

TESTIMONY OF JUDY KNIGHT-FRANK, CHAIRMAN UTE MOUNTAIN
UTE TRIBE IN SUPPORT OF S. 1771 PRESENTED TO THE SENATE
COMMITTEE ON INDIAN AFFAIRS AND THE SENATE ENERGY AND NATURAL
RESOURCES SUBCOMMITTEE ON WATER AND POWER

JUNE 24, 1998

I am Judy Knight-Frank, Chairman of the Ute Mountain Ute Tribe. The Tribe is located in Colorado, New Mexico and Utah. During the past decade the Tribe has made significant progress in achieving economic self-sufficiency. But, implementation of the 1988 Colorado Ute Settlement Act through enactment of S. 1771 is essential to the Tribe's future generations.

On behalf of the Tribe, I want to thank Senator Ben Nighthorse Campbell and Senator Jon Kyl and their colleagues for holding this hearing to consider S. 1771.

We appreciate that this Administration has had a difficult time implementing Indian Water Rights Settlements. Yet, Secretary Babbitt expressly acknowledged to us in the summer of 1996 that a storage facility is required to complete the 1988 Settlement.

S. 1771 - proposed by the Colorado Ute Tribes and their neighbors - sets forth the least costly storage facility with the fewest environmental impacts. In S. 1771, our non-Indian neighbors have relinquished all irrigation facilities and the Tribes have agreed to a 40% reduction in water supplies.

S. 1771 results in a reduction of the costs of settlement described in the 1988 Settlement Act - estimated by the Bureau of Reclamation to be \$379 million in 1986 and

\$675 million in 1998. A seven year construction schedule contemplated in S. 1771 would result in 7 annual federal expenditures of \$38 million. S. 1771 therefore implements a decade old Indian water rights settlement at a significant cost savings than originally committed to by the United States. In exchange for reducing the water supply by 40% the Colorado Ute Tribes seek a waiver of their capital repayment.

S. 1771 also provides the means to assure a successful recovery of endangered fish in the San Juan Basin. For seven years, a broad array of tribal, local, state and federal entities have worked together to re-operate flows in the San Juan River to benefit endangered fish. This recovery program is specifically dependent upon the construction of the three facilities incorporated in S. 1771.

S. 1771 relies on nearly two decades of environmental analysis. The Colorado Ute Tribes have conditioned their willingness to take a 40% reduction in water supplies proposed in S. 1771 on a commitment by Congress that these amendments will indeed become a final settlement. The Tribes are unwilling to accept a reduced settlement unless they are assured that the reduced facilities and depletions can rely on the existing environmental analysis. Without this protection, we are afraid that a second decade may pass before the United States commitments made in 1988 are finally realized.

We have all spent a decade preparing for this moment. It is now time for action.

1. Introduction.

"In order to reduce future controversy" the United States Departments of justice and interior entered into the 1986 Colorado Ute Water Rights Settlement Agreement. in Public Law 100-585 Congress implemented the 1986 Agreement. S. 1771 represents the good faith effort, after a decade of intense environmental compliance, by the non-federal parties to the 1986 Agreement, to accept a substantially reduced water supply project.

2. S. 1771 significantly Reduces The Cost of settling The Colorado Ute Tribal Water Rights.

S. 1771 results in a reduction of the cost to settle the Colorado Ute water rights as described in the 1988 Settlement Act - estimated by the Bureau of Reclamation to be \$379 million in 1986 and \$675 million in 1998. A seven year construction schedule contemplated in S. 1771 would result in 7 annual federal expenditures of \$38 million. S. 1771 therefore implements a decade old Indian water rights settlement using substantially fewer dollars than originally provided for in the 1968 Settlement Act. in exchange for reducing the water supply by 40%, the Colorado Ute Tribes seek a waiver of their capital repayment. Under existing law the Tribes' repayment is deferred until revenues exceed their costs. The Tribes' proposed waiver therefore operates to expedite the productive use of these water supplies.

3. S. 1771 Implements Endangered Species Act Protections.

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4. S. 1771 Authorizes A Reservoir For Present And Future Uses.

S. 1771 authorizes a 260,000 acre foot reservoir. That reservoir allows depletions of 57,100 acre feet to be stored. The reservoir size also assures that an the region's last water storage facility, it is positioned to provide M&I and agricultural storage for future generations. While S. 1771 does not provide the authority to store additional depletions, the Endangered Species Act program in the San Juan Basin is expressly designed to both preserve endangered fish and allow water development to proceed. This reservoir accomplishes both of these goals.

The reservoir has an inactive storage elevation which is designed to (1) allow water to flow back through the conduit system to satisfy City of Durango M&I needs, (2) allow access to the La Plata Basin in the event the ESA allows additional water supplies for irrigation and funding can be secured and (3) assure that the reservoir establishes a useable and functioning 1,600 acre recreation lake.

5. The Legacy Fund Is A Wholly Inadequate Alternative.

Alternatives to a reservoir Using Animas River water have been explored for two decades. Opponents of S. 1771 have offered a legacy fund as an alternative. That alternative proposes giving the two Colorado Ute Tribes a sum of money to acquire land and direct stream flows from its neighbors. This alternative rejected by the Colorado Ute Tribes and the State of Colorado pulls the rug out from under the 1986 Water Rights Settlement Agreement. In that Agreement, irrigators and communities using direct flow out of the region's rivers were allowed to continue their historic use of these water supplies, subject to the Tribes' obtaining some direct flow rights and the Tribes' securing a new supply of water from the generous flows of the Animas River.

The Legacy Fund is also problematic because in the absence of storage, the Tribes will be acquiring a water supply which frequently exists for only three months a year. Moreover, any effort to move that direct flow to another location would trigger extensive Colorado Water court litigation and raise serious wetlands and Clean water Act issues. In a word, the legacy fund is an effort to "buy out" Colorado Ute Tribes and not to honor the 1986 Settlement Agreement.

6. Pervasive Litigation Involving The United States Is The Only True Alternative To A Reduced ALP.

All parties to the 1996 Agreement have a good faith obligation to implement its provisions. If the United States fails to provide the Colorado Ute Tribes with a reasonable (even if reduced) assured supply of water, it leaves the Tribes with no alternative but to pursue litigation.

a. Water Rights Litigation.

In the event there is no reduced ALP, the Tribes and the United States will have to prosecute reserved rights adjudications against irrigators and rural communities now relying upon Animas and La Plata River direct flows. This is a massive undertaking which is sure to set back regional integration for decades to come.

b. ESA Litigation.

The Tribes will move with their Colorado partners to institute litigation designed to assure that all San Juan River depletions are put in jeopardy (and new ones prohibited) until the Tribes' depletion

supply is secured, and;

C. Bad Faith Contract Litigation.

The Colorado Ute Tribes would pursue bad faith contract breach claims against the United States for failure to implement in good faith the 1986 Agreement. While that Agreement expressly contemplated that Congress might not implement it, it was always understood that the Departments of Justice, Interior, OMB and others were under a good faith obligation to provide the Tribes with a water supply. Indeed a decade of modest Administration appropriations led the Tribes to incur significant expenditures in reliance upon the good faith implementation of the 1986 Agreement.

7. Conclusion.

The non-federal parties, including the States of Colorado and New Mexico, have done their share to "avoid future controversy" as mandated by the 1986 Agreement. it is now time for the federal parties to do the same.