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

**Oversight Hearing  
Bureau of Reclamation's Facility Title Transfers:  
Lessons Learned and Future Opportunities  
March 24, 2004**

Mr. Chairman, thank you for inviting me to testify today. My name is Steven Malloch. I appear on behalf of both Trout Unlimited (TU) and the Henry's Fork Foundation (HFF) in testifying about Bureau of Reclamation facility ownership transfer.

Trout Unlimited's mission is to conserve, protect and restore North America's trout and salmon fisheries and their watersheds. Trout Unlimited is a private, non-profit organization with 130,000 members in 450 chapters nationwide. TU's Western Water Project works on water quantity and policy issues around the West. Across the West, even in normal water years, but especially in drought years like we have had in the past 5 years, rivers routinely are drained dry – a condition that is disastrous for fish, anglers and the local economies that depend on water-based recreation.

Today I also appear on behalf of the Henry's Fork Foundation, an Idaho conservation organization whose 2,000 members are dedicated to protecting the Henry's Fork watershed. The HFF mission is to understand, protect, and restore the unique values of the Henry's Fork of the Snake River in the context of mutual respect for others that live and work in the watershed to ensure that solutions are sustainable.

The Henry's Fork Foundation and the Fremont-Madison Irrigation District (FMID) are leaders in the Henry's Fork Watershed Council, which has a remarkable history of collaboration and compromise on difficult resource issues extending back a decade. Trout anglers greatly appreciate this progress because the Henry's Fork is internationally famous for its remarkable trout fishing – with large numbers of huge, fat, and, unfortunately, smart wild rainbow trout. TU members voted it the best fishing in the country, and ranked it number one in TU's Guide to America's 100 Best Trout Streams. Anglers are not the only beneficiaries of this fabulous fishing, local business is as well. An economic study funded and completed by the HFF and published in *Intermountain Journal of Sciences* in 2000 estimated the regional economic benefit of only a small portion of the Henry's Fork fishery to be in excess of \$5 million per year.

## **Introduction**

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I am here today to offer comments from the perspective of both an active participant in specific ownership transfers, and as an advocate for addressing some of the pervasive problems in western water through title transfer.

The first perspective is as a participant. Since 1996, HFF, TU and other organizations, notably Western Resource Advocates, have worked on proposals to transfer title to portions of the Minidoka project in Idaho to the Freemont-Madison Irrigation District. Legislation directing transfer of parts of that project passed last year, and the transaction is in process. I would like to note that TU and HFF supported the final version of the legislation; to my knowledge, this is the only title transfer endorsed by conservation organizations. TU is now engaged in a proposed transfer on the Provo River in Utah and has worked on other ownership transfer proposals.

The second perspective results from my work for TU and others on ownership transfer since the early 1990's, when serious proposals to dispose of California's Central Valley project and federal Power Marketing Authorities circulated. Since then, I have been an advocate for strong consideration of environmental and public interests in transfer of ownership from Reclamation to non-federal entities. On behalf of TU and others, I have testified before this subcommittee on a number of occasions about transfer proposals and the need to improve western water management in transfers.

### **Transfer Policy Approach**

The essence of my testimony is this: Congress should transfer ownership of Reclamation projects only when doing so results in certain and sustained improvement in our ability to meet the needs of the West's future. We should not be satisfied with fundamental changes to the Reclamation system, such as change in ownership, unless there is a very substantial return on the enormous federal investment in Reclamation projects. We propose that much of that return be in the form of improved fish, wildlife and river recreation benefits, both because they were much harmed in building and operating Reclamation facilities, and because westerners today and in the future will benefit greatly from their enhancement.

Congress should use title transfer, and the benefits ceding ownership to non-federal entities confers, to make the west's water systems work better for all interests. Ownership transfer should be seen as a tool that can be used to fix some of the West's water problems, not an end in itself, or a means to simply lock in the status quo ante.

