



UTE INDIAN TRIBE

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Ute Indian Tribe of the Uintah and Ouray Reservation

Comments on United States Bureau of Reclamation's Green River Block Water Exchange Contract with the State of Utah and Draft Environmental Assessment

November 2, 2018

I. INTRODUCTION

The Ute Tribal Business Committee of the Ute Indian Tribe (the "Tribe") of the Uintah and Ouray Indian Reservation submits these comments regarding the United States Bureau of Reclamation's ("USBR") Draft Environmental Assessment for the Green River Block Water Exchange Contract with the State of Utah. The Ute Indian Tribe is located on the Uintah and Ouray Reservation ("Reservation") located in northeastern Utah, approximately 150 miles east of Salt Lake City, Utah. The Reservation lies within the Upper Colorado River Basin. Today, the Reservation is the second largest Indian reservation in the United States, covering more than 4.5 million acres. The Ute Indian Tribe has a tribal membership of almost four thousand individuals, a majority of whom live within the exterior boundaries of the Reservation. All of the Reservation land lies within the drainage of the Colorado River Basin.

The Tribe has Indian reserved water rights by diversion of 530,665 acre-feet per year in the Upper Colorado River Basin. Priorities for these rights are dated 1861 for all historically and practicably irrigable lands of the Uintah Valley portion of the Reservation, including municipal and industrial water rights, and 1882 for all lands served on the Uncompahgre portion of the Reservation, through which the Green River and its tributaries flow and border. The Ute Indian Tribe owns the highest priority water right to natural flows from all rivers within the exterior boundaries of the Reservation.

The northwestern area of the Reservation consists of five major river drainages with seven contributing rivers that generally flow southeast and east into the Green River. The Duchesne River system to the west drains from the Wasatch and Uinta Mountains through major tributaries that include Rock Creek, the Strawberry River, the Lake Fork River (with its major tributary the Yellowstone River), and the Uinta River (with its major tributary the Whiterocks River). The White River and other desert tributaries, including Willow Creek and Bitter Creek, drain the southeastern area of the Reservation into the Green River.

The Bureau of Indian Affairs operates the Uintah Indian Irrigation Project, authorized by Congress in 1906, that serves the vast majority of current Tribal agricultural operations on the

Reservation, with water sourced from the Duchesne, Lake Fork, and Uinta River systems. A maximum diversion rate of 1 cfs to 70 acres was established for direct natural flow diversions, with an annual allocation of 3 acre-feet per acre in the Lake Fork and Uinta Basins (under 1923 federally-decreed reserved water rights), 4 acre-feet per acre in the Duchesne River, Bitter, Sweet Water, Willow, and Hill Creeks Basins, 4.8 acre-feet per acre in the White River Basin, and 4.5 acre-feet per acre in the Green River Basin. These Indian water rights belong to our Tribe because, under the *Winters* doctrine, the primary purpose of the federal government's establishment of our Reservation was to require members of our Tribe to become productive farmers, a government policy intended to promote Indian self-sufficiency. These rights are established as a quantified apportionment of Indian reserved water rights in the Upper Colorado River Basin, and are a Tribal trust asset of the Ute Indian Tribe—a sovereign government, federally recognized by the United States. These Indian reserved water rights are present perfected rights, as recognized by the United States Supreme Court in *Arizona v. California* (U.S. Supreme Court, 1963) (1964 Decree). Additionally, the water on the Reservation was recognized by Congress in 1899 as the paramount rights of the Tribe, and this federal legislation directed the Secretary of the Department of Interior to secure and preserve a quantity of water necessary for the present and prospective wants of the Tribe.

Our tribal government provides services to our members and manages the Reservation through 60 tribal departments and agencies including land, fish and wildlife management, housing, education, emergency medical services, public safety, and energy and minerals management. The Tribe is also a major employer and engine for economic growth in northeastern Utah. Tribal businesses include a bowling alley, a supermarket, gas stations, a feedlot, a manufacturing plant, Ute Oil Field Water Services, and Ute Energy. Our governmental programs and tribal enterprises employ approximately 450 people, 75% of whom are tribal members. The Tribe takes an active role in the development of its resources, including as a majority owner of Ute Energy and owns numerous oil and gas wells on the Reservation. We depend on our natural resources as a primary source of economic development to establish a permanent homeland and economic security for our members.

For reasons detailed below, the Tribe requests that an Environmental Impact Statement (“EIS”) be conducted, with the final requirements incorporating the serious concerns raised by the Tribe. We also request that a government-to-government consultation be conducted on the Green River Block Water Exchange Contract with the State of Utah and on the Draft Environmental Assessment so that the USBR is aware of, discusses, and understands the Tribe's concerns on both of these issues. This way, we can work together, in accordance with federal law and policy, to ensure that the federal government, as trustee of the Tribe's reserved water rights, adheres to its fiduciary responsibilities to protect and preserve the Tribe's reserved water rights in the Green River and the Upper Colorado River Basin, and assists the Tribe in developing its Indian reserved water rights. We request that USBR takes our concerns into account.

II. FAILURE TO ENGAGE IN GOVERNMENT-TO-GOVERNMENT CONSULTATION

Under the policy of the United States, the USBR is required to conduct government-to-government consultation with the Ute Indian Tribe on this matter in order to be in compliance with Executive Order 13175, Presidential Memoranda, Department of Interior Secretarial Order 3317, and

the Bureau of Reclamation policy. (*See* Correspondence from Wayne G. Pullan, Area Manager of the Upper Colorado Region, to the Ute Tribal Business Committee, dated October 1, 2018).

According to the USBR Draft Environmental Assessment report, “Reclamation sent consultation letters with a determination of No Adverse Effect to historic properties for the Project to [the Ute Indian Tribe of the Uintah and Ouray Reservation] on June 8, 2018. The USBR explained that its consultation has been focused on “identify[ing] any concerns about historic properties; to advise on the identification and evaluation of historic properties; and to participate in the resolution of Project effects. (p. 6). The scope of the USBR’s consultation is too narrow, where the primary, if only, focus has been on historical properties.

