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97 CIS S 31133

**TITLE:** Miscellaneous Hydroelectric and Reclamation Projects

CIS-NO: 97-S311-33

SOURCE: Committee on Energy and Natural Resources. Senate

DOC-TYPE: Hearing [Retrieve the full text of testimony](#)

DOC-NO: S. Hrg. 105-145

DATE: June 10, 1997

LENGTH: iii+75 p.

CONG-SESS: 105-1

ITEM-NO: 1040-A; 1040-B

SUDOC: Y4.EN2:S.HRG.105-145

MC-ENTRY-NO: 98-2063

INCLUDED IN LEGISLATIVE HISTORY OF: P.L. 105-189; P.L. 105-190; P.L. 105-351; P.L. 105-352; P.L. 106-220; P.L. 106-469**SUMMARY:**

Hearing before the Subcom on Water and Power to consider the following hydroelectric and water supply project bills:

H.R. 651 and H.R. 652, each to extend FERC deadline for starting construction on a specified hydropower project in King County, Wash., licensed under the Federal Power Act.

S. 439, to amend the Federal Power Act to transfer from FERC to Alaska jurisdiction over licensing certain small hydropower projects within the State, limit FERC authority to license hydropower projects in Hawaii, exempt from FERC regulation a hydropower transmission line in Rio Arriba County, N.Mex., and authorize FERC to extend to 10 years the deadline for starting construction on any hydropower project.

S. 533, to direct the Department of Interior to transfer from the Bureau of Reclamation to the Burley Irrigation District (BID) certain water distribution facilities within the Minidoka Project, Idaho.

S. 725, to direct the Department of Interior to transfer the Collbran Reclamation Project in Colorado from the Bureau of Reclamation to the Ute and Collbran Water Conservancy Districts, and direct FERC to issue a 40-year license for operating project hydroelectric power plants.

S. 736, the Carlsbad Irrigation Project Acquired Land Transfer Act, to direct the Department of Interior to convey the Carlsbad Project irrigation system and acquired lands from the Bureau of Reclamation to the Carlsbad Irrigation District (CID).

S. 744, the Fall River Water Users District Rural Water System Act of 1997, to direct the Department of Interior to grant monies to the Fall River Water Users District Rural Water System to construct a water supply system in Fall River County, S.Dak.

Supplementary material (p. 73-75) includes correspondence.

S. 846, cited on cover, is not discussed.

**CONTENT-NOTATION:** Hydroelectric projects miscellaneous bills

**BILLS:** 105 H.R. 651; 105 H.R. 652; 105 S. 439; 105 S. 538; 105 S. 725; 105 S. 736; 105 S. 744

**DESCRIPTORS:**

SUBCOM ON WATER AND POWER. SENATE; FEDERAL ENERGY REGULATORY COMMISSION; HYDROELECTRIC POWER; ELECTRIC POWER PLANTS; LICENSES; FEDERAL POWER ACT; ENERGY REGULATION; DEPARTMENT OF INTERIOR; WATER SUPPLY AND USE; IRRIGATION; BUREAU OF RECLAMATION; PUBLIC WORKS; KING COUNTY, WASH.; WASHINGTON STATE; ALASKA; FEDERAL-STATE RELATIONS; JURISDICTION; HAWAII; RIO ARRIBA COUNTY, N.MEX.; NEW MEXICO; IDAHO; COLORADO; CARLSBAD IRRIGATION PROJECT ACQUIRED LAND TRANSFER ACT; FALL RIVER WATER USERS DISTRICT RURAL WATER SYSTEM ACT; FALL RIVER COUNTY, S.DAK.; SOUTH DAKOTA

97-S311-33 TESTIMONY NO: 1 June 10, 1997 p. 4-28

**WITNESSES (and witness notations):**

FRISBY, PERCY (Director, Division of Energy, Alaska Department of Community and Regional Affairs)  
TOMASKY, SUSAN (General Counsel, FERC)  
JANOPPAUL, MONA (Conservation Counsel, Trout Unlimited; also representing Hydropower Reform Coalition)  
HESSION, JACK (Alaska Representative, Sierra Club)  
GRIMM, ROBERT S. (President, Alaska Power and Telephone Co)  
WALLS, CHARLES Y. (President and CEO, Alaska Village Electric Cooperative)

**STATEMENTS AND DISCUSSION:**

Opposing views on S. 439 provisions to transfer licensing jurisdiction over certain hydropower projects in Alaska; review of FERC position on H.R. 651, H.R. 652, S. 439, and S. 725.

**CONTENT NOTATION:**

Hydroelectric projects miscellaneous bills

**TESTIMONY DESCRIPTORS:**

ALASKA DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS

97-S311-33 TESTIMONY NO: 2 June 10, 1997 p. 28-66

**WITNESSES (and witness notations):**

MARTINEZ, ELUID L. (Commissioner, Bureau of Reclamation, Department of Interior)  
DRIVER, BRUCE C. (attorney, representing Friends of the Earth, Idaho Wildlife Federation, and other environmental organizations)  
DAVIS, TOM W. (Manager, CID)  
LING, ROGER D. (Attorney, BID)

**STATEMENTS AND DISCUSSION:**

Reasons for Administration opposition to S. 538, S. 736, and S. 744; opposing views on S. 725, S. 538, and S. 736; merits of S. 538, with rebuttal to criticism of bill.

**CONTENT NOTATION:**

Water supply projects miscellaneous bills

**TESTIMONY DESCRIPTORS:**

FRIENDS OF THE EARTH

97-S311-33 TESTIMONY NO: 3 June 10, 1997 p. 66-72

**WITNESSES (and witness notations):**

BENSON, LEONARD (President, Fall River Water Users District)

**STATEMENT AND DISCUSSION:**

Support for S. 744.

**CONTENT NOTATION:**

SDak water supply system construction, Interior Dept grant estab

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June 10, 1997, Tuesday

**SECTION:** CAPITOL HILL HEARING TESTIMONY**LENGTH:** 187 words**HEADLINE:** TESTIMONY June 10, 1997 WITNESS LIST SENATE ENERGY & NATURAL RESOURCES WATER AND POWER WATER AND POWER LEGISLATION**BODY:****Senate Committee on Energy and Natural Resources**

Witness List

**Subcommittee on Water and Power**

June 10 Hearing

SD-366 9:30 am

Panel I

Percy Frisby

Director 439, H.R. 651, H.R. 652, S. 846

Division of Energy

State of Alaska

Susan Tomasky

General Counsel

Federal Energy Regulatory Commission

Jack Hession

Alaska Representative

Sierra Club

Mona Janopaul

Conservation Counsel Trout Unlimited

and on behalf of the Hydropower Reform Coalition

Robert Grimm

President

Alaska Power & Telephone Company

Charles Walls

President and CEO

Alaska Village Electric Cooperative

Panel II

Eluid Martinez

Commissioner S. 736, & S. 744

Bureau of Reclamation

Bruce Driver

Boulder Colorado

S. 736- Carlsbad

Tom Davis

Manager

Carlsbad Irrigation District

S. 538-Minidoka

Roger Ling

Attorney at Law

Rupert, Idaho

Accompanied by: Randy Bingham, Manager Of

Burley Irrigation District

Panel III

Eluid Martinez

Commissioner

Bureau of Reclamation

Leonard Benson

President

Fall River Water Users District

**LOAD-DATE:** June 11, 1997

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Test. of Bruce Driver



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June 10, 1997 Tuesday

**SECTION: CAPITOL HILL HEARING TESTIMONY**

**LENGTH:** 3760 words

**HEADLINE:** TESTIMONY June 10, 1997 BRUCE C. DRIVER OWNER LAW AND CONSULTING BOULDER,  
COLORADO SENATE ENERGY & NATURAL RESOURCES WATER AND POWER WATER AND POWER  
LEGISLATION

**BODY:**

TESTIMONY OF

BRUCE C. DRIVER

ON SENATE BILLS 725, 538 AND 736

BEFORE THE **SUBCOMMITTEE ON WATER AND POWER OF THE**

**COMMITTEE ON ENERGY AND NATURAL RESOURCES**

UNITED STATES **SENATE**

JUNE 10, 1997

Speaking on behalf of:

AMERICAN RIVERS

ENVIRONMENTAL DEFENSE FUND

GRAND CANYON TRUST

LAND AND WATER FUND OF THE ROCKIES

NATIONAL AUDUBON SOCIETY

NATIONAL WILDLIFE FEDERATION

NATURAL RESOURCES DEFENSE COUNCIL

and on S. 725:

COLORADO ENVIRONMENTAL COALITION

GRAND VALLEY AUDUBON SOCIETY

HIGH COUNTRY CITIZENS' ALLIANCE PLATEAU VALLEY ASSOCIATION

ROCKY MOUNTAIN CHAPTER OF THE SIERRA CLUB

SIERRA CLUB SOUTHWEST OFFICE

TOWN OF COLBRAN

WESTERN COLORADO CONGRESS

and on S. 538

IDAHO CONSERVATION LEAGUE

IDAHO RIVERS UNITED

NORTHWEST CONSERVATION ACT COALITION

and on S. 736

SIERRA CLUB SOUTHWEST OFFICE

SOUTHWEST ENVIRONMENTAL CENTER

TESTIMONY OF BRUCE C. DRIVER ON

S. 725, S. 538 AND S. 736

#### Introduction & Summary

Good Morning, Mr. Chairman and members of the Subcommittee. I am Bruce Driver. I have my own law and consulting business located in Boulder, Colorado. Today, I am speaking on behalf of numerous environmental organizations, one municipality and one citizens' association on S. 725, S. 538 and S. 736.

These organizations oppose these bills because they favor one interest -- those of the project transferees -- at the expense of other interests, including environmental, other public and taxpayer interests.

#### Background

Over a year ago environmental organizations began talking together to determine how to respond to congressional and U.S. Bureau of Reclamation attention to transfers of federal water and power assets to non-federal parties. Eventually, several organizations agreed on a statement of principles regarding these transfers. The two-page statement is attached to my testimony.

As these principles make clear, the organizations agreeing to the statement do not oppose water and power asset transfers per se. However, to gain the support of these organizations, transfers must enhance the environment as well as be consistent with other principles.

Transfers should enhance the environment for at least two reasons. First, many reclamation projects have had an adverse impact on the environment. Once the federal government withdraws as owner of a project, the route to mitigation of this impact is less direct than if the project had remained in federal ownership. For example, under section 7 of the Endangered Species Act (ESA), federal agencies must utilize their authorities to conserve threatened and endangered species. This requirement no longer applies once a project is transferred to nonfederal owners, although requirements with less force do apply to non-federal interests under other sections of the ESA. Thus, the environment is likely to lose when a project is transferred out of federal ownership. However, we agree that this problem can be addressed if transferees, themselves, agree to take actions that will enhance the environment.

Second, transfers usually confer significant economic or other value on the transferees. Some of this value from projects financed by the taxpayer should flow back to taxpayers, in part in the form of environmental enhancement. In addition, the irrigation features of most reclamation projects have been highly subsidized by the taxpayer. It seems only fair that irrigation district-transferees help mitigate some of the environmental

problems to which the projects have contributed.

Another policy contained in our principles is that transfers, and the operation of facilities after transfer, should comply with all environmental laws. This policy means that Congress should not direct the transfer of assets to non-federal interests until after there has been compliance with NEPA and other environmental laws and until a facility-specific plan to govern the transfer has been developed that reflects the input of all stakeholders. After all, legitimate interests protected by federal and state law -- recreational, power use, municipal water use, fish and wildlife dependencies among others -- have built up around most federal water and power projects. These interests must be heard and their views integrated into transfer plans. Otherwise, the transfer is likely to be unfair and to kindle disagreements on the ground.

