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Negotiating An Indian Water Rights Settlement: The Colorado Ute Indian Experience

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**NEGOTIATING AN INDIAN WATER
RIGHTS SETTLEMENT: THE COLORADO
UTE INDIAN EXPERIENCE**

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University of Colorado School of Law
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NEGOTIATING AN INDIAN WATER RIGHTS SETTLEMENT:
THE COLORADO UTE INDIAN EXPERIENCE

I. Introduction

The Colorado Ute Indian Water Rights Final Settlement Agreement, signed December 10, 1987, benefited the Ute Mountain Ute and Southern Ute Indian Tribes. These tribes are of Shoshonean stock, with aboriginal lands that included central and western Colorado, eastern Utah, and northern New Mexico. Today the Ute Mountain Ute Tribe is located on a reservation in extreme southwestern Colorado, with portions of the reservation extending into New Mexico and Utah. The reservation totals 599,329 acres with a population of approximately 1,400 members. The Southern Ute Tribe is located on a 308,000 acre reservation to the east of the Ute Mountain Ute Reservation and has a population of approximately 1,000 members.

These reservations lie within the drainage of the Colorado River, primarily within the San Juan River drainage basin. Almost every river in southwestern Colorado passes through one or both of these reservations. The Navajo, Blanco, San Juan, Piedra, Pine, Florida, Animas, La Plata, Mancos, and Dolores Rivers and McElmo Creek all pass through the Indian reservations and then flow southwesterly into Utah or New Mexico.

The Colorado Ute Settlement is an example of the benefits which can be obtained by all parties when Indian reserved water

rights are negotiated instead of litigated. The Ute Tribes received wet, usable water. They also obtained funding to develop the water resources promised to them by the settlement. Many barriers to full tribal use of reserved waters were removed, such as the Nonintercourse Act and a reservation limitation on the place of use of the water to within the reservations. In turn, the State of Colorado and the non-Indian communities received the benefit of protecting existing water uses, local economies, and state water administration. The federal government received a substantial state contribution, 39 percent, for the settlement of the tribal reserved water right claims. All parties received certainty: future change in use proceedings, administrative proceedings, and coordinated use of the shared water resource were negotiated and resolved. The settlement is a model of successful cooperation and preservation of harmonious Indian and non-Indian relations.

Unfortunately the settlement is also an example of the vagaries of the negotiation process and the ever-changing climate in which these settlements take place. Early on, necessary federal agencies were absent from the negotiation table. The parties would reach an agreement only to find that a absentee federal agency would not accept the compromise. The United States Fish and Wildlife Service ("FWS") nearly dealt the settlement its coup de grace last May by issuing an eleventh-hour draft biologic

opinion which threatened the Animas-La Plata Project ("ALP"), the lynch-pin of settlement. There is still hope that this decision will be remedied; however, its appearance after six years of negotiations is a lesson to all those who are about to engage on the long and arduous process of negotiating Indian reserved rights claims.

II. History of the Settlement

A. Federal Court Filings

Litigation commenced in 1972, when the United States Department of Justice filed reserved water right claims on behalf of the two Ute Indian Tribes in federal district court. The State of Colorado and other parties intervened in this litigation, moving to dismiss on the grounds that, under the McCarran Amendment (43 U.S.C. § 666), the Colorado District Court in and for Water Division No. 7 ("state water court") was the appropriate court to quantify the Indian reserved right claims. After 4 years of litigation the United States Supreme Court concurred and ruled that: (1) the state water court was the appropriate forum in which to litigate the Indian reserved water right claims; and (2) the policy of the McCarran Amendment would be furthered if quantification of the Indian reserved water right claims occurred in state water court (Colorado River Water Conservation District

v. United States, 424 U.S. 800 (1976)).

B. 1976 State Court Filings

The U.S. Department of Justice refiled these cases in state water court in 1976. Currently, there are eleven separate amended applications, each covering water rights associated with the specific rivers identified above (District Court for Water Division No. 7, Case Nos. W-1603-76; W-1603-76A; W-1603-76B; W-1603-76C; W-1603-76D; W-1603-76E; W-1603-76F; W-1603-76G; W-1603-76H, W-1603-76I; and W-1603-76J).

C. Settlement Discussions

Settlement discussions began in November 1984. Throughout 1985, the parties held plenary negotiation sessions in Durango, Colorado, and on both reservations. Representatives of both tribes, the states of Colorado and New Mexico, local municipalities and water user entities, federal officials from the Departments of Justice and the Interior, and other water users attended these sessions, which often included over 100 participants.

Central to these early discussions was the use of water from two major federal reclamation water projects, the Dolores Project and ALP. The Dolores Project was nearing completion, but funds for construction of ALP, a participating project under the

Colorado River Storage Project Act (70 Stat. 105), authorized by the Colorado River Basin Project Act (82 Stat. 885), had never been appropriated by Congress.

