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SUPPLEMENT

Testimony
Before the Committee on Resources
United State House of Representatives

Colorado: Options to Increase Water Supply
And Improve Efficiencies
December 12, 2003

Denver, Colorado

In my pre-submitted testimony, I mentioned several means by which Congress could increase water supply, or protect existing water supply. A federal court opinion issued on December 11, 2003, has unfortunately created another opportunity for Congress to act in response to judicial interpretations damaging to water suppliers. Therefore, I submit this supplemental testimony to make an additional recommendation for Congressional assistance to increase water supply.

5. Adopt the “No Surprises Policy” as part of Section 10 of the ESA. In 1994, the Departments of the Interior and Commerce first announced the “No Surprises Policy” which provides crucial protection to landowners and water suppliers who are willing to devote resources to protection of threatened and endangered species by means of a Habitat Conservation Plan (HCP) created pursuant to Section 10 of the Endangered Species Act. 16 U.S.C. § 1539(a). The “No Surprises Policy”, codified into regulation in 1998, provides regulatory certainty to property owners in exchange for conservation commitments. The regulation prevents the federal government from imposing additional requirement that would increase costs or further restrict the use of natural resources beyond the original HCP. See 50 C.F.R. §§ 17.22, 17.32, 222.2.

The No Surprises policy has been extremely successful in encouraging property owners to enter into HCP’s. From 1982 to 1992, only 14 plans were approved. In the following ten years, 379 HCP’s with No Surprises assurances have been approved, covering approximately 30 million acres and affecting more than 200 species. The policy is also important to Denver Water, which has an HCP for the Preble’s Meadow Jumping Mouse covering thousands of acres of operating property along the foothills west of Denver. Without the No Surprises policy, Denver Water would not be willing to enter into an HCP and dedicate certain land as a refuge for the mouse. Without an HCP, Denver Water’s operations could be severely compromised.

The No Surprises regulation has been remanded by a federal district court on procedural grounds. *Spirit of the Sage Council, et al. v. Norton, et al., Civ. Action No. 98-1873(EGS)(D.D.C. Dec. 11, 2003)*. The court’s order of remand was sufficiently critical of the intent and purpose of the No Surprises policy that its survival in the next round of judicial review is doubtful. Congress could resolve this problem simply by adopting the No Surprises regulation into Section 10 of the ESA.