

Calendar No. 751

106TH CONGRESS }
2d Session }

SENATE

{ REPORT
{ 106-373

MISSOURI RIVER BASIN, MIDDLE LOUP DIVISION FACILITIES CONVEYANCE ACT

AUGUST 25, 2000.—Ordered to be printed

Filed under authority of the order of the Senate of July 26, 2000

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

REPORT

[To accompany S. 1612]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 1612) to direct the Secretary of the Interior to convey certain irrigation project property to certain irrigation and reclamation districts in the State of Nebraska, 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. SHORT TITLE.

This act may be cited as the “Missouri River Basin, Middle Loup Division Facilities Conveyance Act”.

SEC. 2. DEFINITIONS.

In this act:

(1) COMMISSIONER.—The term “Commissioner” means the Commissioner of Reclamation.

(2) DISTRICT.—The term “District” means—

(A) the Farwell Irrigation District, a political subdivision of the State of Nebraska;

(B) the Sargent Irrigation District, a political subdivision of the State of Nebraska; and

(C) the Loup Basin Reclamation District, a political subdivision of the State of Nebraska.

(3) PROJECT.—The term “Project” means Sherman Reservoir, Milburn Diversion Dam, Arcadia Diversion Dam, related canals and other related lands, water rights, acquired land, distribution and diversion facilities, contracts, personal property, and other associated interests owned by the United States and authorized under the Act of June 17, 1902 (32 Stat. 388, chapter 1093), the Act of De-

ember 22, 1944 (commonly known as the "Flood Control Act of 1944") (58 Stat. 887, chapter 665), and the act of August 3, 1956 (70 Stat. 975, chapter 917).

(4) REPAYMENT AND WATER SERVICE CONTRACTS.—The term "Repayment and Water Service Contracts" means all repayment and water service contracts between the Secretary and the District relating to the Project.

(5) SECRETARY.—The term "Secretary" means the Secretary of the Interior.

SEC. 3. CONVEYANCE OF THE PROJECT.

(a) CONVEYANCE.—

(1) IN GENERAL.—As soon as practicable after the date of enactment of this Act and in accordance with all applicable laws, the Secretary shall convey to the Districts, by quitclaim deed, assignment, or patent, the interest of the United States in the Project, in consideration of payment to the Secretary—

(A) by the Districts of \$2,847,360, which—

(i) has been determined in accordance with the Bureau of Reclamation document entitled "Framework for Title Transfer" and the memorandum of understanding between the Commissioner and the Districts under section 5; and

(ii) includes all credits and adjustments provided for in that document and memorandum of understanding; and

(B) by the Western Area Power Administration, of \$2,600,000.

(2) CANCELLATION OF OBLIGATION.—The obligation to make payments due and owing from the Districts to the United States under the repayment and water service contracts are canceled for the year 2000 and thereafter.

(3) TIMING.—The conveyance under paragraph (1) shall be made concurrently with the making of the payment under paragraph (1)(A), but the payment under paragraph (1)(B) shall be made from capacity and energy charges at Pick-Sloan Missouri Basin Program firm power rates received in fiscal year 2000 or the first subsequent fiscal year in which the amount of power sale revenue received exceeds the amount of interest and operation and maintenance obligations of the Western Area Power Administration by at least \$2,600,000, to the extent of the excess.

(4) SATISFACTION OF OBLIGATIONS AGAINST THE PROJECT.—The payment under paragraph (1)(B) shall constitute full and compete satisfaction of all obligations of the Western Area Power Administration against the Project, the United States, and the Districts existing before the date of the conveyance or thereafter relating to the Project, including—

(A) future obligations for additional drainage required in the project;

(B) obligations under any contracts entered into between the United States, the Districts, and the Western Area Power Administration of its predecessors; and

(C) any obligation that may have been required by the Act of December 22, 1944 (58 Stat 887, chapter 665) or other related Federal law.

(5) SATISFACTION OF OBLIGATIONS FOR IRRIGATION BENEFITS.—The conveyance of the Project and the payment of the consideration under paragraph (1) shall constitute full satisfaction of any and all obligations of the Districts or of the Pick-Sloan Missouri Basin Program firm power users of the Western Area Power Administration for irrigation benefits of the Project or for any other benefits conveyed to the Districts.

(b) CONTAMINATED PROPERTY.—The Secretary shall convey the Project without regard to whether all necessary remedial action required under section 120(h)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)(3)) on any part of the Project has been completed.

(c) EXTINGUISHMENT OF OBLIGATIONS BETWEEN THE SECRETARY AND THE DISTRICTS.—Effective on the date of the conveyance, all obligations not canceled under subsection (a)(2) between the Secretary and the Districts relating to the Project and the Repayment and Water Service Contracts are extinguished.

SEC. 4. LIABILITY.

