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ENVIRONMENTAL REGULATIONS AND WATER SUPPLY RELIABILITY

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" THE IMPACTS OF THE ENDANGERED SPECIES ACT ON WESTERN WATER SUPPLIES, WATER CONSUMER COSTS AND THE ENVIRONMENT"

Good morning, Mr. Chairman and members of the Subcommittee. My name is Chris Udall. I am the Executive Director of the Agri-Business Council of Arizona ("ABC"), a not for profit trade association whose membership represents the entire agricultural community from ditch bank to the dinner table in Arizona. The ABC was established in 1978 and serves as the State's Reclamation representative to the National Water Resources Association. Its members include growers, ranchers, suppliers of equipment, seed, chemicals and services, agricultural processors, financiers of agribusiness enterprises, co-op groups, trade associations, electrical districts and irrigation and drainage districts. The ABC's purpose is to ensure the vitality and sustainable profitability of the agricultural industry; and to further ensure that it remains strongly connected to the overall diversified economic health of Arizona.

I want to speak with you today regarding the impacts that the Endangered Species Act is having on water supplies and water consumer costs around the west. In particular, I want to focus on effects the Act is having on reservoirs that supply water to consumers in my home state of Arizona, and the neighboring states of California and Nevada.

I will discuss three case studies--Lake Mead on the Lower Colorado River, Roosevelt Dam and Lake on the Salt River in Arizona, and Lake Isabella on the Kern River in California. These reservoirs provide vital water and, in some cases, power supplies to farmers, cities and towns, Indian tribes and others in the drought plagued southwestern United States. With the exception of modifications to Roosevelt Dam completed in the mid 1990s, which created some additional storage space, all of these reservoirs have been in existence and operational for several decades. The oldest of these reservoirs, original Roosevelt Dam, was completed and began operating in 1911.

In the past several years, operators of each of these reservoirs have faced the threat of being required to operate differently, resulting in the storage of less water, in order to avoid liability under the Endangered Species Act. In some cases, reservoir operators were required by the government or the courts to limit their storage of water until they could arrange for the purchase of mitigation habitat for species affected by their operations. Such purchases typically required the expenditure of several million dollars.

In the case of Lake Isabella, for example, from 1998 until this year, the Army Corps of Engineers was prohibited by a court order from completely filling this reservoir in order to avoid harm to nests of the endangered southwestern willow flycatcher. Under the court's order, the Corps could only fill the reservoir to 330,000 acre-feet; the capacity of the reservoir is 560,000 acre-feet. In exchange for the purchase of land in the Kern River Valley to be managed for the benefit of the flycatcher costing over $7 million, including the most recent acquisition of 975 acres, the Corps will now be permitted to fill the reservoir to capacity for the first time in seven years.

For two other reservoirs, Lake Mead and Modified Roosevelt Dam, federal agencies were required to implement costly habitat conservation measures developed by the U.S. Fish and Wildlife Service ("FWS") after the FWS determined that activities at these reservoirs were likely to jeopardize the continued existence of multiple endangered bird and fish species.

At Lake Mead, the Bureau of Reclamation was required in 1997 to purchase 1,400 acres of mitigation habitat for the southwestern willow flycatcher to offset the loss of habitat resulting from the Bureau's operation of the reservoir. Importantly, this was only a "temporary" measure to alleviate short-term effects of operation of Lake Mead and other Lower Colorado River reservoirs on endangered species. To address long-term effects, the Bureau, working with other affected federal agencies and water and power providers from California, Nevada and Arizona, has spent 10 years developing the Lower Colorado River Multi-Species Conservation Program ("MSCP"). Approved by the FWS in April of this

year, the MSCP permits the continued operation of Lower Colorado River reservoirs, including Lake Mead, and other facilities for a 50 year period. The mitigation measures required by the MSCP will benefit 26 species, at a cost of $626 million in 2003 dollars. Half of the funds needed to implement the plan will be contributed by federal agencies; the other half—over $313 million in 2003 dollars—will be paid for by the water and power users in the States of Arizona, California and Nevada.

A similar example affecting Roosevelt Dam occurred in the 1990s, when the Bureau of Reclamation proposed to modify Roosevelt, resulting in the storage of an additional 250,000 acre-feet of water behind the dam. The FWS found that the inundation of the additional storage space would result in the loss of habitat for 90 flycatchers, and would jeopardize the continued existence of the flycatcher throughout its range. In order to proceed with its proposed action, the Bureau was required to implement expensive conservation measures developed by the FWS, including the acquisition and management of substitute flycatcher habitat, bird surveys and monitoring. It is estimated that the total cost of these measures will exceed $20 million. The City of Phoenix and other neighboring cities holding appropriative rights to the newly constructed conservation space at Roosevelt have reimbursed the Bureau for a portion of these costs.

