Committee on Resources

Witness Testimony

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Mr. Chairman, committee members, my name is Herb Guenther. I am the Executive Assistant for Special Affairs with the Wellton-Mohawk Irrigation and Drainage District (WMIDD) in Wellton, Arizona. We are a political subdivision of the State of Arizona that provides irrigation water, power, drainage and flood protection for the residents and lands in the Wellton-Mohawk Valley. WMIDD is part of the Gila Project authorized by Congress in 1947 to be built by the Bureau of Reclamation. The project was completed and transferred to WMIDD in 1951. We are located along the Gila River in Southwestern Arizona, approximately 30 miles east of Yuma, Arizona. We operate and maintain the infrastructure necessary to provide Colorado River water to irrigate 62,500 acres of prime agricultural land. The fertile agricultural land is located along both sides of the Gila River for a distance of about 60 miles.

The Gila River in the WMIDD is comprised of the surplus flows of the Salt and Gila Rivers which drain a watershed of approximately 50,800 square miles. The Gila River in the WMIDD is normally a dry river bed that only receives flow when the numerous upstream reservoirs fill and spill or excessively heavy local precipitation causes the desert washes to run.

In 1959, the United States Corps of Engineers (USACE) completed Painted Rock Dam, 57 miles upstream from the WMIDD, to provide flood protection for WMIDD, Yuma, the Imperial Valley of California and Mexico. As part of the Painted Rock Reservoir Project, Congress authorized a flood control channel to be built from Painted Rock Dam to the confluence of the Gila River with the Colorado River. That flood channel project was never funded due to unfounded environmental concerns and changing benefit/cost considerations.

In 1973, following a damaging flood, the WMIDD began considering alternatives to provide flood protection from the Gila River. In 1984 following an exhaustive environmental compliance marathon, the WMIDD began construction of a scaled down flood control channel and levee project to protect irrigation infrastructure, adjacent farmlands , transportation facilities and local communities from Gila River flooding. The USBR provided partial funding and environmental compliance assistance. Environmental compliance included the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), section 404 of the Clean Water Act (CWA) and the National Historic Preservation Act (NHPA). The Project was issued a 404 CWA Permit on the basis of an environmental assessment and a fully mitigated finding of no significant impact (FONSI). The flood control project was designed to safely handle a 10,000 cubic feet per second (cfs) flow.

In January 1993 the flood control project was 98% complete. Following a series of severe winter storms, all upstream reservoirs were full and surplus water began to fill Painted Rock Reservoir. By the end of February 1993, Painted Rock Reservoir had filled to capacity (2.5 million acre feet) and began to spill, eventually reaching a peak uncontrolled spill of 25,800 cfs. Despite a tremendous flood fighting effort, the

downstream flood control project was heavily damaged by this 500-year flood event (0.2% annual chance of occurrence). Flood flows lasted more than 11 months, finally ending in late November 1993. In the end, 65% of the levee project was destroyed and substantial damage was suffered by irrigation and drainage facilities, roadways, bridges, power facilities and private property. Damage to public facilities alone in the WMIDD exceeded $100 million, exclusive of highways and bridges. The area had been declared a Major Federal Disaster Area. Because of the level of damage and the increased vulnerability to future flood flows, WMIDD immediately applied for disaster assistance under the Robert T. Stafford Disaster Relief Act (Public Law 93-228).

Due to accretion (gradual change) and avulsion (sudden change) of the river channel during the flood, the course of the Gila River had changed location as much as a mile at some locations within the WMIDD. The river now occupied large areas of land that were prime farmland before the flood. Nearly 10,000 acres of farmland were damaged by the flooding with more than 2,000 acres damaged beyond reasonable repair. This new river alignment significantly complicated the process of restoring flood protection.

Implementation of the Stafford Act is overseen by the Federal Emergency Management Agency (FEMA). In October 1993, at the request of FEMA, the WMIDD did a cost comparison analysis of restoring the flood protection facilities along the post-disaster river alignment versus returning the river to its pre-disaster location. The analysis demonstrated that it was less costly to use the post-disaster alignment which was also the alternative favored from an environmental viewpoint. FEMA directed the WMIDD to proceed with the design and environmental compliance for the restoration of flood protection facilities along the post-disaster alignment.