Although representatives of the Tribe attended a recent public meeting in Vernal, Utah, on September 26, 2018, on the proposed Draft Environmental Assessment, conducted by representatives from the USBR for “stakeholders,” the USBR has had no governmental consultation with the Tribal government—even though the USBR has worked on the development of water within the exterior boundaries of the Reservation since the early 1900s. The USBR is very aware of the interests and rights of the Ute Indian Tribe in the Green River and its fiduciary responsibility to the Tribe regarding these trust assets. Most of the USBR efforts, however, have been primarily focused on developing the State-based water rights to the detriment of the Tribe’s development and use of its Indian reserved water rights in the Upper Colorado River Basin.

Ironically, the USBR has identified one of the purposes of the Green River Block Water Exchange Agreement as “provid[ing] the State with a reliable water supply for development of the 1996 Assignment.” The State’s existing water right is a junior natural flow water right that is unreliable, especially during the later part of the summer months. As the Draft Environmental Assessment report stated under the No Action Alternative, “[t]he State may run into shortages in years of drought, especially during the latter part of the summer when tributary flows can be significantly reduced.” The Ute Indian Tribe has been under a “no action” plan since 1882, when the Uncompahgre reservation was established, creating a present perfected property right to the water flowing through, on, and bordering the Reservation. In 1965, the Tribe reached an agreement with the federal government on the apportionment of the Tribe’s Indian reserved water rights and agreed to defer the development of a portion of its quantified reserved water rights to assist in the development of the CUP. It has been meeting with representatives from the Central Utah Project Completion Act (“CUPCA”) Office and the USBR for at least the last ten years about its need to acquire storage in Flaming Gorge in order to have a more reliable water supply for the development of its Green River reserved water rights. This has yet to happen.

After a representative of the Tribe raised the concern at the September 26, 2018, Vernal, Utah, meeting that the USBR had failed to engage in government-to-government consultation between the Tribe and the USBR, the Ute Tribal Business Committee received a request, dated October 1, 2018. At this time, the parties are seeking a mutually agreeable date on which to conduct the required government-to-government consultation. The Tribe requests that no decision be finalized on the adequacy of the Draft Environmental Assessment until after the Tribe has had the opportunity to have a government-to-government consultations with the USBR to discuss its concerns regarding the adverse impact on the availability and development of the Tribe’s reserved

water rights and to ensure the protection and preservation of its Indian reserved water rights.

III. BACKGROUND ON THE GREEN RIVER BLOCK EXCHANGE CONTRACT DRAFT ENVIRONMENTAL ASSESSMENT

The USBR published the Green River Block Water Exchange Contract Draft Environmental Assessment (Green River Block Draft EA) in September of 2018. The Tribe’s comments describe several concerns of the Tribe that must be taken into consideration by the USBR before concluding that its Proposed Action based on the Draft Environmental Assessment has sufficient evidence to rely on an Environmental Assessment for its compliance with the National Environmental Policy Act (“NEPA”). It is our conclusion that an Environmental Impact Statement is necessary.

As explained in the USBR Draft Environmental Assessment report, “[t]he Colorado River Storage Project Act of April 11, 1956 (“CRSP Act”), authorized construction of the Colorado River Storage Project (“CRSP”) which allowed for comprehensive development of the water resources of the Upper Basin states” (p. 3). The Flaming Gorge Unit is one of the four initial storage units in the CRSP. In addition, “[t]he CRSP Act and subsequent legislation authorized the construction of 16 participating projects, including the Central Utah Project (“CUP”).” (p. 3-4). The Ute Indian Unit was one of these CUP units, identified as part of the final phase of the CUP development, known as the “Ultimate Phase,” which was intended to transfer water from Flaming Gorge to the Uinta and Duchesne River basins to provide irrigation to lands under the Uintah Indian Irrigation Project (including future irrigated lands) with the Ute Indian Tribe’s reserved water rights on the Reservation. When the CUP became too expensive, Congress directed that it be scaled down and, in 1992, the Ute Indian Unit was de-authorized under the Central Utah Project Completion Act (“CUPCA”). Subsequently, of the four units initially identified for development under the CUP, only the Ute Indian Unit was completely abandoned—the only unit dedicated to providing storage and water delivery of the Tribe’s Indian reserved water rights for its development and use. (p. 4).

In 1958, USBR filed an application with the State of Utah for water to be stored in Flaming Gorge Reservoir that included 500,000 acre-feet of Green River water supply for the Central Utah Project. According to the Green River Block Draft Environmental Assessment report (“Report”), “[t]he consumptive uses of this appropriation included the support of the Ultimate Phase Units[,]” including the Ute Indian Unit. The Green River Block Draft EA states that because “the Ultimate Phase Units were de-funded under CUPCA,” the water rights were reallocated to other uses, and 447,500 acre-feet of diversion remained with the United States. Nevertheless, portions of the stored water right were to be used to deliver Flaming Gorge water to lands on the Uintah and Ouray Reservation for irrigation of historical, current, and future trust lands of the Ute Indian Tribe and its members, as well as for non-tribal members with the right to use the Indian reserved water rights under the Uintah Indian Irrigation Project. This never happened. In 1996, the USBR assigned this remaining water right (“1996 Assignment”) to the Utah Board of Water Resources, which “provided the Board an opportunity to develop a portion of the Ultimate Phase Right before it lapsed in 2009”—for State-based water users.

The USBR received a letter dated January 5, 2016, from the State requesting two contracts for the use of its assigned water rights (total of 158,890 acre-feet depletion); one is for

the Lake Powell Pipeline Project, and the second contract is for developing water along the Green River. The second contract, a proposed “Exchange Contract” between the USBR and the State, is the subject of the Green River Block Draft EA and the meeting held September 26, 2018, where representatives of the Ute Indian Tribe participated. With this proposed action between the USBR and the State of Utah, the Ute Indian Tribe may not only be cut out of the storage facility and related water delivery system that the Ute Indian Unit was to provide under the CUP, but also from the ability to use stored water in Flaming Gorge representing a portion of its Indian reserved water rights.

As with the current activity between the USBR and the State of Utah, there appears to have been no consideration by USBR in 1996 of its responsibility to the Ute Indian Tribe as the trustee of the Tribe’s present perfected, Indian reserved water rights—a Tribal trust asset. In spite of the fact that the USBR and the State redesigned the CUP units in a manner that cut the Tribe out of any storage facility and water delivery system from which to develop its Indian reserved water rights (according to the report, three of the four “Initial Phase” CUP units have been fully constructed, with the remaining unit nearing completion, and the Uintah Unit from the “Ultimate Phase” being partially developed, with none of these storage facilities providing storage or water delivery for Tribal water), the USBR and the State of Utah have continued their partnership to develop the State’s apportionment of the Colorado River, to the detriment of the Tribe’s ability to develop its Indian reserved water rights’ apportionment in the Colorado River system, including in the Green River.