These federal reclamation projects were critical to the settlement because the existing water supply was insufficient to meet both the Indian and non-Indian needs. Many of the rivers and streams to which the tribes made claim were already fully or over-appropriated. If the existing supply of water was not augmented, providing wet water to the tribes would displace existing non-Indian water users.

In 1985, Congress appropriated \$1 million for construction of ALP, but conditioned this appropriation on a non-federal cost-share agreement for project construction being in place by June 30, 1986 (Chapter IV of Public Law 99-88, 99 Stat. 293). In addition, the federal negotiators from the Department of the Interior stated that final federal approval would also be contingent upon settlement of the reserved water rights claims of the two Ute Tribes.

With the June 30, 1986 deadline looming, the parties struggled to reach cost-share and reserved water rights agreements satisfactory to the Department of the Interior and the Office of Management and Budget, the states of Colorado and New Mexico, the two Ute Indian Tribes, and local water users.

There were many difficult issues which threatened the nego-

tiations, in addition to the difficulty of reaching a cost-share agreement satisfactory to the federal government. Primary among these issues was the off-reservation use of tribal waters. The opportunity to use water off-reservation was central to the tribal demands to receive "usable" water. Colorado agreed to allow off-reservation use as long as state law and the "law of the river," which includes federal and state laws and regulations, decrees, interstate compacts, international treaties and compacts which govern the use of water from the Colorado River, were protected. Colorado's legal position was that these laws would prohibit the out-of-state use or sale of these waters, but Colorado reserved to the tribes the right to litigate the legal question: to what extent does the law of the river apply to Indian reserved water rights? In contrast, however, Steve Reynolds, then New Mexico's Interstate Stream Commissioner, stated that if ALP arguably could put water in interstate commerce, he would withdraw his support for the project.

This difficult negotiation process finally stalled in the fall of 1985 due to the high cost-share demands of the federal governmental. Subsequently, Colorado, New Mexico, and the two tribes decided to negotiate without the federal government. The parties did so successfully and, in March 1986, reached an Agreement in Principle. This Agreement in Principle settled all matters: cost-sharing and financial participation in the construc-

tion of the ALP, quantification of the Indian reserved water right claims on each of the rivers, and the thorny legal issues concerning marketing of Indian reserved water rights.

This agreement was presented to the U.S. Department of the Interior with a request for speedy review; the June 30, 1986 deadline imposed by Congress loomed. The federal government came back to the table on June 11, 1986. Even then the federal government's cost-sharing demands remained out of reach and significant legal hurdles emerged. The federal government was unmoved in its opposition to the type of liquidated damage provisions the parties believed essential to the enforceability and finality of the agreement. There was significant federal pressure for a modification of the state's position on interstate marketing: the federal government wanted Colorado to agree to upper basin leasing, with the law of the river to apply only in the lower basin. New demands for water administration were made. The federal government quantified its trust obligation to the tribes by stating that these considerations served to move them back to the bargaining table. On June 26, 1986 the parties were still \$53 million apart.

In the last two days before June 30, the deadlock broke and on June 30, 1987, the State of Colorado, the New Mexico Interstate Stream Commission, the major Colorado and New Mexico water user entities, the two Ute Indian Tribes, and the Under Secretary

of the Interior signed a binding cost-share agreement for the construction of the Animas-La Plata Project. This agreement also included the parameters of the Indian water rights settlement which were, in essence, the Agreement in Principal reached by Colorado and the Ute Indian Tribes in March. At the time the parties anticipated merely "clarifying" the March Agreement in Principal.

The anticipated "clarification" turned into six more months of intense negotiations on almost every issue, with leasing the central issue. Interior had a national agenda for these Indian settlements and the Colorado Ute Settlement did not fit the mold. Often Colorado and the two Ute Tribes were aligned against the federal trustee. Fortunately, all parties persevered, and on December 10, 1986, the Final Settlement Agreement was signed by the Departments of the Interior and Justice, the State of Colorado, the Ute Mountain Ute Indian Tribe, the Southern Ute Indian Tribe, and various water conservancy districts, municipalities, ditch companies, and water users in Colorado. The State of New Mexico did not need to sign this agreement because it did not involve New Mexico cost-sharing or New Mexico water rights.

III. Final Settlement Agreement

The Final Settlement Agreement is a complex and lengthy

document. It provides a comprehensive settlement of the tribes' claims for water and secures for the tribes the means to develop their reservations. It has 6 major components:

(1) The tribes receive rights to specified amounts of water from the Animas-La Plata and Dolores Projects and additional rights to certain quantities of water from various rivers and streams which pass through their reservations. The Final Settlement Agreement quantified the priority, amount and source of the reserved water right and identified the place of use, type of use, and diversion points for the water rights.