Other principles we hold address the establishment of a fair price for transfer of federal water and power assets, the remaining federal role after transfers, the role of competitive bidding in asset transfers, public oversight, and fairness in the determination of the impact of transfers on the federal budget.

On the matter of price, some contend that a fair price for project beneficiaries that have repaid their share of project debt is zero dollars. However, even projects that are "paid out" -- where irrigators have paid their allocated share of project costs -- are not usually "paid for." A "paid out" project has not repaid taxpayers for the subsidies inherent in the Reclamation program, including the absence of interest on the taxpayer's capital investment. This factor, as well as the value of the project, should be considered in determining a fair price.

We invite you to review our principles. They provide the context for my testimony on the pending legislation, to which I would now like to turn.

#### Testimony on S. 725

S. 725 would direct the Secretary of the Interior to convey facilities included in the Collbran project to the Ute and Collbran water conservancy districts. We oppose this legislation because legislation to convey Collbran is premature at this point and because, as introduced, S. 725 is contrary to the broad public interest.

By way of background, five environmental organizations opposed last year's House version of Collbran Project legislation, H.R. 3366 by Rep. McInnis. After the bill died, and in the spirit of collaboration, representatives (including me) of three groups -- the Land and Water Fund, Grand Canyon Trust and the Environmental Defense Fund -- traveled to western Colorado to discuss the issues with the proposed project transferees. Thereafter, on April 10, 1997, we developed and sent to the proposed transferees -- the Ute and Collbran Water Conservancy districts -- a three-page statement of position on the transfer for their consideration. Among other things, this position suggests a way, described in more detail below, that the districts can obtain a FERC license to operate Collbran hydroelectric facilities for up to ten years without having to comply with the full panoply of Federal Power Act provisions. In short, we believe our positions are moderate and reasonable.

We asked that Ute and Collbran respond to our positions, especially before legislation was reintroduced this year. They have not done so. But a few days ago they asked whether we might meet with some of their board members. We shall honor that request. We believe that, while we are discussing issues with the districts, it is premature to legislate on the Collbran Project.

The provisions of S. 725 are another reason for postponing congressional action on it at this time. We have several problems with S. 725. We discuss two of them here:

1. S. 725 freezes the public out of the transfer Section 3(a)(1)(A) commands the Secretary of the Interior to transfer ownership of Collbran Project facilities within one year of the date of enactment, "subject only to the requirements of this Act." The effect of this provision is to render worthless the results of compliance with NEPA, especially the input of the public to the transfer. The people on whose behalf I am speaking today, including especially those who live near the Collbran Project, care about issues that are not at all or are not fully addressed in S. 725, such as:

- a. Impacts of the transfer on water consumption and growth in Colorado's Grand Valley;
- b. Impacts of the transfer on the Plateau Valley -- the location of the Collbran Project -- and its citizens;
- c. Impacts of the transfer on fish and wildlife;

- d. Issues arising from the sale by the districts of electricity generated by Collbran's two power plants;
- e. The impact of the transfer on ranching and farming in the Plateau Valley;
- f. The impact of the transfer on groundwater in Plateau Valley;
- g. The impact of the transfer on the Ute District's proposal to expand its Plateau Creek pipeline;
- h. Impacts of the transfer on the public's access to project facilities;
- i. Impacts of the transfer on public oversight of project operations;
- j. The nature of "historic" project operations which the proposed transferees propose to maintain;
- k. The responsibilities of the Ute and Collbran districts for post-transfer project management; and
- l. Whether either Ute or Collbran possess the financial strength to handle their responsibilities post-transfer.

Of course, people who care about these issues can appear at the public hearings that KEPA compliance would provide and make their arguments. But if these KEPA hearings cannot lead to a transfer plan that varies at all from the provisions of S. 725, why bother with them? What is needed is public involvement that is meaningful and can lead to changes in S. 725 if that is what is appropriate.

The absence of meaningful public involvement in the determination of transfer terms and conditions is contrary to the public interest in the area in which the Collbran Project is found and it provides another reason why it is premature for Congress to legislate on Collbran. Instead, Congress should wait to see if negotiations and KEPA compliance managed by the U.S. Bureau of Reclamation result in the development of a facility-specific plan that takes into account the many interests that exist beyond those of the Ute and Collbran districts. Only if such plan is developed should Congress approve a transfer.

2. The FERC license provisions are contrary to the public interest Section 5(a) of S. 725 commands the Federal Energy Regulatory Commission (FERC) to issue a 40-year operating license to the Collbran project transferees for the purpose of operating the project "in accordance with the authorized purposes of the project," which do not include fish and wildlife. This section also waives the applicability of a long list of laws to the issuance of the license, including major provisions of the Federal Power Act, NEPA, the Endangered Species Act, the Fish and Wildlife Coordination Act, the Federal Land Policy and Management Act and several others.

Operation of hydroelectric facilities can have adverse impacts on fish and riparian habitat. In essence, the nation depends on FERC license conditions to control these impacts when they occur in conjunction with nonfederal facilities. These conditions are developed, in part, under sections of the Federal Power Act and ancillary federal environmental legislation that S. 725 would waive. 1 The result is to free the Collbran hydro-facilities from environmental regulation for forty years. To exempt these facilities from environmental regulation in this manner is poor public policy. Here's why. Operation of hydro plants in a peaking mode is usually the surest way to make money off of them. Thus, we assume that, although the transferees have the freedom to operate the facilities in a non-peaking mode, they likely will try to operate them to make the most money and, thus, to operate them for peaking purposes, as has been the practice in the past. We note that operation of hydro facilities in a peaking mode elsewhere has often been deleterious to stream ecology. It may be that Collbran hydro facilities should no longer be operated as peaking units, but instead be operated as base or intermediate units. But S. 725 proposes to waive provisions of law under which operating conditions that protect the environment are required to be considered and developed. As a result, there is no procedure to determine a method of operation that is sensitive to the environment.

On the other hand, we are aware of how long it can take to obtain a full FERC hydro license, even for stall facilities like these ones. As a result, we have developed a proposal for Ute and Collbran under which they could obtain a special, temporary FERC operating license for ten years, which would be based on the provisions of the facility-specific transfer plan discussed above. If a good plan could be developed, one that reflects consideration of environmental mitigation associated with the Collbran power plants, many of the provisions of law which S. 725 would waive might be supplanted for those ten years.

We suggest that the proper course for Congress to take at this point on S. 725 is to postpone action on it until the public can be heard on the transfer and a facility-specific plan of transfer developed that is

responsive to all stakeholders. 1 For example, S. 725 would waive section 10(j) of the Federal Power Act, which states:

That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued by under this Part shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act ... from the National Marine Fisheries Service, the United States Fish and Wildlife service, and state fish and wildlife agencies.

#### Testimony on S. 538

S. 538 would transfer canals, laterals, transmission lines and other facilities of the Minidoka Project to the Burley Irrigation District (Burley). We think that S. 538 as introduced is unfair to environmental, taxpayer and other interests. In particular:

1. S. 538 violates the spirit of NEPA. Similarly to S. 725, S. 538 commands the Secretary of the Interior to transfer assets to Burley, hard-wiring key features of the transfer, in advance of compliance with KEPA, rendering such compliance a nearly worthless exercise. As we argued above, this is very poor public policy.

If any transfer of facilities to Burley is appropriate, it should be authorized only after NEPA compliance and the development of a facility-specific transfer plan. To gain our support at that point in time, the plan must include terms and conditions to enhance the environment, based not only on what is appropriate for Burley but also on what other interests want and need.

2. S. 538 would undercut efforts to recover salmon stocks in the Columbia River system S. 538 is inconsistent with efforts underway to recover endangered salmon species in the Pacific Northwest. First, S. 538 would direct the transfer to Burley of certain ground water and other natural flow water rights now held by the Bureau and would give statutory affirmation to Burley's storage space in Upper Snake River Basin reservoirs. These directives appear to constrain the Bureau's ability, under section 7 of the Endangered Species Act, to carry out programs to recover endangered species. That is, the Bureau may need to use the water rights as well as the space in Snake River storage reservoirs that would be transferred under S. 538 for recovery purposes. (In this regard, we note the pending Notice of Intent to Sue for Violations of the Endangered Species Act filed by the Sierra Club Legal Defense Fund, which asserts that the Bureau is in violation of the ESA absent consultation under ESA section 7 on Snake River storage reservoirs.) It makes little sense to us to transfer these resources, given the need for water by the salmon, especially in advance of the information that would be generated through NEPA compliance.

Second, it is our understanding that Burley intends to use the laterals and canals that would be transferred under S. 538 to enable water-spreading -- the use of project water on ineligible lands. Using taxpayer-owned facilities to enable water-spreading is unlawful, but may not be unlawful were the canals and laterals to belong to Burley. Water-spreading has been a contentious issue in the Pacific Northwest for years, with Idaho Rivers United, among other organizations, strongly opposing it because water-spreading allocates water that tight be used for salmon recovery to other uses. However, so far, the Bureau has ignored water-spreading, although it may not be able to continue to do so if there is consultation under ESA section 7. It takes little sense to us for Congress now implicitly to approve water spreading under S. 538, when the hopefully upcoming section 7 consultations may show that the water is needed for fish recovery.

3. S. 538 is unfair -- to taxpayers. S. 538 would transfer a wide range of facilities to Burley at no cost, other than a maximum of \$40,000 of the administrative and related costs of the transfer. This is unfair to the federal taxpayer, notwithstanding that Burley apparently has repaid those (subsidized) project costs for which it was liable under its repayment contracts with the United States.

First, American taxpayers are entitled to a fair price for facilities which they have financed. Establishing the fair price includes consideration of the value of facilities, to Burley and other possible purchasers, not simply their historic cost or whether Burley has repaid such costs.

Second, the legislation would transfer certain withdrawn lands for which Burley has not and would not under the legislation pay. Why the taxpayer should simply give away these lands to Burley without compensation is beyond us. Indeed, there is a serious question whether these lands should be transferred at all, in light of the fact that they presently provide public access to the Snake River for purposes of recreation. Again, whether transfer of these lands to Burley is appropriate at all, or if appropriate, under what conditions, should be

considered in NEPA compliance before any transfer is ordered.

4. S. 538 is fair to other interests. Two other features of S. 538 cause us to contend that S. 538 is unfair to other interests as well.

First, the bill would confer on Burley and others entitled to storage in Lake Walcott a right of first refusal to acquire the Minidoka power plant, dam, and related facilities if the U.S. decides to sell them. These facilities include 27.7 megawatts of valuable power generation capacity, recently upgraded as a result of taxpayer investment. Why should Burley and the other districts, who in any event have not repaid the U.S. for the cost of the power generation capacity, have any special right to them? We note that ownership of Minidoka power generation facilities is likely to confer a competitive advantage on their owners in the new, market-driven electric industry. To confer such an advantage on one set of market players is just inappropriate. Any entity capable of operating the facilities should have an equal right to these assets should the United States decide to sell them.

Second, S. 538 would give Burley a permanent right to project power at the cost of production. The cost of production of project power, we are told, is 11 mills/kilowatt hour (kWh). This project power is available on demand and for the long run and, thus, is quite valuable. In the region power of the same value may cost two to three times this amount. As such, the real economic value to Burley of project power in 1997 is in the neighborhood of 10 to 20 mills per kWh. In years past Burley has used roughly 30 million kWh of project power annually. It follows that a permanent entitlement to project power is tantamount to a gift of \$300,000 to \$600,000 per annum to Burley. We ask: Why should Burley, no longer strictly speaking a garden variety irrigation project if S. 538 is enacted, be given such a right, especially when other conventional irrigation projects have no such right?

