

STATEMENT OF
ROBERT S. LYNCH
APPOINTED MEMBER OF THE WATER RIGHTS TASK FORCE
BEFORE THE
HOUSE COMMITTEE ON RESOURCES
SUBCOMMITTEE ON WATER AND POWER
CONCERNING H.R.3561 TO ESTABLISH THE
TWENTY-FIRST CENTURY WATER POLICY COMMISSION

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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 in the areas of water supply, water rights and water policy at the Justice Department and in private practice for nearly 35 years. I had the pleasure of serving on the federal Water Rights Task Force, a federal advisory committee established by the Federal Agriculture Improvement and Reform Act, P.L. 104-127. I was appointed in June 1996 to this seven-member committee by then Speaker of the House Newt Gingrich. The committee was chaired by Bennett Raley, now Assistant Secretary of the Interior for Water and Science. While your kind invitation does not specifically address the issue, I presume that I have been invited to testify at this hearing on H.R.3561 because of my experience of having served on the most recent national water study that Congress directed. It is my pleasure to do so.

I would like to divide my testimony into three parts. First, I would like to briefly discuss with you the current drought situation that faces my state and my basin, the Colorado River Basin. I have read in the papers even as late as the end of last week about drought in the East and other parts of the country, so I believe sharing with you some of the developments in Arizona may be relevant to the purposes of this legislation. Second, I would like to talk to you about the mechanisms that H.R.3561 proposes to use to address the mission of the body to be created by this legislation. Third, I would like to address the mission itself.

THE DROUGHT

A colleague of mine is fond of saying "drought, it's not just for the West anymore." If I can believe what I read in the papers, that is certainly true, in spite of recent rainstorms. The problem with drought is that, when it goes away, people forget it happened. But droughts will return. We know. We are in one again. Flagstaff, Arizona, near the Grand Canyon, has started water rationing. The drought has allowed wildfires to start months before our regular fire season. Homes burned down near Prescott, Arizona last week.

Wildfires started so early this year that the agencies didn't have contracts completed for the slurry planes or the fire crews.

Last Friday, Secretary of Agriculture Ann Veneman was in Phoenix to meet with Arizona Governor Hull. The Secretary announced, at a press conference, drought relief from the Agriculture Department in recognition of the dry conditions and the significant impacts they are already causing even before our summer really begins. A copy of her letter is attached to this testimony.

Our entire basin is suffering. Snowpack as of May 1 in the Upper Colorado River Basin, where most of the snow collects, is an abysmal 30% of average. Indeed, a fish ladder for endangered fish on the Gunnison River in Colorado, a tributary to the Colorado River, had to be taken out of operation because of the lack of water in the river. And the Geological Survey is saying that this might be the front end of a 20-30 year cycle, at least in our basin. By contrast, there apparently is significant flooding in some Midwestern states from recent storms. Nevertheless, from what I have read, the recent rains in the Northeast still leave that area of the country short of water.

We need to remember that drought and floods are the opposite sides of the same coin and the coin is engraved "we are not yet in control of our water supply." There are a number of reasons why, and I will discuss some of them in the third part of my testimony, but suffice it to say that we have a serious problem.

ALTER THE STRUCTURE OF THE STUDY

H.R.3561 would create a study committee of 17 members appointed by the President who will be handed a large mission to be accomplished in 12 months. This just will not work. I have attached a matrix to my testimony showing the makeup of various water studies over the last 40 years and the timeframes they were allotted. Speaking from personal experience, I can tell you that the mechanisms proposed in this legislation will seriously inhibit its chance of success.

First, there are too many people. We were a 7-member federal advisory committee which met a dozen times in a year and took public testimony at most of those meetings, including a hearing in the United States Senate. Coordinating the schedules and demands of 7 people in order to get a report to Congress somewhere close to the allotted time was a nightmare. If you decide to study this subject, use a smaller group.

Whatever size group you use, don't have the study dominated or even populated by agencies. Regardless of whether you're talking about a federal, state or local government entity, the natural tendency of public officials is to guard turf, expand turf where possible, and otherwise compete with sister agencies for attention. This same construct works at the state and local government level as well. If you want an honest read about the problem in a reasonable

period of time, I would recommend using the 5 non-federal representatives called for in H.R.3561 but pick them from outside government. And don't pick people on the basis of their affiliation with a specific organization. Pick people on the basis of what they know and whether they have a reputation for good judgment.

Whether the President appoints a study group, if you decide to move forward with this legislation, or someone else does or several do, as with the advisory committee on which I served, do not require appointments in 30 days. That was supposed to happen with us and it didn't happen. There is just too much to do and too many other things to occupy attention. I would suggest that an appointment timeframe be somewhere between 60 and 90 days.

The larger the assignment you hand a group like this, the more time you must give them to address it. A one-year timeframe for the subjects covered in H.R.3561 is just too short. You have to choose between narrowing the mission or lengthening the time or do some of each in order to come up with a construct that can produce something worthwhile.

Designate the support mechanism for any study group that you create. What agency is going to staff this effort? Where is the money going to come from?

As I read the provisions of the bill, they seem to conflict with the Federal Advisory Committee Act. If the study is to go forward, that problem must be remedied.

