claims.

RA 4 maintains the foundation of the Settlement of the appropriative and reserved water rights approved by the parties -- including the United States and the State of Colorado -- in the 1986 Settlement Agreement by providing the Tribe with water from storage. RA 4 would provide the Tribe with a firm supply of water from storage that can be used to meet its present and future needs on the west side of the Reservation without taking water from its non-Indian neighbors. Moreover, the structural component of RA 4 is a straightforward solution with little or no risk. The structural portion of this alternative can be implemented in 5 years.

RA 6, on the other hand, will not necessarily allow the Tribe to receive a firm supply of water from storage that can be used to meet its present and future needs. One component would be equivalent to the structural component of RA 4 and includes purchasing 11,933 acres of land, enlarging Lemon Dam, coordinating the operation of existing reservoirs with streamflows in the San Juan Basin for more efficient utilization of the water supplies, and purchasing 200 acre-feet of stored water in Red Mesa Reservoir. In addition, a water acquisition fund would be established for the two Tribes to purchase approximately 13,000 acre-feet per year of historical depletions. Id. at 2-139-140.

Thus, RA 6 would not result in the development of new water supplies but instead would use non-structural alternatives in an attempt to provide the Tribe with water now being used by others or provide money to the Tribe. RA 6 is simply a reallocation of an already scarce resource and has serious problems. First, RA 6 fails to develop a needed water supply. Second, if the Tribe were to buy non-Indian water rights, it would obtain only the priority date of the seller, not

RA 6. The Tribe should not be required to bear the burden of implementing such a program in the face of such grave difficulties. There is a long history of cooperation between the Tribe and its neighbors on a host of issues. The federal government should not seek to impose a settlement on the Tribe that threatens to destroy that relationship.

In sum, RA 6 is not practicable because of the uncertainty of the water supply and priority date that it would produce and the management difficulties that would be created if the Tribe were to obtain significant land and water rights that were not held in trust by the United States for the Tribe's benefit. Because of these uncertainties and difficulties, RA 6 does not constitute a settlement of the tribal water rights and would place an unacceptable burden and risk on the Tribe. RA 6 is not feasible and, therefore, it is not a practicable alternative. Bersani v. EPA, 674 F.Supp. 405, 417 (N.D.N.Y. 1987).

C. RECOMMENDATION.

BUREC should recommend RA 4 as its preferred alternative in the Final SEIS.

D. TYPOGRAPHICAL ERRORS.

On page B-71, the sentence in § 12.1 should be revised to read:

> Revised Alternative 4 would **not** result in significant adverse effect to human welfare, when mitigation measures are applied.

In addition, the first sentence in § 12.2 should be revised to read:

> Revised Alternative 4 would **not** result in significant adverse effect to life stages of organisms, when mitigation measures are applied.

IV. ENDANGERED SPECIES ISSUES

The Sierra Club claims that the "DSEIS predicts grave consequences for endangered fish species in the San Juan River, as a result of depletions caused by ALP." ALP Facts. The Sierra Club is wrong.

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In October of 1991, the Fish and Wildlife Service issued a biological opinion pursuant to § 7 of the Endangered Species Act, 16 U.S.C. § 1531, 1536 ("ESA"), concluding that the depletions associated with the ALP, as previously proposed, were likely to jeopardize the

continued existence of the Colorado squawfish (now known as the Colorado pikeminnow) in the San Juan Basin. That opinion reversed a 1979 opinion allowing construction and operation of the ALP and was premised on the then newly adopted Fish and Wildlife Service policy that recovery of the San Juan population is necessary to the recovery of the population as a whole. The Fish and Wildlife Service issued a subsequent biological opinion in February of 1996 which reached the same conclusion.

All water users in the basin, including the Navajo Nation and the Jicarilla Apache Tribe, as well as the two Tribes, were placed at risk on account of the opinions' conclusions regarding the effect of additional water development in the San Juan Basin on endangered fish. Prior to the issuance of the final biological opinion in 1991, the four tribes, the States of Colorado and New Mexico, and certain water users in New Mexico and Colorado, worked with BUREC and the Service in an effort to find a reasonable and prudent alternative ("RPA") that would allow the ALP to proceed.