In sum, S. 538, as introduced, is not in the public interest and should be withdrawn or voted down by the Committee on Energy and Natural Resources.

#### Testimony on S. 738

S. 738 would authorize the conveyance to the Carlsbad Irrigation District (CID), at no cost, of certain acquired lands, the entitlement to certain oil and gas royalties and irrigation, drainage and other facilities associated with the Carlsbad Project in New Mexico.

This legislation is an improvement over last's bill and is closer to legislation that we might be able to support than the other two bills, primarily because S. 738 "authorizes" rather than directs the Secretary of the Interior to transfer these lands and facilities to CID. This and related reporting provisions appear to accord the Secretary flexibility to fashion a facility-specific transfer plan that is in the public interest.

Nonetheless, there are features of the bill that give us concern. First, S. 736 would give CID, we are told, 5500 acres of acquired land at no cost. We are aware that CID's predecessors owned these lands and that CID has repaid the U.S. the money which the U.S. paid for these lands. Nonetheless, we question whether it is good Public Policy to simply give these lands, without consideration, to CID now. Second, the bill would divert past and future royalties from oil and gas leases from these lands to CID. Past revenues accumulated from these royalties and remaining in the Reclamation Fund total \$1.6 million. We cannot know the level of future royalties, but we note that revenues from these royalties between 1990 and 1995 have varied between a high of \$1.2 million in 1990 and a low of \$51,000 in 1992. In short, the entitlement to past and future oil and gas royalties is a valuable gift.

Assuming for the moment that the acquired lands should be transferred to CID, why should CID also gain the royalties from the oil and gas leases? Royalty revenue money might better be used for other purposes, such as deficit reduction and/or environmental mitigation in conjunction with the project, perhaps through an environmental trust fund.

In our view, the appropriate use of oil and gas royalties, like other major terms and conditions of this transfer, should be determined after NEPA analysis and in the development of a facility-specific transfer plan prior to transfer rather than fixed by statute now.

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[next»](#)[Full](#)Copyright 1997 Federal Document Clearing House, Inc.  
Federal Document Clearing House Congressional Testimony~~June 10, 1997~~ Tuesday**SECTION: CAPITOL HILL HEARING TESTIMONY****LENGTH:** 4340 words**HEADLINE:** TESTIMONY June 10, 1997 ELUID MARTINEZ COMMISSIONER, U.S. BUREAU OF RECLAMATION  
SENATE ENERGY & NATURAL RESOURCES WATER AND POWER WATER AND POWER LEGISLATION**BODY:**

Statement of Eluid Martinez

Commissioner, U.S. Bureau of Reclamation

**Senate Energy and Natural Resources Committee****Subcommittee on Water and Power**

June 10, 1997

Thank you for the opportunity to appear today to provide the Administration's views on four bills before this Subcommittee. These bills are S. 538, legislation to convey certain facilities of the Minidoka Project to the Burley Irrigation District; S. 736, legislation to convey the acquired lands and the distribution and drainage system of the Carlsbad Irrigation Project to the Carlsbad Irrigation District; and S. 744, the Fall River Water Users District Rural Water System Act of 1997. The Administration also has concerns about S. 439 and will submit a statement for the hearing record.

Before I discuss the specifics of each legislative proposal, I would like to talk briefly about Reclamation's title transfer efforts in general.

**Title Transfer**

As you may recall, the Bureau of Reclamation's title transfer efforts began as part of Phase U of the Administration's National Performance Review (REGO II). It was and still is viewed as an opportunity to create a government that works better and costs less by transferring certain facilities to state or local units of government or other non-Federal entities.

In August, 1995, Reclamation released its Framework for the Transfer of Title: Bureau of Reclamation Projects. This framework sets out a consistent, fair, and open process for negotiating the transfer of title to appropriate facilities with all the interested stakeholders to develop an agreement that could be brought to Congress and supported by all the parties involved.

Soon after the Administration announced the initiative more than sixty entities -- including irrigation districts, municipal authorities, and cities -- contacted Reclamation and expressed their interest in title transfer. However, the majority of those entities decided not to pursue title transfer at that time for a variety of reasons -- the most common of which was concern about assuming liability for the facilities.

Since that time, Reclamation's five regions have entered into discussions and negotiations with approximately twenty districts - some of those have dropped out, but many remain on-going. Currently, there are three title transfers that are working their way through the Administration's review that we believe will be good models for others interested in title transfer. These include:

- 1) Clear Creek, an irrigation facility located in the Central Valley Project in California.
- 2) Contra Costa, a municipal district also located in the Central Valley Project; and
- 3) San Diego Aqueduct, a municipal facility located in southern California.

The difference between the legislation before this Committee today and the three negotiated transfer mentioned above are important. Each of these three listed above will have gone through a full NEPA review process before coming to Congress, none of them is designed to diminish or circumvent environmental objectives, and all would include terms that protect the financial interests of the United States. And as importantly, each has gone through a public negotiations sessions and have attempted to include any interested stakeholders in the proposal's development.

In the 18 months since this effort began, the most important lesson that we --both Reclamation and the districts -- have learned is that there is no such thing as a simple project. Each facility is unique and each has its own set of complexities that neither Reclamation nor the districts anticipated when we began discussions. Let me assure this committee, however, that transferring title to appropriate Reclamation facilities remains a high priority for me personally and for the Administration.

There has been criticism about Reclamation's process -- as being cumbersome and slow. I am sensitive to this concern and we are working to try to streamline the process to make it work better. Frankly, Mr. Chairman, a big part of the problem is that we -- again both Reclamation and the entities we are discussing transfers with -- are new to this. We don't have a lot of experience and are learning as we go. With each project, we find that we are having to identify new sets of issues that we did not anticipate and work to resolve them in an equitable and thoughtful manner. I firmly believe, however, that we are gaining the experience with each set of negotiations which will enable us to move more quickly in the future.

Regardless of the specifics of each project and how negotiations proceed-- whether it is through our Framework process, some other administrative process or directly through the legislative process -- there are a few basic tenets that we need to ensure are a part of every facilities transfer negotiation.

First and foremost, the process needs to be open and inclusive of all stakeholders. History has shown that if the process is not inclusive, those who are left out will derail the proposal at the eleventh hour and ultimately it will take even longer. It has been our experience that short cuts take significantly more time than the thorough route.

Second, any proposal must pass the "straight face test." To help clarify how to do that we have established six basic criteria that we believe satisfy that threshold: (1) The Federal Treasury and thereby the taxpayers' financial interest, must be protected; (2) there must be compliance with all applicable State and Federal laws; (3) Interstate compacts and agreements must be protected; (4) the Secretary's Native American trust responsibility must be met; (5) Treaty obligations and international agreements must be fulfilled; and (6) the public aspects of the project such as recreation, flood control, fish and wildlife and others must be protected.

Given those broad parameters, I would like to provide our views on the legislation under consideration by the Subcommittee.

S. 538, Certain Facilities of the Minidoka Project to the Burley Irrigation District.

S. 538 directs the Secretary of the Interior to convey to the Burley Irrigation District (BID), with out consideration, all right, title and interest of the United States in and to the withdrawn and acquired lands, easements, and rights-of-way of or in connection with the South Side Pumping Division of the Minidoka project.

For the reasons discussed below, the Administration strongly objects to S. 539 as drafted. While some features of the project may be suitable for transfer the bill would require significant modifications before the Department could support it.

First, I would like to provide some history. On March 11, 1996, Reclamation met with BID following their request to initiate discussions about title transfer and to begin the process to cooperatively negotiate and craft a proposal to bring to Congress which all parties could support. Unfortunately, that process did not get very far as S. 1921 was introduced in the 104th Congress and discussions came to an end.

After the 104th Congress adjourned, Reclamation reinitiated discussions with BID in hopes of developing a consensus based proposal. These efforts were short lived and S. 538, was introduced in the 105th Congress. Having provided the history, I would now like to outline our concerns:

1) The legislation directs, rather than authorizes, the Secretary to convey the facilities of the project. This mandate directing the Secretary to transfer title makes any actions under NEPA moot, because the outcome is predetermined. The Administration firmly believes that the completion of activities under NEPA must occur prior to title transfer to allow the Department, the Congress, and the public to fully understand the impacts of a proposed transfer. The Secretary also must be able, prior to the transfer of title, to condition the transfer in ways that resolve any issues identified during the NEPA process. Likewise, the default language in Section 1(f)(2) is inappropriate. If the title transfer is not completed within two years, we recommend that the Secretary report to Congress on the reason transfer has not occurred as is done in the Carlsbad legislation.

In addition, the Sierra Club Legal Defense Fund recently filed on behalf of several organizations a 60-day Notice of Intent to Sue under the Endangered Species Act, based on current operations of the Upper Snake River Basin. There are endangered snail species in Lake Walcott (the reservoir created by Minidoka Dam), and other species are under consideration for listing. Appropriate consultation under Section 7 of the Endangered Species Act will be required prior to any transfer of title.

Any proposed transfer must also be consistent with the Secretary's Native American trust responsibility and must meet U.S. treaty obligations to protect their rights to fish at usual and customary fishing grounds.

2) Withdrawn Lands: Section 1 (b) proposes to transfer 13.4 acres of land to the district which are within the Minidoka Irrigation District's (MID) boundaries. There are several problems with this provision: (A) These lands were withdrawn from the public domain for use by the Federal project. For this and all Reclamation projects, the value of withdrawn lands was never included in the allocation of costs to be repaid by the beneficiaries. Consequently, BID has not made any repayment or financial contribution to the Federal government for these lands; (B) these withdrawn lands are jointly used as a gravel source for BID and MD (C) These withdrawn lands also provide public access to the Snake River for recreational purposes which could be restricted under this bill.

As a result of these problems, the 13.4 acres of withdrawn lands should either be removed from the proposal or accommodations need to be made in the language in S. 538 to address each of the above issues.

3) Other Conveyance The headworks of the Main South Side Canal -- proposed for transfer under S. 538 -- serve to supply water to both Minidoka and Burley Districts, and is an integral part of Minidoka Dam. It should be specifically understood that the headworks mentioned in S. 538 is not included as a specific facility to be transferred and that title to the headworks should be retained by the United States.

4) Valuation and Cost: S. 538 proposes to give the District, without compensation, the withdrawn lands, and other potential sources of revenue. Reclamation opposes these provisions. These assets should be accounted for in a valuation process in order to appropriately protect the financial interests of the Treasury.

Section 1(b)(20) states: "The first \$80,000 in administrative costs of transfer of the title and related activities shall be paid in equal shares by the United States and Burley, and any additional amount of administrative costs shall be paid by the United States." We recommend that Congress instead require transferees to cost share all the transaction costs, including but not limited to those costs associated with the NEPA and real estate boundary surveys.

5) Water Rights: Section 1 (c) would transfer to the District any water rights held by the United States for the benefit of the District. Currently, Reclamation holds natural flow water rights for the Minidoka and Burley districts as one right. This natural-flow right is presently being adjudicated in the ongoing Snake River Basin Water Right Adjudication. Partitioning the water rights under S. 538 could impair integrated project operations; affect adjudicated rights, and result in third-party impacts, including impacts to other project water users.

Furthermore, section 1 (c) could impair the effective management of the water resources of the region. The

Federal government now is able to provide irrigation deliveries in a manner that also enhances flows for fish and wildlife purposes. The proposed transfer of water rights could reduce this operational flexibility and hinder the salmon recovery efforts now underway downstream. Therefore, we strongly recommend that the current relationship between the United States and BID concerning water rights be retained.