(2) The manner in which these water rights will be used and administered was specified, including proceedings to be followed for changes in type, place or time of use; regulation of surface diversions; sharing of stream flow data; and beneficial use limitations.

(3) The tribes waived ancillary breach of trust claims against the United States and all other claims to water.

(4) A \$60.5 million tribal development fund was established to enable the tribes to develop their water resources and to otherwise make their reservations economically self-sufficient.

(5) A non-federal cost-share commitment for the Animas-La Plata Project and the tribal development funds was provided.

(6) Certain federal deferrals of reclamation project costs were agreed to.

In all, the Ute Mountain Ute Indian Tribe received the right to beneficially use 25,100 acre-feet of water from the Dolores Project, 33,000 acre-feet of water from ALP, and 27,400

acre-feet of water from the three rivers flowing through the Ute Mountain Ute Indian Reservation. The Southern Ute Indian Tribe received the right to beneficially use 29,900 acre-feet of water from ALP and over 10,000 acre-feet of water from various other water sources serving the reservation. In addition, both tribes received underground water for individual domestic and livestock uses, and current existing uses were protected.

The tribes were also given the right to use their water off-reservation. Within the State of Colorado this use was governed by state law. Outside the State of Colorado the use was governed by law of the river. The Final Settlement Agreement was silent, however, on the extent to which the law of the river applied to tribal reserved water rights. Again the issue was left for a future judicial determination.

Unfortunately, the signing of the Final Settlement Agreement did not end the Colorado Ute Settlement process. Instead, it merely provided the road map for the beginning of a new process, directing the signatory parties in three different directions: to the United States Congress to obtain specific legislative enactments, to the Colorado State Legislature to obtain necessary state moneys, and to the state water court to obtain final court decrees confirming the water rights of the tribes.

IV. Legislation

A. Federal Legislation

After great debate and renegotiation with both the federal government and other western states, the "Colorado Ute Indian Water Rights Settlement Act of 1988" became law in November 1988, (102 Stat. 2973). With this legislation Congress fulfilled many federal legislative requirements of the Final Settlement Agreement. This legislation:

- (1) authorized the use of the Animas-La Plata and Dolores Projects to supply reserved water to the Tribes in accordance with the Final Settlement Agreement;
- (2) waived the provisions of the Indian Nonintercourse Act (25 U.S.C.177) thereby allowing the tribe to alienate their water rights without congressional approval;
- (3) waived or deferred repayment of tribal reclamation project costs;
- (4) established a \$60.5 million tribal development fund and provided a funding schedule for payment of these monies;
- (5) waived selected provisions of reclamation law; and
- (6) directed the Secretary of the Interior to comply with the administration agreement in the Final Settlement Agreement.

Not surprisingly, one of the critical elements renegotiated in Congress was off-reservation use of tribal waters. Congress prohibited the tribes from litigating the off-reservation ques-

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tions reserved by the Final Settlement Agreement. The legislation requires that the tribal water rights be used as state water rights off-reservation and prohibits the sale or lease of waters from ALP or the Dolores Project into the lower basin, absent an agreement of those states taking water from the Colorado River or a court decision which holds that the sale of state water rights is permitted by the law of the river.

The last piece of necessary federal legislation is the appropriation of the third and final federal contribution to the tribal development fund, which is expected to occur this year.

B. State Legislation

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The necessary state legislation included appropriations for: (1) construction of a drinking water pipeline to Towaoc, Colorado; (2) state contributions to the construction of the ALP; and (3) state contributions to the tribal development fund. All of these state appropriations have been made.

V. Final Consent Decrees

The parties are in the process of distributing and signing the stipulations for consent decrees. One stipulation, the San Juan River stipulation, has already been filed. After these stipulations are filed with the court, hearings on the proposed

stipulations will be held in state water court. It is anticipated that final consent decrees will be entered by the court in the fall of this year.

VI. Endangered Species Problems

On May 7, 1990, shortly before the scheduled groundbreaking ceremony for the Animas-La Plata Project, the FWS issued a draft biological opinion regarding ALP. This opinion threatened the last six years of negotiations and the settlement of the tribes' reserved water right claims, and reversed an earlier 1979 final biological opinion on ALP issued by the FWS. The May 7 opinion stated, in part, that construction of ALP might jeopardize the continued existence of the endangered Colorado squawfish and that no reasonable and prudent alternative was available to mitigate this harm. The FWS believed that construction of ALP would jeopardize the Colorado squawfish because the project would further deplete water in the San Juan Basin. The FWS further believed that there was no reasonable and prudent mitigation alternative available because there was insufficient factual information about squawfish in the San Juan basin to evaluate potential alternatives.

