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SENATE

{ REPORT
{ 115-374

ENDANGERED FISH RECOVERY PROGRAMS EXTENSION ACT

NOVEMBER 26, 2018.—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. 2166]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 2166) to maintain annual base funding for the Upper Colorado and San Juan fish recovery programs through fiscal year 2023, to require a report on the implementation of those programs, 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.

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 “Endangered Fish Recovery Programs Extension Act”.

SEC. 2. EXTENSION OF AUTHORIZATION FOR ANNUAL BASE FUNDING OF FISH RECOVERY PROGRAMS; REMOVAL OF CERTAIN REPORTING REQUIREMENT.

Section 3(d) of Public Law 106-392 (114 Stat. 1604; 126 Stat. 2444) is amended—
(1) by striking paragraph (1) and inserting the following:

“(1) AUTHORIZATION OF APPROPRIATIONS.—

“(A) IN GENERAL.—There is authorized to be appropriated to the Secretary to be used by the Bureau of Reclamation to make the annual base funding contributions to the Recovery Implementation Programs \$10,000,000 for each of fiscal years 2020 through 2023.

“(B) NONREIMBURSABLE FUNDS.—The funds contributed to the Recovery Implementation Programs under subparagraph (A) shall be considered a nonreimbursable Federal expenditure.”; and

(2) in paragraph (2)—

(A) in the fourth sentence, by striking “power revenues” each place it appears and inserting “Colorado River Storage Project power revenues”; and

(B) by striking the fifth, sixth, and seventh sentences.

SEC. 3. REPORT ON RECOVERY IMPLEMENTATION PROGRAMS.

Section 3 of Public Law 106–392 (114 Stat. 1603; 126 Stat. 2444) is amended by adding at the end the following:

“(j) REPORT.—

“(1) IN GENERAL.—Not later than September 30, 2021, the Secretary shall submit to the appropriate committees of Congress a report that—

“(A) describes the accomplishments of the Recovery Implementation Programs;

“(B) identifies—

“(i) as of the date of the report, the listing status under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) of the Colorado pikeminnow, humpback chub, razorback sucker, and bonytail; and

“(ii) as of September 30, 2023, the projected listing status under that Act of each of the species referred to in clause (i);

“(C)(i) identifies—

“(I) the total expenditures and the expenditures by categories of activities by the Recovery Implementation Programs during the period beginning on the date on which the applicable Recovery Implementation Program was established and ending on September 30, 2021; and

“(II) projected expenditures by the Recovery Implementation Programs during the period beginning on October 1, 2021, and ending on September 30, 2023; and

“(ii) for purposes of the expenditures identified under clause (i), includes a description of—

“(I) any expenditures of appropriated funds;

“(II) any power revenues;

“(III) any contributions by the States, power customers, Tribes, water users, and environmental organizations; and

“(IV) any other sources of funds for the Recovery Implementation Programs; and

“(D) describes—

“(i) any activities to be carried out under the Recovery Implementation Program after September 30, 2023; and

“(ii) the projected cost of the activities described under clause (i).

“(2) CONSULTATION REQUIRED.—The Secretary shall consult with the participants in the Recovery Implementation Programs in preparing the report under paragraph (1).”.

PURPOSE

The purpose of S. 2166 is to maintain annual base funding for the Upper Colorado and San Juan fish recovery programs through fiscal year (FY) 2023, and to require a report on the implementation of those programs.

BACKGROUND AND NEED

The Upper Colorado and San Juan River basins contribute significant water and hydropower supplies to portions of Arizona, Colorado, New Mexico, Utah, and Wyoming. Due to the presence of four endangered fish (Colorado pikeminnow, razorback sucker, humpback chub, and bonytail) listed under the Endangered Species Act (ESA), concerns about potential water and hydropower curtailment led the Governors of Colorado, Utah, and Wyoming, the Secretary of the Interior (Secretary), and the Administrator of the Western Area Power Administration to create the Upper Colorado and San Juan River Basin Endangered Fish Recovery Implementation Programs (Programs) in 1988 and extend them in 1992.

Congress authorized \$6 million in base Federal funding for the Programs (\$4 million for the Upper Colorado and \$2 million for the San Juan) in 2000 (Public Law 106–392), and in 2013 subsequently extended the authorization through FY 2019 (Public Law 112–270).

Additional limitations and oversight on expenditures were imposed in the 2012 reauthorization. Capital funds have also been expended on hatchery facilities, fish passage and screening, water acquisition, and habitat restoration. Overall, the Federal and non-Federal expenditures on the Upper Colorado Program have totaled nearly \$380 million (since 1989) and the San Juan Program has totaled almost \$75 million (since 1992).

