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DEPARTMENT OF NATURAL RESOURCES

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May 31, 2016

Duane Moss
Ute Tribe Water Resources Director
P.O. Box 190
Fort Duchesne Utah 84026

Dear Duane:

As you know, the State of Utah and the Ute Tribe have worked for decades to resolve matters related to water resources in the Uintah Basin. State officials worked with the Tribe both before and after passage of the Central Utah Project Completion Act (CUPCA) in 1992, in hopes this issue could be finally settled. We continue to believe the time has come to resolve this matter, and we are enthusiastic about doing so. We gather from recent comments from members of the Ute Tribe Business Committee and Water Commission the Ute Tribe feels the same way.

We are informed the Business Committee has delegated to the Tribe's Water Commission the responsibility to develop a Tribal Water Code. State officials met in Ft. Duchesne on April 20 with members of the Commission and federal officials to discuss a draft of this Code and related matters and agreed to provide comments on the draft to the Water Commission. This letter contains what we hope are helpful comments on the important topic of the Ute Tribe administering water under their tribal jurisdiction. Our comments are provided against a backdrop under which we have analyzed the Proposed Code. Three major, and somewhat overlapping, components comprise this backdrop: (1) the need for a Water Compact or established basis from which the Code is framed, in this case we believe Congress created that framework in 1992 when it enacted (CUPCA) which included approval of the 1990 Compact; (2) the need for the Code to respect the provisions of that framework; and (3) the need for formulation of the Code according to appropriate legal process recognizing its impact on various stakeholders.

We offer the following specific comments with respect to the proposed water code considering the backdrop described:

- 1) Our view is that CUPCA and the Compact establish the Tribe's water rights and therefore we disagree with the generalizations contained in Findings (1)(b) on page one of the Proposed Code. We similarly disagree with finding (1)(e) and page eight, (nn), since in our opinion the "Ute Indian Tribe's water" under the provisions of CUPCA is limited to the reserved water rights described in that Act (Section 507). CUPCA Section 507 provides "The Tribe shall waive, upon receipt of the section 504, 505, and 506 moneys, any and all claims relating to its water rights covered under the agreement of September 20, 1965, including claims by the Tribe that it



retains the right to develop lands as set forth in the Ute Indian Compact and deferred in such agreement. Nothing in this waiver of claims shall prevent the Tribe from enforcing rights granted to it under this Act or under the Compact.” CUPCA in Section 501 acknowledged the promises made to the Ute Tribe in the deferral agreement would not be realized. Since resolution of the Tribe’s water right claims relied on that agreement, CUPCA became the mechanism for a new agreement to resolve the claims. Instead of water projects the Ute Tribe was promised money, a modified Compact which continued to acknowledge quantified water rights as before but one that moved water for lands which could not be served without the projects to the Green River with language acknowledging Tribal water could be marketed off reservation under certain circumstances. Our understanding is the Tribe has received Section 504, 505, and 506 moneys in addition to annual payments under Section 502 which are being provided as compensation for 35,000 acft of water which will not be supplied because the Upalco and Uintah units were not constructed. The Tribe is not prevented from enforcing rights granted under the Act or Compact but otherwise is prevented by waiver from asserting any other water right claims. The Compact, Page three, lines 19 to Page four, line two, further describes that the water quantified under the Compact represents “all water rights of every nature and description derived from the reserved water rights doctrine.”

We believe CUPCA was a full settlement of the Ute reserved rights claims as they had been outlined in the 1965 Deferral Agreement. When Congress enacted CUPCA the Compact had been negotiated and was complete. CUPCA, with its financial provisions, and the 1990 Compact, with its water provisions, fully and completely settled the Tribe’s federal reserved water right claims and subsequent claims that arose from inability to implement provisions of the 1965 Deferral Agreement. CUPCA is clear on this point. The testimony of the Tribal Chairman at the time of CUPCA’s passage emphasizes this point. And, the participation of the Tribe’s attorney in the formulation of not only the 1990 Compact but also CUPCA itself further clarifies this point.

- 2) Our view of (4)(a) on page three of the proposed Code has been narrowed by our interaction with the Federal Team charged with implementing the Ute Indian Compact as we have discussed possible compact alterations over the years. Based on that interaction, we believe the Ute Indian Tribe, through adoption of the Proposed Code which regulates reserved water rights for the Tribe, is not authorized to regulate non-Tribal members who may have water rights that derive from the Tribe’s water rights unless the Secretary of the Interior first approves the Proposed Code. Lines two thru six, page four, of the Compact acknowledges there may be claims by persons based on reserved water rights of the Tribe and provides that any of those claims that are successful are included in the water quantified in by the Compact. Page two, lines 11-13, of the Compact provides that “no water rights held in trust can be transferred from the lands listed in said groups without approval of the Secretary of the Interior.” The Ute Tribe Constitution in Article VI,

Section 1(l), affirms that any ordinance directly affecting nonmembers is subject to review by the Secretary of Interior. It is clear the Secretary should be involved.

