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SENATE

{ REPORT
105-131

TO CONVEY CERTAIN FACILITIES OF THE MINIDOKA
PROJECT TO THE BURLEY IRRIGATION DISTRICT

NOVEMBER 3, 1997.—Ordered to be printed

Mr. MURKOWSKI, from the Committee on Energy and Natural
Resources, submitted the following

REPORT

[To accompany S. 538]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 538) to authorize the Secretary of the Interior to convey certain facilities of the Minidoka project to the Burley Irrigation District, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. CONVEYANCE OF FACILITIES.

(a) DEFINITIONS.—In this section:

(1) BURLEY.—The term “Burley” means the Burley Irrigation District, an irrigation district organized under the law of the State of Idaho.

(2) DIVISION.—The term “Division” means the Southside Pumping Division of the Minidoka project, Idaho.

(3) SECRETARY.—The term “Secretary” means the Secretary of the Interior.

(b) CONVEYANCE.—

(1) IN GENERAL.—The Secretary shall, without consideration or compensation except as provided in this section, convey to Burley, by quitclaim deed or patent, all right, title, and interest of the United States in and to acquired lands, easements, and rights-of-way of or in connection with the Division, together with the pumping plants, canals, drains, laterals, roads, pumps, checks, headgates, transformers, pumping plant substations, buildings, transmission lines, and other improvements or appurtenances to the land or used for the delivery of water from the headworks (but not the headworks themselves) of the Southside Canal at the Minidoka Dam and reservoir to land in Burley, including all facilities used in conjunction with the Division (including the electric

transmission lines used to transmit electric power for the operation of the pumping facilities of the Division and related purposes for which the allocable construction costs have been fully repaid by Burley).

(2) COSTS.—The first \$80,000 in administrative costs of transfer of title and related activities shall be paid in equal shares by the United States and Burley, and any additional amount of administrative costs shall be paid by the United States.

(c) WATER RIGHTS.—

(1) TRANSFER.—The Secretary shall transfer to Burley, through an agreement among Burley, the Minidoka Irrigation District, and the Secretary, in accordance with and subject to the law of the State of Idaho, all natural flow, waste, seepage, return flow, and ground water rights held in the name of the United States for the benefit of, and for use on land within, the Burley Irrigation District as described in the contracts between Burley and the United States including the provisions on use of any waste, seepage, and return flow set forth in such contracts: *Provided*, That, such transfer shall not impair the integrated operation of the Minidoka project, affect any other adjudicated rights, or result in any adverse impact on any other project water user.

(2) ALLOCATION OF STORAGE SPACE.—The Secretary shall provide an allocation to Burley of storage space in Minidoka Reservoir, American Falls Reservoir, and Palisades Reservoir, as described in Burley Contract Nos. 14–06–100–2455 and 14–06–W–48, subject to the obligation of Burley to continue to assume and satisfy its allocable costs of operation and maintenance associated with the storage facilities operated by the Bureau of Reclamation.

(d) PROJECT RESERVED POWER.—The Secretary shall continue to provide Burley with project reserved power from the Minidoka Reclamation Power Plant, Palisades Reclamation Power Plant, Black Canyon Reclamation Power Plant, and Anderson Ranch Reclamation Power Plant in accordance with the terms of the existing contracts, including any renewals thereof as provided in such contracts.

(e) SAVINGS.—

(1) Nothing in this Act or any transfer pursuant thereto shall affect the right of Minidoka Irrigation District to the joint use of the gravity portion of the Southside Canal, subject to compliance by the Minidoka Irrigation District with the terms and conditions of a contract between Burley and Minidoka Irrigation District, and any amendments or changes made by agreement of the irrigation districts.

(2) Nothing in this Act shall affect the rights of any person or entity except as may be specifically provided herein.

(f) LIABILITY.—Effective on the date of conveyance of the project facilities, described in section (1)(b)(1), the United States shall not be held liable by any court for damages of any kind arising out of any act, omission, or occurrence relating to the conveyed facilities, except for damages caused by acts of negligence committed by the United States or by its employees, agents or contractors prior to the date of conveyance. Nothing in this section shall be deemed to increase the liability of the United States beyond that currently provided in the Federal Tort Claims Act, 28 U.S.C. 2671 et seq.

(g) COMPLETION OF CONVEYANCE.—

(1) IN GENERAL.—The Secretary shall complete the conveyance under subsection (b) (including such action as may be required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.)) not later than 2 years after the date of enactment of this Act.

(2) REPORT.—The Secretary shall provide a report to the Committee on Resources of the United States House of Representatives and to the Committee on Energy and Natural Resources of the United States Senate within eighteen months from the date of enactment of this Act on the status of the transfer, any obstacles to completion of the transfer as provided in this section, and the anticipated date for such transfer.