This is not an impossible or unduly idealistic task. On the Henry's Fork in Idaho, an irrigation district will receive ownership of a well field, diversion dam and canal, as well as water rights. As part of that deal, a much-needed drought management plan is being developed, one that will explicitly take into consideration the needs of farmers as well as the trophy wild trout in the river. The result is a net gain for the irrigation district, the health of the river, and the local economy that is supported by both anglers and farmers.

On the Provo River in Utah, an interrelated set of improvements is being developed that appears to hinge on transfer of title. Ownership transfer underlies a financing mechanism that will replace an open canal with pipes, improving public safety and

water supply security, while decreasing leakage and evaporation from the canal. The salvaged water will be used in part to improve flows in the Provo River, with benefits for both an endangered species and, potentially, trout fishing. The increased river flows will extend through the Provo city limits, enhancing a rare urban trout fishery. In addition, local communities are proposing to convert the old canal route to walking and bicycle trails. This is the kind of project that we should be looking for in title transfers – improvements in water management, usable supplies, environmental values, and recreation.

The approach we advocate has four main points:

***Transfers should enhance the public benefits of the project and the associated river system.***

Our fundamental position is that transfers only make sense if the human and environmental systems associated with the water projects are improved because of transfer.

This Committee knows very well the problems of western aquatic and riparian species – some are already extinct and many others are declining, threatened or endangered – as well as the legal issues those declining species cause water users. Ownership transfer must work to solve these problems, not to avoid their legal consequence, maintain the status quo, or encourage further degradation. Enhancement of the physical systems is usually physically straightforward – habitat improvement, water quality improvements, and increased river flows solve most problems. The problem is in creating the incentives for current water users to take those physical steps. Granting of a new benefit, ownership, can be used to provide that incentive.

In the case of the Provo Reservoir Canal Enclosure Project, title transfer will allow use of financing arrangements by the new owner that would not otherwise be possible. Given that federal funds for upgrading Reclamation projects are increasingly scarce, this type of non-federal investment will be increasingly needed to modernize and enhance existing Reclamation projects.

***Some federal water and power projects should remain federal.***

Projects that play critical roles in watershed and river management for public purposes or are important to interstate, international, or treaty obligations should remain federal. Some projects are simply too important to be able to adequately condition the transfers. Projects such as Hoover Dam, Glen Canyon Dam or the Grand Coulee Dam and associated reservoirs simply should remain federal. Large Reclamation projects that provide substantial benefits to a multitude of competing interests require a balancing that should also remain federal; examples include the California's Central Valley Project and Idaho's Upper Snake River projects.

As a corollary to the first principle, where public benefits cannot be ensured and enhanced in a transfer, because adequate terms cannot be crafted or the recipient will not accept the conditions, the project should remain federal.

The recipient of the project may matter in evaluating whether the project remains federal. Even through they are technically arms of local government, most water districts are accountable only to their members, and not to the general public; this makes protecting the public benefits more difficult.

However, even in the large multi-purpose projects, parts of the whole may be appropriate for ownership transfer when the parts are operationally separable and reasonable terms are agreed upon. In the Henry's Fork example, the Fremont-Madison Irrigation District decided to seek title to two important dams and associated reservoirs and other assets, including those now being transferred, shortly after Reclamation released its *Framework for Transfer of Reclamation Project Facilities* in 1995. The effort was highly contentious, and despite very intense efforts on the part of FMID, HFF and others to craft a transfer approach and terms that addressed the problems, resolution was not possible. Too many private and public interests vested in the dams, reservoirs and water rights to allow ownership transfer to a one group of water users. Eventually FMID decided to pursue transfer only of those portions of the project that were operationally separate and less contentious, dropping the two major dams and reservoirs. That approach proved both reasonable and successful.

***Water users are not entitled to project ownership; transfer is a new benefit to be negotiated.***

Under Reclamation laws and Supreme Court rulings, water users are in no sense entitled to project ownership when they complete their capital repayment obligations. The law and history are unambiguous on the point: "paid out" does not mean "paid for."