State officials recognize the right of the Ute Tribe to implement rules and ordinances for the management of Tribal resources and conduct of Tribal members and view the Proposed Code as such an effort. We appreciate the opportunity afforded our agency to comment on the Proposed Code before implementation. The non-Tribal members are understandably concerned that their rights be protected as the Proposed Code is implemented. Secretarial approval of the Proposed Code is a critical component of that protection. They have expressed those concerns to our office and suggested we be unresponsive to Ute Tribe requests for input on the Proposed Code until there is acknowledgement by the Tribe of provisions of CUPCA including the Compact and an appropriate Secretarial process for approval of the Proposed Code. In our opinion their previous silence on the Proposed Code should probably not be interpreted as support for the Proposed Code.

- 3) We note that the Tribe adopts a definition of "Domestic Use" (Page five, (5)(m)) in the Proposed Code which includes irrigation of 0.5 acre. We recognize the Tribe has authority to create its own regulations, but note the discrepancy with Utah's existing definition since it will likely be the source of confusion among water users because the state definition of "domestic use" includes no outside use. Since the Tribe is instituting regulations which did not previously exist, one possible solution might be the selection of a term which would be distinct from that already used by the State.
- 4) We believe the definition of "Reservation" ((ff) on page seven of the Proposed Code) is lengthy, confusing and could be more succinctly stated as "as defined by the 10th Circuit in the Ute V decision." We understand state, tribal, and local officials continue to discuss the meaning of Ute V and other decisions and are working on a map to better describe what Ute V means. We hope these discussions will succeed. An alternative suggestion is that in addition to Ute V the definition state that the Reservation is as depicted on the map of Land Status of the Uintah Valley Indian Reservation prepared by the Department of Interior.
- 5) Definition (jj) on Page seven, last sentence, implies some tribal jurisdiction over state water rights which is contrary to provisions of the 1990 compact. The Compact recognizes and quantifies specific water rights for the Tribe which are to be delivered to their head gates under authority of the state engineer, thereafter to be administered by the Tribe and United States. Water appropriated by the state engineer under state water rights is junior in priority to Tribal Reserved Water Rights, but is appropriated and delivered under the state engineer's administrative authority even if the application is filed by the Ute Tribe or its members (*see* Compact page five, lines three thru seven).

- 6) Page 10, (2)(a) of the Proposed Code states: "Tribal Reserved Water is owned by the Tribe." The Compact, page one, lines 19-23, provides the water under the Compact is apportioned, confirmed, and recognized from water apportioned to Utah under the Colorado River Compact to the United States in perpetuity, in trust as Winters Doctrine water rights for the Ute Indian Tribe and **others**. There is a subtle but important distinction in those two statements.
- 7) Page 10, (2)(c), last sentence states: "Tribal Reserved Water Rights are not subject to regulation, management and control of state law." Compact, page five, lines 15-21, provides the state engineer will have general administrative supervision of all surface and groundwater apportioned under the Compact including measurement, apportionment, and distribution thereof, to the points of diversion from the main source. The Compact page six, lines one thru four, provides further that the United States on behalf of the Tribe or the Tribe shall comply with the provisions of Section 73-3-3 of Utah Code with regard to changes in point of diversion, place or nature of use; except no application need be made to the State Engineer for a change of place of use when the new place of use is within the same canal system. We see the Proposed Code as out of compliance with the Compact on this matter.
- 8) Page 11, (2)(e) discusses consolidation of water rights found to be in non-use under the Proposed Code for purposes of water marketing or other approved uses. This will likely be an issue of concern to those who have derivative claims. We note that much of the controversy we experience with the state water right system revolves around forfeiture of rights and perceptions of the same. Our experience suggests these kinds of actions are very controversial and if there is a lack of consistency in application it will be even more controversial.
- 9) Page 11, (2)(e)(2) uses the term "fee land owners." We believe the complexity of land issues in the Uintah Basin warrants the term being included as a defined term.
- 10) Page 11, (2)(e)(2) suggests fee owner rights to transfer their use of water off of original lands are limited. We believe this is a specific instance where regulation is being directed to those who are most likely not tribal members and therefore the Tribe's regulation of their conduct is subject to approval by the United States.
- 11) Page 13, Chapter four, (1) provides that a Water Commission will enact rules to carry out the policies and intents of the Proposed Code. While the notion that specifics of the Proposed Code will be left to rule-making may work well for those who are Tribal members, those with derivative rights who are not represented in the Tribal government may have legitimate concern about how the rule-making process will proceed. The

implications of this provision on rights of non-tribal members will be an important issue as the Secretary considers approval of the Proposed Code, and the Secretary may need to approve the rules as well as the Proposed Code.