The Green River Block Draft EA involves a water exchange between the State of Utah and the USBR. Under this Exchange Contract, the State of Utah would agree to pay a base rate of \$19 (plus a \$3.47 O&M fee) per acre-foot to use USBR released storage from Flaming Gorge Reservoir in exchange for the State’s agreement not to develop an equal quantity of water rights. The Green River Block Draft EA states that the purpose of the Exchange Contract is to facilitate a water exchange of 72,641 acre-feet of depletions annually under the 1996 Assignment, which was previously included as part of CRSP (Colorado River Storage Project) participating project water right. The USBR stated that “this contract is needed to resolve a long-standing disagreement between Reclamation and the State regarding the use of the water rights assigned in 1961.” The following comments describe potential impacts to the Tribe resulting from the Green River Block Water Exchange Contract and Draft EA, which the USBR has not considered and included in its conclusions as reflected in the Draft EA.

IV. THE DRAFT ENVIRONMENTAL ASSESSMENT IS BASED ON INADEQUATE WATER SUPPLY AND DEMAND MODELING

The Tribe has federal, Indian reserved water rights in the Green River, which are present perfected rights as of the date of the creation of the Reservation, and the method the USBR used to model the potential impacts of the Green River Exchange Contract may underestimate its adverse impacts on the Tribe’s natural flow rights in the Green River. In conducting its Environmental Assessment and modeling of the water rights under the Exchange Contract and its effect on the environment, which must include the effect on the water supply, the USBR did not consider the 110-

year trend of decreasing water supply. The Green River Block Draft EA states on page 2 of Appendix A that:

“For each depletion scenario (no action, [Green River Block] depletion, and full depletion), one future inflow hydrology scenario was modeled. The inflow scenario uses data from the observed streamflow record (1906-2015).”

A simple linear trend line through the USBR’s estimated natural flow data (<https://www.usbr.gov/lc/region/g4000/NaturalFlow/current.html>) shows that the Colorado River’s water supply at Lee’s Ferry has decreased by an average of 34,000 acre-feet per year over the past 110 years.

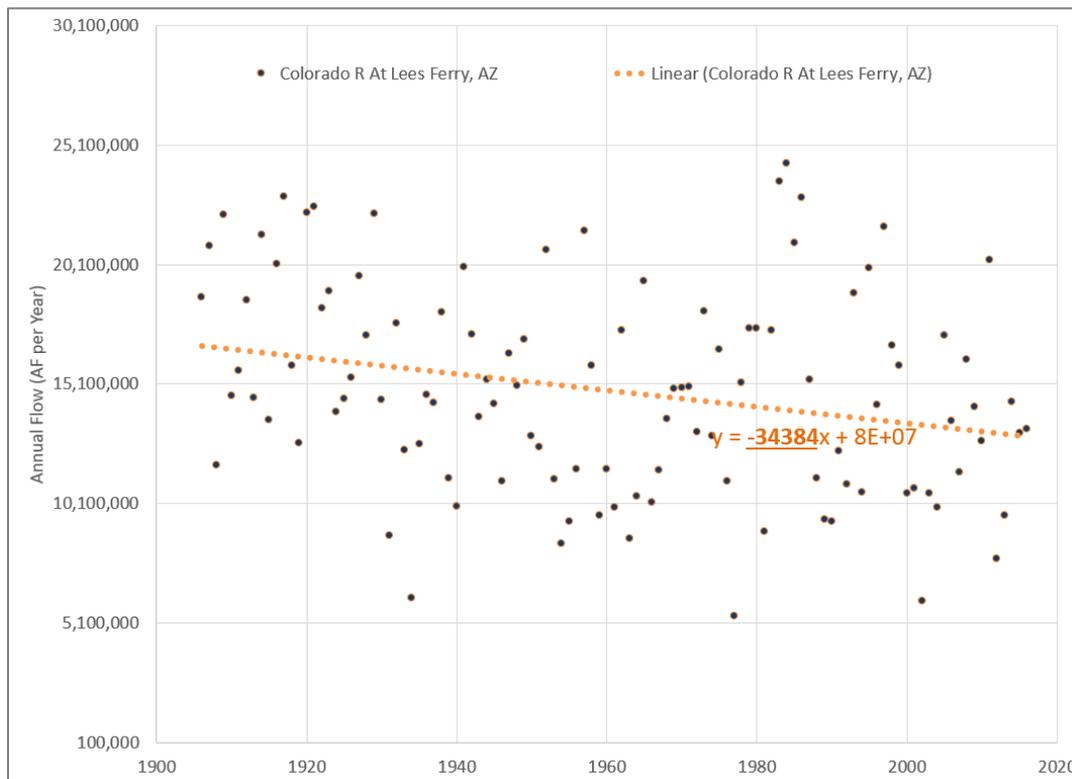


Figure 1: USBR Natural Flow Data for the Colorado River at Lee’s Ferry with a linear trend line

This decreasing trend of average annual flow in the Colorado River was also found in the USBR’s Colorado River Water Supply and Demand Report (<https://www.usbr.gov/lc/region/programs/crbstudy/finalreport/index.html>). Table B-3 on page B-82 of Technical Report B – Water Supply Assessment summarized results from the USBR’s water supply projections using the downscaled GCM Projected Scenario. This analysis predicted that average annual future flows in the Colorado River would be 7.5% less than historic by 2025, 10.9% less than historic by 2055, and 12.4% less than historic by 2080.

