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FORT SUMNER PROJECT TITLE CONVEYANCE

JUNE 27, 2013.—Ordered to be printed

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

R E P O R T

[To accompany S. 284]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 284) to transfer certain facilities, easements, and rights-of-way to Fort Sumner Irrigation District, New Mexico, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 284 is to transfer certain facilities, easements, and rights-of-way to Fort Sumner Irrigation District, New Mexico.

BACKGROUND AND NEED

The Fort Sumner Project area was developed by private interests in the mid-1800s. The project includes approximately 6,500 acres and is located within the Pecos River basin in Eastern New Mexico. Some of the first irrigators were the Apache and Navajo Indians, held in captivity by United States troops under the command of Kit Carson. The Fort Sumner Irrigation District (District) acquired the property in 1919. In 1949, Congress authorized the Bureau of Reclamation (Reclamation) to rehabilitate the project and Reclamation and the District entered into a repayment contract to allow the U.S. to recover the costs of the rehabilitation work.

In 2009, the District entered into a forbearance agreement with Reclamation whereby the District has agreed not to take all of the irrigation water it is entitled to take each year and receives a payment for that water from Reclamation. Reclamation stores the water and uses it to keep the Pecos River wet in times of drought in order to comply with Endangered Species Act flow requirements

for the Pecos bluntnose shiner. The payment the District receives for water offsets the amount the District owes the U.S. under its repayment agreement. The 2009 forbearance agreement includes provisions that the U.S. will support title transfer to the District.

A Memorandum of Agreement between Reclamation and the District will govern the title transfer process. Upon transfer of title, the repayment contract will terminate, but the forbearance agreement will continue for at least ten years. S. 284 is needed to facilitate the transfer.

LEGISLATIVE HISTORY

S. 284 was introduced by Senator Udall of New Mexico and Senator Heinrich on February 12, 2013. The Subcommittee on Water and Power held a hearing on S. 284 on April 16, 2013. At its business meeting on May 16, 2013, the Committee ordered S. 284 favorably reported by voice vote.

In the 112th Congress, Senators Bingaman and Udall of New Mexico introduced similar legislation, S. 1225. The Subcommittee on Water and Power held a hearing on June 23, 2011 (S. Hrg. 112-129).

COMMITTEE RECOMMENDATION

The Senate Committee on Energy and Natural Resources, in open business session on May 16, 2013, by a voice vote of a quorum present, recommends that the Senate pass S. 284.

SECTION-BY-SECTION ANALYSIS

Section 1 provides for the short title, the “Fort Sumner Project Title Conveyance Act”.

Section 2 defines key terms in the bill.

Section 3(a) and (b) authorizes the Secretary of the Interior (Secretary) to convey United States right and title to all works, lands, and facilities of the Fort Sumner reclamation project to the Fort Sumner Irrigation District (District) in accordance with the terms and conditions of the Transfer Agreement, subject to all valid existing rights.

Subsection (c) stipulates that the costs of conveyance including environmental compliance may be shared between the United States and District in accordance with the Memorandum of Agreement between the United States and the Fort Sumner Irrigation District Concerning Principles and Elements of Proposed Transfer of Title to Fort Sumner Irrigation District Facilities,” numbered 11-WC-40-406.

Subsections (d) and (e) direct the Secretary to assure compliance with environmental laws before conveyance. The Secretary is further directed to report to Congress if conveyance is not completed within 2 years of completion of the requirements stipulated above.

Section 4 requires that after the date of conveyance, the U.S. shall have no further interest in or responsibility for operating and maintaining the project and shall not be liable for damages to the conveyed property, other than for damages committed by the U.S. or its agents.

Section 5 stipulates that effective beginning on the date of conveyance, the repayment contract between the U.S. and the District

(numbered Ilr—1524 and dated November 5, 1948, including supplements and amendments) shall terminate and the U.S. and the District shall have no further obligations under the contract.

Section 6 orders that the terms and conditions of the forbearance agreement between the U.S. and the District (numbered 08–WC–40–292, dated August 21, 2009) for the forbearance of exercising priority water rights shall remain in full force and effect on termination of the Repayment Contract for not less than 10 years after the enactment of this Act and that the U.S. shall have no payment obligation under the agreement.