In December 1993, FEMA and USACE determined that the portion of the project located "within the waters of the U.S." would require permits under sections 404 and 401 of the CWA and that the remainder of the project would require clearance under NEPA. The USACE was designated as the lead Federal agency for environmental compliance.

In January 1994, WMIDD working under the guidance of FEMA and USACE, organized the Interagency Working Group (IWG) to scope the project and assist with environmental compliance activities.

Compliance activities included:

- Clean Water Act - Sections 401 and 404 (CWA)
- National Environmental Policy Act (NEPA)
- Endangered Species Act (ESA)
- National Historic Preservation Act (NHPA)
- Executive Order 11990 - Protection of Wetlands
- Executive Order 11988 - Floodplain Management

The Interagency Working Group included:

- U.S. Army Corps of Engineers (USACE)

- Federal Emergency Management Agency (FEMA)
- U.S. Fish and Wildlife Service (USFWS)
- U.S. Bureau of Reclamation (USBR)
- U.S. Environmental Protection Agency (USEPA)
- Arizona Department of Environmental Quality (ADEQ)
- Arizona Game and Fish Department (AGFD)
- Arizona Division of Emergency Management (ADEM)
- Bookman-Edmonston Engineering, Inc. (consultant)
- Resource Management International, Inc. (consultant)
- WESCO (consultant)

The Interagency Working Group (IWG) held 12 meetings between January 1994 and February 1995. In March 1995 the USACE issued a finding of no significant impact (FONSI) based on a fully mitigated project. The final environmental assessment (EA) and the FONSI were noticed and made available for public review during March and April 1995. In May 1995 the USACE issued the CWA 404 Permit with the support of all the Interagency Working Group except the USEPA. The USEPA continued to demand that USACE and FEMA prepare an environmental impact statement (EIS) even after 3 months of repeated attempts by the IWG to address their unfounded concerns.

With regard to this project, compliance with the Endangered Species Act was not a major issue. While the endangered Yuma Clapper Rail was found in the area prior to the 1993 flood event, the complete decimation of all potential habitats during the disaster precluded a finding of effect and thereby avoided a lengthy section 7 consultation. The post-disaster environment resembled a moonscape with nothing but debris littered sandbars occupying most of the river bottom.

Compliance with section 106 of the National Historic Preservation Act was a different matter. Our primary rock quarry located at Antelope Hill had undergone two previous 106 compliance assessments with a finding of no effect. However the mountain on which the quarry was located had been found to be eligible for listing on the National Register of Historic Places due to a large amount of rock art (petroglyphs) found on parts of the mountain. In addition, unknown to WMIDD, subsequent archaeological investigations had found the presence of ancient milling sites where Native American Tribes had quarried stone for the production of tools used for grinding. Since the area was Register Eligible the statute required additional consultation with the Native American Tribes and the Council on Historic Preservation. Part of the consultation with the Native Americans involved asking them if the mountain was a Traditional Cultural Property in the view of their tribes. Predictably, the majority answered in the affirmative which led to an additional intense and convoluted process. Now more than three and one half years into the process, we have yet to receive permission to continue our quarry activities to develop shot rock for the.revetment of our restored levees.

In June 1995, after being stimulated by employees of the USEPA, the Southwest Center for Biological

Diversity (SCBD), Defenders of Wildlife (DOW) and the Public Employees for Environmental Responsibility (PEER) filed suit against USACE in U.S. District Court seeking to enjoin the project and force preparation of an EIS. The WMIDD filed a motion to intervene in the lawsuit in July 1995.

In August 1995, FEMA withdrew from further participation in the flood protection restoration project citing their new levee policy and dual Federal authorities as their justification. They subsequently deobligated all funding thereby leaving the disaster recovery effort without a source of funding. The dual authority FEMA cited was the PL 84-99 authority of USACE. However, the PL 84-99 program had not been implemented in Arizona and was not available in-lieu of the Stafford Act. WMIDD filed a formal appeal of FEMA's decision. In December 1995, the WMIDD was granted intervenor status in the lawsuit against the USACE. WMIDD quickly filed a motion for a summary judgment on the basis that the plaintiffs lacked standing. The Southwest Center for Biological Diversity gave 60 day notice to USACE that they intended to file an additional litigation claiming a violation of the CWA and the ESA.