Effective on the date of conveyance of the Project, the United States shall not be liable for claims, costs, damages, or judgments of any kind arising out of any act, omission, or occurrence related to the Project except for such claims, costs, or damages arising from acts of negligence committed by the United States or by employees or agents of the United States before the date of conveyance for which the United States is liable under chapter 171 of title 28, United States Code (commonly known as the "Federal Tort Claims Act").

SEC. 5. COMPLETION OF CONVEYANCE.

(a) IN GENERAL.—The Secretary shall not make the conveyance under section 3 until the following events have been completed:

(1) Compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Execution of a memorandum of understanding between the Commissioner and the Districts describing the purchase price and other terms and conditions of the conveyance consistent with this Act.

(b) DISTRICT MANAGEMENT OF PROJECT.—The Districts shall manage the Project in a manner substantially similar to the manner in which the Project was managed before the conveyance and in accordance with applicable Federal and State laws, including—

(1) entering into an agreement with the Nebraska Game and Parks Commission that preserves on a permanent basis the right of the Commission to develop, provide, and protect the public interest in Project fish, wildlife, and recreation facilities related to the Projects, and

(2) entering into an agreement with the University of Nebraska Lincoln-State Museum that provides for protection of cultural resources at the project after the conveyance consistent with applicable law that authorizes the Districts or others with responsibility to protect significant historic features in situ or otherwise, and

(3) providing that the Districts shall annually make payments to local governments in the amounts in which the Commissioner made payment to the local governments under chapter 69 of title 31, United States Code (commonly known as “payments in lieu of taxes”) for fiscal year 1999.

(c) CREDITING TO RECLAMATION FUND.—All funds paid to the Secretary under this Act shall be credited to the Reclamation Fund in the Treasury of the United States toward repayment of capital costs of the project in an amount equal to the associated undiscounted obligation.

(d) NO EFFECT ON RATES.—No payment under this act shall affect Pick-Sloan Missouri Basin Program firm power rates in any way.

(e) REPORT.—If the conveyance under section 3 is not substantially completed on or before December 31, 2001, the Secretary and Districts shall promptly submit to the Committee on Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a report on the status of the conveyance describing the matters remaining to be resolved before completion of the conveyance and stating the anticipated date for the completion of the conveyance.

(f) FUTURE BENEFITS.—

(1) IN GENERAL.—Effective on the date of the conveyance under section 3, the Middle Loup Division of the Missouri River Basin Project—

(A) shall not be treated as a Federal reclamation project, and

(B) shall not be subject to the reclamation laws or entitled to receive any reclamation benefits under those laws.

(2) NO FLOOD CONTROL COMPONENT.—After the date of the conveyance under section 3, the Project shall no longer have a flood control component.

PURPOSE OF THE MEASURE

The purpose of S. 1612, as ordered reported, is to direct the Secretary of the Interior to convey certain irrigation project property to certain irrigation and reclamation districts in the State of Nebraska.

BACKGROUND AND NEED

S. 1612 would provide for the transfer of title of irrigation project facilities and lands from the Bureau of Reclamation to the Loup Basin Reclamation District, including the Sargent Irrigation District and the Farwell Irrigation District. The project facilities are part of the Missouri River Basin Project in central Nebraska, and provide water from the Middle Loup River to just under 64,000 acres of irrigable lands, as well as providing recreation and fish and wildlife benefits. Principal features of the projects include the Sherman Dam and Reservoir, the Arcadia Diversion Dam, the Milburn Diversion Dam, irrigation canals and laterals, drains and pumping plants. Crops grown on the project lands include alfalfa, small grains, sugar beets and feed corn.

The projects were constructed between 1955 and 1966 under authorities of the Flood Control Act of 1944, and are operated and maintained by the Districts under contracts between each project and the Bureau of Reclamation. The transfer will provide for total repayment, at net present value, of all outstanding obligations on behalf of the irrigation districts and power producers in accordance with law, construction plans and obligations. All current uses and purposes for the projects will be retained, except that flood control benefits, which have never existed, will be removed from the listed benefits. The Bureau of Reclamation and the Corps of Engineers, the agency responsible for flood control management in the Missouri River Basin, have agreed to this deletion.

The legislation provides for the conveyance of the project and facilities on or before January 1, 2001, at a cost of approximately \$5.4 million. The irrigation districts will pay \$2,847,360 of this obligation and power producers will pay \$2,600,000.

LEGISLATIVE HISTORY

S. 1612 was introduced by Senators Kerrey and Hagel on September 22, 1999 and a Subcommittee hearing was held on October 20, 1999. At the business meeting on June 7, 2000, the Committee on Energy and Natural Resources ordered S. 1612, as amended, favorably reported.