PURPOSE OF THE MEASURE

The legislation, if amended as recommended by the Committee, would provide for the transfer of the distribution facilities of the Southside Pumping Division of the Minidoka Project used by the Burley Irrigation District to the District. The legislation also would provide for the transfer of those water rights held by the United States for the benefit of the District and appurtenant to lands in

the District and continue whatever contractual rights and obligations the District has with the United States under Reclamation law as part of the Minidoka Project, including the allocation of storage space and the obligation for allocable costs of operation and maintenance and receipt of project reserved power. The legislation would require the transfer to be completed within two years with a requirement that the Secretary of the Interior provide a progress report to the Senate and House Committees within eighteen months.

BACKGROUND AND NEED

General background

In the 104th Congress, the Committee held hearings on legislation (S. 620) that would provide generic authority for the transfer of certain Reclamation projects to project beneficiaries as well as legislation specific to individual projects. The generic legislation was introduced following the Department of the Interior's statement, as part of the Reinventing Government Initiative, that it would seek to transfer title to projects where there were no overriding concerns.

S. 620 directed the Secretary of the Interior to transfer to all Federal property associated with fully paid out Bureau of Reclamation projects to the project beneficiaries in those instances where the beneficiaries have already assumed responsibility for operation and maintenance. The legislation provided that the transfer would be without cost and also made all revenues previously collected from project lands and placed in the reclamation fund available to the beneficiaries under the formula set forth in subsection I of the Fact Finders Act of 1924. The Fact Finders Act provides generally that when water users take over operation of a project, the net profits from operation of project power, leasing of project lands (for grazing or other purposes), and sale or use of town sites are to be applied first to construction charges, second to operation and maintenance (O&M) charges, and third "as the water users may direct".

Proposals to transfer title to selected reclamation facilities have been advanced before. Some have already been authorized by Congress. (See most recently: Pub. L. No. 102-575, title XXXIII transferring facilities to the Elephant Butte Irrigation District, New Mexico, and title XIV, dealing with the Vermejo Project, New Mexico.) Other title transfer proposals, such as ones advanced in 1992 for the Central Valley Project and in the late 1980s for the Solano Project and the Sly Park Unit, have been quite controversial.

The Bureau of Reclamation in the Department of the Interior (DOI) is responsible for approximately 348 storage reservoirs, 254 diversion dams, 268 pumping plants, 52 hydroelectric powerplants, and thousands of miles of canals, pipelines, tunnels, laterals, and project drains throughout the 17 Western States. Some of these facilities are part of large multipurpose projects, such as the Central Valley Project (CVP) in California. Others are parts of smaller projects, or are single purpose projects, such as the Platoro Dam, a closed basin unit which is part of the San Luis Valley Project in Colorado, and the Smith Fork Project in Western Colorado.

Most Bureau water supply projects were built under the general authority granted to the Secretary of the Interior in the Reclamation Act of 1902, or through omnibus or individual flood control and water resources development authorizations. In 1991, Bureau facilities provided nearly 30 million acre-feet of water to 9.2 million acres and 30 million people. The agency estimated in 1990 that its investment in project facilities is \$10.6 billion dollars.

As of 1990, the Bureau had identified 415 project components—out of a total of 568 facilities—where operation and management responsibilities had been transferred or were scheduled to be transferred to project users. Section 6 of the Reclamation Act of 1902 (32 Stat. 388, 389) provides in pertinent part that “when the payments required by this act are made for the major portion of the lands irrigated from the waters of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby * * *”. The section concludes with the following proviso: “*Provided*, That the title to and the management and operations of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.” Historically, the Bureau has usually transferred operation and maintenance to local districts in advance of project repayment where the districts have expressed an interest in taking over management and have the capability to assume the responsibility.

A transfer provision was also included in the 1955 Distribution System Loans Act, as amended. This provision differs from the 1902 law in that it allows transfer of title to the lands and facilities upon repayment of the loan. In addition to the operations and management transfer authorization under the Reclamation Act of 1902, several other title transfer provisions are included in individual project acts. These include Section 7 of the 1928 Boulder Canyon Project Act (Act of Dec. 21, 1928, 45 Stat. 1057, 43 U.S.C. 617 et seq.), which authorizes the Secretary to transfer title of the All-American Canal and certain other related facilities after repayment has been completed; provisions in the Act of September 22, 1959 (Pub. L. No. 86-357, 73 Stat. 641), regarding transfer of title for Lower Rio Grande project facilities; and, Pub. L. No. 83-752 (68 Stat. 1045), which directs the Secretary to transfer title to the Palo Verde Irrigation District upon repayment. Under the 1954 Act, the United States retained the right to build hydro power facilities at the site and to retain a share in energy production.