6) Project Power: Section 1 (d)(1) gives BID a permanent right to project power at the "cost of production." The Administration does not believe it is in the best interest of the taxpayers and other power users to grant any transferred project such a permanent right. The present contractual arrangement between BID and Reclamation was entered in 1962. BID may now receive up to 10,000 kilowatts for 40 years at a rate that is discounted 0.7 mills/kWh below the actual cost of production for power used at BID's pumping plants. Following this 40-year period, the 1962 contract allows BID to enter into additional contracts without the discount. With the prospect of restructuring the electric utility industry, circumstances in the electricity market are rapidly changing. Any perpetual right would provide the District a windfall that other power customers or the general taxpayer would have to subsidize.

7) Right of First Refusal: Section 1(d)(2) provides BID and other entities entitled to storage water in Lake Walcott (the reservoir created by Minidoka Dam) the right of first refusal to acquire the power plant or dam and related facilities, if the United States decides to transfer these facilities out of Federal ownership. This language should be removed as it is unfair to give this district preferential treatment which would prejudice future actions by the Congress or the Executive branch with respect to privatization of hydroelectric generation facilities.

Section 1 (d)(2) states: "If the United States decides to transfer out of Federal ownership title to the Minidoka Power Plant or Dam, the Secretary shall grant to entities entitled to storage water in Lake Walcott (the reservoir created by Minidoka Dam) under spaceholder contracts with the United States a right of first refusal to acquire the power plant or dams and related facilities at such reasonable cost and subject to such terms and conditions as may be agreed on by the spaceholders and the Secretary." We believe the provision could have significant negative impacts to the irrigation districts in southern Idaho and western Oregon that rely upon power for irrigation purposes from the southern Idaho system. In addition, this provision would have negative impacts to Bonneville Power Administration (BPA) customers, including municipal and domestic entities.

On May 21, 1963, BPA was designated, consistent with 16 U.S.C. 837(a) and (b), as the marketing agency for Federal power generation sold in southern Idaho. This action assured that preference customers in southern Idaho receive a fair share of the power produced at Federal Columbia River Power Systems (FCRPS) hydroelectric generating projects. Since 1963, the assets allocated to power for the five southern Idaho system hydroelectric generating projects Minidoka, Boise Diversion, Black Canyon, Anderson Ranch, and Palisades - have been included as part of the FCRPS and as part of the BPA's responsibility for repayment to the Treasury. The total FCRPS investment in the southern Idaho system on September 30, 1995, was about \$70 million. Of that total, \$28 million is for existing facilities and \$42 million is for replacement of worn out power facilities at the Minidoka project. Section 1 (d)(2) would authorize the transfer of ownership from Reclamation, and presumably the power marketing and Treasury repayment responsibility from BPA, to "entities entitled to storage water in Lake Walcott." Congress should delete this provision. S. 538 should be limited solely to the transfer of irrigation facilities. The transfer of any assets from the FCRPS should not be addressed as part of this legislation.

(8) Liability: S. 538 should contain language to ensure that the purchaser accepts full liability for the transferred portion of the project facilities when they are conveyed, rather than just the lands, easements, and right-of-ways, as proposed in S. 538. The Administration proposes the following language: "Effective on the date of conveyance of the project facilities, described in section 1 (b)(1), the United States shall not be held liable by any court for damages of any kind arising out of any act, omission, or occurrence relating to the conveyed facilities, except for damages caused by acts of negligence committed by the United States or by its employees, agents, or contractors prior to the date of conveyance. Nothing in this section shall be deemed to increase the liability of the United States beyond that currently provided in the Federal Tort Claims Act, 28 U.S.C. Section 2671 et seq."

While these are the main points of concern for the Administration on S. 538, there are a number of other technical issues which we can address -- hopefully as we move forward.

Again, Mr. Chairman, I would like to reiterate that we believe that this project is a potential candidate for title transfer, provided important modifications are made. Let me pledge to this Committee as well as to the bill sponsors and the District, my interest and willingness to see if we can work to make this title transfer a

reality.

S. 736 Carlsbad Irrigation Project Acquired Land Transfer Act

S. 736 would authorize the Secretary to convey, without cost and right, title and interest of the United States in the irrigation and drainage system of the Carlsbad Project and acquired lands described in the "Status of Lands and Title Report: Carlsbad Project" to the Carlsbad Irrigation District (CID).

Since the end of the 104th Congress, Reclamation and CID have continued to discuss and negotiate title transfer of these facilities and lands in the hopes of finding resolution to the issues raised during the 104th Congress. Although these negotiations and discussions brought us closer together, they have not yet been successful. And, while it would be desirable to transfer title to the irrigation and distribution facilities to CID, the Administration cannot support S. 736 in its current form.

Before identifying our concerns, I would like to note the progress and some areas where we believe improvements have been made from earlier drafts:

1) S. 736 authorizes the Secretary to convey title rather than directing him to do so as in S. 538 and S. 725. This legislation envisions that actions under NEPA would be carried out. Although we do not anticipate encountering significant environmental issues in this transfer we believe the legislation should provide that the Secretary may establish such conditions for the transfer as he deems appropriate to resolve issues identified during the NEPA process.

2) Section 2 directs the Secretary to notify CID of all mineral and grazing leases on acquired lands. Under previous draft, such notification was required within 45 days. In testimony presented in the 104th Congress, the Department recommended that 120 days would be appropriate. S. 736 has provided 120 days as requested.

Unfortunately, other provisions of S. 736 do not sufficiently protect the interests of the Treasury and therefore, the Administration cannot support this proposal. Like the other bills under consideration today, Reclamation believes that Carlsbad is a good candidate for title transfer. Furthermore, with some modifications, we believe we could support passage of S. 736. Let me outline the concerns of the Administration:

1) Dam Safety. Section 2 reserves for the Secretary title to the surface estate for lands which are located under the footprint of Brantley and Avalon dams. We recommend an important technical amendment to clarify that no mineral extraction will occur one mile from the center axis of the dam, unless approved by the Secretary.

2) Pay-As-You-Go. Section 3(b) and 3(c) would reduce expected receipts to the Treasury and increase the Federal deficit. As these provisions are not offset, S. 736 would be subject to the Pay-As-You-Go requirements of the Omnibus Budget Act of 1990.

3) Reclamation Fund. Section 3(b) and 3(c) would require the United States to make available approximately \$1.6 million in the Reclamation Fund and all future oil, gas, and grazing revenues to the CID. Under the Mineral Leasing Act for Acquired Lands of 1947, these revenues are placed in the Reclamation Fund and are credited in the Carlsbad construction account towards repayment of any future project construction obligation. However, no additional construction is authorized or contemplated. We are concerned that under the bill the District is not being asked to pay a fair price for the revenue producing assets that it seeks to acquire considering the value that the lands and mineral estate would have to the Federal government or other potential purchaser.

4) Water Conservation. The Administration recommends the deletion of section 4, as it provides a new authorization for the expenditure of monies. Reclamation needs to retain the flexibility to determine the appropriate Federal share of water conservation costs for this project. In addition, the language if adopted should be clarified to ensure the District's water conservation practices comply with Federal and State laws, and are consistent with the existing management of such lands and other adjacent project lands.

5) Liability Language S. 736 should be amended to contain language to ensure that the recipients accept full liability for the property when it is conveyed. We recommend that S. 736 include the following: "Effective on the date of conveyance of the lands and facilities described in Section 2(a), the United States shall not be held liable by any court for damages of any kind arising out of any act, omission, or occurrence relating to

the conveyed lands and facilities, except for damages caused by acts of negligence committed by the United States or by its employees, agents, or contractors prior to the date of conveyance. Nothing in this section shall be deemed to increase the liability of the United States beyond that currently provided in the Federal tort Claims Act, 28 U.S.C. 2671 et seq."

6) Water Rights. Unlike the provisions of the Collbran transfer, the Carlsbad legislation does not attempt to transfer title to any project water rights obtained by the United States by purchase or appropriation for the Carlsbad project. Carlsbad project water is provided to the CID by contract and the District is in agreement with the ownership of title to all project water rights remaining in the name of the United States.

The flowage easement retained by the United States in Section 2(a)(2)(B) needs to include a right of access to the conveyed property to operate and maintain and construct and reconstruct the facilities and lands and interests in lands and facilities retained by the United States. Such an easement will allow the United States access to the dams for safety of dams and other purposes as well as the ability to perform such functions as dredging and other operations in the reservoir.

S. 744, Fall River Water Users District Rural Water System Act of 1997

S. 744 would direct the Secretary of the Interior to grant monies to the Fall River Water Users

District Water System for the purpose of planning and constructing a water supply system. The water supply system would provide water to meet the domestic and livestock water needs of 660 residents in Fall River County, South Dakota, and would assist in the mitigation of wetland areas. Under terms of the legislation, the Western Area Power Administration would be directed to make available energy and capacity to meet the pumping and incidental requirements of the water supply system at the firm power rate. S. 744 would authorize \$3.6 million for the planning and construction of the system.

The Administration opposes this legislation. Long-standing Reclamation policy for municipal, rural, and industrial water supply projects requires that non-Federal interests repay, at current interest rates, 100 percent of project costs. In contrast, S. 744 would require the Federal government to pay 80 percent of the of the planning and construction costs.

The Administration opposes the authorization of new single-purpose municipal and industrial water supply projects for rural areas through the Reclamation program, unless the needs of Native American communities justify Department of the Interior involvement. The rural development mission area at the U.S. Department of Agriculture (USDA) is dedicated to the issues facing rural communities. Congress has authorized three Federal agencies within USDA to accomplish this task (the Rural Utilities Service, the Rural Housing Service, and the Rural Business- Cooperative Service). For example the Rural Utilities Service provides grants and low interest loans for rural water and wastewater systems. If Congress wishes to consider authorizing additional water development assistance for rural areas, such projects should be authorized within the framework of USDA's rural development mission area. We believe this would be more appropriate than making it a Department of the Interior responsibility.

Although feasibility reports were prepared by private sector firms, the feasibility reports do not meet Reclamation standards for determining project feasibility. The cost estimates shown in the reports do not appear to include funding for meeting National Environmental Policy Act requirements, as well as cultural resources and environmental mitigation activities

In addition, the bill is silent on which entity would take title to the project once it is constructed and does not ensure that the United States will have no liability associated with the project.

This concludes my remarks. I would be happy to answer any questions you may have.

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June 10, 1997 Tuesday

**SECTION: CAPITOL HILL HEARING TESTIMONY****LENGTH:** 1145 words**HEADLINE:** TESTIMONY June 10, 1997: LEONARD BENSON PRESIDENT FALL RIVER WATER USERS DISTRICT  
SENATE ENERGY & NATURAL RESOURCES WATER AND POWER WATER AND POWER LEGISLATION**BODY:**

WRITTEN STATEMENT

OF

LEONARD BENSON, PRESIDENT

FALL RIVER WATER USERS DISTRICT

S. 744

THE FALL RIVER WATER USERS DISTRICT

RURAL WATER SYSTEM ACT OF 1997

SUBMITTED TO THE

**WATER AND POWER SUBCOMMITTEE****ENERGY AND NATURAL RESOURCES COMMITTEE**

UNITED STATES SENATE

THE HONORABLE JON KYL, CHAIRMAN

JUNE 10, 1997

The Fall River Water Users District respectfully submits this written testimony to Chairman Kyl and members of the Senate **Water and Power Subcommittee** in support of S. 744, a bill to authorize the construction of the Fall River Rural Water System in eastern Fall River County in South Dakota.