COMMITTEE RECOMMENDATION

The Committee on Energy and Natural Resources, in open business session on June 7, 2000, by a unanimous voice vote with a quorum present, recommends that the Senate pass S. 1612, if amended as described herein.

COMMITTEE AMENDMENT

During the consideration of S. 1612, the Committee adopted an amendment in the nature of a substitute. Significant changes made in the substitute amendment were the elimination of the trust fund and the establishment of a purchase price. Other changes are described in the section-by-section analysis, below.

SECTION-BY-SECTION ANALYSIS

Section 1 is a short title.

Section 2 defines key terms used in the bill.

Section 3 provides that the Project shall be conveyed as soon as practicable (to provide Reclamation with some flexibility in time to comply with NEPA requirements) and includes conditions regarding financial consideration (specific purchase price of \$2,847,360 by District and \$2,600,000 by WAPA); timing; satisfaction of obligations against the Project; and contaminated property. Further district payments on present water service and repayment contracts for 2000 and beyond are terminated. Reclamation does not retain any obligation for remedial action at CERCLA sites and District assumes such liability upon transfer of title.

Section 4 provides that, upon conveyance, the United States shall have no liability except for that arising out of acts of negligence committed by the United States or its employees, agents or contractors.

Section 5 describes events that must occur before conveyance, including compliance with NEPA, execution of a memorandum of agreement describing terms and conditions of the conveyance and an agreement regarding: (1) management of the Project in accordance with Federal and State laws; (2) protection of cultural resources; and (3) PILT payments. Section 5 requires that all funds paid to the Secretary be credited to the Reclamation Fund. Also, the Secretary and the Districts must submit a report to Congress if the conveyance is not substantially completed on or before December 31, 2001. Upon conveyance, the Districts are no longer entitled to benefits under reclamation law and the Project shall no longer have a flood control component.

COST AND BUDGETARY CONSIDERATIONS

The Congressional Budget Office cost estimate report had not been received at the time the report was filed. When the report becomes available, the Chairman will request that it be printed in the Congressional Record for the advice of the Senate.

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. 1612. 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. 1612, as ordered reported.

EXECUTIVE COMMUNICATIONS

On, October 13, 1999, 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. 1612. These reports had not been received at the time the report on S. 1612 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 follows:

STATEMENT OF ELUID L. MARTINEZ, COMMISSIONER, BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR

My name is Eluid Martinez. I am Commissioner of the U.S. Bureau of Reclamation (Reclamation). Thank you for the opportunity to provide the Department's views on S. 1612 to direct the Secretary of the Interior to convey the Middle Loup Division of the Pick Sloan Missouri Basin Program to the Loup Basin Reclamation District, the Sargent River Irrigation District, and the Farwell Irrigation District (Districts) in Nebraska. While we believe this project to be a good candidate for title transfer and have

made significant progress on many issues, the Administration opposes S. 1612 as drafted.

However, we are continuing to work closely with Senator Kerrey, Representative Barrett, who introduced a similar bill in the House, the Districts and the other stakeholders to address the outstanding issues.

Background

The Middle Loup Division of the Pick Sloan Missouri Basin Program provides water for irrigation to the Sargent and the Farwell Irrigation Districts in central Nebraska. The Loup Basin Reclamation District operates and maintains the water supply for both irrigation districts. The project costs were principally allocated to irrigation and a majority of the costs will be recovered through revenues from power generation known as "aid-to-irrigation." However, a small amount of the costs are allocated to recreation and fish and wildlife. The project proposed for transfer includes the dam and reservoir at the Sherman site, as well as supply and distribution canals, laterals, drains, and all lands or interest in lands associated with the project.

While primarily an irrigation project, Sherman Reservoir also provides significant recreation and wildlife benefits in the area. The Nebraska Game and Parks Department manages the recreation and wildlife components through a lease agreement with the Bureau of Reclamation. Reclamation expects that there will be a similar agreement between the Districts and the State if the facilities are conveyed.

Mr. Chairman, we have been working with the irrigation districts along with the State of Nebraska, the State Historic Preservation Office, the University of Nebraska—Lincoln, the neighboring Middle Loup Public Power and Irrigation District, the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers and a number of other stakeholders for a number of years on the issues associated with this title transfer. Reclamation participated in two public meetings, sponsored by the Districts in January 1996 to identify issues of concern. Since that time we have been working cooperatively with the Districts to address the myriad of issues that have arisen. In addition, Reclamation, in consultation with the Districts has been working to complete an environmental assessment on this transfer, which we hope will be completed shortly. We have also completed discussions on, and signed, the memorandum of understanding, referenced in S. 1612, which addresses a clear process and delineates roles and responsibilities for completing this title transfer in a timely fashion.

As we testified on a similar bill, H.R. 2984, we are concerned about directed transfer provisions in the bill.

