S. Elizabeth Birnbaum
Vice President for Government Affairs
American Rivers

Testimony
Before the Subcommittee on Water and Power
Committee on Resources
United States House of Representatives

Legislative Hearing on H.R. 2603
September 22, 2004

Good afternoon, Mr. Chairman and Members of the Subcommittee. I appreciate the opportunity to come here today to talk about H.R. 2603, a bill that could have sweeping impacts on public land management, natural resource conservation, and tribal trust assets nationwide.

My name is Liz Birnbaum, and I am the vice president for government affairs at American Rivers. American Rivers, founded in 1973, is the leader of a nationwide river movement. American Rivers is dedicated to protecting and restoring healthy natural rivers, and the variety of life they sustain, for the benefit of people, fish and wildlife. We have more than 38,000 members nationwide and we work with hundreds of local organizations, from every state in the nation, working to protect and restore their hometown rivers.

H.R. 2603 is a rather stunning bill – in less than a page, it could radically alter resource protection across the country. The largest impacts would be on rivers, but in fact it could affect virtually every land or water management decision that any Interior Department agency is involved in as well. This could be described as the "Great Unintended Consequences Bill" of the 108th Congress.

There are two main features of the bill – a limitation on the Department of the Interior from making water rights claims except in the narrow case of water rights for Indian reservations, and a far broader limitation on the Department's taking any action that might "abrogate, injure or otherwise impair" any water right. This latter limitation contains a number of ambiguities that make it very hard to assess how broadly it would be interpreted, but it could potentially affect every Interior land and water management or regulatory decision.

I can't begin to itemize every potential effect of H.R. 2603, but I believe it is possible to sort the potential effects into a few categories: impacts from Interior's inability to claim or protect water rights; impacts on Interior's ability to manage federal lands and water projects; impacts on Interior's ability to regulate activities off federal

lands; and impacts on Interior's ability to advise other agencies with respect to other federal actions.

Federal Water Rights

Paragraph (1) of the bill would prohibit the Secretary of the Interior from asserting federal water rights for any purpose other than Indian reservation use, unless specifically directed by Congress. This isn't limited to federal reserve rights – it appears to extend to use rights, flow rights, storage rights and drainage rights. It's unclear what would constitute sufficient congressional direction, but here are a few examples of Interior's current water rights holdings and claims:

- Interior holds federal reserve water rights for a huge number of areas, including most of the 95 million acres of National Wildlife Refuges. Water rights are essential to maintaining the wetlands and other wildlife habitat for which the refuges were designated. If Interior could not file claims for these rights, it could not protect them, and the refuges could easily be rendered useless. The result could be incalculable losses to the fish and wildlife that depend on these refuges, as well as to the taxpayers and sportsmen who have invested hundreds of millions of dollars to acquire these lands.

- On the subject of federal acquisitions, just two weeks ago Secretary Norton announced the completion of acquisitions for the Great Sand Dunes National Park in Colorado. The designation of this park and expansion of its boundaries was entirely motivated by the need to protect groundwater in the area, out of fear that a loss of groundwater would destroy the dunes. Neighboring lands were acquired to protect associated groundwater rights – if these rights could not be protected, Secretary Norton would be awarded a pyrrhic victory. In this particular case, there was language in the bill designating the park that directed the Secretary to protect the water rights – but since the bill did not outline water volumes, places or times of use, other water users might argue that even the Great Sand Dunes language is insufficient to meet the "specific direction of law" requirement of paragraph (1).

- Apart from this specific example, under H.R. 2603 the National Park Service might not be able to acquire or maintain other water rights essential to protect park resources – for example, the stunning waterfalls of Yosemite and the Grand Canyon of the Yellowstone, groundwater essential to the geothermal resources of Yellowstone or Hot Springs National Park and the formation of Carlsbad and Lechuguilla caverns, or even the water necessary to operate drinking fountains in the parks' visitors' centers.

- Because the assertion of Indian water rights is limited under this bill to only the water necessary for reservations, it ignores other tribal trust responsibilities of the Secretary of the Interior. For example, completely apart from the endangered species controversies in the Klamath River Basin, the U.S. government has

asserted water rights claims in Oregon's Klamath basin adjudication on behalf of the Klamath Tribe, arising from their treaty fishing rights. If the Secretary could not make such claims, the federal government's tribal trust responsibility might be abrogated, and the tribes might even have a takings claim against the United States.

- The Bureau of Reclamation also holds water rights that are used to provide both irrigation and M&I water to its contractors. Apart from ongoing debates over whether BuRec holds true title or holds water in trust, the fact is simply that if BuRec could not protect those water rights, its contractors might not be able to maintain existing seniority.

- And finally, the bill might call into question Interior's ability to assert water rights for firefighting activities on federal lands.

Management of Federal Lands and Water Projects

Of course, apart from the wildlife refuges and national parks, Interior is also responsible for managing 261 million acres of BLM land, many additional millions of acres of mineral estate, and dozens of Reclamation projects across the West. The language of subparagraphs (2)(B) and (C), if interpreted broadly, could interfere with a huge proportion of the resource management decisions involved in managing those lands and projects.

- BLM approvals necessary for oil and gas exploration and development and hardrock mining operations on federal lands incorporate numerous conditions designed to minimize resource impacts and impacts other users. Often these conditions include provisions that restrict water use, disposal or storage. If this bill is read broadly, BLM could not include such conditions on permits and approvals.

