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ROBERT S. LYNCH & ASSOCIATES,
BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES,
SUBCOMMITTEE ON WATER, POWER AND OCEANS, OVERSIGHT HEARING
ENTITLED "*Modernizing Western Water and Power Infrastructure in the 21st Century*"

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Chairman Lamborn, Ranking Member Huffman, Members of the Subcommittee, I am pleased to have the opportunity to present testimony on a number of topics that the title of this hearing invites.

Our firm, among other clients, represents a state association, the Irrigation & Electrical Districts' Association of Arizona (IEDA). Numbered among its 24 members are most of the special districts that manage water and electrical systems in Arizona as well as several of the municipalities that provide electrical service to their citizens. As such, our members are in frequent contact with the Western Area Power Administration (WAPA) and the U.S. Bureau of Reclamation (Reclamation). They experience first-hand the problems in dealing with federal agencies with overly complicated regulations and guidelines and the accompanying lack of transparency that impedes progress. Modernizing water and power programs related to these agencies clearly is an appropriate subject in these changing times and worthy of this Subcommittee's attention.

Reclamation Small Hydropower Licensing Program

First, let me mention a modernization this Subcommittee has already produced, albeit with mixed results. Section 9(c) of the Reclamation Project Act of 1939 has authorized Lease of Power Privilege at Reclamation facilities for over a half a century. When we first began exploring ways to make that process more useful for small hydro (5 megawatts and below), Reclamation had only exercised that authority nine (9) times. Once this Subcommittee's efforts began to address that very streamlining, Reclamation responded with Directives and Standards on this subject (guidelines to its own employees) that outlined the very bureaucratic morass the legislation sought to avoid. The legislation accomplished its task and the President signed it on August 9, 2013. Reclamation responded by detailing the person that should have been managing the program to Grand Coulee Dam for a year and a half. Reclamation has still not lived up to the promise this bill presented. For example, the Department of Energy did a study of just the State of Colorado and identified enough sites at 5 megawatts and below to install 1,400 megawatts of capacity. That is the nameplate capacity of Glen Canyon Dam. That possibility has not been realized. Reclamation's sister agency, the Federal Energy Regulatory Commission (FERC), received similar streamlining authority on a bill signed the exact same day. It has outstripped Reclamation in implementing its new authority. There is no reason I can think of why Reclamation does not focus more effort on this obviously beneficial program. It develops small sources of clean renewable hydropower in systems that already exist with essentially no environmental impact whatsoever.

Reclamation Transparency

I want to thank Congressman Gosar and tangentially Senator Barrasso for continuing to push on the Reclamation transparency legislation. I note they have introduced companion bills this year and I think it is essential that Reclamation have guidelines for reporting aging infrastructure, both as to its reserved works and to its transferred works. In investigating this issue, we found out that Reclamation could assemble aging infrastructure information about its reserved works but did not at the time categorize it in that fashion. But Reclamation had the information. What was lacking was information about transferred works, that is federally-titled facilities being managed by water users associations or irrigation districts under Reclamation law. Those facilities are not only managed by the customers but are maintained at their expense. Reclamation has not asked for data nor kept records on that maintenance. There are going to be situations where something happens that creates a sufficiently large dollar need that it may be beyond the ability of these customer organizations to finance. Perhaps the Subcommittee could consider a way that these transferred works needs could be reported to Reclamation to be folded into budget requests and therefore promote reporting aging infrastructure at transferred works by offering the possibility of financial assistance to the facility operators.

Alternative Financing

There have been a number of suggestions about finding alternative sources for Reclamation to address its aging infrastructure issue. Reclamation has consistently reported to Congress that it has something in the order of between $1 billion and $3 billion of aging infrastructure backlog that needs to be addressed. Finding a source of financing for that effort beyond the appropriation process is something worth considering. Most importantly, however, if these funds, when identified, are going to be spent wisely, we recommend that the authority to acquire these funds be sourced through the project customers who, in turn, would contract with the agency for the work involved. Doing so would make the customers equal partners with Reclamation to get the necessary work done, provide oversight and collaboration in that effort, and insure that the funds were spent wisely and were providing the benefits to the people who are supposed to benefit from them.