The 1991 final biological opinion recognized an RPA based on the views of a group of biologists with expertise on the endangered fish. The 1996 biological opinion advanced RPAs similar to those advanced in the 1991 biological opinion and determined that in order to preclude jeopardy the following seven elements had to be implemented: (1) constructing project facilities that result in an initial depletion of 57,100 acre-feet per year; (2) determining endangered fish habitat needs; (3) operating the Navajo Dam to provide a wide range of flow conditions for the endangered fish; (4) developing a procedure to implement flow recommendations; (5) committing to release peak flows out of the Navajo Dam in concurrence with the Biology and Navajo Dam Operating Committees; (6) guaranteeing that, based on the results of the research

> The Service also concludes that the proposed project is not likely to jeopardize the continued existence of the bald eagle.

Memorandum from Regional Director, Region 6, U.S. Service, to Regional Director, Bureau of Reclamation, Upper Colorado Regional Office at 38 (Mar. 31, 2000). Thus, contrary to the Sierra Club's contentions, "[u]nder [RA 4] there should be no significant impact to either endangered fish species due to flow reductions." DSEIS at 3-114.

V. BENEFIT-COST ANALYSIS

There is no statutory or regulatory requirement under the National Environmental Policy Act ("NEPA") (codified as 42 U.S.C. §§ 4321-70e) or the Council on Environmental Quality ("CEQ") regulations mandating that BUREC include a benefit-cost analysis of the Project in the EIS. Rather, the inclusion of a benefit-cost analysis in a Final SEIS is a decision within BUREC's discretion as the action agency.

A. BACKGROUND.

Although BUREC included a benefit-cost analysis in the 1980 FES for ALP by incorporating the benefit-cost analysis in ALP's Definite Plan Report, it did not include such an analysis in the DSEIS. The Sierra Club claims that BUREC must include "a cost-benefit analysis for the project as required by reclamation law intended to protect the federal taxpayer (the Water Resources Planning Act, 42 U.S.C. § 1962 et seq., the Economic and Environmental Principles and Guidelines)." ALP Facts. A benefit-cost analysis, however, is not appropriate for inclusion in the EIS.

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B. 1986 SETTLEMENT AGREEMENT

Under the 1986 Settlement Agreement, as ratified by the 1988 Settlement Act, the United States committed to proceed in good faith to develop a water supply project for the benefit of the two Tribes, although the development of that water supply project cannot be accomplished without complying with the applicable environmental laws. However, there is no legal requirement that a project such as the presently proposed configuration of ALP undergo a benefit-cost analysis before it proceeds. Nor are there any generally agreed upon economic values to use in an analysis of a tribal water rights settlement. The outcome of any such study would be extremely subjective and would largely depend upon the assumptions used in the analysis. Under these circumstances, a benefit-cost analysis would not help the decision-making process but only potentially add to the controversy. Certainly, a benefit-cost analysis would not provide a legal basis for the United States to refuse to construct RA 4. Having concluded that RA 4 can be constructed, the United States has an obligation to move forward in good faith. It may not break its word to the two Tribes even if it were to determine that keeping its word no longer makes economic sense, since it is abundantly clear that RA 4 is the only feasible method for settling the two Tribes' water rights claims.

C. NEITHER NEPA NOR THE CEQ REGULATIONS REQUIRES A BENEFIT-COST ANALYSIS IN THE EIS.

The CEQ issued regulations under NEPA which indicate that the decision to include or exclude a benefit-cost analysis in the EIS is discretionary on the part of the agency preparing the EIS. 40 C.F.R. § 1502.23 (1991). *See* Save the Niobrara River Ass'n v. Andrus, 483 F. Supp. 844, 857 (D. Neb. 1977), (1979) (NEPA language "does not require economic benefits and costs

to be included in an environmental statement."); Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974) (absence of benefit-cost analysis in EIS is not fatal); Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240, 247 (N.D. Cal. 1974) (NEPA does not require that benefit-cost analysis be included in EIS), *aff'd*, 621 F.2d 1017 (9th Cir. 1980); Environmental Defense Fund, Inc. v. Armstrong, 352 F. Supp. 50, 57 (N.D. Cal. 1972) (EIS does not need to contain benefit-cost analysis).