To say that the tribes and states were angry and frustrated by this late development would be an understatement. In partic-

ular, the tribes felt betrayed by the Department of the Interior, whose officials and agencies had sat at the negotiation table, signed all the agreements, and supported all the necessary federal legislation and appropriations, only to reverse its position at the last minute and refuse to construct ALP. The shock wave from the decision did not stop with Colorado, New Mexico and the two Ute Tribes, however, since the analysis underlying the ALP biological opinion logically extended to all projects and water users in the San Juan River basin. The Navajo Nation, the Jicarilla Apache Tribe, and every other water user in the San Juan River basin became involved.

Once again Colorado, New Mexico and U.S. Bureau of Reclamation ("Bureau") officials began holding massive meetings with affected Indian tribes (now four in number), and numerous municipalities, water conservancy districts and irrigators in southwestern Colorado and northwestern New Mexico.

On September 28, 1990, in an effort to avert the threatened regional social and economic disaster, the Bureau invited various San Juan River basin water users and environmental interests to the negotiation table to determine if a reasonable and prudent alternative could be developed for ALP. The environmentalists refused to join this effort. All other parties broke into three teams, a biological team, a hydrological team and a legal team. The primary objective of the biology team was to determine if an

alternative was available to preclude the likelihood of jeopardy to the endangered Colorado squawfish and the razorback sucker, which had recently been proposed for listing.

As a result of this intense study process, on March 4, 1991, the Bureau sent FWS a letter which outlining a reasonable and prudent alternative which was supported by the three teams. The teams and the Bureau agreed that this alternative would mitigate all impacts of the proposed construction of ALP.

The basis of the alternative is:

- (1) depletion of 57,100 acre-feet for ALP instead of the full ALP depletion of 154,800 acre-feet of water. This depletion represents that portion of the ALP available from the construction of Ridges Basin Dam and Reservoir, and Durango Pumping Plant and inlet pipeline;
- (2) the long-term reoperation of Navajo Reservoir, a large Bureau reservoir on the San Juan River in New Mexico, to mimic the natural hydrograph of the San Juan River;
- (3) seven years of research on the San Juan River and its tributaries to determine the needs of the endangered fish;
- (4) the development of a recovery implementation plan which will provide for conservation of the threatened and endangered fish species while providing for water development in the San Juan Basin; and
- (5) long-term protection of reservoir releases from Navajo Dam for the benefit of the threatened and endangered fish throughout its habitat.

In response to this alternative, on March 21, 1991, the FWS

issued a revised draft biological opinion for ALP. This opinion incorporated the alternative proposed by the Bureau and stated that if all elements of the reasonable and prudent alternative were fully implemented, the likelihood of jeopardy to the endangered fish would be avoided.

VII. Current Status

The parties are presently negotiating a draft Memorandum of Understanding ("MOU") which will be signed by the Department of the Interior, the states of Colorado, New Mexico and Utah, the Navajo Nation, the Southern Ute Indian Tribe, the Ute Mountain Ute Indian Tribe, and the Jicarilla Apache Tribe. The MOU will include agreements on measures necessary to carry out the reasonable and prudent alternative for ALP and the development and implementation of the Recovery Implementation Program ("RIP") for the endangered fish.

Among other things, the RIP is intended to provide a mechanism which will allow the United States to meet its obligations under the Final Settlement Agreement. The reasonable and prudent alternative currently under consideration does not do this because it only provides for partial construction of ALP. The irrigation component of ALP, which is critical to both tribes, will have to undergo another section 7 consultation in the

future.

VIII. Summary

The San Juan River basin presents a unique situation. There are four federally recognized Indian tribes within the basin. With regard to three of the four tribes, there are specific federal water development plans intended to fulfill, in part, federal trust obligations to these tribes. The FWS is mindful of the trust obligation to the tribes as well as its obligation to conserve the endangered fish. Non-Indian water development pressures within the basin are also high. Concerns about disparate treatment among groups entitled to and needful of the water resources of the San Juan River broaden the issues to be considered during the settlement of the Ute claims, making negotiations more difficult and consensus harder to reach. Despite this, the parties in the San Juan River basin have continued to negotiate by emphasizing their commitment to a successful resolution of the shared problem.

Although the success of the parties' venture will be not be known for years, the new roadmap for resolution is in place and the next chapter of the of the Colorado Ute Settlement is beginning. Suffice to say, however, that the process has not been easy. Meeting the needs of existing water users, new water

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users, and endangered fish is difficult in water short areas, and few basins in the west have surplus water. If efforts to provide tribes with usable water are to be successful, and if the Colorado experience is any indication, the settlement of reserved rights claims will require substantially more than agreeing on a quantity of water. A complete settlement will require resolution of numerous legal, social, political, and institutional problems. Indian water rights, like other water rights, are subject to the changing climate of western water law, a climate which makes new uses difficult. Despite these problems, the benefits of settlement will still outweigh the costs of litigation.

