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FEDERAL IMPEDIMENTS TO WATER RIGHTS, JOB CREATION, AND RECREATION: A LOCAL PERSPECTIVE

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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CONTENTS

	Page
Hearing held on Thursday, April 25, 2013	1
Statement of Members:	
McClintock, Hon. Tom, a Representative in Congress from the State of California	1
Prepared statement of	2
Napolitano, Hon. Grace F., a Representative in Congress from the State of California	4
Prepared statement of	9
Tipton, Hon. Scott R., a Representative in Congress from the State of Colorado	10
Prepared statement of	11
Statement of Witnesses:	
Benson, Reed D., Keleher and McLeod Professor, Chair, Natural Resources Committee, University of New Mexico School of Law, Albuquerque, New Mexico	23
Prepared statement of	24
Boardman, Russell, Shoshone Conservation District Supervisor, Frannie, Wyoming	39
Prepared statement of	41
Costlow, David, Executive Director, Colorado River Outfitters Association, Buena Vista, Colorado	20
Prepared statement of	22
Link, Geraldine, Director of Public Policy, National Ski Areas Association, Lakewood, Colorado	17
Prepared statement of	19
Parker, Randy N., Chief Executive Officer, Utah Farm Bureau Federation, Sandy, Utah	28
Prepared statement of	30
West, William E. "Bill," General Manager, Guadalupe-Blanco River Authority, Seguin, Texas	12
Prepared statement of	14
Additional materials submitted for the record:	
Article entitled "The Federal Water Grab Expands to Ski Resorts" written by Randy Parker, Utah Farm Bureau Federation, submitted for the record by The Honorable Rob Bishop	27
Outen, Dr. Ronald B., Regional Director, The Aransas Project, Statement submitted for the record by The Honorable Grace Napolitano	4
The Aransas Project (TAP) Member Organizations, List submitted for the record	7
Sustainable Slopes to Business for Innovative Climate & Energy Policy, Letter submitted for the record by The Honorable Grace Napolitano	61

OVERSIGHT HEARING ON "FEDERAL IMPEDIMENTS TO WATER RIGHTS, JOB CREATION, AND RECREATION: A LOCAL PERSPECTIVE"

Thursday, April 25, 2013
U.S. House of Representatives
Subcommittee on Water and Power
Committee on Natural Resources
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10 a.m., in room 1334, Longworth House Office Building, Hon. Tom McClintock [Chairman of the Subcommittee] presiding.

Present: Representatives McClintock, Lummis, Tipton, Labrador, LaMalfa, Napolitano, Costa, and Huffman.

Also present: Representative Bishop.

Mr. MCCLINTOCK. The Subcommittee on Water and Power will come to order. A quorum is present.

The Chair would ask unanimous consent that Mr. Bishop be allowed to sit with the Subcommittee and participate at the hearing.

[No response.]

Mr. MCCLINTOCK. There is no objection. So ordered. We will now begin with opening statements.

STATEMENT OF THE HON. TOM MCCLINTOCK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. MCCLINTOCK. The Subcommittee on Water and Power meets today to hear testimony that arises from a torrent of complaints from multiple Western States of Federal laws and Federal officials usurping long-established water rights in a manner that threatens entire sectors of their economies, including agriculture, ranching, tourism, and municipal water supplies. We will hear of a pattern of conduct by Federal agencies that seems abusive, high-handed, and contrary to the proper role of government as envisioned by the founders. This pattern evinces a design to assert Federal control over the water resources traditionally reserved to the States under a time-honored doctrine that recognizes and protects the property rights of water users.

For over a century, western water law has been based on the prior appropriation doctrine to allow for communities which were first in line to receive water from sometimes distant rivers. This philosophy created a mechanism of investment where beneficiaries paid for the water and power they received based on water rights preserved and protected at the State level, but with the backing of the Federal Government. This system helped lead to the creation of over 348 Bureau of Reclamation projects that stored water in wet years in wet places for release or delivery in dry years or to dry places, all in accordance with State laws. The West grew and prospered because of this arrangement.

Water rights procured under State law started to erode with the Federal Endangered Species Act of 1973. For example, the Central Valley of California is once again threatened with massive water cutbacks to accommodate federally ordered releases of billions of gallons of water, all for the amusement of the delta smelt, a three-inch minnow. So far, 812,000 acre-feet, all of which were once water rights assigned to irrigators or communities, have been lost to the ocean. These communities are currently slated to receive only 400,000 acre-feet of their normally allotted 2 million acre feet.

We will hear dramatic testimony of litigation in Texas that could upend State water law across the Western United States, while doing absolutely nothing to protect the species it purports to save.

The ESA is failing not only species, but people. And the law needs to be changed on a number of fronts, including counting artificially propagated species. It is becoming increasingly clear that some Federal land management agencies are driven by an extreme ideology that is hostile to public use of public land and antithetical to the fundamental framework of American federalism.

The Forest Service, for example, now controls 193 million acres within our Nation, a land area equivalent to the size of Texas. We will hear of how this agency is abusing its authority to undermine the legitimate water rights of citizens who are attempting simply to contribute to the economy of their regions.

For example, there are 121 ski areas on those lands. These ski areas rely on privately held water rights for snow-making and as collateral for financing to build and maintain their facilities, and for supplying water to the local communities they support. In 2011 the Forest Service issued a directive that would effectively take these private property rights without compensation, in violation of State law, and at the expense of millions of dollars to ski areas, all while jeopardizing continued recreational use into the future.

We will hear of an edict establishing a national blueways system passed not by Congress, but rather imposed by a former American Rivers executive-turned-bureaucrat who is trying to turn a 44 million-acre watershed into a Federal playground under the guise of coordination. As one witness asks, "How can a designation that requires no public notice, no comment opportunity, and was created without coordination or consultation with affected land owners, local governments, or States, could result in increased coordination?"

When the Norman and Plantagenet kings of England declared one-third of the land area of southern England off limits to the common people, the result was that no fewer than five clauses in the Magna Carta were specifically written to redress the people's grievances on this subject. I would hope that the process we begin today leads to our generation's Runnymede, where the fundamental rights of the people over the people's land can be restored.

[The prepared statement of Mr. McClintock follows:]

PREPARED STATEMENT OF THE HONORABLE TOM MCCLINTOCK, CHAIRMAN, SUBCOMMITTEE ON WATER AND POWER

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Mr. MCCLINTOCK. With that, I will yield back and recognize the Ranking Member, my colleague from California, Mrs. Napolitano, for 5 minutes.

STATEMENT OF THE HON. GRACE F. NAPOLITANO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. NAPOLITANO. Thank you, Mr. Chair, and good morning, and welcome to the witnesses. Thank you for being with us today. Today's hearing features local perspectives on States' rights and Federal actions. The Federal Government has historically deferred to the States' authority to manage water resources within each State.

We also know that the water flows beyond State and political boundaries are recognized by the Commerce Clause in our Constitution. This shows the clear Federal interest in management of this public good from navigation, recreation, flood control, and the protection of our environment.

We will hear arguments today about the actions Federal Government has taken to interfere with States' rights. We will also hear about what water means to our local communities and our local governments. Water is the life blood of the West. Water is economy. Historically, water used in the West was predominantly for agriculture. And as the West evolved, the economies of our communities have also progressed to reflect our environmental values.

This includes local communities like Aransas County, Texas. The Aransas Chamber of Commerce said that in 2008 tourism brought in $97.2 million into their county's economy. The county estimated that 26 percent of its tax revenue comes from tourism, from the tourists who go to see the whooping cranes. The U.S. Fish and Wildlife Service estimates that there are 50,000 to 80,000 visitors to the Aransas National Wildlife Refuge, with about $5 million in local spending each year.

And, Mr. Chair, I refer to you and introduce into the record testimony for the record from the Aransas project.

Mr. MCCLINTOCK. Without objection.

[The information submitted for the record by Mrs. Napolitano follows:]

PREPARED STATEMENT OF DR. RONALD B. OUTEN, REGIONAL DIRECTOR, THE ARANSAS PROJECT

Chairman McClintock, Ranking Member Napolitano and the members of the Subcommittee,

My name is Dr. Ronald B. Outen, and I am the Regional Director of The Aransas Project, a nonprofit alliance of local governments, businesses, organizations, and citizens. I appreciate the opportunity to present the following information to the Subcommittee on Water and Power because it relates to a truly "local perspective" on this important issue.

Background on *The Aransas Project* v. *Shaw,* and Local Interests of The Aransas Project

The Aransas-Wood Buffalo flock of Whooping Cranes that winters on the Texas coast is the only natural wild flock remaining in the world. This flock of whooping cranes travels 2,500 miles from their nesting grounds in Canada to reach this unique and rare ecosystem along the Texas coast. The flock has increased from 16 birds in the early 1940s to a high of 270 in the spring of 2008. The 2008–2009 year was the worst in recent history for the Whooping Crane, with a death toll of 57 birds, a staggering loss of 21.4 percent of the flock—of which 23 deaths, or 8.5 percent of the flock, occurred in Texas during their winter at Aransas. The lack of freshwater inflows to the bays from the Guadalupe and San Antonio Rivers resulted in very high salinity levels and depleted food and water sources for the Cranes.

In March 2010, The Aransas Project (TAP) filed a citizen suit against Texas State officials under the Endangered Species Act (ESA). TAP alleged that the actions and inactions of the Texas State officials in managing freshwater uses and inflows from

the Guadalupe and San Antonio rivers caused a "take" of Whooping Cranes in violation of Section 9 of the ESA. (16 U.S.C. § 1538(a) and (g)). The suit is entitled *The Aransas Project* v. *Shaw et al.* Three entities intervened on behalf of the Texas Officials—Guadalupe-Blanco River Authority (GBRA), the San Antonio River Authority, and the Texas Chemical Council. In March 2013, The Aransas Project prevailed in this lawsuit in Federal district court. The case is now on appeal.

TAP has tremendous local support from many diverse coastal interests. Many of the member organizations are listed on the Web site—*http://thearansasproject.org/about/memberorganizations/* and they include (among others) bipartisan support from the Aransas County Republican Party and Aransas County Democratic Party, Aransas County, the City of Rockport, and the Town of Fulton. TAP members also include many local businesses, which depend upon a healthy bay ecosystem. Thus, the local perspective of this lawsuit is that of both local political parties, local governments, local businesses along the Texas Gulf Coast, and hundreds of individual members—all whom are part of TAP.

The District Court Opinion

The district court conducted an 8-day trial in December 2011. TAP presented 17 witnesses, 10 of whom were scientific experts on Whooping Crane biology, freshwater inflows, bay and estuary ecology, and scientific modeling. The Texas State officials presented just two witnesses; GBRA presented eight. The district court rendered a 124-page opinion with comprehensive fact-findings and witness credibility determinations. The district court determined that the quality of TAP's witnesses was high, and the court found GBRA's witness to be of questionable credibility. The district court stated:

> "TAP's experts were world renowned in their respective fields. Several of TAP's witnesses hold endowed chairs at prestigious universities . . . all have published numerous scientific papers in respected journals . . . . [T]he Court found an alarming trend in the experts that GBRA offered, most of whom had limited experience and insignificant knowledge of whooping cranes in particular. Indeed, in most instances it was established that GBRA selected the data for which its experts were to make a determination without regard to the peer reviewed published scientific data available." Mem. Op. at 43.

The district court's opinion speaks for itself. The district court found the witnesses presented by GBRA to be faulty, wanting, irrelevant, and in some cases, lacking in credibility and candor. The Texas officials put on absolutely no scientific witnesses themselves. In short, the district court reviewed all this testimony, facts and information, applied the well-established ESA law and precedent in these kinds of cases and issued a decision. Indeed, there is little that is novel about the legal basis behind TAP's lawsuit. Relying on the plain language in the ESA, Federal courts in five Circuits have found that a governmental authority may be liable for violations of Section 9 authorized by their regulatory schemes. No contrary ESA caselaw exists.

Having found that endangered Whooping Cranes died, and that the Texas State officials that TAP sued were liable, the district court was obliged to order a remedy. However, the court did not order any pumps to be turned off—no cities, farmland, power plants or factories will run dry or close. No jobs will be lost. Every drop of water that was available before the lawsuit remains available after it. Instead, the court narrowly crafted an order that prevents the situation from getting worse, and starts a process for finding a long-term solution. First, the order prevents the approval of new water permits affecting the Guadalupe or San Antonio Rivers "until the State of Texas provides reasonable assurances to the Court" that new permits would not result in harm to the Whooping Cranes. Second, the order required the defendants to seek an Incidental Take Permit pursuant to Section 10 of the ESA, and develop a Habitat Conservation Plan (HCP) to protect the Whooping Cranes. An Incidental Take Permit is the remedy Congress crafted. It allows the permit holder to proceed with an otherwise lawful activity that results in "incidental" harm to an endangered species, but requires the permit holder to design, implement and fund a plan—the HCP—that minimizes and mitigates harm to the species while carefully balancing competing interests of various stakeholders in the river basin.

Local Perspective on the Economic Benefits of Whooping Cranes and a Healthy Bay

One of the witnesses at trial for The Aransas Project was Mr. Andy Sansom, head of the Texas Rivers Institute. He prepared a report discussing various studies on the economics of a healthy bay. For example, Texas Parks and Wildlife Department

has released data showing that recreational and commercial fishing in the San Antonio Bay generate $55 million a year in economic benefits. Other studies have shown between $11 million and $155 million in activity. Finally, as Mr. Sansom reported, in one 1984 study, the USA total "combined option price and existence value" of the Whooping Cranes at Aransas was estimated to be $1,580 million. (Stoll, J. and L. Johnson, Concepts of Value, Non-Market Valuation, and the Case of the Whooping Crane, Transactions of the North American Wildlife and Natural Resources Conference 49: 382–393 (1984)).

Aransas County Judge Burt Mills testified at trial and provided a local perspective on the coastal economy. The Aransas Chamber of Commerce said that in 2008, tourism bought $97.2 million into the Country economy, and the County estimated that 26 percent of its tax revenue comes from tourists, many who come just to see the Whooping Cranes. USFWS estimates 50,000 to 80,000 visitors to the Aransas National Wildlife Refuge, with about $5 million in local spending each year.

In short, the survival of the Whooping Crane, the survival of coastal fishing and shrimping businesses, the survival of coastal recreation and tourism—are all linked to a healthy bay ecosystem. The economy of the Texas coast is dependent upon freshwater inflows from the rivers to the bay—and if the rivers are over-appropriated, or inadequately managed by the regulatory authorities, then the freshwater inflows will disappear.

The Endangered Species Act Does Not Result in Federal Impediments to Water Rights

This year is the 40th anniversary of the Endangered Species Act. With the ESA, Congress decided that to prevent extinction and preserve certain species such as the Whooping Crane, they needed temporary Federal protection. That Federal protection is removed when the species recovers to a level when it is no longer in danger of extinction. If the Whooping Cane is protected against hunting, its habitat conserved, and with adequate resources such as food and water, the species will eventually recover. However, with fewer than 300 birds in the wild flock, it has a ways to go, so we must learn to live with the protections the Cranes need.

In Texas, we have learned to live with the ESA, and the story of the Edwards Aquifer springs species shows how it can be done. In the 1990s, in *Sierra Club* v. *Babbitt,* the Guadalupe-Blanco River Authority aligned with the Sierra Club as plaintiffs in another significant ESA lawsuit. In *Sierra Club* v. *Babbitt,* GBRA prosecuted a citizen suit to protect certain endangered species living in freshwater springs (such as the Comal Springs Dryopid beetle and the Texas Blind salamander). The plaintiffs successfully forced an entirely new regulatory agency to be formed to limit pumping of the Edwards Aquifer, a huge Texas aquifer and the source of the water for the freshwater springs. By limiting pumping of the groundwater aquifer, GBRA was able to ensure the springflows were maintained, which not only protected the listed species but, more importantly for GBRA, guaranteed high flows from the springs into the Guadalupe River. By using the ESA to maintain springflows, GBRA was able to guarantee freshwater in the Guadalupe River, from which GBRA could sell water from their own water permits. In short, GBRA was an active litigant under the ESA, using the ESA to manipulate policies of Texas groundwater.

Notably, the end result of *Sierra Club* v. *Babbitt* litigation was not a Federal takeover of Texas groundwater. Instead, the State created a new regulatory agency, the Edwards Aquifer Authority, and the U.S. Fish and Wildlife Service helped fund and facilitate a Recovery Implementation Program to bring together all the State agencies and local stakeholders. This led to a Habitat Conservation Plan (HCP) being developed. With the HCP, various stakeholders—including GBRA, State agencies, farmers, cities and industries—worked together to develop a solution to protect the springs and the species. In December 2012, the HCP for the Edwards Aquifer springs species was approved and a Section 10 Incidental Take Permit was issued by USFWS. This is exactly how people expected the HCP process to work.

Some of the claims made today about TAP's lawsuit to protect the Whooping Cranes are the same ones heard in the 1990s about GBRA's lawsuit to protect a beetle. The Edwards Aquifer story shows that, in Texas, the ESA can be implemented in the precise manner that Congress intended, and in a way that water users and the State agencies can all agree on and support. The outcome of *The Aransas Project* v. *Shaw* is similar. The judge ordered the Texas State officials to develop an HCP. This means that, similar to the HCP for the Edwards Aquifer springs species, many local stakeholders will come together to evaluate how to preserve adequate freshwater inflows in the rivers and to the bays to ensure the vitality and recovery of the Whooping Cranes. The Federal court did not tell the Texas

State officials how this should be done, but left it up to the Texas State officials—and other stakeholders, such as GBRA—to decide on the methods and details.

A Legitimate Federal Interest Exists in the Whooping Cranes

The Whooping Crane is an interstate and international species, migrating from Texas through seven States, to end up at their nesting grounds in Canada. Federal courts have upheld the ESA as a valid statute promulgated pursuant to the Commerce Clause. Moreover, the ESA also explicitly implements several international treaties including one with Canada to protect birds migrating between our two countries. The Whooping Crane was grandfathered into the ESA 40 years ago, and with that Federal protection and the help of dedicated conservation efforts, the species is slowly recovering from the low of 16 birds in the 1940s. Surely the Whooping Crane is a species deserving of our help and protection. Texas has shown in the past that when endangered species and water issues intersect, it is not fatal to either side. It is the ESA itself that provides the mechanisms to find solutions that at the same time preserve endangered species, jobs, economic growth, and recreation.

I thank the Subcommittee for the opportunity to submit this written testimony.

About The Aransas Project

www.TheAransasProject.org

The Aransas Project (TAP) is 501(c)(3) nonprofit organization that brings together an alliance of local governments, businesses, organizations, and citizens who want responsible water management of the Guadalupe River Basin to ensure freshwater flows to the bays and estuaries that it supports. These bays and estuaries provide critical habitat for the last freely migrating flock of endangered whooping cranes as well as serving as the lifeblood for coastal economies. TAP Members include Aransas County, Aransas County Navigation District, Town of Fulton, City of Rockport, International Crane Foundation, the Coastal Bend Guides Association and more.

TAP Member Organizations

The Aransas Project was founded by a diverse group of organizations who believe that the whooping cranes, the Texas coast and the freshwater of the Guadalupe River Basin are essential to our way of life.

Municipalities: Aransas County; Aransas County Navigation District; City of Rockport; Town of Fulton.

Political Organizations:; Aransas County Republican Party; Aransas County Democratic Club.

National/International Organizations: American Bird Conservancy; International Crane Foundation; The Whooping Crane Conservation Association.

Texas Organizations:; Aransas Bird and Nature Club; Audubon Texas; Coastal Bend Audubon Society; Coastal Bend Guides Association; Environment Texas; Galveston Bay Conservation and Preservation Association; Houston Audubon Society; Matagorda Bay Foundation; Travis Audubon Society; Texas Conservation Alliance.

Businesses:; Anthony's By the Sea; Aransas Bay Birding Charters; Casterline Fishing Company; The Crane House; C-Side Decorating; Durham & Associates; Falcon Group Sustainable Services; Hamilton A/C, Electric, and Plumbing, Inc.; James Fox Guide Service; Key Allegro Properties, LLC; Livin' On The Bay; MasterPlan Design; Pelican Rentals; PSpencer Consulting, LLC; Rockport Birding and Kayak Adventures; Ron Outen Associates, LLC; Scheumack Builders, L.P.; Scheumack Investments, Inc.Members

Individual Members

The Aransas Project enjoys the support of many individuals across Texas and beyond: Steven Abbey; Daniel Adams; Lorene Adkins; Lane Alison; Susan Alloway; Connie Ames; John H Anderson; Marilyn Anderson; Richard Anderson; Floyd Appling; Wes Appling; Charles Arand; Elaine Lockhart and Bill Arbon; Elayne Arne; Becky Arreaga; Jackie Arvantinos; Ruth Asher; Don Auderer; Candace Baggett; John Bagley; Michael Bagley; Bruce Baird; Sue Balderree; Chuck Baldwin; Shirley Ballard; Lynn Barber; Claire Barhnart; Keith Barrett; Cynthia Barrett; Lynn Baskind; Pam Bates; Pamela Bates; Jerry Beattie; David Bechtol; Mary Bechtol; Jean Beck; Luna Bell; Karen Bennoch; Lori Bennoch; Tom Berkenkotter; Ann Bird; Shirley Blackman; Clint Blackman; Billie Bliznak; Justin Bodin; Fred Boggs; Earle Bolks; Brenda Bonham; Melinda Bottino; Jaki Boyd; Marilyn Brien; Patty Brinker; V W Brinkerhoff III; Patti Brinkerhoff; Audra Brister; Carleen Brooks; Blair Brown; M. Lee Brown; Lana Brown; Judi Brownell; Jason Bruns; Pearlie Bushong; Don Butler; Bernie and Margie Calvo; Daniel Carey-Whalen; Linda Carey; Amanda Carr; Teresa Carrillo; Albert and Gigi Carrillo; Mary Cartwright; Michael Caserta; Re-

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Carter Crigler; Vickie Cross; Judy Crow; Susan Curtis; Jo Darnell; Dorman David; David Davidson; Richard Davila; Marilyn Davis Rabkin; Buddy Davison; Rusty Day; Robert Day; Angalee DeForest; Kenneth DeVito; Ken DeVito; Judy Deater; John and Audre Debler; Stacy Dial; Larissa Diaz; Malcolm Dieckow; Carol Dietrich; Pat Donohue; Lynn Drawe; Karen Dressel; Babs Driscoll; Irene Dubicka Christensen; Russell and Kate Dunnam; Dwayne "Bull" and Melinda "Mindy" Durham; Ernie Edmundson; Edward Eiland; Ed Escobedo; Patricia Fahrenthold; Cindy Farrell; Julie Findley; Jim Fiore; Kate FitzPatrick; Krystal Flores; Jack Floyd; William Forbes; Charles Ford; Frankie Fox; James Fox; T J Fox; Alison Fox; Linda Frank; Marc Fredson; Karen French; Johnny French; Phillip and Carol Frey; Ray Fribbie; Delia GARCIA; Rob Gaber; Peggy Gaines; Kathryne Garcia; Joan Garland; Gayla J. Gatling; Marie Gian; Richard Gibbons; Veronica Gileau; Linda Gill; Richard Gill; Ralph Gilster lll; Scott Gleesn; Paul Gonin; Jim and Carita Gould; Carolyn Gray; Michelle Green; Sheryl Green; Barbara Griffin; Kathy Griffith; Pam Guelker; A. Lee and Jane E. Guinn; Thomas Haase; Roxy Hale; Jonathan Halepeska; Carroll Hall; Harry Hallows; Thea Hamilton Wiley; Dr. Rick Hammer; Jeanne Hand; Flo Hannah; Linda and Jim Hargrove; Tracy Hargrove; Greg Harlan; Stephen Harrigan; Henry Harris III; Jay Haselwood; Dustin Haver; Bonnie Heckman; Larry and Pam Heidt; Nancy Henderson; John "Pete" Hendrick; Stuart Henry; Darryl Hill; Rachel Hirsh; Marcy Holloway; Henry and Nancy Holubec; Diane Homeyer; Rolf and Penelope Hong; Toby Hooper; John W. Huckabee; Diane and John Hushman; Lee Hutchinson; Fred Jackson; John Jackson; Don Jackson; Vicki Jamison; John Kimball; Mary L. Johnson; Al Johnson; Kathleen Johnson; Junie Johnstone; Jim Jones; Katherine Jones; Melinda Jones; Bill and Catherine Jones; Tim Jones; Todd Kocian; John Kafka; Matt Kafka; Duane Keilstrup; Thomas L. Keller; Ellen Kennard; Ray Kirkwood; Laura Knizner; Carol Koutnik; Eugenia Kowalik; Nancy Kraus; Malcolm Kriegel; Tom Kronke; Richard A. "Sandy" and Lorraine C. Kubek; Debbie Kucera; Gretchen Kuhn; Ethelyn Kuldell; Bob Kurtz; Richard Lamb; Jane Lamont; Fred Lanoue; Linda Lanoue; Marissa Latigo; Lynn Lee; Lawanda Lee; Adriana Leiva; Linda Lemmons; Tammy Lemoine; Roger Letz; George Levandoski; Laura Liles; Jason Loghry; Ron Long; Tyrrell Lourie; Diane Loyd; Tammy and Nick Lyons; Scott MacDonald; Tern MacDonald; Donald L. and Alice S. MacFarland; Carol Machacek; John Maresh; Mark Adler Mark Adler; Patricia Marshall; John Martell; Elisabeth Martensen; Kathleen Martin; Robert D. and Joann Martin; Paul Martinez; Lalise Mason; Michael Mauldin; Michelle McClendon; Chester McConnell; Sally McCoy; Mara McDonald; Sandy McNab; Patrick Mcdermott; Steve Melcher; Saul and Nicky Mercado; Tamara Merson; Operation Migration; Presley Miller; Kevin Mitchell; Marthanne Mitchell; Nita Moccia; Chris Moffitt; Maria E. Montoya; Daryl Moon; Matthew Moore; Patricia Moore; Ronald D. and Diane S. Moore; Tracy Morales; Bill Morgenstern; Brooks Mullen; Larry Myers; Susan Nenney; Anita O'Rourke; Linda Ogburn; Janssen Olthoff; Kathryn Orlans; David Outen; Russell Painton; M'lissa Parson; Claire Partin; Kay Past; Sheila Patterson; Shirley Paxton; Paul Pearcy; Rebecca Penland; Cassandra Perkins; Cat Perz; Virginia Pierce; Kelea Piper; Don Pitts; Caroline Pledger; Sally Ploeger; Jerrod Poffenberger; Mike Polk; Stephen Pollard; Janet Potter; Lynda Pouyer; Rachel Powers; Larry and Jeanne Prochnow; Danny Purcell; Paul R. Nelson; Leecia Rad; Bill Raduenz; Lucille Rainwater; Sam Ramos; John Ray; Campbell Read; James Reaves; Ann Reimer; Kathleen Reinhard; Ellen Reisinger; Deborah Repasz; Ronald Restrepo; Wanda Reynolds; Mike Rhyne; Leah Rhyne; Mike Richards; William Richter; Ty Riley; Rubi Rios; Linda Rippert; Clementina Rivera; Douglas Rives; Lewis S. and Linda Robinson, III; Antonio Rodriguez; Victoria Roller; Elizabeth Rosenauer; Lewis Rosenthal; Mary Rosin; Suzie Ross; Stacey Roussel; Bruce Russell; Janie Russell; Tom Ryan; Karen Lee Rystad; Irma Salinas; Andrew Samo; Bill Sandidge; Duane Scheumack; Vicki Schroeder; Janna Scott; Joyce Scott; Michelle Scott; Laurel Seth; Donna Setterbo; Linda Sheets; Jason Shen; Richard Shephard; Carolyn Shirley; John Shreves; J. Paul Sides; Michelle Simmons; James Smallenberger; Dr. Peter Smith; Andy Smith; Joann Smith; Charles Smith; Ron Smudy; Les Sorenson; Julie Sorenson; Patricia Speck; Jennifer Speights; Roxanne Sprehe; Devanie Stanner; Jamey Steen; Vicki Stephan; Rhonda Stephens; Charles Steward; Rhett Stuman; Jo Swann; Janet Taylor; William Taylor; Dolores Thoms; Sue Tidwell; James F. Tracy, Jr.; Billy Trimble; John U Turany; Terry Turney; Hector Uribe; Rigo Vallejo; Nancy Vandenberg; Alesha Vardeman Aulds; Cristina Velasquez; Eileen Vincent; David A. Wade; Kam and Scott Wagert; William J Wagner, jr; Stephen Wagster; Martha Wallace; Thomas Warren; John Warren; Noah Waters; Ann P Watson; Ron Watson; Allan Weber;

Scott Wehrung; Lorraine and Herb Weier; Capt. Chuck West; John Whaley; Tom and Janie White; Pat Wiggins; Patricia Wight; Renee Wiley-Edwards; Don Wiley; Jim Williams; Barry Williams; Debbie and George Williams; Evelyn Wilson; Sharon Wilson; Jan Wimberley; Mary Wollitz-Dooley; Michael Womack; Decker Womack; Leeann Wright; Phyllis Yochem; Dee Ytreeide; and Ken and Barbara Zaslow.