An EIS may, however, include a benefit-cost analysis under §102(2)(b) of NEPA (codified as 42 U.S.C. § 4332(2)(B) and 40 C.F.R. § 1502.23), where such an analysis would help in the decision-making process. If the EIS contains a benefit-cost analysis, the analysis must "represent a realistic assessment of the economic value of the project," and must not be misleading. Johnston v. Davis, 698 F.2d 1088, 1094 (10th Cir. 1983).

Because the inclusion of a benefit-cost analysis in the EIS is discretionary on the part of the responsible agency, a court reviewing the decision must defer to agency expertise. Id. at 1091; *see also*, Sierra Club v. United States Army Corps of Eng'rs, 772 F.2d 1043, 1050-51 (2d Cir. 1985) ("judicial role is relegated to affirming the agency's decision so long as a rational basis is presented for the decision reached."(citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 290 (1974)). Therefore, the decision to include or not to include a benefit-cost analysis in the EIS is only reviewable for lack of "good faith, objective, and reasonable explanation of environmental consequences." Johnston, 698 F.2d at 1091.

D. THE P&Gs ARE IN FUNDAMENTAL CONFLICT WITH THE RESERVED RIGHTS DOCTRINE.

The purpose of the reserved rights doctrine is to meet the present and future needs of the Reservation. The P&Gs[8], on the other hand, are designed to determine whether federal funding for an irrigation project would benefit the national economy. The fundamental premise of the P&Gs is that they are to be used to select only those projects that will "maximize[] net national economic development benefits." P&Gs at iv. Application of the economic analysis set forth in the P&Gs leads to a result which ignores the purposes of the Southern Ute Indian Reservation and makes the purposes of the P&Gs paramount. Moreover, the Tribe's legal right to use its water is avoided and the lost economic opportunity of those who have neither a legal right nor an equitable claim to use the resources is central to the economic analysis. Thus, conducting a benefit-cost analysis for the Project pursuant to the P&Gs is inappropriate.

E. RECOMMENDATION.

Pursuant to the 1986 Settlement Agreement and the 1988 Settlement Act, the United States made a commitment to the Tribes to proceed in good faith with the development of a water supply project. Because the United States cannot break its promise, a benefit-cost analysis would serve no purpose since there is no legal requirement in NEPA or the CEQ regulations to analyze the costs and benefits of ALP. A benefit-cost analysis is not required to evaluate the environmental impact of ALP. Finally, application of the P&Gs would be in direct conflict with

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[8]Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies (1983) (established pursuant to the Water Resources Planning Act of 1965, Pub. L. No. 89-80 (codified as amended at 42 U.S.C. § 1962 a-2 and 4-1)) ("P&Gs").

the reserved rights doctrine. Therefore, BUREC need not and should not reevaluate its benefit-cost analysis as part of the Final SEIS.

VI. NON-BINDING USES

The Sierra Club opposes the Project, claiming the two Tribes have no present need for the water and that future use, based on hypothetical use, cannot be analyzed to determine impacts of the Project. ALP Facts. The Sierra Club's contentions are meaningless.

First, while future end uses are unknown at this time, the two Tribes are not required by the Settlement or federal law to have present uses for the water. The two Tribes' 1868 federal reserved water rights are not subject to the beneficial use doctrine of Colorado water law. Furthermore, although the two Tribes provided information on potential end uses, water requirements and possible locations to BUREC to aid in its analysis of specific impacts, the Tribe maintains that the analysis is not necessary. If previously undisclosed impacts emerge when these waters are committed to a specific end use, additional environmental analysis may be required. DSEIS at 2-3, 3-3.[9]

Second, under the 1986 Settlement Agreement, as implemented by the 1988 Settlement Act, the two Tribes' water rights claims have been quantified and that question should not be subject to reevaluation. The two Tribes are not required to put the water to beneficial use within a specific time period or at any time. The purpose of the reserved rights doctrine is to make the Reservation livable for tribal members by providing for present and future needs of the

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[9]The 1988 Settlement Act governs the use of tribal water rights off of the two Ute Reservations. The Tribe recognizes that the use of water outside the State of Colorado must be accomplished in accordance with the requirements of state law. Those requirements may change over time.

