

## STATEMENT OF LORI POTTER

ON S. 1771

BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS AND  
THE SUBCOMMITTEE ON WATER AND POWER,  
COMMITTEE ON ENERGY AND NATURAL RESOURCES

JUNE 24, 1998

### **Introduction**

My name is Lori Porter. Thank you for the opportunity to testify on S. 1771. I am from Denver, Colorado. I am a lawyer and for the last ten years have represented environmental and taxpayer groups, including the Sierra Club, Taxpayers for the Animas River, and Four Corners Action Coalition, seeking alternatives to the proposed Animas-La Plata project (ALP). My clients oppose Animas-La Plata for many reasons relating to its impacts on the environment and the taxpayer, and now oppose ALP-Lite and S. 1771 for the same reasons, as I will discuss in detail. The local, regional, and national organizations which have announced their opposition to ALP-Lite include Taxpayers for Common Sense, Friends of the Earth, Earthjustice Legal Defense Fund (formerly Sierra Club Legal Defense Fund), Environmental Defense Fund, Trout Unlimited, American Rivers, and many more. Copies of their letters to Congress and to the Administration are attached to my written statement.

### **History of Animas-La Plata and Grounds, for Opposition to S. 1771**

As you know, ALP was authorized by Congress 30 years ago, but final approval has never been given and construction has never begun. There are three important reasons why Congress has not funded ALP, and why it has remained on the drawing board for so long. One, the project has unacceptable environmental impacts. Two, it is economically and financially unfeasible; it depends totally upon a huge subsidy by the federal taxpayer benefitting local municipal water users who, under federal law and policy, should be paying for their own water development. Three, it is based on bad information and admitted gaps in data. These are the reasons that the environmental and taxpayer communities oppose Animas-La Plata and Animas-La Plata Lite, and consequently why we oppose S. 1771.

### **Environmental Impacts**

Animas-La Plata has serious environmental problems. It diverts the flow of one of the last free-flowing rivers in the American west, the Animas River, and pumps the water 500 vertical feet up into Ridges Basin, where a storage reservoir would be built. This causes unacceptable environmental impacts on the river, downstream, and in the basin.

The Animas River is the heart of the City of Durango. It supports a thriving local rafting industry, and I attach to my statement a letter from the Durango rafting companies telling how building

Animas-La Plata Lite will ruin their businesses. The Animas River is notable as a place where not only Olympic kayakers but families with small children can take a thrilling river trip. In the stretch of the river where the project's pumps would divert river flows, the Animas is a state-designated Gold Medal Trout Stream.

Farther downstream, the Animas feeds the San Juan River, a candidate for Wild and Scenic River designation and a magnet for water sports enthusiasts. Depletion of Animas River flows will likewise deplete flows in the San Juan, and has been determined to cause jeopardy to two species of endangered fish found there. Return flows from ALP irrigation uses would cause nearly continuous violations of New Mexico state water quality standards.

Ridges Basin, where Animas-La Plata project water would be stored, is critical winter habitat for one of Colorado's largest elk herds, and thus a place used by hunters. It is full of Indian burial sites and other archeological ruins protected by the National Historic Preservation Act but which would be inundated by the Animas-La Plata reservoir. It is home to bald eagles and other wildlife. Building Ridges Basin dam would also flood many acres of wetlands, which are rare in the western United States.

### **Violations of Federal Law Affecting Animas-La Plata**

The Bureau of Reclamation (Bureau) has a long and sorry history of whitewashing these environmental impacts, and an equally long history of being caught breaking the law. In 1991, citizen groups took the first of a series of actions against ALP which either a Court found, or the Bureau admitted on its own, to be a violation of law. First, we notified the Bureau that it was out of compliance with the Endangered Species Act. It was, as it and the Fish and Wildlife Service admitted. Then we found that the

Environmental Impact Statement was completely inadequate and out-of-date, but citizens had to bring a lawsuit against the Bureau to get the agency to admit its violations and prepare a new study. We found that the Bureau claimed to be exempt from the Clean Water Act, had no permits, and did not qualify for an exemption, so it went back to square one on that, too. On a trip to Ridges Basin, we found the Bureau illegally dumping drilling fluid in Basin Creek, for which EPA cited it in violation of the Clean Water Act. The Bureau then began a program of excavating the Indian burial sites in Ridges Basin without proper authority. A federal court enjoined that, and a court-entered consent decree against excavation is still in effect today.