TABLE B-3
 Summary of Annual and Monthly Streamflow Statistics for the Downscaled GCM Projected Scenario for the 3 Future 30 Year
 Time Periods: 2011–2040 (2025), 2041–2070 (2055), and 2066–2095 (2080)

	Statistic	Downscaled GCM Projected 2011–2040 (2025)	Downscaled GCM Projected 2041–2070 (2055)	Downscaled GCM Projected 2066–2095 (2080)
Annual (Water Year)	Average Annual Flow (maf)	13.9	13.4	13.1
	Percent Change from Long-Term Mean (1906–2007)	-7.5%	-10.9%	-12.4%
	Median (maf)	13.8	13.3	13.4
	25th Percentile (maf)	12.8	12.0	11.2
	75th Percentile (maf)	15.1	14.6	14.5
	Minimum Year Flow (maf)	4.4	3.9	3.7
	Maximum Year Flow (maf)	43.8	44.3	44.3
Monthly	Peak Month	June	May	May
	Peak Month Mean Flow (kaf)	3,535	3,388	3,495
	Peak Month Maximum Flow (kaf)	14,693	10,830	12,991
	Month at Which Half of Annual Flow (Water Year) is Exceeded	June	May	May

The last time period is beyond the Study period, but is shown for informational purposes.

Source: Colorado River Water Supply and Demand Report - Technical Report B – Water Supply Assessment (<https://www.usbr.gov/lc/region/programs/crbstudy/finalreport/index.html>).

Accordingly, it is the Tribe’s position that future natural inflows used for modeling should, on average, be lower flows than historic natural flows. These observed reductions in natural flow should not be ignored because reductions in future natural flow will increase impacts predicted by the Green River Block Draft EA.

Also, on page 5 of Appendix A of the Green River Block Draft EA, the USBR states “*In this analysis, except for reasonably foreseeable depletions, future Upper Basin depletions from the 2007 [Upper Colorado River Commission] UCRC schedule was assumed constant at 2018 levels; this assumption results in depletions significantly lower than the future depletion projections used in long term planning studies such as the Basin Study, which assumed that Upper Basin depletions will grow through 2060.*” The Tribe is concerned that this study does not account for realistic future water development patterns as observed by past trends and predicted under the USBR’s Basin Study.

Therefore, the Tribe requests that an EIS be performed that quantifies impacts by accounting for these observed trends of decreasing water supply and increasing water demand.

V. THE FEDERAL GOVERNMENT, ACTING THROUGH THE BUREAU OF RECLAMATION AND THE CENTRAL UTAH PROJECT COMPLETION ACT OFFICE, AS TRUSTEE OF THE TRIBE'S RESERVED WATER RIGHTS, FAILED TO CONSIDER AND ANALYZE THE ADVERSE IMPACT FROM THE EXCHANGE CONTRACT AND ENVIRONMENTAL ASSESSMENT ON THE TRIBE'S ABILITY TO STORE ITS GREEN RIVER RESERVED WATER RIGHTS IN FLAMING GORGE.

The Tribe has expressed its interest in storing a portion of its Indian reserved water rights in the Flaming Gorge Reservoir and, in fact, has been discussing and negotiating for this with the federal government, through the USBR and the Central Utah Project Completion Act ("CUPCA") Office representatives, for at least the past ten years, and more intensely over the last four years. The 1992 CUPCA, Title V, s. 503 (Revised 1990 Water Compact), proposed the transfer of a substantial amount of Tribal reserved water rights from the Duchesne River Basin (known in the E.L. Decker Report quantifying the Tribe's reserved water rights as Group 5 lands in the Duchesne River Basin) to the Green River, Indian reserved water rights that are present perfected rights as of the date of the establishment of the Reservation with an 1861 priority date. This is the basis for the Tribe's negotiations with the federal government for storage in Flaming Gorge, although the parties have not reached an agreement on such a water transfer. In CUPCA, Congress required that the proposed Revised 1990 Water Compact be re-ratified by the Ute Indian Tribe before it can become effective. The Ute Indian Tribe and its members have not and will not re-ratify this proposed Water Compact unless there is sufficient storage to support the development of its Indian reserved water rights. In fact, the Tribe is in litigation against the United States, in part, over this uncertainty.

The Revised 1990 Water Compact proposed to transfer Indian reserved water rights out of the Duchesne River Basin from a portion of the Tribe's practicably irrigable acreage ("PIA") to the Green River. The transfer was made in an area where there are no Indian trust, arable lands to support PIA lands. First, the Green River runs through a deep canyon through the Reservation where it cannot be economically used for irrigation purposes. Without some storage on the Green River, the Tribe will not be able to use the proposed transfer of this Indian water. The proposed transfer of Indian water is to benefit the non-Tribal, State-based water users in the Duchesne River Basin by reducing a portion of the Tribe's use of its senior priority rights in that Duchesne River Basin. The amount of this proposed water transfer ranges from a portion of the Group 5 PIA land water rights with 60,968 acre-feet of diversion annually, to the entirety of the Tribe's Group 5 reserved water rights. In addition, the Tribe has additional water rights under what are known in the Decker Report as Groups 6 and 7 lands in the Green River and its tributaries. The Tribe must have the flexibility of both stored water (in Flaming Gorge Dam) and natural flow water in the Green River if the Tribe, with the assistance of its trustee, the federal government, is to protect and preserve through storage its Indian reserved water rights. The Tribe has discussed this extensively with the federal representatives from the CUPCA Office and the USBR.

And yet, the USBR has failed to consider and study whether, by permitting the State of Utah to exchange natural flow rights of 127,026 acre-feet per year to access low cost, released storage water from the Green River, this will adversely impact ongoing negotiations between the USBR, the CUPCA Office, and the Tribe related to the Tribe's ability to secure a portion of its water rights coming out of released storage water. In a statement in the Draft EA, the USBR presents a

conclusion that “[a]lthough the Green River flows through the Uintah and Ouray Indian Reservation, no negative effects have been identified to the native population as a result of the Proposed Action.” (at page 47, Socioeconomics). If the Ute Indian Tribe is unable to fully develop and use its Indian reserved water rights, including those in the Green River, such an outcome will have a direct, significant, and certain economic adverse impact on the Tribe and its members. (*See also* section VII, impact on trust assets, below).

Therefore, the Tribe requests that an EIS be performed that quantifies any impacts under the Exchange Contract on the Tribe’s ability to store a portion of its Green River reserved water rights in Flaming Gorge.

VI. THE FEDERAL GOVERNMENT, ACTING THROUGH THE BUREAU OF RECLAMATION AND THE CENTRAL UTAH PROJECT COMPLETION ACT OFFICE, AS TRUSTEE OF THE TRIBE’S RESERVED WATER RIGHTS, FAILED TO CONSIDER AND ANALYZE ANY ADVERSE IMPACT ON THE TRIBE’S ABILITY TO USE ITS GREEN RIVER RESERVED WATER RIGHTS.