Removing Barriers

There is a provision in Reclamation law called the Hayden-O'Mahoney Act passed in 1937. Certain power facilities authorized under the Townsites Act of 1920 were about to be paid off and the continuing revenues from them were literally up for grabs. Many of the districts thought they would benefit but the Reclamation Fund was in trouble and the senators decided that these ongoing revenues should go back into the Reclamation Fund for the benefit of the projects where they were installed. The problem is that, the way the bill was written, it only applied to contracts that were in place at the time. That has been confirmed by two Tenth Circuit Court of Appeals opinions turning aside irrigation district attempts to use the Act. This is a tool that could be used now and possibly help finance small hydropower under the streamlined authority that Congress has given Reclamation. A few simple word changes in the statute would make it prospective instead of retrospective and once again become a useful tool in the Reclamation arsenal. We would be pleased to work with the Subcommittee in developing that language.

Federal/State Water Controversies

It is no secret that, from time to time, various federal agencies, especially the Forest Service, have made efforts to play a role in the management of surface waters and ground waters that are subject to state law and have additionally begun efforts to use the Clean Water Act as an adjunct to that effort. The surface water controversy produced a bill sponsored by Congressman Tipton that passed the House easily in a previous Congress but did not go further. This latest controversy is just that, the latest controversy. I was personally involved in this general controversy between federal and state rights to water and claims by federal land management agencies in the 1970s, again in the 1980s, and again in the 1990s. That third flare-up caused Congress to create the Congressional Water Rights Task Force on which I was pleased to serve with an attorney from Colorado, Bennett Raley, who later became Assistant Secretary for Water and Science in the Bush Administration in the 2000s. We filed a report, the agency backed off, nothing else happened. They came back. Hence the Tipton bill. While the Tipton bill may very well need to be reconsidered, and we would be pleased to assist in doing that, there is an underlying problem with regard to the Appropriation Doctrine, on the surface water issue, that is serious enough and complicated enough that it really cannot be articulated in detail here. It is the precipitating cause for much of these federal/state water controversies and another issue we believe would be worthy of this Subcommittee's attention.

Western Area Power Administration Issues
Financing

Turning to the power side of the equation that we deal with on a daily basis, one of the central issues facing the Western Area Power Administration (WAPA) is the need for additional transmission and serious upgrading of existing facilities. Congress has recognized that this need exists, not once but twice. In Section 1222 of the Energy Policy Act of 2005, WAPA is given authority to receive money from others for facilities that meet certain requirements and to jointly own facilities that result from this effort. The joint ownership issue is very significant because that is not something that WAPA can do otherwise. The statute itself was written in haste. Indeed, I had a hand in writing a portion of it and things written in haste often are things you can live to regret. Whether it is worth salvaging I cannot say but the concept of how WAPA can hold facilities in which it is not a total owner is worthy of this Subcommittee's attention. I know that the National Association of Regulatory Utility Commissioners (NARUC) is not a fan of this statute because it believes that it emasculates state jurisdiction over line siting. That is a legitimate concern and one that I have faced within the last month in a line siting process in Arizona. Nevertheless, looking at this more closely may be in order.

Another Congressional response is the Transmission Infrastructure Program (TIP) inserted into the American Recovery and Reinvestment Act of 2009. I know of only one successful project under that program accomplished by WAPA and that is the Palo Verde to ED5 line in central Arizona. In my view, that succeeded because our people put together a Joint Action Agency to help clear barriers and answer unanswered questions to insure that this project got built. It is a successful project and WAPA is entitled to be proud. The fact that it stands out like that is the problem. Here again, the TIP program could be clarified in a way that might make it more attractive to more of WAPA's customers who would help participate in additional upgrading and other activities that improve WAPA's 17,000 miles of transmission system. The

essential ingredient in success, as demonstrated by Palo Verde to ED5, is customer involvement. If the TIP program insured that WAPA customers were essential to sourcing the funds for the improvements that they would ultimately pay for anyway, a partnership that made sense and focused on the real world would be created to the benefit of both the agency and the customers.

If there is a theme to my discussion of WAPA issues, it is that Congress can facilitate and streamline certain processes that make agency/customer partnerships easier to construct, easier to implement and more efficiently cost controlled. The power customers are self-motivated to work on systems on which they depend and equally self-motivated to be concerned about the costs because they will be paying them. There are other related issues in the WAPA/customer relationship that bubble up from these kinds of discussions but I will leave it at this for now.

Thank you for the opportunity to appear here today. If there is anything else we can do to assist you in furthering your agenda, please do not hesitate to ask.