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Colorado River Basin Study Comments--Southwestern Water Conservancy District/Southern Ute Indian Tribe

Janice C. Sheftel

Maynes, Bradford, Shipps & Sheftel LLP

Southwestern Water Conservancy District

Southern Ute Indian Tribe

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MAYNES, BRADFORD, SHIPPS & SHEFTEL

ATTORNEYS AT LAW

WEST BUILDING - 835 E. SECOND AVENUE, SUITE 123
POST OFFICE BOX 2717
DURANGO, COLORADO 81302-2717

970/247-1755
FAX: 970/247-8827
FAX: 970/247-0727

FRANK E. (SAM) MAYNES
THOMAS H. SHIPPS
JANICE C. SHEFTEL
PATRICIA A. HALL†
SAM W. MAYNES
JOHN BARLOW SPEAR
GEOFFREY M. CRAIG

BYRON V. BRADFORD (1907 - 1985)
†ALSO ADMITTED IN ARIZONA

APR 11 1997

April 8, 1997

Via E-mail (wwsec@do.usbr.gov) and U.S. Mail

Western Water Policy Review Advisory Commission
P. O. Box 25007, D-5001
Denver, CO 80225-0007

Re: Report on the Colorado River Basin

Gentlemen:

Maynes, Bradford, Shipp & Sheftel, LLP represents the Southwestern Water Conservation District and the Southern Ute Indian Tribe. Maynes, Bradford, Shipp & Sheftel does not represent any party in the Romer-Schoettler process. Attached is a revised draft of Pages 54-56 and 61-62 of the Colorado River Basin Study by Dale Pontius, the portions on the Animas-La Plata Project ("ALP Project") and the San Juan Endangered Fish Program, respectively, showing suggested proposed changes to the document. The changes were made for the following reasons:

1. ALP Project

- a. The cost of the ALP Project is not definite.
- b. The two Ute Tribes are officially the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe.
- c. The Tribes are not required to pay for wet M&I water until they use the water.
- d. Colorado did not provide funding to ALP Project opponents, but only passed on federal money.

2. San Juan Endangered Fish Program. No parties in Colorado take water from Navajo Reservoir. The Navajo Reservoir, however, is part of the Reasonable and Prudent Alternative for the ALP Project. Neither does the San Juan/Chama take water from Navajo Reservoir.

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Sincerely,

MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP

A handwritten signature in black ink, appearing to read "Janice C. Sheftel". The signature is written in a cursive style with a large initial "J".

Janice C. Sheftel

JCS:eab
attachment

cc: Board of Directors, Southwestern Water Conservation District
Clement J. Frost, Chairman, Southern Ute Indian Tribe
James M. Olguin, Chief, Division of Natural Resources, Southern Ute Indian Tribe
Ruth Gunnarson, WWPRAC (via E-mail: rgunnarson@do.usbr.gov)

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- **Animas-La Plata Project Status**

Authorized in 1968, the ~~\$710 million~~ Animas-La Plata Project (ALP) would divert flows from the Animas River near Durango, Colorado to produce some 191,230 af/yr, including 111,130 af/yr of irrigation water and 80,100 af/yr of M&I water. The ~~P~~project is embroiled in controversy; pitting various farmers, ranchers, municipalities and developers, together with ~~and~~ the Ute Mountain Ute and Southern ~~Mountain~~ Ute Indian Tribes against environmental conservation interests, the Navajo Nation, and a small but vocal group known as the Southern Ute Grassroots Organization (“SUGO”). Project opponents ~~argue have indicated~~ that ~~Project~~ the diversions could jeopardize endangered fish species, cause water quality problems, destroy riparian ecosystems and habitat areas, and impact Animas River recreational opportunities. ~~Project p~~Proponents argue that the ~~P~~project is needed to provide “wet” water as promised by the federal government both in an executed agreement and in federal legislation for the settlement of Indian water rights, as well as for growing municipal populations in Colorado and New Mexico, and for irrigated agriculture, to maintain the rural life style in southwestern Colorado and northwestern New Mexico.