Mrs. NAPOLITANO. There are local communities like Fort Collins, Colorado. Many locals consider the Cache La Poudre River to be the lifeblood of Fort Collins community. The La Poudre River is a popular summer destination for fly fishing, white water rafting, tubing, and kayaking. As we will hear from testimony today, the economic impact of commercial river rafting in Colorado is approximately $151 million. The impacts of water on our localities cannot be understated.

I do find it rather ironic that while we are talking about protecting States' rights, just last year our Majority here in D.C. moved H.R. 1837, the Sacramento-San Joaquin Water Reliability Act. The legislation goes to the heart of the water supply by preempting any State or Federal law, including the public trust doctrine and possibly California water rights laws from reducing water supplies beyond those allowed in the Bay Delta Accord. The bill declared Federal supremacy over water management to protect assisting water rights throughout the system "despite three dozen letters in opposition, including from the States of California, Colorado, Wyoming, Oregon, and the non-partisan Western States Water Council."

Water is a public good. Water demands are only expected to increase. And water will become scarcer due to drought, also due to climate change. Instead of escalating the fights of an already dwindling resource, we need to be smarter on how we use our water. This includes investment in local water supplies, such as gains in efficiencies, water reuse and recycling, just to name a couple. As the stewards of this resource, we must recognize all the needs of the system and work together from the localities up to the Federal level to meet those needs.

But in meeting those needs we must consider all of the uses of the system. As former Chairman of the Natural Resources Committee, Mo Udall once said, "The more we exploit nature, the more our options are reduced, until we have only one: to fight for survival".

Thank you, Mr. Chair, and I look forward to the hearing and to the witnesses' testimony.

[The prepared statement of Mrs. Napolitano follows:]

PREPARED STATEMENT OF THE HONORABLE GRACE F. NAPOLITANO, RANKING MEMBER, SUBCOMMITTEE ON WATER AND POWER

Good morning, thank you to our witness for being here today.

Today's hearing features local perspectives on States' rights and Federal actions. The Federal Government has historically deferred to the States' authority to manage water resources within each State. We also know that water flows beyond State and political boundaries, as recognized by the Commerce Clause in our Constitution. This shows a clear Federal interest in the management of this public good: from navigation, recreation, flood control, and the protection of our environment.

We will hear arguments today about actions the Federal Government has taken to interfere with States' rights. We also will hear about what water means to our local communities. Water is the lifeblood of the West. Historically, water use in the

west was predominantly for agriculture. As the West evolved, the economies of our communities have also progressed to reflect our environmental values.

This includes local communities like Aransas County, Texas. The Aransas Chamber of Commerce said that in 2008, tourism bought $97.2 million into the country economy. The County estimated that 26 percent of its tax revenue comes from tourists, many who come for the Whooping Cranes. The U.S. Fish and Wildlife Service estimates that there are 50,000–80,000 visitors to the Aransas National Wildlife Refuge, with about $5 million in local spending each year. I would like to submit into the record testimony that outlines the local perspective from the Aransas Project. I would also like to include in the record a list of the Aransas Project Member organizations, which include both the Aransas County Republican Party and Democratic Club.

There are local communities like Ft. Collins, Colorado. Many locals consider the Cache la Poudre River to be the life blood of the Fort Collins community. The Poudre River is a popular summer destination for fly fishing, whitewater rafting, tubing, and kayaking. As we will hear from testimony today, the economic impact of commercial river rafting in Colorado is approximately $151 million. The impacts of water on our localities cannot be understated.

I do find it rather ironic that while we are talking about protecting States' rights, just last year, the majority moved H.R. 1837, the Sacramento-San Joaquin Water Reliability Act. *This legislation goes to the heart of the water supply issue by preempting "any" State or Federal law (including the public trust doctrine and possibly California water rights laws) from reducing water supplies beyond those allowed in the Bay-Delta Accord*. The bill declared Federal supremacy over water management to "protect existing water rights throughout the system," despite three dozen letters in opposition, including from the States of California, Colorado, Wyoming, Oregon, and the non-partisan Western States Water Council.

Water is a public good. Water demands are only expected to increase and water will become scarcer due to drought and climate change. Instead of escalating the fights on an already dwindling resource, we need to be smarter on how we use our water. This includes investment in local water supplies, such as gains in efficiencies, water reuse, and recycling. We also must continue to make tribal water rights settlements a priority.

As stewards of this resource we must recognize all the needs of the system, and work together from the localities up to the Federal level to meet those needs. But in meeting those needs, we must consider all uses of the system. As former Chairman of the Natural Resources Committee Mo Udall once said, "The more we exploit nature, the more our options are reduced, until we have only one: to fight for survival."

Thank you and look forward to hearing from our witnesses today.

Mr. McCLINTOCK. Well, thank you. It is customary for this Committee to recognize Members to make opening statements.

The Chair recognizes Mr. Tipton for 5 minutes.

STATEMENT OF THE HON. SCOTT R. TIPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. TIPTON. Thank you, Chairman McClintock, for holding today's hearing on what I consider to be one of the most critical issues facing the West and our way of life. I also want to thank our witnesses for making the trip to be able to testify. In particular, I would like to thank Geraldine Link from Colorado for her work on protecting water rights and ensuring a bright future for recreation in Colorado.

While folks from the East may find it difficult to be able to understand, many of my colleagues on this Committee need no reminder that in the West, State water law and rights and the rights that it protects are sacred to westerners of all political stripes. Our system of water law is what allowed for westward expansion, population of our cities and towns, the responsible use of our natural resources, and is today the bedrock of our livelihoods and domestic security.

In the fall of 2011 it came to my attention that the Forest Service was attempting to upend this long-held framework by requiring the relinquishment of private water rights as a conditional use of permit being obtained by our skiing areas. No compensation was to be offered for this act, and very little public notice was given about the policy.

At that time I wrote to Secretary Vilsack, urging him to retract the directive and to develop a water clause which would respect State law and the private water rights protected by it. Although the directive was struck down by the Federal district court due to the agency's failure to properly notify and engage the public, the Forest Service has again announced that it is going to attempt this onerous water grab, putting ski areas and recreational opportunities at immediate risk in the coming ski season.

In addition to seeking the relinquishment of water rights through ski area permits, the Forest Service has come up with new ways to attempt to take private water rights. I have in my hand the written testimony of Gary Derck, a local business owner in my district who operates the Durango Mountain Resort near Durango, Colorado. Although he has been a good steward of the environment and its water rights, the Forest Service has repeatedly denied him access to develop those water rights, jeopardizing his rights under State law. This is nefarious. It is coercive. And it has to stop.

This policy isn't limited to ski areas. The Forest Service has also been implementing a similar requirement for grazing permits in several Western States. Many of the ranchers I represent can't afford drawn-out, costly legal battles with the Forest Service to protect what is rightfully theirs under State law.

To add to this list of Federal threats to State water law, there have been recently issued by the Department of the Interior a Secretarial Order establishing the national blueways system, a source-to-mouth watershed-wide Federal program about which little is known, and which raised fears among many local water conservation districts who are already doing an outstanding job of managing precious water supplies.

The bottom line is this. We continue to see a trend of Federal intrusion into State water law, which protects all of these uses that we hold dear, from recreation to irrigation, domestic use, and environmental protection. To undermine this system is to create risk and uncertainty for all western water users.

This is not a political battle, it is a regional one. Water is the lifeblood of the West. I once again would like to commend the Chairman for bringing this issue forward. And with that, I yield back.

[The prepared statement of Mr. Tipton follows:]

PREPARED STATEMENT OF THE HONORABLE SCOTT R. TIPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Thank you Chairman McClintock for holding today's hearing on what I consider one of the most critical issues facing the West and our way of life. I also want to thank our witnesses for making the trip to testify; in particular I would like to thank Geraldine Link from Colorado for her work on protecting water rights and ensuring a bright future for recreation in Colorado.

While easterners may find it a little difficult to understand, many of my colleagues on this Committee need no reminder that in the West, State water law and the rights it protects are sacred to westerners of all political stripes. Our system

of water law is what allowed for westward expansion, the population of our cities and towns, the responsible use of our natural resources, and is today, the bedrock of our livelihoods and domestic security.

In the fall of 2011 it came to my attention that the Forest Service was attempting to upend this long held framework by requiring the relinquishment of private water rights as a condition to obtain a ski area permit. No compensation was to be offered for this act, and very little public notice was given about the policy. At that time I wrote to Secretary Vilsack urging him to retract the directive and develop a water clause which would respect State law and the private water rights protected by it. Although this directive was struck down in Federal district court due to the agency's failure to properly notify and engage the public, the Forest Service has announced that it is going to attempt this onerous water grab once again, putting ski areas and recreational opportunities at immediate risk in the coming ski season.

In addition to seeking the relinquishment of water rights through ski area permits, the Forest Service has come up with new ways to attempt takings of private water rights. I have in my hand the written testimony of Gary Derck, a local business owner in my district who operates Durango Mountain Resort near Durango, Colorado. Although he has been a good steward of the environment and his water rights, the Forest Service has repeatedly denied him access to develop those water rights, jeopardizing his rights under State law. This is nefarious and coercive and it has to stop.

This policy isn't limited to ski areas. The Forest Service has also been implementing a similar requirement for grazing permits in several Western States. Many of the ranchers I represent can't afford drawn-out and costly legal battles with the Forest Service to protect what is rightfully theirs under State law. To add to the list of Federal threats to State water law is the recently issued Department of the Interior Secretarial Order establishing the National Blueways System; a "source to mouth, watershed-wide" Federal program about which little is known and which has raised the fears of many local water conservation districts who are already doing an outstanding job of managing precious water supplies.

The bottom line is this: we continue to see a trend of Federal intrusion into State water law which protects all of the uses we hold dear, from recreation to irrigation, domestic use and environmental protection. To undermine this system is to create risk and uncertainty for all western water users. This isn't a political battle, it's a regional one. Water is the lifeblood of the West. I once again commend the Chairman for bringing this issue forward.

Mr. MCCLINTOCK. Thank you. If there are no other opening statements, we will now hear from our panel of witnesses. Each witness's written testimony will appear in full in the Committee record, and I would ask that witnesses keep their oral testimony to 5 minutes, as outlined in the invitation letter to you, and also under the Committee rules.

Our timing lights are very simple. When you begin to speak, the clerk will start the timer at 5 minutes. The green light will go on and you will see your life then slowing slipping away until that final minute when the yellow light goes on. And at red we need to ask you to conclude.

And with that, I will recognize Mr. Bill West, General Manager of the Guadalupe-Blanco River Authority from Seguin, Texas, to testify.

STATEMENT OF WILLIAM E. "BILL" WEST, JR., GENERAL MANAGER, GUADALUPE-BLANCO RIVER AUTHORITY, SEGUIN, TEXAS

Mr. WEST. Mr. Chairman, thank you for the opportunity to testify before you today. I am Bill West, General Manager of the Guadalupe-Blanco River Authority, a river authority created in Texas by the legislature in 1933. The district is situated between the high-growth area of San Antonio and Austin, the 16th and 12th most populated cities in the United States, respectively. I would

address your attention to Attachment A in your packet. There is a map of the State of Texas. You see from the north to the south, the I–35 interstate; from the west to the east, I–10 interstate; and then the watershed of the Guadalupe Basin between those two metropolitan cities.

GBRA has among its statutory duties to control, store, and preserve the surface water and the groundwaters of the district, and develop those supplies for the needs of the district. We are a State reclamation district. GBRA is involved in construction, operation activities, raw water service, water treatment, wastewater dams, irrigation canals, power plants, and so forth.

The southwestern area of the United States has experienced a protracted drought in recent years, and a significant portion of the area that makes up GBRA is under a multi-year drought that in its intensity has exceeded the drought of record, which is the drought of the 1950s. Obviously, drought affects both humans and wildlife.

Over the years, GBRA has been working hard to develop other supplies, primarily through surface water rights it holds on the Guadalupe, the development of groundwater, and the long-term possible desalination of the Gulf of Mexico.

But GBRA not only has been devoting limited resources to develop new supplies to serve constituents of this fast-growing area, it has also been forced by the simple filing of a citizens suit under ESA to spend an enormous portion of its available resources to defend and retain the water rights it holds that are needed for its constituents. We have spent over $6 million to date on the trial.

GBRA's efforts to fulfill its mission are being needlessly complicated by an ESA citizen suit brought in the Federal district court. The suit was filed on March 2010 by plaintiffs in the Aransas project, known as TAP, a non-profit organization that was created for the purpose of bringing the litigation, and it is funded largely by a wealthy Texas oil and ranch family. The wealthy family objected, was to block GBRA from providing surface water to a proposed power plant located adjacent to the family's property. What started out as a typical NIMBY, or not-in-my-backyard suit, through the misuse of ESA, to stop a power plant has evolved into a classic misuse of ESA on many levels, including, but not limited to the reliance by the plaintiff on poor science and inappropriate use of 501(c)(3) organization.

TAP's complaints allege that TCEQ, the State entity, violated the provision of Section 9 of the ESA. TAP contends that during the 2008 and 2009 drought, it reduced the amount of fresh water reaching the coastal marshes, causing salinity to rise so high in the San Antonio Bay that the whooping cranes in the Aransas National Wildlife Refuge were unable to find sufficient food, water, and allegedly led to the death of 23 cranes.

During the winter of 2008 and 2009, only two crane carcasses were found and two piles of feathers. The alleged death of 23 cranes was based on airplane flyovers where birds that were not seen were assumed to be dead. Birds that were not seen were assumed to be dead. There is no proof of the 23 birds, and the number of whooping cranes that returned the next year confirms that there was a normal number of deaths the previous winter. Even

U.S. Fish and Wildlife has disavowed the previous methodology accepted by the court for counting the birds and determining mortality.

Yet, on March 11, 2013, the Federal district court held that TCEQ caused the whooping crane deaths by issuing water permits that allowed diversions, and ordered TCEQ to immediately stop issuing water permits on the Guadalupe and San Antonio Basin. The judge also ordered the State immediately engage in the costly planning process duplicative to the current State programs. The opinion involves several novel ESA theories and important, broad implications.

Then, on March 26th, the fifth circuit stayed only 24 hours after the appeal by the TCEQ and GBRA. The endangered whooping crane need and have protection for their continued recovery. But they should not be used as pawns for special interest. The ESA, in particular the citizens suit provisions, need to be amended to avoid unintended consequences that have developed over the years.

Thank you, members of the Committee, for the opportunity to address you. I will be happy to respond to any questions that you might have.

[The prepared statement of Mr. West follows:]

PREPARED STATEMENT OF WILLIAM E. "BILL" WEST, JR., GENERAL MANAGER, GUADALUPE-BLANCO RIVER AUTHORITY OF TEXAS

Thank you for the opportunity to testify before you today on Federal intrusion into States' rights using the Endangered Species Act (ESA). I am Bill West, general manager of the Guadalupe-Blanco River Authority of Texas. The GBRA, as it is called, was created in 1933 by an act of the Texas Legislature.

GBRA has a 10-county statutory district that covers an area of more than 6,600 square miles and includes the majority of the 432-mile Guadalupe River, which many of us in Texas consider to be the prettiest little river in Texas. Our area also includes the 90-mile Blanco River, the 75-mile San Marcos River and other tributaries. The 10-county district is situated between and serves the high-growth corridor from San Antonio to Austin, the 6th and 12th most populous cities in the United States respectively. A March 18, 2013, article in *Forbes* magazine noted, "Growth momentum has shifted decidedly toward Texas. Austin's population expanded a remarkable 3 percent last year, tops among the Nation's 52 largest metro areas. Three other Lone Star metropolitan areas—Houston, San Antonio, Dallas-Fort Worth—ranked in the top six and all expanded at roughly twice the national average." **[See Attachment A]**

GBRA is a service provider, not a regulatory entity, governed by a board of nine directors who are appointed by the Governor and confirmed by the Texas Senate. The organization cannot levy or collect taxes, assessments, or pledge the general credit of the State of Texas. GBRA has among its statutory duties to control, store and preserve surface water resources of its district; to conserve, preserve and develop underground waters within the district; to acquire water, water supply facilities and storage capacity; and to use, distribute and sell those waters.

To fulfill its duties, GBRA is involved in numerous and diverse planning, development, construction and operational activities. In addition to other operations, GBRA has raw water reservoir operations, water treatment plants, wastewater treatment plants for municipalities and other developers, water transmission pipelines, canals for water delivery for agricultural uses at farms and ranches, several dams and hydroelectric operations, and power plant cooling reservoir operations.

GBRA's primary water supply reservoir is Canyon Reservoir, which is situated in the district between Austin and San Antonio. Canyon's permitted water supply of 90,000 acre-feet annually is fully committed through contracts with municipalities, developers and other customers.

The southwestern area of the United States has experienced a protracted drought in recent years. Texas, and in particular a significant portion of the area of Texas that makes up GBRA is suffering under a multi-year drought that in its intensity has exceeded the drought of record of the 1950s. Drought, of course, affects the river flow. During drought conditions in 2008–2009 for example, the Guadalupe River

flow on December 14 at the gauge in Victoria, Texas, was 431 cubic feet per second compared to its median flow of 1,030 cubic feet per second during times when rainfall is normal. Obviously, droughts impact both humans and wildlife.

Over the years, GBRA has been working hard to develop other water supplies, primarily through surface water rights it holds on the Guadalupe River, the development of groundwater and, in the long-term, possible seawater desalination on the Gulf of Mexico. But GBRA not only has been devoting its limited resources to develop new water supplies to serve the constituents of this fast-growing area, it also has been forced, by the simple filing of a citizens suit under the ESA, to spend an enormous portion of its available resources to defend and retain the water rights it holds that are needed to develop new supplies.

GBRA's efforts to fulfill its mission are being needlessly complicated by an ESA citizens suit (case # 2:2010cv00075, brought in Federal district court in Corpus Christi). The suit was filed in March 2010 by plaintiff "The Aransas Project" or TAP, a non-profit organization that was created for the purpose of bringing the litigation and that is funded largely by a wealthy Texas oil and ranch family. The wealthy family's objective was to block GBRA from providing surface water to a proposed power plant located adjacent to the family's property in Victoria County.

What started as a typical "Not in My Back Yard" or NIMBY through the misuse of the ESA to stop a power plant has evolved into a classic misuse of the ESA on many levels, including but not limited to reliance by the plaintiff on poor science and inappropriate use of 501(c)3 organizational formation.

TAP's complaint alleged that the Texas Commission on Environmental Quality (TCEQ) violated the "taking" provision of Section 9 of the ESA (prohibiting any activity that kills or harms a listed species or that destroys its habitat) merely by permitting water rights in accordance with State law as TCEQ has for decades. TAP contends that during the 2008–2009 drought, a reduced amount of fresh water reaching the coastal marshes caused the salinity to rise so high in San Antonio Bay that whooping cranes wintering at Aransas National Wildlife Refuge were unable to find sufficient food and water, allegedly leading to the deaths of 23 whooping cranes that winter. Because the remedy sought through this lawsuit could mean reallocating water rights on the Guadalupe River, the GBRA immediately filed to intervene as a defendant intervener, and in April 2010, the Federal judge issued an order granting GBRA's motion to intervene. After other denied motions to intervene went through appeals, defendants ultimately were comprised of the TCEQ, GBRA, the San Antonio River Authority, and the Texas Chemical Council. The City of San Antonio (the 6th most populous city in this country), City Public Service (the electric power arm of the City of San Antonio), the Texas Farm Bureau, and the American Farm Bureau all were denied intervention in this critically important case. The U.S. Fish and Wildlife Service was noticeably absent.

When one speaks of endangered species, particularly a species as iconic as the whooping crane, it evokes strong emotions that can impede constructive discussion on the subject. GBRA is proud of its efforts to research and protect the endangered, majestic whooping crane that winters on the Texas coast along the edges of the Guadalupe River Basin. In 2001, long before TAP existed, GBRA founded the Guadalupe-Blanco River Trust to conserve land in the watershed and one of the joint projects established a more reliable water supply in the Refuge where the whooping cranes winter. GBRA and the San Antonio River Authority and other entities, including in-kind support from the U.S. Fish and Wildlife Service (USFWS), funded a 7-year, $2 million study of whooping crane diet, behavior and habitat. Texas A&M University researchers conducted that study and presented the findings in April 2009. GBRA also was instrumental in establishing the San Antonio Bay Foundation to serve as a vehicle for the protection and preservation of the bay and estuary system at the end of the Guadalupe River Basin. As a result of the efforts of the USFWS, the Texas Parks and Wildlife Department, GBRA and other agencies, data show the population of the Aransas Wood Buffalo flock—the world's only naturally migrating flock of whooping crane—has steadily progressed over the years from a low of 15 in the 1940s to nearly 300 today.

While TAP's lawsuit alleged 23 whooping crane deaths, only two whooping crane carcasses and two partial carcasses were found during 2008–2009—a loss of whooping cranes more consistent with the expected number of deaths over a given winter. The alleged death of 23 whooping cranes was based on airplane flyovers where birds that were not seen were assumed to be dead. There is no proof of 23 deaths, and the number of whooping cranes returning for the next winter (2009–2010) confirms that there was a normal number of deaths the previous winter. The method of determining mortality argued in the lawsuit was so flawed that at best the high number reflected birds moving around so much that year that they could not be found. Even the USFWS has disavowed the previous methodology accepted by the court for

counting the birds and determining mortality in the winter of 2008–2009 and previous winters.

Yet, on March 11, 2013, the Federal district court judge held that the TCEQ caused the death of 23 whooping cranes by issuing water permits that allowed diversions and ordered TCEQ to immediately stop issuing water permits on the Guadalupe and San Antonio rivers. The Judge also ordered the State to immediately engage in a costly planning process that is duplicative of current State programs. The opinion and involves several novel ESA theories with important broader implications.

First, the district court concluded that the Texas water-rights permitting scheme was preempted by the ESA and the Supremacy Clause of the U.S. Constitution. This is a potentially far-reaching conclusion to the extent it suggests various State permitting programs, including oil and gas permitting by State agencies, must consider and enforce the ESA in policy areas traditionally reserved for State and local decision-making. The effect of the decision, if it stands, is to essentially impose on the TCEQ, a State agency, a Section 7-type consultation process, which otherwise applies in the ESA explicitly to Federal agencies only.

Second, the district court concluded that proximate causation can exist under the ESA even when a defendant government agency indirectly authorizes an activity that does not inherently cause take. The district court's finding that TCEQ proximately caused take by implementing a water permitting program is significant precedent for groups challenging permitting schemes indirectly leading to take of endangered species, including State and Federal agency programs that permit oil and gas projects.

Third, the district court's 125-page opinion stretched statistical evidence beyond its limits to support its conclusion that TCEQ's regulatory scheme for issuing water-rights permits caused the deaths of 23 whooping cranes. The court's ultimate conclusion on causation involved several faulty scientific findings for each part of a multi-link causal chain leading from TCEQ's water permitting scheme to the purported death of the birds. For example, there was significant doubt whether 23 birds had even died, let alone that they did not die from other natural causes such as extreme local drought (extremely low rainfall on the whooping cranes' habitat). In this case, correlations were equated to causation. The district court's findings on causation suggest even the most attenuated State regulatory decisions could be successfully challenged under the ESA.

Finally, by enjoining all new water rights permits, unless those permits meet certain court-supervised conditions, and ordering the TCEQ to seek an Incidental Take Permit and associated Habitat Conservation Plan within 30 days, the court ordered an extraordinary and expensive remedy for the alleged death of 23 cranes. Similar court-supervised injunctions and costly remedial actions could be ordered for other agencies.