The hearings on S. 620 during the 104th Congress demonstrated that generic legislation was not likely to deal with all the possible issues associated with project transfers and that such legislation would wind up being complex and overly burdensome. As a result, discussions began on the potential transfer of several projects, or portions thereof. The Committee considered the transfer of the Collbran project and included language in the Reconciliation measure, H.R. 2491, the Balanced Budget Act of 1995, which was vetoed by the President. The Reconciliation measure also contained language (section 5356) to transfer the Sly Park unit of the Central Valley Project. That language was included in the House amendments and accepted in conference. During the 104th Congress, the Committee also conducted hearings and favorably reported legisla-

tion on the Carlsbad project (S. 2015), and the distribution portion of the Minidoka project serving the Burley Irrigation District (S. 1921), which was similar to S. 538. The Committee also held hearings on legislation for the transfer of Canadian River, Palmetto Bend and Nueces River projects in Texas (S. 1719).

Minidoka Dam and Powerplant

Minidoka project lands extend discontinuously from the town of Ashton in eastern Idaho along the Snake River approximately 300 miles downstream to the town of Bliss in south-central Idaho. The project furnishes a full or supplemental water supply to more than 1 million acres of land from five reservoirs that have a combined active storage capacity of 2,784,600 acre-feet. The project works consist of Minidoka Dam and Powerplant and Lake Walcott, Jackson Lake Dam and Jackson Lake, American Falls Dam and Reservoir, Island Park Dam and Reservoir, Grassy Lake Dam and Grassy Lake, two diversion dams, 1,662 miles of canals, 3,929 miles of laterals, 1,249 miles of drains, and 177 water supply wells.

Natural flow of the Snake River and some of its tributaries, and water stored in the reservoirs at Jackson Lake, Grassy Lake, Island Park, American Falls, and Lake Walcott are delivered at numerous diversion points to the Fremont-Madison, Burley, and Minidoka Irrigation Districts, American Falls Reservoir District No. 2, and Warren Act contractors. A full water supply is furnished to 216,796 acres and a supplemental supply to 946,846 acres. Water from Palisades Reservoir on the Palisades Project is instrumental in helping meet the Minidoka Project water requirements. Much of the power developed on the project is used for pumping water to lands lying above the gravity canals and for pumping drainage water. Power also is furnished to several small communities in the area.

Minidoka Dam is a combined diversion, storage, and power structure located just south of Minidoka, Idaho. A key structure in the initial development of the project, the zoned earthfill dam is 86 feet high. The reservoir, Lake Walcott, has a storage capacity of 95,200 acre-feet. Water is diverted at the dam into a canal on each side of the river. The concrete powerplant, which forms a section of the dam, has seven generating units with a combined capacity of 13,400 kilowatts. Water is diverted on the north side of Minidoka Dam into the North Side Canal, a gravity canal and lateral system serving 72,000 acres of land called the Gravity Division, in the vicinity of Rupert, Idaho. The 8-mile canal has an initial capacity of 1,700 cubic feet per second. Water is diverted on the south side of Minidoka Dam into the South Side Canal, a canal system which includes three large pumping plants. Each plant lifts the water about 30 feet, for a total lift of about 90 feet. The system, known as the South Side Pumping Division, serves 48,000 acres adjacent to Burley and Declo. The canal is 13 miles long and has an initial capacity of 1,325 cubic feet per second.

In 1904, the lower Minidoka Project area around the present cities of Burley and Rupert was a nearly uninhabited sagebrush desert with only a few scattered ranches. After construction of the initial phases of the project brought water to the land, giving opportunity for expansion, it became a prosperous, highly developed

farm area. By 1919, 2,208 farms were in operation, there were 6 towns, and the total population was about 17,000. Early investigations of irrigation possibilities in Idaho were made under the direction of the Geological Survey in 1889-90. These surveys included a preliminary examination of the Minidoka Project, when survey lines were run from 15 to 35 miles westward on both sides of the Snake River from the Minidoka Dam site. Additional surveys were made in 1895. Private organizations became interested in developing the area at various times after 1887.

At the time of passage of the Reclamation Act of June 1902, considerable data relative to the area were available for use by the State Engineer, who was responsible for cooperating with the Reclamation Service in Idaho. During 1902, information obtained about the storage potential in the headwaters of the Snake River indicated that suitable capacities could be developed at reasonable cost. On November 17, 1902, the Secretary of the Interior withdrew from public entry a large body of land embracing the proposed irrigable area of the Minidoka tract, rendering it subject to filing under the terms of the Reclamation Act. The Minidoka Project was authorized by the Secretary of the Interior on April 23, 1904. Investigation and construction funds for the Gravity Extension Unit (Gooding Division) were provided by act of Congress January 12, 1927 (44 Stat. 934), and the Secretary's finding of feasibility July 2, 1928, was approved by the President on July 3, 1928. The Upper Snake River storage was authorized by a finding of feasibility by the Secretary of the Interior, and approved by the President on September 20, 1935. The North Side Pumping Division was authorized for construction by the act of September 30, 1950 (64 Stat. 1083, Public Law 864, 81st Congress). Replacement of American Falls Dam was authorized by act of December 28, 1973 (87 Stat. 904, Public Law 93-206).