- The impacts may be far more drastic on the opposite side, however, as mining activities often have impacts on *other* users' water rights or disrupt groundwater and river recharge. Coalbed methane development in particular has been highly controversial because it discharges contaminated water that lowers the water quality of water bodies used by senior water rights holders – typically ranchers. So BLM could be caught in a bind, where approving a mine or a coalbed methane well would affect these other users' water rights while failing to approve it would prevent a federal lessee or mining claim holder from operating. It is completely unclear from this bill how BLM could resolve such a conflict.

- The language of H.R. 2603 might also affect BLM's ability to manage grazing permits. Under the Supreme Court's 9-0 decision in the *Public Lands Council* case, grazing permittees are solely permissive occupants of the federal lands, and their operations may be conditioned by BLM in any manner necessary to protect public resources. However, certain grazing permittees have argued that lease

restrictions affect their use of water rights perfected for stock watering, even going so far as to make takings claims. Again, if interpreted broadly by the Secretary or a court, H.R. 2603 would deter BLM land managers from managing grazing lands. It could seriously limit BLM's ability to restrict the use of grazing lands where a permittee has associated water rights, or to remove cattle from overgrazed ranges, subverting the entire purpose of the Taylor Grazing Act to establish professional management of the grazed areas of public lands.

- Subparagraph (2)(C) of H.R. 2603 addresses agency actions affecting water contracts, and would principally affect management of water projects by the Bureau of Reclamation. If interpreted broadly, it could prevent curtailment of water delivery for any reason – even reasons far beyond BuRec's control, like drought or damage to facilities. The shortage provision of BuRec contracts is designed to give BuRec operating discretion in these circumstances, but this bill might be interpreted to say that the shortage provision could not be used, even though the contractors had agreed to withstand shortages under these conditions.

Interior's Regulatory Authority

H.R. 2603 would not only affect Interior's management of federal lands and water projects. There are numerous areas where actions by Interior affect other activities and the actions of other agencies. The notable areas where Interior has statutory regulatory authority are in hydropower licensing and the protection of endangered species. H.R. 2603 might extend its reach to these areas as well.

- Under the Federal Power Act, several agencies within Interior have authority to place conditions on hydropower licenses issued by the Federal Energy Regulatory Commission: any of the land management agencies may impose conditions necessary to protect public lands, and the Fish and Wildlife Service may require the installation of fishways to ensure fish passage. Since nearly all of these conditions involve some restriction on the management of the hydropower utilities' water supply, all might be interpreted under H.R. 2603 to have some prohibited effect on water use rights, subverting the purpose of these conditioning authorities. Fish need water; fishways would be rendered useless if the Fish and Wildlife Service could not require adequate water flow.

- The Fish and Wildlife Service has some essential regulatory authority with respect to the take of listed species. The Endangered Species Act imposes fines for example, for killing, injuring or harassing endangered species, and it is the Secretary of the Interior's responsibility to impose civil penalties. H.R. 2603 could be interpreted to prevent the Service from investigating or penalizing these actions when they involved the exercise of water rights, as when fish are entrained in screens, pumps or turbines. Since aquatic species are five times more likely to be endangered than terrestrial species, this bill could take a significant bite out of protection for imperiled species.

- The other major regulatory impact from the Service's ESA responsibilities comes under section 7 of the Act, requiring all federal agencies to consult with the Service before taking any action that may affect listed species. Again, H.R. 2603 could be interpreted to abandon necessary protections for the large number of listed aquatic and water-dependent species in these consultations. It might prevent the Service from even making a jeopardy finding, and certainly from developing reasonable and prudent measures or reasonable and prudent alternatives that would be necessary to prevent extinction.

Interior's Advisory Authority

In addition to regulatory authorities, the Fish and Wildlife Service has an advisory role with respect to innumerable federal actions that affect fish and wildlife. H.R. 2603 could be interpreted to affect even these advisory authorities, since it prohibits the Secretary from exercising any authority in any way that might impair a water right.

- Under the Fish and Wildlife Coordination Act, the Service consults with other federal agencies on any project that impounds, diverts or controls water, whether by action of the federal agency or under a federal permit. These activities by their very nature are likely to involve water rights, and the Service's consultation under the Coordination Act could thus be severely limited.

- The Fish and Wildlife Service also reviews every wetlands permit application under section 404 of the Clean Water Act. Again, these are activities that by their very nature are likely to affect water rights, whether the rights of the applicant or those of neighboring landowners or water users. The Service's review of these applications would be severely limited if it were required to assess whether any comment might "abrogate, injure or impair" any water right in the watershed.

Conclusion

I have just attempted to provide a few examples of the far-reaching unintended consequences that might follow if H.R. 2603 were enacted. Each of these examples might also have enormous impacts on downstream water users and water quality. The bill could radically reconfigure water rights and river and groundwater flows across the West, and to a lesser extent in the eastern U.S. as well.

H.R. 2603 has a number of drafting problems that might mean that none of these interpretations would occur. It's simply impossible to know. But the *threat* of these and innumerable other unintended results is definite, and it should be avoided.

American Rivers strongly opposes H.R. 2603. We urge the Committee to abandon any effort to enact it.