Reservation. In Arizona v. California, 373 U.S. 546, (1963) ("Arizona v. California I"), the Supreme Court recognized extensive water rights for the five Indian tribes located along the lower Colorado River, stating that the water so reserved "was intended to satisfy the future as well as the present needs of the Indian Reservations . . . ." Id. at 600. Stated another way, the United States reserved water "to make the reservation livable," now and in the future. Id. at 599 (cited with approval in Montana v. United States, 450 U.S. 544, 566 n.15 (1981)).

But those pronouncements do not establish a precise standard by which courts can measure tribal reserved rights. That difficult task is left to the trial judge or special master for consideration on the merits of each case. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685-86 (1979). For the five Colorado River tribes, the Court agreed "with the Master's conclusion as to the quantity of water intended to be reserved," noting that the Master had "found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage [PIA] on the reservations." Arizona v. California I, 373 U.S. at 600 (emphasis added).

The method to measure tribal rights should be calculated using current technology:

> My reading of the transcript reveals that the evidence of "practicable irrigability" was determined by then-current standards . . . . Reference to past standards would introduce an additional complication in an already complex case. Given that these issues are to be litigated presently, the most sensible method of determining feasibility is by using present standards.

26

See Elbert P. Tuttle, Special Master, *Report* at 98 (Feb. 22, 1982), Arizona v. California, 460 U.S. 605 (1983) ("Tuttle Report") (emphasis added) (footnotes omitted). Special Master Tuttle further stated:

> The above discussion indicates that prior practice of using current technology should guide the present decision. . . . Quantification based on technology at the date of establishment of the reservation may provide a fixed quantity, but it also creates the difficulty of determining the technological possibilities of the nineteenth and early twentieth centuries. That inquiry is not likely to be reliable and might consume a large amount of trial time by itself.

Id. at 98 n.24. *See also* Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir.) ("We also consider [the Tribes'] need to maintain themselves under changed circumstances.") (footnote and citations omitted), *cert. denied*, 454 U.S. 1092 (1981).

The courts have repeatedly recognized that tribes are entitled to employ modern technology in the exercise of their rights to use natural resources. The court in United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *modified*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981), stated with regard to the extent of treaty-reserved rights to fish:

> The Indians' right to fish, like the aboriginal use of the fishery on which it is based, is not a static right. The reserved fishing right is not affected by the passage of time or changing conditions. The right is not limited as to species of fish, origin of fish, the purpose of use or the time or manner of taking. The right may be exercised utilizing improvements in fishing techniques, methods and gear. It may expand with the commercial market which it serves, and supply the species of fish which that market demands, whatever the origin of the fish.

Id. at 260 (citations omitted). *Accord* United States v. Washington, 384 F. Supp. 312, 357 (W.D. Wash. 1974) (fishing rights are not limited to the methods used historically and as more modern methods and gear become available, Indian tribes may take advantage of such changed conditions), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968) (treaty reserving to the Puyallup Tribe the right to fish at usual and accustomed places did not restrict the manner of fishing to that employed in 1854 when the tribe negotiated the treaty; therefore modern net fishing by the tribe was within the reserved treaty right).

In conclusion, the right to use water to meet the present and future needs on the Southern Ute Indian Reservation was reserved. That right was quantified in 1988 and is neither subject to reexamination nor to Colorado's beneficial use doctrine. Nor is the Tribe restricted to historic uses. Rather, the Tribe's present and future needs, 132 years after the establishment of the Reservation, must be judged by modern demands.