We notified the Bureau that its economic analysis of the project violated Departmental law and regulation by overstating the benefits and underestimating the costs, and petitioned for an adequate study to be done. The Bureau did a new analysis which admitted that the project returned just 36 cents on each dollar. The Bureau withheld information about project impacts from inquiring citizens, and so another suit was filed, and again a Court found the Bureau in violation of the law. The Bureau produced another EIS which the EPA ruled unsatisfactory, and which still has not been approved. The Bureau violated public comment requirements on its programmatic agreement for archeological resources, which it offered only after citizens once again complained. On and on these violations went. Currently, a citizen lawsuit pending against

the Bureau challenges it with violating the Reclamation Reform Act by failing to involve the public in amending the project repayment contracts. The Bureau has admitted in the case that once again its initial position of not offering public participation opportunities was unjustified.

### **Sufficiency Language**

S. 1771 seeks to deal with environmental impacts not by addressing these many issues but with sufficiency language, calling the Bureau's efforts to date "adequate." With a record such as the Bureau has on Animas-La Plata, it should be no wonder why sufficiency language is particularly unacceptable. To put it bluntly, none of the Bureau's Animas-La Plata compliance efforts has ever been adequate. S. 1771 would sweep the problems under the rug, not solve them.

Project supporters point to the documents previously prepared as supplying "adequate" compliance. The fact is, there has never been a satisfactory Environmental Impact Statement on Animas-La Plata. Whether in litigation or under scrutiny by sister agencies and the public, no one has found, and the Bureau has not contended, that any of its attempts at NEPA compliance are adequate. The EPA is the agency with legal authority over the NEPA process, and it has objected to the Bureau's attempts at producing a legally satisfactory EIS.

The fact is also that there has never been compliance with the Clean Water Act for Animas-La Plata. The project has never received a 404 permit or 402 water quality certification. The Bureau claims a little-known and rarely used exemption from those laws under section 404(r) of the Act for fully federal projects with a satisfactory EIS and a full 404(b)(1) analysis. This project is not fully federal, nor does it have a satisfactory EIS, nor is its 404(b) analysis adequate. The Corps of Engineers customarily implements the 404 permit process, and that agency is rarely if ever accused of blocking water development projects. Yet it has stated that there is doubt that any phase of Animas-La Plata, including ALP Lite, meets the 404(b) guidelines. The Corps' letter is attached to my written statement.

The final fact is, as to the Endangered Species Act, that the project has been illegally segmented and, to use the exact words of the Corps of Engineers from its letter, it proceeding with alternative 4a [i.e., ALP Lite] also seems to violate a tenet of Section 7 compliance against committing irreversible or irretrievable resources by an agency. This prevents any agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would avoid violating 7(a)(2) of the Endangered Species Act." To put it in other words, the ALP Lite plan to build a dam 92% as large as it would be for the full ALP project violates the ESA.

In 1986, all of the project participants, including the United States, signed two agreements which committed them to compliance with NEPA, Bureau procedures and law generally. Today, through S. 1771, the proponents are asking Congress, the Administration and the American people to disregard the law, to pretend it doesn't exist, and to overlook the violations which have already been identified.

The facts do not support sufficiency language, or adequacy language, or any other type of

exemption or rider, however it is named. The facts support the conclusion that Animas-La Plata and Animas-La Plata Lite have fundamentally unacceptable environmental impacts.

### **Improper Federal Subsidies of Local Water Development**

The economic history of Animas-La Plata is as wretched as the environmental history just described. In 1981, former Bureau water project planner and Senate Energy Committee staff director Dan Dreyfus candidly admitted that Animas-La Plata survived only because the Bureau "cooked the books" to make the economic figures look less bad than they were. The Inspector General of the Department of Interior audited the project in 1994, and concluded that it was neither economically feasible (ie., the costs exceeded the benefits) nor financially feasible (ie., beyond the repayment capabilities of the participants). After receiving a citizen petition to do so, the Bureau of Reclamation updated its own economic analysis of the project in 1995, and found that none of the repayment contracts covered project costs and that the benefit cost ratio was just 36 cents on each tax dollar invested.

