TESTIMONY OF ROBERT S. LYNCH,
ROBERT S. LYNCH & ASSOCIATES,
BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES,
SUBCOMMITTEE ON WATER, POWER AND OCEANS, OVERSIGHT HEARING
ENTITLED "EMPOWERING STATES AND WESTERN WATER USERS THROUGH
REGULATORY AND ADMINISTRATIVE REFORMS"
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Vice Chairman Gosar, Ranking Member Huffman, Members of the Subcommittee, I am pleased to have the opportunity to present testimony on the plethora of issues the subject of this hearing presents.

Our firm, among other clients, represents a state association, the Irrigation & Electrical Districts' Association of Arizona (IEDA). Numbered among its 25 members are most of the special districts that manage water and electrical systems in Arizona as well as several of the municipalities that provide water and electrical service to their citizens. As such, these members are in frequent contact with federal land management agencies in the course of their business and are acutely aware of the management hurdles these agencies face.

The problems we face in the West concerning federal land management agencies and their policies and programs are systemic. Originally, the main land management agencies, the Bureau of Land Management (BLM), the Forest Service (FS), and the Park Service (PS), had land stewardship mandates that reflected relatively straightforward missions – grazing, timbering, watershed and visitor recreation. Over the years, these missions have been expanded by Congressional management directions, such as the Taylor Grazing Act of 1934 (Pub. L. No. 73-482, 43 U.S.C. 315) and the Multiple-Use Sustained-Yield Act of 1960 (Pub. L. No. 86-517, 16 U.S.C. 528).

Beginning in 1970, environmental laws such as the National Environmental Policy Act (NEPA) (Pub. L. No. 91-190, 42 U.S.C. 4321), followed by the Clean Water Act of 1972 (CWA) (Pub. L. No. 92-500, 33 U.S.C. 1251), and then closely followed by the Endangered Species Act of 1973 (ESA) (Pub. L. No. 93-205, 16 U.S.C. 1531), have added additional layers of complexity to these missions.

It is no wonder, then, that these and other agencies have felt pressure to expand their roles when dealing with users of the resources they have been charged with managing. It is only human nature.

Now we have these same agencies rushing simultaneously to comply with the President's November 3, 2015 Memorandum (Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, November 3, 2015). The agencies must put in place new policies that "share and adopt a common set of their best [mitigation] practices" (Memorandum, p. 2) that will "result in predictability sufficient to provide incentives" for non-federal advance mitigation ("compensation") (Memorandum, p. 3),

all the while achieving "a net benefit goal" (Memorandum, p. 4) or, at a minimum, "a no net loss goal." (Ibid.)

To add to the stress on the agencies, the Forest Service gets six (6) months for handbook changes and two (2) years to finish mitigation regulations, while BLM and the Fish & Wildlife Service (F&WS) have only a year to comply. (Memorandum, p. 6.) Interestingly, the National Oceanic and Atmospheric Administration (NOAA), the flipside partner with F&WS in ESA enforcement, is not mentioned. Each "Federal natural resource trustee agencies" (not identified) also get one (1) year to comply as does Interior. (Ibid.)

Aside from the fact that the terminology used is new to the resource management arena and without statutory or regulatory footing, the Memorandum presents particular challenges to the West concerning water use. The Memorandum clearly implies a level of control over water resources that flies in the face of reality. Uniformity in water use, the exercise of water rights and planning for future water uses is impossible. Interstate Western waters are subject to decrees, statutes, compacts, and other requirements unique to each. Western state water laws vary widely in their use of the Appropriation Doctrine and the American Rule of Groundwater Use. Add to that the complexity of the geography of the West and the multiple land management overlays and uniformity fades into oblivion.

Far from encouraging investment, this search for "net benefit" will stand "predictability" on its ear. If the Memorandum's intent is to create a one-size-fits-all "pay to play" cash register for federal lands, its very vagueness and undefined directives run totally counter to achieving that goal, let alone improving water management in the West.

Now we have a new Presidential Memorandum: Building National Capabilities for Long-Term Drought Resilience, March 21, 2016. Does this compound the problem for the agencies? I think so. The seminal statement in this Memorandum (pp. 1-2) is:

> "In carrying out this memorandum, executive departments and agencies (agencies) shall continue to recognize the primacy of States, regions, tribes and local water users in building their resilience to drought." (Emphasis supplied.)

Query: How can this primacy not be accompanied by state and tribal water use and water rights primacy? Doesn't this confuse the agencies further? I think so. And, for sure, the goal of predictability is pushed farther from the playing field.

Federal land managers are not water regulators. Indeed, in many instances, they may not be legitimate water rights holders. Giving them the false sense that they are somehow free from considering the historic role that States play in water use, administration of water rights and water resource planning and investment will only exacerbate the recent federal/state tensions over these issues. Now giving them a contrary command muddies the water, so to speak, even further. Indeed, the only people whom I know who will benefit from this exercise in misdirection are water lawyers like me.

Thank you for the opportunity to appear here today.