Currently, the State of Utah has a 1958 priority natural flow water right (where the flows in some of the streams are intermittent and is only available at certain times of the year). The Green River Block Exchange would provide the State of Utah with access to a firm supply of 127,026 acre-feet of diversion and 72,641 acre-feet of depletion by utilizing year-round storage releases from Flaming Gorge Reservoir and, as stated in the Green River Block Draft EA, “*provide the State with a reliable water supply for development of the 1996 Assignment.*”

As explained in Comment section V, above, the 1992 CUPCA Act, Title V, s. 503 (Revised 1990 Water Compact), proposed the transfer of a substantial amount of Tribal reserved water rights from the Duchesne River Basin (Group 5 lands) to the Green River with an 1861 priority date. Due to the lack of irrigable lands, the primary beneficial use of this water can only be through Tribal water marketing. If the USBR provides a substantial quantity of low-cost, released storage water to the State under the Green River Block Exchange, the USBR will significantly diminish the ability of the Tribe to market water in the Green River and, therefore, reduce the Tribe’s ability to develop and use its full apportioned Indian reserved water rights.

In other words, since the State’s current water right is a natural flow right, during drought years and towards the summer the State may face shortages. By converting a relatively junior natural flow water right to a more reliable released storage water right and, therefore, providing a more firm water supply to be available to the State throughout the year, the proposed water exchange elevates the State’s water right, making it more attractive than the most senior natural flow right of the Ute Indian Tribe in the Green River. Hence, potential water leasing entities will be more interested in the newly acquired released storage right of the State water users compared to the Tribe’s most senior natural flow water right, adversely impacting the ability of the Ute Indian Tribe to market its water right—resulting in a significant, adverse socioeconomic impact on the Tribe, in particular, on the economic development of this Tribal natural resource (as mentioned previously). Also, because the purpose of the federal government in creating the Reservation was to provide a permanent homeland for the Ute Indian Tribe and its members, which includes the development of self-

sufficiency, such purpose could be defeated under the proposed Exchange Contract—representing a failure of the federal government’s fiduciary duty to the Tribe.

Therefore, the Tribe requests that an EIS be performed that quantifies any impacts from this Exchange on the Tribe’s ability to utilize its Green River reserved water rights.

VII. THE GREEN RIVER BLOCK DRAFT ENVIRONMENTAL ASSESSMENT FAILS TO RECOGNIZE THE TRIBE’S RESERVED WATER RIGHTS, HELD IN TRUST BY THE UNITED STATES FOR THE BENEFIT OF THE TRIBE, AS A TRUST ASSET OF THE TRIBE.

As stated in the Draft EA, “[t]he ITAs are legal interests in property held in trust by the United States for Indian tribes and individuals.” (at p. 56). The Green River Block Draft EA states that “*Trust assets may include lands, minerals, hunting and fishing rights, traditional gathering grounds, and water rights.*” (p. 57, emphasis added). It also states that “[t]he development and operation of oil and gas wells associated with tribal mineral rights, tribal fishing access, and hunting and gathering are expected to continue within the Project APE [Area of Potential Effects].” It is the Tribe’s position that the USBR’s analysis of the Proposed Action is insufficient and deficient, and that the USBR failed to properly identify, consider, and analyze the Tribe’s reserved water rights as a Tribal trust asset, titled in the United States as trustee for the benefit of the Tribe, and, consequently, has failed to analyze the effects on the Ute Indian Tribe, including the present, reasonably foreseeable, and cumulative effects, the Proposed Action will have on the Ute Indian Tribe’s reserved water rights as a trust asset, resulting in a legally flawed Draft EA and the conclusions the USBR has drawn from the Draft EA.

Therefore, the Tribe requests that an EIS be performed to address our concern that the Proposed Action will have a significant, adverse effect on the Tribe’s reserved water rights, a Tribal Trust Asset, and a highly relevant factor in analyzing the environmental consequences of the Exchange Contract.

VIII. CONCLUSION

The Ute Indian Tribe appreciates the opportunity to comment on the Green River Block Draft Environmental Assessment. For the reasons described above, it is our conclusion that the USBR’s conclusion that no EIS need be prepared because the proposed impact will not have a significant effect on the human environment is based on legally insufficient analysis. Therefore, we ask that the USBR, first, engage in the legally required government-to-government consultation process with the Tribe, as it is required to do under federal law and policy, before issuing a final decision on whether an Environmental Impact Statement is required. Second, it is the Tribe’s position that the USBR failed to identify and give legally sufficient consideration to the consequences of the Green River Block Exchange Contract on the Tribe’s reserved water rights as a trust asset with the paramount water rights in the Green River—which is to be preserved and protected by the Secretary, such as through storage and sufficient natural flow to allow for the Tribe’s use of this trust asset to economically benefit its members—resulting in the conclusion that the Draft Environmental Assessment is flawed and insufficiently accounts for the Tribe’s reserved water rights development, including storage and use.

Additional studies resulting in an Environmental Impact Statement are needed to give these Tribal concerns regarding the consequences of the Proposed Action a hard look and the serious consideration that is required under the environmental assessment process. The Tribe appreciates USBR's consideration of these comments and we look forward to consulting with the Department of the Interior on these issues.



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF RECLAMATION

Upper Colorado Regional Office
125 South State Street, Room 6107
Salt Lake City, Utah 84138-1147



UC-400
WRT-4.03

MAR 3 0 2007

Mr. Don Ostler
Executive Director
Upper Colorado River Commission
355 South 400 East
Salt Lake City, UT 84111

Subject: Water Marketing From Flaming Gorge Reservoir

Dear Mr. Ostler:

The Bureau of Reclamation has been approached with a request to market water from Flaming Gorge Reservoir. We understand the project proponent has contacted the Upper Colorado River Commission and intends to provide a briefing on the details of the project. Reclamation has completed an analysis of the amount of water that may be available for diversion and contracting from Flaming Gorge Reservoir. The analysis presumes that Wyoming, Colorado, and Utah will continue to develop their water supplies, continued compliance with the flow recommendations adopted in the 2006 Flaming Gorge Environmental Impact Statement and Record of Decision, and continued use of the active storage pool, which protects the power pool.

