STATEMENT OF REED D. BENSON
REGARDING FEDERALISM, WATER, AND THE ENDANGERED SPECIES ACT
BEFORE THE SUBCOMMITTEE ON WATER AND POWER,
U.S. HOUSE COMMITTEE ON NATURAL RESOURCES
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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 overallocated 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.