

**Testimony of Charles T. DuMars
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Submitted to:

**U.S. House of Representatives
Committee on Resources
Subcommittee on Water and Power
Oversight Hearing: *"The Bureau of Reclamation's 21st Century Challenges
in Managing, Protecting and Developing Water and Power Supplies"***

April 5, 2006

The Honorable George Radanovich, Chairman
U.S. House Subcommittee on Water and Power
1522 Longworth House Office Building
Washington, D.C. 20510

RE: TESTIMONY OF Charles T. DuMars Regarding National Research Council of the National Academy of Science's Report: *Managing Construction and Infrastructure in the 21st Century*, Bureau of Reclamation and the United States Bureau of Reclamation Response to that Report: *MANAGING FOR EXCELLENCE An Action Plan for the 21st Century*

Dear Chairman Radanovich and Subcommittee Members:

Thank you for inviting me to speak on the role of the Bureau of Reclamation in the 21st century in the context of the National Research Council Report on that topic and the Bureau of Reclamation's response to that Report.

My name is Charles T. DuMars; I am a Professor Emeritus of Law at the University of New Mexico School of Law, where my courses taught include constitutional law, water law and environmental law.

I am familiar with the United States Bureau of Reclamation as I serve as legal counsel to the Middle Rio Grande Conservancy District ("MRGCD"), a conservancy district comprised of 1200 miles of ditches along the middle Rio Grande valley. The MRGCD contains six Indian Pueblos, approximately 75,000 acres of irrigated lands, the largest city in New Mexico and was formed by the consolidation of 78 acequias or rural ditch organizations, in the 1930's.

I am familiar with the National Research Council because I served as the chairman of the NRC committee evaluating water supply alternatives for Mexico City; I

also served on the NRC committee that issued a report on the water quality problems created at Kesterson Reservoir in California.

Turning first to the NRC report regarding the future of the Bureau of Reclamation in the 21st century. That Report correctly concludes that a host of factors will dramatically alter the role of this federal organization. Key among those are:

a) **Urbanization** of irrigated areas and the consequential movement of water from agricultural use to urban and domestic use. In the MRGCD, the demand for the purchase of water rights has escalated, doubling the price per acre - foot of water in five years to its current rate of \$10,000.00 per acre - foot.

b) **A Broadened Set of Stakeholders.**

Throughout the Western United States, in addition to the traditional irrigators, the entities desiring a say as to the allocation of Reclamation water include not only municipal and urban users, but also environmental organizations championing the needs of particular species, and finally, members of society at large who wish to see the riverine systems remain intact as part of the quality of life of the society as a whole. In New Mexico, within the MRGCD, these new entities seeking a place at the table are the developers who need a sustainable surface water supply for growth, the environmental advocates for the Rio Grande Silvery Minnow - an endangered species now protected by a Biological Opinion, and a growing number of hikers, bikers, horse back riders, bird watchers, and the supporters of thousands of ducks, geese, sand hill cranes, and other migratory birds that rely on the river and the farms along that river to utilize as their habitat.

c) **Water Scarcity as a result of a changing snow pack environment.**

Virtually all medium to small size irrigation systems are dependent on snow pack run-off captured in reservoirs to sustain their summer irrigation activities. While drought is normal and constancy of supply is abnormal, the droughts have changed in one dramatic way. Snowpack run-off is only useful if it comes when it is needed. Current trends demonstrate two changes over the last ten years. First, less snow pack has been provided, and second, the period of snow melt and run-off occurs earlier in the year and prior to the time farmers are ready to use it due to planting schedules. At times the run-off occurs when reservoirs may not be ready to capture it.

- d) The Need to Coordinate with the demands of Native American Tribes.** In New Mexico, we have numerous Native American tribes, with current requests for new projects to “settle” their water claims. These proposed settlements could exceed one billion dollars in cost to pay for infrastructure. Because many of these settlements involve new agriculture uses, their cost-benefit ratios in traditional terms are questionable. Yet, the alternative is litigation and attempted enforcement of priorities, which is also not a positive outcome.
- e) New Pressures to support an expanded federal agenda on behalf of particular stakeholders.** While the Bureau of Reclamation is no stranger to political pressures to fund competing projects or respond to needs of major institutions, the current times reveal pressures from entirely new sectors. Because of an absolute scarcity of supply in many areas, the needs of some communities are not just for some project through which federal money can be allocated, but rather the motivation may be survival of a culture, an economy or a species.

These issues are compelling and require congressional attention in a way not heretofore imagined.

- f) **An expanded need for small win/win projects.** There is no doubt that as surface water supplies are consumed more and more by domestic users and as scarcity affects species and small agricultural communities, the paradigm projects of the future will be small in scope but vital to the institutions affected. Funding, supporting and coordinating these small projects will be a new institutional setting for the Bureau of Reclamation.

The NRC Report makes a number of specific recommendations and also describes numerous “scenarios for future operation.” I will focus only on a few and then address how I believe the Bureau of Reclamation has responded to those in its response document.

