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SENATE

{ REPORT
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LOWER COLORADO RIVER MULTI-SPECIES CONSERVATION PROGRAM ACT

JUNE 16, 2008.—Ordered to be printed

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

R E P O R T

[To accompany H.R. 2515]

The Committee on Energy and Natural Resources, to which was referred the Act (H.R. 2515) to authorize appropriations for the Bureau of Reclamation to carry out the Lower Colorado River Multi-Species Conservation Program in the States of Arizona, California, and Nevada, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the Act, 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 “Lower Colorado River Multi-Species Conservation Program Act”.

SEC. 2. DEFINITIONS.

In this Act:

(1) **LOWER COLORADO RIVER MULTI-SPECIES CONSERVATION PROGRAM.**—The term “Lower Colorado River Multi-Species Conservation Program” or “LCR MSCP” means the cooperative effort on the Lower Colorado River between Federal and non-Federal entities in Arizona, California, and Nevada approved by the Secretary of the Interior on April 2, 2005.

(2) **LOWER COLORADO RIVER.**—The term “Lower Colorado River” means the segment of the Colorado River within the planning area as provided in section 2(B) of the Implementing Agreement, a Program Document.

(3) **PROGRAM DOCUMENTS.**—The term “Program Documents” means the Habitat Conservation Plan, Biological Assessment and Biological and Conference Opinion, Environmental Impact Statement/Environmental Impact Report, Funding and Management Agreement, Implementing Agreement, and Section 10(a)(1)(B) Permit issued and, as applicable, executed in connection with the LCR MSCP, and any amendments or successor documents that are developed consistent with existing agreements and applicable law.

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

(5) STATE.—The term “State” means each of the States of Arizona, California, and Nevada.

SEC. 3. IMPLEMENTATION AND WATER ACCOUNTING.

(a) IMPLEMENTATION.—The Secretary is authorized to manage and implement the LCR MSCP in accordance with the Program Documents.

(b) WATER ACCOUNTING.—The Secretary is authorized to enter into an agreement with the States providing for the use of water from the Lower Colorado River for habitat creation and maintenance in accordance with the Program Documents.

SEC. 4. ENFORCEABILITY OF PROGRAM DOCUMENTS.

(a) IN GENERAL.—Any party to the Funding and Management Agreement or the Implementing Agreement, and any permittee under the Section 10(a)(1)(B) Permit, may commence a civil action in United States district court to adjudicate, confirm, validate or decree the rights and obligations of the parties under those Program Documents.

(b) JURISDICTION.—The district court shall have jurisdiction over such actions and may issue such orders, judgments, and decrees as are consistent with the court’s exercise of jurisdiction under this section.

(c) UNITED STATES AS DEFENDANT.—

(1) IN GENERAL.—The United States or any agency of the United States may be named as a defendant in such actions.

(2) SOVEREIGN IMMUNITY.—Subject to paragraph (3), the sovereign immunity of the United States is waived for purposes of actions commenced pursuant to this section.

(3) NONWAIVER FOR CERTAIN CLAIMS.—Nothing in this section waives the sovereign immunity of the United States to claims for money damages, monetary compensation, the provision of indemnity, or any claim seeking money from the United States.

(d) RIGHTS UNDER FEDERAL AND STATE LAW.—Except as specifically provided in this section, nothing in this section limits any rights of any party under Federal or State law.

(e) VENUE.—Any suit pursuant to this section may be brought in any United States district court in the State in which any non-Federal party to the suit is situated.

SEC. 5. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—There is authorized to be appropriated to the Secretary such sums as may be necessary to meet the obligations of the Secretary under the Program Documents, to remain available until expended.

(b) NON-REIMBURSABLE AND NON-RETURNABLE.—All amounts appropriated to and expended by the Secretary for the LCR MSCP shall be non-reimbursable and non-returnable.

PURPOSE OF THE MEASURE

The purpose of H.R. 2515 is to authorize appropriations for the Bureau of Reclamation to carry out the Lower Colorado River Multi-Species Conservation Program in the States of Arizona, California, and Nevada, and for other purposes.

BACKGROUND AND NEED

The Lower Colorado River Multi-Species Conservation Program (MSCP) is a cooperative effort among 50 federal and non-federal entities in Arizona, California, and Nevada to protect 27 endangered, threatened and sensitive species on the Lower Colorado River (from Lake Mead to the Mexican border—approximately 400 river miles). Implementation and compliance with the program provides the basis for incidental take authorizations under the Endangered Species Act (ESA), which allows affected water and power agencies in the three states to continue operations under specified conditions.

Specifically, the MSCP is defined by several program documents including a habitat conservation plan, biological assessment, bio-

logical opinion, and an environmental impact statement. The Program is expected to create over 8,100 acres of riparian, marsh, and backwater habitat for the covered species, and is to rear and stock over 1.2 million fish to augment populations of the two endangered fish at issue. The MSCP also provides for maintenance of existing high-quality habitat, and a research, monitoring, and adaptive management effort to ensure that Program elements are effective in helping conserve covered species. Overall, it is expected that the MSCP will cost over \$600,000,000 (2003 dollars) over a 50-year time frame. These costs are to be split 50/50 between the federal government and the participating non-federal entities. H.R. 2515 will ensure that the program is implemented consistent with the program documents.