Public Law 100-585
100th Congress

An Act

To facilitate and implement the settlement of Colorado Ute Indian reserved water rights claims in southwest Colorado, and for other purposes.

Nov. 8, 1988
[P.L. 100-585]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Colorado Ute
Indian Water
Rights
Settlement Act
of 1988

SECTION 1. SHORT TITLE.

This Act may be cited as the "Colorado Ute Indian Water Rights Settlement Act of 1988".

SEC. 2. FINDINGS.

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.

(3) The major parties to the lawsuits and others interested in the settlement of the water rights claims of the Ute Mountain Ute Indian Tribe and the Southern Ute Indian Tribe have worked diligently to settle these claims, resulting in the June 30, 1986, Binding Agreement for Animas-La Plata Project Cost Sharing which was executed in compliance with the cost sharing requirements of chapter IV of Public Law 99-58 (59 Stat. 283), and the December 10, 1986, Colorado Ute Indian Water Rights Final Settlement Agreement.

(4) The Ute Mountain Ute Indian Tribe and the Southern Ute Indian Tribe, by resolution of their respective tribal councils, which are the duly recognized governing bodies of each Tribe, have approved the December 10, 1986, Agreement and sought Federal implementation of its terms.

(5) This Act is required to implement portions of the above two agreements.

SEC. 3. DEFINITIONS.

For purposes of this Act—

(1) The term "Agreement" means the Colorado Ute Indian Water Rights Final Settlement Agreement dated December 10, 1986, among the State of Colorado, the Ute Mountain Ute Indian Tribe, the Southern Ute Indian Tribe, the United States, and other participating parties.

(2) The term "Animas-La Plata Project" means the Animas-La Plata Project, Colorado and New Mexico, a participating project under the Act of April 11, 1966 (70 Stat. 166; 43 U.S.C. 620; commonly referred to as the "Colorado River Storage

Project Act") and the Colorado River Basin Project Act (82 Stat. 885; 43 U.S.C. 1501 et seq.).

(3) The term "Dolores Project" means the Dolores Project, Colorado, a participating project under the Act of April 11, 1956 (70 Stat. 105; 43 U.S.C. 620; commonly referred to as the "Colorado River Storage Project Act"), the Colorado River Basin Project Act (82 Stat. 885; 43 U.S.C. 1501 et seq.), and as further authorized by the Colorado River Basin Salinity Control Act (98 Stat. 2933; 43 U.S.C. 1591).

(4) The term "final consent decree" means the consent decree contemplated to be entered after the date of enactment of this Act in the District Court, Water Division No. 7, State of Colorado, which will implement certain provisions of the Agreement.

(5) The term "Secretary" means the Secretary of the Interior.

(6) The terms "Tribe" and "Tribes" mean the Ute Mountain Ute Indian Tribe, the Southern Ute Indian Tribe, or both Tribes, as the context may require.

(7) The term "water year" means a year commencing on October 1 each year and running through the following September 30.

SEC. 4. PROVISION OF WATER TO TRIBES.

(a) **WATER FROM THE ANIMAS-LA PLATA AND DOLORES PROJECTS.**—The Secretary is authorized to supply water to the Tribes from the Animas-La Plata and Dolores Projects in accordance with the Agreement: *Provided*, That nothing in this subsection or in the authorized purposes of the projects may be construed to permit or prohibit the sale, exchange, lease, use, or other disposal of such water by the Tribes. Any such sale, exchange, lease, use, or other disposal of water from these projects shall be governed solely by the other provisions of this Act and the Agreement as modified pursuant to section 11 of this Act.

(b) **APPLICATION OF FEDERAL RECLAMATION LAWS.**—Except as provided in section 5 of this Act, the water supplied to the Tribes from the Animas-La Plata Project and the Dolores Project shall be subject to Federal reclamation laws only to the extent needed to effectuate the terms and conditions contained in Article III, section A, subsections 1 and 2 and Article III, section B of subsection 1 of the Agreement.

SEC. 5. DISPOSAL OF WATER.

(a) **INDIAN INTERCOURSE ACT.**—The provisions of section 2116 of the Revised Statutes (25 U.S.C. 177) shall not apply to any water rights confirmed in the Agreement and the final consent decree: *Provided*, That nothing in this subsection shall be considered to amend, construe, supersede, or preempt any State law, Federal law, interstate compact, or international treaty that pertains to the Colorado River or its tributaries, including the appropriation, use, development, storage, regulation, allocation, conservation, exportation, or quality of those waters.