The Gravity Division has been operated by the Minidoka Irrigation District since January 1, 1917; the South Side Pumping Division by the Burley Irrigation District since April 1, 1926; Gooding Division by American Falls Reservoir District No. 2 since May 1, 1933; and the Upper Snake River Division by Fremont-Madison Irrigation District since November 15, 1940. The North Side Pumping Division, last to be developed, was turned over to the A&B Irrigation District for operation on March 1, 1966. All storage and power facilities are operated by the Bureau of Reclamation.

The Burley Irrigation District was organized under the laws of the State of Idaho on March 5, 1918 to hold water rights for and operate and maintain a distribution system used for the delivery of water to the lands within the irrigation district. By contract with the Bureau of Reclamation dated March 15, 1926, operation and maintenance of the distribution system of the Southside Pumping Division of the Minidoka project was transferred to Burley, and the district has operated and maintained the distribution system since that date. By contract with the Bureau and the Minidoka Irrigation District dated December 12, 1950, the Main Southside Canal was transferred to Burley for operation and maintenance. In 1954 certain electrical distribution lines were also transferred to Burley for operation and maintenance. In 1954 certain electrical distribution lines were also transferred to Burley for operation and maintenance.

nance. All allocable construction costs attributable to storage and distribution have been repaid to the United States. As part of the Minidoka project, Burley receives reserve power generated at Minidoka Power Plant for the operation of its pumping facilities under a contract with the Bureau at rates established by the Secretary of the Interior for the Minidoka power plant and the other federal power plants that are interconnected as the Reclamation Southern Idaho Power Pool. Excess power is provided to Bonneville Power Administration as required by Federal law. In addition to water rights held in its own name, Burley also has rights to a share of water rights obtained by the United States from Idaho pursuant to Reclamation law for the purpose of the Minidoka project for the benefit of the lands within the project. Those rights are for the benefit of lands served by Burley as well as for lands served by the Minidoka project and would be partitioned under the legislation pursuant to Idaho law as agreed to by Minidoka, Burley, and the Secretary of the Interior.

While Burley has pursued discussions with the regional offices of the Bureau of Reclamation for a transfer of those facilities and rights maintained and paid for by Burley, it also sought to initiate legislation in the 104th Congress. The legislation, if amended as recommended by Committee, would transfer title to Burley of those facilities and rights. The legislation is not a part of Reclamation law and would not modify or amend any portion of Reclamation law applicable to the Minidoka project. Existing contractual rights and obligations would be continued and there will be no practical change on the operation of the Minidoka project or on any project water user. The only effect on adjudicated rights would be the need to partition the unified natural flow right held for the benefit of the lands within the Burley Irrigation District and the Minidoka Irrigation District with Burley obtaining title to its share and the United States continuing to hold title for the benefit of the Minidoka District to the other portion. No change in the actual rights to usage would be involved and shortages would continue to be shared as presently allotted.

LEGISLATIVE HISTORY

Similar legislation (S. 1921) was the subject of hearings in the 104th Congress before the Subcommittee on Forests and Public Land Management on September 5, 1996 and was reported by the Committee on September 5, 1996.

S. 538 was introduced by Senator Craig (for himself and Senator Kempthorne) on April 9, 1997. A companion measure, H.R. 1282, was introduced in the House of Representatives. A hearing on S. 538 was held by the Subcommittee on Water and Power on June 10, 1997. At the business meeting on October 22, 1997, the Committee on Energy and Natural Resources ordered S. 538, as amended, favorably reported.

COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTES

The Committee on Energy and Natural Resources, in open business session on October 22, 1997, by a unanimous voice vote of a quorum present, recommends that the Senate pass S. 538, if amended as described herein.

COMMITTEE AMENDMENT AND SECTION-BY-SECTION ANALYSIS

During the consideration of S. 538, the Committee adopted an amendment in the nature of a substitute. A description of the amendment follows.

Subsection 1(a) provides a series of definitions and is self-explanatory.

Subsection (b) directs the conveyance to the Burley Irrigation District (Burley), by quitclaim deed, all interests of the United States in and to the facilities used by Burley for the delivery of water from the headworks of the Southside Canal at the Minidoka Dam to the lands within the district including any acquired lands. The Committee amendment clarifies that title to the headworks themselves will remain with the United States. The administration expressed concern over the transfer of certain withdrawn lands without consideration. Although the Committee understands that the lands consist of gravel pits that had been used in the past and may be of limited value, the Committee is concerned over the precedent that a transfer without any consideration might create in the absence of a more definitive conclusion on the value. Accordingly, the Committee has deleted the transfer of any withdrawn lands. The legislation provides for any easements or rights-of-way that may be necessary for operation and maintenance of the facilities to be transferred. If, on review, the administration concludes that a transfer of the withdrawn lands would be in the interest of the United States, the Committee would be willing to consider legislation providing for such transfer. The section further provides that Burley will share the first \$80,000 of administrative costs involved in title transfer.