Recovery of the four endangered species in the basin is the overall goal of the Programs, and science-based, basin-wide recovery goals have been set and are periodically revised. The two Programs also help provide ESA compliance to allow the use of over 3.7 million acre-feet of water for nearly 2,500 Federal, Tribal, and non-Federal water and power projects. The Programs are cooperatively managed with Federal, State, Tribal, water and power customer, and environmental organization participation, and no lawsuits have been filed on any of the associated water projects. Reauthorization is needed to continue base funding through FY 2023.

LEGISLATIVE HISTORY

Senator Gardner introduced S. 2166 on November 28, 2017. The Subcommittee on Water and Power held a hearing on S. 2166 on February 28, 2018.

Representative Curtis introduced companion legislation, H.R. 4465, in the House of Representatives on November 28, 2017. The Natural Resources Committee's Subcommittee on Water, Power, and Oceans held a hearing on H.R. 4465 on December 6, 2017, and favorably reported the bill on February 16, 2018. H.R. 4465 passed the House of Representatives on March 13, 2018, by a vote of 392–6.

The Senate Committee on Energy and Natural Resources met in an open business session on October 2, 2018, and ordered S. 2166 favorably reported, as amended.

COMMITTEE RECOMMENDATION

The Senate Committee on Energy and Natural Resources, in open business session on October 2, 2018, by a majority voice vote of a quorum present, recommends that the Senate pass S. 2166, if amended as described herein.

COMMITTEE AMENDMENT

During its consideration of S. 2166, the Committee adopted an amendment in the nature of a substitute. The substitute amendment makes base funding of the Programs subject to appropriations rather than extending the date authorizing direct use of Colorado River Storage Project power revenue. The substitute amendment also makes several conforming changes to Public Law 106–392 to ensure the legislation does not affect funding for the current fiscal year. The substitute amendment is further described in the section-by-section analysis.

SECTION-BY-SECTION ANALYSIS

Sec. 1. Short title

Section 1 sets forth the short title.

Sec. 2. Extension of authorization for annual base funding of fish recovery programs; removal of certain reporting requirement

Section 2 amends section 3(d) of Public Law 106–392 to authorize \$10 million in appropriations for FYs 2020 through 2023. It also directs the appropriated funds to be treated as non-reimbursable. This section also clarifies that “power revenues” in the underlying statute are Colorado River Storage Project power revenues and strikes language requiring reporting requirements.

Sec. 3. Report on recovery implementation programs

Section 3 requires the Secretary to submit a report to Congress by September 30, 2021, describing accomplishments and activities, identifying the listing status of the four focus species, and detailing various expenditure and cost information.

COST AND BUDGETARY CONSIDERATIONS

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

Summary: S. 2166 would authorize the appropriation of \$10 million for each year over the 2020–2023 period for the Bureau of Reclamation (BOR) to participate in fish recovery programs in the Upper Colorado and San Juan River Basin. Fish recovery activities under those programs include research, fish population monitoring, removal of nonnative fish, and program management activities. Using information from BOR, CBO estimates that enacting S. 2166 would cost about \$35 million over the 2019–2023 period, assuming the appropriation of specified amounts. In recent years, annual spending for fish recovery programs has totaled about \$12 million.

Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting S. 2166 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

S. 2166 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

Estimated cost to the Federal Government: The estimated budgetary effect of S. 2166 is shown in the following table. The costs of the legislation fall within budget function 300 (natural resources and environment).

	By fiscal year, in millions of dollars—					
	2019	2020	2021	2022	2023	2019–2023
INCREASES IN SPENDING SUBJECT TO APPROPRIATION						
Authorization Level	0	10	10	10	10	40
Estimated Outlays	0	6	9	10	10	35

Basis of estimate: For this estimate, CBO assumes that S. 2166 will be enacted in 2019 and that the authorized amounts will be appropriated for each year. Estimated outlays are based on historical spending patterns for similar programs.

Pay-As-You-Go considerations: None.

Increase in long-term direct spending and deficits: CBO estimates that enacting S. 2166 would not increase net direct spending

or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

Mandates: S. 2166 contains no intergovernmental or private-sector mandates as defined in the UMRA.

Previous CBO estimate: On January 31, 2018, CBO transmitted a cost estimate for H.R. 4465, the Endangered Fish Recovery Programs Extension Act of 2017, as ordered reported by the House Committee on Natural Resources on December 13, 2017. H.R. 4465 would increase direct spending for fish recovery programs, but those changes would be offset by reductions in other spending. Spending under S. 2166 would be subject to further appropriation. CBO's estimates reflect those differences.