LEGISLATIVE HISTORY

H.R. 2515 was introduced by Rep. Dean Heller on May 24, 2007, and referred to the Committee on Natural Resources. Representatives Shelley Berkley, Ken Calvert, Trent Franks, Harry Mitchell, Jon Porter, George Radonovich, Rick Renzi, and John Shadegg are co-sponsors. Under suspension of the rules, H.R. 2515 passed the House of Representatives on March 31, 2008 and was referred to the Committee on Energy and Natural Resources. A companion measure, S. 300 was introduced by Senator Kyl on January 16, 2007, and referred to the Committee on Energy and Natural Resources. Senators Reid, Ensign, and Feinstein are co-sponsors. The Subcommittee on Water & Power held a hearing on S. 300 on July 26, 2007. (S. Hrg. 110–152.) At its business meeting on May 7, 2008, the Committee on Energy and Natural Resources ordered H.R. 2515 favorably reported as amended.

COMMITTEE RECOMMENDATION

The Committee on Energy and Natural Resources, in open business session on May 7, 2008, by voice vote of a quorum present, recommends that the Senate pass H.R. 2515, if amended as described herein.

COMMITTEE AMENDMENT

During the consideration of H.R. 2515, the Committee adopted a substitute amendment to improve the bill. The substitute amendment modifies definitions contained in the bill, removes provisions unnecessary to implement the program, and modifies a provision providing a limited waiver of the United States' sovereign immunity to allow the non-Federal parties to seek enforcement of the program documents.

SECTION-BY-SECTION ANALYSIS

Section 1 provides the short title of the Act.

Section 2 defines terms used in the Act.

Section 3(a) authorizes the Secretary to participate in the MSCP consistent with the program documents.

Section 3(b) authorizes the Secretary to enter into an agreement with the States of Arizona, Nevada, and California concerning the use of Colorado River water for purposes of implementing the

MSCP. The agreement is expected to be executed after enactment of the bill.

Section 4(a) authorizes any party to certain agreements related to the MSCP, or a permittee under the ESA, to commence a civil suit in Federal court to adjudicate rights and obligations under the MSCP.

Section 4(b) establishes jurisdiction by the Federal district court over actions authorized by subsection (a).

Section 4(c) establishes that the United States' sovereign immunity is waived for the limited purposes set forth, and that it may be named as a defendant in actions authorized by subsection (a).

Section 4(d) disclaims that anything in section 4 limits any rights under Federal or state law, except as may be specifically provided.

Section 4(e) declares the proper venue for actions brought under section 4.

Section 5(a) authorizes appropriations for the Federal share of the MSCP.

Section 5(b) declares that any amounts appropriated and expended are non-reimbursable to the United States.

COST AND BUDGETARY CONSIDERATIONS

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

H.R. 2515—Lower Colorado River Multi-Species Conservation Program Act

H.R. 2515 would authorize the Secretary of the Interior to participate in the Lower Colorado River Multi-Species Conservation Program. That program is a collaborative effort between the federal government and entities in the states of Nevada, Arizona, and California to address the needs of threatened and endangered fish and wildlife along the lower Colorado River while ensuring consistent water and electric power deliveries to the states involved in the program.

Based on information from the Bureau of Reclamation, CBO estimates that implementing the program would cost approximately \$70 million over the next five years and several hundred million dollars over the 50-year life of the program. The bureau, however, has been implementing the program since 2005 under existing authorities, and this legislation would not authorize any activities beyond those in which the bureau already is engaged. Hence, CBO estimates that implementing this act would not significantly affect the federal budget. Enacting the legislation would not affect direct spending or revenues.

H.R. 2515 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

On March 24, 2008, CBO transmitted a cost estimate for H.R. 2515, the Lower Colorado River Multi-Species Conservation Program Act, as ordered reported by the House Committee on Natural Resources on March 12, 2008. The two versions of the legislation are similar, and the estimated costs are the same.

The CBO staff contact for this estimate is Tyler Kruzich. This estimate was approved by Theresa Gullo, 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 H.R. 2515. 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 H.R. 2515, as ordered reported.

CONGRESSIONALLY DIRECTED SPENDING

H.R. 2515, as reported, does not contain any congressionally directed spending items, limited tax benefits, or limited tariff benefits as defined by rule XLIV of the Standing Rules of the Senate.

EXECUTIVE COMMUNICATIONS

The testimony provided by the Bureau of Reclamation at the Senate Committee on Energy and Natural Resources subcommittee hearing on companion measure S. 300 follows:

STATEMENT OF LARRY TODD, DEPUTY COMMISSIONER,
BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the Subcommittee, my name is Larry Todd and I am here today to present the views of the Department of the Interior on S. 300, a bill to authorize a habitat conservation program on the lower Colorado River in the States of Arizona, California, and Nevada.

