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Testimony
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Testimony on H.R. 3981 “*Accelerated Revenue and Repayment, and Surface Water Storage Enhancement Act*”

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Mr. Chairman and members of the Committee, my name is Stuart L. Somach. I am an attorney with the law firm of Somach Simmons & Dunn, located in Sacramento, California. We represent clients in California, Arizona, Texas, Oregon and Nevada on a variety of issues and matters, including those involving water and the environment. I have testified before this Committee, and other House and Senate committees, on numerous issues and legislation, including hearings dealing with the Coordinated Operations Agreement, the Endangered Species Act, the Central Valley Project Improvement Act, and various versions of so-called “CALFED” legislation. I also worked on legislation, which became the Southern Oregon Bureau of Reclamation Repayment Act of 2005 (Pub. L. 109-138). That legislation deals with issues similar to those that are presented in the instant legislation. Most recently, on June 4, 2012, I testified before this Committee on a predecessor to the current legislation.

Prior to entering private practice in 1984, I represented the United States and the United States Bureau of Reclamation, first as an attorney within the Solicitor’s Office in Washington, D.C., and in Sacramento, and then as an Assistant United States Attorney and a Senior Trial Attorney within the United States Department of Justice. This representation included both transactional work, such as negotiation of Reclamation contracts, providing legal advice on the interpretation of various aspects of and questions about Reclamation law, as well as working on and advising the Bureau of Reclamation on “regulatory” compliance matters, including matters associated with the Reclamation Reform Act of 1982 (“RRA”). My work in the United States Attorneys Office and with the Department of Justice involved representation of the United States in litigation involving the Bureau of Reclamation and Reclamation law.

Since entering private practice I have represented clients West-wide on a wide variety of issues associated with Reclamation law. This has included transactional work, as well as providing legal advice on various aspects of Reclamation law, including compliance with the provisions of the RRA. I have also litigated a great number of cases

involving Reclamation law. For example, I intervened on the side of the United States on behalf of Reclamation Contractors West-wide in an attempt to defend the Bureau of Reclamation's rules and regulations implementing the RRA. I also represented clients before the Ninth Circuit Court of Appeals and the United States Supreme Court in *Orff v. United States of America*, Case No. 03-1566, which dealt with significant aspects and provisions of Reclamation law. I also represented the Central Arizona Water Conservation District in a significant piece of litigation challenging the way the Reclamation law was being applied to the Central Arizona Project ("CAP"). Fundamental to that litigation and to its resolution was the CAP's repayment obligation and the allocation of funds once those dollars were repaid to the United States.

I am currently lead counsel for the State of Texas in an Original Action in the United States Supreme Court. *State of Texas v. State of New Mexico and State of Colorado*, No. 141 Original. That litigation involves the 1938 Rio Grande Compact and the Rio Grande Reclamation Project.

Matters dealt with in H.R. 3981 "*Accelerated Revenue and Repayment, and Surface Water Storage Enhancement Act*" have been of long-standing interest to me. How repayment is accomplished and the underlying policy issues associated with the repayment obligation are fairly fundamental to Reclamation law. I last grappled with these issues in 2004-2005 on behalf of clients in Southern Oregon who wanted to take their business "public" through stock offerings.

The business involved the growing and selling of "gift fruit." Most of the fruit orchards were irrigated with non-federal water, but some fields were located within irrigation districts that received water from Bureau of Reclamation facilities (or facilities that had been enlarged by the Bureau of Reclamation) and were thus subject to a repayment obligation and all of the reporting and other requirements of the RRA. The clients did not understand Reclamation law and, more importantly, because of the various SEC regulations, most, if not all, of the RRA requirements would need to be disclosed as part of the stock offering. The clients were advised that these disclosures would cause the stock to be under-valued because they held out the potential for those with large holdings to be forced to fill out the RRA repayment forms. This was complicated by the potential of institutional buyers holding stock in other companies that were subject, in some way, to Reclamation law and the reality that stocks are bought and sold every day and the impossibility of attempting to keep up with the reporting requirements under those circumstances.

In attempting to resolve this problem I exhausted every possible administrative remedy. Some within Reclamation were very helpful, but in the end they could not provide a solution. As a consequence, we worked on a legislative solution that ultimately was enacted in Southern Oregon Bureau of Reclamation Repayment Act of 2005 (Pub. L. 109-138). That legislation, of course, provided for early repayment by districts or

individuals within districts of their repayment obligations. This, then, allowed relief from many provisions within the RRA, including the reporting requirements which were plaguing my clients.

At the time we were assisting in the development of Public Law 109-138, I argued that the provisions should not be limited to Southern Oregon, but should be applied on a West-wide basis. For various reasons not at all related to the question of repayment, there was a great deal of resistance to this broader effort. Because my clients had very real and immediate needs, I did not press the issue, and we were able to obtain needed relief through Public Law 109-138.