During a five year period from 1988, the southeastern portion of Fall River County experienced a severe drought. When there was not enough rain to replace the surface water, the county ranchers began looking at the various alternatives that would provide water for both their domestic and livestock needs. Many home owners and ranchers were forced to haul water to sustain their domestic and livestock water needs. In 1990, area home owners and ranchers formed the Fall River Water Users Association to start the planning process for development of a rural water system. The Association was dissolved and the Fall River Water User District, a political subdivision of the State of South Dakota, was formed in June 1992 to continue project

planning and to search for project funding.

The estimated \$4.5 million Fall River rural water system is a relatively small project compared to a \$100 to \$200 million multi-county rural water system, but the project will have a major, positive economic impact in the local project area. The rural water system will provide economic stability, address the health and safety issues, and provide sound fiscal water management throughout the project area.

Currently the residents rely on shallow wells within the area that are not of the quality or quantity required for domestic and livestock use. Portions of the proposed rural water system area have health concerns as the water is high in nitrates, sulfates, chloride, iron, manganese, and total dissolved solids. Existing wells serving the towns and the Angostura State Recreation Area and private ranches exceeds the limits for at least one, and in some cases several, contaminants. One area rancher that was born and raised in the area can still remember his Dad hauling water for household use. The smell of the water was something he had to get used to in order to drink. Many of the residents haul water for all uses, some as far as 60 miles round trip. This proposed project will help alleviate those existing water quality concerns.

Past cycles of severe drought in the southeastern area of Fall River County have left residents without a satisfactory water supply. The rural water system will not only provide water for domestic use and livestock watering to the members of the district, but also the State of South Dakota for the Angostura State Recreation Area which is administered by the Department of Game, Fish & Parks. The system will provide all of the water needed for the Angostura State Recreation Area. Currently, the quality and quantity of water found in the park is insufficient to handle the needs of both the day user as well as those that are seasonal residents. By upgrading the quality and quantity of the water, the park will realize larger visitation numbers which will bring about a healthier economic climate. This project will also assist the Game, Fish & Parks by utilizing the services offered through the rural water system rather than developing a costly water system on their own.

The area relies on farming and ranching for its livelihood and the majority of estimated water use is for livestock purposes. In the past, as a direct result of droughts, a vast majority of the livestock owners in the district have been forced to reduce livestock due to the lack of water, in spite of the fact that these ranches are dry land operations and there is adequate feed on hand. A stable water source that provides dependable, high quality water will provide enhanced weight gains on cattle thus eliminating the need for livestock owners to reduce their livestock levels.

Livestock health, growth, and reproduction are directly related to adequate supplies of high quality water. Local ranchers have paid higher veterinary bills as a direct result of low water levels in stock ponds. One problem associated with low water levels is salt toxicity which accounts for an average annual loss of two cows per ranch, according to a local veterinarian. Calves are especially vulnerable to poor water quality which sometimes leads to coccidiosis and scours. Left untreated, calves gain weight slowly and may even die. Steers, too, can suffer from drinking poor quality water. A veterinarian estimates that ranchers incur expenses of \$50 each for ten percent of the local steer crop for treatment of water belly. And, finally, the veterinarian estimates that about ten percent of the cows either fail to conceive or calve late without a good source of water -- again hurting ranch profits. One rancher estimates his out-of-pocket costs are approximately \$50 per week to haul water to 70 head of livestock.

The land ownership within the District is a mixture of federal, state, and private land which encompasses approximately 460,800 acres of land. The federal land within the district is administered by the U.S. Forest Service with the exception of a few small Bureau of Land Management parcels. The Angostura State Recreation Area is administered by the S.D. Department of Game, Fish & Parks. State land within the district is administered by the Office of School and Public Lands. Attached is a project area map.

The area that comprises the project depends entirely on runoff from snow and rain to fill the dams with water for livestock use as well as to recharge the shallow wells for domestic use. During the drought cycles this area has experienced, the moisture for recharging the wells and filling the dams has been at a minimum. The water that is available for recharging wells and filling stock dams contains contaminants that are considered harmful for consumption.

The State of South Dakota is dedicated to the development and construction of rural water systems. Since 1992, the State has authorized and established the state's cost share commitment for eleven rural water systems of which Fall River was one. The legislature established a state cost share of \$800,000 for the non-federal matching requirements. In addition to the legislative authorization, the State Legislature appropriated a \$50,000 grant for planning activities to the district.

Chairman Kyl, and members of the subcommittee, I ask for your favorable consideration and passage of S. 744.

**LOAD-DATE:** June 11, 1997

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June 10, 1997, Tuesday

**SECTION:** CAPITOL HILL HEARING TESTIMONY**LENGTH:** 1911 words**HEADLINE:** TESTIMONY June 10, 1997 JACK HESSION ALASKA REPRESENTATIVE SIERRA CLUB SENATE  
ENERGY & NATURAL RESOURCES WATER AND POWER WATER AND POWER LEGISLATION**BODY:**

Statement of Jack Hession, Alaska Representative

Sierra Club

on S.439

To provide for Alaska State jurisdiction

over small hydroelectric projects, and for other purposes

**Subcommittee on Water and Power****Committee on Energy and Natural Resources**

United States Senate

Washington, D.C.

June 10, 1997

Good Morning. My name is Jack Hession. I am the Alaska Representative of the Sierra Club, which is a national environmental organization of over 600,000 citizens with chapters in every state including Alaska. I live in Anchorage.

In summary, we oppose Sec.1 of S.439, which would allow the State of Alaska to assume regulatory authority over small hydropower projects in Alaska.

For the Subcommittee, the basic question is what would be the likely effect of the proposed transfer of jurisdiction on those Alaska rivers and river-lake systems that might be subject to small hydropower proposals. Bearing in mind the commercial, subsistence, recreational, ecological, and wilderness/wild river importance of Alaska's free-flowing rivers, would a transfer of jurisdiction likely improve, maintain, or weaken current standards available under Federal Energy Regulatory Commission (FERC) administration?

One way to approach this question is to review Alaska's recent record of natural resource and environmental stewardship. Our review suggests that a transfer would probably result in weaker licensing/relicensing standards and procedures, and inadequate and poorly funded enforcement of regulations and operating requirements, including any safeguards for associated non-power resources.

We conclude that this is not the time for a transfer of such important responsibilities to the State; the risks are simply too great. Accordingly, a conservative approach is warranted in this case; FERC jurisdiction should continue.

#### Sec. 1

Two subsections of Sec. 1 would allow for a complete state assumption of jurisdiction over existing and proposed small hydropower. Sec. 1.(c) would allow the State to assume licensing and regulatory authority for new hydropower projects of 5 megawatts or less. Sec. 1 (d) would let existing FERC licensees make their projects "subject to the authorizing authority of the State" thereby replacing FERC relicensing and other project requirements with state ones.

Jurisdictions would be transferred to the State when the Governor notified the Secretary of Energy "...that the State has in place a process for regulating such hydroelectric projects which gives appropriate consideration to the improvement or development of the State's waterways.." and for various other purposes.

If accepted by the State, jurisdiction would extend to state, municipal, Native corporation, and other privately owned land, as well as to national forests, Bureau of Land Management lands, and units of the National Wildlife Refuge System. Units of the National Park and National Wild and Scenic Rivers Systems, and Indian reservations in Alaska would be exempt from state jurisdictions.

National park and wild/scenic river system units are already closed to new hydropower development under existing law. However, under Sec. 1 state jurisdiction would include small hydropower proposals on private or State lands inside the boundaries of national parks and national wild and scenic rivers. There are many thousands of acres of private (Native corporation) lands within national park system units in Alaska, and the State owns several thousand acres within national park system units.

Similarly, there are millions of acres of Native corporation lands within the boundaries of the national wildlife refuges, and hundreds of thousands of acres of Native corporation lands within the national forests. Under Sec. 1, the State would have jurisdiction over small hydropower proposals on these private inholdings.

#### Likely Effect of Sec. 1

As noted above, a transfer of jurisdiction to the State is conditioned on the State, i.e., the Alaska Legislature, establishing a regulatory structure for small hydropower authorization and regulations. Presumably, the Legislature would authorize the new State program, and establish and fund a new division of small hydropower, probably in the Department of Natural Resources.

This prospect is worrisome given the performance of the Alaska Legislature in recent years, with the current Legislature qualifying as perhaps the most anti-environment, anti-regulation, and anti-government legislature since Statehood.

In the 1997 session the majority coalition mounted a comprehensive assault on the State's environmental laws and regulations. Laws were weakened, budgets for environmental and natural resource management reduced, and several other bad bills were prepared for final action when the Legislature returns next January.

The Legislature's attack took place as billions of dollars in oil revenues continued to roll into the State treasury, and as each Alaskan prepared to receive his or her yearly check in excess of a thousand dollars from these revenues. Alaska's wealth has not translated into a more benign attitude towards the environment on the part of a majority of its elected representatives, who would rather pour concrete than fund environmental protection and effective management of the State's natural resources.

Here are some examples of the Legislature's approach to environmental protection and the State's parks, public lands, and waters:

\* An "Environmental audit" bill that passed by wide margins allows polluters to forestall inspection and prosecution by declaring self-audits. Corporate and other polluters receive immunity for any violations they disclose. Governor Tony Knowles' veto was handily overridden 43-16;

\* A new law for off-road vehicles and helicopters in the state parks. No closures by the State Parks Division of over 90 days is allowed without the approval of the Legislature; closures of less than 90 days cannot be

renewed for a second time without such approval. This bill will effectively throw the state parks wide open to off-road vehicles, snow machines, other snow vehicles, and helicopters.

Even prior to this new law, the Knowles Administration yielded to motorized access interests by abandoning the Denali State Park Master Plan, and allowing jetboats, airboats, snowmachines, other tracked snow vehicles, and helicopter landings in park wilderness areas previously off-limits to these incompatible means of access.

\* Motorized access to state public domain lands. This new law requires the Department of Natural Resources (DNR) to seek approval from the Legislature before closing public domain tracts larger than 640 acres to any form of motorized access. Prior to the law it was a motorized free-for-all on the public domain lands, but at least DNR had closure authority to protect the most sensitive tracts from wholesale degradation. The new law effectively prevents timely DNR intervention to safeguard public resources;

\* A new law allowing 18"x 90" so-called tourist directional signs outside the state right-of-way and on private property. These relatively small signs will probably proliferate along the state's highways and roads, and set the stage for billboards in Alaska.

Other ill-conceived bills the legislators moved along towards final action next year include:

\* A bill pushed by industrial and pro-development interests that would lower Alaska's existing water quality standards to the minimum allowed under federal law, and mandate mixing zones for pollutants. This "Dirty Water" bill passed the House easily, 26- 10. After the Legislators went home, the Knowles Administration, bowing to pressure from commercial interests and their supporters in the Legislature, administratively weakened existing standards, and allowed mixing zones despite the risk to fisheries and recreational resources;

\* A bill on Revised Statute 2477--the State's "Pave the national parks" effort--declares 582 historic trails and routes as valid 100-foot-wide state-owned rights-of-way and orders them recorded as encumbrances on federal and private lands, including several national parks and wildlife refuges, other federal lands, and Native corporation lands;

\* A bill requiring members of the Boards of Fish and Game to have held fishing/hunting/trapping licenses for five years prior to appointment. Only about 20 percent of Alaskans fish, hunt, or trap.

Among other destructive proposals awaiting further action are a repeal of Alaska's coastal zone management program; a "takings" bill; a bill allowing same-day airborne wolf hunting in "intensive game management areas;" a bill restricting the ability of Alaska Department of Fish and Game agents to enforce federal fish and wildlife laws; funding below-cost timber sales; a lottery giving away one million acres of state land per year; and a bill eliminating signs and placards for hazardous materials.