Subsection (c) provides for the transfer of those water rights held by the United States from the State of Idaho pursuant to Reclamation law for the benefit of, and for use on lands within, Burley and directs the Secretary to continue to provide an allocation of storage space as now provided subject to the obligation of Burley to continue to assume its allocable operation and maintenance costs. The Committee understands that the United States now holds a single natural flow right obtained for the benefit of the Project and that the beneficial use of such right is allotted between Burley and the Minidoka Irrigation District and the amounts and priorities of natural flow rights were established by decree in the 1913 decree in *Twin Falls Canal Company v. Charles N. Foster et al.* The Committee wants to emphasize that in directing a partition of the right, there is no intention to enlarge or diminish the beneficial rights of either District. The Committee also does not intend that there be any effect on integrated operations of the Minidoka project or on any other adjudicated rights or other project water users. The Committee does not believe that the mere transfer of title should have any such effect. The Committee amendment references the existing contract because the contract sets forth the allocation between the districts that will serve as the basis for a partition. The Committee notes that the contract also provides that with respect to certain waste, seepage, and return flows that they will serve as a source of supply first for lands within the district and then for other lands within the project. The intent of the legislation is merely to trans-

fer title and not to change, alter, enlarge or diminish the respective rights of either of the districts to the beneficial use of the water rights held by the United States for the project, but it is also the intent to transfer to Burley all rights held for the benefit of Burley held by the United States.

Subsection (d) directs the Secretary to continue to provide Burley with project reserved power in accordance with the terms of existing contracts. The Committee understands that Burley presently has a contractual right to project reserved power at a discount. The Committee has deleted language that could be interpreted to continue the discount under any renewal or extension of the contract. The Committee has also deleted language that would have provided a right of first refusal to entities with storage rights in Lake Walcott to the Minidoka Dam or Powerplant in the event of a sale. The Committee understands the concern of the District, but does not see any reason to address that issue at this time. The Committee wants to make clear that future operation of the project, whatever that may be, will be subject to the provisions of the contract and any renewals thereof.

Subsection (e) provides a specific savings provision to protect the interests of the Minidoka Irrigation District to joint use of the gravity portion of the Southside Canal and a general savings provision for all other entities except as specifically provided in the legislation. The legislation is not an amendment to Reclamation law nor is there any change in the authorizations for the operation of the Minidoka project.

Subsection (f) contains language recommended by the administration providing that the United States will no longer bear any liability with respect to transferred facilities upon the transfer.

Subsection (g) directs the Secretary to complete the conveyance within two years and requires the Secretary to submit an interim progress report within eighteen months. The legislation as introduced had provided that if the facilities had not been transferred within two years, the transfer would occur by operation of law. The Committee assumes that the Secretary will be able to complete the transfer expeditiously and that such a provision will not be necessary. The Committee expects that the Secretary will inform the Committee well within the eighteen months if there is some obstacle to completion within the time frame.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of the cost of this measure has been provided by the Congressional Budget Office:

S. 538—A bill to authorize the Secretary of the Interior to convey certain facilities of the Minidoka project to the Burley Irrigation District, and for other purposes

Summary: S. 538 would direct the Secretary of the Interior to transfer land and facilities used by the Burley Irrigation District (the district) within the Minidoka Project in Idaho from the Bureau of Reclamation (the bureau) to the district. The cost of the transfer would be shared equally between the bureau and the district up to a total cost of \$80,000. Remaining costs would be paid by the bureau.

CBO estimates that enacting the bill would result in new spending subject to appropriation of about \$40,000 over fiscal years 1998 and 1999. Enacting the bill would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply. The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA), and would not impose any costs on state, local, or tribal governments.

Other provisions in the bill would not have a budgetary impact. They include directions to the Secretary of the Interior to:

- transfer all natural flow, waste, seepage, return flow, and ground water rights to the district and provide the district with permanent storage rights in the Minidoka Project reservoirs on the condition that the district continue to pay all allocable costs of operating and maintaining the storage facilities; and

- provide the district with a permanent right to purchase reserve power from the Minidoka Project at the cost of production, the same rate as under current law.

S. 538 would require the Secretary of the Interior to complete the transfer, including actions required under the National Environmental Policy Act, within two years of enactment.

Estimated cost to the Federal Government: CBO estimates that enacting the bill would result in new spending subject to appropriation of about \$40,000 over the 1998–1999 period. The cost of this legislation falls within budget function 300 (natural resources and environment).