(b) **RESTRICTION ON DISPOSAL OF WATERS INTO LOWER COLORADO RIVER BASIN.**—None of the waters from the Animas-La Plata or Dolores Projects may be sold, exchanged, leased, used, or otherwise disposed of into or in the Lower Colorado River Basin unless water within the Colorado River Basin held by non-Federal, non-Indian holders of that water pursuant to any water rights could be so sold,

exchanged, leased, used, or otherwise disposed of under State law, Federal law, interstate compacts, or international treaty pursuant to a final, nonappealable order of a Federal court or pursuant to an agreement of the seven States signatory to the Colorado River Compact.

(c) USE OF WATER RIGHTS.—(1) The use of the rights referred to in subsection (a) within the State of Colorado shall be governed solely as provided in the Agreement as modified pursuant to section 11 of this Act and this subsection. The Agreement is hereby modified to provide that a Tribe may voluntarily elect to sell, exchange, lease, use, or otherwise dispose of any portion of a water right confirmed in the Agreement and final consent decree off its reservation. If either the Southern Ute Indian Tribe or the Ute Mountain Ute Indian Tribe so elects, and as a condition precedent to such sale, exchange, lease, use, or other disposition, that portion of the Tribe's water right shall be changed to a Colorado State water right, but be such a State water right only during the use of that right off the reservation, and shall be fully subject to State laws, Federal laws, interstate compacts, and international treaties applicable to the Colorado River and its tributaries, including the appropriation, use, development, storage, regulation, allocation, conservation, exportation, or quality of those waters.

Contracts.

(2) The characterizations in the Agreement of any water rights which may be used off the reservation of the respective Tribe as either "project reserved water right" or "nonproject reserved water right" are hereby expressly disapproved and any claim to water rights so characterized shall be extinguished when the final consent decree is entered.

(d) RULES OF CONSTRUCTION.—Nothing in this Act or in the Agreement shall—

(1) constitute authority for the sale, exchange, lease, use, or other disposal of any Federal reserved water right off the reservations;

(2) constitute authority for the sale, exchange, lease, use, or other disposal of any water held pursuant to a Colorado State water right, or of any Colorado State water right, outside the State of Colorado; or

(3) be deemed a congressional determination that any holders of water rights do or do not have authority under existing law to sell, exchange, lease, use, or otherwise dispose of such water or water rights outside the State of Colorado.

SEC. 6. REPAYMENT OF PROJECT COSTS.

Contracts.

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

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

(b) AGRICULTURAL IRRIGATION WATER.—(1) The Secretary shall defer, without interest, the repayment of the construction costs

within the capability of the land to repay, which are allocable to each Tribe's agricultural irrigation water allocation from the Animas-La Plata and Dolores Projects in accordance with the Act of July 1, 1932 (25 U.S.C. 886a; commonly referred to as the "Leavitt Act"), and section 4 of the Act of April 11, 1956 (70 Stat. 107; 43 U.S.C. 620c; commonly referred to as the "Colorado River Storage Project Act"). Such allocated construction costs which are beyond the capability of the land to repay shall be repaid as provided in subsection (g) of this section. Until such water is first used either by a Tribe or pursuant to a water use contract with the Tribe, the Secretary shall bear the annual operation, maintenance, and replacement costs allocable to the Tribe's agricultural irrigation allocation from the Animas-La Plata Project, which costs shall not be reimbursable by the Tribe.

Agriculture and
agricultural
commodities.

(2) As an increment of such water is first used by a Tribe or is first used pursuant to the terms of a water use contract with the Tribe, the Tribe shall commence bearing that increment's pro rata share of the allocable annual operation, maintenance, and replacement costs. During any period in which water is used by a tribal lessee on land owned by non-Indians, the Tribe shall bear that increment's pro rata share of the allocated agricultural irrigation construction costs within the capability of the land to repay as established in subsection (b)(1).

(c) ANNUAL COSTS WITH RESPECT TO RIDGES BASIN PUMPING PLANT.—(1) The Secretary shall bear any increased annual operation, maintenance, and replacement costs to Animas-La Plata Project water users occasioned by a decision of either Tribe not to take delivery of its Animas-La Plata Project water allocations from Ridges Basin Pumping Plant through the Long Hollow Tunnel and the Dry Side Canal pursuant to Article III, section A, subsection 2.i and Article III, section B, subsection 1.i of the Agreement until such water is first used either by a Tribe or pursuant to a water use contract with the Tribe. Such costs shall not be reimbursable by the Tribe.

(2) As an increment of its water from the Animas-La Plata Project is first used by a Tribe or is first used pursuant to the terms of a water use contract with the Tribe, the Tribe shall commence bearing that increment's pro rata share of such increased annual operation, maintenance, and replacement costs, if any.

