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SENATE

{ REPORT
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AQUIFER RECHARGE FLEXIBILITY ACT

OCTOBER 29, 2019.—Ordered to be printed

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

R E P O R T

[To accompany S. 1570]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 1570) to provide flexibility to allow greater aquifer recharge, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill, as amended, do pass.

AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Aquifer Recharge Flexibility Act”.

SEC. 2. DEFINITIONS.

In this Act:

- (1) BUREAU.—The term “Bureau” means the Bureau of Reclamation.
- (2) COMMISSIONER.—The term “Commissioner” means the Commissioner of Reclamation.
- (3) ELIGIBLE LAND.—The term “eligible land”, with respect to a Reclamation project, means land that—
 - (A) is authorized to receive water under State law; and
 - (B) shares an aquifer with land located in the service area of the Reclamation project.
- (4) NET WATER STORAGE BENEFIT.—The term “net water storage benefit” means an increase in the volume of water that is—
 - (A) stored in 1 or more aquifers; and
 - (B)(i) available for use within the authorized service area of a Reclamation project; or
 - (ii) stored on a long-term basis to avoid or reduce groundwater overdraft.
- (5) RECLAMATION FACILITY.—The term “Reclamation facility” means each of the infrastructure assets that are owned by the Bureau at a Reclamation project.

(6) RECLAMATION PROJECT.—The term “Reclamation project” means any reclamation or irrigation project, including incidental features thereof, authorized by Federal reclamation law or the Act of August 11, 1939 (commonly known as the “Water Conservation and Utilization Act”) (53 Stat. 1418, chapter 717; 16 U.S.C. 590y et seq.), or constructed by the United States pursuant to such law, or in connection with which there is a repayment or water service contract executed by the United States pursuant to such law, or any project constructed by the Secretary through the Bureau for the reclamation of land.

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

SEC. 3. FLEXIBILITY TO ALLOW GREATER AQUIFER RECHARGE IN WESTERN STATES.

(a) USE OF RECLAMATION FACILITIES.—

(1) IN GENERAL.—The Commissioner may allow the use of excess capacity in Reclamation facilities for aquifer recharge of non-Reclamation project water, subject to applicable rates, charges, and public participation requirements, on the condition that—

(A) the use—

(i) shall not be implemented in a manner that is detrimental to—

(I) any power service or water contract for the Reclamation project; or

(II) any obligations for fish, wildlife, or water quality protection applicable to the Reclamation project;

(ii) shall be consistent with water quality guidelines for the Reclamation project;

(iii) shall comply with all applicable—

(I) Federal laws; and

(II) policies of the Bureau; and

(iv) shall comply with all applicable State laws and policies; and

(B) the non-Federal party to an existing contract for water or water capacity in a Reclamation facility consents to the use of the Reclamation facility under this subsection.

(2) EFFECT ON EXISTING CONTRACTS.—Nothing in this subsection affects a contract—

(A) in effect on the date of enactment of this Act; and

(B) under which the use of excess capacity in a Bureau conveyance facility for carriage of non-Reclamation project water for aquifer recharge is allowed.

(b) AQUIFER RECHARGE ON ELIGIBLE LAND.—

(1) IN GENERAL.—Subject to paragraphs (3) and (4), the Secretary may contract with a holder of a water service or repayment contract for a Reclamation project to allow the contractor, in accordance with applicable State laws and policies—

(A) to directly use water available under the contract for aquifer recharge on eligible land; or

(B) to enter into an agreement with an individual or entity to transfer water available under the contract for aquifer recharge on eligible land.

(2) AUTHORIZED PROJECT USE.—The use of a Reclamation facility for aquifer recharge under paragraph (1) shall be considered an authorized use for the Reclamation project if requested by a holder of a water service or repayment contract for the Reclamation facility.

(3) MODIFICATIONS TO CONTRACTS.—The Secretary may contract with a holder of a water service or repayment contract for a Reclamation project under paragraph (1) if the Secretary determines that a new contract or contract amendment described in that paragraph is—

(A) necessary to allow for the use of water available under the contract for aquifer recharge under this subsection;

(B) in the best interest of the Reclamation project and the United States; and

(C) approved by the contractor that is responsible for repaying the cost of construction, operations, and maintenance of the facility that delivers the water under the contract.

(4) REQUIREMENTS.—The use of Reclamation facilities for the use or transfer of water for aquifer recharge under this subsection shall be subject to the requirements that—

(A) the use or transfer shall not be implemented in a manner that materially impacts any power service or water contract for the Reclamation project; and

(B) before the use or transfer, the Secretary shall determine that the use or transfer—

- (i) results in a net water storage benefit for the Reclamation project;
- or
- (ii) contributes to the recharge of an aquifer on eligible land; and
- (C) the use or transfer complies with all applicable—
 - (i) Federal laws and policies; and
 - (ii) interstate water compacts.
- (c) CONVEYANCE FOR AQUIFER RECHARGE PURPOSES.—The holder of a right-of-way, easement, permit, or other authorization to transport water across public land administered by the Bureau of Land Management may transport water for aquifer recharge purposes without requiring additional authorization from the Secretary where the use does not expand or modify the operation of the right-of-way, easement, permit, or other authorization across public land.
- (d) EFFECT.—Nothing in this Act creates, impairs, alters, or supersedes a Federal or State water right.
- (e) EXEMPTION.—This Act shall not apply to the State of California.

