

STATEMENT OF REED D. BENSON
ON REGULATORY AND ADMINISTRATIVE REFORMS IN WESTERN WATER
BEFORE THE SUBCOMMITTEE ON WATER, POWER AND OCEANS,
U.S. HOUSE COMMITTEE ON NATURAL RESOURCES
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Good morning, Chairman Fleming and members of the committee. My name is Reed D. Benson, and I am a professor at the University of New Mexico School of Law. I have studied, practiced, or taught water law for about 25 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, Power and Oceans Subcommittee.

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—three areas where federal law has been primary for over a century. The national government has also built multipurpose water projects and regulated hydropower development, sometimes in ways that states strongly opposed. 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 (ESA).

Many people seem to think that those environmental laws, and the way the current Administration uses them, are the root cause of federal-state tensions in this field. But ever since the days of Teddy Roosevelt, western water world has rarely been a harmonious place of peace, love and cooperative federalism. To the contrary, the federal role in water management was often controversial throughout the 20th Century. One of the greatest American water law scholars, Professor Frank Trelease, once wrote that federal-state conflict over water rights leads to “confusion, uncertainty, bad feeling, jealousy and bitterness. To a substantial degree, this is what exists today.” He wrote those words in 1971, before the enactment of the Clean Water Act and the ESA, at a time when the President was a conservative Republican from the West. Political fights over federal involvement in water management are as old as the western states.

Even with the Reclamation Act of 1902, Congress did not simply defer to western states and water users. The law authorized federal money to build irrigation projects, and required the Interior Department to follow state law in carrying out the Reclamation program. But it also imposed requirements based on national policy, not state water law. Congress not only dictated the purpose of these projects, but also imposed acreage limitations and residency requirements on those who would receive project water. The 1902 Act also provided that even after irrigators had repaid their share of project costs, “title to and the management and operation of the reservoirs ... shall remain in the Government until otherwise provided by Congress.” Thus, from the beginning of the Reclamation program, Congress saw Reclamation reservoirs as important public projects, to be retained by the United States rather than transferred to states or water users.

While Congress has asserted various national interests regarding water, it has retained the states' primary authority over water rights. In the West, states chose the prior appropriation doctrine to allocate and manage 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, allowing them to take all the available water to the detriment of junior users. It is a backward-looking system that has generally 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 reliable water supplies, and environmental water needs have low priority.

Because state laws generally don't ensure that aquatic and riparian ecosystems will actually receive adequate water, people who care about these ecosystems have often turned to federal law, especially the Endangered Species Act. The ESA is front and center because no other national law 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 Reclamation—unlike the Corps of Engineers—has no general authority or statutory direction for environmental restoration. And because Reclamation built nearly all of its projects before 1970, it operates them largely under a set of water rights, contracts, and project authorizing statutes that were adopted with little or no regard to environmental concerns. Congress could help by modernizing the law to broaden Reclamation's authority to address environmental concerns related to its project operations; without that, the ESA remains crucial.

Some would say the ESA is a prime target for reform, but for many years the federal government has been willing to be flexible and innovative in how it applies the law to western waters. Consider the Recovery Implementation Programs (RIPs), 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. The Upper Colorado and San Juan RIPs have been around for over 20 years, and have attracted strong bipartisan support in Congress when that was otherwise hard to find. It is certainly fair to question whether these programs are doing enough for listed species, and also important to note that the ESA remains very controversial in some places, especially the Central Valley. But these programs have shown that the ESA can be implemented in a way that states and water users can support. RIPs are unique to western water management, and they are an important reform that seeks to balance competing values that might otherwise be in conflict.

I believe federal water officials should emphasize these kinds of reforms, which address not only traditional project purposes such as water supply and hydropower, but also advance public values such as environmental protection and river recreation. These public values are especially vulnerable to the impacts of drought because they typically have low priority (or no recognition) under state law. For this reason, I would like to see these values be a higher priority for the Bureau of Reclamation, which is the key federal water agency for the West because it operates so many of the region's most important water projects. I would urge Reclamation to consider three initiatives that it would have authority to carry out under existing statutes.

First, Reclamation has significant authorities under the Reclamation States Emergency Drought Relief Act that it has rarely if ever used in the 25 years since Congress first enacted the law. These authorities include making temporary water supplies available from a Reclamation project, whether inside or outside that project's existing service area. That authority potentially could benefit users ranging from non-project irrigators to public water suppliers, and it could especially help protect fish and wildlife populations at risk of serious harm from drought. Congress mandated that Reclamation "shall give specific consideration to the needs of fish and wildlife, together with other project purposes, and shall consider temporary operational changes which will mitigate, or can be expected to have an effect in mitigating, fish and wildlife losses and damages resulting from drought conditions" Implementing this direction could help Reclamation prevent environmental impacts that can be both long-lasting and hard to remedy.

Second, Reclamation can do more with its authorities under the 2009 SECURE Water Act. I acknowledge that implementing this law has been a high priority for the agency, and Reclamation has published some important reports, funded and participated in a variety of basin studies, and made over \$100 million in grants. But the law calls on Reclamation not only to identify the risks of climate change for western water and to analyze the impacts of those risks, but also to produce mitigation strategies. It specifically directs Reclamation, "in consultation with appropriate non-federal participants," to develop strategies for reducing the water-related risks of climate change; the law lists a wide range of potential strategies, including "the modification of any reservoir storage or operating guideline," or "the development of new water management, operating, or habitat restoration plans" Thus, Congress called for development of specific adaptation measures, including those relating to operation of existing projects. The agency's brand-new Climate Change and Water Report certainly focuses more on strategies than the original 2011 version, but still indicates that Reclamation is moving slowly and very deliberately in considering strategies relating to project operating plans.

Third, Reclamation has no program for updating the operating plans of its existing projects in a way that incorporates the latest science and provides for public participation. (It has launched a pilot program to integrate new science at a few selected projects.) Thus, Reclamation may be missing opportunities to revise its operations to reflect the impacts of climate change, to respond to changes in the affected area since the project was built, and to address the public's needs and values relating to water. In the 2014 WRRDA, Congress called on the Corps of Engineers to consider changes in the operating plans for that agency's projects. For hydropower dams, the relicensing requirement of the Federal Power Act ensures that operations are reassessed every few decades. As for Reclamation, it is currently engaged with a variety of stakeholders in considering revised operations for Glen Canyon Dam on the Colorado, revisiting an issue it engaged in the 1990s under the Grand Canyon Protection Act. For Reclamation, such reviews clearly would take resources and would pose risks, but they could also bring important rewards for the West in the form of potentially beneficial changes to project operating plans.

The water management challenges of the West are only getting more serious in this era of climate change, rapid population growth, and potentially conflicting demands. Yesterday's Reclamation built many of the water projects that have helped today's West withstand some of the impacts of drought. If Reclamation can do more in the future with its existing authorities, it can help the West do more with its limited water supplies.