Both the TCEQ and the GBRA filed notices of appeal and requests to stay the district court order. GBRA's motion specifically noted that the district court's order would have irreparable harm on hydraulic fracturing operators in the Eagle Ford Shale needing new water rights permits.

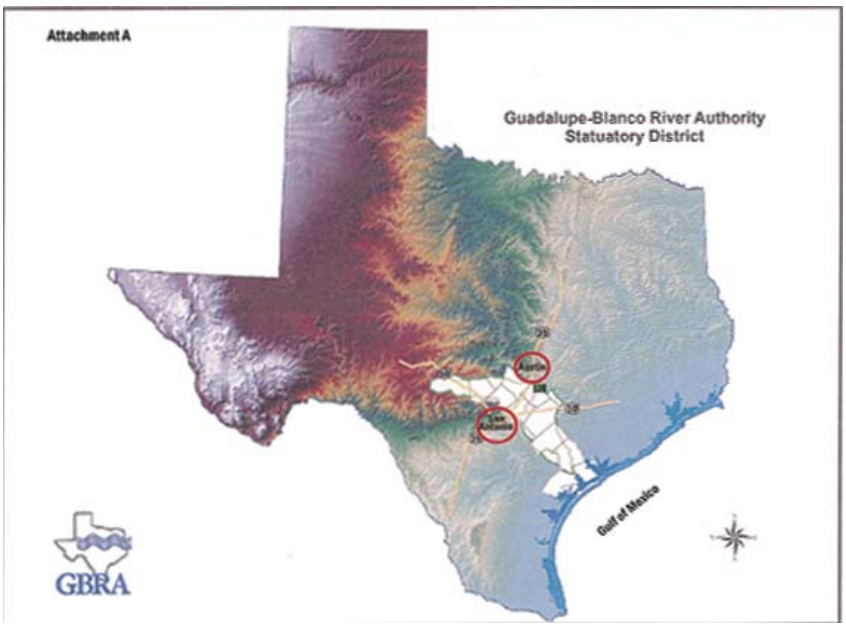
On March 26, 2013, a panel of three judges from the United States Court of Appeals for the Fifth Circuit stayed the U.S. District Court ruling in *The Aransas Project (TAP)* v. *Shaw,* barely 24 hours later.

Appellants are pleased that the Fifth Circuit agreed that appellants were likely to succeed on the appeal and we are hopeful that the Court ultimately will vacate the district court's order and reverse.

The lower court ruling had enjoined the TCEQ from issuing any water rights permits on the Guadalupe or San Antonio rivers, except as required for public health and safety, which would seriously disrupt economic development in a growing part of Texas.

Policies and regulations based on unproven and potentially false premises are not the way to govern. The State's water resources must be shared for many uses, including population growth, agricultural productivity, environmental needs and economic development. Parties that bring these suits ought to have legitimate, not just plausible, interests in the results of such a case. The citizens suit provision should be reviewed and modified. It is particularly troubling to have a system where a novel and extremely disruptive ESA enforcement judgment is allow to occur without the USFWS even being a party to the case. Endangered whooping cranes need and have protection for their continued recovery, but they should not be the pawns for special interests. The ESA—in particular the citizens suit provision—needs to be amended to avoid the "unintended consequences" that have developed over the years.

Members of the Committee, thank you again for this opportunity to testify regarding this case of Federal intervention into State's rights—specifically the State's surface water rights and its ability to issue permits. I will be happy to address any questions you might have.



Mr. McCLINTOCK. All right, thank you very much, Mr. West.

I now recognize Ms. Geraldine Link, Director of Public Policy for the National Ski Area Association, which is based in Lakewood, Colorado, to testify.

STATEMENT OF GERALDINE LINK, DIRECTOR OF PUBLIC POLICY, NATIONAL SKI AREAS ASSOCIATION, LAKEWOOD, COLORADO

Ms. LINK. Thank you for the opportunity to testify today on behalf of the National Ski Areas Association. NSAA has 121 ski area members, and they operate on national forest system lands under a special use permit. They occupy, or they are located in 13 different States. And the majority of skier visits in the United States occur at these public land ski areas.

The ski industry collectively generates $12.2 billion in economic activity annually, and public land ski areas, again, are over half of those visits in the United States Collectively, ski areas have invested hundreds of millions of dollars on water rights to support and enhance their operations. Water is crucial to ski area operations, and ski area water rights are considered valuable assets to ski area owners. Water is crucial to the future growth of ski areas, and the future growth of the ski areas impacts the rural economies that depend on them greatly.

Ski areas are also major employers in those rural economies, employing 160,000 people and help drive job creation. I would like to address how draconian Forest Service water clauses that require

transfer of ownership of water rights negatively affect a ski area's bottom line and, ultimately, jobs in rural economies.

Forest Service water clauses that demand transfer of ownership to the United States substantially impair the value of these ski area assets. In the short term, the taking of these assets by the Government could cause a ski area to go into default on a loan, for example, because water rights are assets, they are pledged as collateral on loans. Their removal could result in violation of debt equity ratios or other loan covenants.

In the long term, these clauses hinder a ski area's ability to obtain access to capital for growth and expansion, again, lowering the valuation of the ski area's assets. They create uncertainty with respect to the resort's ability to make adequate snow and operate successfully in the future, because the United States won't guarantee that our water, once in their name, will continue to be used for snow-making or other resort operations.

Most importantly, these types of water clauses provide a huge disincentive for ski areas to acquire more water rights in the future. Ask yourself this question: Why would a ski area invest any more on water rights in the future if those water rights are going to be taken by the Government? It would not be a sound business practice to do so. If ski areas stop investing in water rights in the future, the outlook for the rural economies dependent on them would be bleak.

The Forest Service has started a new public process to develop a ski area water rights clause. The agency states over and over again in its announcements on this process that the objective is to sustain ski areas and the rural economies dependent on them. However, a Forest Service policy that takes water from ski areas will have the absolute opposite effect. It will not sustain ski areas and rural economies; it will stifle the growth and expansion that help fuel job creation in rural and mountain economies.

Just last week, in conjunction with the Forest Service's new public process on water rights, the ski industry offered a new approach to a ski area water clause. The new approach would address the Forest Service's concerns about having sufficient water for the future, but it does not involve government seizure of private assets.

Briefly, we offered a two-part framework, one that ski areas would demonstrate for future projects which require water for implementation, that sufficient water would be available to support those projects; and two, upon the sale of a ski area, resorts would provide an option to purchase water rights at fair market value to a successor ski area.

As a condition of this new approach, all previous water clauses issued by the agency must be expressly declared unenforceable and null and void, and would be removed from ski area permits. Ski areas are offering this approach because it demonstrates the agency doesn't need to own the water rights to meet its stated objectives.

In closing, I would like to point out that the Forest Service has an opportunity to boost rural economies by moving forward with policy on four-season use of ski areas. Four-season use was approved by Congress in 2011. It will allow ski areas to become four-season employers. We still don't have a draft policy on summer

uses, and we are 17 months out from passage of the legislation. So we are calling for a reversal of priorities. Our message to the agency: Focus on four-season uses, and stop trying to take our water rights.

Thank you for your consideration.

[The prepared statement of Ms. Link follows:]

PREPARED STATEMENT OF GERALDINE LINK, DIRECTOR OF PUBLIC POLICY, NATIONAL SKI AREAS ASSOCIATION

Thank you for the opportunity to testify today on behalf of the National Ski Areas Association. NSAA has 121 member ski areas that operate on National Forest System lands under a special use permit from the U.S. Forest Service. These public land resorts accommodate the majority of skier visits in the United States and are located in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Hampshire, New Mexico, Oregon, Utah, Vermont, Washington and Wyoming. The ski industry generates $12.2 billion in economic activity annually, and public land ski areas accommodate 60 percent of the skier/snowboarder visits in the United States.

Collectively, ski areas have invested hundreds of millions of dollars on water rights to support and enhance their operations. Water is crucial to ski area operations and ski area water rights are considered valuable assets to ski area owners. Water is crucial to future growth of ski areas, and that future growth directly impacts the rural economies associated with ski areas. Ski areas are major employers in rural economies, employing 160,000 people, and help drive job creation in rural and mountain economies.

I would like to address how draconian Forest Service water clauses that require transfer of ownership of water rights negatively affect a ski area's bottom line—and ultimately jobs in rural economies.

USFS water clauses that demand transfer of ownership of ski area water rights to the United States substantially impair the value of these ski area assets. In the short term, the taking of these assets by the Government could cause a ski area to go into default on a loan because water rights are assets, and their removal could result in violation of debt/equity ratio loan covenants. In the long term, they hinder a ski area's ability to obtain access to capital for growth and expansion in the future by lowering the valuation of the ski area's assets. They create uncertainty with respect to a resort's ability to make adequate snow and operate successfully in the future, because the United States won't guarantee that our water, once in their name, will continue to be used for snowmaking and resort operations. Most importantly, these types of water clauses provide a disincentive for ski areas to acquire more water rights in the future. Ask yourself this question: why would a ski area invest any more on water rights in the future if they are going to be taken by the Government? It would not be a sound business practice to acquire assets that are going to be taken away from you. If ski areas stop investing in water rights for the future, the outlook for the rural economies dependent on them would be bleak.

The Forest Service has started a new public process to develop a ski area water clause. The agency states over and over again in its announcements on this process that the objective is to sustain ski areas and the rural economies dependent on them. However, a Forest Service water policy that takes water from these private parties will have the absolute opposite effect. It will not sustain ski areas and rural economies, it will stifle the growth and expansion that help fuel job creation in rural and mountain economies.

Just last week, in conjunction with the Forest Service's new public process on water rights, the ski industry offered a new approach to a ski area water clause. This new approach would address the Forest Service's concerns about having sufficient water for the future, but does not involve Government seizure of assets.

Briefly, we offered a two part framework:

(1) Ski areas will demonstrate for future projects which require water for implementation that sufficient water is available to support the projects. This would be a part of the review and approval process going forward for proposals that include on mountain facilities or snowmaking;

(2) Upon sale of a ski area, resorts will provide an option to purchase at fair market value sufficient water to reasonably run the ski area to a successor ski area owner. If the successor ski area declines to exercise such option, the ski area would

offer it to the local government; if the local government declined to exercise the option, the Forest Service would have the option to buy the water.

As a condition of supporting this approach, all previous water clauses must be expressly declared unenforceable, superseded, and null and void, and would be removed from every ski area permit.

Ski areas are offering this alternative approach because it demonstrates that the agency doesn't need to own the water rights to meet its stated objectives. We are also tired of the politicization of water and the uncertainty that is created as policies shift from administration to administration. The uncertainty that we have lived with in our day to day operations for decades is not good for business. We need certainty in order to plan for our future and achieve a high level of growth. It is for these reasons that we offer this alternative. Make no mistake, however, that if the agency ignores our alternative approach and proceeds to issue yet again a water policy that unlawfully takes our water rights, we will challenge that policy in Federal court, and we will prevail.

In closing, I would like to point out that the Forest Service has an opportunity to boost rural economies by moving forward with policy on four-season use of ski areas. Four season use was approved by Congress in 2011. It will allow ski areas to become four season employers and expand their businesses greatly in the summer months. We still don't have a policy from the Forest Service, and the reason is that we are objecting to the agency's water policy. Congress gave the agency 18 months to come up with regulations and policy under the Recreational Opportunity Enhancement Act of 2011, and next month is the 18th month since passage of the bill. We have not even seen a draft of this policy, and a final policy is not expected until at least a year from now. We need a reversal of priorities here in order to boost rural economies. The message to the agency is this: focus on four season uses, and stop trying to take our water rights.

Thank you for your consideration of this testimony.

Mr. McCLINTOCK. Great. Thank you very much, Ms. Link.

I now recognize Mr. David Costlow, Executive Director of the Colorado River Outfitters Association, which is based in Buena Vista, Colorado, to testify.

STATEMENT OF DAVID COSTLOW, EXECUTIVE DIRECTOR, COLORADO RIVER OUTFITTERS ASSOCIATION, BUENA VISTA, COLORADO

Mr. COSTLOW. Mr. Chairman, members of the Committee, I am Dave Costlow, Executive Director of the Colorado River Outfitters Association, also known as CROA. My organization represents approximately 45 commercial rafting and float fishing outfitters throughout the State of Colorado.

To give you a little background, river outfitters in Colorado took rafters and anglers on trips that accounted for 496,000 user days in 2011. Rafting days primarily occur during the very short season of mid-May to August. So because the season is short, it is imperative for outfitters to be planned, trained, and ready for business come May. If we consider that in 2011, those use numbers, each boat had a guide and there was an average of 6 customers per raft, 2011 produced a total of 83,000 guide days, which, for summertime Colorado is a considerable number of work days.

Based on data compiled for us annually by Joe Greiner and Jody Werner, the economic impact of commercial rafting in Colorado in 2011 was approximately $151 million. In comparison, the 1988 data indicate the impact to be $36 million. So there has been tremendous growth in my industry over the last 23 years.

This past 2012 season, Colorado experienced a severe drought. Whereas previously mentioned, 2011 had close to one-half million user days, this past year, 2012, we saw a 17 percent reduction to

411,000 user days. This was a major hit for most outfitters, and affected job opportunities for guides, reservationists, bus drivers, et cetera.

I have included table 1, which is displayed, to show the number of user days by river. If we were to—I am not sure we can really read that very well, but if we could look at the cell for the 2012 column, and where the Poudre River comes across there, you will see there is a dramatic decrease in user days in 2012 compared to 2011. This was the river corridor that suffered from the highly publicized High Park fire last June.

So, the river was closed for 3 weeks. It reopened right at the peak of the 2004 tourist season. But because no outfitter knew when it was going to be reopened, they hadn't really been booking people. There was nobody on the books to go rafting. Once the river reopened, they had to quickly ramp up efforts to regain their market share. They had just begun regaining some of the market when they experienced the effects of drought, the reservoirs ran low, river levels dropped, and they began turning away customers again.

The Arkansas River, one of the most rafted rivers in the world, had a 19 percent decrease in business due to decreased water flows. So, water and rivers are important to an industry like mine.

In Colorado, most all raftable rivers are located near small mountain towns. They are not located near the metropolitan area. Small businesses in these rural towns greatly benefit from the boating industry, both through commercial rafters and private rafters that appear. And the towns themselves gain through the receipts of sales tax dollars. So when flows are down, so are their receipts.

To help maintain protectable flow, my organization has attempted to engage in negotiations on a number of fronts. For example, about 7 years ago the Bureau of Land Management was considering stretches of the Upper Colorado River for designation under the National Wild and Scenic Rivers Act. A local stakeholder group formed, and it was formed to consider alternative approaches. The local group includes the entities that are shown here in table 2.

The group attempted to solve a number of competing issues for use of the river's resources. The overall goal is to protect the outstanding, remarkable values that have been identified in the eligibility reports for the BLM.

Another cooperative agreement exists on the Arkansas River. That is the one I mentioned, one of the most rafted rivers in the world. On this river there is a voluntary flow program in place to coordinate water releases aimed at moving water to benefit recreational boating and the fishery. The voluntary flow program simply tries to maintain some consistency in the flow, so as to avoid wild fluctuations that might otherwise occur.

My time is about up, so this concludes my testimony before this Committee. I invite any questions you might have.

[The prepared statement of Mr. Costlow follows:]

PREPARED STATEMENT OF DAVID COSTLOW, EXECUTIVE DIRECTOR, COLORADO RIVER OUTFITTERS ASSOCIATION, BUENA VISTA, COLORADO

I am David Costlow, the Executive Director of the Colorado River Outfitters Association (CROA), an organization representing approximately 45 commercial rafting and float fishing outfitters in the State of Colorado. To give you a little background, river outfitters in Colorado took rafters and anglers on trips that accounted for 496,000 user days in 2011. Rafting days primarily occur during the months from mid-May to August. The rafting season in Colorado is short so it is imperative for outfitters to be planned, trained and ready for business come May. If we consider that in 2011 each boat had a guide and that there was an average of 6 customers per raft, 2011 produced a total of 83,000 guide days, which is a considerable number of work days.

Based on data complied annually by Joe Greiner and Jody Werner (2013), the economic impact of commercial river rafting in Colorado is approximately $151 million. In comparison, in 1988, the data indicate the impact to be $36 million so there has been tremendous growth in the industry over 23 years. River rafting in Colorado is big business.

Over the last few years, the industry has been affected by declines in consumer spending, changes in market segments, changes in tourism travel, forest fires, and drought conditions. This past 2012 season, Colorado experienced a severe drought. Whereas previously mentioned, 2011 had 496,000 user days, 2012 saw a 17 percent reduction to 411,000 user days. This was a significant hit for most outfitters and affected job opportunities for guides, reservationists, bus drivers, etc. I have included Table 1 showing the number of user days by river. Please look at the cell for the 2012 column and the Poudre River row. You will see a dramatic decrease in user days compared to 2011. The full name of this river is the Cache la Poudre and it is the only federally designated Wild and Scenic River in Colorado. This is the river corridor that suffered from the highly publicized High Park fire last June. The river was closed for 3 weeks. It reopened right at the peak of the July 4th tourist season, but because no one knew when it would reopen outfitters were continuously turning away customers. Once the river opened they had few reservations on the books and had to quickly ramp up efforts to regain their market. Then, just a few weeks later, they experienced the effects of drought as the reservoirs ran low and river levels dropped. They again began turning away customers.

The Arkansas River, one of the most rafted rivers in the world, had an almost 19 percent decrease in business due to decreased water flows. Water in rivers is important to the recreation industry.

In Colorado, most all raftable rivers are located near the smaller mountain towns not the metropolitan areas. Businesses in these rural towns benefit greatly from the boating industry by way of expenditures and the towns themselves gain through the receipts of sales tax dollars. When flows are down so are revenues.

Returning to Table 1 you will notice a few interesting things. For the row labeled Colorado-Glenwood you will see that user days rose from approximately 44,000 in 2011 to 64,000 in 2012. For the row Colorado-Upper a similar pattern appears. This is a result of outfitters shifting business to rivers with predictable water flows due to reservoir releases. If you look at the row labeled Clear Creek you will see a drop in user days from over 60,000 in 2011 to just over 35,000 in 2012. Clear Creek has no appreciable water releases to aid the rafting season.

To help maintain predicable water flows, CROA has engaged in negotiations on a number of fronts. About 7 years ago, the Bureau of Land Management (BLM) was considering stretches of the Upper Colorado River for designation under the National Wild and Scenic Rivers Act. A local stakeholders group was formed to consider alternative approaches. The local group includes the entities shown in Table 2. You will see that this list encompasses a number of trans-mountain water diverters, county governments, Vail Resorts, Trout Unlimited, American Whitewater (representing private boating interests), and CROA, among others. This group has attempted to resolve a number of competing issues for use of the river's resources. The overall goal is to protect the Outstanding Remarkable Values (ORVs) that have been identified in the Eligibility Reports for the BLM. I think you will find this approach will quickly become the preferred alternative for local communities struggling to manage limited water resources. If the Stakeholder Plan is adopted by the BLM as the preferred alternative in its upcoming Management Plan revisions, a Governance Committee consisting of 6 interest groups will manage for the ORVs. A more detailed Briefing Paper for the Upper Colorado River Stakeholder Group Management Plan (Alternative Wild & Scenic Stakeholders Group, *2012)* is attached.

Another cooperative agreement exists on the Arkansas River. On this river there is a voluntary program in place to coordinate water releases aimed at moving water to benefit recreational boating and the fishery. The voluntary flow program simply tries to maintain some predictable consistency in the flow to avoid the wild fluctuations that might otherwise occur. The Arkansas River Outfitters Association (AROA), Trout Unlimited, Southeastern Water Conservancy District, Colorado Parks and Wildlife, Aurora Water, Colorado Springs Water and the Bureau of Reclamation, among others are participants in these voluntary flow efforts.

This concludes my testimony before this committee. I invite any questions you might have.

Mr. MCCLINTOCK. Thank you, Mr. Costlow.

I now recognize Mr. Reed Benson, Keleher and McLeod Professor at the University of New Mexico School of Law in Albuquerque, New Mexico, to testify.

STATEMENT OF REED D. BENSON, KELEHER AND MCLEOD PROFESSOR, CHAIR, NATURAL RESOURCES COMMITTEE, UNIVERSITY OF NEW MEXICO SCHOOL OF LAW, ALBUQUERQUE, NEW MEXICO

Mr. BENSON. Thank you, Mr. Chairman, members of the Committee. My name is Reed Benson. I am a law professor at the University of New Mexico. The views I offer today are solely my own, and I appreciate the chance to present them to the Water and Power Subcommittee.

Federal water law in the West goes back more than a century, even before the Reclamation Act and the Winters decision on reserve water rights. But States have primary authority over water allocation, especially as to water rights. The Western States chose the prior appropriation doctrine, which recognizes proprietary water rights based on the application of water to a beneficial use. Such rights normally last forever, and the oldest rights get top priority in times of shortage, potentially taking all the available water.

The system has always valued putting water to work over preserving natural systems, and emphasized private rights over public uses. It is often said that State water law gets deference under Federal law. That is, that the national government has let the States decide how they will allocate and manage water. But there are several areas where Federal water law does not defer to State law, but instead, establishes Federal rules that protect important national interests. These areas include navigation, interstate allocation, Federal and tribal reserve rights, and hydropower development. Congress has also protected national interests through the environmental laws, including the Endangered Species Act.

The ESA has been controversial, as applied to western waters, and there are several places where it is still the focus of major disputes. Water users feel it doesn't respect their rights. Fish advocates believe Federal officials aren't doing enough. States believe it gives them too little say in key decisions, and Federal agencies feel caught between their usual missions and their Section 7 duties. When it comes to water and endangered species, there is plenty of frustration to go around.

Still, the Endangered Species Act plays a vitally important and necessary role in the context of western waters, because it asserts publicly supported values that get little protection under other Fed-

eral and State water laws. The ESA gets criticized for being single-minded and hard-nosed. But the same can be said of prior appropriation. The water laws are tough. And in order to bring some semblance of balance to the system, the ESA has to be tough, as well.

The ESA is crucial for three main reasons. First, State water laws provide little assurance that environmental water needs will actually be met. By the time the States enacted laws allowing for water to be protected in its natural course, many rivers were already fully allocated and heavily developed. Most Western States now recognize instream flow rights, but where such rights exist they mostly protect what flows are left, and don't work to restore depleted rivers.

Second, no other Federal law makes the environment a real priority in the operation of existing Federal water projects. The Bureau of Reclamation has no general authority or statutory direction for environmental restoration, and operates many projects under an old set of water rights, contracts, and authorizing statutes that have never accounted for environmental concerns. And despite the serious impacts of its projects, Reclamation rarely does NEPA reviews on operating decisions. For addressing environmental impacts of Federal water projects, there currently is no substitute for the ESA.

Third, the ESA has often catalyzed cooperative efforts that probably would not have happened without it. Some of the best examples are the established recovery implementation programs, or RIPs, which provide for ongoing water use in development, while also taking steps to benefit listed species. These programs have effectively given seats at the ESA table to States and stakeholders, as well as Federal agencies, and delivered reliable ESA compliance for many years without disrupting water operations.

It is certainly fair to question whether these programs are doing enough for listed species, and also important to note that this approach has not caught on everywhere. But the RIPs have shown that the ESA can be implemented in a way that States and water users can support.

Unfortunately, Reclamation's river restoration projects are driven almost entirely by the ESA. This kind of tunnel vision means that Federal environmental efforts focus too narrowly on the needs of listed species where they do exist, and largely overlook those places where they do not exist. I would urge Congress to broaden that focus and direct Reclamation to consider environmental recreational interests at all its projects.

Westerners want to see healthy, free-flowing rivers, listed species or no. And the law governing Federal water projects should address that concern. But given the law as it is, the ESA remains highly important and absolutely necessary. Thank you.

[The prepared statement of Mr. Benson follows:]

PREPARED STATEMENT OF REED D. BENSON, KELEHER AND MCLEOD PROFESSOR, CHAIR, NATURAL RESOURCES COMMITTEE, UNIVERSITY OF NEW MEXICO SCHOOL OF LAW, ALBUQUERQUE, NEW MEXICO

Good morning, Chairman McClintock and members of the Committee. My name is Reed D. Benson, and I serve as Keleher and McLeod Professor at the University of New Mexico School of Law. I have studied, practiced, or taught water law for

many years, in several different parts of the Western United States, and I have written extensively on the application of Federal law to water resources in the West. I emphasize that the views I offer today are solely my own, and I appreciate the invitation to present them to the Water and Power Subcommittee.

The Federal Government has been a major player in western water development since 1902, when the Reclamation Act authorized the U.S. Interior Department to construct and operate irrigation projects in 16 Western States. Throughout the 20th century Congress revised and broadened the mission of the Bureau of Reclamation, which now operates hundreds of projects throughout the West. These projects have provided the Nation with important benefits, including irrigation, hydropower, and public water supply (including drinking water for my home city of Albuquerque). These benefits have come at a high cost, however, in Federal tax dollars and in other ways, such as harm to aquatic ecosystems, impacts to Indian tribes, and loss of river recreation.

Federal water law, however, goes back even further than the Reclamation Act. The National Government has always had full power over navigation, and the Supreme Court decided as early as 1899 that the United States could block construction of an irrigation dam in the West that might impair navigation on the lower Rio Grande. The Court in that case also recognized the power of the National Government to ensure water supplies for Federal lands, and later defined that power in the *Winters* case and other decisions recognizing reserved water rights for tribal and Federal reservations. Around that same time the Supreme Court decided that Federal law required States to share equitably the benefits of interstate waterways, rejecting Colorado's argument that States had complete and unlimited sovereignty over their water resources. Thus, Federal law has imposed significant limits on State authority, and potentially on the exercise of State-law water rights, for over a century.

Despite these Federal limits, States have retained primary authority over water allocation, especially in establishing and recognizing rights to use water. In the West, the States (with certain exceptions) chose the prior appropriation doctrine for allocation and management of their water resources. Prior appropriation recognizes proprietary water rights based on application of water to a "beneficial use;" such water rights normally last forever, and the oldest rights get top priority in times of shortage, potentially taking all the available water to the detriment of junior users. The system has always valued "putting water to work" over preserving natural systems, and emphasized private rights over public uses of water. Across much of the West today, many rivers are over allocated under existing rights, new uses often find it difficult and expensive to secure water supplies, and environmental water needs have low priority.