Section 7 states that after conveyance, the property shall not be considered a Federal reclamation project and shall not be eligible to receive benefits, except for those that would be available to a similarly situated entity with respect to property that is not part of a Federal reclamation project.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of S. 284 has been provided by the Congressional Budget Office:

S. 284—Fort Sumner Project Title Conveyance Act

S. 284 would direct the Secretary of the Interior to convey the title of the Fort Sumner Project, including the diversion dam and all associated features, to the Fort Sumner Irrigation District. Based on information from the Bureau of Reclamation, enacting the legislation also would end the repayments the District makes to the U.S. Treasury for certain costs of the project. CBO estimates that those repayments will total about \$550,000 under current law over the 2014–2023 period. Because enacting the legislation would decrease offsetting receipts, which are treated as reductions in direct spending, pay-as-you-go procedures apply. The legislation would not affect revenues.

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. S. 284 would decrease offsetting receipts (thus, increasing direct spending) beginning in 2014, for a total cost of \$550,000 through 2023.

CBO ESTIMATE OF THE STATUTORY PAY-AS-YOU-GO EFFECTS FOR S. 284 AS ORDERED REPORTED BY THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES ON MAY 16, 2013

	By fiscal year, in millions of dollars—													
	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2013–2018	2013–2023	
NET INCREASE OR DECREASE (–) IN THE DEFICIT														
Statutory Pay-As-You-Go Impact	0	0	0	0	0	0	0	0	0	0	0	0	0	1

S. 284 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.

The CBO staff contact for this estimate is Aurora Swanson. The 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 S. 284.

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. 284, as ordered reported.

CONGRESSIONALLY DIRECTED SPENDING

S. 284, as 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.

EXECUTIVE COMMUNICATIONS

The testimony provided by the U.S. Department of the Interior at the April 16, 2013, Subcommittee on Water and Power hearing on S. 284 follows:

STATEMENT OF ROBERT QUINT, SENIOR ADVISOR BUREAU
OF RECLAMATION U.S. DEPARTMENT OF INTERIOR

Chairman Schatz and members of the Subcommittee, I am Robert Quint, Senior Advisor at the Bureau of Reclamation (Reclamation). I am pleased to provide the views of the Department of the Interior (Department) regarding S. 284, which would authorize the Secretary of the Interior to convey title to all of the works of the Fort Sumner Project (including the diversion dam, easements, ditches, laterals, canals, drains, and other rights) to the Fort Sumner Irrigation District (FSID). The Department supports S. 284.

In 2011, S. 1225 was introduced in the 112th Congress, which would have authorized the United States to convey title to all of the works of the Fort Sumner Project to the FSID. At the time of the hearing on June 23, 2011 before this Committee on that bill, it was the view of the Administration that a number of issues had yet to be resolved between the United States and FSID, including a net financial loss to the Treasury of approximately \$250,000, the need for an open and transparent process for the public to provide input prior to conveyance of title, and the need for Reclamation and FSID to work through a collaborative process to ensure that operational, fiscal, environmental, and other issues are identified and addressed. However, since that time, Reclamation and FSID have worked together and a number of those issues are addressed in S. 284. Specifically, in 2012, the "Memorandum of Agreement between the United States and the Fort Sumner Irrigation District Concerning Principles and Elements of Proposed Transfer of Title to Fort Sumner Irrigation District"

(MOA) was executed, which addresses the issues we had with the previous legislation as described below.

BACKGROUND

There are two Reclamation projects on the Pecos River located in southeastern New Mexico: the Carlsbad and Fort Sumner Projects. The Fort Sumner Project was developed by private interests at the turn of the last century. In the 1950s, this project was reconstructed and rehabilitated by Reclamation. In 1948, in order to make this happen, Reclamation and the FSID executed a contract to provide for the repayment of construction costs to rehabilitate the project. As part of the process, Reclamation law required that Reclamation take title to the Project. Currently, the FSID has an annual repayment obligation of about \$54,500 with an outstanding balance of approximately \$597,697.00

The FSID holds a senior water right for not more than 100 cubic feet per second from the natural flow of the Pecos River. Reclamation must bypass the FSID's water through Sumner Reservoir prior to storing water for the Carlsbad Project. Over the past ten years, Reclamation has consulted with the U.S. Fish and Wildlife Service (Service) to ensure that Federal actions are not jeopardizing the existence of the Pecos bluntnose shiner or adversely modifying its critical habitat located below FSID's diversion dam. In these consultations, Reclamation has committed to the Service to maintain the shiner population level by minimizing river drying. A significant cause of drying on the Pecos is due to the FSID diverting its senior water right. The only way Reclamation has been able to keep the Pecos River flowing is by purchasing water from willing sellers and by paying the FSID not to divert water through a forbearance agreement.

