

**Testimony of Patrick T. Tyrrell
Wyoming State Engineer, State of Wyoming**

Supporting Enactment of H.R. 2288

**Before the Water and Power Subcommittee
of the Committee on Natural Resources
U.S. House of Representatives
Washington D.C.**

September 22, 2009

Madam Chairwoman and Members of the Subcommittee, my name is Patrick T. Tyrrell. I am the Wyoming State Engineer. I represent the State of Wyoming on the governing committee of the Upper Colorado Endangered Fish Recovery Program. Wyoming has participated in the Upper Colorado River Endangered Fish Recovery Program since its inception in 1988. I am here to testify in support of H.R. 2288, to amend Public Law 106–392 to maintain annual base funding for the Upper Colorado and San Juan fish recovery programs through fiscal year 2023.

H.R. 2288 addresses the needs of both the Upper Colorado River Endangered Fish Recovery Program and the San Juan River Basin Recovery Implementation Program (Programs). I believe you have received letters in support of H.R. 2288 from Governor Freudenthal and numerous other participants in the Programs, including the States of Colorado, New Mexico and Utah, American Indian tribes, water users, power customers and environmental organizations.

Upper Colorado And San Juan River Basin Recovery Programs: The Programs have the goals of recovering four federally listed endangered fish species in the Upper Colorado River basin while water development and management activities proceed in compliance with state laws, interstate compacts, and the federal Endangered Species Act (ESA). Activities of the Programs provide ESA compliance for more than 1,800 water projects depleting approximately three million acre-feet per year in the Upper Colorado River and San Juan river basins, including every Bureau of Reclamation project in the Upper Basin upstream of Lake Powell, water projects that meet the United States’ trust obligations to American Indian tribes, and literally hundreds of non-federal water projects providing water for municipal, irrigation, industrial, and recreational uses. No lawsuits have been filed as a result of ESA compliance under the Programs. The Programs have substantial grassroots support among participants, including the four Upper Basin states (Colorado, New Mexico, Utah and Wyoming), American Indian tribes (Navajo Nation, Jicarilla Apache Nation, Southern Ute Tribe and Ute Mountain Tribe), water users, power customers and environmental organizations. Five federal agencies (U.S. Fish and Wildlife Service, Bureau of Reclamation, National Park Service, and Western Area Power Administration and Bureau of Indian Affairs) participate in the Programs.

The Programs have been hailed by Administrations led by both parties for their successes. In 2000, Secretary of the Interior Bruce Babbitt described the Programs as “an ongoing success story” (Colorado River Water Users Association, 2000). Secretary of the Interior Gale Norton referred to the Programs as being a national model of how the Endangered Species Act should be implemented (Colorado Water Congress, 2006). In 2008, the Upper Basin and San Juan programs were recipients of the Department of the Interior’s Cooperative Conservation Award for their successful history of stakeholder collaboration resolving “seemingly intractable water use conflicts ...” (see attached Exhibits A and B).

P.L. 106-392: P.L.106-392 was signed into law on October 30, 2000. The law authorizes the Bureau of Reclamation to provide cost-sharing for capital construction and annual operations for these two endangered fish recovery Programs. The law recognizes significant and specific cost-sharing contributions to the Programs by the States of Colorado, Wyoming, Utah, and New Mexico, power customers, and water users for these purposes.

P.L. 106-392 has been amended three times with substantial bi-partisan support in both the House of Representatives and United States Senate. P.L.107-375 extended the period for capital construction to 2008 for both Programs. P.L.109-183 extended the period for construction of capital projects for the Programs through FY 2010, authorized an additional \$15 million in capital expenditures for the Upper Basin Program, and recognized an additional \$11 million in non-federal cost-share contributions. P.L. 111-11 provides an additional \$27 million in authority for federal funding of capital projects, recognizes an additional \$56 million in non-federal contributions, and extends the capital funding authority to FY 2023, which is the expected recovery date for the endangered fish species. The Program’ participants are pleased to note the participating states’ Members are nearly unanimous in their co-sponsorship of this bill.

H.R. 2288 Amendments Extending the Authorization Period for Annual Base Funding from Power Revenues: Annual base funding from Colorado River Storage Project power revenues contribute significantly to successfully carrying out recovery actions by both recovery programs, including instream flow identification, evaluation, and protection; habitat restoration and maintenance; management of nonnative fish impacts; endangered fish propagation and stocking; research, monitoring, and data management; public information and involvement; and program management. Subsequent to passage of P.L. 106-392, \$36,725,200 in power revenue base funds have been expended or obligated by the Upper Colorado Recovery Program, and \$17,752,300 by the San Juan Recovery Program (2001–2009). The U.S. Fish and Wildlife Service, the four participating states, American Indian Tribes, and water users also provide additional annual funding and in-kind contributions for these activities.