In considering the impacts of implementing the Act's provisions, those costs borne by the private sector are often overlooked. In Arizona, the financial impacts of the Act on providers of water and power have been and continue to be significant. I have already mentioned the large costs to water and power users participating in the Lower Colorado River MSCP. But reservoir operators in Central Arizona, such as the Salt River Project ("SRP"), also have been heavily impacted by Endangered Species Act compliance costs.

SRP is the operator of Roosevelt Dam, which provides the single largest component of the water supplies for metropolitan Phoenix. In 2001, after water levels in Roosevelt had been declining due to several years of drought, it became apparent that the number of southwestern willow flycatchers nesting in the space behind Roosevelt had increased significantly to well over 200 birds. Further, flycatchers were now nesting in the lower elevations of the reservoir, in the original space completed in 1911. Knowing that the drought would eventually end, and water would once again inundate these areas, SRP made the decision to obtain "take" coverage for the eventual loss of these birds and their habitat through the development and implementation of a habitat conservation plan ("HCP") for the species. The Roosevelt HCP took two years to develop, and will cost in excess of $16 million to implement. In exchange, SRP will be permitted to continue storing water behind Roosevelt—the cornerstone of water supplies for the Phoenix area—for 50 years.

As these cases amply demonstrate, the financial and water supply impacts of the Endangered Species Act on reservoirs in the west have been monumental in recent years. We expect that trend to continue, and possibly even intensify, as the Fish and Wildlife Service continues to meet its responsibilities under the Act to designate critical habitat for already listed species. One such critical habitat designation, for the southwestern willow flycatcher, is likely to have significant impact on the reservoirs I have mentioned. The proposed designation, published by the FWS last year, includes portions of Lakes Mead and Isabella, all of Roosevelt Lake, and all of Horseshoe Reservoir, another facility operated by SRP. Remarkably, the areas proposed for designation, which the FWS now claims are "essential to the conservation of the species," are the same areas that the FWS permitted to be inundated in exchange for the expensive mitigation measures already undertaken by these reservoir operators. Will the designation of these areas as "critical habitat" result in renewed restrictions on the storage of water behind these reservoirs? This is a grave concern, and an unacceptable result, given the already sizable contributions of these operators towards species conservation, through the implementation of the conservation plans already required of them by the FWS.

There are solutions to these problems. First, it is crucial that the FWS' determinations of the effects of projects on species and the adequacy of mitigation be firmly grounded in sound science. The Act requires the FWS to use the best scientific and commercial evidence available in conducting an effects analysis. But the implementation of this standard has not been consistent, often resulting in unfair results. For example, this year, Roosevelt Dam filled to over 95 per cent of its capacity for the first time in 10 years. Even though much of the flycatcher habitat at Roosevelt was inundated by storage, this does not appear to have affected its suitability for flycatcher nesting. There are already well over 200 birds nesting at Roosevelt this year, and more are anticipated this summer. Perhaps more adequate data on the effects of storage projects on these birds might have proved that concerns about the loss of these populations were unfounded. In the meantime, SRP has bought hundreds of acres of mitigation lands and birds are already nesting on these as well.

I also want to commend Congressman Flake on his recent introduction of H.R. 1837, which exempts areas within water storage reservoirs and other artificial water delivery facilities from being designated as critical habitat, where fluctuations in water levels periodically create and destroy the habitat. This is a measure whose beneficial impacts on reservoirs and water supplies would be widespread. The Flake bill also provides better direction regarding the lands that can be used to mitigate for the loss of critical habitat resulting from the implementation of a project. Additionally, the bill makes clear that the mitigation required by the FWS in exchange for proceeding with a project must be rationally related to the level of take anticipated.

The Flake bill also exempts the operators of reservoirs and other artificial water delivery facilities from liability for effects

of nonnative fish predation and competition on listed fish, where the nonnative species were introduced into the stream system by another person. A chief cause of the decline in populations of native aquatic species has been the introduction of nonnative aquatic species into rivers and streams, often for sport-fishing and related purposes, or as a result of the construction of canals or other water projects connecting previously disconnected river basins. In recent years, members of the environmental community and others have suggested that liability for the loss of listed aquatic species, attributable to the introduction of nonnatives, should be borne by the operators of water storage reservoirs, diversion or delivery structures inhabited by native and nonnative aquatic species. The Flake bill clarifies that these operators should not be required to bare legal and/or financial responsibility for these effects.

In sum, we enthusiastically welcome the changes proposed by Congressman Flake's bill, which would help to lessen the burdens of ESA regulation on water users throughout the southwest.

Finally, it is important that Congress codify the ESA "No Surprises" regulations promulgated by the FWS in 1998. These regulations provide holders of incidental take permits, who are implementing their HCPs, with assurances that no further financial compensation, water or other natural resources will be required of them with respect to species covered by their permits, in the event of unforeseen circumstances. A recent lawsuit has challenged the validity of these regulations and we urge the Congress to codify them, in order to end the uncertainty that has been caused by this suit. This would give more private entities the incentive to enter into HCPs, knowing that what is agreed to with the FWS is "a deal".

Thank you for the opportunity to present these remarks.