A certain degree of uncertainty always surrounds yield studies. This analysis used an unusually long and accurate historic record. The modeling was also at a relatively high level of detail. The water supply may be further reduced or impacted by the outcomes of the future National Environmental Policy Act and Endangered Species Act processes associated with this project, and all water supply numbers should be considered preliminary until that process is completed. As one would expect, there is a degree of uncertainty beyond the original 40-year term of the water service contract. The potential contract for this water would reflect this uncertainty and the need for reevaluation at the time of contract renewal.

Our total estimated amount of water available from Flaming Gorge for the next 40 years is relatively small at 165,000 acre-feet per year. Please find enclosed our draft analysis for your review and comment. Mr. Dave Trueman, Manager of the Resources Management Division, is available at 801-524-3759, if you have questions or would prefer a briefing.

Sincerely,

Rick L. Gold
Regional Director

Enclosure

cc: See next page.

cc: Mr Rick Clayton
Bureau of Reclamation
125 South State Street, Room 6107
Salt Lake City, UT 84138-1147

Mr. Jeff Fassett, P.E.
HDR Engineering, Inc.
170 Carey Ave., Suite 612
Cheyenne, WY 82001
(w/encl to each)

**Draft
Flaming Gorge
Water Availability Analysis
March 19, 2007**

Background

A private party has approached the Bureau of Reclamation with a request to purchase water from Flaming Gorge Reservoir. The project proponent would like to know how much water might be available for contracting and the potential terms of a contract (costs). The proponent plans on privately funding a pipeline from Flaming Gorge to the front range of Colorado. Reclamation would potentially enter into negotiations on the terms of a contract and then later execute a water service contract after environmental compliance is completed.

It is expected that the Upper Basin States, acting through the Upper Colorado River Commission, would approve charging the water to the state in which it is beneficially used, as provided in the Upper Colorado River Basin Compact. Each state has the responsibility to assure that their cumulative use does not exceed their individual compact allocation. Historically each state has used the Basin yield from the Hydrologic Determination to calculate their respective allocations. Such tabulations are maintained by the Upper Colorado River Commission and used by Reclamation in its modeling studies. There is sufficient unused allocation that the proposed use would be well within each state's allocation.

In order for Reclamation to have a better understanding of what volume of water might be available in the future for such a diversion, a RiverWare computer model was developed to study a range of parameters. This report describes the result of this modeling. Because of the nature of future National Environmental Policy Act (NEPA) compliance, all conclusions about the potential bounds of water supply are preliminary and subject to environmental compliance.

Water available for potential contracting is a mass balance of supply, reservoir storage, and demands (both upstream and downstream). Water supplies originate primarily in Wyoming, and future upstream uses in Wyoming are expected to reduce inflows and supply as development continues under their compact allocation. Demands from storage include Record of Decision (ROD) flow requirements recently adopted in the Flaming Gorge Environmental Impact Statement (EIS). ROD flows and particularly the ROD baseflows make a significant demand on storage and dramatically reduce the potential amount of water available for marketing from the reservoir. Storage is impacted by sedimentation and limited to the active pool in this analysis. While it is not required to protect the minimum power pool, it is assumed that Reclamation will continue that operational practice in this modeling work.

Water Availability

This model run evaluates the potential water available for the initial term of a 40-year water service contract.

Assumptions

As of December of 2006, modeling of the proposed diversion had evolved to the following general modeling assumptions:

- **Study Period (42 years)** – The study period was for 42 years from January 2008 to December 2049 using historic natural inflow hydrology for the period from 1922 to 2005 as input. Eighty-three independent inflow traces were created using Index Sequential Method and routed through the model. This period represents the initial term of a potential water service contract. Past inflows are only an indicator of what might happen in the future. The water supply may vary from the historic record.
- **Future Depletions** - Future Depletion schedules in Wyoming, Colorado, and Utah all match current Colorado River Simulation System schedules. It should be noted that Wyoming's future water development directly impacts the water supply of Flaming Gorge.
- **ROD Flows** - All ROD spring and base flow objectives are met at the specified long-term frequencies described in the ROD. ROD flows significantly reduce the availability of water that might be contracted from the reservoir.
- **Release Capacities** - Release limitations due to reservoir elevation constraints were assumed as follows:

Elevation Range	Maximum Release Capacity
6015' and above	12,600 to 28,600 cfs
6000' to 6015	8,600 cfs
5925' to 6000	7,900 cfs
5908' to 5925	6,900 cfs
5908' and below ¹	3,700 cfs (no powerplant)

- **Continuous Diversion** - A continuous (steady) diversion was modeled beginning in January of 2008 and ending at the termination of the run in December of 2049. No phase in period for this diversion was modeled.

Results

The model output indicated that a continuous diversion of 165,000 acre-feet per year could physically be diverted from Flaming Gorge Reservoir during the period from 2008 to 2049 without imposing a significant risk that the powerplant would have to go off line due to insufficient water in the reservoir during this period. All 83 traces of inflow hydrology maintained reservoir elevations above 5908 feet above sea level for the duration of the model run with one minor exception in the critical trace where a single monthly elevation fell to 5907.3 feet for a single month. The minimum power pool elevation of 5908 feet above sea level includes 40 feet of water cover over the midpoint of the lowest penstock intake. It was assumed that some operational adjustments would allow the powerplant to operate slightly below the 5908 foot elevation and, therefore, no adjustment to the diversion was studied beyond this point. All ESA and other ROD flows were maintained.

¹ This elevation was considered the allowable limit of operation of the powerplant. This elevation is 40 feet above the midline of the lowest penstock intake of the selective withdrawal device. It may be possible to operate somewhat below this level with some modification to powerplant operation. For the modeling, it was assumed that the elevation should not fall below this elevation to be acceptable; however, this was not considered to be a hard and fast rule.



THE SECRETARY OF THE INTERIOR
WASHINGTON

ORDER NO. 3335

Subject: Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries

Sec. 1 Purpose. In 2009, Secretary's Order No. 3292 established a Secretarial Commission on Indian Trust Administration and Reform (Commission). The Commission issued its Final Report and Recommendations in December 2013, which sets forth its views and recommendations regarding the United States' trust responsibility. In response to the report, this Order sets forth guiding principles that bureaus and offices will follow to ensure that the Department of the Interior (Department) fulfills its trust responsibility.