S. 300 authorizes the Lower Colorado River Multi-Species Conservation Program (LCR MSCP) and addresses issues associated with implementation of the program, including Colorado River water use, investment of appropriated funds, and the enforceability of program documents. The Lower Colorado River is a critical resource to citizens of the Southwest. Maintaining compliance with the Endangered Species Act and avoiding water supply conflicts that have been occurring in other areas of the West is critical to the Department. The Department supports the LCR MSCP as well as the intent of S. 300 to further this program. However, the Department remains concerned about language in Section 2, 4(b), 5(c), and 5(d), which I will discuss below.

The LCR MSCP was developed through a collaborative partnership with State leaders, local stakeholders and the Administration. This innovative program addresses the needs of threatened and endangered fish and wildlife on the lower Colorado River while assuring greater reliability of water deliveries and hydropower production. By meeting the needs of fish and wildlife listed under the Endangered Species Act, as well as preventing the need to list additional species, the plan provides greater certainty of continued water and power supplies from the river for Ne-

vada, California and Arizona—and is designed to allow future water transfers within or among water users for a 50-year period.

Reclamation began work to develop the LCR MSCP in 1997 and the program was formally approved and adopted by Secretary Norton in 2005. Under existing authorities, Reclamation has been implementing activities that are similar in nature to those described in this program since 1997 when the U.S. Fish and Wildlife Service issued a Biological Opinion for southwestern willow flycatcher, bony tail chub, Yuma clapper rail and razorback sucker fish. In 2001, Reclamation adopted interim Surplus Guidelines that define when water operations can provide surplus water to water users in the Lower Colorado River Basin, and the Biological Opinion for that action is being implemented through the LCR MSCP. With these and other actions, Reclamation has been meeting the requirements of the Endangered Species Act (ESA) for over a decade.

Reclamation has spent a total of \$9.5 million in FY2004 and FY2005, and spent \$13 million in FY2006 from both Federal and non-Federal sources pursuant to the Program's Funding and Management Agreement with non-Federal entities. The LCR MSCP Steering Committee supports a budget of over \$16 million for FY 2007. In addition to establishing over 270 acres of new habitat along the Colorado River, Reclamation has stocked 46,079 razorback suckers and 14,836 bony tail chub into the lower Colorado River since 2004. A significant amount of money has been spent on the research and monitoring needed to develop a sound scientific foundation for this 50-year program. Accomplishment reports for FY2004 and FY2005 have been approved by the MSCP Steering Committee, reviewed by the U.S. Fish and Wildlife Service, and found to be in compliance with the LCR MSCP ESA Section 10 Permit. The FY2006 report has been approved by the Steering Committee and U.S. Fish and Wildlife Service. All reports can be found on Reclamation's website at www.lcrmscp.gov.

In Reclamation's FY2008 budget, which is awaiting Congressional approval, \$7 million has been identified from Federal funding for the program, with a \$7 million match from non-Federal partners.

Since presenting testimony on H.R. 5180 last year, the Department is pleased to report progress toward resolving issues surrounding section 3(b). As written, this Section would direct the Secretary to enter into an agreement with the States of Arizona, California and Nevada providing for the use of Colorado River water specifically for habitat creation and maintenance purposes. The Department believes that through existing contract terms, willing seller transactions, and current policies, Reclamation can utilize Colorado River (and non-Colorado River) water to implement the program. However, Reclamation has made progress with our funding partners in the Lower Basin States to develop an agreement acceptable to all parties on the use of Colorado River water for program purposes. Such an

agreement could facilitate program implementation, and we look forward to continuing productive efforts with our partners on this proposed agreement.

We do have a couple of concerns with provisions contained in S. 300. The geographic definition of the Lower Colorado River in section 2 should be clarified to match that contained in the MSCP Program Documents. The Administration cannot support the language in section 4(b) of this bill allowing the Secretary to invest appropriated moneys that are not required to meet current program expenditures. Investing appropriations provides additional moneys to finance a governmental purpose outside of the normal appropriations process.

We are also concerned about section 5(c), which addresses judicial review of program documents. We note that this provision has been modified from the language introduced in the last session of Congress, and that language has been added clarifying that the United States would not be liable for claims for money damages. Nevertheless, we have been advised by the Department of Justice and we are concerned that this provision could expand Federal litigation exposure in significant respects and open the door for judicial intrusion into administrative decision making. We would appreciate the opportunity to continue to work with the committee to address our concerns regarding section 5(c).

Section 5(d) seeks an explicit exemption from the Federal Advisory Committee Act. The Department believes that this exemption is not necessary as the program was determined by the Director of the U.S. Fish and Wildlife Service to be an Ecosystem Recovery and Implementation Team (ECRIT) pursuant to section 4(f)(2) of the ESA, thereby making the LCR MSCP Steering Committee exempt. Therefore, we believe section 5(d) is superfluous and we recommend deleting it.

The Department already has clear authorities to administer this program under existing statutes, and Reclamation began actively implementing the full LCR MSCP program in 2005. Through implementation of this program, the likelihood of a water conflict on the lower Colorado River is reduced.

The Department supports the LCR MSCP and will continue to work with interested stakeholders that seek to enhance the program. Thank you for the opportunity to comment on this legislation. We look forward to working with you on the various concerns we have. I am happy to take 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 H.R. 2515, as ordered reported.