This record of the Legislature, and the general political climate in Alaska points up the risks inherent in allowing the State, to assume jurisdiction over small hydropower. Should the State accept the offer of jurisdiction, it is safe to assume its regulatory structure would have far weaker project authorization criteria, contain no impact analysis remotely comparable to NEPA, and have much less stringent standards for the protection and conservation of associated non-power resources and values.

It is also unlikely that the Legislature would provide adequate funding for a new state small hydro division. Since 1984, Department of Natural Resource budgets have been steadily cut, and the current Legislature has maintained this tradition while finding \$100,000 for a state/industry lobby operation working to open the Arctic National Wildlife Refuge to oil and gas leasing.

Sec. 1(e) of S. 439 provides that State-authorized projects -Located in whole or part on Federal lands"... shall be subject to the approval of the Secretary having jurisdiction with respect to such lands and subject to such terms and conditions as the Secretary may prescribe." In our view, this provision is not an acceptable substitute for direct FERC responsibility and jurisdiction, in consultation with the appropriate Secretary, who under existing law imposes terms and conditions for the protection of fish and wildlife habitats, and other riverine resources.

Moreover, once state regulators approved a small hydropower project, a Secretary would be under heavy pressure to endorse it. A Secretary who favored small hydropower development could be expected to approve small hydropower projects and to forgo setting terms and conditions more rigorous than the State's.

### Summary and conclusions

We prefer continued FERC jurisdiction because it offers environmental impact analysis under NEPA, public consultation procedures, and federal standards for adequate in-stream flows and other safeguards for non-power resources for authorized and relicensed hydropower projects.

Given the recent performance of the Alaska Legislature, this is not the time for Congress to experiment with State jurisdiction over small hydropower. The risk of environmental harm is too high for those Alaska rivers and river-lake systems that would come under state jurisdiction.

We recommend that Sec. 1 of the bill be deleted.

Thank you for this opportunity to present our views.

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June 10, 1997 Tuesday

**SECTION:** CAPITOL HILL HEARING TESTIMONY**LENGTH:** 1145 words**HEADLINE:** TESTIMONY June 10, 1997 MONA JANOPAUL CONSERVATION COUNSEL TROUT UNLIMITED  
SENATE ENERGY & NATURAL RESOURCES WATER AND POWER WATER AND POWER LEGISLATION**BODY:**

TESTIMONY OF MONA JANOPAUL, ESQUIRE

CONSERVATION COUNSEL OF TROUT UNLIMITED (also representing  
the HYDROPOWER REFORM COALITION)on S. 439, THE FEDERAL **POWER** ACT AMENDMENTS OF 1997  
before the**SUBCOMMITTEE ON WATER AND POWER**of the U.S. **SENATE ENERGY AND NATURAL RESOURCES COMMITTEE**

JUNE 10, 1997

Mr. Chairman, members of the Subcommittee, I appreciate the opportunity to give you the views of Trout Unlimited (TU) and the Hydropower Reform Coalition (HRC) on S.439.

TU is a national fisheries conservation group dedicated to the conservation, protection and restoration of our nation's trout and salmon resources and the watersheds that sustain those resources. TU has over 95,000 members in 445 chapters in 38 states. TU has a major stake in the issues raised by S.439, especially the Federal Power Act exemption for small hydropower projects in Alaska. Our members generally are trout and salmon anglers who voluntarily contribute substantial amounts of their personal resources to aquatic habitat protection and restoration efforts. In particular, many of our members in Alaska derive their livelihoods from working in the trout and salmon sportfishing industries. Because our efforts to protect and restore trout and salmon resources have been so adversely affected by hydropower dams, TU has a deep and abiding interest in how the Federal Power Act and FERC regulate hydropower dams.

The Hydropower Reform Coalition (HRC) is a coalition of 30 national, regional, and local conservation and recreational organizations working to protect and restore river resources affected by non-federal hydropower projects throughout the United States. Thus, HRC's members also have a long standing interest in Federal Power Act regulation of hydropower facilities and the issues raised by S. 439.

**A. Exemption for Small Hydropower Projects in Alaska**

S.439 would exempt hydropower projects in the state of Alaska of 5 megawatts or less from Federal Power

The bill presents no justification for such an exemption. The Federal Power Act was signed into law to regulate hydropower development in all states of the United States. The need for federal government involvement in this arena is the same for Alaska as it is every other state. It is patently unfair to other states and all other interests involved in hydropower to exempt one state, or specific categories of projects, from federal law. Also, Alaska's rivers support world class salmon resources which are clearly tied to our federal responsibilities to share management responsibilities for salmon with Canada via the U.S./Canada Salmon Treaty.

Furthermore, S.439's exemption of small Alaskan projects also exempts the projects from the strong and useful environmental requirements of the Federal Power Act. The Federal Power Act gives the US Fish and Wildlife Service and the National Marine Fisheries Service strong roles in conserving fish and wildlife resources potentially lost through hydropower development and requires applicants to ensure fish passage around hydropower projects. Second, Section 4(e) of the Federal Power Act gives the Forest Service and other land management agencies authority to ensure that dams licensed by FERC are not inconsistent with the purposes of the surrounding federal lands, e.g., the fisheries habitat conservation purposes of our National Forests. Third, exemption from the Federal Power Act eliminates the ability of the state of Alaska to certify (under Section 401 of the Clean Water Act) that the project will comply with water quality standards and beneficial uses established for Alaskan rivers under the Clean Water Act. These authorities, which would be eliminated by S.439 for hydropower projects of 5 megawatts or less, are essential for sound fish and wildlife conservation in Alaska, just as they are in every other state in the Nation.

### B. Ten Year Extension for Commencement of Construction

## Summary

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**Test. of Robert Grimm**

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June 10, 1997, Tuesday

**SECTION: CAPITOL HILL HEARING TESTIMONY****LENGTH:** 1369 words**HEADLINE:** TESTIMONY June 10, 1997 ROBERT S. GRIMM PRESIDENT ALASKA POWER & TELEPHONE COMPANY SENATE ENERGY & NATURAL RESOURCES WATER AND POWER WATER AND POWER LEGISLATION**BODY:**Testimony of Robert S. Grimm, President, Alaska **Power** & Telephone CompanyBefore a **subcommittee** on **Water and Power**of the **Senate Committee** on **Energy and Natural Resources**

Regarding small hydropower licensing, S.439

June 10, 1997

My name is Robert S. Grimm. I serve as President of Alaska Power & Telephone Company (AP&T). AP&T is an investor-owned and employee-owned corporation which has been providing public utility services in Alaska since 1957. We currently provide services to 25 different communities from above the Arctic Circle to very southern portions of Alaska. Most of these communities are very small and due to the lack of infrastructure have isolated electric systems utilizing small diesel electric generating units that use fossil fuel.

AP&T strongly supports Section 1 of S.439 for reasons I would like to briefly outline:

One of the solutions to fossil fuel generation in these remote areas is the development of small hydroelectric projects to provide a renewable and nonpolluting source of energy. We began a program to identify and develop cost-effective projects in 1984.

In July 1987 we applied for a preliminary permit for the Black Bear Lake Project. In June 1988 the FERC issued a preliminary permit for a term of 36 months. During this period, as evidenced by progress reports filed with the agency, AP&T spent a considerable amount of time and effort consulting with the agencies. In May 1991 we filed our license application. In November 1993 FERC issued the license authorizing the Project with a capacity of 4.5 MW. The project was completed and began commercial operation on August 28, 1995. The permitting and licensing phase took seven years and cost nearly \$1.2 million dollars. The actual construction took one year and cost \$10 million. It is interesting to note that the permitting costs alone almost exceed the installed cost of equivalent diesel electric generating units. I would like to point out that this project was funded entirely from private funds.

Another of our projects is located near Skagway, Alaska and has a capacity of 4 Mw. The project is called the Goat Lake Hydropower. We filed for a FERC preliminary permit in January 1991 which the FERC issued in June 1991. In May 1994 we filed our license application and FERC issued the license in July 1996. The permitting and licensing process took six years and cost us \$1,043,100. The project is now under construction and is scheduled to be completed this year at a cost of about \$10 million. Again, this project has

been funded entirely with private funds.

Another small hydroelectric project, Wolf Lake is located on Prince of Wales Island in southeast Alaska, has a capacity of about 2 MW. The preliminary permit was issued by the FERC in April 1995. We have fulfilled our obligations under the permit and expect to file our license application before April 1998. This project would have been already permitted and ready for construction if the proposed legislation before you was in place two years ago.

Additionally, as part of the Upper Lynn Canal Regional Energy Plan we are in the process of licensing a 5 MW project that is located on Kasidaya Creek north of Juneau near Skagway and Haines in southeast Alaska. We filed for our preliminary permit in July 1996 and FERC issued the permit in November 1996. We are currently following an Applicant Prepared Environmental Assessment Process and pursuing a license.

In October 1996 we filed with FERC a request for a non-jurisdictional determination for a very small project located entirely upon private land on a nonnavigable stream, with no interstate interconnection and with no significant adverse environmental impact. We await a determination in this matter. If FERC, after investigation, determines that it does not have jurisdiction on this project the project will be licensed under state law in accordance with Section 23 of the Federal Power Act.

In addition we have had the opportunity to re-license and amend our 1.1 Mw project at Dewey Lakes FERC No.1051.

We have had extensive experience with FERC during the last decade and have first hand experience. It appears to us that the lack of stratification (i.e. large impact vs. small impact) in the FERC rules, regulations, and requirements for these small projects has been the major reason that so few have been developed in Alaska.

The continued use of fossil fuel generation in these remote areas and the significant impacts associated with fuel storage and air emissions more than offset the minor impacts of these hydroelectric projects. These projects do not have large dams that constrict free-flowing rivers. These projects are very similar to the smallcommunity water systems being developed in Alaska under state law. As you are aware, the environmental costs associated with the continued use of fossil fuels are significant. One authority <sup>1</sup> has attempted to estimate the "bottom line" cost of fossil fuels. They included in this assessment health costs, damage to water resources, treatment costs necessary to counteract the adverse effect of fossil fuel use on food supplies, water resources, climate, and health. These costs when tabulated equal 3.35 cents per kilowatt-hour of fossil fuel energy. Even this assessment does not include the environment costs of cleaning-up contaminated fossil fuel storage sites which in rural alone is a \$300 million dollar problem waiting to be addressed. <sup>1</sup> International Hydrogen Energy Association

These facts are understood and widely accepted. At the policy level it is why we as a nation place so much importance on the development of low impact renewable energy resources. Alaskan small hydropower is one that has proven itself yet the regulatory maze continues to hinder its development. Those of us on the frontline trying to implement these policies are bewildered. With all of the benefits associated with the development of small hydropower when compared to the continued use of fossil fuels why is it that small hydro is so difficult to develop?

The proposed legislation will provide us significant regulatory relief from the hardship we are now encountering when trying to displace fossil fuel generation with a proven renewable and non-polluting resource. That relief translates in dollars and timesaving.

I am sure you will hear from representatives of FERC how their regulations contain shortcuts to be used by smaller projects and how the Applicant Prepared Environmental Assessment can deliver a FERC license in a shorter time period. We have had direct experience with these shortcuts and have found them to be largely ineffective. While we appreciate the intent and efforts of individual FERC staff. The Applicant Prepared Environmental Assessment has the potential to shorten the licensing periods but it cost more in up-front permitting and licensing costs.

A major underlying problem is the diffusion of hydropower oversight that once was exclusively FERC's. Over the years FERC's overall authority in the Federal Power Act has been eroded by court decisions and legislative initiatives giving multiple state and federal agencies authority over various aspects of the licensing process. The process has become very inefficient and confrontational and results in very long licensing time periods and additional costs. Many small hydropower projects simply cannot afford these costs.