Need For 2008 Amendments: Unless reauthorized by Congress, the utilization of power revenues for annual base funding of recovery program actions, other than for operation and maintenance of capital projects and monitoring, will cease after fiscal year 2011.

The approximate fiscal impact (estimates in fiscal year 2008 dollars) of reductions in annual base funding after fiscal year 2011 without reauthorization is summarized as follows:

Recovery Program	Currently Available Annual Base Funding	Reductions in Annual Base Funding After 2011 Without Reauthorization	Remaining Annual Base Funding After 2011 Without Reauthorization
Upper Colorado	\$4,678,000	-\$1,824,000	\$2,854,000
San Juan	\$2,339,000	-\$942,500	\$1,396,500
Total:	\$7,017,000	-\$2,766,500	\$4,250,500
Percent:	100%	-39%	61%

Without reauthorization, annual base funding from power revenues will be reduced by about forty percent (40%). Funding for nonnative fish management, research, public information and involvement, and program management would be eliminated from both Programs. This would delay and significantly impede the two Programs' achievements in restoring populations of the endangered fishes. As a result, ESA compliance provided by recovery program actions for more than 1,800 water projects, as well as future projects, would not likely continue. ESA compliance depends not only on implementing recovery actions, but is ultimately and directly linked to long-term improvement in the status of fish populations and achievement of recovery.

Continuation of Current Levels of Annual Funding From Other Sources: The language in the existing legislation that base funding and depletion charges previously agreed upon will be retained: *"Nothing in this Act shall otherwise modify or amend existing agreements among participants regarding base funding and depletion charges for the Recovery Implementation Programs."* This provision ensures that annual and in-kind contributions by the U.S. Fish and Wildlife Service, the four participating States, American Indian Tribes, and water users identified in the original cooperative agreements will continue. All participants have committed to the conduct of these Programs through the end of FY 2023 by virtue of having extended their cooperative agreements through that date (see attached Exhibits C and D).

Conclusion: P.L.106-392 should be amended to allow continued use of power revenues through 2023 for annual base funding of all activities as originally authorized. All four of the endangered fish species are expected to be recovered by 2023. I greatly appreciate the opportunity to provide testimony supporting the enactment of H.R. 2288 to this Subcommittee.

Exhibit A. Cooperative Conservation Award Citation Presented to the Upper Colorado River Endangered Fish Recovery Program in April 2008



THE SECRETARY OF THE INTERIOR
WASHINGTON

CITATION

COOPERATIVE CONSERVATION AWARD

UPPER COLORADO RIVER ENDANGERED FISH RECOVERY PROGRAM

In recognition of extensive collaboration in management of water resources for wildlife conservation and human needs by the Upper Colorado River Endangered Fish Recovery Program.

In recent decades, development of water resources has been a subject of enormous conflict in the Upper Colorado River Basin. From 1977 through 1981, the U.S. Fish and Wildlife Service issued Endangered Species Act "jeopardy biological opinions" for all water projects in the Upper Basin, finding that any depletion of water would harm endangered fish species. In light of water conflicts, water users, the States of Colorado, Utah, and Wyoming and the U.S. Fish and Wildlife Service entered into a settlement process to identify means to recover endangered fish species and allow needed water development. This initial effort at working together precipitated an extensive collaborative undertaking, culminating in January 1988 with formation of the Upper Colorado River Endangered Fish Recovery Program. Actions to recover endangered fish species under the Program include: constructing fish passages, fish screens, and habitat improvements; enhancing instream flows; stocking; monitoring; and research. The Recovery Program reached a milestone in 2006 with completion of the Elkhead Dam and Reservoir Enlargement Project in northwest Colorado, which provides additional storage capacity for human and endangered species needs. These actions provide a reasonable and prudent alternative to "jeopardy biological opinions" for water depletions in the Upper Basin, while working in concert with interstate water compacts, State water and wildlife laws, and tribal rights. The Program is now a nationally recognized model for resolving endangered species and water resource conflicts. All parties, including water users, States, environmental organizations, and Federal agencies, have committed substantial resources into a basinwide, collaborative conservation partnership effectively working to recover endangered fish while meeting human water resource use and development needs. For its history of successful stakeholder collaboration resolving seemingly intractable water use conflicts, the Upper Colorado River Endangered Fish Recovery Program is granted the Cooperative Conservation Award of the Department of the Interior.



Secretary of the Interior

Exhibit B. Cooperative Conservation Award Citation Presented to the San Juan River Basin Recovery Implementation Program in April 2008



THE SECRETARY OF THE INTERIOR
WASHINGTON


CITATION

COOPERATIVE CONSERVATION AWARD

SAN JUAN RIVER BASIN RECOVERY IMPLEMENTATION PROGRAM

In recognition of multi-stakeholder collaboration by the San Juan River Basin Recovery Implementation Program in managing water resources for recovery of the Colorado pikeminnow and the razorback sucker while proceeding with needed water development activities.