(d) SECRETARIAL DEFERRAL.—The Secretary may further defer all or a part of the tribal construction cost obligations and bear all or a part of the tribal operation, maintenance, and replacement obligations described in this section in the event a Tribe demonstrates that it is unable to satisfy those obligations in whole or in part from the gross revenues which could be generated from a water use contract for the use of its water either from the Dolores or the Animas-La Plata Projects or from the Tribe's own use of such water.

(e) USE OF WATER.—For the purpose of this section, use of water shall be deemed to occur in any water year in which a Tribe actually uses water or during the term of any water use contract. A water use contract pursuant to which the only income to a Tribe is in the nature of a standby charge is deemed not to be a use of water for the purposes of this section.

(f) AUTHORIZATION OF APPROPRIATIONS.—There is hereby authorized to be appropriated such funds as may be necessary for the Secretary to pay the annual operation, maintenance, and replacement costs as provided in this section.

(g) **COSTS IN EXCESS OF ABILITY OF THE IRRIGATORS TO REPAY.**—The portion of the costs of the Animas-La Plata Project in excess of the ability of the irrigators to repay shall be repaid from the Upper Colorado River Basin Fund pursuant to the Colorado River Storage Project Act and the Colorado River Basin Project Act.

(h) **DEFERRAL OF CERTAIN CONSTRUCTION COSTS.**—Repayment of the portion of the construction costs of the Florida Project which have been allocated to the 563 acre-feet of agricultural irrigation water for which the Southern Ute Tribe is responsible shall be deferred by the Secretary pursuant to the Act of July 1, 1932 (25 U.S.C. 386a; 47 Stat. 564) as provided in section 4(d) of the Act of April 11, 1956 (43 U.S.C. 620c; 70 Stat. 107), and the Florida Water Conservancy District's current repayment obligation shall not change.

SEC. 7. TRIBAL DEVELOPMENT FUNDS.

(a) **ESTABLISHMENT.**—There is hereby authorized to be appropriated the total amount of \$49,500,000 for three annual installment payments to the Tribal Development Funds which the Secretary is authorized and directed to establish for each Tribe. Subject to appropriation, and within 60 days of availability of the appropriation to the Secretary, the Secretary shall allocate and make payment to the Tribal Development Funds as follows:

Appropriation
authorization.

(1) To the Southern Ute Tribal Development Fund, in the first year, \$7,500,000; in the two succeeding years, \$5,000,000 and \$5,000,000, respectively.

(2) To the Ute Mountain Ute Tribal Development Fund, in the first year, \$12,000,000; in the two succeeding years, \$10,000,000 and \$10,000,000, respectively.

(b) **ADJUSTMENT.**—To the extent that any portion of such amount is contributed after the period described above or in amounts less than described above, the Tribes shall, subject to appropriation Acts, receive, in addition to the full contribution to the Tribal Development Funds, an adjustment representing the interest income as determined by the Secretary in his sole discretion that would have been earned on any unpaid amount had that amount been placed in the fund as set forth in section 7(a).

(c) **TRIBAL DEVELOPMENT.**—(1) The Secretary shall, in the absence of an approved tribal investment plan provided for in paragraph (2), invest the moneys in each Tribal Development Fund in accordance with the Act entitled "An Act to authorize the deposit and investment of Indian funds" approved June 24, 1938 (25 U.S.C. 162a). Separate accounts shall be maintained for each Tribe's development fund. The Secretary shall disburse, at the request of a Tribe, the principal and income in its development fund, or any part thereof, in accordance with an economic development plan approved under paragraph (3).

Securities.

(2) Each Tribe may submit a tribal investment plan for all or part of its Tribal Development Fund as an alternative to the investment provided for in paragraph (1). The Secretary shall approve such investment plan within 60 days of its submission if the Secretary finds the plan to be reasonable and sound. If the Secretary does not approve such investment plan, the Secretary shall set forth in writing and with particularity the reasons for such disapproval. If such investment plan is approved by the Secretary, the Tribal Development Fund shall be disbursed to the Tribe to be invested by the Tribe in accordance with the approved investment plan. The

Secretary may take such steps as he deems necessary to monitor compliance with the approved investment plan. The United States shall not be responsible for the review, approval, or audit of any individual investment under the plan. The United States shall not be directly or indirectly liable with respect to any such investment, including any act or omission of the Tribe in managing or investing such funds. The principal and income from tribal investments under an approved investment plan shall be subject to the provisions of this section and shall be expended in accordance with an economic development plan approved under paragraph (3).