In November 1995 FEMA agreed to reconsider the eligibility of the flood protection restoration project for a limited grant under the Stafford Act if the project could demonstrate a favorable benefit/cost ratio based solely on Federal benefits. In May 1996 FEMA completed the benefit/cost analysis and agreed to partially fund the project if WMIDD complied with some additional requirements regarding NEPA, NHPA and Executive Order 11988.

In July 1996 the Federal District Court issued a summary judgment in favor of the defendants on the basis that the plaintiffs lack standing. The plaintiffs immediately filed a motion for an injunction and an emergency appeal with the Ninth Circuit Court of Appeals. In September the 9th Circuit denied the motion seeking an injunction and an emergency appeal but agreed to an expedited appeal. The 9th Circuit Court of Appeals heard arguments on the appeal February 12, 1997 but has yet to issue a ruling. WMIDD to date has spent in excess of $160,000 on legal fees associated with this litigation.

In November 1996 WMIDD completed a treatment plan and memorandum of agreement (MOA) for the Antelope Hill Quarry to complete the section 106 requirements of the NHPA. In January 1997 FEMA became a signatory to the MOA.

In December 1996 WMIDD petitioned the Yuma County Flood Control District Board of Directors to amend the flood control ordinances consistent with FEMA's requirements under Executive Order 11988. The flood control ordinances were successfully amended in February 1997.

In March 1997 FEMA issued a supplemental environmental assessment (SEA) and finding of no significant impact (FONSI) under NEPA for the flood protection restoration project. The SEA and FONSI are currently undergoing a 30 day public review process. The Southwest Center for Biological Diversity is already threatening additional litigation.

The bottom line is, when it comes to restoring flood protection facilities, the disaster assistance program is broken. The environmental statutes assisted by regulatory creep preclude the timely restoration of any facility located in floodplain. Our project is not a new project. It is merely the restoration of flood protection to the same level that existed before the 1993 flood disaster. The pre-disaster project had been fully permitted and mitigated. All we were asking for was some assistance in restoring flood protection to a devastated area, so the residents could once again enjoy some predictability in their lives. It is now almost 4 years since we began the environmental clearance process. Federal, State and local interests have invested nearly $43 million in irrigation, drainage and power infrastructure restoration. Private individuals have

invested millions more dollars in restoring their farms and homes. Millions of Federal and State dollars have been spent restoring highways and bridges. And today, all that investment remains in jeopardy because of a poorly defined Federal program and totally unnecessary and unreasonable environmental regulatory requirements that preclude the restoration of flood protection.

The current system:

- 1. Precludes the timely restoration of flood protection.
- 2. Continues to jeopardize the Federal, State and local investment in other restored public infrastructure.
- 3. Invites litigation from special interest groups that wish to obstruct projects or have a separate agenda.
- 4. Causes unnecessary expense and delay in dealing with environmental issues that have no meaningful application in disaster situations.
- 5. Prevents disaster victims from restoring normalcy and predictability to their lives.

H.R. 478 is a step in the right direction but it falls short of many of the obstacles that frustrate disaster recovery efforts. There must be clear-cut Federal Agency responsibilities as they relate to restoration of flood protection facilities. There must be exemptions or greatly expedited environmental compliance processes involving not only the ESA, but also the broader requirements of NEPA, CWA, NHPA, EO 11988 and EO 11990. Perhaps a multi-agency disaster task force could be established to convene in the event of a disaster and decide on the spot, what sensitive environmental concerns need to be addressed, what restrictions or guidelines need to be implemented and what mitigation, if any, is appropriate. These agency experts would need to have sole decision making authority. Lastly, we need to take some definitive action to eliminate the regulatory creep and legal fiction that results from the agencies and the courts trying to further define the intent of Congress. There needs to be a review of these acts from time to time, along with the applicable regulations and case law to determine if a clarification of intent is warranted. Only in this way can we keep the intent focused and the requirements reasonable.

I thank you for the opportunity to testify on this issue. I would be happy to try to answer any questions that you might have.

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