Resolution of the issues surrounding the ALP has proceeded at what some have called a “glacial” pace, as new issues are continually raised by Project opponents. Since authorized by Congress in 1968, to be completed concurrently with the Central Arizona Project, the ALP has undergone several modifications in response to fiscal and environmental concerns and to date a total of only \$60.5 million has been appropriated. A key element of the ALP is the 1986~~8~~ Colorado Ute Indian Final Water Rights Ssettlement Agreement (“Settlement Agreement”), under which ALP water ~~will is dedicated to~~ satisfy reserved water rights claims of the Southern ~~Mountain~~ Ute Indian and Ute Mountain Ute ~~Indian~~ Tribes. The Tribes have claims to approximately one third of the ~~P~~project water, including significant municipal and industrial (“M&I”) water, for which the Tribes incur no payment obligation until the water is actually put to use, and agricultural water, for

which payments are deferred under the Levitt Act. Most All Tribal Council members favor the Pproject due to its major role in providing wet water, including M&I water, to fulfilling the water rights claims resolved under of the 1988 Ssettlement Agreement. Opposition to the Pproject in the Indian community comes from SUGO the Southern Ute Grassroots Organization, which is concerned about environmental damages and the financial obligations the Pproject would impose on the tribes. In addition, the Navajo Nation has recently raised issues regarding a conflict with of their Winters rights claims, which date from 1868, and have never been adjudicated, with those of the Ute Tribe also dating from 1868, and which could be impacted by the Pproject. The last Congress debated cutting funding for the Pproject, but \$9.5 +2 million in funding was restored for FY 1997.

In an attempt to resolve the continuing disputes about the Pproject, Colorado Governor Roy Romer and Lt. Governor Gail Schoettler convened a state-wide process for negotiations. Among the stakeholders involved in this process are: the two Utes Tribes, Navajos, the Animas-La Plata Water Conservancy District, the San Juan Water Commission (New Mexico), conservationists, SUGO Southern Ute Grassroots Organization, and interests representatives from the states of Colorado and New Mexico, Colorado, the EPA, and the Department of the Interior. Secretary Babbitt indicated that he believes the process "may provide a helpful model for negotiated settlement of knotty problems within the Colorado River Basin."

Most agree that the Romer/Schoettler process is innovative. *High Country News* called the negotiations "revolutionary in their recognition of the newest arrivals' right to be at the table" (Marsten, 1996). Financial support for this process is being offered by an array of agencies, including the U.S. Department of the Interior and EPA.

The Romer/Schoettler process is an alternative to the on-going litigation. Project proponents and

opponents have entered into a "Stand Still" Agreement, which places pending lawsuits on hold and allows stakeholders to focus their resources on resolving differences within the negotiating process. To enhance the potential for resolution, Governor Romer and Lt. Governor Schoettler have established a set of ground rules for the stakeholders. The rules require stakeholders to refrain from publicly voicing or publishing personal attacks on the character or motives of other parties and to recognize that each party deserves to be treated with dignity and respect despite differing points of view.

Some progress has been made. Consensus has been reached that the water rights of the Tribes are not subject to renegotiation. **Jim Lochhead, Executive Director of the Colorado Department of Natural Resources (CDNR), stated that the Settlement Agreement "required vision, extraordinary leadership, respect for the needs of all sides, a willingness to listen to and explore new solutions, and a commitment to stay at the table until a solution is reached. If these same qualities are applied in [the Romer-Schoettler] process, we can reach a positive and lasting result" (CDNR, 1996).**

Yet most disputes remain unresolved; the stakeholders are still defining "the process" for negotiations to come. Discussions on key issues such as power revenues and water marketing are barely underway. Lt. Governor Schoettler, who has presided over most of the discussions, told the *Durango Herald*, "This has been a very slow process. We're all going to have to be very patient. It's a very complicated, difficult issue. You can't force a solution" (Draper, 1996). **Both proponents and opponents of ALP are to notify the Lt. Governor by April 7, 1997, of the date by which their proposed alternative to the ALP as currently designed will be ready.**

~~Jim Lochhead~~, Executive Director of the Colorado Department of Natural Resources (CDNR), stated

that the 1986 settlement agreement “required vision, extraordinary leadership, respect for the needs of all sides, a willingness to listen to and explore new solutions, and a commitment to stay at the table until a solution is reached. If these same qualities are applied in [the Romer-Schoettler] process, we can reach a positive and lasting result” (CDNR, 1996).