If the timeframe turns out to be more than one year, ask for annual interim reports and designate specifically the information you expect to receive. Hold their feet to the fire.

Require a minimum number of hearings for the period of time allotted and require that at least a certain number of them be held in different regions of the country. All water problems are local, virtually all state water laws are different in at least some respects and water politics are varied and often situational.

Direct federal agencies to respond promptly, i.e., within 30 days, to any information request from the study group. Condition submission of testimony, data and materials from non-federal interests on cooperation with the study group in terms of information requests.

In short, use action-forcing mechanisms like these I've suggested to ensure that the group has a chance of succeeding.

NARROW THE MISSION

H.R.3561 outlines an impressive mission. A study group could take 10 years and not be able to get its arms around all aspects of water management.

More importantly, in my view, do not demand that the group recommend a comprehensive (national) water policy. I have been personally involved in reports that have been produced on this subject

since the late 1960's and I firmly believe there is no way to have a comprehensive national water policy. Indeed, there is really no need to attempt to homogenize the subject of water supply, water quantity or water rights.

The bill does define the critical point, however. The problem is not the lack of a comprehensive national water policy. The problem is the barriers to problem-solving that Congress has raised from time to time.

Most, but not all, of these barriers are created by environmental laws. Some are merely created by lack of Congressional attention. Environmental laws such as the Endangered Species Act and the Clean Water Act not only raise barriers to existing water uses; they provide barriers to expanded conservation of water resources.

EPA has a construct known as a "zero discharge limitation". That means that water that is contaminated is required to be evaporated. Thus, this environmental regulation fights water conservation.

When Bill Ruckleshaus became Administrator of EPA, he was fond of saying that "dilution is not the solution to pollution". How times have changed. Now EPA is proposing a water quality trading policy that would, as a practical matter, allow dilution to be the solution to pollution. Water Quality Trading Policy, Proposed Policy, 67 Fed.Reg. 34709-10 (May 15, 2002). It may work. It will also require more water. The EPA white paper is suggesting that problems in the Gulf of Mexico and other places could be solved by throwing more water at the problem. How that will work in a drought is anybody's guess.

The materials circulated with H.R.3561 mention a number of new technologies that could be employed. Some of them, like aquifer recharge, are already happening in places like Arizona and southern California. As you may know, Arizona has the most stringent groundwater law in the nation, and as a result, our cities, towns and farmers have gotten pretty good at conservation. But conservation of this nature doesn't create new water, it just saves water you already had. Finding "new" water will require dusting off some old strategies such as cloud seeding and vegetation management as well as promoting existing strategies in order to truly be effective.

One of the other things that could be studied is mandating that the federal regulatory agencies that enforce our environmental laws come up with broader solutions. Whether it is EPA under the Clean Water Act or the Fish and Wildlife Service under the Endangered Species Act, agencies largely focus on compliance with their programs, not problem solving. Forcing the agencies to help find solutions while they are creating sidebars to water supply efforts should also be considered.

CONCLUSIONS AND RECOMMENDATIONS

I will not presume to tell you whether Congress should order a

study of the present or future water supply problems we face. And perhaps the drought issue will receive adequate attention in the bills just introduced by Senator Domenici (S.2528) and Congressman Hastings (H.R.4754), and co-sponsored by members of the Arizona delegation. I will say that I believe that any study, if it is to be conducted, needs to be run by a small group consisting of people outside government who are intended to act as a filter for information from government at all levels, as well as from non-federal organizations and individuals from the private sector. Give the person or persons who appoint the members of the study group adequate time to do so, mandate adequate staff support and financing, and give the study a chance to work by giving it enough time to do its job. Narrow the mission to something that can be achieved in the time allotted and direct the group conducting the study to devise specific recommendations, the level at which they would be implemented, the need for federal legislation and the need for federal incentives to motivate state and local governments and private organizations. If it were up to me, I would ask the group to focus on a study of barriers to better water supply management but that is your call. H.R.3561 focuses attention on a significant issue. I fear, however, that, as introduced, the bill's study committee and its mission are unrealistically large. If you decide that such a study is desirable, I hope you will consider the recommendations I have made in this testimony about how to structure the group and the task.

Thank you for the opportunity to testify on this extraordinarily important subject.

Entity	<u>Duration</u>	Size	Makeup
Water Resources Council	3 years	7 members 2 associate members 2 observers	Exclusively made up of members of the cabinet
National Water Commission	3 years	7 members	Exclusively non-federal (citizen) appointees
Public Land Law Review Commission	6 years	19 members	Mixed, 6 members were non-federal appointees by president; 12 were

			members of Congress, the last was appointed by the original 18
Western Water Policy Review Advisory Commission	5 years	22 members	Mixed, 10 members were non-federal appointees by president; 12 were members of Congress.
Water Rights Task Force	1 year	7 members	Exclusively non-federal appointees.
H.R. 3561 21 st Century Water Policy Commission Establishment Act	1 year	17 members	Mixed, 8 members from fed agencies, 5 members non government interest groups, 2 members local government, 2 members state or Indian tribes.