PURPOSE

The purpose of S. 1570, as ordered reported, is to provide flexibility to allow greater aquifer recharge.

BACKGROUND AND NEED

Groundwater, water contained in aquifers and accessed by wells, makes up about 38 percent of public water supplies and 48 percent of irrigation supplies nationally. The storage capacity of aquifers is a critical component of many western water management regimes and is often managed in conjunction with surface storage (known as conjunctive use) to provide water security and drought protection. Managed or artificial groundwater recharge is an important storage and management tool for many water managers. Groundwater recharge is done in several ways, including through injection wells, constructed recharge ponds, or simply spreading water in a basin favorable to percolation into the aquifer. The ability and effectiveness of aquifer recharge and storage is dependent on a variety of natural characteristics, including soil type and underlying geology, which influences water retention and the ability to recover stored water.

If groundwater pumping exceeds the recharge (referred to as overdraft) for an extended period of time, it will cause the water table to drop and can lead to permanent land subsidence or other impacts. The need to prevent overdraft and to preserve and better utilize the storage capacity of aquifers has led to increased management of groundwater. While state law is responsible for the management and regulation of groundwater supply, including pumping and recharge, Federal water infrastructure, including dams and canals, are often designed or operated to assist in the management and recharge of groundwater resources.

In some cases, use of existing Federal water facilities for aquifer recharge can be increased, to the extent it is allowed under state law, by addressing specific aspects of Federal law and policy. Specifically, the location of use of “project water”—state water rights held for use by a Bureau of Reclamation (BOR or Reclamation) project and delivered through the project facilities—is restricted by the project’s authorized boundary. However, aquifers frequently underlie both project and non-project lands, and in certain cases adjacent non-project lands may be more amenable, because of better soils, existing land use patterns, or other factors, for recharging the shared aquifer. S. 1570 would allow use of non-project lands that share an aquifer with project lands for groundwater recharge if

those lands are eligible to receive the water under state law and meet specific other requirements to ensure the benefits accrue to the Reclamation project and its contractors.

In addition, section 1 of the Warren Act (43 U.S.C. 523) authorized the use of excess capacity above what is required to meet contractual demands of the Reclamation project to be used to impound, store or convey “non-project water” (state water rights held by a non-Federal entity) through BOR facilities for irrigation purposes. The ability to enter into a Warren Act contract under this authority for water intended for groundwater recharge has been unevenly applied. S. 1570 would expressly authorize the use of excess capacity at BOR facilities to be used for non-project water intended for aquifer recharge. Similar issues related to different treatment of water intended for irrigation and water intended for aquifer recharge have also emerged for some non-Federal water facilities on easements or rights-of-way across Federal land and are addressed in S. 1570.

LEGISLATIVE HISTORY

S. 1570 was introduced by Senator Risch on May 21, 2019.

Representative Fulcher introduced identical legislation, H.R. 2871, on May 21, 2019, in the House of Representatives. The Natural Resources Committee’s Subcommittee on Water and Power held a hearing on the measure on July 18, 2019.

In the 115th Congress, similar language was included in S. 2563, which was introduced by Senator Flake on March 15, 2018. The Committee held a hearing on S. 2563 on March 22, 2018.

The Senate Committee on Energy and Natural Resources met in open business session on September 25, 2019, and ordered S. 1570 favorably reported, with an amendment in the nature of a substitute.

COMMITTEE RECOMMENDATION

The Senate Committee on Energy and Natural Resources, in open business session on September 25, 2019, by a majority voice vote of a quorum present, recommends that the Senate pass S. 1570, if amended as described herein. 6602

COMMITTEE AMENDMENT

During its consideration of S. 1570, the Committee adopted an amendment in the nature of a substitute. The substitute amendment strikes the definition and specific allowance in section 3(c) related to in lieu recharge (the use of surface water instead of groundwater), and it strikes the sense of Congress in subsection (d). The substitute amendment also clarifies that the request of a water service or repayment contract holder is required to make aquifer recharge an authorized use of a Reclamation project in section 3(b)(2); adds a requirement that the use or transfer complies with interstate water compacts in subsection (b)(4); and adds an effects provision to clarify that nothing in the Act creates, impairs, alters, or supersedes a Federal or State water right in the new subsection (d). The substitute amendment also contains a number of technical, conforming, and clarifying changes.

SECTION-BY-SECTION ANALYSIS

Sec. 1. Short title

Section 1 sets forth the short title.

Sec. 2. Definitions

Section 2 defines key terms.

Sec. 3. Flexibility to allow greater aquifer recharge in western states

Section 3(a) authorizes the Commissioner of Reclamation (Commissioner) to use excess capacity in Reclamation facilities for aquifer recharge of non-Reclamation project water. The subsection specifies several restrictions for such use, including that the authorization shall not be implemented in a detrimental manner to any power service or water contracts or any existing obligations for fish, wildlife, or water quality protection; is consistent with applicable water quality guidelines; complies with State and Federal laws and policies; and is consent to by the non-Federal party to an existing contract. The subsection also states that contracts for use of excess capacity of Reclamation conveyance facilities for aquifer recharge in effect on the date of enactment are not affected.