VII. CULTURAL RESOURCES

The Sierra Club claims that "[i]t is inappropriate to flood burial sites and the reservoir will prevent any further valuable research on the important sites." ALP Facts. It is true that construction activities associated with both RA 4 and RA 6 could disturb or destroy cultural resources eligible for inclusion in the National Register of Historic Places. BUREC acknowledges that even if the impacts to cultural resources are resolved in terms of proper treatment and handling of cultural resources in compliance with applicable regulations and guidelines, such resolution will not reduce the impacts to insignificant levels. DSEIS at 3-134. It is unfortunate that certain cultural resources may be adversely affected or destroyed. Yet,

BUREC has consulted with 26 tribes regarding concerns of potential impacts of the Project on traditional cultural properties ("TCPs"), sacred sites and burials that may be in or adjacent to the Project area in an effort to avoid and/or mitigate impacts to cultural resources in compliance with applicable regulations and guidelines. DSEIS at 3-134, 143.

A. BACKGROUND.

Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f ("NHPA"), requires BUREC to take into account the effects of its undertakings on historic properties and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on such undertakings. 36 C.F.R. § 800.1(a). Moreover, the amendments to the regulations place major emphasis on the role of Indian tribes and other Native Americans. The revisions embody the principle that Indian tribes should have the same involvement when actions occur on tribal lands as the state historic preservation officer ("SHPO") does for actions outside Indian country. The revisions also require that BUREC consult with those tribes that may have a cultural or religious affiliation to property located off-reservation that may be affected by the Project.

The Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-13 ("NAGPRA"), provides a system for identifying the rights of lineal descendants and Indian tribes to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated ("NAGPRA items"). If any NAGPRA items are to be excavated, BUREC must follow the requirements of the Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm.

Although the Tribe commends BUREC for its efforts to consult with the tribes potentially affected by its activities in constructing the Project, concerning the potential impacts of the

Project on cultural resources and NAGPRA items, BUREC needs to recognize that Indian tribes are often reluctant to divulge special information regarding the location, nature and activities associated with such sites. Thus, BUREC must be prepared to address the tribal concerns regarding confidentiality and recognize that confidentiality and communication issues may require BUREC to allow more time for the exchange of information. In addition, the ethnographic team's consultation with the tribes should be expanded to include the tribes' interpretation of sites and features based upon traditional knowledge.

B. PROGRAMMATIC AGREEMENT.

BUREC has prepared a draft *Amended Programmatic Agreement by and among the Advisory Council on Historic Preservation, the Bureau of Reclamation, the Colorado State Historic Preservation Officer, and the New Mexico State Historic Preservation Officer regarding the Animas-La Plata Project* ("Programmatic Agreement"), DSEIS Attachment H, for the Project which sets forth the procedures which must be followed in order to ensure compliance with the historic preservation laws. DSEIS, Attachment H. Based on the foregoing, the Programmatic Agreement could be improved if the following revisions were made:

1. The Advisory Council amended the previous regulations, 36 C.F.R. Part 800, on May 18, 1999. 64 Fed. Reg. 27,044-87 (1999). In making its revisions, the Advisory Council revised and renumbered certain sections. Thus, BUREC should make sure that its references to these regulations are correct -- specifically its references to 36 C.F.R. § 800.11 and 36 C.F.R. § 800.13.

2. On page 1 of Attachment H, the fifth "Whereas" clause should be revised to read

> WHEREAS, all Indian Tribes (Tribes), who may have a cultural or religious affiliation to properties that may be affected, or whose tribal lands may be affected by the Project **(collectively referred to as Consulting Tribes)**, have been invited to participate in consultation; and

3. On page 1 of Attachment H, the sixth "Whereas" clause should be revised to read:

> WHEREAS, the Southern Ute Indian Tribe (SUIT), the Ute Mountain Ute Tribe (UMU), and the Navajo Nation **(collectively referred to as Concurring Tribes)**, have been invited to concur in this Programmatic ~~Memorandum of~~ Agreement; and,