The economics of water projects make nonsense of the notion that water users have in any sense "bought" the projects. Since 1914, the federal taxpayer provided a subsidy of from 40% to more than 90% of the cost of irrigation projects simply through 40 year or more no-interest loans. On top of that generous subsidy, irrigation water users have had more than half (53%) of their \$7.1 billion irrigation share of water project costs shifted to hydropower users or simply forgiven. (Information on Allocation and Repayment of Costs of Constructing Water Projects, GAO/RCED 96-109, 1996.)

The result is that irrigators pay only pennies on the dollar of the costs for Reclamation projects. In the project transfer debate, water districts argue they are due ownership when they complete payments. Yet, there is no legal claim that those pennies built equity.

Cost is one issue, value is another. The most common water aphorism used to be Mark Twain's about whisky, water and fightin'; now we hear that "water is the oil of the 21<sup>st</sup> century." Water and the facilities to control water are increasingly valuable. Further, while older Reclamation projects were often authorized only for one or a few purposes (usually irrigation, flood control and power) even these single or limited purpose projects now provide much wider benefits. The Henry's Fork is typical in that fish and recreation extremely important to the local economy are not a part of the Reclamation project authorization. For many, if not most, Reclamation reservoirs, there is at least some economically important non-authorized use, if only lakeside real estate development. The current value of these projects, not just the enormously subsidized authorized uses, should be considered in transfer of ownership.

In fact, because the federal taxpayer bore almost the entire cost of these projects, the argument in favor of continued public ownership and increasing public benefits is much stronger than any argument in favor of water user ownership. If a transfer of ownership to water users is accomplished, substantial additional value is due to the public and taxpayers.

***A decision to transfer a project should not be made until the consequences of transfer are understood and the terms of transfer determined.***

Because water projects affect so many interests, the terms of the deal determine whether a transfer is in the public interest. Congress requires that water projects proposed for construction be evaluated, based on a detailed feasibility study, before considering projects for authorization. Congress should do no less in disposing of projects in which it has already invested the taxpayers' money.

**Significant Issues**

TU and HFF agree that the federal government need not own all of the 600-plus Reclamation projects. Our support for transfer of portions of the Minidoka project and current work on transfer of facilities on the Provo River demonstrates that we will endorse transfer proposals that meet the fundamental goal of improving western water systems.

We see the following as significant issues for Congress to consider in evaluating the record of Reclamation transfer to date, and in setting an approach for the future.

***What is to be accomplished through Reclamation facility ownership transfer?***

At the root of many of the issues in Reclamation facility title transfer is the question: What is the policy goal in ownership transfer? Is the goal to confer new benefits on the current water contractors, or to lock up the existing benefits and subsidies to the benefit of one class of user at the expense of others? Is the goal to reduce the size of the Reclamation budget, or allow that budget to be focused on the highest federal priorities? Is the goal to help water contractors avoid strictures of federal Reclamation and environmental law such as acreage limitations, Endangered Species Act regulation, or constraints on conveying irrigation water to cities willing to pay high prices for water?

The goals put forward by Reclamation in its 1995 Framework were vague. No clearer formulation has been offered since.

We suggest that the Administration makes a compelling case for the end of business as usual for western water in its Water 2025 initiative. While the substance of their approach has yet to be revealed, the Administration recognized that growing western urban populations, pervasive degradation of aquatic and riparian ecosystems, and climate variability require new approaches. Transferring ownership of Reclamation facilities is one of the tools which can and should be used in developing solutions.

In that context, the goal of ownership transfer should be to make the water management system more flexible and capable of producing greater benefits, while at the same time solving existing, and probable future, problems. From TU's perspective, improving fisheries and fish habitat should rate quite high on the list of problems to be solved at most Reclamation projects.

The approach taken on the Henry's Fork is the right one – do not transfer ownership until the deal includes features that will help solve the water management and environmental problems associated with the project. That is also the approach we advocate on the Provo River.

***Legislation directing transfers (“Secretary shall transfer..”) in advance of finalizing transfer conditions effectively eliminates environmental review and Interior’s ability to craft terms that protect the public interest; it also puts project recipients at risk.***

Most of the recent transfer legislation directs the Secretary of the Interior to transfer title, with payment and other terms specified. We are informed that the Office of the Solicitor for Interior issued an opinion that this language eliminates Interior’s ability to impose conditions on transfers, and eliminates the need to initiate consultation under Section 7 of the Endangered Species Act. The reasoning of that opinion also suggests that Interior would not be required to conduct environmental impact analysis of a directed ownership transfer under the National Environmental Policy Act.