Estimate prepared by: Federal costs: Aurora Swanson; Mandates: Zachary Byrum.

Estimate reviewed by: Kim P. Cawley, Chief, Natural and Physical Resources Cost Estimates Unit; H. Samuel Papenfuss, 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. 2166. 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. 2166, as ordered reported.

CONGRESSIONALLY DIRECTED SPENDING

S. 2166, 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.

EXECUTIVE COMMUNICATIONS

The testimony provided by the Department of the Interior at the February 28, 2018, hearing on S. 2166 follows:

STATEMENT OF ALAN MIKKELSEN, SENIOR ADVISOR TO THE
SECRETARY FOR WATER AND WESTERN RESOURCE ISSUES,
U.S. DEPARTMENT OF THE INTERIOR

Chairman Flake, Ranking Member King, and Members of the Subcommittee, I am Alan Mikkelsen, Senior Advisor to the Secretary of Interior for Water and Western Resource Issues, and former Deputy Commissioner of the Bureau of Reclamation (Reclamation). Thank you for the opportunity to provide the views of the Department of the Interior (Department) on S. 2166, the Endangered Fish Recovery Programs Extension Act of 2017. The Department provided testimony the House-companion to this bill, H.R.

4465, and our testimony here reflects the same conclusions.

As described below, the Department supports the efforts of both the Upper Colorado River Endangered Fish Recovery Program and San Juan River Basin Recovery Implementation Program (Programs) and as such does not object to HR 4465 or S. 2166.

The Programs share the dual goals of recovering populations of endangered fish while water development continues to meet current and future human needs. The Programs' actions provide Endangered Species Act (ESA) compliance for more than 2,400 federal, tribal, and non-federal water projects consuming 3.7 million acre-feet of water to support municipal, industrial and agricultural water use and related economic development. The Programs, initially authorized by Public Law (PL) 106-392, were established under cooperative agreements in 1988 (Upper Colorado) and 1992 (San Juan). The Programs' partners include the states of Colorado, New Mexico, Utah, and Wyoming; the Bureau of Reclamation, Western Area Power Administration, U.S. Fish and Wildlife Service, Bureau of Land Management, National Park Service, and Bureau of Indian Affairs; Native American tribes; environmental organizations; water users; and power customers.

PL 106-392 expressly authorized the use of a maximum of \$6 million per year (indexed for inflation) of Colorado River Storage Project (CRSP) hydropower revenues from Glen Canyon Dam and other CRSP facilities to support the base funding needs of the Programs through 2011. Subsequent legislation extended this authority through 2019. Base funding is used for program management, scientific research, fish population monitoring, fish stocking, control of non-native fish, and operation and maintenance of capital projects.

Section 2 as introduced would extend the authorization to utilize CRSP hydropower revenues at the current level (up to \$6 million per year adjusted for inflation, or approximately \$8.48 million in 2017 dollars) through 2023 to support the base funding needs of the Programs. Section 3 of HR 4465 would also require the Secretary to submit a report to Congress in 2021 that includes a description of Program accomplishments, expenditures, and status of the four endangered fish species. The report will also project listing status of the fish at the end of fiscal year 2023, identify management activities beyond 2023, and estimate costs of the post-2023 activities.

The Programs are nationally recognized for their cooperative approach to recovering native fish species, avoiding litigation, and providing ESA compliance to federal and non-federal water users. The continued use of CRSP hydropower revenues is critical to ensuring these Programs accomplish their goals. Both Programs have developed strong grassroots support and the bill is unanimously supported by the Programs diverse non-federal partners.

This concludes my written statement. I would be 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, changes in existing law made by the original bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

PUBLIC LAW 106-392

(as amended by Public Law 112-270)

AN ACT To authorize the Bureau of Reclamation to provide cost sharing for the endangered fish recovery implementation programs for the Upper Colorado and San Juan River Basins.

* * * * *

SEC. 3. AUTHORIZATION TO FUND RECOVERY PROGRAMS.

* * * * *

(c) NON-FEDERAL CONTRIBUTIONS TO CAPITAL PROJECTS.—(1) The Secretary, acting through the Bureau of Reclamation, may accept contributed funds from the Upper Division States, or political subdivisions or organizations with the Upper Division States, pursuant to agreements that provide for the contributions to be used for capital projects costs. Such non-Federal contributions shall not exceed \$17,000,000.