It is often said that State water law gets "deference" under Federal law—in other words, that the National Government has always let the States decide how they will allocate, develop, and manage water resources. That conventional wisdom is largely myth, because there are many areas where Federal law does not simply defer to State law, but instead establishes Federal rules that protect important national interests. These areas include navigation, interstate allocation, and Federal and tribal reserved rights, as mentioned above. The National Government has also built multipurpose water projects and promoted hydropower development over State objections. More recently, Congress has established strong legal protection for national interests through the environmental laws, including the Clean Water Act and the Endangered Species Act.

The Endangered Species Act has been controversial as applied to western waters, and there are several places where the ESA has been the focus of major disputes, including the Klamath Basin, the Middle Rio Grande in New Mexico, and the California Central Valley. I understand that some water users are resentful and angry at what they see as Federal policy that gives priority to fish over farmers. Fish advocates, including many whose livelihoods are tied to healthy populations, have their own complaints: they often see Federal officials as striving harder to preserve *status quo* water operations than to restore fish runs. State officials often feel they get too little say regarding water and wildlife—resources they generally see as theirs to manage. When it comes to water and listed species, there is plenty of frustration to go around.

Still, the Endangered Species Act plays a vitally important and necessary role in the context of western waters. The ESA requires serious attention to environmental values that many people care deeply about, but which otherwise get little protection under Federal and State water laws. The ESA often gets criticized for being single-minded and hard-nosed, but the same can be said of prior appropriation. The water laws are tough, and in order to bring some semblance of balance to the system, the ESA has to be tough as well.

The ESA is crucial for three main reasons. First, State water law generally provides little assurance that environmental water needs will be met. In the West, States provided no legal mechanism for protecting instream flows until the latter part of the 20th century, by which time many rivers were already fully allocated and heavily developed. (The fact that so many of the West's native fish species are threatened or endangered is one indication of how dramatically we have altered aquatic ecosystems, and how little water law has protected them.) Where they exist today, legal protections for instream flows have relatively recent priority dates, leaving them ineffective as against senior rights. Most Western States now see fish, wildlife, and recreation as beneficial uses, and several have fairly robust instream flow programs, but those programs mostly protect what flows are left and don't work to restore degraded rivers. My State of New Mexico has no instream flow statute *per se;* there is a very modest program that allows a State agency to acquire water rights for instream use, but only for limited purposes, including efforts to preserve ESA-listed species—or keep species from being listed.

Second, no other law besides the ESA makes environmental restoration a real priority in the operation of existing Federal water projects. Congress has enacted some project-specific legislation in western river basins, but the Bureau of Reclamation has no general authority or statutory direction for environmental restoration. And because it built nearly all of its projects before 1970, Reclamation today operates largely under a set of water rights, contracts, and project authorizing statutes that were adopted with little or no regard to environmental concerns. If Reclamation regularly did environmental reviews under NEPA regarding project operations, that would at least require some public involvement and consideration of alternatives, and would create the possibility—though not the requirement—of beneficial changes. Reclamation generally operates projects without conducting NEPA reviews, however, leaving no official process for environmental or recreational interests to weigh in. In short, for addressing ongoing environmental impacts of Federal water projects, there is currently no substitute for the ESA.

Third, the ESA has often catalyzed cooperative programs or agreements for water and ecosystem management that probably would not have happened without it. Examples appear all over the West, from the Klamath Basin to the Missouri River to the Edwards Aquifer. Some of the best-known examples are the established Recovery Implementation Programs, which provide for ongoing water use and development while also taking steps to benefit listed species. These programs have effectively given seats at the ESA table to States and stakeholders as well as Federal agencies, and have delivered reliable ESA compliance for many years without disrupting water operations. These are surely some key reasons why the last Congress passed H.R. 6060 with strong bipartisan support, ensuring ongoing funding for the Upper Colorado and San Juan RIPs. It is certainly fair to question whether these programs are doing enough for listed species, and also important to note that the ESA remains hotly controversial in some places. But the RIPs have shown that the ESA can be implemented in a way that states and water users can support.

In my view, the problem is not that the ESA has too much power over water in the West. The problem is that no other general environmental statute has much power at all, at least as to existing water projects, leaving the ESA alone to force Federal agencies to address environmental impacts and promote restoration. This is not true in some places, especially California, where laws such as the Central Valley Project Improvement Act and Section 5937 of the State Fish & Game Code have worked to provide water for environmental needs. With rare exceptions, however, Reclamation's river restoration projects are driven almost entirely by the ESA. This tunnel vision means that Federal environmental efforts focus too narrowly on the needs of listed species where they do exist, and largely overlook those places where they do not exist. I would urge Congress to broaden that focus and direct Reclamation to consider environmental and recreational interests at all its projects. Westerners want to see healthy, free-flowing rivers regardless of the presence of listed species, and the law governing Federal water projects should address that concern.

The basic challenge in the West has always been too many demands on too little water, and that challenge is only getting tougher on both sides of the equation. One of those demands today is for enough water to keep our rivers flowing and functioning, even as those rivers are asked to sustain irrigation, cities and other users. The ESA gives real legal muscle to those demands, and that is important in a field that is otherwise dominated by prior appropriation and old-school reclamation laws. I would like to see Congress make the ESA less central in this field by giving Reclamation legal authority to address more environmental concerns in more places. But given the law as it is, the ESA remains highly important and absolutely necessary.

Thank you for the opportunity to testify, and I would be happy to answer any questions.

Mr. MCCLINTOCK. Thank you, Mr. Benson. The Chair now yields to the gentleman from Utah, Mr. Bishop, for an introduction.

Mr. BISHOP. Thank you, Mr. Chairman. I need to catch my breath for a second. I am pleased to be able to introduce Mr. Randy Parker from the Utah Farm Bureau Federation, who is here with us today. He does a great job in my State. His organization represents 27,000 families. It equates to about 70,000 jobs in the State of Utah. And the economy that is produced from the farmers of the State of Utah agriculture is about 14 percent of the GDP of my State.

So I appreciate him being here. He knows well the significance of water for both agriculture and recreation, especially in the ski areas we have in Utah. If he has not included a written statement called, "The Federal Water Grab Expands to Ski Resorts" in his record, I would ask unanimous consent to have the article written by Mr. Parker included in the record.

Mr. MCCLINTOCK. Without objection.

[The information submitted for the record by Mr. Bishop follows:]

[From the Utah Farm Bureau News, February 2013, Vol. 59 No. 1]

FEDERAL WATER GRAB EXPANDS TO SKI RESORTS

(By Randy Parker, Chief Executive Officer, Utah Farm Bureau Federation)

The ski industry and western ranchers have found something in common. The Federal Government through the United States Forest Service wants both their water. Last year, when the Forest Service issued new rules demanding ski resorts operating on forest permits hand over part or all their water to the United States or risk losing their permits, the resorts cried foul—and sued!

Sound familiar? It should. Farm Bureau has locked horns with the Forest Service in recent years as the Federal agency has aggressively moved to acquire more water rights across Utah. Ranchers, like ski resorts. Mining and a few other Federal land-dependent industries all operate under a similar creed—without a Federal permit and without water, there is no business!

Ownership of water originating on Federal lands has been in a long running battle and the catalyst for Government claims and lawsuits across the West. Livestock producers have been embroiled in philosophical and legal battles for generations. Grazing and the ability to put historic livestock water rights to beneficial use are tied directly to access and the grazing permits issued by the Federal Government agencies. However, according to Nevada Federal District Court Judge Robert C. Jones, anybody who is of school age or older knows "the history of the Forest Service in seeking reductions in AUMs (Animal Unit Months) and even elimination of cattle grazing during the last four decades."

So, what's Federal Government's agenda? Reduced cattle on the public lands? Ownership of more western water? Greater control over the western public lands and natural resources? Or all of the above?

Ranchers have squabbled with the Forest Service for years over their ability to develop and/or maintain livestock water rights on forest lands. Regional Forest Service policy dictates that the United States must own the water or an interest in the water before allowing the grazers a permit to develop or maintain their water right. Even if the development is paid for by the rancher, ownership of the water project is claimed by the Forest Service. This policy is a clear violation of Utah State law and an infringement on sovereignty, private water rights and the ability to put the water to beneficial use.

Last year the ski industry was added to the western water skirmish. The Forest Service issued new rules requiring ski resorts permitted on public lands to give up their water rights. Ski resorts across the West were threatened with losing their permits if they didn't provide the Forest Service with joint ownership of their water and agreement to voluntarily turn over their water rights if their permits were ter-

minated. And the icing on the cake, the Forest Service demanded the ski industry waive any claim against the United States for compensation for their lost water rights.

Sounds a little like highway robbery! Jesse James and Butch Cassidy would be proud.

Like livestock ranchers, many ski resorts across Utah and the West own their water rights on the national forests. For stockmen, access and water are critical to exercising the livestock grazing preference protected in the 1934 Taylor Grazing Act. For the ski industry, assurance of access and water rights are critical to snow-making and the economic viability of their resorts and hotels. Certainty is critical to maximizing Utah's "Greatest Snow on Earth" and continuing to attract skiers from around the world.

Those who enjoy skiing and those who enjoy a good steak or lamb chop should be united and outraged at this Federal Government overreach! A grazing association in Tooele County last spring was asked to sign over water rights to the Forest Service or risk not being allowed to "turn out" their cattle onto their historic Forest allotments.

For more than three decades, Nevada cattleman Wayne Hage battled the Forest Service over phantom grazing reductions and seized water rights dating back to the 1860s. Hage ultimately won $4.2 million in his "takings" lawsuit, but sadly died before seeing a penny. In Idaho, the Forest Service sued the Joyce Livestock Company claiming their livestock water rights were the property of the United States because of its ownership and control of the public lands. The Idaho Supreme Court found that United States "did not actually apply the water to beneficial use" therefore had no right to the water.

In December, in a landmark water rights decision (*National Ski Areas Association* vs. *U.S. Forest Service*), Judge William Martinez of the Colorado Federal District Court joined the Joyce and Hage decisions in protecting privately held water rights. The court slammed the Forest Service for not following a uniform policy on water rights for decades and not considering the impacts on small businesses as required by the Regulatory Flexibility Act. The Court ordered the Forest Service to vacate its "Water grab" rule. In addition, the Court forbade the rules enforcement nationwide. This ruling is important to 121 ski resorts operating on National Forest lands in 13 States, including Utah.

It's sad to realize this adversarial relationship between the power hungry central Government and the sovereign States takes years—or even decades—and millions of dollars in legal costs to protect against the tax payer funded attacks of Federal bureaucrats on western water rights!

Mr. BISHOP. And I am just grateful for him being here. Both the State legislature as well as the Farm Bureau delegates passed a resolution this last year dealing with this issue, basically asking the Federal Government to respect States and to knock the crap off.

With that, I am pleased to hear the testimony from Mr. Parker.

STATEMENT OF RANDY N. PARKER, CHIEF EXECUTIVE OFFICER, UTAH FARM BUREAU FEDERATION, SANDY, UTAH

Mr. PARKER. Thank you, Congressman. And thank you, Mr. Chairman and Committee members. It is a great opportunity to be here with you today. I am Randy Parker, CEO of the Utah Farm Bureau. Utah Farm Bureau and American Farm Bureau represent more than 6 million member families across America. And we are calling on the Federal Government to honor State water laws and property rights.

To discuss impediments to water rights as it relates to livestock, it is important to note that Congress numerous times has declared water sovereign to the States. The act of July 26, 1866, the Taylor Grazing Act, and FLPMA, all in one way or another have said the States are to control their waters. Furthermore, Congress says nothing in these acts shall diminish or impair possession, or the

States' determination of beneficial use of their water. But this is not what is happening.

Mark Twain once said, "Whisky is for drinking, water is for fighting," and that seems to be what is happening in the Western States. The Forest Service is engaged in a State-specific strategy that aggressively seeks ownership of livestock water rights, and therefore, greater control of the public lands.

After FLPMA ushered in a new management era for the Federal agencies, they began to challenge ranchers who grazed livestock on Federal lands for generations, and to ignore the history, culture, and local economies, as they challenged State water law and prior appropriation.

Nevada's Hage family found the Forest Service was over-filing on their water rights that went back to 1866. To defend against this action and to protect their water rights, the Hages were forced to sue the Federal Government. That case took more than two decades to come to completion. In Idaho, the Forest Service claimed that because the Federal Agency owns and controls the land that they grazed on, the livestock water rights on those grazing allotments belonged to the United States. The Joyce family in Idaho disagreed. That case took more than a decade to get figured out. In both of these cases, the ranching families prevailed on critical points of law, access and ownership, but only after years of costly, protracted litigation.

I will note that those families paid for the litigation, while the Forest Service relied on the taxpayers for those 30 years of courtroom battles.

In August of 2008, the Forest Service, in a guidance document, seemed to establish policy that runs contrary to congressional intent. It reports the agency has secured thousands of water rights on Federal lands from livestock, and it provides a step-by-step instruction guide for forest employees on how to acquire livestock water rights in six Western States.

In Utah, the Forest Service has been pretty aggressive. They have challenged State law, and they have forced livestock permitees to sign over water rights. The Forest Service has filed more than 16,000 diligence claims on water involving every grazing allotment in the State. They claim that because the livestock producers grazed on that land before statehood, the United States now owns that—or owns those water rights today.

Because Utah allows the Federal Government to own water, they are bullying ranchers into joint ownership. In one case in Tooele County, Utah, they told permitees that they needed to sign forms to give the Forest Service greater control, or they would risk the turnout of their cattle that spring on the Forest Service allotments.

Utah's forfeiture laws require water be placed to beneficial use. But the Federal agents determine use of the allotment, whether the permittee can develop his water, or, ultimately, the number of cattle. If they don't—if those producers don't put that water to beneficial use, the State will pull that right back. If the State takes that back because of a Federal Government action, the inside track for reappropriation goes to the Forest Service. In this scenario, and the fact that the Federal Government has filed on 16,000 claims in Utah, tees up a battle ranchers face every day.

For over 150 years, water in the West was a matter of life and death. Today it is a matter of economic life and death. Congress has the power to assure the Federal agencies honor sovereign water rights, and especially in these public land States that have a history of putting their water to beneficial use. Thank you, Mr. Chairman.

[The prepared statement of Mr. Parker follows:]

PREPARED STATEMENT OF RANDY N. PARKER, CHIEF EXECUTIVE OFFICER, UTAH FARM BUREAU FEDERATION, SANDY, UTAH

Mr. Chairman and Subcommittee members:

The Utah Farm Bureau Federation is the largest general farm and ranch organization in the State of Utah representing more than 27,000 member families. We represent a significant number of livestock producers who use the Federal lands for sheep and cattle grazing. Livestock ranching is an important part of the historic, cultural and economic fabric of the State of Utah and major contributor to the State's economy. In the second most arid State in the Nation, water was and is our limiting factor.

Utah food and agriculture contributes to the State's economic health and provides jobs to thousands of our citizens. Utah farm gate sales in 2012 exceeded $1.6 billion. Utah State University analyzed the forward and backward linkages to industries like transportation, processing, packaging and determined food and agriculture are the catalyst for $17.5 billion in economic activity, or about 14 percent of the State GDP, and provides employment for more than 70,000 Utahans.

As water has historically been developed in the West, it was for the production of food and fiber. According to the Utah State Engineer, farmers, ranchers and agriculture interests own and control 82 percent of Utah's developed water. The landscape of the West is changing with growing populations west-wide and Utah is one of the fastest growing States in the Nation. With nearly 70 percent of Utah owned and controlled by the Federal Government, sovereignty and State control of our water resources is critical to food production and security, growth and our economic future.

Utah Farm Bureau delegates in November 2012 adopted policy that calls on the Federal Government to "not claim ownership of water developed on Federal land." In addition, Farm Bureau policy calls for "State control of water rights, stock water rights to be held by the individual grazing permittee and protection against Federal encroachment on State waters."

HISTORY

Scarcity of water in the Great Basin and Southwest United States led to the development of a system of water allocation that is very different from how water is allocated in regions graced with abundant moisture. Rights to water are based on actual use of the water and continued use for beneficial purposes as determined by State laws. Water rights across the west are treated similar to property rights, even though the water is the property of the citizens of the States. Water rights can be and often are used as collateral on mortgages as well as improvements to land and infrastructure.

The arid west was transformed by our pioneer forefathers through the judicious use of the precious water resources. Utah is the Nation's second most arid State, second only to Nevada. For our predecessors, protecting and maximizing the use of the water resources was not only important, it was a matter of life and death.

The timeless quote attributed to Mark Twain, "Whiskey is for drinking, water is for fighting over," vividly describes the reality of water in the West whether protecting one's water from an eager neighbor who takes his irrigation water-turn earlier than prescribed or Federal agents who have identified a course of action that challenges water ownership and the sovereignty of State water laws.

The United States Congress passed the Act of July 26, 1866 [subsequently the Mining Act of 1866] that became the foundation for what today is referred to "Western Water Law." The act recognized the common-law practices that were already in place as settlers made their way to the western territories including Utah. Congress declared:

Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts,

the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but when ever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (43 U.S.C. 661)

This act of Congress obligated the Federal Government to recognize the rights of the individual possessors of water, but as important, recognized "local customs, laws and decisions of State courts."

Western water law or the "doctrine of prior appropriation" governs the use of water in many of the States in the West. The fundamental principle embodied in the doctrine of prior appropriation is that while no one may own the publicly owned resource, persons, corporations or municipalities have the right to put the water to beneficial use any defined by State law. For purposes of beneficial use, the allocation of right rests in the principle of "first in time, first in right." The first person to use the water is the senior appropriator and later users are junior appropriators. In Utah, and across the arid West, this principle protects the senior water right priority for this scarce and valuable resource.

To put the water to beneficial use, the appropriator makes application to the State to divert that right in water from its natural course. Beneficial uses are determined by State legislatures generally including livestock watering, irrigation for crops, domestic and municipal use, mining and industrial uses.

The rights of the States to govern water has been recognized by generations of Federal land management agencies as well and the United States Congress.

FOREST SERVICE ESTABLISHED

In 1907, Gifford Pinchot, "father" of the United States Forest Service (USFS) and the First Chief Forester explicitly reassured western interests in the agency's "use book" noting that water is the sovereign right of the State. Pinchot declared, ***"The creation of the National Forest has no effect whatever on the laws which govern the appropriation of water. This is a matter governed entirely by State and Territorial law."***

BUREAU OF LAND MANAGEMENT ESTABLISHED

On July 28, 1934, Congress passed the Taylor Grazing Act, establishing what is now known as the Bureau of Land Management (BLM). Again recognizing the Act of 1866 and common law use of the water resources, grazing permits were issued based on past use "to those within or near a district who are land owners engaged in the livestock business, bona fide occupants or settlers or owners of water or water rights, . . ." Further, the Taylor Grazing Act stated, ***"nothing in this Act shall be construed or administered in a way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing and other purposes . . ."***

ABANDONMENT OF THE HISTORIC OBLIGATION

With passage of the Federal Land Policy Management Act (FLPMA) in 1976, the historic relationship between Federal agencies, State and local governments and grazing permittees took a dramatic change of course. The U.S. Forest Service and the Bureau of Land Management began a resource management planning process for grazing allotments. As part of the new Congressional authority granted the Federal land management agencies, the USFS and BLM began to administratively formulate new grazing and water policies. FLPMA now required agency permission. Holders of livestock water rights who needed to develop or maintain a water impoundment or structure on Forest land was now required to apply for and obtain a special use permit from the Forest Service. Permits to water rights last a prescribed term. The Forest Service may or may not re-issue the permit and may impose different conditions.

This exercise of greater authority by agency personnel ushered in an era of conflict and distrust of the USFS and BLM. The Federal agents ignored or openly repudiated the principles of prior appropriation and sovereign water rights that had been in place since settlement of the American West.

When conflicts arose, the courts generally upheld the United States right to control, regulate and even revoke the ability to use its land for the purpose of accessing State appropriated water rights!

In a letter dated June 29, 1984, Robert H. Tracy, Director of Watershed and Air Management for the U.S. Forest Service stated nine reasons why his agency needed to control the water and why stock water rights should remain on the land rather

than with the ranchers holding the grazing permits. This quantifies a transition by the USFS toward a more hostile course of action as the Federal agency deals with the following generations of the western settlers.

Confrontation between Federal land managers and livestock grazing interests became a part of doing business for permittees. Mostly, those with sheep and cattle grazing permits capitulated to the force of the Federal agents and the courts. Cuts in grazing permits and the Federal agencies accumulating suspended use grazing permits became common place in Utah and across the West.

Most permittees, but not all, heeded the warning that to fight the Federal Government is futile. Few had the financial resources to engage in what the Federal agencies assured livestock permittees would be a costly and protracted legal battle. The ranchers were and continue to be at a decided disadvantage to the tax-payer funded deep Federal pockets and army of agency lawyers they would meet at trial.

A pattern has emerged out of the Federal land management agencies that disregards, ignores or even displays distain for what the First Chief Forester and the Taylor Grazing Act specifically cites and recognizes as a sovereign right of the States.

INTERMOUNTAIN REGION—U.S. FOREST SERVICE
Authorization of Western Water Grab

National and Intermountain Region Forest Service policies authorize and instruct agency personnel on the "establishment of water rights in the name of the United States" and have provided guidance and "State Specific Considerations" outlining the steps to obtain a livestock water right.

Historic commitments and statutory obligations have been set aside for decades. Forest personnel have been filing on water rights and making diligence claims in Utah for the past 50 years. The arrogance to honoring State water sovereignty is outlined in the United States Code (Title 16, Chapter 2 National Forests, Subchapter I Establishment and Administration, Section 526 Establishment and Protection of Water Rights) provides guidance on the agency's willingness to challenge sovereign water rights in the Western States:

"There are authorized to be appropriated for expenditure by the Forest Service such sums as may be necessary for the investigation and establishment of water rights, including the purchase thereof or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in connection with the administration and public use of the national forests".

In an August 15, 2008 Briefing Paper, Regional Forester Harv Forsgren explained the "United States, through the Forest Service, has filed thousands of claims for livestock water on Federal lands. The Forest Service in the Intermountain Region has filed or holds in excess of 38,000 stock water rights . . ."

The briefing paper continues, "In recent years, ranchers and community leaders have contested ownership of livestock water rights. Some ranchers believe that they should hold the water rights because their livestock actually use the water. Land management agencies, such as the U.S. Forest Service, have argued that water sources used to water livestock on Federal Lands are integral to the land where the livestock grazing occurs, therefore the United States should hold the water rights."

Intermountain Regional Forester Forsgen in agency guidance issued on August 29, 2008 referenced USFS policy (FSM 2541.03 and FSM 2541.32) and directed his personnel as follows:

". . . obtain and maintain water rights as needed for Forest Service purposes under State and Federal law in the name of the United States. Livestock grazing, by its nature requires water. Sustainable livestock grazing is a valid and important use of National Forest System lands. Approximately 70 percent of those lands with the Intermountain Region are within livestock allotments. To ensure the continued viability of the Federal livestock grazing program, the United States, through the Forest Service, has secured thousands of livestock water rights on Federal lands pursuant to State law. The United States cannot obtain livestock water rights via Federal law . . ."

*The Intermountain Region of the U.S. Forest Service includes Utah, Nevada, Southern Idaho and Western Colorado.

UTAH

Recognizing the need to protect the State's water and to protect proven livestock water rights on Federal land, ranching interests sought help from the Utah Legislature. In 2008, House Bill 208, Livestock Water Rights Act was passed by the Utah Legislature. The legislation was designed to recognize grazing permittee's water

rights while protecting the State's water as appurtenant to the land. (Utah Code Title 73 Chapter 3 Section 31) Water Right for Watering Livestock on Public Land States:

"A livestock water right is appurtenant to the allotment on which the livestock is watered."

The most compelling argument that the Forest Service must insure the availability of livestock water for a viable Federal grazing program was addressed by Utah policymakers.

The conflict for the Forest Service came in two parts in Subsection (5) that authorized the Utah State Engineer to issue a certificate of livestock water right only to a defined beneficial user and abandoned or forfeited livestock water rights would be held by the State of Utah:

(1) *"the beneficial user of a livestock watering right is defined as the grazing permit holder for the allotment to which the livestock watering right is appurtenant."*
(2) *". . . be held by the Utah State Department of Agriculture and Food (UDAF)."*

The State Engineer manages beneficial use of the State's water. UDAF, as livestock water rights custodial, can manage inventoried rights for livestock permittees to assure the State livestock water use policy on Federal lands is in harmony with Forest Service and BLM grazing mandates.

However, the State inadvertently defined "beneficial user" as the *"person that owns the grazing permit"* without specifying who owns the livestock necessary to put the livestock water right to beneficial use!

The Regional Forester jumped on the legislature's error and broad definition of permit ownership arguing they are the person that owns the grazing permit.

The Regional Forester has submitted a grazing permit for each active allotments in the State of Utah to the State Engineer and ***shown that the USFS is the owner of the permit.*** The State Engineer has issued nearly 500 livestock water certificates to the USFS for these allotments. The Regional Forester recognized these certificates are not water rights, but notes in the August 29th guidance that, "Until a court issues a decree accepting these claims, it is not know whether or not these claims will be recognized as water rights." It appears the USFS has already teed up a legal challenge to State sovereign water rights seeking to change livestock water certificates into U.S. Forest Service water rights.

New Intermountain Region Forest Service Guidance—August 29, 2008

Citing Intermountain Region policy (R–4 FSM 2241) proclaiming that the Forest Service must have a water right on a source before funds are expended on the ground or construction begins on any livestock water development or facility as defined in regulations (36 CFR 222.9(b)(2)).

The Regional Forester issues a prohibition to livestock water rights with private funds if the water right is solely owned!

Guidance states: "The Intermountain Region will not invest in livestock water improvements, nor will the agency authorize water improvements to be constructed or reconstructed with private funds where the water right is held solely by the livestock owner."

As an outcome of the State issuing livestock water certificates, the Forest Service threatened the State that without the United States being able to hold an ownership interest in the livestock water, they would be unable (or unwilling) to allow livestock permittees with livestock water rights to access, develop or maintain the water on Federal lands.