4. BUREC should identify, evaluate and treat TCPs in the same manner as it does historic properties. While this is likely BUREC's intent, it is not clear from reviewing the Programmatic Agreement whether TCPs are included within the term "historic properties." Thus, BUREC should include in the Programmatic Agreement a definition of historic properties similar to its definition in the NHPA:

> *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria. The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

36 C.F.R. § 800.16(l).

5. The regulations require that the tribes who may have a cultural or religious affiliation should be consulted regarding identification, evaluation and treatment of historic properties. 36 C.F.R. §§ 800.4(a)(4), (c)(1), 800.5(a), 800.6(a). BUREC has included consulting

tribes in some but not all of the relative sections of the Programmatic Agreement. Thus, consulting tribes should be included in the following paragraphs:

a. I(C)(1) - end of second sentence;

b. I(C)(2) - first and second sentences;

c. I(D) - first sentence in opening paragraph;

d. I(D)(2)(b) - first and second sentences;

e. III(A)(2) - first sentence; and

f. III(A)(3) - first sentence.

6. The Programmatic Agreement § I(D) refers to Stipulation II, but the Programmatic Agreement does not contain a Stipulation II.

7. The Southern Ute Indian Tribe, the Ute Mountain Ute Indian Tribe, and the Navajo Nation have been invited to concur in the Programmatic Agreement. However, there are references to the Southern Ute Indian Tribe and the Ute Mountain Ute Indian Tribe throughout the Programmatic Agreement but not to the Navajo Nation. Thus, the Navajo Nation should be included in the following paragraphs:

a. I(E)(1) - first sentence;

b. IV(E) - first sentence; and

c. IV(F) - first sentence.

In addition, a signature line should be added to the Programmatic Agreement for the Navajo Nation to sign as a concurring party.

8. Section I(E)(2) should be revised to reflect that the Southern Ute Indian Tribe, the Ute Mountain Ute Indian Tribe, and the Navajo Nation should receive copies of final historical/ archeological reports resulting from actions pursuant to the Programmatic Agreement.

C. NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT - PLAN OF ACTION

BUREC has prepared a draft entitled *A Written Plan of Action for the Treatment of Intentionally Excavated or Inadvertently Discovered Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony for the Proposed Animas-La Plata Water Project* ("POA"), DSEIS Attachment H, for the Project which sets forth the procedures which must be followed in order to ensure compliance with NAGPRA. Based on the foregoing, the POA could be improved if the following revisions were made:

1. BUREC should clarify when it will notify all interested Indian tribes of the discovery of NAGPRA items as set forth in § III of the POA. The POA states the tribes will be notified within one business day, but it is unclear whether discovery of a NAGPRA item triggers notification.

2. While we believe BUREC intends to consult with the tribes, the POA is unclear as to whether the BUREC will merely notify the tribes of the discovery or whether it will consult with the tribes regarding treatment, care and handling of NAGPRA items.

3. BUREC must obtain a permit issued under 16 U.S.C. § 470cc in order to remove or excavate NAGPRA items and should so acknowledge in the POA.

Dated:_____

Respectfully submitted,

Scott B. McElroy
M. Catherine Condon
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
(303) 442-2021

Attorneys for the Southern Ute Indian Tribe

By:_____
Scott B. McElroy

RESOLUTION NO. 99-137

RESOLUTION
OF THE
COUNCIL OF THE SOUTHERN UTE INDIAN TRIBE
AUGUST 24, 1999

WHEREAS, authority is vested in the Southern Ute Indian Tribal Council by the Constitution adopted by the Southern Ute Indian Tribe and approved November 4, 1936, and amended October 1, 1975, to act for the Southern Ute Indian Tribe; and

WHEREAS, on December 10, 1986, the Southern Ute Indian Tribe entered into the Colorado Ute Indian Water Rights Final Settlement Agreement of 1986 ("1986 Agreement") Which has as its foundation the construction of the Animas-La Plata Project; and

WHEREAS, in 1988, the Colorado Ute Indian Water Rights Settlement Act of 1988 ("1988 Settlement Act") was enacted by the United States Congress which would implement portions of the 1986 Agreement; and

