

Written Statement of
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on behalf of
The States of Colorado, New Mexico, Utah and Wyoming, and
The Upper Colorado River Commission
To the
Subcommittee on Water and Power,
Committee on Natural Resources,
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“Collaboration on the Colorado River: Lessons Learned to Meet Future Challenges.”

Good morning Madam Chairwoman and members of the Subcommittee. I am Jennifer Gimbel, the Director of the Colorado Water Conservation Board. In my role as director, I carry out the policies and directives of a citizen board relating to the conservation, development and utilization of Colorado’s water resources. I also serve the state of Colorado as commissioner to the Upper Colorado River Commission. I appreciate this opportunity to testify today on the topic of “Collaboration on the Colorado River: Lessons Learned to Meet Future Challenges.” The state of Colorado maintains a strong tradition of seeking out and building consensus on this river. This testimony briefly reviews the history of collaboration among the seven basin states, American Indian tribes, and the federal government, and then discusses some of our current collaborative efforts in the basin. I am testifying on behalf of the States of Colorado, New Mexico, Utah, and Wyoming, and also on behalf of the Upper Colorado River Commission. This written testimony focuses on five topics that you highlighted in your March 26, 2010 letter: 1) history and past challenges; 2) challenges in the near and long term; 3) existing frameworks to address challenges; 4) potential confrontations and possible resolutions; and, 5) the proper federal role in addressing challenges.

HISTORY OF COLLABORATION AND PAST CHALLENGES

History has shown that collaboration is a necessary ingredient for action in the Colorado River basin. Beginning in 1917, water users throughout the Colorado River basin formed the League of the Southwest. The League’s goal was collaboration and cooperation on a regional level. The constitution of that organization pledged the League to “foster closer social and commercial relations and to link the communities of the Southwest in a spirit of brotherhood and the promotion of the civic, commercial and social interests of the territory.”¹ Discussions within this organization laid the groundwork for the ultimate exercise of collaboration on the river—an interstate agreement upon which the basin’s legal framework would rest—the Colorado River Compact of 1922.

¹ Norris Hundley, Jr., *Water and the West*, Univ. of California Press, 2d ed. (2009), p. 56.

States had never before attempted to apportion a stream. Colorado water lawyer Delphus E. Carpenter was the first to suggest that the basin should turn its gaze away from litigation and toward collaboration around an interstate agreement. Carpenter advocated using the compact clause of the U.S. Constitution to resolve interstate water disputes. The compact clause allows interstate agreements between states so long as Congress consents.² When the League passed a resolution that the states should pursue an interstate water compact, Carpenter stated: "This is just the beginning of what has been the dream of... more than one generation.... We wish to treat before war, and this is, we hope, the beginning of the treaty."³ Cooperation and collaboration were required ingredients if Carpenter's method was to work. Then, as now, with these ingredients, the most intractable problems could dissolve; without them, protracted litigation seemed inevitable.

On November 24, 1922, representatives from the seven basin states signed the Colorado River Compact in Santa Fe, New Mexico. The compact's major purposes reflect the spirit of cooperation required by such an agreement:

to provide for the equitable division and apportionment of the use of the waters of the Colorado River system; to establish the relative importance of different beneficial uses of water; *to promote interstate comity; to remove causes of present and future controversies* and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods.⁴

The Colorado River Compact touched off a series of laws and collaborative efforts in the basin that we call "the Law of the River." The following are a few examples in the rich history of cooperation in the basin:

- In 1928, the Boulder Canyon Project Act allowed for construction of Hoover Dam and Lake Mead but also provided for the study of projects throughout the basin.⁵
- In 1938, the basin states formed the Committee of Sixteen and the Committee of Fourteen to negotiate power contracting and Mexican treaty issues. These collaborative efforts involved representatives from the basin states as well as Hoover power contractors.
- In 1948, the Upper Colorado River Basin Compact was signed. That compact apportioned use of water in the upper basin and created the Upper Colorado River Commission. Many forget, however, that the upper basin includes a portion of Arizona. Therefore, Arizona's cooperation was necessary in negotiating the Upper Basin Compact with Colorado, Wyoming, New Mexico, and Utah.
- In 1956, the Colorado River Storage Project Act authorized the construction of Lake Powell, Flaming Gorge, Aspinall, and Navajo reservoirs in addition to several

² U.S. Constitution, art. I, § 10.

³ Hundley, note 1 *supra*, at 108.