Compliance with Federal Laws and Agreement: S. 1612 as introduced "directs" rather than "authorizes" the Secretary to convey the facilities of the Project. The Department strongly opposes such directive. This mandate direct-

ing the Secretary would severely diminish the review process to be conducted pursuant to the National Environmental Policy Act (NEPA), as the Secretary's ultimate decision regarding the transfer would be predetermined. The Administration firmly believes that a meaningful NEPA analysis must occur prior to title transfer to allow the Department, the Congress, and the public to fully understand the impacts of the proposed transfer, its alternatives, and potential mitigation measures. Reclamation has almost completed the environmental assessment and does not anticipate encountering significant environmental issues in this transfer. However, the Secretary's authority to condition the transfer in ways that resolve any issues identified during the NEPA process prior to title transfer must also be clear. Additionally, I must make clear that final Administration approval of the transfer is predicated on satisfactory implementation of the memorandum of Understanding.

In addition, S. 1612, as drafted, raises additional policy and technical concerns.

(1) *Price*: While S. 1612 states that the price should be determined with Reclamation's "Framework for Title Transfer," and the Memorandum of Understanding (MOU) that is in place between Reclamation and the Districts, it places an artificial ceiling on the amount the District and the Western Area Power Administration should pay. The payment to be made for the Project should reflect a price that protects the financial interests of the taxpayers. Placing this limitation restricts our ability to do that and contradicts the provisions of the MOU in terms of the process that was agreed to. Additionally, the Administration objects to S. 1612's requirement that the Federal government assume or maintain responsibility for costs associated with certain remedial and historic preservation activities. This is contrary to both our signed MOU with the district and the Administration's fiscal policy on title transfers, as the provision requires continued Administration financial responsibility for aspects of the transferred project.

(2) *Drains*: For several years, we have been working with the Districts, the State and the neighboring community of Loup City to identify the source of drainage problems that exist in the area. As drafted S. 1612 proposes to transfer all of the facilities, but proposes to require that all of the obligations for the drains, which may be directly related to the project would remain with the United States. In taking title to this project, the Districts must take all the obligations along with the benefits that come along with holding title.

Mr. Chairman, the most significant benefits to Reclamation in this title transfer is that we would get out of the management and oversight obligations as well as being relieved of the liability for this project. If the liability for the drains is left with the United States, that benefit is not realized. In summary, it is our view that the Districts should take title to the entire project, including the drains.

(3) *Trust Funds*: S. 1612 as introduced establishes the Nebraska-Middle Loup River Community Environmental Trust and the Nebraska-Middle Loup River Game and Parks Trusts—which propose to undertake—at a local level—a number of important activities including stabilizing surface and groundwater supplies, conserving water, improving and enhancing fisheries and recreational opportunities. While we applaud these program goals, we are concerned that S. 1612 proposes to capitalize these trust funds with the proceeds from the transfer that would otherwise go to the Treasury. The Administration is strongly opposed to this provision. As a base criteria of its title transfer policy, the Administration requires that the Federal Treasury and the taxpayers' financial interests be adequately protected.

Further concerns are raised by the fact that S. 1612 does not indicate who would be managing the funds. In previous drafts of legislation to transfer title to this project, there were provisions indicating what organizations or types of organizations would be represented on the entity that administers the trust fund. No such provision is included in S. 1612.

(4) *Project Power*: As drafted, it is unclear how S. 1612 deals with issue of the District's ability to continue to receive Pick Sloan power at subsidized rates for irrigation pumping even though the projects are no longer owned by the Federal government. It is the Administration's policy that, after title transfer, districts previously receiving pumping power would no longer be eligible for the "project use pumping power rate." They would be eligible to receive the same amount of power as they did when it was a Federal project, but would be required to pay the wholesale preference customer rate, currently at 14.54 mills/Kwh for this project.

Technical concerns

In addition to those issues raised above, there are a significant number of technical and clarifying concerns that need to be addressed. We would be pleased to work with the Districts, Senator Kerrey, and the Committee to work to clarify or address these concerns which are likely to be technical in nature. These issues include, but are not limited to, provisions relating to: (1) the drains; (2) the "obligations" that are "satisfied" by this legislation; (3) how remediation under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) is carried out; (4) crediting of certain items toward payment; (5) references to a Memorandum of Agreement; (5) "Nonreimbursability" of funds deposited into the trust funds; (6) provisions relating to funding of planning and the potential implementation of work on drains; and (7) eligibility for future benefits under Reclamation law.

Conclusion

At this time I would like to thank Tom Knutson, General Manager for the Loup Basin Reclamation District, Senator Kerrey and his staff, and Congressman Barrett, sponsor of H.R. 2984 for their cooperation as we have worked through a variety of complicated and technical issues.

That concludes my testimony. I would be happy to answer any questions.

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. 1612, as ordered reported.