My last point is tidal power. Currently we believe that small tidal or free flowing hydropower plants placed upon navigable waters will be subject to the jurisdiction of FERC. In Alaska this technology may have promise for many small coastal or riverside villages. However, the cost and time required for a FERC license make this technology a non-option for small-scale development.

The proposed legislation would greatly facilitate the development of Alaska's Small Hydro potential by removing regulatory overlay while still requiring applicants to receive approvals from all other local, state, and federal agencies.

We ask for your support and passage of S.439. I will gladly respond to any questions.

Thank you for this opportunity.

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June 10, 1997, Tuesday

**SECTION: CAPITOL HILL HEARING TESTIMONY****LENGTH:** 1008 words**HEADLINE:** TESTIMONY June 10, 1997 CHARLES Y. WALLS PRESIDENT AND CEO ALASKA VILLAGE ELECTRIC COOPERATIVE, INC. SENATE ENERGY & NATURAL RESOURCES WATER AND POWER WATER AND POWER LEGISLATION**BODY:**Testimony of Charles Y. Walls, President & CEO, Alaska Village

Electric Cooperative, Inc.

before the **Subcommittee on Water and Power**United States **Senate Committee on Energy and Natural Resources**

regarding section 1 of S.439

June 10, 1997

My name is Charles Y. Walls and I serve as President and CEO of the Alaska Village Electric Cooperative, Inc. (AVEC) headquartered at 4831 Eagle Street, Anchorage, Alaska 99503.

AVEC is a non-profit consumer owned electric cooperative incorporated in 1967 to meet the needs for central station electric service in Alaska's villages. Today AVEC provides electric utility service for 50 isolated Alaska villages employing small diesel electric generating plants. The average village population is 376 people, 92% of whom are native. The costs are high with village electric rates averaging 40 cents per kilowatt-hour; about five times the national average. That is further compounded by the high unemployment and poverty levels of Alaska's villages. The average household income in the villages we serve is about \$20,000; half that of the urban Alaska communities. Meeting the energy needs of our villages with fuel oil also poses environmental problems. Much of the bulk fuel handling and storage in rural Alaska is substandard and poses major environmental regulatory compliance problems.

One alternative to diesel for some of our villages is developing hydroelectric power. The main hurdle to overcome with these small hydroelectric projects isn't Alaska's formidable logistics, it is the Federal Energy Regulatory Commission (FERC) licensing process and financing. I am here to speak in favor of section 1 of S.439 that provides for Alaska state jurisdiction over small hydroelectric projects.

We are currently in the preliminary permit stage of a FERC license for a small 330 kilowatt hydroelectric project to serve the village of Old Harbor, population 310, on Kodiak Island. The proposed project has very minimal adverse environmental impact and significant beneficial environmental impacts. We filed for a preliminary FERC permit in October, 1995 and hope to have our FERC license by the end of 1998. To date we have spent about \$90,000 on the development of this project. We expect our development costs will rise to about \$300,000 to get the project designed and to the point where it can be licensed by FERC.

Once we have the FERC license, it will take us about 18 months to construct the Old Harbor hydro project at a cost of about \$4,000 per kilowatt or \$1,320,000. Adding in the front end development costs (including the FERC license) at \$300,000 brings the total project to about 1.6 million dollars. In order for this project to be able to compete with diesel generated power, the project will require at least 50% grant funding. This is typical of most small hydroelectric projects built in Alaska over the past thirty years. With rare exception, these small communities are not willing to pay higher electric rates in order to make a renewable energy resource feasible. We are currently seeking some grant funding or other low cost financing so that the Old Harbor hydroelectric project can be built.

Moving down to a smaller scale yet, there are a number of possible smaller (10 to 50 kW) hydro plants that could be used by lodges, hatcheries, homes and very small communities. Where three years of time and a \$300,000 front end development cost is a serious burden on the Old Harbor project, it is a project killer for the smaller projects. The cost of FERC licensing for such small projects is greater than the actual cost of constructing the plant. For example, at the village of Tenakee Springs in the Juneau area, population 114, a small hydro was not built largely because of the cost of FERC licensing. Tenakee Springs continues to rely on imported fuel oil.

Most projects in Alaska, with little environmental consequences, should be able to deal directly with the primary resource agencies and obtain permits just as if they were building a town water system. Because a water system generates electricity, should not mean that it is treated differently. An example of this is the 100 kW McRobert's Creek project built in the Anchorage area that was not subject to FERC. The developer was able to get the necessary permits within about six months. There certainly should be a means of differentiating between large projects with significant environmental impacts and small projects using streams where there are no compelling environmental or recreational values to be dealt with. I would think that FERC, with its workload, would applaud this common sense distinction.

The developer of a small hydro project should have the option of using or not using the FERC licensing process. In some cases, FERC can be very helpful. FERC has the authority to make agencies follow a time line and, when a project is held up at a critical point by a landowner, FERC may invoke the power of condemnation. An example of that is the Humpback Creek project that was built in Cordova, Alaska. For such reasons, some projects may be better off under the FERC process. Others, such as the McRobert's Creek example, may be better off under a state controlled process.

We believe it is in the public's best interests to develop small environmentally beneficial renewable energy resources such as the Old Harbor hydro project. The Old Harbor hydro plant will significantly reduce the amount of fuel oil transported to the community and thereby reduce the risk of oil spills. Renewable energy resources, particularly small hydros, should be encouraged by simplifying regulations to protect the environment and encouraging responsible development. Grants and low interest loans would further assist in recognizing the advantages of environmentally beneficial renewable energy resources compared to fossil-fueled generators in rural Alaska.

Thank you, Mr. Chairman and members of the subcommittee. I will be happy to answer any questions.

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June 10, 1997 Tuesday

**SECTION: CAPITOL HILL HEARING TESTIMONY****LENGTH:** 4111 words**HEADLINE:** TESTIMONY June 10, 1997 ~~ROGER D. LING~~ ATTORNEY BURLEY IRRIGATION DISTRICT SENATE  
ENERGY & NATURAL RESOURCES WATER AND POWER WATER AND POWER LEGISLATION**BODY:**

TESTIMONY IN SUPPORT OF

S. 538

PRESENTED TO THE

**WATER AND POWER SUBCOMMITTEE**

of

**THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES**

June 10, 1997

by

Roger D. Ling

Attorney

Burley Irrigation District

SENATOR JOHN L. KYL, CHAIRMAN, AND MEMBERS OF THE SUBCOMMITTEE:

My name is Roger D. Ling of the firm of Ling, Nielson Robinson, 615 a street, Rupert, Idaho 833500, attorneys for Burley Irrigation District. I have practiced law in Idaho for 33 years and have devoted much of my practice to representation of irrigation districts, canal companies and other water distribution organizations, requiring me to become familiar with the water laws of the State of Idaho and the Federal Reclamation Act of 1902, and Acts amendatory and supplemental thereto. My testimony today is given in support of S.538 authorizing the Secretary of the interior to transfer legal title to Burley Irrigation District of those certain federal reclamation distribution facilities constructed by the United States, the construction costs at which have been fully repaid by Burley Irrigation District to the United States and which have been operated and maintained exclusively by Burley Irrigation District for Over 71 years, together with all water rights held in the name of the United States that are appurtenant to the lands within the irrigation district and are administered exclusively by the state of Idaho and are distributed exclusively by the irrigation district for use of the lands of the district. The passage of S.538 will also affirm to the irrigation district its allocation of storage space in federal reclamation reservoirs, the full construction costs of which have been paid by the

irrigation district, the right of Burley Irrigation District to continue to receive reserved power as provided by its existing contracts and the Reclamation Act of 1902, as amended, and its right to purchase, with its sister district, Minidoka Irrigation District, the dam and/or powerplant originally constructed exclusively for Burley Irrigation District and Minidoka Irrigation District, in the event the United States elects to sell or transfer said facilities to non-federal ownership.

The Reclamation Act of 1902 and Acts amendatory and supplemental thereto were clearly adopted by Congress to encourage the settlement and reclamation of lands in the western states. The Acts provided a method by which the United States could provide funds for the construction of water storage and distribution systems to aid in the reclamation of these lands, and to construct powerplants' as part of the project when power was required to operate all or any portion of the project. The Act provides that construction cost are to be repaid to the United States by the beneficiaries of the project. It was under the Reclamation Act that the initial steps were taken in 1903 for the construction of the Minidoka Project, consisting of the gravity division of the Project (Minidoka irrigation District lands) and the South Side Pumping Division (Burley Irrigation District lands), together with the Minidoka Dam and powerplant and Jackson Dam and Reservoir in Wyoming. A brief history of the Minidoka Project has been provided by Randy Bingham, Manager of Burley Irrigation District.

Section 6 of the Reclamation Act of 1902 provides that when payments required by the Act are made for the major portion of the lands irrigated from the waters of any of the works constructed under the Reclamation Act, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby-, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of Interior. Section 6 further provides that title to and management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the government until otherwise provided by Congress. (43 U.S.C. 5498). S.539 does not address the transfer of title to or the management and operation of the reservoirs constructed as part of the Minidoka Project and in which Burley Irrigation District is a space-holder. It is noteworthy that Section 6 does not address the transfer of title to the distribution facilities addressed by S-538.

The United States, in construction of the Minidoka Project, also obtained certain water rights, including natural flow and storage rights, as well as other incidental rights, such as flow rights, waste-water, ground water and return flows for irrigation of the Minidoka Project. In obtaining these rights, the United States was bound by Section 8 of the Reclamation Act of 1902, which provides, in part, "that the right to use of water acquired under the provisions of the Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." (43 U.S.C. 5372). Thus, although the United States may hold bare legal title to water rights, it is clear that equitable title is vested in the landowners or the landowners' organization.

Section 4 of the Reclamation Act of 1902, in part, provided that

The said charges (construction charges which shall be made per acre upon the entries and upon lands in private ownership which may be irrigated by this waters of any irrigation project, shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and it shall be determined equitably. (43 U.S.C. 461).

In 1914, Congress determined that whenever any legally organized water-users' association or irrigation district shall so request, the Secretary of the Interior is authorized to transfer to such water-users' association or irrigation district the care, operation, and maintenance of all or any part of the project works. (43 U.S.C. 499). In 1922, Congress authorized the Secretary to enter into a contract with any legally organized irrigation district whereby the irrigation district would agree to pay the moneys required to be paid to the United States both for the construction of the irrigation works and for operation and maintenance upon said contract being confirmed by a decree of a court of competent jurisdiction. (43 U.S.C. 511). In 1924,, Congress made it mandatory that the legally organized water users' association of an irrigation district, take over the care, operation, and maintenance of the distribution system of the projects whenever two-thirds of the irrigable area of any project, or division of a project, shall be covered by water right contracts between the water users and the United States. (43 U.S.C. 500). As an incentive for an irrigation district to assume the operation and maintenance of the project works, the 1924 Act further provided that the total accumulated net profits, as determined by the Secretary, derived from the operation of project powerplants leasing the project grazing and farmlands, and the sale or use of town-sites shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. (43

U.S.C; 6501).

