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Water and Power Subcommittee

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Mr. Chairman, Members of the Committee, thank you for providing me the opportunity to address the important issue of the need for Congress to take action to update and strengthen the Endangered Species Act so that we can do a better job of meeting the challenges of this important law and provide a reliable water supply for farms, for people, and for the environment.

As this Committee may recall, I served as the Assistant Secretary for Water and Science, Department of the Interior from 2001-2004. As an Assistant Secretary my responsibilities provided me with varying degrees of exposure to a wide range of water related Endangered Species Act issues throughout much of the west. I served as the Administration lead in the "CalFed" process, which was intended to address Endangered Species Act as well as wider array of water related environmental issues in the Central Valley of California, and spent significant time working on issues related to environmental restoration in the Grand Canyon of the Colorado River, which included important Endangered Species Act elements. Because 2001-2004 was also characterized by extreme droughts throughout much of the west, my experiences with the challenges of meeting the goals of the Endangered Species Act and providing a reliable water supply were at times quite intense, as both people and endangered species suffer when there is not enough water to go around. Over the years I have also worked on water related Endangered Species Act issues as a private attorney in several western states.

I took the invitation to appear before you as an opportunity to reflect on the "lessons learned" as a result of my experiences in the Department of the Interior as they relate to the challenges of meeting the goals of the Endangered Species Act and providing a reliable water supply, and would share the following observations:

1. While the public debate tends to be captured by the extremes at either end of the spectrum, most people expect government to find a way to protect endangered species and provide a reliable water supply. People want endangered species to be protected and recovered, just as they want to have a reliable water supply at home and at work. People also value farms and ranches for the food and fiber they produce and for their preservation of a way of life that makes the American west a special place to live.
2. The Endangered Species Act needs to be updated to recognize commonly accepted scientific principles. The concept of "adaptive management", which really just means "learn from your past mistakes and successes", has not been incorporated into the Endangered Species Act. In a 1999 Report on the use of the concept of adaptive management in the Grand Canyon of the Colorado River, a Committee of the National Academy of Sciences recognized that the concept first "coalesced" in the 1970's. See <http://www.nap.edu/catalog/9590.html> at 52. Since that time, the concept of adaptive management has emerged and become widely accepted in the scientific and environmental restoration communities. Most people would be shocked to learn that the Endangered Species Act does not incorporate such an important and common sense concept as "learning from your past." Surely everyone can agree that the Endangered Species Act should be updated to allow a greater use of adaptive management concepts in the conservation and recovery of listed species. The Grand Canyon Adaptive Management Program, see <http://www.usbr.gov/uc/envprog/amp/> and <http://www.gcmrc.gov/>, provides a good example of the need to update the Endangered Species Act, as neither current law nor current institutional structures are adequate to fully integrate the recovery of the humpback chub under the ESA with the efforts of a wide range of stakeholders to attain the goals of the ESA as a part of an integrated program to protect the Grand Canyon. The incorporation of concepts of adaptive management into the ESA, when combined with assurances to stakeholders that they will not be singled out to bear the consequences of changes resulting from the lessons learned, can only make the ESA more effective in achieving its goals.
3. The Endangered Species Act needs to be updated in order to make it easier to develop "Recovery Programs" for aquatic species listed under the Act. As currently written, the ESA refers to "Recovery Plans", but not "Recovery Programs". The concept of "Recovery Programs" for aquatic species emerged after the ESA was written. "Recovery Programs" for aquatic species were developed because people realized that the existing tools of Section 7, Section 9, and Section 10 of the ESA were inadequate to provide for the recovery of aquatic species in large basins that implicate the interests of participation of hundreds of stakeholders over thousands of square miles. In response, federal agencies, states, and stakeholders have developed a series of "work around" solutions that stretch existing provisions of the ESA to the limit.

Two successful examples of this approach are found in the Upper the Colorado River Basin. The Upper Colorado River Endangered Fish Recovery Program, see <http://coloradoriverrecovery.fws.gov/>, and the San Juan River Recovery Implementation Program, see <http://www.fws.gov/southwest/sjrip/>, were developed because existing provisions of the ESA did not provide an effective way to move beyond the litigation driven approach of individual Section 7 consultations. However, in part because these approaches were developed after the ESA was enacted and not clearly within the scope of existing law, Congressional action was required in order for these programs to proceed. See P.L 102 396, 114 Stat. 1602 (106th Cong. 2000). Similar efforts are underway in the Platte River basin and the Middle Rio Grande basin, and this approach has been considered for the Klamath and other basins where the number of species, geographic scale, and number of interested parties create complexities that are beyond the capacity of Section 7 to address.

A similar approach has been adopted in the Lower Colorado River, where the States of California, Nevada, and Arizona, along with federal agencies and other stakeholders, have agreed to implement a 50 year effort to protect listed species as a part of a "Lower Colorado River Multi Species Habitat Conservation Program." See <http://www.lcrmscp.org/>. However, it is clear that the Lower Colorado River MSCP is yet another example of how the ESA has not been updated to keep pace with efforts to make progress towards recovery of aquatic species, as this Program could have been developed in a more effective manner had the sponsors not been forced to use an awkward combination of Section 7 and Section 10 to develop a program for recovery of listed species.