Since that time I have represented numerous clients affected by the various reporting requirements associated with the RRA. In my view, these requirements add burdens that increase operating and other costs without, in most cases, providing a material benefit to anyone. In one example, when a landowner and the United States had entered into a water right settlement contract, RRA requirements were triggered because 600 acre feet of water out of an in excess of 50,000 acre feet of “settlement” contract water were denominated as reclamation project water. The ability to early repay the dollars associated with these 600 acre feet of water would greatly benefit the landowners involved and provide relief from many of their RRA obligations.

I believe that reform of the repayment provisions of Reclamation law is needed and is good policy. In this context, for the most part, the United States has already expended the capital costs for federal reclamation projects and facilities. In most cases those expenditures were made decades ago. Moreover, the irrigation component of these repayment obligations are interest free. Indeed, there has been a great deal of criticism about this so-called “subsidy.” While I could spend pages explaining and supporting the policy decisions behind this “subsidy,” the fundamental reality is that if the Reclamation Contractor is able to “pre-pay” or “early pay” its capital reimbursement obligation, this “subsidy” is eliminated. For any number of reasons, therefore, early payment should be facilitated and encouraged. H.R. 3981 *“Accelerated Revenue and Repayment, and Surface Water Storage Enhancement Act,”* of course, does this.

I also believe that the provisions of H.R. 3981 *“Accelerated Revenue and Repayment, and Surface Water Storage Enhancement Act,”* that deal with the establishment of a Water Storage Account are good additions to the bill. I do not think that any rational person can argue that additional surface water storage is not needed in the West. The water that would have been available from additional water storage facilities would certainly be of great value in California right now.

In addition to the obvious environmental issues that need to be addressed in developing new surface water storage, issues associated with costs and financing loom large as impediments to putting these facilities online. Providing funding through what

is, in essence, the recycling of federal dollars, is an efficient way to begin to tackle this problem. Proceeding in this manner, among other things, allows non-federal entities to obtain financing for water storage projects without the need for the United States to appropriate new federal dollars for this purpose. It also insures that dollars that were once invested to assist in water development continue to work for that purpose.

This type of funding mechanism is not new. I was involved in a similar re-direction of repayment dollars associated with the Central Arizona Project [Arizona Water Settlements Act of 2004, Pub. L. No. 180-451, 118 Stat. 3478] which has worked very well and has served to advance broad public policy goals, again without the need to appropriate new dollars for this purpose.

The provisions of H.R. 3981 “*Accelerated Revenue and Repayment, and Surface Water Storage Enhancement Act*” take into account numerous important aspects of Reclamation law in an appropriate fashion. Among these are:

- Allows for the conversion of certain contracts that are or are in the nature of “water service contracts” to “repayment contracts.” The use of water service contracts, as opposed to repayment contracts, is, for example, common in the Central Valley Project. It is of note that most, if not all, of these water service contracts provide for their conversion to repayment contracts. However, these contractual provisions provide no practical way for this to occur. The draft legislation provides this needed detail.
- Adds the concept of “accelerated repayment” or “repayment” without penalty to the early *full* payment of the repayment obligation.
- Captures mechanisms for the collection of capital costs incurred after the date of the contract or appropriate “rate schedule” on an expedited basis up to \$5,000,000, with alternate means to insure repayment of amounts in excess of \$5,000,000.
- Eliminates the benefit of power revenues to those who proceed under the provisions of this legislation.
- Allows the Contractor to determine how best to pre-pay, if it uses alternate financing mechanisms to do so.
- Insures that the early or accelerated prepayment will not affect the repayment obligations of any other Contractor or any other obligations among or between the United States and Contractors.

- Provides an adjustment in case this is needed once a project’s “final cost allocation” is completed.
- Insures continued compliance with Reclamation law and relevant RRA requirements, but eliminates various limitations and requirements, including the reporting requirements of the RRA.
- Insures that all costs, including operation and maintenance costs, properly payable but not otherwise captured in the prepayment or accelerated payment, remain an obligation that must be fulfilled by the Contractor.
- Provides that prepayment dollars be redirected and deposited into a Surface Water Storage Account to fund or provide loans for the construction of surface water storage.
- Allows for cooperative agreements between the Secretary and water users’ associations to facilitate funding and construction of surface water storage, thereby providing needed flexibility with respect to surface water storage development.
- Provides for repayment of the dollars loaned from the Surface Water Storage Account back into that Account so that these funds can be used again for the purpose of facilitating financing for surface water storage projects.

I believe all of these provisions to be appropriate. Enactment of this legislation will provide a comprehensive means for those who desire early repayment to do so. It, of course, also avoids the “piecemeal” legislative process that has been used in the past. It also provides a mechanism to assist in the financing and development of surface water storage without adding new federal budget related pressures.

I appreciate the opportunity to testify here today and would be happy to answer any questions you might have now, or to provide additional information if requested.