

Committee on Resources

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TESTIMONY
BEFORE THE HOUSE COMMITTEE ON RESOURCES
SUBCOMMITTEE ON WATER AND POWER
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON H.R. 2603
SEPTEMBER 22, 2004

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Mr. Chairman and Members of the Subcommittee, my name is Bob Lynch. I am an attorney in Phoenix, Arizona. I have worked on water and water rights issues, beginning at the Justice Department here in Washington in the late 1960's and then in private practice in Phoenix for over 37 of the 40+ years I have been a member of the bar.

In June 1996, then Speaker of the House Newt Gingrich appointed me to the Water Rights Task Force, a federal advisory committee that had been established by the Federal Agriculture Improvement and Reform Act, P.L. 104-127. This seven-member advisory committee was chaired by Colorado water attorney Bennett Raley, now Assistant Secretary of the Interior for Water and Science. The Task Force met and conducted public hearings at a dozen locations. We received written documentation and heard testimony from interest groups and private citizens. We filed our report with Congress in August 1997.

I also have the privilege of serving as the Chairman of the Water and Property Rights Task Force of the National Water Resources Association.

I mention these two items out of my resume in order to help you understand that I have been a practitioner and student of water law for nearly four decades. In that time, I participated in litigation in the early 1970's involving the newly-passed Clean Water Act and the National Environmental Policy Act. Shortly after I left the Justice Department to enter private practice, Congress passed the Clean Water Act and the following year, the Endangered Species Act. Thus, I have, for something over 30 years, watched the interplay between water rights and water resources delivery on the one hand and the application of environmental laws on the other. As we know from recent litigation, the most striking impact on water supplies, especially in the West, has come from the influence of the Endangered Species Act. As the Colorado River Basin enters its fifth year of drought and Arizona enters its ninth, I cannot emphasize too strongly the need to find a path through the morass of laws and regulations that water users face in order to provide certainty in the administration of these laws and regulations to the water-consuming public we all serve. We have always had to battle Mother Nature for our water supplies and that will not change. But compounding that struggle with laws that can reach out and interrupt supply almost without warning complicates a situation in a manner that is just not good public policy. That is why I am here to testify in support of H.R. 2603.

H.R. 2603

This bill was introduced by Mr. Pearce in reaction to the decision of the United States Court of Appeals for the Tenth Circuit in what is widely referred to as the Silvery Minnow case. In that controversy, the Court found that the Bureau of Reclamation had the discretion to interrupt water supplies that belonged to the City

of Albuquerque and others in order to provide stream flows below the City of Albuquerque in an effort to maintain this endangered fish. The Court later vacated its decision, finding that Mother Nature and the passage of time had, at least temporarily, cured the problem. Nevertheless, the disruption to water supply and planning in New Mexico was serious and obvious to anyone who was paying attention. Indeed, the Silvery Minnow decision was just one in a series of court decisions that have found ways to justify interrupting or redirecting water supplies. The courts have done so by finding that the federal official in question had discretion to act in the given situation and thus was compelled by the Endangered Species Act to interrupt these water supplies.

H.R. 2603 goes straight to the heart of the matter, the discretion of the Secretary of the Interior and those operating under the Secretary to exercise discretion in acquitting statutory responsibility and in carrying out responsibilities under contract. In my view, H.R. 2603 is intended to stabilize this situation by returning to Congress the discretion that the courts are increasingly finding in these situations so that Congress can directly guide these agencies in the extremely important task of delivering water supplies from federal projects.

The current situation is intolerable. Each separate controversy brings a new development in law and a new threat to a water supply in some river basin, most often in the West. No one is safe and no water supply is firm. H.R. 2603 is a simple bill. It makes it crystal clear that Congress is in charge of providing stability to water supply programs. Under this guiding principle, a contract is a contract. If Congress decides that a water supply needs to be redirected to fulfill an obligation under the Endangered Species Act, that decision will be obvious. People will see it coming and be able to plan for it and people will also be able to explore alternatives and possible common sense partnerships and solutions. Indeed, the Silvery Minnow problem in the Rio Grande Basin is a poster child for how this should have been done in the first place. Through the efforts of Senator Domenici and others, problem solving is underway.

In our own basin, the Colorado River Basin, various interests have successfully developed an Upper Colorado River program for four endangered fish. The area from Glen Canyon Dam to Lake Mead has been the subject of ongoing study and mitigation activities for over 20 years. The Lower Colorado River Basin is moving toward a Multi-Species Conservation Plan that is intended not only to solve problems with regard to existing endangered and threatened species but to set in motion programs that will prevent other species from suffering the same fate. Somewhere between 20 and 30 million people rely on the Colorado River. The concept that a federal official could somehow decide, or be forced by a court, to interrupt water supplies in the Colorado River Basin is unthinkable. Yet we live with that risk every day of our lives, wondering when another shoe will drop. The only way we can reinfuse stability into this situation is to have Congress step forward and accept the responsibility for giving specific direction. In H.R. 2603, that specific direction is aimed at the Secretary of the Interior. It doesn't cover all situations, but it is a good start. I urge you to report this bill to the full Committee and urge that it be considered by the full Resources Committee as soon as possible.

Thank you for the opportunity to testify on this important subject and this equally important bill. I would be happy to respond to any questions or supply any additional materials that might aid the Subcommittee in its deliberations.