(2) In addition to the contribution described in paragraph (1), the Secretary of Energy, acting through the Western Area Power Administration, and the Secretary of the Interior, acting through the Bureau of Reclamation, may utilize power revenues collected pursuant to the Colorado River Storage Project Act to carry out the purposes of this subsection. Such funds shall be treated as reimbursable costs assigned to power for repayment under section 5 of the Colorado River Storage Project Act. This additional contribution shall not exceed \$17,000,000. Such funds shall be considered a non-Federal contribution for the purposes of this Act. The funding authorized by this paragraph over any 2-fiscal-year period shall be made available in amounts equal to the contributions for the same 2-fiscal-year period made by the Upper Division States pursuant to paragraph (1).

(3) The additional funding provided pursuant to paragraph (2) may be provided through loans from the Colorado Water Conservation Board Construction Fund (37-60-121 C.R.S.) to the Western Area Power Administration in lieu of funds which would otherwise be collected from power revenues and used for storage project repayments. The Western Area Power Administration is authorized to repay such loan or loans from power revenues collected beginning in fiscal year 2012, subject to an agreement between the Colorado Water Conservation Board, the Western Area Power Administration, and the Bureau of Reclamation. The agreement and any future loan contracts that may be entered into by the Colorado Water Conservation Board, the Western Area Power Administration, and

the Bureau of Reclamation shall be negotiated in consultation with Salt Lake City Area Integrated Projects Firm Power Contractors. The agreement and loan contracts shall include provisions designed to minimize impacts on electrical power rates and shall ensure that loan repayment to the Colorado Water Conservation Board, including principal and interest, is completed no later than September 30, 2057. The Western Area Power Administration is authorized to include in power rates such sums as are necessary to carry out this paragraph and paragraph (2).

(4) All contributions made pursuant to this subsection shall be in addition to the cost of replacement power purchased due to modifying the operation of the Colorado River Storage Project and the capital cost of water from Wolford Mountain Reservoir in Colorado. Such costs shall be considered as non-Federal contributions, not to exceed \$20,000,000.

(d) BASE FUNDING.—**[(1) Beginning in the first fiscal year commencing after the date of the enactment of this Act, the Secretary may utilize power revenues collected pursuant to the Colorado River Storage Project Act for the annual base funding contributions to the Recovery Implementation Programs by the Bureau of Reclamation. Such funding shall be treated as nonreimbursable and as having been repaid and returned to the general fund of the Treasury as costs assigned to power for repayment under section 5 of the Colorado River Storage Project Act.]** (1) *AUTHORIZATION OF APPROPRIATIONS.*—

(A) *IN GENERAL.*—*There is authorized to be appropriated to the Secretary to be used by the Bureau of Reclamation to make the annual base funding contributions to the Recovery Implementation Programs \$10,000,000 for each of fiscal years 2020 through 2023.*

(B) *NONREIMBURSABLE FUNDS.*—*The funds contributed to the Recovery Implementation Programs under subparagraph (A) shall be considered a nonreimbursable Federal expenditure.*

(2) For the Recovery Implementation Program for the Endangered Fish Species in the Upper Colorado River Basin, the contributions to base funding referred to in paragraph (1) shall not exceed \$4,000,000 per year. For the San Juan River Recovery Implementation Program, such contributions shall not exceed \$2,000,000 per year. The Secretary shall adjust such amounts for inflation in fiscal years commencing after the enactment of this Act. The utilization of **[power revenues]** *Colorado River Storage Project power revenues* for annual base funding shall cease after the fiscal year 2019, unless reauthorized by Congress; except that **[power revenues]** *Colorado River Storage Project power revenues* may continue to be utilized to fund the operation and maintenance of capital projects and monitoring. **[No later than the end of fiscal year 2011, the Secretary shall submit a report on the utilization of power revenues for base funding to the appropriate Committees of the United States Senate and the House of Representatives. The Secretary shall also make a recommendation in such report regarding the need for continued base funding after fiscal year 2019 that may be required to fulfill the goals of the Recovery Implementation Programs. Such report shall also describe the Recovery Implementation Programs actions and accomplishments to date, the status of the endangered species of fish and projected dates for downlisting**

and delisting under the Endangered Species Act of 1973, and the utilization of power revenues for annual base funding.】 Nothing in this Act shall otherwise modify or amend existing agreements among participants regarding base funding and depletion charges for the Recovery Implementation Programs.

(3) The Western Area Power Administration and the Bureau of Reclamation shall maintain sufficient revenues in the Colorado River Basin Fund to meet their obligation to provide base funding in accordance with paragraph (2). If the Western Area Power Administration and the Bureau of Reclamation determine that the funds in the Colorado River Basin Fund will not be sufficient to meet the obligations of section 5(c)(1) of the Colorado River Storage Project Act for a 3-year period, the Western Area Power Administration and the Bureau of Reclamation shall request appropriations to meet base funding obligations.