Based on information provided by the bureau, CBO expects that the work required to transfer the facilities, including actions required under the National Environmental Policy Act, would cost about \$80,000. The federal government's share would be half this amount.

CBO estimates that completing the transfer of land and facilities would not result in any loss of future receipts because the district already has paid the federal government for the facilities that would be transferred. In addition, the water that would be transferred to the district is already being provided to it at no cost and the bureau is expected to continue this policy in the future. Finally, the district would continue to pay all allocable costs for operating and maintaining storage facilities and would continue to pay the rate for power that is required under current law.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: S. 538 contains no intergovernmental or private-sector mandates as defined in UMRA. The bill would require the Burley Irrigation District to pay up to \$40,000 for its share of the cost of the transfer, but the district would incur this cost voluntarily.

Estimate prepared by: Federal costs: Gary Brown. Impact on State, Local, and Tribal Governments: Marjorie Miller.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 538.

The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 538, as ordered reported.

EXECUTIVE COMMUNICATIONS

On, May 15, 1997, the Committee on Energy and Natural Resources requested legislative reports from the Department of the Interior and the Office of Management and Budget setting forth Executive agency recommendations on S. 538. These reports had not been received at the time the report on S. 538 was filed. When the reports become available, the Chairman will request that they be printed in the Congressional Record for the advice of the Senate. The testimony provided by the Commissioner of the Bureau of Reclamation at the Subcommittee hearing pertaining to S. 538 follows:

STATEMENT OF ELUID MARTINEZ, COMMISSIONER, U.S.
BUREAU OF RECLAMATION

Thank you for the opportunity to appear today to provide the Administration's views on S. 538, legislation to convey certain facilities of the Minidoka Project to the Burley Irrigation District.

Before I discuss the specifics of this proposal, I would like to talk briefly about Reclamation's title transfer efforts in general.

TITLE TRANSFER

As you may recall, the Bureau of Reclamation's title transfer efforts began as part of Phase II of the Administration's National Performance Review (REGO II). It was and still is viewed as an opportunity to create a government that works better and costs less by transferring certain facilities to state or local units of government or other non-Federal entities.

In August, 1995, Reclamation released its Framework for the Transfer of Title: Bureau of Reclamation Projects. This framework sets out a consistent, fair, and open process for negotiating the transfer of title to appropriate facilities with all the interested stakeholders to develop an agreement that could be brought to Congress and supported by all the parties involved.

Soon after the Administration announced the initiative more than sixty entities—including irrigation districts, municipal authorities, and cities—contacted Reclamation and expressed their interest in title transfer. However, the

majority of those entities decided not to pursue title transfer at that time for a variety of reasons—the most common of which was concern about assuming liability for the facilities.

Since that time, Reclamation's five regions have entered into discussions and negotiations with approximately twenty districts—some of those have dropped out, but many remain on-going. Currently, there are three title transfers that are working their way through the Administration's review that we believe will be good models for others interested in title transfer. These include:

- (1) Clear Creek, an irrigation facility located in the Central Valley Project in California.
- (2) Contra Costa, a municipal district also located in the Central Valley Project; and
- (3) San Diego Aqueduct, a municipal facility located in southern California.

The difference between the legislation before this Committee today and the three negotiated transfers mentioned above are important. Each of these three listed above will have gone through a full NEPA review process before coming to Congress, none of them is designed to diminish or circumvent environmental objectives, and all would include terms that protect the financial interests of the United States. And as importantly, each has gone through a public negotiations session and have attempted to include any interested stakeholders in the proposal's development.

In the 18 months since this effort began, the most important lesson that we—both Reclamation and the districts—have learned is that there is no such thing as a simple project. Each facility is unique and each has its own set of complexities that neither Reclamation nor the districts anticipated when we began discussions. Let me assure this committee, however, that transferring title to appropriate Reclamation facilities remains a high priority for me personally and for the Administration.

There has been criticism about Reclamation's process—as being cumbersome and slow. I am sensitive to this concern and we are working to try to streamline the process to make it work better. Frankly, Mr. Chairman, a big part of the problem is that we—again both Reclamation and the entities we are discussing transfers with—are new to this. We don't have a lot of experience and are learning as we go. With each project, we find that we are having to identify new sets of issues that we did not anticipate and work to resolve them in an equitable and thoughtful manner. I firmly believe, however, that we are gaining the experience with each set of negotiations which will enable us to move more quickly in the future.

Regardless of the specifics of each project and how negotiations proceed—whether it is through our Framework process, some other administrative process or directly through the legislative process—there are a few basic te-

nets that we need to ensure are a part of every facilities transfer negotiation.

First and foremost, the process needs to be open and inclusive of all stakeholders. History has shown that if the process is not inclusive, those who are left out will derail the proposal at the eleventh hour and ultimately it will take even longer. It has been our experience that short cuts take significantly more time than the thorough route.