3. If Congress really cares about protecting species, it should act to stop the waste of scarce resources on critical habitat designations. Secretary Babbitt and Secretary Norton have unfortunately shared the experience of being forced to spend scarce dollars on the designation of critical habitat, even though both agree that this is not the most effective expenditure of resources. See <http://www.nytimes.com/2001/04/15/opinion/15BABB.html>, and <http://www.fws.gov/pdfs/manson0519.pdf>. The simple fact is that court driven listings and critical habitat designations are driving the budgets of the agencies responsible for administration of the ESA, and action agencies and project proponents are likewise having to devote fixed or shrinking dollars to an ever increasing list of species and critical habitats, thereby reducing the chances of making progress towards recovery on any front. The consequence of the tunnel vision that is inherent in litigation driven resolution of complex public policy issues is that existing resources are poorly deployed, tend to benefit lawyers, activists, and certain types of consultants as much or more than the species themselves, and decisions are postponed or avoided for decades. My personal experience while at the Department of the Interior was that it was often difficult to get time with Assistant Secretary Manson, his key staff, and key career employees to discuss recovery efforts because they were perpetually engaged in responding to yet another critical habitat or listing litigation deadline. The failure to address these important issues means yet more delay in getting to the important work of recovering species, which is, after all, one of the most important goals of the Endangered Species Act.

4. When it comes to water, people, farms, and the environment all need certainty in order to plan for and meet long term objectives. Endless litigation rarely, if ever, achieves this goal. In particular, long term or multi year Biological Opinions under Section 7 of the Endangered Species Act provide the predictability that is necessary in order to make the rational decisions and investments that are required to provide water for people, water for farms, and water for the environment. The Endangered Species Act should be updated to provide incentives for states, local governments, and private water users to participate in efforts to recover listed species through long term Section 7 consultations. In my experience, water users are often willing to participate in efforts to recover listed species which are beyond what can be compelled through regulatory actions under Section 7 or Section 9. It is also my opinion that in most cases collaborative efforts will produce more "on the ground" progress towards recovery of listed species than can be obtained through the regulatory approach. What water users need in return for doing more than the minimum the law requires is to know that their efforts will not be used against them, and that their agreement to work in a collaborative fashion and to contribute resources to the effort will not be transformed into a "blank check" that exposes them to endless financial or other liability. Concepts like "no surprises" for HCP's created under Section 10 are essential for persuading water users to go beyond a focus on litigation or the bare minimum requirements of Section 9, and similar protections should be available when water users fund Section 7 based Recovery Programs. Likewise, states and water users that choose to dedicate scarce resources to the recovery of a listed species need to know up front what will constitute recovery and what will be required for delisting of a species.

5. My final set of observations relate to lessons learned about management of complex environmental programs that include Endangered Species Act components. First, my time at Interior taught me a lesson about the dangers of developing a "Program" that is designed to be all things to all people. CalFed was and is a great concept a unified program intended to address water supply, water quality, and environmental compliance and restoration for California's massive Central Valley. When Secretary Babbitt executed the Record of Decision for CalFed it envisioned an \$8 billion expenditure for Phase 1 over 7 years, with just under \$3 billion of that coming from the federal government. The reality is that the CalFed Authorization that passed the Senate and House and that President Bush signed into law only authorizes a fraction of that amount for the federal share of Phase I, and the State of California now finds it difficult, if not impossible, to provide its anticipated 1/3 share for CalFed as originally envisioned, let alone pick up the shortfall from federal sources. And the prospects for the collective shortfall to be met from non federal and non state sources is not particularly great. The

problem with CalFed while I was at Interior was that it was incapable of responding to the changing fiscal reality. Long after everyone knew that the federal share was likely to be substantially less than \$3 billion, CalFed continued to budget and plan for money that was never going to appear, which in turn meant that money was spent on lower priority program elements instead of being dedicated to the highest priorities.

The lesson to be learned from this experience is that there is a need for discipline and prioritization in the development of large scale efforts like CalFed. And while the realities of the legislative process guarantee that program proponents will avoid making premature concessions out of a fear that they will end up with less than they would otherwise receive, programs of this nature should be prioritized so that regardless of how much money is ultimately available, the highest priority items are funded first. All participants states, stakeholders, and federal agencies need to avoid making the assumption that endless dollars will be available. In the context of programs that are intended to recover species and provide a reliable water supply, this reality means that other program elements may need to be deferred or eliminated in order to ensure that priority elements are implemented and completed. This issue is not unique to CalFed, as other potential programs, such as the Platte River and Middle Rio Grande, are in danger of repeating the mistakes of CalFed.

A second lesson to be learned from the CalFed experience is the need for better management of the science that is used in the program. By management, I do not mean manipulating the data or the conclusions. I mean managing the dollars so that the science is focused on issues that are likely to be priorities for the program instead of being focused on the expertise and interests of the scientists that happen to be in place, or dedicated to defending an advocacy position developed by an agency or stakeholder group. CalFed achieved some significant success in this regard, but the need for prioritization of scientific efforts will only increase as the effects of the shortfall in available funds are felt in coming months and years.

Thank you for providing me with this opportunity to address the challenges that we face as we work to recover species listed under the ESA and provide a reliable water supply for people, for farms, and for the environment.