The process builds upon a trend in water resource management to identify and solicit participation from all stakeholders. This strategy was critical to the resolution of controversies surrounding the Central Arizona Project and California’s 30-year water war in the Bay-Delta Accords. Agreements on these projects were not reached easily, and consensus on the ALP will require new partnerships to form among diverse and differing interests.¹

THE SAN JUAN ENDANGERED FISH PROGRAM

The San Juan Basin makes up about one-fourth of the Upper Basin and drains 25,000 square miles of the Four Corners states. The San Juan River is the second largest tributary of the Colorado. It includes four Indian reservations, which make up about 60 percent of the land in the basin. Private land makes up about 13 percent of the basin and government land the rest. At its confluence at Lake Powell, the San Juan River produces an average annual flow of 2 maf, about half of this is controlled upstream by the Navajo Dam.

Navajo Dam was authorized in 1956 as part of the Colorado River Storage Project Act and stores 1.7 maf. The dam and reservoir have been described as “truly the quintessential cornerstone of the

¹ Due to the dynamic nature of the ALP discussions, it is likely that developments have occurred since this writing. The Governor’s office maintains a World Wide Web site with the current status and updates on the process. The address for this site is http://www.state.co.us/gov_dir/govnr_dir/a_lp/index.html.

future potential management options in the San Juan River Basin” (Gold and Jensen, 1996). Water users in the basin, including the Navajo Indian Irrigation Project (NIIP), ~~San Juan-Chama Project, ALP,~~ and others, depend on this reservoir. New Mexico derives almost all of its Upper Basin Compact water from this project **and the San Juan-Chama Project.**

The endangered fish program for the San Juan Basin was developed as the RPA to the jeopardy opinion on the ALP, which as planned would deplete 154,800 af from the Animas and La Plata Rivers in Colorado and New Mexico. A Memorandum of Understanding (MOU) was signed ~~by between~~ New Mexico, Colorado, and Utah plus the Southern Ute Indian, Ute Mountain Ute and Jicarilla Tribes and DOI to develop a recovery implementation program to address the needs of two listed fish (Colorado squawfish and razorback) **in the context of plus seven** other native fishes. The program was initiated in 1992 and is to run for 15 years. A second MOU was signed to deal with the NIIP and Navajo Reservoir releases, although the Navajos Nation refused to participate or agree to protect releases from Navajo Reservoir. ~~Again,~~ **“Sufficient Progress” is required** toward recovery ~~of the two listed fish would be required by the RPA for additional and~~ **depletions levels above recognized levels. were negotiated** and a seven-year research period was initiated to determine flows **needed for endangered fish recovery. and the basis for determination of w**What constitutes **“Sufficient Progress” is still to be determined.**

The main controversy is over the need for spring releases for **the endangered** fish downstream of Navajo Dam, which impacts water available in storage in **Navajo Reservoir** for **P**project users **and other projects depending on the SJRRIP as an RPA, including ALP.** The conflict here between endangered species and Native American rights is profound. The Navajo Nation opposes releases from the dam for fish because they claim the stored water is reserved to the Nation for full development of the **NIIP project** and the ultimate satisfaction of their reserved rights. **The two Ute**

Tribes claim the right to fully develop their reserved rights which were to be settled by the construction of the full ALP.

The San Juan long-range program is similar to the Upper Basin program; its major differences are that it includes **more emphasis on water quality, ~~enhancement and~~** includes a number of other native species to avoid listings in the future, **and the problem of competition with non-native fish has not yet received the intense scrutiny it has received apparently is not at the same level of concern in the San Juan basin as in the Upper Basin.** ~~It~~ **The San Juan Recovery Implementation Program** is currently funded at a level of \$800,000 a year from BOR and FWS appropriations, but **the funding is closer to \$2 million per year if indirect costs for all participants are included.** ~~A~~**after the research period has ended, it is anticipated that up to \$15 million will be needed for capital projects to recover the fish, with an annual operating cost of at least \$600,000.**