Second, any proposal must pass the "straight face test." To help clarify how to do that we have established six basic criteria that we believe satisfy that threshold: (1) The Federal Treasury and thereby the taxpayers' financial interest, must be protected; (2) there must be compliance with all applicable State and Federal laws; (3) Interstate compacts and agreements must be protected; (4) the Secretary's Native American trust responsibility must be met; (5) Treaty obligations and international agreements must be fulfilled; and (6) the public aspects of the project such as recreation, flood control, fish and wildlife and others must be protected.

Given those broad parameters, I would like to provide our views on the legislation under consideration by the Subcommittee.

S. 538, CERTAIN FACILITIES OF THE MINIDOKA PROJECT TO
THE BURLEY IRRIGATION DISTRICT

S. 538 directs the Secretary of the Interior to convey to the Burley Irrigation District (BID), without consideration, all right, title and interest of the United States in and to the withdrawn and acquired lands, easements, and rights-of-way of or in connection with the South Side Pumping Division of the Minidoka project.

For the reasons discussed below, the Administration strongly objects to S. 538 as drafted. While some features of the project may be suitable for transfer the bill would require significant modifications before the Department could support it.

First, I would like to provide some history. On March 11, 1996, Reclamation met with BID following their request to initiate discussions about title transfer and to begin the process to cooperatively negotiate and craft a proposal to bring to Congress which all parties could support. Unfortunately, that process did not get very far as S. 1921 was introduced in the 104th Congress and discussions came to an end.

After the 104th Congress adjourned, Reclamation reinitiated discussions with BID in hopes of developing a consensus based proposal. These efforts were short lived and S. 538, was introduced in the 105th Congress. Having provided the history, I would now like to outline our concerns:

(1) The legislation directs, rather than authorizes, the Secretary to convey the facilities of the project. This mandate directing the Secretary to transfer title makes any actions under NEPA moot, because the outcome is predeter-

mined. The Administration firmly believes that the completion of activities under NEPA must occur prior to title transfer to allow the Department, the Congress, and the public to fully understand the impacts of a proposed transfer. The Secretary also must be able, prior to the transfer of title, to condition the transfer in ways that resolve any issues identified during the NEPA process. Likewise, the default language in Section 1(f)(2) is inappropriate. If the title transfer is not completed within two years, we recommend that the Secretary report to Congress on the reason transfer has not occurred as is done in the Carlsbad legislation.

In addition, the Sierra Club Legal Defense Fund recently filed on behalf of several organizations a 60-day Notice of Intent to Sue under the Endangered Species Act, based on current operations of the Upper Snake River Basin. There are endangered snail species in Lake Walcott (the reservoir created by Minidoka Dam), and other species are under consideration for listing. Appropriate consultation under Section 7 of the Endangered Species Act will be required prior to any transfer of title.

Any proposed transfer must also be consistent with the Secretary's Native American trust responsibility and must meet U.S. treaty obligations to protect their rights to fish at usual and customary fishing grounds.

(2) Withdrawn Lands: Section 1(b) proposes to transfer 13.4 acres of land to the district which are within the Minidoka Irrigation District's (MID) boundaries. There are several problems with this provision: (A) These lands were withdrawn from the public domain for use by the Federal project. For this and all Reclamation projects, the value of withdrawn lands was never included in the allocation of costs to be repaid by the beneficiaries. Consequently, BID has not made any repayment or financial contribution to the Federal government for these lands; (B) these withdrawn lands are jointly used as a gravel source of BID and MID (C). These withdrawn lands also provide public access to the Snake River for recreational purposes which could be restricted under this bill.

As a result of these problems, the 13.4 acres of withdrawn lands should either be removed from the proposal or accommodations need to be made in the language in S. 538 to address each of the above issues.

(3) Other Conveyance: The headworks of the Main South Side Canal—proposed for transfer under S. 538—serve to supply water to both Minidoka and Burley Districts, and is an integral part of Minidoka Dam. It should be specifically understood that the headworks mentioned in S. 538 is not included as a specific facility to be transferred and that title to the headworks should be retained by the United States.

(4) Valuation and Cost: S. 538 proposes to give the District, without compensation, the withdrawn lands, and other potential sources of revenue. Reclamation opposes

these provisions. These assets should be accounted for in a valuation process in order to appropriately protect the financial interests of the Treasury.

Section 1(b)(20) states: "The first \$80,000 in administrative costs of transfer of the title and related activities shall be paid in equal shares by the United States and Burley, and any additional amount of administrative costs shall be paid by the United States." We recommend that Congress instead require transferees to cost share all the transaction costs, including but not limited to those costs associated with the NEPA and real estate boundary surveys.