Sec. 2 Authority. This Order is issued pursuant to the U.S. Constitution, treaties, statutes, Executive Orders, and other Federal laws that form the foundation of the Federal-tribal trust relationship and in recognition of the United States' trust responsibility to all federally recognized Indian tribes and individual Indian beneficiaries.

Sec. 3 Background. The trust responsibility is a well-established legal principle that has its origins with the formation of the United States Government. In the modern era, Presidents, Congress, and past Secretaries of the Interior have recognized the trust responsibility repeatedly, and have strongly emphasized the importance of honoring the United States' trust responsibility to federally recognized tribes and individual Indian beneficiaries.

a. **Legal Foundation.** The United States' trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and Indian tribes. The Constitution recognized Indian tribes as entities distinct from states and foreign nations. Dating back as early as 1831, the United States formally recognized the existence of the Federal trust relationship toward Indian tribes. As Chief Justice John Marshall observed, "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence ... marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831). The trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights. See generally Cohen's Handbook of Federal Indian Law § 5.04[3] (Nell Jessup Newton ed., 2012); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

The U.S. Supreme Court has repeatedly opined on the meaning of the United States' trust responsibility. Most recently, in 2011, in *United States v. Jicarilla*, the Supreme Court recognized the existence of the trust relationship and noted that the "Government, following 'a humane and self-imposed policy . . . has charged itself with moral obligations of the highest responsibility and trust,' obligations 'to the fulfillment of which the national honor has been

committed.” The Court further explained that “Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes. In some cases, Congress established only a limited trust relationship to serve a narrow purpose. In other cases, we have found that particular ‘statutes and regulations . . . clearly establish fiduciary obligations of the Government’ in some areas. Once federal law imposes such duties, the common law ‘could play a role.’ But the applicable statutes and regulations ‘establish [the] fiduciary relationship and define the contours of the United States’ fiduciary responsibilities.” *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324-25 (2011)(internal citations omitted).

While the Court has ruled that the United States’ liability for breach of trust may be limited by Congress, it has also concluded that certain obligations are so fundamental to the role of a trustee that the United States must be held accountable for failing to conduct itself in a manner that meets the standard of a common law trustee. “This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. ‘One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets.’” *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003)(internal citations omitted).

b. Presidential Commitments to the Trust Responsibility. Since this country’s founding, numerous Presidents have expressed their commitment to upholding the trust responsibility. In the historic Special Message on Indian Affairs that marked the dawn of the self-determination age, President Nixon stated “[t]he special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government . . . [T]he special relationship . . . continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.” Public Papers of the President: Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970).

For more than four decades, nearly every administration has recognized the trust responsibility and the unique government-to-government relationship between the United States and Indian tribes. President Obama established a White House Council on Native American Affairs with the Secretary of the Interior serving as the Chair. President Barack Obama, Executive Order No. 13647, Establishing the White House Council on Native American Affairs (June 26, 2013). The Order requires cabinet-level participation and interagency coordination for the purpose of “establish[ing] a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities.” See also President Barack Obama, Memorandum on Tribal Consultation (Nov. 5, 2009); President George W. Bush, Executive Order No. 13336, American Indian and Alaska Native Education (Apr. 30, 2004); President William J. Clinton, Public Papers of the President: Remarks to Indian and Alaska Native Tribal Leaders (Apr. 29, 1994); President George H.W. Bush, Public Papers of the President: Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments (Jun.14, 1991); President Ronald Reagan, American Indian Policy Statement, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983); President Gerald L. Ford, Public Papers of the President: Remarks at a Meeting

with American Indian Leaders (July 16, 1976); President Richard M. Nixon, Public Papers of the President: Special Message on Indian Affairs (July 8, 1970); President Lyndon B. Johnson, Public Papers of the President: Special Message to the Congress on the Problems of the American Indian: "The Forgotten American" (March 6, 1968).

c. Congress. Congress has also recognized the United States' unique responsibilities to Indian tribes and individual Indian beneficiaries. Recently, Congress passed a joint resolution recognizing the "special legal and political relationship Indian tribes have with the United States and the solemn covenant with the land we share" and acknowledged the "long history of depredations and ill-conceived policies by the Federal government regarding Indian tribes" and offered "an apology to all Native peoples on behalf of the United States." 111th Cong. 1st Sess., S.J. Res 14 (Apr. 30, 2009). Congress has expressly and repeatedly recognized the trust responsibility in its enactments impacting Indian Affairs. *See, e.g.*, Indian Education and Self-Determination and Assistance Act of 1975; Tribal Self-Governance Amendments of 2000; American Indian Trust Fund Management Reform Act of 1994; Federally Recognized Indian Tribe List Act of 1994; Tribally Controlled Schools Act of 1988 and Indian Education Act of 1972; Indian Child Welfare Act of 1978; Indian Mineral Development Act of 1982; Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act).

d. The Department of the Interior. The Department likewise has recognized its obligations as a trustee towards Indian tribes and individual Indian beneficiaries and has been vested with the authority to perform certain specific trust duties and manage Indian affairs.

The Bureau of Indian Affairs (BIA) was transferred from the War Department to the Department in 1849. Congress delegated authority to the Department for the "management of all Indian affairs and of all matters arising out of Indian relations[,]" 25 U.S.C. § 2 (2014); *see also* 25 U.S.C. § 9 (2014); 43 U.S.C. § 1457. The BIA became the principal actor in the relationship between the Federal Government and Indian Tribes, and later Alaska Native Villages, exercising administrative jurisdiction over tribes, individual Indians, their land and resources.

The BIA has evolved dramatically over the last 185 years from an agency implementing past policies of allotment and assimilation, to a bureau charged with promoting and supporting Indian Self-Determination. In addition, several other bureaus and offices within the Department were created for or have specific duties with respect to fulfilling the trust responsibility, such as the Bureau of Indian Education, Office of the Assistant Secretary – Indian Affairs, Secretary's Indian Water Rights Office, Office of the Special Trustee for American Indians, Land Buy-Back Program for Tribal Nations, Office of Historical Trust Accounting, Office of Natural Resource Revenue, Office of Appraisal Services, and Office of Minerals Evaluations. All of these programs support and assist federally recognized tribes in the development of tribal government programs, building strong tribal economies, and furthering the well-being of Indian people. As instruments of the United States that make policy affecting Indian tribes and individual Indian beneficiaries, the Bureau of Land Management, Bureau of Reclamation, Fish & Wildlife Service, National Park Service, and the Department's other bureaus and offices share the same general Federal trust responsibility toward tribes and their members.