For proposed transfers that have not completed NEPA and ESA review prior to enactment of legislation, the standard formulation for transfer bills effectively eliminates formal public scrutiny and environmental mitigation. NEPA and ESA consultation serve important roles in identifying issues that should be resolved prior to transfer. That Solicitor’s opinion also suggests that directing transfer eliminates the ability of Interior to craft transfer terms that protect the federal interest, protect the public interest or resolve problems in what are often complicated transfers. Directing transfer eliminates both the problem identification stage and the ability to solve the problem.

The issue of whether transfer should be authorized (“...may transfer”) or directed (“...shall transfer”) is one that has been repeatedly raised in the legislative process. In one hearing in this Subcommittee a Member noted that directing transfer was risky to project recipients because they would not have the ability to renegotiate the deal if a problem like hazardous waste arose.

We strongly urge Congress to repudiate the practice of directing transfer, particularly when state and local government and the public have not had the opportunity to comment on a proposed transfer and the terms and conditions of transfer have not been finalized.

We support Reclamation’s approach of completing review, public comment and transfer terms before legislation is introduced.

***Title transfer is never “uncomplicated” because even projects originally authorized for a single purpose may now provide a variety of benefits.***

The one lesson from the years of title transfer efforts which all can agree upon is that there are no “uncomplicated” Reclamation projects for which ownership transfer is a simple task. The “single-purpose” projects, typically authorized only for irrigation, often now have a variety of other benefits. While not authorized, these benefits may be very important to the local people and regional economies.

Using the Henry’s Fork as an example, the reservoirs to which FMID originally sought title were authorized for a single purpose – irrigation. Now, however, they provide water supplies for a world-class trophy trout fishery on the Henry’s Fork, which generates at least \$5 million per year in economic benefits to the surrounding area. In addition these reservoirs are used for non-federal power generation, flood control and lake recreation. An approach that considered only the single originally authorized purpose for these dams and reservoirs would have fallen far short of

accounting for the actual benefits currently provided.

***Title transfer should continue to be accomplished on a project-by-project basis, not through blanket transfer authorization.***

Congress authorizes modern water projects only after carefully considering comprehensive feasibility studies that evaluate the economics, distribution of benefits, and technical issues of that project. Investing in the authorized projects through the appropriations process provides ample opportunity for further evaluation. After all of this due diligence and scrutiny, disposing of public assets should be due no less consideration.

Please note that conservation organizations are not alone in concern about crafting bespoke terms for each transfer. The Western States Water Council whose members are appointed by Western governors arrived at very similar conclusions in twice adopting a position on transfers of federal water and power projects. In 1995 and again in 1998 the WSWC adopted a position on transfers that sets out their concerns with third party impacts, public costs and benefits, the change in applicable laws, and the need for a strong role for states. The WSWC urged Congress and the Administration to adopt a process and develop criteria and guidelines for project-by-project review of transfer proposals, with significant state involvement. (See Position No. 209 at <http://www.westgov.org/wswc/transfer.html>).

Given the sensitive balancing needed in transferring ownership, a political review in Congress is appropriate, just as it is in constructing projects. Therefore, Congress should not enact a blanket authorization for Interior to transfer title to all or a subset of Reclamation facilities.

***Congress has a compelling interest in considering the future use of transferred projects, and where appropriate should insist on enforceable protection for federal and public interests.***

With the significant public benefits now resulting from the federal investment in Reclamation projects, Congress should ensure that those benefits continue after ownership transfer. This may require crafting transfer terms that protect those public benefits, and creating enforcement mechanism that ensure that the benefits continue.

For a number of project transfer bills enacted, language was included that asserted that there would be no changes to the operations of the project. That language had no legal effect on future operations of the project, but may have limited environmental and other review by constraining consideration of alternative uses of the project.