WHEREAS, since 1988, the application of certain environmental laws has halted the construction of the Project as authorized in 1968 and contemplated in the 1986 Agreement; and

WHEREAS, the Southern Ute Indian Tribe, the Ute Mountain Ute Indian Tribe and other signatories to the 1986 Agreement have been engaged for the past three years in discussions concerning appropriate restructuring to the settlement that would allow a storage project to be constructed; and

WHEREAS, the Southern Ute Indian Tribal Council has carefully considered the advantages and disadvantages of restructuring to the 1986 Agreement and 1985 Settlement Act, and determined that certain modifications can be made that will allow the Tribe to receive a firm supply of water from storage that can be used to meet the present and future needs of the Tribe without taking water from its non-Indian neighbors; and

NOW, THEREFORE BE IT RESOLVED, by the Southern Ute Indian Tribal Council acting for and on behalf of the Southern Ute Indian Tribe that the proposed legislation is in the best interest of the Southern Ute Indian Tribe; and

BE IT FURTHER RESOLVED, that the Southern Ute Indian Tribal Council does not support any amendments to the 1968 Colorado River Storage Project Act as part of this legislation; and

Resolution No. 99-137
August 24, 1999
Page 02

BE IT FURTHER RESOLVED, that the Congress of the United States is respectfully requested to enact such legislation.

This Resolution was duly adopted on the 24th day of August, 1999.

/s/ Clement J. Frost
Clement J. Frost, Chairman
Southern Ute Indian Tribal Council

CERTIFICATION

This is to certify that there were 7 of the regularly elected Southern Ute Indian Tribal Council members present at the above meeting at which 5 for, and 1 against, it being a quorum and the above Resolution was passed, the Chairman not being permitted to vote in this instance due to a Constitutional provision.

/s/ Yvette L. Cuthair
Yvette L. Cuthair, Recording Secretary
Southern Ute Indian Tribal Council

RESOLUTION NO. 97-160

RESOLUTION

OF THE

SOUTHERN UTE INDIAN TRIBE

WHEREAS, authority is vested in the Southern Ute Indian Tribal Council by the Constitution adopted by the Southern Ute Indian Tribe and approved November 4, 1936, and amended October 1, 1975, to act for the Southern Ute Indian Tribe; and

WHEREAS, under the provisions of Article VII, Section 1 (c) of said Constitution, the Tribal Council has the inherent power to act regarding the water rights of the Southern Ute Indian Tribe and under the provisions of Section 1(n) has the power to protect and preserve the property and natural resources of the Southern Ute Indian Tribe; and

WHEREAS, the Southern Ute Indian Tribe has negotiated a settlement of their reserved water rights which were the subject of litigation in the Colorado water courts; and

WHEREAS, on December 10, 1986, the Southern Ute Indian Tribe entered into the Colorado Ute Indian Water Rights Final Settlement Agreement of 1986 which has as its foundation, the construction of the Animas-La Plata Project; and

WHEREAS, in 1988, legislation was enacted by the United States Congress which would implement portions of the Colorado Ute Indian Water Rights Final Settlement Agreement of 1986; and

WHEREAS, certain members of Congress, with the support and encouragement of various environmental groups including the Sierra Club, have refused to recognize and abide by the federal trust responsibility to carry out the letter and the spirit of the Colorado Ute Indian Water Rights Final Settlement Agreement of 1986 and 1988 implementing legislation, which refusal sets a dangerous precedent for all Indian tribes; and

WHEREAS, since 1988, the enforcement of the Endangered Species Act and other environmental laws, as well as new budget priorities in Congress, have halted the construction of the Project and caused the United States to fail to live up to its solemn obligations under the settlement; and

WHEREAS, under the leadership of Governor Romer and Lieutenant Governor Schoettler, the Southern Ute Indian Tribe, the Ute Mountain Ute Indian Tribe, and other signatories to the 1986 Agreement have been engaged for the past year in discussions with the project opponents about potential alternatives to the Project; and