The purpose of the San Juan River Basin Recovery Implementation Program is to protect and recover endangered fishes in the San Juan River Basin while enabling water development to proceed in compliance with Federal and State laws. Endangered species include the Colorado pikeminnow, *Ptychocheilus lucius*, and the razorback sucker, *Xyrauchen texanus*. The Program was modeled after the highly touted Upper Colorado River Endangered Fish Recovery Program and has met with initial success. As with the Upper Colorado Program, the San Juan River Basin Recovery Implementation Program is benefited by broad stakeholder participation, including tribes, water developers, environmental organizations, States, and Federal agencies. Projects undertaken by the Program have produced promising results. A fish passage project at the Public Service Company of New Mexico weir on the San Juan River has allowed razorback suckers, Colorado pikeminnows, and other native fish to move upstream since 2003. Removal of two non-native species, adult channel catfish and common carp, has measurably reduced their abundance. Colorado pikeminnow now outnumber common carp in removal areas. Biologists continue to expand removal efforts into middle river reaches to manage channel catfish. Actions taken under this Program to recover the Colorado pikeminnow and razorback sucker also provide benefits to other native fishes in the Basin. For its many collaborative undertakings demonstrating that endangered species conservation and water development and management can be compatible, the San Juan River Basin Recovery Implementation Program is granted the Cooperative Conservation Award of the Department of the Interior.



Secretary of the Interior

**Exhibit C. Extension of the Cooperative Agreement through 9/30/2023 for the
Upper Colorado River Endangered Fish Recovery Program Signed in 2009**



**Upper Colorado River
Endangered Fish
Recovery Program**

**EXTENSION
OF THE
COOPERATIVE AGREEMENT
FOR THE RECOVERY IMPLEMENTATION PROGRAM FOR
ENDANGERED FISH SPECIES IN THE UPPER COLORADO RIVER BASIN**

The parties hereto agree to extend the Cooperative Agreement dated January 21, 1988, which provided for their participation and implementation of the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin (Program), through September 30, 2023.

Ken Salazar AUG 26 2009
Ken Salazar Date
Secretary of the Interior

[Signature] 8/14/09
Dave Freudenthal Date
Governor of Wyoming

Bill Ritter, Jr. 8-6-09
Bill Ritter, Jr. Date
Governor of Colorado

1522 8/3/09
Timothy J. Meeks Date
Administrator, Western Area
Power Administration
U.S. Department of Energy

[Signature] 7/30/09
Jon M. Huntsman, Jr. Date
Governor of Utah

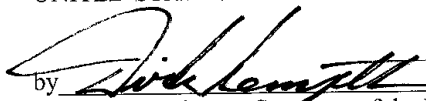
**Exhibit D. Extension of the Cooperative Agreement through 9/30/2023 for the
San Juan River Basin Recovery Implementation Program Executed in 2006**
(first signature page of seven separate signature pages reproduced here)

EXTENSION
OF THE
COOPERATIVE AGREEMENT
FOR THE SAN JUAN RIVER RECOVERY IMPLEMENTATION
PROGRAM

The parties hereto agree to extend the 1992 Cooperative Agreement, which provided for their participation in and implementation of the San Juan River Basin Recovery Implementation Program through September 30, 2023.

IN WITNESS WHEREOF each party has caused this Cooperative Agreement to be executed by an authorized official on the day and year set forth below by his or her signature.

UNITED STATES OF AMERICA

by 
Dirk Kempthorne, Secretary of the Interior

Date 10-26-06

STATE OF COLORADO

by _____
Bill Owens, Governor

Date _____

STATE OF NEW MEXICO

by _____
Bill Richardson, Governor

Date _____

STATE OF UTAH

by _____
Jon Huntsman, Jr., Governor

Date _____

NAVAJO NATION

by _____
Joe Shirley, Jr., President

Date _____

SOUTHERN UTE INDIAN TRIBE

by _____
Howard D. Richards, Sr., Chairperson

Date _____

UTE MOUNTAIN UTE INDIAN TRIBE

by _____
Judy Knight-Frank, Chairperson

Date _____

JICARILLA APACHE INDIAN TRIBE

by _____
Levi Pesata, President

Date _____

**Statement of Patrick T. Tyrrell
Wyoming State Engineer, State of Wyoming
Regarding Enactment of H.R. 3563
Before the Water and Power Subcommittee of the Committee on Natural Resources
U.S. House of Representatives, Washington D.C.
September 22, 2009**

Thank you, Madame Chairwoman and members of the subcommittee. It is indeed a pleasure to be here. I am Pat Tyrrell, Wyoming State Engineer. I will testify today about Wyoming's concerns with the Crow Compact and subsequent federal legislation.