As previously noted by Randy Bingham, Burley Irrigation District was organized under the laws of the State of Idaho on March 5, 1918. Burley Irrigation District is a quasi-municipal corporation under the laws of the State of Idaho, and is authorized to Acquire land and water rights and to hold said property rights in trust for the landowners included in the district and entitled to receive water from the district. By the authority granted to the irrigation district under the laws of the State of Idaho, the irrigation district can levy assessments on the lands within the district to satisfy obligations of the irrigation district, including the operation and maintenance costs incurred in operating the district and the repayment of construction costs of the project agreed to be paid to the United States under its repayment contract. By contract dated March 15, 1926, operation and maintenance of the distribution system of the South Side Pumping Division of the Minidoka Project was transferred to Burley Irrigation District, and the irrigation district agreed to assume and satisfy the construction costs incurred in the construction of the distribution system as well as the allocated share of the construction costs of storage facilities constructed by the United States. This contract was entered into pursuant to the 1924 Act of Congress above referred to. In the contract, the United States agreed to continue to operate and maintain the works used in common by the Burley and Minidoka Irrigation Districts, including the Southside Canal to the first lift station (later transferred to Burley), the Jackson Lake Reservoir in Wyoming, Lake Walcott Reservoir in Idaho, the Minidoka Dam, and the powerplant at the Minidoka Dam. These works were known as the "reserved works." Burley Irrigation District is not seeking title to these works, even though all construction costs have been paid by the irrigation district, but seeks to obtain legal title to only those works transferred to the irrigation district for care, operation and maintenance, as well as the water rights for that project. An amendatory contract was entered into between United States and Burley Irrigation District in 1961. This contract provided that title to the transferred works shall remain in the United States until otherwise provided by the Congress. (Article 13) The contract provided that Burley Irrigation District would continue to operate and maintain the transferred works previously transferred to the irrigation district for care, operation and maintenance. The 1961 contract provided that upon completion of payment of the district's construction charge obligation, it shall have a right to its share of the water supply for beneficial use on the project lands superior to any other contract of the United States for such share of the water supply, and such right shall become permanent, subject to the payment of the district in operation and maintenance obligations on the reserved works. Finally, the 1951 contract provides that after a 40-year period beginning with the year 1961: "power and energy will be provided to the district by the United States from the Minidoka powerplant and other federal plants interconnected there with when and as provision for such services is made by contracts entered into under the provisions of the Federal Reclamation Laws. Such contracts will provide such energy to the the district at rates and under conditions as favorable as are then permissible under then applicable laws relating to such powerplants. (Article 15(b)).

All construction charges of whatsoever kind or nature agreed to be paid by Burley Irrigation District to the United States have been paid in full. After 71 years of operation and maintenance of the transferred works, Burley Irrigation District seeks to have legal title to these works. Under 543-316, Idaho Code, legal title to all property acquired by an irrigation district under the laws of the State of Idaho shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for, and is dedicated and set apart to, the uses and purposes set forth in Title 43 of the Idaho code. Under Title 43, irrigation districts are authorized to acquire property for the distribution and use of water among the owners of land to which the water is appurtenant, and may establish equitable by-laws, rules and regulations as may be necessary, and just to secure the just and proper distribution of water to the landowners within the district. Title 43 of the Idaho Code also provides that the use of all water required for the irrigation of lands of any district formed under the laws of the State of Idaho, together with the rights of way for canals and ditches, sites for reservoirs, groundwater recharge projects and all other property required in fully carrying out the provisions of Title 43, are declared to be a public use, subject to the regulation and control of the state, in the manner proscribed by law.

By the passage of S-538, Burley Irrigation District also seeks to obtain legal title to those water rights hold by the United States for the benefit of lands of the irrigation district to which water rights are permanent under the 1961 contract that now exists between the United States and Burley Irrigation District. The irrigation district is not attempting to obtain legal title to its proportionate share of the water stored in reclamation storage facilities, recognizing that the number of space-holders in many of these reservoirs are numerous and that the operation and maintenance of the reservoirs is performed by the United States, and its costs recovered through assessments against the beneficial owners of the stored water. Burley Irrigation District does want some assurance that these permanent rights are affirmed.

Burley Irrigation District also stake assurance through the passage of S.538 that its right to project reserved power from the Bureau of Reclamation is not curtailed by reason of the transfer of legal title to certain water

rights and the distribution system. Finally, Burley Irrigation District and Minidoka Irrigation District seek a right of first refusal to purchase legal title to the Minidoka Dam and/or powerplant, should the United States decide to transfer such works out of federal ownership.

All concerns previously raised by the United States have been properly, addressed in this legislation, and it is respectfully submitted that those concerns have been properly dealt with. Burley Irrigation District agrees to continue to recognize the right of Minidoka irrigation District to use, with Burley Irrigation District, the gravity portion of the South Side Canal. Although Burley Irrigation District has for 71 years assumed all liability in the operation and maintenance of the distribution system of this division of the project, it has still agreed to recognize that there shall be no increase in the liability to the United States as the result of this transfer of legal title. Although Burley Irrigation District is of the opinion that the transfer of title addressed in S.538 is not significant federal action contemplated by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) in an effort to insure that compliance with this Act can be accomplished, the irrigation district has agreed to share in costs incurred by the United States in complying with said Act and other administrative costs incurred in accomplishing the acts required of the Secretary, up to the sum of \$40,000.

Notwithstanding the efforts of Burley Irrigation District to address the concerns of the United States in regard to title transfer, and the concessions, made by Burley Irrigation District to accomplish a title transfer of assets which have been fully paid for by the irrigation district, it appears that there is some possibility of opposition by the administration. The nature of this opposition has not been conveyed to Burley Irrigation District nor has the agenda of the United States been fully explained. However, recent activities of the Bureau of Reclamation give us some concern. One of our recent concerns arose from what we believe to be a rather mundane public service to be performed by Burley Irrigation District. Adjacent to the boundaries of Burley Irrigation District is Southwest Irrigation District. Until recent years, the sole water source for the landowners within southwest Irrigation District was groundwater. As the result of several years of drought, ending in 1995, groundwater tables were severely depleted. To alleviate the drought conditions, Southwest Irrigation District acquired some natural flow rights from the Snake River, and sought an agreement with Burley Irrigation District whereby Burley would transport the Southwest water through the Burley system to a point where the water could be pumped by Southwest Irrigation District to lands within that district. Burley Irrigation District agreed to enter into such a water transport agreement with the understanding that it would transport water only when the capacity of its delivery system exceeded the requirements for the delivery of water to lands within Burley Irrigation District. Arrangements were made to insure that the power used by Burley Irrigation District to pump the water through its lift stations was power purchased from a public utility and not reserve power received by Burley Irrigation District for the irrigation of its own lands, in reaching this agreement, approval was sought from the Bureau of Reclamation. The Bureau Approved the contract with the condition that it receive \$1.00 an acre-foot for each acre-foot of water delivered for Southwest Irrigation District through the system of Burley Irrigation District, which system is operated and maintained by Burley Irrigation District and the construction costs of which have been paid by Burley Irrigation District. The irrigation district has refused to enter into a contract with the Bureau of Reclamation which provides that a surcharge be paid to the Bureau for services rendered by the district for another irrigation district in the State of Idaho. When the surcharge was initially proposed by BOR, the irrigation district was assured that such a surcharge was not being sought in an effort to establish a revenue source for valuation in the district's facility transfer legislation. However, when some assurances were requested in writing, I received, as the attorney for the district, proposed language to include in the water transport agreement, a copy of which is attached hereto as Exhibit A. This language makes it clear that BOR was attempting to identify a revenue source for valuation and the language was rejected by Burley Irrigation District. Burley Irrigation District then received a letter from BOR demanding that no water be transported by Burley Irrigation District for Southwest Irrigation District without an agreement approved by BOR. A copy of that letter is attached hereto as Exhibit B. Our response to the Bureau of Reclamation is attached hereto as Exhibit C. In addition to the numerous legal restraints identified in our response prohibiting any such collection of charges by the Bureau of Reclamation for crediting to the reclamation fund, it is believed that the Bureau of Reclamation's Own rules prohibit it from receiving such surcharge and applying it to the credit of the reclamation fund. At 43 CFR, Part 403-3, revenues generated from the authorized use of reclamation water projects and project lands is defined. The rule states in part:

Revenues refers to monies generated from the use of lands. This excludes administrative fees, annual obligations paid in accordance with repayment contracts and water services contracts, monies generated from marketing of surplus power, or revenues from the rental of surplus power, and revenues from the sale of water or storage and conveyance capacity.

The Bureau of Reclamation has adopted a framework for the transfer of title to reclamation projects. It is our belief that S.538 meets this criteria and additional studies, assessments, appraisals and reports are



unnecessary to, accomplish the transfer, upon approval by Congress. The Federal Treasury, and thereby the taxpayers' financial interest, has been protected, as all construction costs have been paid by the irrigation district for both the distribution, system as well as its allocated costs under "space-holder" contracts in reclamation reservoirs. There are no applicable state laws which require compliance for the irrigation district to obtain title to the distribution facilities. The only federal law that must be dealt with is that Congress must approve and direct the transfer. There are no interstate compacts and agreements that will be affected by the transfer of title, nor are the Secretary's Native American trust responsibilities impaired in any manner. Finally, the public aspects of the project will be protected under the laws of the state of Idaho. As no change in the operation and maintenance of the distribution system will occur, it is submitted that the National Environmental Policy Act is not applicable. In any event, it would appear that the Bureau of Reclamation recognizes that a transfer of title of the distribution system of the Southside Pumping Division of Minidoka Project to Burley Irrigation District would be entitled to a categorical exclusion, as it would not significantly impact the environment and could be categorically excluded from a detailed NEPA review.

There should also be no dispute that Burley Irrigation District is competent to manage the project and is willing and able to fulfill all legal obligations associated with taking ownership of the project, including compliance with federal and state laws that apply to facilities and private ownership. It has at all times assumed full liability for all matters associated with ownership and operation of the transferred facilities, as required by Idaho law. Although the irrigation district's liability is limited by the Idaho tort claims act, as a political subdivision of the state, it has voluntarily provided liability insurance to insure that any injuries caused by the negligent acts of the district can be compensated for.

The Bureau of Reclamation should recognize that no additional payments are due to obtain title to the, distribution system operated and maintained by the district. Any attempt to obtain additional funds from the Irrigation District to obtain title would constitute a double payment by the irrigation district. It is our hope that the Bureau of Reclamation will recognize that there is no additional base value for which compensation is due the United States.

Finally, it is essential that Burley Irrigation District's right to reserved power be confirmed by Congress. At the time of the construction of Minidoka Dam, a powerplant was installed in the dam to provide power for the pumping of water to the Southside Pumping Division of the Minidoka Project. Burley Irrigation District and Minidoka Irrigation District paid for the construction costs of the Minidoka Dam which is utilized by the powerplant. By the Act of September 30, 1950, Congress authorized the construction of the Palisades Dam and Reservoir as part of the Minidoka Project to provide a supplemental water supply to irrigators in southern Idaho. There was also constructed a hydropower facility in said dam as a part of that dam and reservoir. There is no provision in the Reclamation Act that indicates that, once an irrigation district has paid its construction costs and title to certain portions of the project have been transferred to the irrigation district, the irrigation district is no longer a part of the federal reclamation project and is no longer entitled to receive benefits of the Reclamation Act of 1902 and Acts amendatory and supplemental thereto. In fact, the opposite appears. The Reclamation Act of 1902 provides that not only should reserved power be provided to the irrigation districts which have taken over the operation and maintenance of the distribution works of the project, but that excess power revenues should also continue to be provided to the landowners of the project through their irrigation district. Although the Hayden-O'Mahoney Amendment to the Reclamation Act provided that after construction costs of any reclamation project allocated to power have been repaid by power revenues, the power revenues from the sale of power in connection with such projects shall be transferred and covered in the general treasury unless otherwise provided by statute or contract, there is no similar provision that the reserved power for the reclamation project should no longer be made available. To deny Burley Irrigation District the right to reserved power from the project it was instrumental in causing to be constructed would be a severe penalty for paying off its construction costs and asking for legal title to the distribution works of the project.

If any members of the Committee have questions, I would be happy to respond to the best of my ability.

LOAD-DATE: June 11, 1997