(e) **AUTHORITY TO RETAIN APPROPRIATED FUNDS.**—At the end of each fiscal year any unexpended appropriated funds for capital projects under this Act shall be retained for use in future fiscal years. Unexpended funds under this Act that are carried over shall continue to be used to implement the capital projects needed for the Recovery Implementation Programs.

(f) **ADDITIONAL AUTHORITY.**—The Secretary may enter into agreements and contracts with Federal and non-Federal entities, acquire and transfer interests in land, water, and facilities, and accept or give grants in order to carry out the purposes of this Act.

(g) **INDIAN TRUST ASSETS.**—The Congress finds that much of the potential water development in the San Juan River Basin and in the Duchesne River Basin (a subbasin of the Green River in the Upper Colorado River Basin) is for the benefit of Indian tribes and most of the federally designated critical habitat for the endangered fish species in the San Juan River Basin is on Indian trust lands, and 2½ miles of critical habitat on the Duchesne River is on Indian Trust Land. Nothing in this Act shall be construed to restrict the Secretary, acting through the Bureau of Reclamation and the Bureau of Indian Affairs, from funding activities or capital projects in accordance with the Federal Government's Indian trust responsibility.

(h) **TERMINATION OF AUTHORITY.**—All authorities provided by this section for the respective Recovery Implementation Program shall terminate upon expiration of the current time period for the respective Cooperative Agreement referenced in section 2(1) unless, at least 1 year prior to such expiration, the time period for the respective Cooperative Agreement is extended to conform with this Act.

(i) **LIMITATION ON INDIRECT COST RECOVERY RATE.**—The indirect cost recovery rate for any transfer of funds to the U.S. Fish and Wildlife Service from another Federal agency for the purpose of funding any activity associated with the Upper Colorado River Endangered Fish Recovery Program or the San Juan River Basin Recovery Implementation Program shall not exceed three percent of the funds transferred. In the case of a transfer of funds for the purpose of funding activities under both programs, the limitation shall be applied to the funding amount for each program and may not be allocated unequally to either program, even if the average aggregate indirect cost recovery rate would not exceed three percent.

(j) REPORT.—

(1) IN GENERAL.—Not later than September 30, 2021, the Secretary shall submit to the appropriate committees of Congress a report that—

(A) describes the accomplishments of the Recovery Implementation Programs;

(B) identifies—

(i) as of the date of the report, the listing status under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) of the Colorado pikeminnow, humpback chub, razorback sucker, and bonytail; and

(ii) as of September 30, 2023, the projected listing status under that Act of each of the species referred to in clause (i);

(C)(i) identifies—

(I) the total expenditures and the expenditures by categories of activities by the Recovery Implementation Programs during the period beginning on the date on which the applicable Recovery Implementation Program was established and ending on September 30, 2021; and

(II) projected expenditures by the Recovery Implementation Programs during the period beginning on October 1, 2021, and ending on September 30, 2023; and

(ii) for purposes of the expenditures identified under clause (i), includes a description of—

(I) any expenditures of appropriated funds;

(II) any power revenues;

(III) any contributions by the States, power customers, Tribes, water users, and environmental organizations; and

(IV) any other sources of funds for the Recovery Implementation Programs; and

(D) describes—

(i) any activities to be carried out under the Recovery Implementation Program after September 30, 2023; and

(ii) the projected cost of the activities described under clause (i).

(2) CONSULTATION REQUIRED.—The Secretary shall consult with the participants in the Recovery Implementation Programs in preparing the report under paragraph (1).

SEC. 4. EFFECT ON RECLAMATION LAW.

Specifically with regard to the acreage limitation provisions of Federal reclamation law, any action taken pursuant to or in furtherance of this title will not—

(1) be considered in determining whether a district as defined in section 202(2) of the Reclamation Reform Act of 1982 (43 U.S.C. 390bb) has discharged its obligation to repay the construction cost of project facilities used to make irrigation water available for delivery to land in the district;

(2) serve as the basis for reinstating acreage limitation provisions in a district that has completed payment of its construction obligations; or

(3) serve as the basis for increasing the construction repayment obligation of the district and thereby extending the period during which the acreage limitation provisions will apply.

SEC. 5. LIMITATION ON TRAVEL FOR ADVOCACY PURPOSES.

No Federal funds may be used to cover any expenses incurred by an employee or detailee of the Department of the Interior to travel to any location (other than the field office to which that individual is otherwise assigned) to advocate, lobby, or attend meetings that advocate or lobby for the Recovery Implementation Programs.