In an extended legal opinion regarding the meaning of the trust responsibility, former Department of the Interior Solicitor Leo M. Krulitz concluded that “[t]he trust responsibility doctrine imposes fiduciary standards on the conduct of the executive. The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property.” Memorandum from Department of the Interior Solicitor Leo M. Krulitz to Assistant Attorney General James W. Moorman, at 2 (Nov. 21, 1978). This opinion remains in effect today.

In exercising this broad authority, past Secretaries have acknowledged that the Department’s relationship with Indian tribes and individual Indian beneficiaries is guided by the trust responsibility and have expressed a paramount commitment to protect their unique rights and ensure their well-being, while respecting tribal sovereignty. *See e.g.*, Secretary’s Order 3317, Department of the Interior Policy on Consultation with Indian Tribes (Dec. 01, 2011); Secretary’s Order 3175, Departmental Responsibilities for Indian Trust Resources (Nov. 8, 1993); Secretary’s Order 3206, American Indian Tribal Rights, Federal Trust Responsibilities, and the Endangered Species Act (Jun. 5, 1997); Secretary’s Order 3215, Principles for the Discharge of the Secretary’s Trust Responsibility (Apr. 28, 2000); Secretary’s Order 3225, Endangered Species Act and Subsistence Uses in Alaska (Jan. 19, 2001).

The Department has also sought to build a strong government-to-government relationship with Indian tribes. The Department of the Interior Policy on Consultation with Indian Tribes, which was adopted in December 2011, sets forth standards for engaging with Indian tribes on a government-to-government basis to ensure that the decisions of the Department consider the impacts on affected Indian tribes and their members.

Sec. 4 A New Era of Trust. During the last few decades, the trust relationship has evolved. In the Era of Tribal Self-Determination, the Federal trust responsibility to tribes is often fulfilled when the Department contracts with tribal governments to provide the Federal services owed under the trust responsibility. Because tribal governments are more directly accountable to the people they represent, more aware of the problems facing Indian communities, and more agile in responding to changes in circumstances, tribal governments can often best meet the needs of Indian people. In sum, the Federal trust responsibility can often be achieved best by empowering tribes, through legislative authorization and adequate funding to provide services that fulfill the goals of the trust responsibility.

In recent decades, the trust relationship has weathered a difficult period in which Indian tribes and individual Indians have resorted to litigation asserting that the Department had failed to fulfill its trust responsibility, mainly with regard to the management and accounting of tribal trust funds and trust assets. In an historic effort to rebuild the trust relationship with Indian tribes, the Department recently settled numerous “breach of trust” lawsuits. This includes *Cobell v. Salazar*, one of the largest class action suits filed against the United States, and more than 80 cases involving Indian tribes. Resolution of these cases marks a new chapter in the Department’s history and reflects a renewed commitment to moving forward in strengthening the government-to-government relationship with Indian tribes and improving the trust relationship with tribes and individual Indian beneficiaries.

As part of the *Cobell* Settlement, the Department established a Secretarial Commission on Indian Trust Administration and Reform in 2009 through Secretary's Order No. 3292. The Commission issued its final report in December 2013. The report highlighted the significance of the Federal trust responsibility and made recommendations to the Department on how to further strengthen the commitment to fulfill the Department's trust obligations. The Commission urged a "renewed emphasis on the United States' fiduciary obligation" and asserted that this "could correct some [issues], especially with respect to ensuring that all federal agencies understand their obligations to abide by and enforce trust duties."

As a response to the Commission's recommendation, this Order hereby sets forth seven guiding principles for honoring the trust responsibility for the benefit of current and future generations.

Sec. 5 Guiding Principles. Pursuant to the long-standing trust relationship between the United States, Indian tribes and individual Indian beneficiaries and in furtherance of the United States' obligation to fulfill the trust responsibility, subject to Section 6 below, all bureaus and offices of the Department are directed to abide by the following guiding principles consistent with all applicable laws. Bureaus and offices shall:

Principle 1: Respect tribal sovereignty and self-determination, which includes the right of Indian tribes to make important decisions about their own best interests.

Principle 2: Ensure to the maximum extent possible that trust and restricted fee lands, trust resources, and treaty and similarly recognized rights are protected.

Principle 3: Be responsive and informative in all communications and interactions with Indian tribes and individual Indian beneficiaries.

Principle 4: Work in partnership with Indian tribes on mutually beneficial projects.

Principle 5: Work with Indian tribes and individual Indian beneficiaries to avoid or resolve conflicts to the maximum extent possible in a manner that accommodates and protects trust and restricted fee lands, trust resources, and treaty and similarly recognized rights.

Principle 6: Work collaboratively and in a timely fashion with Indian tribes and individual Indian beneficiaries when evaluating requests to take affirmative action to protect trust and restricted fee lands, trust resources, and treaty and similarly recognized rights.

Principle 7: When circumstances warrant, seek advice from the Office of the Solicitor to ensure that decisions impacting Indian tribes and/or individual Indian beneficiaries are consistent with the trust responsibility.

Sec. 6 Scope and Limitations.

a. This Order is for guidance purposes only and is adopted pursuant to all applicable laws and regulations.

b. This Order does not preempt or modify the Department's statutory mission and authorities, position in litigation, applicable privilege, or any professional responsibility obligations of Department employees.

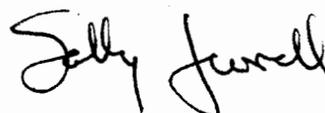
c. Nothing in this Order shall require additional procedural requirements related to Departmental actions, activities, or policy initiatives.

d. Implementation of this Order shall be subject to the availability of resources and the requirements of the Anti-Deficiency Act.

e. Should any Indian tribe(s) and the Department agree that greater efficiency in the implementation of this Order can be achieved, nothing in this Order shall prevent them from implementing strategies to do so.

f. This Order is intended to enhance the Department's management of the United States' trust responsibility. It is not intended to, and does not, create any right to administrative or judicial review or any legal right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies, or instrumentalities, its officers or employees, or any other person.

Sec. 7 Expiration Date. This Order is effective immediately and will remain in effect until it is incorporated into the Department Manual, or is amended, suspended, or revoked, whichever occurs first.



Secretary of the Interior

Date: August 20, 2014