(5) Water Rights: Section 1(c) would transfer to the District any water rights held by the United States for the benefit of the District. Currently, Reclamation holds natural flow water rights for the Minidoka and Burley Districts as one right. This natural-flow right is presently being adjudicated in the ongoing Snake River Basin Water Right Adjudication. Partitioning the water rights under S. 538 could impair integrated project operations, affect adjudicated rights, and result in third-party impacts, including impacts to other project water users.

Furthermore, section 1(c) could impair the effective management of the water resources of the region. The Federal government now is able to provide irrigation deliveries in a manner that also enhances flows for fish and wildlife purposes. The proposed transfer of water rights could reduce this operational flexibility and hinder the salmon recovery efforts now underway downstream. Therefore, we strongly recommend that the current relationship between the United States and BID concerning water rights be retained.

(6) Project Power: Section 1(d)(1) gives BID a permanent right to project power at the "cost of production." The Administration does not believe it is in the best interest of the taxpayers and other power users to grant any transferred project such a permanent right. The present contractual arrangement between BID and Reclamation was entered in 1962. BID may now receive up to 10,000 kilowatts for 40 years at a rate that is discounted 0.7 mills/kWh below the actual cost of production for power used at BID's pumping plants. Following this 40-year period, the 1962 contract allows BID to enter into additional contracts without the discount. With the prospect of restructuring the electric utility industry, circumstances in the electricity market are rapidly changing. Any perpetual right would provide the District a windfall that other power customers or the general taxpayer would have to subsidize.

(7) Right of First Refusal: Section 1(d)(2) provides BID and other entities entitled to storage water in Lake Walcott (the reservoir created by Minidoka Dam) the right of first refusal to acquire the power plant or dam and related facilities, if the United States decided to transfer these facilities out of Federal ownership. The language should be removed as it is unfair to give this district pref-

erential treatment which would prejudice future actions by the Congress or the Executive branch with respect to privatization of hydroelectric generation facilities.

Section 1(d)(2) states: "If the United States decides to transfer out of Federal ownership title to the Minidoka Power Plant or Dam, the Secretary shall grant to entities entitled to storage water in Lake Walcott (the reservoir created by Minidoka Dam) under spaceholder contracts with the United States a right of first refusal to acquire the power plant or dams and related facilities at such reasonable cost and subject to such terms and conditions as may be agreed on by the spaceholders and the Secretary." We believe the provision could have significant negative impacts to the irrigation districts in southern Idaho and western Oregon that rely upon power for irrigation purposes from the southern Idaho system. In addition, this provision would have negative impacts to Bonneville Power Administration (BPA) customers, including municipal and domestic entities.

On May 21, 1963, BPA was designated, consistent with 16 U.S.C. 837(a) and (b), as the marketing agency for Federal power generation sold in southern Idaho. This action assured that preference customers in southern Idaho receive a fair share of the power produced at Federal Columbia River Power Systems (FCRPS) hydroelectric generating projects. Since 1963, the assets allocated to power for the five southern Idaho system hydroelectric generating projects—Minidoka, Boise Diversion, Black Canyon, Anderson Ranch, and Palisades—have been included as part of the FCRPS and as part of the BPA's responsibility for repayment to the Treasury. The total FCRPS investment in the southern Idaho system on September 30, 1995, was about \$70 million. Of that total, \$28 million is for existing facilities and \$42 million is for replacement of worn out power facilities at the Minidoka project. Section 1(d)(2) would authorize the transfer of ownership from Reclamation, and presumably the power marketing and Treasury repayment responsibility from BPA, to "entities entitled to storage water in Lake Walcott." Congress should delete this provision. S. 538 should be limited solely to the transfer of irrigation facilities. The transfer of any assets from the FCRPS should not be addressed as part of this legislation.

(8) Liability: S. 538 should contain language to ensure that the purchaser accepts full liability for the transferred portion of the project facilities when they are conveyed, rather than just the lands, easements, and right-of-ways, as proposed in S. 538. The Administration proposes the following language:

Effective on the date of conveyance of the project facilities, described in section 1(b)(1), the United States shall not be held liable by any court for damages of any kind arising out of any act, omission, or occurrence relating to the conveyed

facilities, except for damages caused by acts of negligence committed by the United States or by its employees, agents, or contractors prior to the date of conveyance. Nothing in this section shall be deemed to increase the liability of the United States beyond that currently provided in the Federal Tort Claims Act, 28 U.S.C. Section 2671 et seq.

While these are the main points of concern for the Administration on S. 538, there are a number of other technical issues which we can address—hopefully as we move forward.

Again, Mr. Chairman, I would like to reiterate that we believe that this project is a potential candidate for title transfer, provided important modifications are made. Let me pledge to this Committee as well as to the bill sponsors and the District, my interest and willingness to see if we can work to make this title transfer a reality.

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CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill S. 532, as ordered reported.

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