In August 2009, Reclamation and FSID entered into a mutually beneficial agreement whereby FSID would forbear the diversion of up to 2,500 acre-feet of water annually for ten years when they would otherwise be in priority. Instead, this water goes into Sumner Lake reservoir where it is stored and delivered for Reclamation to prevent intermittency of flows on the Pecos River in compliance with the 2006 biological opinion. Reclamation pays FSID \$60,000 annually plus \$20 per acre-foot for the water. In addition to the forbearance of this water, FSID agreed to pursue ESA Section 10 consultation with the Service and Reclamation agreed to assist them in this process. Also in this agreement, FSID indicated its desire to take title to the facilities and Reclamation agreed to work with them on that process. The forbearance agreement further provides that the annual payments of \$60,000 from Reclamation to FSID will cease upon both the passage of title transfer legislation and the conveyance of title. To date, this has been a mutually beneficial agreement. The forbearance water has afforded Reclamation with an addi-

tional tool to meet the biological opinion to ensure that the Pecos River does not run dry in a cost effective manner.

As drafted, S. 284 protects the financial interests of the taxpayers of the United States. Under the terms of the Forbearance Agreement that is currently in place, Reclamation pays FSID \$60,000 annually plus \$20 per acre-foot for water. Under the terms of S. 284, after title transfer, the \$60,000 annual payments from the United States to FSID would cease. At the same time, FSID's repayment obligation of \$597,697 to the United States would also cease. These two revenue streams—one to FSID and one to the United States would offset. Further, the United States would continue to receive, in perpetuity rather than just for the ten years, the below-market-cost of \$20 per acre-foot for up to 2,500 acre feet of water annually that they need in order to meet the 2006 biological opinion—thereby saving the taxpayers in costs associated with this important water acquisition effort.

MEMORANDUM OF AGREEMENT

On June 22, 2012, the United States and FSID executed MOA, numbered 11-WC-40-406. This agreement was the culmination of a collaborative process between Reclamation and the FSID which articulated the principles elements for any legislation to authorize conveyance of title to the works of the Fort Sumner Project, as well as the steps required to complete the title transfer process, the responsible parties for each activity and spelled out the prerequisites to the actual conveyance of title to FSID.

The MOA takes an important step in resolving our concern regarding compliance with Federal and state laws—more specifically—with the terms of agreement to be developed between FSID and the U.S. Fish and Wildlife Service required under Section 10 of the Endangered Species Act. While it would be our preference to complete all of the activities required under the National Environmental Policy Act, the National Historic Preservation Act and the Endangered Species Act prior to acting upon legislation to transfer title, as a compromise, S. 284 requires that all the activities associated with these laws, including whatever mitigation may be necessary be completed prior to the transfer of title to these facilities. As part of that, before the conveyance of title, Reclamation must concur with the ESA Section 10 agreement thus ensuring that the United States' interests are not compromised.

Because S. 284 requires National Environmental Policy Act compliance and completion of ESA Section 7 and Section 10 consultations as prerequisites to conveyance of title, Reclamation and FSID will have the opportunity to complete a public process to determine whether other interested citizens of New Mexico have concerns and any issues that arise during that public process can be collaboratively be addressed in the title transfer agreement that must be prepared to articulate the terms and conditions of the title transfer as defined in Section 2(7) of the Act.

S. 284 also authorizes Reclamation to cost-share with FSID for both environmental compliance as well as the cost of conveyance of title.

Lastly, Reclamation believes that S. 284 would assure the continuation of the partnership Reclamation has developed with FSID in meeting the 2006 Biological Opinion requirements. With the challenges of persistent drought in the Pecos River basin and the need for Reclamation to consult, in partnership with FSID and the Carlsbad Irrigation District, with the Service in obtaining a new biological opinion by 2016, this title transfer legislation will enable us to meet this critical objective.

As a result of the efforts, hard work and compromises by both Reclamation and FSID, we believe that we have reached an agreement that protects the interests of FSID, the citizens of the States of New Mexico and the interests of the United States.

That concludes my written statement. I am pleased to answer questions at the appropriate time.

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 S. 284, as ordered reported.