Following the threats by Regional Forester Forsgren, in 2009 the Utah Livestock Water Rights law was amended as follows:

"On or after May 12, 2009, a livestock watering right may only be acquired by a public land agency jointly with the beneficial user."

The 2009 action also amended out of the law the State's obligation to hold vacated livestock water rights at the Utah Department of Agriculture and Food.

The USFS now has State law allowing joint ownership of a Utah Livestock Water Certificate.

Tooele County Grazing Association

In the Spring of 2012, livestock grazing permittees meeting with the local Forest managers were confronted with a packet of information related to the Forest Service seeking a "sub-basin claim" from the State of Utah. Where a sub-basin claim is granted by the Utah Division of Water Rights, changes in use and diversion can be done without State approval. The permittees were asked to sign a "change of use"

application which would have allowed the Forest Service to determine what the use would be, including changing use from livestock water to wildlife, recreation or elsewhere.

When permittees objected, they were told that not complying with the Forest Service request could adversely affect their "turn out" or the release of sheep and cattle onto Forest allotments.

Utah Farm Bureau was concerned that the permittees were being blackmailed into actions undermining their proven State water rights. A meeting was held on May 11, 2012 in Tooele County that included grazing permittees, Forest personnel, Utah State Engineer, County Commissioners and State and local Farm Bureau leaders.

When confronted with the charge of blackmailing permittees into signing the change of use applications, the Forest agents objected and said they had not engaged in such action. The permittees countered "yes they did" and pointed out specifically one of the Forest employees. The retort by the Forest employee—"well you must have misunderstood!"

A follow up meeting was held August 28, 2012 the Farm Bureau Center in Sandy which included ranching interests, Intermountain Forester Harv Forsgren, Kathleen Clarke the Governor's Public Lands Coordinator, Kent Jones, Utah State Engineer, Leonard Blackham, Utah Commissioner of Agriculture, Leland Hogan, President of the Utah Farm Bureau and Randy Parker, Farm Bureau CEO.

Forsgen noted that what the Forest Service was asking the permittees to agree to joint ownership as provided in the 2009 amended Utah Livestock Water Rights law—not to sign a change of use application.

As part of the broader understanding of Utah water law, the Utah State Engineer led a discussion and provided background on Utah water diligence claims, forfeiture and the impacts of ongoing actions by the U.S. Forest Service.

Diligence Claims

The United States Forest Service has 16,000 livestock water rights and claims for livestock water rights covering all Forest administered grazing allotments in Utah.

For more than one-half century, the U.S. Forest Service has been filing diligence claims on Forest administered lands. These diligence claims being filed by the Federal agency pre-date the 1903 water legislature and also pre-date the 1905 establishment of the U.S. Forest Service. Mr. Forsgren said "the diligence claims are made on behalf of the United States, which was the owner of the land where the livestock grazed and livestock watering took place and that action

established the Federal Government's water rights. Currently, the USFS administers the land under the Organic Act and other Federal laws, and therefore is the appropriate agency to file water rights claims on behalf of the United States. However, the water right was established under State law, and is being claimed by the United States under State law."

A "Diligence Right" or "Diligence Claim" under Utah law is a claim to use the surface water where the use was initiated prior to 1903. In 1903, statutory administrative procedures were first enacted in Utah to appropriate water. Prior to 1903, the method for obtaining the right to use water was simply to put the water to beneficial use. To memorialize a diligence claim, the claimant has the burden of proof of the validity of beneficial use prior to 1903.

Forfeiture

Because water in Utah is considered a scarce and valuable public resource, Utah's laws have been designed to encourage full responsible development of water supplies and to discourage efforts to speculate in or monopolize the resource. As a result of this approach, it has been believed necessary to assure that those who acquire rights to use Utah's water actually place it to beneficial use. Although the statute has changed since first adopted in 1903, the current law states as follows in Utah Code Section 73–1–4:

"When an appropriator or the appropriator's successor in interest abandons or ceases to use all or a portion of a water right for a period of 7 years, the water right or the unused portion of that water right is subject to forfeiture in accordance with Subsection (2)(c). . . ."

Utah forfeiture laws, in the instance of livestock water rights, provides an interesting dilemma and potential for confrontation between livestock interests that proved up on the water right based on the State's constitutional method and the claims of the land management agency.

Access

Recognizing the Federal Government controls 67 percent of Utah, USFS and BLM State administrative personnel including the Regional Forester, BLM State Director

or even in the district offices maintain dramatic control. Forest Service agents have the ability to control allotment access, determine if there will be use of the permittee's livestock water right, establish the numbers of sheep and cattle utilizing the water and ultimately determine the ability of the rancher to put the public's water resource to beneficial use.

It seems ironic that the USFS has the ability to manage the land and access to the water that could adversely impact permittees and their ability to put their livestock water rights to beneficial use. With thousands of diligence claims pending, thousands of certificates of joint ownership filed and the reality that if the agency exercises unrighteous dominion—where water rights are forfeited based on agency actions—what rancher will ever file for livestock water rights on Forest lands?

This scenario appears to offer the Federal land management agencies the opportunity for an orderly transition of Utah water rights.

Fundamental Question

Legally can the U.S. Forest Service or even BLM, under the State's constitutional method, validate a claim on Utah water where the agency did not and does not own the livestock putting the water to beneficial use while only claiming an ownership interest in the land?

Forsgren warned that "this is a 'slippery slope,' that has led to the Nevada conundrum and hopes this is not the tact that will be taken in Utah."

2013 Utah Legislative Action

Utah State Representative Ken Ivory authored H.J.R. 14 A Joint Resolution on Water Rights that declares that the actions and claims of the United States Forest Service are undermining Utah's State sovereignty and that based on the State's obligation to protect, preserve and defend the health, safety and welfare of its citizens the State must maintain jurisdiction over the water resources of this State. In addition, Representative Ivory sponsored H.R. 166 to amend the Utah Livestock Water Rights on Public Lands statute.

The H.J.R 14 states among other things:

- Beneficial use is defined as domestic use, irrigation, stock watering, manufacturing, mining, hydropower, municipal use, aquaculture, recreation, fish and wildlife, among others.
- The Intermountain Forester will not invest in water improvements, nor will the agency allow improvements to be constructed or reconstructed with private funds where the right is held solely by the livestock owner.
- All improvements in developing, redeveloping or maintaining a livestock permittees' water rights are all claimed as the property of the United States.
- Through the use of pressure tactics, the USFS has coerced livestock permittees into signing certificates of joint ownership or change of use applications.
- Looking to expand Federal interests and control in Utah, the USFS has filed more than 16,000 water rights claims of ownership on livestock water rights.
- Claims based on control of the public lands do not constitute the application of the water to beneficial use under Utah's constitutional method of appropriation and beneficial use.
- In the central Utah community of Scipio, the USFS used its diligence claim filings on use by nineteenth century settlers and then used the filings, and the threat of protracted litigation, to dispossess direct descendants of the settlers from their legitimate water rights.

H.R. 166 Water Rights Amendments authorized:

- A beneficial user, meaning a livestock permittee, the right to access and improve an allotment as necessary for the beneficial user to beneficially use, develop, and maintain the beneficial user's water right appurtenant to the allotment.
- A study of the State's jurisdiction over water rights including conflicts between local interests and the Federal Government and to determine what actions would be needed to maintain and defend State jurisdiction over water rights.

NEVADA

In 2003, the State of Nevada passed Senate Bill 76. The bill precludes the Nevada State Engineer from approving any new applications, permits or certificates filed by the United States for stock water.

NRS 533.503 (1) *The State Engineer shall not issue a permit to appropriate water for the purpose of watering livestock unless:*

(a) The applicant for the permit is legally entitled to place the livestock on the lands for which the permit is sought.

The USFS stated in its August 2008 briefing paper, "Since current Nevada livestock water right law does not allow the Forest Service to acquire any new livestock water rights on National Forest System lands, this is causing difficulties for the Forest Service because our policy requires that a livestock water right be held in the name of the United States of America before we can invest Federal funds in livestock water developments.

Since Intermountain Region policy also states, "nor will the agency authorize water improvements to be constructed or reconstructed with private funds where the water rights held solely by a livestock owner."

It is clear that under the current policy conflicts between the land management agency and the State of Nevada—there is in effect no new water development on Federal land in a State where 86 percent of the land is owned and controlled by the Federal Government.

ARIZONA

Tombstone Arizona illustrates the level to which the USFS can hold local interests hostage. Tombstone, for more than 130 years has piped its water from the Huachuca Mountains 30 miles away. Even after the Huachuca's were designated a Federal wilderness area in 1984, Tombstone was allowed to maintain its road and access to its springs providing Tombstone with water for culinary needs and maybe as important fire protection and public safety.

In 2011, torrential rains destroyed the city's pipes and infrastructure supplying water from mountain springs and wells they developed in the nearby Huachuca Mountains. Tombstone notified the USFS they needed to repair the damage as they had in the past. The Forest Service challenged Tombstone's ownership right to the water. After documenting their water ownership, Tombstone sought relief from the onerous Federal regulations and Forest Service oversight based on the State's public health, safety and welfare obligations.

When the Forest Service finally gave the authorization, the Federal agents established a new standard for the repair work by the city. They had previously been able to make repairs with machinery. Tombstone was forbidden from using any mechanized equipment to make the repairs.

With only shovels, picks and wheelbarrows to remove debris and repair broken water pipes, the mayor of Tombstone and city crews started into the Forest Service administered "wilderness area." They were met by armed Forest Service agents demanding no "mechanized equipment" (wheelbarrows) could be taken up on the mountain.

In a year of severe drought and dramatic heat, even for the desert southwest, the City of Tombstone was at risk because of over-zealous Federal bureaucrats and an uncaring government bureaucracy.

CASE LAW

A summary of Federal and State case law that establishes important livestock water rights related to ranchers legal rights to access water located on Federal land and defining who can put livestock water rights to beneficial use based on state definitions:

Attachment A—*Wayne Hage* vs. *United States*
Attachment B—*Joyce Livestock Company* vs. *United States*

RECOMMENDATIONS

(1) Congress must act to recognize the historic and statutory obligation of honoring the sanctity of sovereign State water rights.

(2) Federal agencies must honor State courts in water matters, including the State defined methods of beneficial use and the doctrine of prior appropriation or first in time, first in right.

(3) Federal agencies must not use adverse management of the Federal lands, specifically related to grazing, access, development and maintenance of water to gain control of water located on Federal lands through abuse of the State's water forfeiture laws.

(4) The United States must not disrupt the business of livestock grazing critical to the history, culture and local economies using the judicial system and protracted, costly litigation to emotionally or financially break the holder of livestock water rights on Federal lands.

(5) The Federal Government must develop a working relationship with the States—State engineers and policymakers—to forge an understanding whereby State water law and the needs of the Federal land managers are complimentary.

(6) Congress must act to allow Utah and other western public lands States to determine the use of their natural resources—including water—which are in the best

interest of the citizens of the State and its future, as is the case with States across the Nation.

This concludes my prepared testimony.

Thank you.

Attachment A

Wayne Hage* vs. *United States

Federal agents in the early 1980s began to over-file on Wayne Hage's livestock water rights and reducing the permitted number of cattle allowed to graze on the public lands including in Nevada's Monitor Valley. The water rights were tied directly to the original users and established in 1965 and subsequently maintained by their successors.

In a landmark "Constitutional takings" case filed in the U.S. Court of Federal Claims (USCFC) in 1991, *Hage* vs. *United States,* the court had to deal with question of property and ownership and the nature of vested and certificated water rights, easements, rights of way, forage harvest on Federal lands and improvements to the grazing allotments. Did the Hage's and other permittees by association have rights associated with cattle harvesting forage on their Government grazing allotments and beneficially using the State's water originating on Federal lands or were the ranchers merely serfs, grazing at the whim of the U.S. Government?

The Hage taking case went to trial in 1998 to determine property interests. In 2004, a second trial was commenced to determine which property had been taken and its value. Chief Judge Loren E. Smith ultimately awarded a $4.4 million judgment against the Federal Government.

To challenge the USCFC decision and seeking an adverse ruling against Hage in an effort to undermine the Smith decision, the USFS and BLM in 2007 filed in Federal District Court against the estate of Wayne Hage alleging trespass on Federal lands. In the 2012 trial in Nevada Federal District Court, Chief Judge Robert C. Jones presided. Jones had to recess the Reno proceedings to allow the Hage family to attend the Federal Circuit Court of Appeals hearing in Washington, D.C. which was reviewing the takings case and USCFC judgment. The Appeals Court three judge panel initially overturned portions of the Smith decision and financial judgment citing the claims were not ripe. But they expressly did agree that the Hage's have "an access right" to their waters on the Federal lands.

When Jones reconvened the Hage trial in Reno and issued his finding, it was an historic decision:

- Congress intended to protect the ranchers' preexisting rights by issuing grazing preferences only to established ranchers who could prove historical use of the range and ownership of the water rights under local law and custom.
- Based on the evidence, the Hage's were awarded a forage right one-half mile around and adjacent to all historic livestock water rights and warned the Federal agency that the livestock could not be found in trespass in those areas.
- In witness credibility finding, Intermountain Regional Forester Harv Forsgren was found to be lying to the court. In his bench ruling Jones stated: "The most pervasive testimony of anybody was Mr. Forsgren. I asked him, has there been a decline in the region or district in AUMs (permitted animal unit months grazing). He said he didn't know. He was prevaricating. His answer speaks volumes about his intent and his directives to Mr. Wiliams." Anybody of school age or older knows "the history of the Forest Service in seeking reductions in AUMs and even the elimination of cattle grazing . . ."
- Humboldt-Toiyabe forest ranger Steve Williams was found in contempt of court and guilty of witness intimidation.
- Tonopah BLM manager Tom Seley as found in contempt of court and guilty of witness intimidation. In addition, he was guilty of having intent to destroy the Hage's property and business interests.
- Williams and Seley were held personally liable for damages exceeding $33,000.

Chief Federal District Court Judge Robert C. Jones, June 6, 2012, *U.S.* vs. *The Estate of Wayne Hage and Wayne N. Hage* stated regarding his findings at trial:

"I find specifically that beginning in the late 1970s and 1980s, first, the Forest Service entered into a conspiracy to intentionally deprive the defendants here of their grazing rights, permit rights, preference rights."

As the wheels of justice turned ever so slowly for Wayne Hage and his heirs in the takings case filed in 1991, the 2008 U.S. Court of Federal Claims award was ultimately overturned July 26, 2012 by the U.S. Court of Federal Appeals in Washington D.C.

The taking case in the Appeals Court pivoted on the Forest Service action requiring that Hage maintain 28 miles of ditches through Nevada's rugged terrain with only hand tools. The lower court found the restriction prevented Hage from beneficially using his water. The Appeals Court disagree.

In another part of the ruling, the Appeals Court found that even though the Forest Service fenced Hage's cattle off a critical watering spring, this was not a physical taking because the fences were up for only 5 years and some of the water flowed out of the fenced area where Hage could access the water.

The Appeals Court rationalized its reversal by determining that since Hage could use some of the water, the Forest Service action did not result in a physical taking of the water right.

Of concern with the Appeals Court ruling, it appears the Federal Government can fence off any private citizen's water right that resides on Federal lands in any jurisdiction—and to take whatever they want without paying compensation as prescribed by the U.S. Constitution.**Harv Forsgren, following the Judge Jones witness credibility finding has retired from the United States Forest Service.*

Attachment B

Joyce Livestock* vs. *United States

Idaho Supreme Court 2007 Opinion No. 23

In the *Joyce Livestock Company* vs. *United States,* the Owyhee County based cattle operation had ownership dating back to 1898 including in-stream stock water rights. The United States over-filed on the Joyce water rights based on a priority date of June 24, 1934—passage of the Taylor Grazing Act. A special master recommended the water right claimed by the United States be granted. District Court said the special master erred and that the agency lacked the necessary intent. District Court determined that Joyce needed to show evidence that they believed they had acquired such water rights in their grazing permit applications. The United States could not show that Joyce or any of its predecessors were acting as it agents when they acquired water rights. As required, Joyce made application for grazing rights under the Taylor Grazing Act on April 26, 1935. The District Court awarded Joyce water rights with a priority date of April 26, 1935.

Upon appeal, the Idaho Supreme Court upheld the District Court ruling that Joyce had acquired a water right on Federal land for watering stock for the following reasons:

(1) An appropriator can obtain a water right in non-navigable waters located on Federal lands.

(2) Under the constitutional method, an appropriator could obtain a water right for stock watering without diverting the water from the water source.

(3) Joyce predecessors obtained water rights on Federal land for stock watering simply by applying the water to beneficial use through watering their livestock in the springs, creeks and rivers on the range they used for forage.

(4) The water rights that the ranchers obtained by watering their livestock on Federal land were appurtenant to their patented properties.

5) A water right appurtenant to real property is conveyed with the real property unless expressly reserved or the parties clearly intended that the conveyance not include the water right.

As related to priority dates, the Idaho Supreme Court said the District Court erred in its analysis and remanded for a redetermination of priority dates. Specifically, the High Court said that the Joyce water priority date must be based on their earlier application of the water to beneficial use by grazing livestock.

In closing, the Idaho Supreme Court considered on appeal the in-stream water rights for stock watering claimed by the United States based on ownership and control of the land and the Taylor Grazing Act management obligation. They concluded:

"The District Court held that such conduct did not constitute application of the water to beneficial use under the constitutional method of appropriation, and denied the claimed rights. The Idaho Supreme Court concurred holding that because the United States did not actually apply the water to a beneficial use the District Court did not err in denying its claimed water rights."

Mr. McCLINTOCK. Thank you, Mr. Parker. The Chair now yields to the gentlelady from Wyoming, Mrs. Lummis, to introduce our final witness.

Mrs. LUMMIS. Thank you, Mr. Chairman. I am delighted that Russ Boardman has joined us today. He is an elected conservation district supervisor from the Shoshone Conservation District in northwest Wyoming. When he left home it was 8 degrees. We have had a very cold, snowy April. And I tell you, it is a great blessing, because we have had such a horrible drought in Wyoming. And that snow, regardless of the cold and the wind and the temperatures, is an absolute blessing.

He has done something that is very difficult for a person to do, and that is start a farm and ranch from scratch. Not marry it, not inherit it, but rather, start it from scratch. And this after a distinguished career as a teacher. And I just have a lot of respect for what he is doing.

As I said, he is an elected conservation district supervisor. Now, in Wyoming, that is a very important position. We have 34 conservation districts. They are governed by five elected officials. And in every district, their statutory responsibilities include issues such as conservation of water, conservation of soil and water resources, utilization of water, using a watershed approach. They frequently have cooperating agency status in working with the Federal Government.

And I want to emphasize the word "cooperating." It is not coordinating agency status when you are working with the Federal Government. The statute, NEPA, says "cooperating." And cooperation implies a two-way street. You are cooperating with each other. Unfortunately, more and more, we find that it is a coordinating—the Feds will touch base with some sort of local group and call that cooperating. It is a two-way street, and these people know how to cooperate.

So, I am delighted, and want to commend to your attention Russ Boardman. Thank you, Mr. Chairman.

STATEMENT OF RUSSELL BOARDMAN, SHOSHONE CONSERVATION DISTRICT SUPERVISOR, FRANNIE, WYOMING

Mr. BOARDMAN. Thank you, Representative Lummis, for those gracious words. Chairman McClintock, Ranking Member Napolitano, and members of the Subcommittee, I am Russ Boardman, an elected official in northwest Wyoming for both the Shoshone Conservation District and also the Deaver Irrigation District. I also am a former educator and an agricultural producer raising cattle and hay in one of the driest places in the United States. I am located 2 miles south of the Montana border around Frannie, Wyoming, population 157.

For a frame of reference of how important the water is in our area, the Big Horn River Watershed receives only 6 to 10 inches of precipitation a year, compared to here, in the Potomac, 30 to 60 inches. My area, the Big Horn Basin, is actually drier than Death Valley, receiving only 5 inches of precipitation a year. As you can imagine, there really isn't anything more important than our water resources. Ladies and gentlemen, water is the lifeblood for our communities.

I am pleased to be here today to share with you on-the-ground watershed work being implemented by local districts and the potential implications of a Yellowstone River national blueway des-

ignation. We do not believe the blueway's designation is necessary, as we have locally driven watershed efforts in place to address multiple resource issues and benefits.

Wyoming conservation districts, our local units of government formed under Wyoming State statute. There are 34 local conservation districts in Wyoming, and our statutory responsibilities include stabilization of agriculture industry; protection of natural resources such as conservation of soil and water resources; flood prevention; development, utilization, and disposal of water in our district.

We are active in a variety of water quality management practices. You will see most of those in my written testimony. They are quite lengthy to present at this time orally. We are active members of a technical steering committee guiding the development of total maximum daily loads, TMDLs, as required by the Clean Water Act. We also have participated, pursuant to the National Environmental Policy Act, as a cooperating agency in the Bureau of Land Management's resource management plan process for the Big Horn RMP, the USDA Forest Service forest planning process for both the Shoshone and the Big Horn National Forest.

We understand there is some consideration being given to nominating the Yellowstone River Watershed as a national blueway created through a Secretarial Order. Until our counterparts in Montana thankfully contacted us and to seek our input and thoughts, I and the other local conservation districts were unaware if such a designation even existed. After we were asked for our input, we researched this designation, and I will share with you some of the concerns we have for this process.

How does a designation that requires no public notice, no comment opportunity, and was created without coordinating or consulting with affected land owners or governments or States result in increased coordination? The fact that my private property or my neighbor's private property and our watershed could be federally designated without any formal opportunity for input is totally inconceivable to me. We fail to see how a blueways designation will enhance the overall waterway. In fact, we are concerned in Wyoming that the designation will hamper those efforts by creating fear, confusion, and controversy.

Real conservation occurs at the grass roots level. If there is a commitment to grass roots conservation, then local efforts like this, once implanted by our conservation district, should be supported, rather than trumped by a Secretarial Order.

Furthermore, the national designation is part of a greater outdoor initiative, and is to establish a community-driven conservation and recreation agenda. We aren't sure what that means. But from past experience, we know that Federal designations does not correlate to community-driven conservation. Instead they correlate to a top-down Washington directive with little or no input from the ground.

Last, as we spend a tremendous amount of time on these management plans, we partnered with the Bureau of Rec and we live in such a arid area we worry about multiple use, water supplies, agriculture, hydropower, and many other water resources of importance in our communities in such a arid region.

Secretarial orders such as this do nothing but interfere and detract from thoughtful, informed processes that result in quality resource management. We are pleased to see that the Secretary has communicated to the Wyoming delegation that no designation would affect Wyoming without the support of our State. Because, frankly, I don't see how we call Federal designation over 44 million acres without any public notice or input "community-driven conservation." Thank you.

[The prepared statement of Mr. Boardman follows:]

PREPARED STATEMENT OF RUSSELL BOARDMAN, SHOSHONE CONSERVATION DISTRICT SUPERVISOR, FRANNIE, WYOMING

Chairman McClintock, Ranking Member Napolitano, and members of the Subcommittee, I am Russ Boardman, an elected Conservation District Supervisor from the Shoshone Conservation District in Northwest Wyoming. I am also a former educator and an agriculture producer, raising cattle and hay in one of the driest places in the United States. I live in Frannie, Wyoming; population 157, located 2 miles south of the Montana Border. Wyoming's Conservation Districts are local units of government formed under Wyoming State statute (*see* WYO.STAT.11–16–101 *et. seq.*). There are 34 local conservation districts in the State and each district is governed by 5 elected officials. Our statutory responsibilities include the stabilization of the agriculture industry, protection of natural resources including but not limited to data and information, conservation of soil and water resources, control and prevention of soil erosion, flood prevention or the conservation, development, utilization and disposal of water within the district utilizing a watershed approach.

I am pleased to be here today to share with you the on-the-ground watershed work being implemented in our local districts and the potential implications a Yellowstone River "National Blueway" designation may have on our efforts. We do not believe the Blueways designation is necessary as we have locally driven watershed efforts in place to address multiple resource issues and benefits.

I reside within the Big Horn Basin and our sub-watershed is the Shoshone River watershed. These fall within the Yellowstone River watershed. The Shoshone River watershed consists of 950,262 acres and makes up 2.15 percent of the Yellowstone River watershed. The portion of the Yellowstone River Watershed that falls within the borders of the State of Wyoming consists of 21,676,484.48 million acres, which equates to 49 percent of the Yellowstone River watershed being within the State of Wyoming. The entire Yellowstone River watershed is over 44 million acres.

The landownership in the Shoshone River watershed consists of 46 percent private, 39 percent BLM, 5 percent State, 9 percent Bureau of Reclamation and other ownership makes up the last 1 percent.

For perspective, the District of Columbia lies within the Potomac watershed as you are aware; it consists of a little over 10 million acres. One could fit four Potomac Watersheds in the Yellowstone River watershed.

Also, for a frame of reference on the importance of water in our area, the Big Horn River watershed receives 6–10 inches on average of annual precipitation. In comparison, the Potomac receives 30–60 inches. My area of the Big Horn Basin is actually drier than Death Valley, receiving only 5 inches of precipitation a year. As you can imagine, there really isn't anything more important than our water resources. It is the lifeblood of our communities.

Our local conservation district, along with the 33 other districts in Wyoming have taken our leadership roles and responsibilities for local natural resource conservation efforts very seriously, especially as it pertains to watershed restoration and protection. Our constituents depend on good quality water for drinking water, recreation and agricultural production. When the Wyoming Department of Environmental Quality identified segments of 6 waterbodies as impaired, out of approximately 250 waterbodies within our district, due to elevated E. coli in 2000 and 2002, our district immediately convened local stakeholders and gathered input on the issues and based on their direction and input we initiated a local watershed planning and implementation effort. Our district monitored the water quality on all six of the waterbodies, in 2006 completed a watershed implementation plan which included the implementation of best management practices.