Scenario 3 at pg. 91 of the NRC Report goes somewhat unnoticed in the report, but it is so significant as to require quotation:

“This scenario further reduces Reclamation’s direct involvement in the management of assets. Under it Reclamation administers its O and M program by distributing federal funds to the irrigation and power users in response to project needs. The users are held responsible for project O and M in conformity with Reclamation standards and guidelines, which are designed to ensure maximum flexibility within the bounds of essential public health and safety interests.”

Report at 91.

This scenario, while not a recommendation, is responsive to three major premises that are sometimes implied and sometimes express within the NRC Report. The first is that accounting, management and carrying out of routine construction through traditional models that worked in the past will not serve in

the future. Rather, the Bureau of Reclamation must engage in capacity building to hire, train and retrain persons with a broad range of talents beyond traditional engineering and accounting. The tasks that confront them complex, politically laden, local and difficult.

Second, because water demand has now equaled, and in many cases exceeded supplies, it is vital that every drop be accounted for, conserved, and managed by those containing expertise in management allocation schemes among alternative and competing users - not just engineering water through hydraulic systems.

Third, to achieve the above goals, two things must occur. First, there must be consistent policy and planning that synthesizes and instructs all utilizing the scarce resources as to the policies of the Bureau of Reclamation, not only today and next week but for some reasonable planning horizon in the future. Second, those actually utilizing the resource should be in charge of its allocation with policy guidance and funding from Washington, and as responsibility devolves to the local level, so too, will come responsibility for more local financial support.

In response to the above realities, the Bureau of Reclamation concludes in its document *MANAGING FOR EXCELLENCE An Action Plan for the 21st Century*, the Bureau of Reclamation sets forth a series of actions it intends to take to achieve “excellence”. The Bureau’s Response does not define what an excellent outcome would be. Rather, it defines the optimal method of engaging in the management process. The Bureau or Reclamation proposes a complete evaluation of the agency’s core capabilities and existing methods of operation.

The Report acknowledges the NRC Report along with other documents as providing impetus for the Bureau of Reclamation's Response. It includes functional proposals such as promoting the 4 C's of conservation through communication, consultation, and cooperation. And, there is a reference to defining the role of Reclamation in exercising "stewardship responsibility as the owner of federal facilities" and discussed elsewhere is Reclamation's goal of "effective management of its vast infrastructure".

While there are clearly well-intended goals and methodologies for improving the efficiency of the Bureau of Reclamation, there is no section of the Response which defines the Bureau of Reclamation's definition of what it perceives to be the goals of its stewardship over these vast resources, how it will ensure those goals reflect the policies of the elected officials who have enacted laws to effectuate those policies. It seems clear that at this stage of the process, the Bureau of Reclamation should be able to at least set out a candidate set of goals that reflect the agency's perception of proper stewardship. At a minimum, these would include ensuring the survival of the agricultural water users within the United States, protecting the environment within the context of changes to it caused by existing infrastructure, and allowing water to move to higher economic valued uses, while ensuring compensation for those holding water rights perfected under state law.

The NRC Report makes it clear that policy consistency is vital for any planning process, is essential for making sound environmental decisions and is essential for planning decisions for the private sector. While there are discussions

of ensuring “synergistic balance of centralized policy development and decentralized operations which are of course excellent ideas, and there is discussion of the development of a *Managing for Excellence* Action Plan, there is no clear commitment to definition of a proper stewardship role and how the exercise of that stewardship authority will reflect specific goals.

A specific example of cooperative management is the Transfer of Title policy carried out in the Provo River Project. I have personal experience with Reclamation’s flexibility on the Transfer of Title issue.

In the early spring of 2000, a Solicitor for the Department of Interior reversed the decision of several previous Solicitors and determined that all of the properties of the Middle Rio Grande Conservancy District belonged to the United States. In direct response to that decision, on July 6, 2000, the Bureau of Reclamation took control of a major diversion dam it now claimed to own, and denied the use of these private water rights to farmers and provided it to an endangered fish.

The Middle Rio Grande Conservancy District sought to quiet title to its property relying, *inter alia*, on the previous opinions of the Solicitors of the Department of Interior. In the ensuing quiet title suit, the Bureau of Reclamation welcomed an environmental group into the property litigation to promote the goal of utilization of Middle Rio Grande Conservancy District’s property to protect an endangered species. So closely was the Bureau of Reclamation aligned with the environmental groups, the United States and the Environmental group filed joint findings of fact and conclusions of law, with the Environmental Groups, in effect,

asserting the role of *parens patriae* over United States' property. The matter is in the Tenth Circuit Court of Appeals to determine whether environmental groups should be allowed to intervene to determine policy as to title over United States' property. Because of this experience, the Transfer of Title section of the Report, while perhaps reflecting a success in one part of the country, does not at all reflect what has happened in New Mexico on this issue.