The need to consider future uses is complicated by the change in applicable law when the projects become non-federal. When projects are removed from federal ownership, important environmental protection is removed as well. After ownership transfer, future changes to most projects will no longer be subject to review under either NEPA or Section 7 of the ESA.

This point is worth elaborating because it has been the subject of some discussion in transfers. Much of the ESA, and in particular Section 9's prohibition on "take" of endangered species applies to everyone, federal or non-federal. However, Section 7 of the ESA applies only to federal agency action and requires that federal agencies

consult with appropriate agencies regarding any proposed action that may jeopardize endangered species. 16 U.S.C. § 1536. Section 7 is more stringent than Section 9, and is the legal basis for most Reclamation-related endangered species litigation. After ownership transfer is accomplished, Section 7 no longer applies to decisions about the project, assuming that there is no other required federal agency action (such as a permit from the Forest Service or other discretionary federal agency action). Similarly, discretionary federal agency action triggers the need to comply with NEPA, which may result in environmental impact analysis. Under Reclamation ownership, any significant changes to a project could result in the need to initiate Section 7 consultation and comply with NEPA. After transfer, there often will be no such obligation.

Therefore a consequence of an ownership transfer is that the legal protections of NEPA and ESA's Section 7 may no longer apply. Future changes to the former Reclamation project may not be subject to either the public review of NEPA or the stringent species protection of Section 7.

When this loss of legal protection in the future is coupled with the loss of NEPA and Section 7 review resulting from directed transfer (under the Office of the Solicitor's opinion), the problem is acute. Not only would there be no need to comply with NEPA and Section 7 after ownership transfer, there would be no need to comply with these laws during the transfer process.

Transfers are good policy only if they make the western water situation better, which implies change. Given the large public investment in these projects, future operations are a legitimate federal concern. Congress should insist on enforceable transfer agreements that ensure federal interests, including continuation and enhancement of public benefits, are protected.

***Congress should direct Interior to engage directly with all affected stakeholders in negotiating title transfer.***

A significant problem in the current title transfer process is that Reclamation and the water contractor seeking title negotiate without the benefit of formal and prolonged consultation and negotiation with all of the affected stakeholders – state and local government, local business, or the affected public. There may be a formal opportunity for comment through the NEPA process, or there may not be such opportunity if transfer legislation directs transfer in advance of that comment period. In any case, Reclamation appears to view as its negotiation partner only the water contractors. Typically water contractors follow suit. Wider negotiation only occurs if the water contractor decides it wants to open such talks, as FMID eventually did on the Henry's Fork. At the end, parties shut out of negotiations in the earlier phases may only have political recourse, through Congress, or legal recourse in the courts.

An open process in advance of the decision will generally result in much better, and less politically and legally contentious outcomes.

We suggest that Reclamation take a broader view of the affected stakeholders in title transfer, and work to engage those stakeholders throughout the process. If it does not, direction from Congress would be appropriate.

**Conclusion**

We are far from solving the problems of when and how to transfer ownership of federal water projects. In part, this is because each project is different, with different users, beneficiaries and environmental issues. Therefore, the appropriate terms and conditions for transfer will differ from project-to-project as well. We suggest that the best approach parallels that which Congress follows when authorizing water projects. Congress should require facility specific transfer plans that develop the issues and find solutions *before* legislation is enacted. Just as with feasibility studies for new projects, results are best when the questions are asked, the public involved, and the solutions explored found early in the process.

The recent development that we find most appealing is that some irrigation districts and conservation organizations are now actually talking to one another about how to manage rivers for their mutual benefit. While those discussions have not yet resulted in full agreement on how former Reclamation projects should be operated, we are very optimistic that common ground can be found. The wisest of the Reclamation contractors appreciate their rights and responsibilities as stewards of natural resources.

Congress' goal should be to improve the benefits derived from the enormous federal investment in western water resources. To be satisfied with the status quo, in a deteriorating and increasingly complicated system, is not enough. Congress should only transfer Reclamation projects when it leads to human and environmental systems that are stronger, healthier and more resilient.

Thank you for your attention, and I would welcome any questions.