In 1999, when the final discussions occurred that led to the tribal compact that is before you, the Montana Compact Commission Chairman indicated that many of Wyoming's interests could be addressed outside of those negotiations in a different forum [*letter from Chris Tweeten to Gordon W. Fassett, May 12, 1999, page 4*]. The State of Wyoming is not a party to this compact and now, a decade later, that different forum exists, and I am here to present Wyoming's concerns about the Compact and the Stream-flow and Lake Level Management Plan incorporated therein. Our position, as a potentially affected party who was not at the negotiating table for these documents, is akin to nervously watching two neighbors making decisions over the keys to your car. At some point, it is appropriate that you get involved.

By way of geographic description, it is important to understand that the Big Horn River's headwaters and 19,000 of its 23,000 square mile drainage area (83%) are in Wyoming, that Big Horn Lake (formed by Yellowtail Dam) straddles the Wyoming/Montana state line and serves recreational users on both sides, and that the Crow Reservation abuts the state line but is entirely within Montana.

Wyoming has historically supported negotiated Tribal water rights settlements over potentially expensive and lengthy, not to mention often acrimonious, litigation. Therefore, we applaud Montana and the Crow Tribe, and the federal government, for arriving at a solution in the

friendlier manner. Although we have concerns about the final product, those in no way diminish our appreciation of the success these parties should enjoy for the hard work they put in.

Wyoming was very concerned about several provisions of the compact as negotiated, and my office provided advice to Senator Barrasso on language that was amended into the enabling legislation in the Senate. I understand this language has now been introduced into the House version. Driving these changes was Wyoming's concern that the State of Montana and its water users might be able to improve their rights to the waters of the Big Horn River as against Wyoming users as a result of a bilateral compact with the Crow Tribe. The amended language from the Senate side does not provide every protection Wyoming sought, but it shores up some language in the original bill, and mutes some effects of the Crow Compact. The Senate report language is also helpful and should remain to memorialize the intent of this legislation.

In 1950, Congress approved the Yellowstone River Compact, designed to allocate between Montana and Wyoming the waters of four interstate tributaries of the Yellowstone River, including the Big Horn River. While Tribal water interests were not to be adversely affected by that compact, neither were they granted their own allocation. In adopting the Yellowstone River Compact, Congress made this allocation the law of the land, and the compact became binding in both states. It is possible to interpret that compact as including Tribal water needs as being satisfied within the allocations provided to each state.

So, in reviewing this Tribal compact, the first protection Wyoming sought was for Congress to state specifically that the Crow Compact would not impair Wyoming's allocations of Big Horn River water under the Yellowstone River Compact. Wyoming is concerned that absent hold harmless assurances in this enabling legislation, the compact between Montana and the Crow Tribe could be misinterpreted to diminish our rights under that earlier law. *[Testimony of Chris D. Tweeten before the Senate Committee on Indian Affairs, September 11, 2008, page 4]*

A second protection we sought arises from subordination provisions in the Crow Tribe's compact with Montana. Under those provisions, Montana non-tribal water users with state rights junior to the tribal right cannot be forced to cease their water use to ease shortages to the tribal rights. Without hold harmless language, this provision could encourage the Tribe, in time of shortage, to seek water from Wyoming users as a first resort. The sanctity of the Yellowstone River Compact requires that Wyoming be protected from the impact of the tribe's decision to subordinate its water right to Montana state rights on the Big Horn.

The third protection we sought involves instream flow rights. The Yellowstone River Compact does not provide for the recognition of instream flow rights in one state as against the other because non-consumptive uses like this are not recognized as beneficial uses in that document. However, the Streamflow and Lake Level Management Plan incorporated in the Crow Compact provides that the Tribe permanently dedicate at least half of its direct flow water right to maintaining instream flows in the Bighorn River from Yellowtail Dam downstream through the Reservation. To prevent this dedication from being extrapolated into a right under which the State of Montana could attempt to seek water from Wyoming users for instream flow purposes, we sought language in this legislation expressly stating that such a betterment of Montana's position cannot occur.

Finally, the Streamflow and Lake Level Management Plan incorporated by the Crow Compact could be read to imply that the Bureau of Reclamation should favor instream flow releases from the dam over other management considerations. This would reverse many years of the Bureau's multiple use management of the dam, in which it gave equal consideration to such things as flood control, flat-water recreation, river flows, and storage. This legislation should clarify the equal weighting of all management needs under the Bureau's discretion.

Language addressing the above concerns now exists in the bill in some form. So, while the amended bill is not perfect in Wyoming's view, it is better than the original, and we appreciate the work that was done.

I thank you Madame Chairwoman and members of the subcommittee for receiving Wyoming's comments and would be pleased to answer any questions you may have.