Another cost which is hidden by S. 1771 is the cost of pumping Animas-La Plata project water from the Animas River 500 vertical feet up into Ridges Basin, and then pumping it again if the water is ever to be delivered to any customer. The market value of the power reserved for the ALP project is \$6 million per year. These costs, too, are subsidized by the federal government, as the power will be supplied by federal hydropower facilities which presently are able to sell the power on the market and realize a benefit to the American taxpayer. *The costs of operating ALP are so great that the project's costs would exceed its benefits even if it could be built for free, as the Bureau's 1995 economic analysis reveals.*

S. 1771 not only perpetuates these problems but, in general, exacerbates them. S. 1771 puts a cap on state and local contributions. S. 1771 reduces, not only in absolute terms but as a percentage of total project costs, the state and local cost shares. S. 1771 proceeds without the benefit of an independent cost estimate for the project, a feasibility study, or any other of the standard tools for evaluating whether water project expenditures are reasonable. Whereas before Animas-La Plata was out of the reach of the state and local entities sponsoring the project because its costs were truly exorbitant, now Animas-La Plata Lite simply makes the vast majority of those costs nonreimbursable to the federal government. In other words, this white elephant project has become, the burden of the federal taxpayer.

### **Animas-La Plata Lite is the Product of a Flawed Process**

S. 1771 asks the American taxpayer to assume nearly the entire burden of building a huge, multi-million dollar water project. Ordinarily, before Congress will even consider such a proposal, it is preceded by the kind of thinking and planning dictated by sound water policy, reclamation law, and good common sense. For Animas-La Plata Lite, all we have is a 2 1/2 page project description by the local project sponsors and an unverified, unsupported and highly optimistic price estimate also submitted by the sponsors. Has the Bureau independently calculated the cost? No. Has the Bureau calculated the benefit-cost ratio of the project? No. Has the Bureau determined whether the project is feasible from an economic and financial viewpoint? No. Has

the Bureau fairly calculated the repayment obligations of the participating entities in accordance with applicable law and guidance? No. Has the Bureau reported to Congress and the American people on the answers to any of these questions. No. ALP Lite has not received even the barest scrutiny, and would not withstand it if it did.

### **Conclusion**

We ask these Committees to vote no on S. 1771. The environmental and economic problems of Animas-La Plata, and of its first phase, "Animas-La Plata Lite," are many. S. 1771 would perpetuate, not solve, those problems. It would sweep the Bureau of Reclamation's many violations of environmental and reclamation laws under the rug with sufficiency language. It would foist off on the federal taxpayer a huge, uncapped financial burden where the economic returns to the country's investment are only pennies to the dollar. It would dignify a process which excluded the public and denied full and accurate information to this Congress and the American people.

The Animas-La Plata Lite proposal and S. 1771 came about only after Animas-La Plata languished, unfunded and unbuilt, for 30 years. Animas-La Plata Lite is a kind of tacit admission of what we have known for a long time: that the full project is a dinosaur which belongs to another age, and which should not show up on the Bureau's screen in the 21st century. S. 1771 does not deauthorize the original project, however, as it should; instead, it expressly keeps the old project alive. S. 1771 sizes the so-called "reduced" or "Lite" dam and reservoir at fully 92% their full-project size. Project participants make no secret of their plans to revive the full project -- but not to pay for it themselves -- in the future. We ask these Committees and the Senate to deauthorize the original projects

There is another course. There are alternatives to a big reservoir 500 feet up on a mesa, evaporating, with no pipelines to anywhere. Commissioner Martinez recognized this in the official biography he gave to the House of Representatives when he testified on the Energy and Water Appropriations bill on March 25, 1998. Here is what was said: *"Commissioner Martinez has overseen a marked change in the Bureau of Reclamation from a large water project construction agency to a water conservation agency which seeks non-structural solutions to America's Western water needs. He has encouraged the Bureau to move into new areas such as water recycling and exploration of water transfers.*

This is precisely what the citizens' groups who oppose S. 1771 have suggested to the Bureau. There are non-structural alternatives to Animas-La Plata. There are existing Bureau reservoirs on rivers which flow through the reservations or have delivery facilities to the reservations. For example, the Dolores Project already delivers water to the Ute Mountain Ute reservation, and the Pine and Florida projects store water upstream for the Southern Ute reservation. There are water rights to be acquired on the open market, through willing seller transactions. There is water to be conserved, recycled, salvaged, and marketed. We need the Bureau to have the same modern day perspective on Animas-La Plata as it apparently does on other water issues in the west. We ask these Committees to tell the Bureau to do its -job and look seriously at alternatives.