⁴ Colorado River Compact, art. I (1922) (emphasis added); *see* 45 Stat. 1057 (ratification).

⁵ Boulder Canyon Project Act, 45 Stat. 1057, § 15 (1928).

participating projects. Without collaboration between the upper basin states, the basin states as a whole, and the federal government, none of these storage projects would exist.

- In the years leading up to 1968, the basin states collaborated to inform passage of the Colorado River Basin Project Act. Congress recognized the need for collaboration and included language directing the Secretary of the Interior to develop long-range operating criteria for the Colorado River Storage Project facilities *in consultation and cooperation with the basin states*.⁶

These laws, guidelines, and programs demonstrate the ability of the states and the federal government to cooperate in moving difficult Colorado River issues forward.

To be sure, the basin has seen its fair share of flashpoints, disagreement, and strife, but the basin states have cultivated a spirit of collaboration that pervades many of the issues currently under discussion.

This history of collaboration has continued more recently in a number of activities involving the water resources of the Colorado River. For example, in 2003 the Colorado River Quantification Settlement Agreement was signed, along with 34 related agreements (commonly referred to as the QSA). The QSA implemented the California 4.4 Plan and the Colorado River Interim Surplus Guidelines that were approved by the basin states in 2001. These Guidelines and the QSA reduced uncertainty among the basin states, and demonstrate a more recent example where Colorado River basin states and stakeholders were able to develop agreements to resolve their differences.

This cooperative endeavor also paved the way for the development of the 2007 Interim Guidelines in which the Secretary collaborated with the basin states to remove political considerations from managing the Colorado River system under drought and low reservoir conditions to offer a secure foundation upon which to build important initiatives necessary to achieve greater flexibility in use and development of the Colorado River resource. The Secretary has further solidified this collaborative relationship by joining in the Agreement executed among the basin states as part of the Interim Guideline process. The Agreement requires consultation between the Secretary and States over any disagreement concerning Colorado River legal matters as a prerequisite to litigation. The Secretary memorialized the importance of this Agreement in the Record of Decision for the Interim Guidelines which provides:

Importantly for the long-term management of the Colorado River, adoption of this decision activities a legal agreement among the Basin States that contains a critically important provision: the Basin States have agreed to mandatory consultation provisions to address future controversies on the Colorado River through consultation and negotiation, as a requirement, before resorting to litigation. With respect to the various interests, positions and views of each of the

⁶ See Colorado River Basin Project Act, 82 Stat. 900, § 602(a) (1968).

seven Basin States, this provision adds an important new element to the modern evolution of the legal framework for prudent management of the Colorado River.

The 2007 Guidelines have been described as the most important agreement involving the Colorado River since the 1922 Colorado River Compact, and in 2009, Secretary Salazar recognized the Bureau of Reclamation, the basin states, and other participants, with the distinguished Partners in Conservation Award.

CURRENT AND FUTURE CHALLENGES AND EXISTING FRAMEWORKS

The basin states, the federal government, and interested stakeholders are involved in a number of collaborative efforts that are still being developed, as well as collaborative efforts that are ongoing. The existing framework related to each one of these efforts is described below.

Colorado River Basin Supply and Demand Study. One such collaborative effort is the "Colorado River Basin Water Supply and Demand Study" under the Bureau of Reclamation's Basin Study Program. This comprehensive study is being conducted between January 2010 and January 2012 to identify current and future water supply and demand imbalances in the Basin, assess the risks to basin resources, and develop and analyze adaptation and mitigation strategies to resolve any recognized imbalances for the benefit of all Colorado River stakeholders. The basin states are a full partner with the Bureau of Reclamation, each dedicating 50% of the \$2 million cost of the study. The study is being lead by a project team made up of federal and state personnel. There is a public involvement plan that is being implemented through this study, and the project team is also working directly with environmental and power interests to assure appropriate input from these stakeholders.

Glen Canyon Dam Adaptive Management Work Group. With respect to Glen Canyon Dam operations, each basin state is a member of a collaborative process called the Adaptive Management Work Group (the "AMWG")—a federal advisory committee that gathers input from a wide array of stakeholders. The AMWG is a key component of the environmental compliance Congress directed the Secretary of the Interior to undertake in the Grand Canyon Protection Act. Other members of this committee include each of the federal cooperating agencies, environmental groups, recreation interests, and contractors for federal power from Glen Canyon Dam. The Secretary brings these varied interests together to reach a consensus on how to protect downstream resources and strike a wise balance on river operations. The AMWG has been and remains an appropriate mechanism for continuing the consultation necessary to meet the respective stewardship obligations of stakeholders on the Colorado River.