(3) Each Tribe shall submit an economic development plan for all or any portion of its Tribal Development Fund to the Secretary. The Secretary shall approve such plan within 60 days of its submission if the Secretary finds that it is reasonably related to the economic development of the Tribe. If the Secretary does not approve such plan, the Secretary shall, at the time of decision, set forth in writing and with particularity the reasons for such disapproval. Each Tribe may alter the economic development plan, subject to the approval of the Secretary as set forth in this subsection. The Secretary shall not be directly or indirectly liable for any claim or cause of action arising from the approval of an economic development plan or from the use and expenditure by the Tribe of the principal of the funds and income accruing to the funds, or any portion thereof, following the approval by the Secretary of an economic development plan.

(d) **PER CAPITA DISTRIBUTIONS.**—Under no circumstances shall any part of the principal of the funds, or of the income accruing to such funds, or the revenue from any water use contract, be distributed to any member of either Tribe on a per capita basis.

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

SEC. 8. WAIVER OF CLAIMS.

(a) **GENERAL AUTHORITY.**—The Tribes are authorized to waive and release claims concerning or related to water rights as described in the Agreement.

(b) **CONDITION ON PERFORMANCE BY SECRETARY.**—Performance by the Secretary of his obligations under this Act and payment of the moneys authorized to be paid to the Tribes by this Act shall be required only when the Tribes execute a waiver and release as provided in the Agreement.

SEC. 9. ADMINISTRATION.

In exercising his authority to administer water rights on the Ute Mountain Ute and Southern Ute Indian Reservations, the Secretary, on behalf of the United States, shall comply with the administrative procedures governing the water rights confirmed in the Agreement and the Final Consent Decree to the extent provided in Article IV of the Agreement.

SEC. 10. INDIAN SELF-DETERMINATION ACT.

(a) **IN GENERAL.**—The design and construction functions of the Bureau of Reclamation with respect to the Dolores and Animas-La Plata Projects shall be subject to the provisions of the Indian Self-Determination and Education Assistance Act (88 Stat. 2203; 25

U.S.C. 450 et seq.) to the same extent as if such functions were performed by the Bureau of Indian Affairs.

(b) APPLICATION.—This section shall not apply if the application of this section would detrimentally affect the construction schedules of the Dolores and Animas-La Plata Projects.

SEC. 11. MODIFICATION OF AGREEMENT; RULE OF CONSTRUCTION.

(a) MODIFICATION.—The Agreement shall be deemed to have been modified to conform to this Act.

(b) RULE OF CONSTRUCTION.—The Agreement shall be construed in a manner consistent with this Act. This Act is intended solely to permit settlement of existing and prospective litigation among the signatory parties to the Agreement. This Act is the result of a voluntary compromise agreement between the Southern Ute Indian Tribe, the Ute Mountain Ute Indian Tribe, the State of Colorado, local water districts and municipalities, and the United States. Accordingly, no provision of this Act, the Agreement, or the final consent decree shall be construed as altering or affecting the determination of any questions relating to the reserved water rights belonging to other Indian tribes.

SEC. 12. INDIVIDUAL MEMBERS OF TRIBES.

Any entitlement to reserved water of any individual member of either Tribe shall be satisfied from the water secured to that member's Tribe.

SEC. 13. EFFECTIVE DATE.

(a) Sections 4(b), 5, and 6 of this Act shall take effect on the date on which the final consent decree contemplated by the Agreement is entered by the District Court, Water Division No. 7, State of Colorado. Any moneys appropriated under section 7 of this Act shall be placed into the Ute Mountain Ute and Southern Ute Tribal Development Funds in the Treasury of the United States together with other parties' contributions to the Tribal Development Funds, but shall not be available for disbursement pursuant to section 7 until such time as the final consent decree is entered. If the final consent decree is not entered by December 31, 1991, the moneys so deposited shall be returned, together with a ratable share of accrued interest, to the respective contributors and the Ute Mountain Ute and Southern Ute Tribal Development Funds shall be terminated and the Agreement may be voided by any party to the Agreement. Upon such termination, the amount contributed thereto by the United States shall be deposited in the general fund of the Treasury.

(b) No provision of this Act shall be of any force or effect if the final consent decree is not executed and approved by the court.

SEC. 14. VOIDING OF AGREEMENT.

The United States shall not exercise its right to void the Agreement pursuant to Article VI, section C, subsection 2 thereof.

Approved November 3, 1988.

LEGISLATIVE HISTORY—H.R. 2642 (S. 1415):

HOUSE REPORTS: No. 100-832 (Comm. on Interior and Insular Affairs).

SENATE REPORTS: No. 100-585 accompanying S. 1415 (Select Comm. on Indian Affairs and Comm. on Energy and Natural Resources).

CONGRESSIONAL RECORD, Vol. 134 (1988):

Oct. 8, considered and passed House.

Oct. 14, considered and passed Senate.

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