While Reclamation's Response is well written, concise and sets out a policy for improving management efficiency, indeed it includes a plan to achieve "excellence" in management, it does not address certain key issues raised in the NRC Report. The central question raised by the NRC Report is whether it will be Reclamation's role in the 21st century to be a policy maker that provides funding and support for local managers on the ground or whether Reclamation's role will continue to reflect that of the "owner" of vast infrastructure utilized by others to create wealth, support the environment, provide recreational opportunities and preserve vital cultures.

While the Bureau of Reclamation has provided abstract theoretical responses to the NRC Report, more appropriate would be an open acceptance of the correctness of some of the conclusions and an explanation of how these changes can come about.

In fairness to the Bureau of Reclamation, its authorizing legislation is a series of statutes one stacked upon the other, providing multiple directions for construction and re-payment of contracts and generic mandates, but no current legislation addresses the problems faced on a day-to-day basis by the agency. The

agency is bombarded by the Endangered Species Act, the Clean Water Act, the National Environmental Policy Act, and many other specific legislations requiring action, but not explaining the agency's role under each one.

I would hope to see an acknowledgment of the need for a national policy on the issues of future operation of projects that states in unequivocal terms the intent and obligations of the Bureau of Reclamation with respect to how the Bureau of Reclamation intends to:

a) achieve the win/win small project successes recommended by the NRC Report. The loss of small farms and small irrigation communities is a loss our society cannot bear. In the end, the student body president from a small irrigation community in the West is as important to our nation as the graduate of a major Ivy League university.

b) turn over control of projects to local users with federal guidelines and standards that protect the water rights of water users and are simple and direct to follow and implement;

c) specify in a manual the method for collaboration and cooperation among federal agencies including the United States Fish and Wildlife Service, the Environmental Protection Agency, the Department of Interior, Bureau of Indian Affairs and other agencies having overlapping jurisdiction over water quantity and quality;

d) develop new accounting procedures that encourage outsourcing of jobs that can be done by the private sector or by the local water users organizations and an updating of the methods for evaluating costs of projects by requiring

payment only for work that is done by qualified experts and only as actually needed;

e) implement processes for regular communication among all stakeholders to promote water conservation technologies through financial incentives, development of new supplies in cooperation with private sector entities seeking those supplies and protection of species through win/win projects that increase water supplies at crucial paths for users and species alike.

What is needed is not just a tinkering with the existing system, but a fundamental evolution toward a new management function. Quality personnel within the Bureau of Reclamation can make this happen. I have appended to this document a set of local concerns of the Middle Rio Grande Conservancy District that may be useful to your deliberations. They have been prepared by the Chief Engineer and CEO of the MRGCD, Mr. Subhas K. Shah.

Thank you for the opportunity to testify on this important topic.

Exhibit "A"

Specific Project Issues Presented by Subhas K. Shah, Chief Engineer and CEO, Middle Rio Grande Conservancy District, New Mexico

1. The quality and quantity of work performed by BOR is not competitive with work provided by private consulting firms. The planning, engineering design, bidding process, construction, management and other federal requirements have to go through several layers of federal bureaucracy which makes projects unnecessarily costly and difficult to complete in a timely manner.
2. Cost estimates prepared by the BOR are sometimes not accurate and may not necessarily reflect appropriate industry standards. Estimates are generally higher than actual costs, but the BOR demands non-federal agencies to set aside their limited resources and funding for the projects. Furthermore, projects can experience delays, which deny the local non-federal agencies use of their funds for an extended period of time. The result is that local agencies are sometimes forced to increase the tax burden on their constituents unnecessarily.
3. For the last 15 years, the MRGCD has requested detailed cost accounting and justification of funds collected and expenditures incurred for budgeted projects. The BOR has failed to provide this information and has not been able to justify expenditures in all instances. It appears also that some collected funds have been spent on unbudgeted projects. There is a need for increased transparency of cost accounting at all levels.
4. It is very difficult to obtain timely responses from the BOR *vis a vis* project planning, contract management and necessary approvals for NEPA, EIS, etc. Since the local area office has limited decision-making responsibilities, the majority of the decisions appear to be made at a higher level in the Regional Office or Washington DC offices. Quite often, this process misses critical time frames. These additional costs are then passed on and paid by the MRGCD.
5. The BOR has had no clear policy as to title. Between 1983 and 2000, the BOR took the position that the MRGCD owned all of its works in fee simple. Since the summer of 2000, when endangered species issues arose, the BOR suddenly reversed its position and now claims ownership in fee simple of MRGCD works under an expired and fully repaid 1951 Rehabilitation loan contract. The BOR continues to operate in the river without interference from the MRGCD and receives benefits to carry out its federal mandated responsibilities. However, when a specific project asset requires rehabilitation or repairs, the BOR demands that the MRGCD pay for all repairs to the asset.

6. Under Water 2025, the BOR requires all projects to be included in the 2025 initiative. The BOR policy requires completion of all projects whether or not funding and cost sharing are sufficient to complete the tasks. Some of the proposed tasks far exceed the finance capabilities of the MRGCD and the federal monies available and there is little flexibility or opportunity for reevaluation.