Our district and other districts across the State are actively working on watershed improvement projects. As of this past fall we have invested, $1.112 million dollars of funding provided by private, State and Federal sources, into watershed restoration work. We work closely with our State and Federal partners. From late 2009

until today, we have partnered with the local NRCS to develop and implement 40 separate cooperative projects in our district. Projects implemented include, the installation of 32,089 ft. of gated pipe, 13 acres of brush management, two forage harvest management plans were developed on 638 acres to manage vegetation cover on irrigated hay lands, 39 acres of irrigation land leveling, 2,333 acres were affected by the installation of irrigation efficiency and water management practices to promote water conservation and reduce nonpoint source pollution, along with 5,218 ft. of fencing to promote better grazing management in adjacent uplands. 25,471 ft. of pipeline and 2,816 of concrete ditch lining were installed, 5,200 acres of prescribed grazing were managed, and 1 pumping plant and 24 water control structures were installed. We are also focused on septic rehabilitation projects. Since 2004, the district has completed 26 septic rehabilitation projects and closed 6,236 feet of open drain. These efforts have improved water efficiencies and working towards improved water quality.

We are active in other aspects of water quality management. We are active members of a technical steering committee guiding the development of a Total Maximum Daily Load (TMDL) as required by the Clean Water Act. As we are have also participated, pursuant to the National Environmental Policy Act, as a "cooperating agency" in the DOI Bureau of Land Management's Resource Management Plan processes for the Big Horn RMP, the USDA Forest Service Forest planning processes for both the Shoshone and Big Horn National Forests.

We are involved in all of these efforts for two primary reasons. We are committed and concerned with the health and quality of our natural resources with our communities. We depend upon them for our livelihoods and our quality of life. Secondly, there are Federal laws and State laws that require these processes and we have deemed it a priority to participate.

We understand that there is some consideration being given to nominating the Yellowstone River Watershed as a "National Blueway," designation, created through a Secretarial Order. Until our counterparts in Montana thankfully contacted us to seek our input and thoughts, I and our local conservation district were unaware that such a designation existed. After we were asked for our input, we researched this designation. I will share with you some concerns we have with this process.

First, the Secretarial Order does not require the Federal Government to notify the public or allow them to comment on proposed designations. This is disturbing to say the least. All of the efforts we have initiated, or are involved in related to water resource management have a public notice and input process. It is unfathomable to me that I and my neighbor's properties and our watershed could be federally "designated" without any formal opportunity for input.

In a May 24, 2012 press release issued by the Department of Interior, the statement is made that the "[e]stablishment of a National Blueways System will help coordinate Federal, State, and local partners to promote best practices, share information and resources, and encourage active and collaborative stewardship of rivers and their watersheds across the country." (*http://www.doi.gov/news/pressreleases/AMERICAS-GREAT-OUTDOORS-RIVERS-Secretary-Salazar-Creates-National-Blueways-System-Designates-Connecticut-River-and-Its-Watershed-as-First-National-Blueway.cfm*)

I would ask how a designation that requires no public notice, no comment opportunity and was created without coordination or consultation with affected landowners, local governments or State's, could result in increased coordination. As explained above, our district and all others in Wyoming are already coordinating with private, State and local entities and we are already promoting best practices, and we are already sharing information and resources. We fail to see how a Blueways designation will enhance this. In fact, we are concerned in Wyoming that this designation will hamper these efforts by creating fear, confusion and controversy. Real conservation occurs at the grassroots level. If there is a commitment to grassroots conservation then local efforts like the ones implemented by our conservation district should be supported, rather than trumped by a Secretarial edict.

The press release goes on to explain that the national "Blueways designation" is part of the Great Outdoor Initiative and is to "establish a community-driven conservation and recreation agenda". We aren't sure what that means, but know from past experience that **Federal designations** does not correlate to **"community-driven conservation"**. Instead they correlate with a top-down Washington directive with little to no input from those affected on the ground. Our conservation district on the other hand practices "community-driven conservation" everyday. We know what it looks like and this isn't it.

Lastly, as a local government we have we have spent a tremendous amount of time and energy participating in Federal land management processes. We partner with the Bureau of Land Management and the Forest Service to develop their long

term management plans. These plans are intended to provide for the multiple uses of our resources. Contrary to multiple-use management, this designation appears to focus solely on recreation uses. We share concern for recreation, but we are also concerned about municipal water supplies, agriculture, hydropower and the many uses of our water resources important to sustain our communities. My concern is if this designation appears to focus primarily on recreation.

Secretarial edicts such as this do nothing but interfere and detract from thoughtful, informed processes that result in quality resource management. We are pleased to see that the Secretary has communicated to Wyoming's Congressional Delegation that no designation would occur affecting Wyoming, without the support of our State because frankly, I don't see how we can call a Federal designation of over 44 million acres without any public notice or input process ***"community-driven conservation."***

Thank you Mr. Chairman and members of the Committee.

Mr. MCCLINTOCK. Great. Thank you very much for your testimony.

Mr. Bishop has a pressing matter that requires his attention. Would there be any objection to going out of the normal order, taking Mr. Bishop first, then to the Ranking Member? Is there objection? We will go Mr. Bishop, then the Ranking Member, then the Chairman, and back to the regular order. Mr. Bishop.

Mr. BISHOP. Well, damn. Now I am embarrassed. I am sorry.

[Laughter.]

Mr. BISHOP. Randy, let me ask you a question. If you can, tell what has been happening with ranchers and farmers, especially in Tooele and Box Elder County lately on this particular issue. If you could, illustrate what you were talking about.

Mr. PARKER. Yes, I can—thank you. I can go into a little bit more detail.

Mr. BISHOP. Can you pull that closer to you and make sure it is on?

Mr. PARKER. OK. Is that better?

Mr. BISHOP. Yes.

Mr. PARKER. In Tooele County, in particular, in the spring of 2012, as the grazers went in for their regular spring visit with their Forest Service managers, they were asked to sign change-of-use forms which allows the Forest Service to then determine where the livestock water is to be used. And if they weren't willing to sign that, they were told that they would not—it could adversely affect their turnout onto their Federal grazing allotment.

That was drawn to our attention. And we had a meeting that we brought the ranchers and a number of other folks together with the Forest Service, the State engineer, and we fleshed that out. But the concern was that these ranchers that have had historic rights, some of them going back generations, to utilize that livestock water right were being threatened by an agency of government to turn over the ability to determine the use of that water to a Federal agency, or it would affect a right that many of them had for generations on those forest allotments, Congressman.

That is the frustration that we have had in Farm Bureau, is this process is not balanced.

Mr. BISHOP. So this process was unprecedented.

Mr. PARKER. Yes.

Mr. BISHOP. And what avenue of recourse do those farmers, agriculturalists, ranchers, have against this particular Forest Service directive?

Mr. PARKER. Well, in two meetings with the regional forester, we were able to change from a change-of-use application to a joint ownership in the water right.

Now, for me, that is even troubling, Congressman, because those are privately owned water rights. They do originate on the public lands. But Utah law does allow the Federal Government to own a right to water. And so, what they did at that point was suggested that the permitees jointly share that water right. And that would maintain the integrity of their ability to graze on the Federal lands.

Mr. BISHOP. But that was a one-sided suggestion. Your recourse was to grovel before them and see if you could get them to mitigate their suggestion.

Mr. PARKER. Yes, that is pretty close to what happened. We had to——

Mr. BISHOP. Seems like kind of a crummy way to run a country, doesn't it?

Mr. PARKER. It was frustrating, because the Federal Government does hold the power on these lands. The water is the right of the State of Utah. But access, the ability to put it to beneficial use, and the number of cattle on there are determined by the Forest Service.

Now, there is a situation where in Utah, if you don't put your water to beneficial use, the State forfeits it. So, if you haven't put it to beneficial use for a period of time, it is use or lose. And in those cases—and I don't know if you would consider this unrighteous dominion, or what you would look at—but if they adversely affect that rancher's ability to put that water to beneficial use, they are lined up next in line to apply for that water right.

Mr. BISHOP. OK. Thank you for expanding on that issue. Thank you, Mr. Chairman. Some day when I have more time I am going to tell you the story of Eddie Gotchner, who was the most inept player in the major leagues. His lifetime batting average was 167. However, if you consider the Endangered Species Act success in recovering species, its average batting average would be 10, if you rounded up. Someday we need a paradigm shift to do something that actually works in this country.

Thank you for your gracious—I am truly embarrassed for doing this, but thank you so much.

Mr. MCCLINTOCK. You are very welcome. Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chairman. To Mr. Benson, Mr. West makes the argument that the Federal Government's implementation of the ESA threatens the States' ability to manage water resources under the State water law. Do you think this is the case? And, if so, why or why not?

Mr. BENSON. Congresswoman Napolitano, the State, like all the rest of us, can't cause take of listed animals. In this case, whooping cranes. And there is a factual and legal dispute about whether that is happening here. The courts will sort that out.

But there is a compliance option for the State to get an incidental take permit. They would need to develop a habitat conservation plan, it would need to meet certain standards. But that is

what has happened on the Edwards Aquifer quite recently, on the Lower Colorado. There are ways to do water management that States and water users have found ways to make work. And that was the remedy that the lower court ordered in this case.

So, Texas is being held to Endangered Species Act compliance, if the lower court's decision is upheld. But in a way that could well be very workable.

Mrs. NAPOLITANO. Thank you. Are there many cases like the case of the whooping crane? And do you have an example of where it has helped to avoid litigation, and instead lead to cooperative——

Mr. BENSON. Congresswoman Napolitano, there have not been very many such cases where water users have been challenged for taking listed species because of their diversions.

There was a case that was nearly brought in Oregon and Washington about 10 or 12 years ago on the Walla Walla River, which flows from Oregon into Washington. Very interesting situation, where irrigators in Oregon and Washington around the State line were drying up the river very rapidly, very completely, and they were stranding fish.

After some of those fish got listed under the Endangered Species Act, the Fish and Wildlife Service knocked on the irrigator's door and said, "You are causing take. You need to do something about it." And they did. The irrigators sat down with Fish and Wildlife, engaged the environmental community, the Umatilla Tribes in that area, and got support for a plan that rewatered the river and did some other good things for the species, while also working for the irrigators. And so it was a case never brought, because they worked it out and it was a good, successful resolution. And, therefore, nobody ever heard about it.

Mrs. NAPOLITANO. Was the Endangered Species delisted?

Mr. BENSON. That was a bull trout case. And it, at least in the early going, was very effective in helping them.

Mrs. NAPOLITANO. Going to another area which is really important, could you explain the importance of settling the federally reserved tribal water rights claims, especially as it relates to the States' ability to manage water rights? We seem to forget them.

Mr. BENSON. Yes, Congresswoman Napolitano. That is an important area in many parts of the West. My State of New Mexico has more than 20 tribal governments. We have had some recent successful settlements that Congress has approved. And these settlements, increasingly, are the way to go. The Western States recognize it, the tribes recognize it. And in some cases, these settlements also have worked to help do environmental restoration, as well. And that is certainly the case with the Nez Perce settlement in Idaho.

Mrs. NAPOLITANO. Thank you. Mr. Costlow, riverflows are important to your industry. But can you explain the Colorado Glenwood and the Colorado Upper increase in use numbers in 2001 to 2002 during a drought year?

Mr. COSTLOW. Yes, Congressman Napolitano. You notice on practically all rivers in the comparison 2011 to 2012, there was a decrease in use numbers, except in those small pockets. And the reason for that is there is reservoir storage on those stretches.

So, what Outfitters did was they moved their clients and as many reservations as they could from areas that were running out of water to areas that had measured releases and predictable releases longer term. Those rivers, both sections of those rivers, the Colorado, the Glenwood and the Upper, had releases that picked up around the first of July and continued even into September. So that accounted for that increase.

In comparison, if you were to look at Clear Creek, that stretch of river just west of Denver, they saw almost a 45 percent decrease on that section, and primarily due to the fact that there is no predictable reservoir release.

Mrs. NAPOLITANO. Thank you, sir. And I think we are going to be looking at more drought cycles, so we need to be cognizant of that as we move forward.

Thank you, Mr. Chair.

Mr. MCCLINTOCK. Which is why we need to store more water.

Mr. Costlow, you represent the Colorado River Rafters commercial enterprises. Yosemite Park officials, with the full backing of the National Park Service, are moving forward with a plan to remove river rafting rentals at Yosemite National Park on the Merced River. Does this policy concern your organization?

Mr. COSTLOW. Well, since we are primarily concerned with our State, not directly. But we always have an eye to that, because, you know, what can happen in other regions can come to our region.

Mr. MCCLINTOCK. Well, this is happening with the full support, apparently, of the National Park Service. So it is coming to a State near you. Does that concern your members?

Mr. COSTLOW. Of course it would concern us, Yes.

Mr. MCCLINTOCK. What would be the economic impact if such a policy metastasizes?

Mr. COSTLOW. The removal of rafting from national parks?

Mr. MCCLINTOCK. Yes.

Mr. COSTLOW. In an area like Grand Junction, Colorado, Dinosaur National Park, that would probably remove all those outfitters from business.

Mr. MCCLINTOCK. There are two rationales that are being given for this proposal. First of all, that it is commercial activity, and commercial activity is offensive in the national park system. What is your view of that?

Mr. COSTLOW. Well, of course, I would view that differently. I would say that commercial activities such as outfitters have been nothing but helpful to national lands.

Mr. MCCLINTOCK. The other argument is that river rafting does not affirmatively enhance the river, and therefore, this enterprise should be removed.

Mr. COSTLOW. Well, I am not sure it enhances the river, but I am not sure I agree with it, that it should be removed. I will say I think it does enhance individuals that go on the river. And there are probably great educational opportunities that occur from those rafts.

Mr. MCCLINTOCK. There may be a lesson in this, that a heavy-handed Federal Government will ultimately come down on your members, if policies like this are allowed to continue and if Federal

usurpations are allowed to continue, which is the point of this hearing.

And I would like to go to Mr. Parker on that. You had testified quite extensively over the impact of the Endangered Species Act——

Mr. COSTA. Would the gentleman yield?

Mr. MCCLINTOCK. For a moment, sure.

Mr. COSTA. Just on this item, because it is an area that you and I and Congressman Miller and Farr have signed a letter specifically as it relates to the use of river outfitters, but also other concessioners within the park. And it just seems to me that we have got to figure out some way to have a bipartisan intervention here. Because, consequently, I think we are going to find the potential impact of that, and its ripple effect in utilization of America's people to enjoy our park system, to be dramatically changed.

This is not the appropriate time to revisit it, but since you brought the matter up, Mr. Chairman, I think this bears worth figuring some way we can come together on this, because I am very concerned about the impact of this plan in Yosemite National Park and its repercussions not only in the current and future use of the park, but to other parks in the country.

Mr. MCCLINTOCK. I appreciate those comments on behalf of all of the communities that depend upon tourism for their economic prosperity, as well as all of the enterprises involved.

Reclaiming my time. Mr. Parker, on the Endangered Species Act, why shouldn't we be counting the product of captive breeding programs both in assessing and mitigating Endangered Species Act requirements?

Mr. PARKER. We have about 42 endangered species in Utah, and they run from instreams to on private property, predominantly.

Mr. MCCLINTOCK. The Department of the Interior is moving forward with plans to tear down four dams on the Klamath River, all, they say, for the sake of the salmon. However, the Iron Gate Fish Hatchery attached to one of the dams, produces 5 million salmon smolts a year; 17,000 return as fully grown adults to spawn. And they won't allow us to include them in the ESA population counts. Does that make any sense to you?

Mr. PARKER. It doesn't. I was going to——

Mr. MCCLINTOCK. When they tear down the dam, they are going to tear down the fish hatchery, and then you are going to have a catastrophic decline of salmon on the Klamath River.

Mr. PARKER. Absolutely. In Utah we have the Utah Prairie Dog. They only count the numbers on the public lands for the ESA count. On private lands, which is where about 90 percent of the population is, it doesn't count against the numbers. But they can't control them, anyway.

Mr. MCCLINTOCK. Thank you. Mr. Costa.

Mr. COSTA. We have votes now?

Mr. MCCLINTOCK. Mr. Costa.

Mr. COSTA. Oh. Thank you very much, Chairman. And I am going to try to keep my questions local to the evolution of the Endangered Species Act and, for the law professors here, as it has evolved since it was enacted over 30 years ago as a result of court cases, and actually, whether or not it still provides the sort of flexi-

bility that is, I think, necessary in terms of dealing with the appropriation of water and water rights for beneficial use.

I represent an area, as many of you know, that is one of the richest agricultural regions in the Nation, maybe the world. We produce over half the Nation's fruits and vegetables and over 300 crops. Number one in citrus production, number one in dairy production. I mean the list goes on and on. We produce 95 percent of the world's almonds. And it is all because of Mother Nature and a great Mediterranean growing climate and the efficiencies—and let me underline efficiencies, because we get criticized often—on how we have dealt with irrigation technology, because 99 percent of the irrigation, or of the agriculture, is irrigated.

And so, it is cutting edge—in one of the largest water districts in the country—90 percent uses drip irrigation. Because water has become very costly, very valuable, and all of that.

In this Federal service area we have had 2 years of average rainfall, we have had 2 years of below-average rainfall. We had one really good year, 180 percent of normal snowpack. That is the last 5 years: two average, two below average, one 180 percent of normal. And the allocation that we have received over those 5 years has been 43 percent, 43 percent of the water allocation for this Federal service area.

My concern—and I don't know, maybe, Mr. Benson, you are a good person to start with—you talked about, in your testimony, about the controversy of water. I mean I have lived it for 30 years. And we know about—I don't know if, really, Mark Twain said whiskey was made for drinking and water was made for fighting, but it is a very descriptive story, anyway. And you talk about the ESA provides a recourse for environmental values. But I am wondering. Where is the balance? Because the Endangered Species Act does not take into effect the environmental impacts to humans as a part of the analysis.

And I think if you weigh a lot of court decisions—and I am not a lawyer, let's be clear about that—it seems to me that there has been, on the balance, on the scale of justice, on the way the Endangered Species Act has been implemented with regards to, in my opinion, flawed biological opinions, a lack of balance. Would you care to comment?

Mr. BENSON. Congressman Costa, thank you.

Mr. COSTA. A little closer to the mic. We all want to hear you.

Mr. BENSON. Congressman Costa, thank you. I know—there it is. Thank you. Thank you, Congressman Costa. There are a lot of hard feelings about the way the Endangered Species Act has been implemented. And I know in—rarely——

Mr. COSTA. It is just not hard feelings, it is——

Mr. BENSON. More so than in—hardly anywhere more so than in your district. I understand that. And there is resentment and anger and a lot of other things.

In response to your question about where is the balance, I think that the Endangered Species Act has brought some balance to a system that it otherwise governed entirely by prior appropriation and Federal reclamation laws.

Mr. COSTA. But we are not going to change—at least I don't think—in the near term, water rights from appropriated rights to

the original riparian rights. I mean, some of my colleagues are just, "Well, let's all start over again." Well, good luck.

Mr. BENSON. And, Congressman, obviously, that is not going to happen.

But my point is this. When those projects were built, the water rights were issued, no consideration was given to the environment. And they have been exercised, these projects have been operating——

Mr. COSTA. OK. That is a given. But when these water battles take place both in court and both in legislation, and people whose goal is not to create any additional water supply—I maintain we have a broken water system in California, because it was designed for 20 million people; we have 38 million people. We have done a lot to conserve, we need to do more.

I know I have run out of my time, but to my point here, where is the balance between 48 percent unemployment in farm worker towns like Mendota and Firebaugh and the economic losses? How do we address that?

Mr. MCCLINTOCK. I tell you what. Could we take that as a rhetorical question and save it for the next round? Mrs. Lummis.

Mrs. LUMMIS. Thank you, Mr. Chairman. And again, I want to thank Mr. Boardman for coming. You can't imagine how hard it is to get here from Frannie, Wyoming.

In December of 2012, an Interior advisor, Rebecca Wodder, presented to the Montana Conservation Districts the benefits of this new Federal blueways designation, and asked them to consider nominating the Yellowstone River Watershed for the designation. Now, this blueways designation was created by Secretarial Order.

Would you put up a slide that shows the Yellowstone River watershed? I want to point out that this watershed is half in Wyoming and half in Montana. Now, with that introduction, Mr. Boardman, when did the Wyoming Association of Conservation Districts become aware that the Yellowstone River Watershed might be designated as a national blueway?

Mr. BOARDMAN. We just found out in February of this year.

Mrs. LUMMIS. Even though Montana was approached last year?

Mr. BOARDMAN. Yes. They actually called and said what do we think about the proposal, and we said, "What are you talking about?" We didn't even know the national blueways existed. And thanks to your staff and our national staff, we were able to investigate that and then bring that forth.

Mrs. LUMMIS. So, you found out from the Montana people?

Mr. BOARDMAN. Yes, ma'am.

Mrs. LUMMIS. You didn't find out from the Secretary of the Interior's Department?

Mr. BOARDMAN. Absolutely not.

Mrs. LUMMIS. Not from Rebecca Wodder, who was the Senior Interior Advisor who presented to the Montana Conservation Districts?

Mr. BOARDMAN. No.

Mrs. LUMMIS. Even though you are the headwaters?

Mr. BOARDMAN. Yes, ma'am. In fact, 49 percent, almost 21 million acres, lay in Wyoming.

Mrs. LUMMIS. And that is about what percentage of the watershed?

Mr. BOARDMAN. Forty-nine percent.

Mrs. LUMMIS. So, 49 percent of this watershed is in Wyoming. The rest is downstream.

Mr. BOARDMAN. Yes, ma'am.

Mrs. LUMMIS. But Interior Department didn't come and talk to you about it?

Mr. BOARDMAN. No, ma'am.

Mrs. LUMMIS. Now, does this cover your conservation district?

Mr. BOARDMAN. Yes, ma'am. In fact, 16 of our conservation districts lay on the northern border.

Mrs. LUMMIS. At any point in time has the Department of the Interior notified you that they are considering the designation of the Yellowstone River as a national blueway?

Mr. BOARDMAN. No.

Mrs. LUMMIS. Have you read the blueway Secretarial Order?

Mr. BOARDMAN. Absolutely. Now.

Mrs. LUMMIS. Does it require any formal notice or public comment prior to a blueways designation?

Mr. BOARDMAN. It asks for stakeholder input, but never notification.

Mrs. LUMMIS. Input, but not, as other Federal laws say, "cooperation," cooperating agency status.

Mr. BOARDMAN. No, no.

Mrs. LUMMIS. Did you consider land acquisition now—going to the way it is being implemented elsewhere, there are a couple other places in the country where these blueways designations have been used. And even though we were all told when we found out about this blueways designation, that was an invention of the Department of the Interior, that the order says it is not intended to be the basis for any new regulatory authority, are you aware that the President's budget requests almost $10 million to acquire over 5,000 acres around the two existing blueways?

Mr. BOARDMAN. I just found that out as we were back here in D.C. the last 2 days.

Mrs. LUMMIS. Do you consider land acquisition to be a regulatory action, particularly if it is designated to capture waterflows to restore or protect natural, cultural, or recreational resources?

Mr. BOARDMAN. Absolutely.

Mrs. LUMMIS. You develop and implement watershed management plans in Wyoming. Is watershed management in the arid West as simple as managing solely for natural, cultural, or recreational resources?

Mr. BOARDMAN. We might at this time draw your attention to—and I think we were—added this to our testimony—it is our local watershed management plan. And it is managed and developed for multiple use: hydro, agriculture, recreation, agriculture. And so—municipal use, in terms of domestic water. So we already, on the ground, have already a watershed management plan that exists. It is quite extensive. We address all of those issues, and not just a single entity.

Mrs. LUMMIS. And is part of the reason that you look at multiple use the fact that FLPMA, the Federal Land Policy and Management Act, requires a multiple-use approach?

Mr. BOARDMAN. Absolutely. And it is very important. Without water, we cease to exist. We even have pipelines that carry water to our houses in the rural areas, because we don't have water there, and we have bad water in the wells. And so, every bit of our water is a precious commodity. We account for every drop. If it isn't grown and irrigated in the West—it is just like this floor—nothing is grown, and nothing happens. We might as well shut our doors, close our communities.

Mrs. LUMMIS. Thank you, Mr. Chairman.

Mr. MCCLINTOCK. We will go another round. Mr. Huffman.

Mr. HUFFMAN. Thank you, Mr. Chairman. I want to start with Mr. West. And, first, thanks, to all the witnesses, for your testimony.

Mr. West, I appreciate your concerns that you expressed in your testimony about how a citizens suit under the Endangered Species Act was being used in a way to protect species that affected the use of water in ways that you felt should be left to the domain of the State. Have you always felt that way?

Mr. WEST. Yes, we have. The citizens suits have a place, there is no question about it. But when it is an enforcement action, we feel like that enforcement action ought to be directed toward the Secretary of the Interior and U.S. Fish and Wildlife, the entity in charge of enforcement of the ESA. In this case, the suit was brought against the State of Texas itself, and we think that is—the suit should have been brought against U.S. Fish and Wildlife, who has that primary responsibility.

Mr. HUFFMAN. Well, I find that an interesting statement, in light of the fact that in 1991 the Guadalupe-Blanco River Authority that you represent here today itself partnered with the Sierra Club in a lawsuit against the Interior Department to protect endangered species in an area involving the Edwards Aquifer. So, I think that consistency may be the hobgoblin of small minds, but I think it does come in to play as we consider the testimony today.

I want to ask all the witnesses for their feelings about Federal law that preempts the field of State water law. Would any witnesses on this panel disagree that Federal law that simply comes in and preempts all State water law is a bad idea?

[No response.]

Mr. HUFFMAN. Full preemption of the field. That would probably be overreaching, and——

Mr. PARKER. Horrible idea, yes.

Mr. HUFFMAN. Yes. Well, it is interesting, frankly, to even be having this hearing, in light of the fact that this Committee and the 112th Congress actually did exactly that with H.R. 1837, a bill that would have fully preempted all State water law involving two particular water projects in California. Any of you think that would have been a good idea?

[No response.]

Mr. HUFFMAN. I appreciate that. Regarding the testimony from the gentleman from Wyoming——

Mr. BOARDMAN. Yes, sir.

Mr. HUFFMAN [continuing]. I realize that there is a healthy skepticism and mistrust, if you will, about the Federal Government in the Western United States. It kind of goes with the territory.

Mr. BOARDMAN. Absolutely.