U.S. – Mexico Negotiations. The basin states and major water utilities, through the auspices of the Departments of State and Interior and the International Boundary and Water Commission, are currently engaged in productive and far-reaching discussions with the Republic of Mexico and the States of Baja California and Sonora. These discussions are designed to expand on the initiatives enacted through the 2007 Guidelines

and provide for more secure water management of the Colorado River for the benefit of water users and the environment in Mexico, and also to allow for access to additional water supplies in Mexico for use in the United States. These negotiations depend on a secure foundation of water management and regulation in the United States, and predictability of water supply. Any prospect of disruptions to the operational regime in the United States will create uncertainty in this negotiation process and adversely affect the positive relationship and discussions with Mexico. It is through the leadership of Lori Lee Gray that this process has made great strides towards success and the Upper Division states are committed to supporting this effort.

Fish Recovery Programs. The Upper Colorado River Endangered Fish Recovery Program and San Juan River Recovery Implementation Program are excellent illustrations of public, governmental, and private collaboration. Established in 1988 and 1992, respectively, these programs seek to recover the four species of endangered fish that inhabit the Colorado River and its tributaries while water use and development proceed in compliance with interstate compacts, state law, the Endangered Species Act ("ESA"), and federal trust responsibilities to the Southern Ute, Ute Mountain Ute, Navajo, and Jicarilla American Indian tribes. These recovery programs are providing ESA compliance for more than 1600 federal, tribal, and non-federal water projects in the Colorado and San Juan rivers and their tributaries in Colorado, Utah, Wyoming, and New Mexico. There has been no litigation regarding ESA compliance on any of these water projects. These programs have been repeatedly recognized by the Department of the Interior as national models for resolving conflict between endangered species and water development.⁷

POTENTIAL CONFRONTATIONS AND POSSIBLE RESOLUTIONS

The States and interested stakeholders face many potential confrontations in each of the identified negotiations, processes, and programs described above. However, the continued commitment to work through differences by staying at the negotiating table has succeeded in the past, and I strongly believe that negotiations can resolve existing and future disputes in the future. While litigation has occurred in the past, is occurring now, and will occur in the future regarding the water resources of Colorado River, litigation is not the best method for resolving disputes. I am particularly concerned about the Grand Canyon Trust litigation in the context of the Glen Canyon Dam Adaptive Management Work Group (AMWG) efforts. The Grand Canyon Trust's decision to litigate the Department of the Interior's operation of Glen Canyon Dam while continuing to participate as a member of AMWG has stifled useful communication and made the process less productive. How to resolve this situation is something we need to consider. Currently, I am serving on the Charter Ad Hoc Group that is charged with looking at possible revisions to the AMWG Charter and I expect this issue will be discussed.

⁷ Most recently in 2008, when recovery program participants received the Secretary of the Interior's Cooperative Conservation Award.

FEDERAL ROLE

The role of the federal government in each one of these efforts differs but is important to success. In the Colorado River Basin Water Supply and Demand Study, the federal government is acting as a partner with the States, and is providing technical expertise and information. In the U.S.-Mexico negotiations, the federal government provides representation of United States in discussions with Mexican federal representatives. In the AMWG process, the federal government is a decision-maker that is advised by the various interested stakeholders. The fact that the federal government is able to play versatile roles under the various federal programs is of great benefit to the Colorado River stakeholders. In the future, the federal government will need to offer continued leadership, through commitment of funding, to invest in repairing existing water infrastructure and in establishing additional water infrastructure. The water challenges of the future regarding the Colorado River basin are many and great. No one State or stakeholder will be able to address the challenges alone. However, the States together with other interested stakeholders, including the federal government, will be able to rise to meet these challenges.

CONCLUSION

In preparing these remarks, I was reminded of Benjamin Franklin's famous quote: "If we do not hang together, we will all hang separately." Water issues are difficult because the resource is so essential to our environment, our economy, our existence. But the basin's history instructs us that cooperation can resolve tough disputes. We must have all of the sovereigns at the table when dealing with issues that will impact them. The basin states, American Indian tribes, and the federal government must continue to embrace cooperation and collaboration in resolving the difficult issues we face today.

Thank you for the opportunity to testify today. I am happy to respond to any questions.