RESOLUTION NO. 97-160 Page 2

WHEREAS, the Southern Ute Indian Tribal Council received a presentation from SLIGO regarding the proposed Southern Ute Land and Legacy Fund and requested the project opponents to attend a public meeting in the vicinity of the Reservation to discuss the Animas River Citizens' Coalition proposal; and

WHEREAS, the Southern Ute Indian Tribal Council has carefully considered the advantages and disadvantages of the Animas River Citizens' Coalition proposal as an alternative to carry out the intent of the 1986 Settlement Agreement and 1988 Settlement Act:

NOW, THEREFORE BE IT RESOLVED, that the Southern Ute Indian Tribal Council acting for and on behalf of the Southern Ute Indian Tribe, hereby determines that Animas River Citizens' Coalition proposal will not meet the tribal objectives that were to be accomplished under the 1980 Settlement Agreement and 1988 Settlement Act because among other things, that proposal does not provide the Tribe with certainty that it will receive a firm supply of water from a reliable source that can be used to meet its present and future needs on the west side of the Reservation.

BE IT FURTHER RESOLVED, that the Chairman is authorized to send a copy of this resolution to the Lieutenant Governor.

This Resolution was duly adopted on the 7th day of October, 1997.

/s/ Marvin E. Cook Vice Chairman
for Clement Frost, Chairman
Southern Ute Indian Tribal Council

CERTIFICATION

This is to certify that there were 5 of the regularly elected Southern Ute Indian Tribal Council members present at the above meeting at which 4 voted for, and 0 against, it being a quorum and the above Resolution was passed, the Chairman not being permitted to vote in this instance due to a Constitutional provision.

/s/ Edna J. Frost
Council Secretary
Southern Ute Indian Tribal Council

OFFICE OF THE CHAIRMAN

Ernest House, Sr.
Chairman
Ute Mountain Ute Tribe

APR 11

CLASS
PROJECT
CONTROL #
NAME | DATE

April 10, 2000

Pat Schumacher
Bureau of Reclamation
P.O. Box 640
Durango, CO 81301

FAX: 970-385-6539

Re: **ALP Draft SEIS**

Dear Mr. Schumacher:

We submit the following comments as they relate to the draft ALP EIS.

1 1. Under the non-binding discussion of potential Colorado Ute Tribe M&I uses, the draft suggests that a power plant would be located on the New Mexico portion of the Ute Mountain Ute Reservation and utilize water supplies from Ridges Basin. Under current law, that use would not be possible. The draft should be corrected to reflect that.

2 2. On pages 2-27 and 2-28, and perhaps elsewhere, there are charts which indicate that under the Clinton Administration proposal some of the 13,000 of of water to be acquired from willing sellers could be obtained in New Mexico. That is erroneous. Because the acquisition of existing supplies is an attempt to implement a Colorado Ute water settlement, those acquisitions as a matter of course can only occur in Colorado.

3 3. On pages 2-14, 25, 29, 96, 132, 133, 142, and perhaps elsewhere, there are tables which suggest that the Colorado Utes under a non-binding scenario might lease some of their water to New Mexico communities. As noted above, such a transaction is not permitted under current law. What the documentation should show is that there exists a long-term regional water supply requirement which includes needs in both Colorado and New Mexico. The Tribes have set forth a non-binding statement of how they might provide some of the regional water, but under current law any water they were to provide would be restricted to Colorado.

We thank you for your work on this project and look forward to reading the final.

Very truly yours,

Ernest House, Sr. Chairman
Ute Mountain Ute Tribe

TR4-1 Having a gas-fired power plant located on the Ute Mountain Ute Reservation in New Mexico is one of the non-binding M&I uses. If some agreement could not be worked out to have the depletions for the power plant charged to the Colorado Ute Settlement in Colorado, then an option is to locate the plant on the Ute Mountain Ute Reservation in Colorado. Text has been added to the FSEIS to reflect this in Section 2.1.1.

TR4-2 Comment noted. Text has been modified in Section 2.1.3 of the FSEIS.

TR4-3 Comment noted. Language has been added to the text in Section 2.1.3 of the FSEIS.