Mr. HUFFMAN. But I was just reading through the description of the blueways system. And it sounds an awful lot like something Mr. Costa helped get started in California called Integrated Regional Water Management, entirely voluntary, recognizing stakeholder collaboration and partnerships at a watershed scale, using incentives rather than mandates. The fact that this came to us from a western rancher himself, Mr. Salazar, probably suggests this may not be the heavy-handed, tyrannical, overreaching of government. Might just be good policy.

So, I just want to say that whatever concerns there may be about this designation, which recognizes collaboration and then increases Federal support for that collaboration in Wyoming, I would sure love to see that recognition in California. So if you don't want it in Wyoming, if anybody from the Interior Department is listening, bring it to California, because we are trying to do that.

Mrs. LUMMIS. Great.

Mr. HUFFMAN. We have been trying to do it for years.

Mrs. LUMMIS. It is all yours, baby.

[Laughter.]

Mr. HUFFMAN. And we will take the dollars that come with it, too.

Mrs. LUMMIS. Absolutely. You can have those, too.

Mr. HUFFMAN. If that is tyranny, I would like more of it——

Mrs. LUMMIS. Excuse me, Mr. Chairman.

Mr. HUFFMAN [continuing]. In my district, in my State.

Mr. BOARDMAN. As that question was referred to me, I thought it said that there was no additional funding that was going to go with that.

Mr. HUFFMAN. Well, the whole point of it was to provide more Federal support, and that is throughout the documentation, so——

Mr. BOARDMAN. In principle, I think the national blueways in the East here, where we have abundant rainfall and beautiful fauna and flora, I think it is a great opportunity, and in principle it is really good. But to manage 44 million acres as one watershed where we have dozens of them already, our one watershed——

Mr. HUFFMAN. And just to be clear, the Secretary and the Department have said they are not going to even do this without consulting with you anyway, so we may be talking about quite a large strawman.

Mr. BOARDMAN. Yes. Thank you.

Mr. HUFFMAN. In all of that. So——

Mr. BOARDMAN. Thank you.

Mr. HUFFMAN. I just want to close by saying, Mr. Chair, I would love to have a serious deliberation about the role of hatcheries and wild stocks in the Klamath. But with all due respect to the gentleman from Utah, asking someone based on their experience with prairie dogs in Utah to opine about anadromous fish species on the Klamath River is probably a little far afield. But thank you. I will yield back.

Mr. PARKER. I don't know. They seem to match. If you can't——

Mr. MCCLINTOCK. The gentleman's time is expired. We will get back to that, though. Mr. Tipton of Colorado.

Mr. TIPTON. Thank you, Mr. Chairman. And I would like to start with Ms. Link and Mr. Parker. And what was the stated reason given by the Forest Service to justify taking water rights from ski areas and ranchers?

Ms. LINK. Thank you, Congressman Tipton. And I also want to thank you on behalf of the ski industry for your focus and support on this important issue for ski areas. We appreciate it very much.

So the stated reason by the Forest Service for this policy—and again, I emphasize the stated reason, because it might not be the real reason—is to sustain ski areas and ski communities in the long term by tying water to the land to stop ski areas from selling off water rights.

Mr. TIPTON. Mr. Parker?

Mr. PARKER. Very similar. They want to control the water so that they can then manage the land for the livestock that is associated with their charge of multiple use.

The interesting thing is—and I appreciate this question, Congressman—Utah already passed in State statute that the livestock water right, those that are occurring out on Federal grazing allotments, are pertinent to the allotment and belong to the grazing permittee. So we have already dealt with it. This is overkill.

Mr. TIPTON. So the Federal Government is effectively saying, "We want to make sure you are using that water for grazing, we want to make sure you are using that water for snow-making."

So I want to ask this question, Ms. Link. Have ski area operators been selling water downstream for more profitable uses?

Ms. LINK. No, that has never happened.

Mr. TIPTON. Never happened. So it is not a problem? They are trying to correct something that doesn't exist.

Ms. LINK. That is correct. It is a made-up problem.

Mr. TIPTON. Great. You mention you have tried to negotiate with the Forest Service to sustain ski areas for future generations without relinquishing your water rights. In the past, what has been the response from the Forest Service?

Ms. LINK. The Forest Service has not been open to a ski area water rights clause that falls short of giving the U.S. Government ownership of our water rights.

Mr. TIPTON. So it is their way or the highway or—I guess now we have to call it the blueway?

Ms. LINK. That is correct.

Mr. TIPTON. OK. Great. In your opinion, what do you suspect the vast—why have they asked for nothing short of just literally full title to those water rights?

Ms. LINK. We believe that the Forest Service is really trying to get what we call water for the woods. And what I mean by that is protection for aquatic species and aquatic habitat. This position was actually articulated in a law review article in 2001 by the Forest Service's lead water counsel, Lois Witte. In that article, which is called, "Still no Water for the Woods," she criticizes Supreme Court precedent that requires the Forest Service to obtain water rights under State law, and she argues that the Forest Service should reject State law mechanisms and use its authority to

condition permits for occupancy of Forest Service lands to seize water rights from private permit holders.

The agency's most recent explanation for its water policy, which is saving the ski areas and the ski communities, is really just a cover for this long-standing objective of getting more water for the woods, for these other purposes. If the agency were truly aiming to keep the water with the ski areas, why, under its 2012 policy, for example, which was struck down in Federal court, was the Forest Service not willing to guarantee that the water would actually stay with the ski area? That is a big question for us.

Mr. TIPTON. So, under the guise of keeping the water for your purposes—for your purposes, Mr. Parker, in terms of the grazing end of it, there is actually a little nefarious idea in terms of they want to be able to direct that water for what they perceive is the best beneficial use.

Mr. PARKER. Yes. And if I might add, in the case of the State's water that is on the Federal lands, those permitees are required to turn over a portion of their water right or risk not being able to develop it, to maintain it, or use it. They literally will not give a permit on to the land to do those things that put their water to beneficial use.

It is frustrating because we have a 7-year forfeiture law in Utah. And once it is not used for 7 years, it is forfeited back to the State of Utah. And at that point, who stands in line to benefit from that forfeiture?

Mr. TIPTON. Right. Well, Mr. Parker, Ms. Link, given the far-reaching implications of the Federal water grabs on public lands, what action would you like to see in order to stop these harmful efforts, and to be able to protect our water rights for western economies?

Ms. LINK. We would welcome legislation that prohibits Federal agencies from using permit conditions that require transfer of privately owned water rights without compensation.

Mr. PARKER. And we would like to see the Federal Government not able to hold water rights, but work with the States to meet the objective. Work collaboratively, instead of the way it is happening today.

Mr. MCCLINTOCK. All right, thank you. Mr. LaMalfa.

Mr. LAMALFA. Thank you, Mr. Chairman. And thanks to the panel for taking part here today, especially those that had to travel very far for this.

I find it interesting when we are talking about ESA. And to the gentleman from the New Mexico law school, Mr. Benson, when we are talking about water projects that were created all over the West, all over the country, that have greatly enhanced stored water, a water supply that would, without their existence, the water would not be available for people, for hydropower, as well as the concern with ESA for species. So we need to give human kind a little bit of credit once in a while, that we have made possible waterflows in drought years that, in my area, where you talk about certain rivers, the old-timers go back and say you could walk across that river in the summer time without getting your knees wet.

And so, we have done amazing things to help the species, with mankind's intervention and wiser management. I think we do

things better these days than we have maybe 150 years ago. But that doesn't seem to be acknowledged very much.

Instead, it is always about ESA all the time, whose track record is somewhere, Mr. Bishop mentioned—I think he was rounding up to have 10 percent, I think the number is more like maybe 3 percent species recovery, if that, for the billions and billions of dollars and the heartache that is has caused to farmers, ranchers, people that like hydropower, all these other things that are beneficial to mankind who, by and large, are bending—I know farmers and ranchers that bend over backwards to install fish screens and do all the things, and yet they have the goalposts moved on them all the time by a litany of State and Federal agencies that keep moving the goalposts on them. So we need to take a little credit for people doing things right in this era of a little more awareness.

So, and I love the definition of the navigable waterway in the United States now not being something that a boat can go up and down, but basically you could take a ducky derby duck and float in it, and someone is defining that as a navigable waterway. Something seriously needs to be done in that area.

Now, to a couple of our witnesses here, Ms. Link, your struggle with the designations here of the water rights and the fight for that, what is the effort lately by Forest Service to use methods other than coercion in working with you in the area, since the court ruling on that? How has that gone for you lately?

Ms. LINK. The agency has actually taken some bold steps in the last couple of months toward acquiring ski area water rights, even in the wake of that Federal decision in December. And also, at the same time that they are supposed to be starting this new process to look at water rights.

For example, in March, last month, Winter Park Ski Area in Colorado was told that if they want a new 40-year permit, because theirs was expiring, they would need to turn over water rights full ownership to the United States under a 1980s water clause. And that water, just so that you know, is owned by the city and county of Denver. Winter Park, obviously, did not want to turn that over. But at the same time, they need their 40-year permit. Financing depends on that permit being in place.

And so, after a lot of wrangling and some political intervention, the Forest Service finally backed down in the case of Winter Park and said, "You can have 2 more years, and then we will come back to this issue of when you are going to turn your water rights over to the United States."

Mr. LAMALFA. Which must have been really awe-inspiring for your financiers to have a 2-year assurance, yes?

Ms. LINK. It is not a good situation. And then just another example, Mount Bachelor, Oregon, which is owned by POWDR Corp, a company that owns Copper Mountain, Colorado, Park City, a number of other ski areas, just last month was offered a draft permit from the Forest Service. Not only did it have the 2012 water clause that was struck down by the Federal court, it had Clause X99, which is, again, a 1980s holdover clause that hasn't been used in years. That was offered to the ski area last month.

So, those are just a couple of examples of what the agency is still doing now in pursuing ski area water rights.

Mr. LAMALFA. Given how we watch much of the western portion of this country burn each year due to forest management policies that are non-management policies, are you inspired by the Forest Service record of managing forests, and in this case, taking over the management of your water rights?

Ms. LINK. No.

Mr. LAMALFA. No? Mr. Parker?

Mr. PARKER. I absolutely agree that we have a lot of frustrations with what is going on. The water rights do have value. And I think something that—as far as you were talking about the ESA, one of the best things that has happened to wildlife in Utah and across the West is the diverse water projects that are done in livestock grazing allotments. That helps wildlife in a huge way.

So, a lot of frustrations and a lot of partnerships that are not recognized.

Mr. LAMALFA. Thank you. Thank you, Mr. Chairman, I——

Mr. MCCLINTOCK. Mr. Labrador.

Mr. LABRADOR. Thank you, Mr. Chairman. I would just like to give Mr. West an opportunity. I heard an interchange here where you were accused of taking an opposite position than you had taken a few years ago. Apparently you were accused of something without being given an opportunity to respond. If you want to take the time to respond to that, I would love to hear the answer.

Mr. WEST. Thank you, sir. I very much appreciate the opportunity to respond. In that particular situation with the Edwards Aquifer, a large aquifer in the center of the State of Texas, there was no regulatory entity in place. It was the rule of the large pump. And those entities that relied on their diversion, those entities that relied on the springflows coming from the Edwards, there was no entity in place to balance all those needs. There was an effort to have the State regulate it. That failed. The ESA was used as a last alternative. But again, in that situation there was no regulatory entity in place.

Surface water in the State of Texas—on the other side, Texas, when it joined the Union, retained ownership of the surface water rights. We have a full operating system in place to achieve the balances for all needs, including the environment. And so, that is a totally different situation than the situation with the whooping crane and oversight, taking over our State water rights on the whooping crane case.

Mr. LABRADOR. Thank you. I think the other side is sometimes confused when there are different fact patterns. But I think I am done with my questions. I wonder if Mrs. Lummis or Mr. Tipton have any questions that they would like to ask, and I can yield my time.

Mrs. LUMMIS. May I claim his time? Thank you very much, Mr. Labrador.

I have some more questions for Mr. Boardman. Mr. Boardman, you held up a watershed management plan that you just completed on the Shoshone Conservation District. Are you implying that you already use a watershed approach to management?

Mr. BOARDMAN. Yes, ma'am. We have done that, and also there is—all the districts in Wyoming have completed a watershed plan. And that is available for your review, if you would like.

Mrs. LUMMIS. And in coming up with those plans, do you work with other stakeholders in your region to improve recreational opportunities or address environmental concerns?

Mr. BOARDMAN. Absolutely. We are totally multi-use, in terms of our watershed management. I thought it was interesting, Mr. Costlow talked about that he moved his rafts to a place where there is stored water.

And we believe in recreation, too. In the West we have one shot at the water. And when the snow melts, it goes downstream. And if you don't catch it, and you don't have beneficial use for it, it is gone. And we have had some great agreements on the ground level.

There were two places at the Yellowtail Dam that there was conflict, just in recreation. And the upper side of the river wanted to keep the full tide, full pool, for recreation of boats and so forth, and skiers, and fishing. And below, at Fort Smith, Montana, is some of the best blue-ribbon trout fishing in the world. And they wanted more release. And through local collaboration, they were to come to an agreement that they could both do some dredging, let some water out, and the recreation went on. And that scares us, when we lose that local control, that someone in the top level could say, "It is either fishing or boating."

Also on the Buffalo Bill Reservoir up out of Cody, where we store a lot of our irrigation water, we came to an agreement with the rafters and also the fisheries. There is a trigger point to how many thousand-acre feet we have in that reservoir. And when it gets below a certain point, we drop it down to 300 cfs per day for the fisheries. If we have a full pool, we increase it to 500.

So we have worked with the fisheries and the recreation and also the Buffalo Bill and Yellowtail hydropower. We irrigate out of it. And so we approach the whole thing as multiple use. Because, like I said before, without water you roll up the streets and shut the lights out and the communities die.

And also, in terms of that, in our area I have a farm of about 1,000 irrigated acres. And in 1957 our DC said there hadn't been a deer on the place in the whole valley. We irrigate 165,000 acres that creates habitat for wildlife. And our current ranch there at home, we had over 200 deer, whitetail and mule deer. We have raccoons, skunks, we have water fowl. All of this was a big, high plateau desert. If it wasn't for irrigation and storage, we wouldn't have wildlife habitat, either.

Mrs. LUMMIS. You mentioned that you live in a place that has very, very little water.

Mr. BOARDMAN. Yes, ma'am.

Mrs. LUMMIS. If you could and do grow vegetation there, does that vegetation sequester carbon dioxide?

Mr. BOARDMAN. Well, all forage do. Yes, ma'am.

Mrs. LUMMIS. Thank you, Mr. Chairman.

Mr. MCCLINTOCK. We will now begin a second round of questions. And I will begin. I do think that we need to set the record straight. I am sorry Mr. Huffman has left, because I think he materially misrepresented the law to you. So let me give you the full story. The law that he referred to, H.R. 1837, reaffirmed California water rights with respect to those systems affected by the joint State-Federal-Central Valley project. Title IV of the measure spe-

cifically reaffirmed and guaranteed the State's system of water rights, and brought the full force of Federal law to protect those rights.

The Northern California Water Association wrote in support of this provision, "The bill, if enacted, now contains provisions that would not only protect the interests of senior water rights holders in the Sacramento Valley, but would also provide significant material water policy improvements to current Federal law. The bill, if enacted, would provide an unprecedented Federal statutory express recognition of and commitment to California's State water rights priority system and area of origin protections. This is important for the region to provide sustainable water supplies for productive farm lands, wildlife refuges, and manage wetlands, cities, and rural communities, recreation, and meandering rivers that support important fisheries."

Mr. Parker, I believe you specifically answered Mr. Huffman's question. Now, with that additional information, would you endorse such Federal actions to reaffirm and guarantee State water rights?

Mr. PARKER. Anything to back up the sovereign water rights of the State, we would support. And, yes, I——

Mr. MCCLINTOCK. Thank you.

Mr. PARKER. We did come here with that——

Mr. MCCLINTOCK. Mr. West, what would be your——

Mr. PARKER [continuing]. It was confusing.

Mr. WEST. Absolutely.

Mr. MCCLINTOCK. I don't think Mr. Huffman understood Mr.——

Mr. WEST. Absolutely, Mr. Chairman.

Mr. MCCLINTOCK [continuing]. Huffman understood the measure. I don't believe he would willfully misrepresent it to witnesses before this Committee.

Mr. West?

Mr. WEST. Absolutely, Mr. Chairman. As I said earlier, the State retained its rights when it joined the Union. We feel very strongly about that.

Mr. MCCLINTOCK. Mr. Boardman?

Mr. BOARDMAN. Absolutely. In fact, in 1911 a piece—water rights on my property went to the Supreme Court. Oliver Wendell Holmes ruled on that in 1911, that before Wyoming and Montana were even states, that the diversion at my ranch was for 2 CFS, and they upheld that and said it is the point of diversion, not the point of where it collects the water.

And so, senior water rights are very important, and we are very lucky in Wyoming that the water rights are tied to the land.

Mr. MCCLINTOCK. Thank you. Ms. Link, you represent the ski resort operators. Could you give us just a thumbnail? What is the economic impact of the Federal encroachments on your rights, in terms of the communities that your folks serve?

Ms. LINK. Sure. We lose assets under a Forest Service approach of taking ski area water rights and loss of those assets can impact our access to capital. We also lose the certainty that we will have sufficient water for snow-making operations because, again, the government doesn't guarantee the water will continue to be used for ski area operations.

And, most importantly, with those kind of clauses, we lose the incentive to invest in water rights in the future. And, again, why would we make those investments if the government is going to take them——

Mr. MCCLINTOCK. How many jobs do you think are at stake with this Federal encroachment?

Ms. LINK. I am sorry, can you repeat the question?

Mr. MCCLINTOCK. How many jobs are at stake?

Ms. LINK. Well, the ski industry nationally employs 160,000 people in rural economies. And again, 60 percent of the industry is public land versus private.

Mr. MCCLINTOCK. Mr. Parker, can you give us any picture, from your perspective?

Mr. PARKER. Livestock agriculture in Utah makes up about 75 percent of our farm gate sales, the receipts. I guess if you extrapolated that to Congressman Bishop's number, that would equate to about $13 to $14 billion in economic activity in the State of Utah. So it is dramatic. Probably to 50,000 to 60,000 jobs, just in the State of Utah.

Mr. MCCLINTOCK. Mr. Boardman?

Mr. BOARDMAN. I wouldn't have the exact numbers, of course. Wyoming is only a little over a half-a-million people. So agriculture is one of our multiple—of course, oil and gas and mineral industry is our top, and then tourism and agriculture is third—second and third.

Mr. MCCLINTOCK. Mr. West?

Mr. WEST. From the standpoint of financing in general, in order to finance infrastructure for whatever purpose, where there is water supply——

Mr. MCCLINTOCK. Well, again, what I am trying to discern is the impact on average families from these policies, if they are allowed to continue and spread.

Mr. WEST. An inability to finance, period.

Mr. MCCLINTOCK. And that, in turn, means what?

Mr. WEST. Means the lack of service and the lack of supplies. If you cannot finance those projects, you cannot support and deliver the needs of the general public.

Mr. MCCLINTOCK. Thank you. Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chair. Ms. Link, the court found that the Forest Service failed to follow the appropriate Federal administrative procedure process and should have gone through a formal notice and public comment. Could you elaborate briefly as to why the public involvement is so critical, so important?

Ms. LINK. Sure. I think in the ski industry's view, this issue is much bigger than the ski industry. The Forest Service has adopted another policy that is similar to the ski area clause that applies off of ski area lands. It was also adopted without any public notice or comment, whatsoever, and it takes the same approach of taking privately owned water rights.

And so, we feel that this is the kind of issue—water is so important to the West, for example, that we think this is the kind of issue that deserves greater public attention. And I think it might open the agency's mind into just how impactful these type of clauses are.

Mrs. NAPOLITANO. Thank you. And I agree. Public input is really one of the most important things we need to ensure that we do involve the public in.

The Committee, this Subcommittee, continually grapples with the challenges facing the water allocation in the West, specifically. But under our Republican leadership, we are failing to confront one of the main drivers of current and future changes in water availability in the West: climate change. It wasn't even something that we actually recognized a couple years ago in this chamber.

But on April 19th, 108 ski resorts, including some in Utah—in fact, there are 24 States that sent a letter of support in a climate declaration supported by a number of major companies in the United States. Are the ski resorts concerned about the impact of this climate change on water resources and the impact on the business?

Ms. LINK. Absolutely. The ski areas are definitely concerned about climate change. The climate declaration that you referenced takes a very fresh approach and says that climate change is an economic priority for this country, and we fully agree with that statement. Ski areas have had a policy on climate change since 2002, and we have weighed in on a number of bills in Congress on that topic. And we are concerned and we are committed to fighting climate change.

Mrs. NAPOLITANO. And in line with that, I think we need to ensure that we continue to implement policies that will conserve water at the local level, not only the conservation issue but also the storage issue, and the ability to ensure that our waterways are kept clean by companies sometimes that are allowed to pollute and then leave it to the general public to pay for the cleanup. Does that affect your industry at all?

Ms. LINK. I mean I—just generally speaking, obviously, water is very crucial to our industry. And we definitely understand the tie between that and climate change, as well.

Mrs. NAPOLITANO. Thank you. Mr. West, Jared had to leave. There was a question in the 1991 case on the Guadalupe-Blanco River Authority when they filed against Interior claiming that unregulated pumping of the aquifer imperiled the endangered species. As a successful Plaintiff under this suit, did you receive reimbursement from the Federal Government for your attorney fees?

And the reason I ask is because there is a move to be able to have this excluded from future ability for parties to get recompensated. And I understand you are not getting all of it, so that is something that I would like to ask.

Mr. WEST. Yes, we did receive our legal fees, part of our legal fees. There is no question. But again, that suit was filed against the Secretary of the Interior and had a successful outcome. Those suits that are filed against individuals that have a tremendous amount of financial impact, there needs to be some way to balance that situation.

Mrs. NAPOLITANO. On both sides.

Mr. WEST. On both sides.

Mrs. NAPOLITANO. Correct. Thank you so very much. And I would like to offer this, a copy of this letter dated April 19th for the record.

And one last question, Mr. Parker.

Mr. MCCLINTOCK. By the way, without objection.

[The information submitted for the record by Mrs. Napolitano follows:]

LETTER SUBMITTED FOR THE RECORD FROM SUSTAINABLE SLOPES TO BUSINESS FOR INNOVATIVE CLIMATE AND ENERGY POLICY (BICEP)

[Submitted for the Record by Grace F. Napolitano]

APRIL 19, 2013

Anne L. Kelly,
Co-Director, Policy Program & Director,
Business for Innovative Climate & Energy Policy (BICEP),
Ceres,
99 Chauncy Street, 6th FL.,
Boston, MA 02111.

Re: Support of the Climate Declaration

DEAR BICEP:

We are writing to express our support for the Climate Declaration launched last week by BICEP and your member companies. One hundred and eight (108) ski resorts across 24 States support the Declaration and stand behind your strong message to policy makers to pass meaningful energy and climate legislation now. Ski areas across the country are concerned about the issue of climate change and its impacts on rising sea levels, wildlife habitat, the health of our forests, and truly our way of life. It is obvious that the success of ski business operations depends greatly on climate. Resorts have made tremendous efforts to raise awareness of the issue of climate change with our guests and with policy makers over the past decade. We have also made great strides in our operations to reduce carbon emissions. We welcome legislative and regulatory initiatives that will reduce carbon emissions, incentivize renewable energy development and help improve our resiliency in the future.

Two years ago, the National Ski Areas Association (NSAA) initiated the "Climate Challenge," a voluntary program dedicated to helping participating ski areas reduce greenhouse gas (GHG) emissions and reap other benefits in their operations, such as reducing costs of energy use. Resorts who take the Challenge are required to complete a climate inventory on their resort operations, set a target for greenhouse gas reduction, and implement a new program or project annually to meet the reduction goal. Examples of some of the actions taken so far include lighting retrofits, development of on-site renewable energy including solar and wind and investment in high efficiency snowmaking equipment. Today, we have 20 resorts that have taken the Challenge, including Alta Ski Area (UT), Arapahoe Basin (CO), Beaver Valley Ski Club (ON), Boreal Mountain (CA), Canyons Resort (UT), Copper Mountain (CO), Giants Ridge (MN), Gorgoza Park (UT), Grand Targhee (WY), Jackson Hole Mountain Resort (WY), Jiminy Peak (MA), Killington Resort (VT), Las Vegas Ski & Snowboard Resort (NV), Mt. Bachelor (OR), Mt. Hood Meadows (OR), Park City Mountain Resort (UT), Pico Mountain Resort (VT), Soda Springs (CA), Sugarbush (VT), and Telluride Ski & Golf Resort (CO).

Apart from the Climate Challenge, ski areas are developing renewable energy on site through the application of wind, solar, geothermal and micro-hydro technology. Ski areas are applying energy-efficient green building techniques, retrofitting existing facilities to save energy, replacing inefficient compressors in snowmaking operations, using alternative fuels in resort vehicle fleets, implementing anti-idling policies and providing or promoting car pooling or mass transit use by guests and employees. Ski areas are also supporting renewable energy by purchasing Renewable Energy Credits (RECs). The ski industry represents a relatively small source of greenhouse gas emissions, however, we are doing our part to set the example and unify all businesses behind the common goal of addressing the long term issue of climate change.

NSAA recently submitted testimony to the Bicameral Task Force on Climate Change to encourage action in Washington on the issue of climate change. Over the past decade, ski areas have supported a variety of energy and climate proposals in Congress, as well as proposed climate policies from Federal agencies. We have advocated support for cap and trade, extending the Investment Tax Credit and the Production Tax Credit, adopting renewable portfolio standards (RPS) and cleaner fuels

and cleaner vehicle emissions requirements, and EPA's establishment of protective carbon emission standards for new power plants.

All of the ski areas listed below applaud your action in launching the Declaration and are pleased to support it. If there is any additional information we can provide from the ski industry, our contact person is Geraldine Link ((720) 963–4205 or glink@nsaa.org) at NSAA.