Subsection (b)(1) authorizes the Secretary of the Interior (Secretary) to contract with a holder of a water service or repayment contract to use available project water, either directly or via transfer, for aquifer recharge on lands that are outside a Reclamation project boundary if those lands are eligible to receive water under state law and share a groundwater sources with land located in the service area of the Reclamation Project.

Subsection (b)(2) states that aquifer recharge use shall be considered an authorized use of the Reclamation project if requested by water service or repayment contract holder.

Subsection (b)(3) authorizes the Secretary to enter into a new contract or contract amendment if the Secretary determines: (A) it is needed to allow for the use of water for aquifer recharge; (B) it is in the best interest of the Reclamation project; and (C) it is approved by the contractor.

Subsection (b)(4) specifies that the use of Reclamation facilities for the use or transfer water for aquifer recharge is subject to the following requirements: (A) the implementation does not materially impact any power service or water contract; (B) the Secretary predetermines that the use or transfer will result in a net water storage benefit, or contribute to the recharge of an aquifer on eligible land; and (C) the use or transfer complies with applicable Federal laws and policies, and interstate water contracts.

Subsection (c) allows the holder of a right-of-way, easement, permit, or other authorization to transport water across public land administered by the Bureau of Land Management to also transport water for aquifer recharge purposes without requiring additional authorization from the Secretary, if that use does not expand or interfere with the operation of the right-of-way, easement, permit, or other authorization across public land.

Subsection (d) states that nothing in the Act creates, impairs, alters, or supersedes a Federal or a State water right.

Subsection (e) excludes the State of California from this Act. 6602

COST AND BUDGETARY CONSIDERATIONS

The Congressional Budget Office estimate of the costs of this measure has been requested but was not received at the time the report was filed. When the Congressional Budget Office completes its cost estimate, it will be posted on the internet at www.cbo.gov.

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. 1570. 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. 1570, as ordered reported.

CONGRESSIONALLY DIRECTED SPENDING

S. 1570, as ordered reported, does not contain any congressionally directed spending items, limited tax benefits, or limited tariff benefits as defined in rule XLIV of the Standing Rules of the Senate. 6602

EXECUTIVE COMMUNICATIONS

The testimony provided by the Department of the Interior at the July 18, 2019, hearing on S. 1570 follows:

STATEMENT OF BRENDA BURMAN, COMMISSIONER, BUREAU OF RECLAMATION, U.S. DEPARTMENT OF THE INTERIOR

Chairman McSally, Ranking Member Cortez Masto, and members of the Subcommittee, I am Brenda Burman, Commissioner for the Bureau of Reclamation within the Department of the Interior (Interior). Thank you for the opportunity to provide Interior's views on S. 1932, the Drought Resiliency and Water Supply Infrastructure Act, S. 2044, the Water Supply Infrastructure Rehabilitation and Utilization Act, and S. 1570, the Aquifer Recharge Flexibility Act.

Reclamation's dams and reservoirs, water conveyance systems, and power generating facilities are integral components of the Nation's infrastructure. This infrastructure is key to Reclamation's continued success. Approximately 50 percent of Reclamation's dams were built between 1900 and 1950, and approximately 90 percent of the dams were built before adoption of currently used, state-of-the-art design and construction practices. Effectively managing the modernization of this infrastructure and the benefits that these structures provide is among the significant challenges facing Reclamation in the next several years. The reliability, safety, efficiency, and cost effectiveness of Reclamation's infrastructure to ensure water deliveries and power generation is a high priority. Our FY 2020 budget

proposed increases in funding for extraordinary maintenance, including dam safety, to modernize infrastructure. We appreciate that the bill sponsors are working to improve western water reliability.

S. 1570—The Aquifer Recharge Flexibility Act

S. 1570, the Aquifer Recharge Flexibility Act, seeks to improve aquifer levels across western states by expanding the ability for aquifer recharge through federal lands and facilities.

In Idaho, Reclamation has been working with the state and water users on efforts to stabilize the Eastern Snake Plains Aquifer (ESPA) and reduce conflict over groundwater withdrawals. This comes on top of the ESPA Comprehensive Aquifer Management Plan, adopted by the Idaho legislature in 2009, which sets forth strategies to stabilize the aquifer, including a managed recharge. Reclamation has been assisting with these efforts while still meeting obligations to the Minidoka Project contractors and listed fish species.

In Idaho, and many other locations, aquifer recharge could require the use of Federal property, sometimes after a lengthy wait for congressional authorization. Reclamation provided technical assistance on this legislation, and we believe its new authorities will help reduce delays in using appropriate federal lands to recharge local aquifers. We would like to work with the committee and bill sponsors to clear up ambiguities and avoid unintended consequences.

CONCLUSION

Thank you for the opportunity to provide the Department's views on these pieces of legislation. We look forward to continuing our work with the sponsors and the Committee on these bills.

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 as ordered reported.