- 12) Page 15 – Establishment of Ute Tribal Water Commission may work well for tribal members who are represented by officials they elect to the Business Committee, but those with derivative rights who are not tribal members may be concerned by the lack of representation in this important decision-making body. Since this body is essential in the due process afforded in the regulation of water delivered to both tribal interests and non-members we assume the United States will carefully consider the due process rights of non-members and how they are protected by the Proposed Code, just as federal officials are concerned with the impact of all Indian water right settlements on allottees. We recognize representation in the Water Commission by those regulated is not a requirement of due process but pass along this concern from non-tribal members for your consideration.
- 13) Page 18, Chapter 2 (1)(a) sets forth requirements of Tribal Water Engineer. The requirements indicate the person must be a “licensed civil or agricultural engineer” or “possess a water hydrology certification.” Normally engineer licensure is thought to be administered by states. Do you care what state the engineer is licensed in or are you referring to some other licensure process? What is a “water hydrology certification,” who issues them, and based on what criteria? We do not bring this issue up as an objection to the Proposed Code but rather as something you may wish to further clarify to avoid future disputes over qualifications.
- 14) Page 33, first sentence references “tape recorder.” We believe that term is out-dated and suggest as a substitute “electronic voice recording” for your consideration.
- 15) We note some provisions of the Proposed Code such as those dealing with water quality may be of interest to other Utah government entities. Item (vi) on page 24 is an example of such a provision. This Utah Division of Water Rights response represents only views of our agency and not of Utah State Government as a whole.

The Need for a Water Compact and Utah’s Suggestion to Resolve That Issue

Since there are conflicting jurisdictional issues neither the State nor the Tribe will be successful in implementing regulations on water in the Uintah Basin without some agreement about the limits of the jurisdiction of each entity. The State needs a Water Compact in place before we can cooperate in any Tribal Water Code being implemented because the Compact establishes the amount and location of water to which the Proposed Code applies and because it provides a measuring stick for use in determining the appropriateness of the Proposed Code.

We believe the Tribe needs a Compact in place because ratification of the Compact allows the Tribe to quantify its rights and take advantage of certain benefits which are an outcome of the Compact, such as the opportunity for off-reservation leasing of water. The Tribe's Constitution requires Secretarial approval of the Proposed Code and Utah cannot support such approval if a Compact is not in place. CUPCA Section 503(a) states that the Revised Ute Indian Compact, "is hereby ratified and approved, subject to re-ratification by the State and Tribe." The State believes it is past time for both sovereigns to accomplish this ratification. Efforts to make changes to the Compact since its approval by Congress have proven unsuccessful and we believe continuing to pursue that same course is unlikely to produce different results.

The State believes a new approach will be in the best interest of all parties. That approach is for the State and the Tribe to ratify the 1990 Compact as Congress intended and, if necessary, to consider side-agreements on issues we can work on and resolve together, provided all parties can agree to this approach. Such ratification would then have the three sovereigns jointly approving the same document as the final step in the process Congress established when it approved CUPCA. It will allow the Tribe to pursue receiving the full benefits of the Compact. Any other approach will require Congressional re-approval. The federal implementation team confirmed this would have been required even if the 2009 version of the Compact had been ratified. Much has changed, however, since that time. The complications involved in moving legislation through Congress continue to increase. We recognize that intergovernmental relations in the Uintah Basin are strained. Colorado River issues have become very complex and given the growing opposition to water development generally there is resistance to bringing such issues before Congress unless absolutely necessary, which is not the case here. Congress did not intend the 1990 Compact be rewritten; if it had intended this it would never have ratified the Compact in CUPCA.

Therefore, the State believes it is unproductive to continue to discuss modifications to the Compact we now know would require further Congressional action. Our intent was never to renegotiate a significantly different compact than the 1990 Compact. We believe the best path forward is for the State and the Tribe to ratify the Compact Congress has approved. Because the State's legislative session ended in March and legislative approval is needed for State ratification of the 1990 Compact, it will likely take about a year for the State to accomplish this if everything goes well. We are unfamiliar with how long it may take for the Tribe to accomplish the ratification, but we suggest you move as quickly as possible to do so.

We understand that the Tribe is very interested in water storage. We remain supportive of the Tribe securing storage but believe the issue has already been addressed as a condition of Compact ratification in CUPCA. While the state is unwilling to support imposing a new financial requirement on either the State or Federal government we hope options for storage remain that the Tribe can consider and we are ready to assist in this as we have described to you previously.

Because it will take a year before the State can ratify the 1990 Compact, on the one hand, it is premature to be working towards finalizing a Tribal Water Code at this time. On the other hand, the State is aware that the effort to draft such a Code is very important to the Tribe and, with that in mind, we provide the above comments. These comments are based on our

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preliminary review of the Proposed Code. We may have additional comments or concerns as this matter moves forward. We hope our comments will aid your process.

We would like to schedule a principals meeting with you, the Water Commission, members of the Business Committee, and State Officials to be held soon in Ft. Duchesne at the Tribal offices or at the State Capitol in Salt Lake City (your choice) to discuss this letter. Please contact me at (801) 538.7371 if you have questions.

Sincerely,



Kent L. Jones, State Engineer
Utah Division of Water Rights

cc: Spencer J. Cox, Lt. Governor
Jacey Skinner, General Counsel to the Governor
Mike Styler, Department of Natural Resources Executive Director
Reed Murray, CUPCA Program Director