Best Regards,

Alaska: Alyeska Resort.
California: Alpine Meadows; Bear Valley; Boreal Mountain Resort; Dodge Ridge; Homewood Mountain Resort; Kirkwood Mountain Resort; ;Mammoth; Mountain High; Mt. Shasta Ski Park; Northstar California; Sierra-at-Tahoe; Soda Springs Ski Area; Squaw Valley; Sugar Bowl.
Colorado: Arapahoe Basin; Aspen Highlands; Aspen Mountain; Beaver Creek; Breckenridge; Buttermilk; Copper; Crested Butte Mountain Resort; Durango Mountain Resort; Echo Mountain; Keystone; Monarch; Powderhorn; Silverton; Snowmass; Sol Vista at Granby Ranch; Steamboat Ski & Resort; Telluride Ski & Golf Resort; Vail Mountain; Winter Park.
Idaho: Lookout Pass; Schweitzer Mountain Resort; Tamarack Resort.
Illinois: Chestnut Mountain Resort.
Indiana: Perfect North Slopes.
Maine: Camden Snow Bowl; Mt. Abram; Shawnee Peak Ski Area.
Massachusetts: Catamount Ski Area; Jiminy Peak; Ski Butternut; Wachusett Mountain Ski Area.
Michigan: Crystal Mountain.
Minnesota: Lutsen Mountains; Spirit Mountain; Welch Village.
Montana: Bridger Bowl; Moonlight Basin.
Nevada: Heavenly Mountain Resort; Las Vegas Ski & Snowboard Resort.
New Hampshire: Attitash; Cranmore Mountain Resort; Gunstock Mountain Resort; Loon Mountain; Mount Sunapee; Ragged Mountain Resort; Waterville Valley.
New Mexico: Pajarito Mountain Ski Area; Taos Ski Valley.
New York: Bristol Mountain; Gore Mountain; Greek Peak Mountain Resort; Holiday Valley Resort; Hunter Mountain; Mt. Peter Ski Area; Whiteface; Windham Mountain.
Oregon: Anthony Lakes; Cooper Spur Mountain Resort; Mt. Ashland Ski Area; Mt. Bachelor; Mt. Hood Meadows Ski Resort; Timberline Lodge & Ski Area.
Pennsylvania: Camelback Mountain Resort; Elk Mountain; Roundtop Mountain Resort; Whitetail Resort.
Utah: Alta Ski Area; Canyons Resort; Deer Crest Private Trails; Deer Valley; Park City Mountain Resort.
Vermont: Bromley; Burke Mountain; Killington; Okemo Mountain Resort; Pico Mountain; Smugglers' Notch Resort; Stowe; Stratton; Sugarbush.
Virginia: The Homestead Ski Area; Massanutten Ski Resort; Wintergreen Resort.
West Virginia: Snowshoe.
Washington: 49 Degrees North Mountain Resort; Mission Ridge; Stevens Pass; Summit-at-Snoqualmie.
Wisconsin: Cascade Mountain; Granite Peak at Rib Mountain State Park.
Wyoming: Grand Targhee Resort; Jackson Hole Mountain Resort.

Mrs. NAPOLITANO. Thank you. There was a move in probably last year by the State of Utah's legislature to turn over all Federal lands in the State to the State of Utah. Is that correct?

Mr. PARKER. Yes, ma'am.

Mrs. NAPOLITANO. Why?

Mr. PARKER. Because in 1896, when we became a State, the Federal Government and the Congress, in allowing us into the Union, said that they would relinquish the lands held by the Federal Government back to the State. That hasn't happened, and the State of Utah feels that we need the same opportunity as other States to determine our future. And this isn't allowing it.

Mrs. NAPOLITANO. And you did support it, right?

Mr. PARKER. Absolutely.

Mrs. NAPOLITANO. Thank you.

Mr. MCCLINTOCK. Mrs. Lummis.

Mrs. LUMMIS. Thank you. A question, then, for Mr. Parker. What portion of Federal lands does Utah feel it is entitled to?

Mr. PARKER. Right now——

Mrs. LUMMIS. National Park Service lands?

Mr. PARKER. No, ma'am. The State of Utah is owned and controlled 67 percent by Federal Government, one agency or another.

Mrs. LUMMIS. So you are just talking about BLM lands.

Mr. PARKER. Yes. It is the unreserved lands that haven't been dealt with. And we believe that—there are some forest lands, as well. But it is not the national parks, the national monuments, even the $1.8 million Grand Staircase-Escalante that was done under the Antiquities Act, those are not part of the challenge, but surely should be.

Mrs. LUMMIS. Because the Federal Government owns 67 percent of the land in Utah, and Utah's population is growing so dramatically, does that create situations where agricultural land, highly productive, very vegetative, that sequesters carbon and helps mitigate the effects of growing carbon dioxide in the atmosphere, are actually crowded out by houses?

Mr. PARKER. Yes. We are seeing that. It is a dramatic effect.

Mrs. LUMMIS. Would it make more sense for some of the BLM arid lands to be used for housing, so the fertile farm ground could be used to produce vegetation that would sequester carbon?

Mr. PARKER. It would be a more appropriate use, absolutely. And the other thing that I think is important, Representative, is the fact that other States east of Denver, Colorado, got to determine their land use patterns and how they would develop and how they would grow up to be States. We have never been given that opportunity.

Mrs. LUMMIS. Does the fact that the Federal Government owns 67 percent of Utah prevent you from getting property tax revenues to fund your school system?

Mr. PARKER. Without a doubt.

Mrs. LUMMIS. A question for Ms. Link. When trees on Federal forests burn up and no longer are able to sequester carbon dioxide, do you believe that could have a negative effect on our ability to address climate change naturally?

Ms. LINK. Yes.

Mrs. LUMMIS. What else does the profligate burning of our national forests have on Colorado watersheds, including those in which the ski areas reside?

Ms. LINK. It clearly has a damaging effect on them. And also, just from a landscape effect, people come to the mountains and come to ski areas to enjoy the natural beauty. And it detracts from that, as well.

Mrs. LUMMIS. Mr. Boardman, a question for you. Again on the climate issue, when you were working on your watershed plan did you consider sequestration of carbon or other climate issues in addressing your plan that you held up?

Mr. BOARDMAN. This was developed about 5 years ago. And so, at that time the climate change wasn't a huge issue.

Mrs. LUMMIS. And do you anticipate that in your position on the Board of the Conservation District, that you could adequately address those issues for the watershed that you have planning authority over?

Mr. BOARDMAN. Absolutely, because we are on the ground, we are close to it, we are local, and we are locally led by a group, a cooperating agency. And that is what we like to have, is local control to make those decisions about where we live. I am just with Mr. Parker. We like to have a say in how we play out our future.

Mrs. LUMMIS. The other blueways, Mr. Boardman, that have been identified are in Connecticut and Arkansas. Can you explain why the Yellowstone drainage might be inappropriate for similar consideration?

Mr. BOARDMAN. Well, in principle, the blueways has some really good theology behind it, in that we can talk about how much rainfall they have back there. And, in principle, it really works. And I don't want to take that away from those people that have that. But in the West, where we have 44 million acres just in the Yellowstone watershed itself, the sheer magnitude of that land mass in differation [sic] from in the Miles City area, maybe in that 15 range, up to Yellowstone Park, where—maybe 20 inches of rain to where I live is 5 inches of rain, it so differentiates in the amount of rainfall, that to manage that as one total watershed with that much land mass, I find it very difficult in how to comprehend how you would manage that large of a land mass.

Mrs. LUMMIS. Thank you, Mr. Chairman.

Mr. MCCLINTOCK. Mr. Tipton.

Mr. TIPTON. Thank you, Mr. Chairman. And I think, just as a point of clarification listening to Ms. Link, Mr. Boardman, and others, the Forest Service has been in deep fault when it comes to the point of following their own rules and regulations when it calls for public input. They just tried to run a reg through with no public input. Once the courts struck it down, as Ms. Link notes, then they decide to go through the actual process that should be followed and should be adhered to.

I do appreciate your testimony, but I am concerned in terms, again, of the overreach that we are seeing by the Federal Government with the blueways program that they are putting forward. And, Mr. Boardman, you had mentioned about stakeholder input. That is pretty vague to me. Who is the stakeholder? Could somebody from New Jersey who enjoys going out to the West maybe to river raft or to be able to go out onto a reservoir, could they effectively be a stakeholder?

Mr. BOARDMAN. The way I read the order, yes. Anyone can nominate a river.

Mr. TIPTON. So, really, what we are seeing out of the Department of the Interior is they are wanting to make the water of the West community property for the entire Nation to be able to make those determinations, which is going to hurt not only our river rafters, our agricultural industries, and our ski areas, and our way of life. Is that a pretty fair assessment?

Mr. BOARDMAN. Yes. The way that I read the order is that it talks about community-driven conservation and recreation. That narrows that up pretty good. If you look at what we try to do in our watershed is multiple use. We are involved in recreation, we are involved in hydropower, we are involved in agriculture, municipalities. And we approach the whole watershed as multiple use.

Mr. TIPTON. Not to mention don't we have a thing in the West called private property rights? Don't we have priority-based systems in place? Don't we have State water law in place? You have given script and verse, in terms of a community, and we see it throughout the Western States, as well, that actually love where they live, actually care about those areas, and put plans into place to be able to do it in a proper and sensible way, while respecting private property rights and State law. Is that something that ought to be preserved?

Mr. BOARDMAN. Absolutely. Private property rights are huge. It was said by one of our forefathers, "If you don't have the ability to own property, you will become property." I don't want to become property. I want to be able to raise my family in the West and nothing better than waking up on an early morning and walking out and hear our State bird, a Meadowlark, sing back to you and see the deer. And that is the American dream that we have been able to accomplish. And we can't do that with the Federal Government——

Mr. TIPTON. Let's tie this together just a little bit. We have got blueways, we have the water grab, in terms of conditional use of permit that we are seeing now come out of the Federal Government.

And, Ms. Link, just to clarify and to put an exclamation point on it, how much money did the Federal Government offer to pay when they demanded that you sign over water rights from the ski areas? How much money did they offer?

Ms. LINK. No money at all.

Mr. TIPTON. No money at all. So the Federal Government now just feels that they can step in and take private property.

Ms. LINK. That is correct. And ski areas have invested hundreds of millions of dollars in water rights.

Mr. TIPTON. Great. Yes. I don't know about you, but this almost seems a little bit like Whack-a-Mole to me. They are popping up first with the conditional use of permit. Now we are following up with blueways. The West loses, private property rights lose, State rights lose, all across the board.

And given that lack of clarity surrounding the blueways Secretarial Order and the massive watersheds that we have had illustrated up on the screen, the potential impacts that we all know, those of us who live in the West, that this can have on our communities and our way of life, what would you like to be able to see, moving forward, to ensure that we protect our State water law and our private property rights? Mr. Boardman? You first.

Mr. BOARDMAN. First of all, to be specific, let's talk about the blueways, since that was what—my testimony. I would like to have the ability, as a local stakeholder, to opt out if we have that choice and say, "No, we are not interested in that."

Mr. TIPTON. We need something to give you that security.

Mr. BOARDMAN. Yes.

Mr. TIPTON. Great. Mr. Parker?

Mr. PARKER. The laws are on the books; let's have them honored. The Congressional Act of July 1866 said that the States control the water and the possessors of that water are recognized. And then

you come even forward to the Taylor Grazing Act, and it says all rights are recognized in water in the States——

Mr. TIPTON. So we need to codify that right.

Mr. PARKER. They are there. Honor them. The frustration, Congressman, that I have had in Utah is the directive in 2008 by the Forest Service. They said, "This is what you are going to do, and that includes you are going to turn over your water to us, or we are not going to allow you to go on to our property and develop and maintain your water." That is the choice they have had, is to either leave their water on the ground where it is and not use it, or sign over their water, or joint ownership to the Federal Government. There is something wrong with that.

Mr. MCCLINTOCK. OK, thank you. Mr. LaMalfa.

Mr. LAMALFA. Thank you again, Mr. Chairman. Well, we have had a wide-ranging discussion here today, and we have talked about climate change here, which actually I am kind of a fan of by the time I have spent a January here, or August, or July August, you know, I like the cycle of nature here. So when you look at it over a—whether that is a period of a year or 10,000 years, when we have cycles, I think combating climate change is something that we need to redefine what it is we are talking about. Instead, what human activities can we do better on doing things cleaner? And, as technology advances, I think we do much better at that.

But we do see the effects that when our hydrology changes, what are we doing to address that in the natural flow of nature and one of the measures would be to impound more water. And some of the ideas we have on the books or in ideas that are proposed for water projects are thwarted. At the same time people want more water for environmental concerns as well as agriculture and urban uses, we are thwarting the ability to impound water, including the intractable wild and scenic designations on rivers on an issue we discussed in this room yesterday that make it where there is really no trust when government comes in with a designation.

I mean when you get to the point where you name something, a wilderness area or a wild-and-scenic or a grasslands or a national forest, when you put a name on it, you are pretty much sentencing it to no more human activity or management in that area.

And so, bringing back to the blueway, addressing Mr. Boardman here, I guess for the TV audience, my understanding of the blueway is that it is much wider in its area than a wild-and-scenic river designation, but it is meant to be narrower. It takes into account just intending to recognize the local efforts of regional conservation, recreation, and restoration efforts.

So, I guess somebody a couple thousand miles away in Washington, D.C., a Secretary, is going to recognize the good work that you are doing by declaring it a blueway. And it doesn't sound like you are asking for that help, that you don't need that recognition from somebody in Washington, D.C. for that; you are doing just fine on your own. Is that a pretty fair assessment?

Mr. BOARDMAN. Yes, correct. And I also agree with your analogy of the climate change. I would assume at this time a year ago, when any of the Iowa and Midwestern corn farmers would have said on April 25th of 2013 you wouldn't have had one field planted

to corn because it is too wet, they would have thought you were crazy. So I think we do have climate in cycles.

But, yes, as the blueways, we just want to be able to have that ability, because we are doing a lot of this on the ground. And also funding is scarce. And we can't just keep throwing dollars out there. So we come up with a new program, the national blueways, and it says there will be money and these people will do something. It is so arbitrary. What is it all about? Is it an award? The letter from Mr. Salazar to the Wyoming Delegation said that this is an award.

Well, to me, if you define award, it is for something that you have already done. You are being recognized for doing something good. And we are nominating these rivers as a prestigious—to be able, in my opinion, to control them. And it is very disturbing to me.

Mr. LAMALFA. Well, generally, my observation is that when you name something you designate something then. Now you are inviting a lot of new stakeholders in that the locals have probably done a pretty good job over the years, as the river still exists, the watershed still exists. But when you invite stakeholders in that generally are not holders nor, speaking to the cattlemen, many of them don't even like steak, that we have outsiders coming in that generally have a desk, a fax machine, and a PR operation that is designed to undermine what it is you do well.

And, by and large, again, I see westerners that are bending over backwards to comply with onerous regulations and designations that are put upon by different level—the argument made earlier that—does the Federal Government intervene on State law or vice versa?

To me, it is about when any level of government is out of control, then it is up to us, as lovers of freedom, in defending constitutional rights, to intervene, really, outside of whose jurisdiction this might be. There needs to be exceptions for that. And when you uphold the constitutional oath, we are here to defend you, the people, not more government. So——

Mr. BOARDMAN. I——

Mr. LAMALFA [continuing]. Thank you for your time here today.

Mr. BOARDMAN. I concur with that, and I thank you very much for that philosophy.

Mr. MCCLINTOCK. Thank you. I can't resist one more round of questions. To dovetail into Mr. LaMalfa's point, can any of you tell me of any period in the 4 billion years that this planet has existed when the climate has not been changing?

[No response.]

Mr. MCCLINTOCK. Anyone? Anyone?

[No response.]

Mr. MCCLINTOCK. Reminds me a little of the Ogden Nash ditty, "The ass was born in March, the rains came in November. Such a flood as this," he said," I scarcely can remember." But I think Mr. LaMalfa makes a good point that recognizing that the climate has been in constant change for the 4 billion years that our planet has existed, that we ought to make preparations for those dry periods, which is why we build reservoirs and aqueducts. We don't build those reservoirs and aqueducts in order to dump that water into

the ocean. I have noticed that water tends to run downhill very nicely on its own. We build dams and aqueducts in order to stop the water from running into the ocean, so that it can be used for productive purposes.

Ms. Link, you mentioned that you tried to negotiate with the Forest Service to sustain ski areas for future generations without the relinquishment of your water rights. What has been the response of the Forest Service to your offers?

Ms. LINK. The Forest Service has not been receptive to alternative approaches to a water clause that would fall short of the United States owning the water.

Mr. MCCLINTOCK. In your opinion, why do you suspect that they have asked for nothing short of full title to the water in these areas?

Ms. LINK. I think that the Forest Service is trying to gain control of water for its own purposes. That is the bottom line. The clauses that the agency has written do not give any guarantee that the water that was owned by the ski areas will continue to be used for ski area operations. So, to us, that is very telling of what their motives are.

Mr. MCCLINTOCK. What alternative uses do you suppose the Forest Service has in mind when they acquire these rights?

Ms. LINK. I would say it is aquatic species protection, aquatic species habitat protection.

Mr. MCCLINTOCK. What assurances does the Forest Service give you, as the permittee, that they will continue to tie the water rights to the land for purposes for which it is now being used?

Ms. LINK. They gave us absolutely none in the last clause that was issued. In fact, it allows the Forest Service to determine what is the sufficient amount of water that is needed for ski area operations.

Mr. MCCLINTOCK. Is the Forest Service using any methods, other than forcing ranchers and ski areas to relinquish water rights as a permit condition to obtain these rights?

Ms. LINK. Yes. And I would like to just highlight one example that I think is very illustrative here. Durango Mountain Resort in Colorado did a land exchange with the Forest Service back in 1990. And in that land exchange it gave away some private acreage on the back side of the ski area, but it retained the water rights that it had. The ski area's water rights had priority dates back to the 1970s.

If you fast forward to today, the Forest Service is now denying that ski area access to its water rights, because now that is public land. So the ski area is forced to seek out a quiet title action, which it will do shortly. The ultimate irony is that if the ski area prevails in that quiet title action, and we think they will, they will still have to get a permit, because it is Forest Service land, to use that water. And the permit will say, "Turn your water rights over to the United States."

Mr. MCCLINTOCK. Mr. Parker, could you reiterate the tactics that you have seen used by the Federal Government on this issue?

Mr. PARKER. Yes, absolutely. And I would concur. This is about control in Utah. The two hottest topics on the public lands are R.S. 2477 road access and controlling the water. Yes, we watched as

they established rules for the agency that are not backed by Congress.

And then, when the State of Utah said, "We are going to change our law so that only private individuals can hold water rights and not the Federal Government," the U.S. Forest Service confronted our legislature and said, "If you want a Nevada scenario where water hasn't been developed on Federal lands in 10 years, that is what you are headed for." At that point——

Mr. MCCLINTOCK. That sounds like extortion.

Mr. PARKER. Well, I am not going to go there.

Mr. MCCLINTOCK. We have some very good laws against that. Are they citing any authority in current law to claim this power over Utah?

Mr. PARKER. No, sir. This was done in agency regulations——

Mr. MCCLINTOCK. So there are no laws that we can change that they are using as justification. But, rather, this is lawless acts by an Administration——

Mr. PARKER. Agency authority is what has established this conflict. The State of Utah then added the joint ownership of livestock water the next year to assure that water would continue to be developed. That is being held over permitees' heads now. They have to sign joint ownership or they can't get to their water.

Mr. MCCLINTOCK. Thank you. Mrs. Napolitano.

Mrs. NAPOLITANO. Oh, thank you, Mr. Chair. Mr. Boardman, former Secretary Salazar, prior to his departure as Secretary of the Interior, sent a letter dated March 27th stating that no new national blueways would be designated without consent from all the States. Does this address your issue of public participation and ability to opt out? And did you receive a letter, or are you aware of that letter?

Mr. BOARDMAN. Yes, I am aware of that letter. And I was very cognitive [sic] of that letter, and I thank him for that. But I felt that was more like an olive branch, a peace offering, on his departure. That is no way indicating what the next Secretary of the Interior will do.

The intent of that letter was to say, "OK, we will assure you you can opt out and we are not going to designate that unless we notify you." But does that mean the next Secretary of the Interior will go ahead and honor that letter?

Mrs. NAPOLITANO. Well, that is like the changes here in Congress. Does one side differ from the other?

Mr. BOARDMAN. Yes. I wish it would have said, "We will not," instead of, "our intent is not to."

Mrs. NAPOLITANO. But then, if I were to pass a law, it could be overturned the next time by somebody else.

Mr. BOARDMAN. Sure.

Mrs. NAPOLITANO. So that is kind of up in the air.

Mr. BOARDMAN. Yes, yes.

Mrs. NAPOLITANO. Mr. Benson, Mr. West has drawn a distinction between his organization's use of the citizens suit clause, say in the 1990s, and the Aransas project's recent suit. In your opinion, is that a valid distinction?

Mr. BENSON. I mean the two cases are not exactly the same. I would acknowledge that. But in both cases you had private actors

suing, arguing that endangered species were being taken, and that remedies were necessary in order to prevent that from happening.

So, I mean, in the big picture I would say the cases are pretty similar. The earlier case alleged that there was a violation by the Fish and Wildlife Service, even though they weren't the ones directly managing the resource. And here, the actual managers of the resource got sued. You could look at this as being a, in terms of causation, being much more direct and straightforward.

So, I would say that the earlier case was more novel than this one.

Mrs. NAPOLITANO. Thank you. Again, Mr. Chair, this bears a lot of thought on water and our future utilization of that precious resource, because Mother Nature does not give us any new water resources. So we need to protect it to ensure that we protect it for future generations. And I am even thinking of my great-grandchildren now.

So, thank you very much for being here, gentlemen and ma'am, and I yield back.

Mr. MCCLINTOCK. Thank you. Mrs. Lummis.

Mrs. LUMMIS. Thank you, Mr. Chairman. I am looking at Mr. Benson's testimony and have a question for Mr. Boardman. And admittedly, Mr. Benson is testifying on the Endangered Species Act, but my question applies to one of the clauses he wrote about how Bureau of Reclamation projects have provided the Nation with important benefits. But he goes on to say these benefits have come at a high cost in Federal tax dollars and in other ways, such as harm to aquatic ecosystems and loss of river recreation.

So, my question, Mr. Boardman, can you respond to Mr. Benson's claim that the Bureau of Reclamation water projects in the West have harmed ecosystems and river recreation? And are you aware of any counter-examples where these projects have actually provided benefits?

Mr. BOARDMAN. Well, I can't speak for all of the West, but let's talk about our watershed area, about 165,000 acres. Before the Buffalo Bill Dam in 1904 was built and then expanded in the 1970s, people came to Wyoming to get on a stagecoach to go to the east entrance to Yellowstone Park, and there was nothing else. Snows came, the rains came, the water went downhill, as our honorable Chairman talked about. And then it was done, and there was no wildlife habitat, there wasn't any fauna or flora. There was no, as we say, carbon sequestration as what we are talking about now. It was gone.

Since then we built a dam, and also we have acquired 165,000 acres of what I think is pristine habitat. We have core sage grouse, which is an endangered species, areas because of that vegetation that we have up there. We also added on to the dam in the 1970s, I believe, or early 1980s, another 27 feet. And part of that was a State-controlled account. And so, then, we were able to release in the winter time added water for downstream for aquatic species. Had we not had that dam, the river would be dry, frozen over in the winter, in the summer and by August and—there wouldn't be any trout and there wouldn't be recreational opportunities because you could walk across the river.

And so, stored water and dams in our given area is a tremendous plus. Not only that, we have created such a beautiful place for people to come and to see, a place for families and people to raise their families and have economic development and live the American dream, such as my wife and our four boys have been able to do.

Mrs. LUMMIS. And can you tell me where the first Wild and Scenic Waters designation was in Wyoming?

Mr. BOARDMAN. I am not familiar with that. The Clarks Fork River, which is just west of us, is a Wild and Scenic River designation, beautiful place.

Mrs. LUMMIS. And that is the first, Mr. Chairman, which is well within the areas that we just saw on the map.

Mr. BOARDMAN. That is part of the Yellowstone watershed.

Mrs. LUMMIS. It is part of the Yellowstone watershed. You don't say?

Mr. BOARDMAN. Yes, Yes.

Mrs. LUMMIS. And that is the subject of this blueways designation?

Mr. BOARDMAN. Yes, it flows down, the Clarks Fork River, and then goes down and joins the Yellowstone at Laurel Montana.

Mrs. LUMMIS. And are all of the headwaters of the Yellowstone River in Montana—in Wyoming, rather?

Mr. BOARDMAN. I think almost every one of them up in Yellowstone Park—you get clear over there by West Yellowstone, clear on the edge over there, some of those that come down into the Yellowstone Park into the Yellowstone Lake, and I am really not totally familiar. But I would image that some of those would go into the Yellowstone River, flow north out of the Yellowstone River, and come on downstream.

Mrs. LUMMIS. And——

Mr. BOARDMAN. But, yes, I would say the majority of them all originate in Wyoming.

Mrs. LUMMIS. And, given that, does it surprise you that the Department of the Interior approached Montana, as opposed to Wyoming, in terms of having this discussion?

Mr. BOARDMAN. I am not privy to that information, whether they were invited or they invited themselves, so I can't answer that question.

Mrs. LUMMIS. Tell me about the difference between cooperating agency status and other just conversations with Federal agencies.

Mr. BOARDMAN. Well, we are very fortunate this last legislative session in Wyoming, that the State—we opened up the conservation districts—had legislation that gave us expertise. And the cooperating agencies, then, had recognized the conservation districts have certain expertise in these watershed areas and conservation. So that gives us a cooperating agency status that, when we go to the table to visit with the BLM or the Forest Service, we get a place at the table to discuss local stakeholders' concerns.

Mrs. LUMMIS. Mr. Chairman, I yield back and want to thank all our witnesses.

Mr. MCCLINTOCK. Thank you very much. I believe we have concluded our questions.

I want to thank all of our witnesses for their testimony today. This Subcommittee very rarely goes to a third round, which is a

testament of its interest in the subject matter and in the quality of the testimony that all of you presented. And I want to thank you again.

Mr. Costa, who was trying to get back here for another round of questions, Mr. Benson, he expressly wanted me to convey his interest in and answer to the question that he had asked earlier regarding legal challenges that there wasn't time for you to answer.

The Committee's record will be open for 10 days. There may be additional questions, as well. And we will submit them to you in writing, if there are.

And, with that, if there is no further business to come before the Subcommittee, and without objection, this Subcommittee stands adjourned.

[Whereupon, at 12:18 p.m., the Subcommittee was adjourned.]

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