

# Committee on Natural Resources

Rob Bishop, Chairman  
Markup Memorandum

July 24, 2017

**To:** All Committee on Natural Resources Members

**From:** Majority Committee Staff  
Subcommittee on Water, Power and Oceans (x 5-8331)

**Mark-up:** **H.R. 3281 (Rep. Doug Lamborn, R-CO)**, To authorize the Secretary of the Interior to facilitate the transfer to non-Federal ownership of appropriate reclamation projects or facilities, and for other purposes.  
**July 25 & 26, 2017; 1324 Longworth House Office Building**

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**H.R. 3281 (Rep. Doug Lamborn, R-CO)**, *“Reclamation Title Transfer and Non-Federal Infrastructure Incentivization Act.”*

**Bill Summary:**

H.R. 3281 introduced by Rep. Doug Lamborn seeks to reduce administrative paperwork, eliminate federal taxpayer liability and empower water users by streamlining the process governing the transfer of some U.S. Bureau of Reclamation projects to non-federal interests.

**Background:**

The U.S. Bureau of Reclamation (Reclamation) is the nation's largest wholesale water supplier, providing 1 out of 5 (or 140,000) western farmers with irrigation water for 10 million farmland acres that produce 60 percent of the nation's vegetables and one quarter of its fresh fruit and nut crops. The federal agency also delivers 10 trillion gallons of water to more than 31 million people annually and is the second largest domestic producer of hydropower.<sup>1</sup> Reclamation's assets include 492 dams, 1,901 buildings and over 8,000 miles of canals in the 17 western states.<sup>2</sup>

Reclamation holds title to the individual water and power supply and delivery facilities it has constructed over the last century. The federal government provided the initial capital contribution to build the vast majority of these early projects; however, the water and power customers who benefitted from the facilities entered into long-term contracts with the federal government to repay their part of the initial taxpayer investment. Under the Reclamation Act of 1902, Reclamation may transfer day-to-day operational and maintenance responsibilities to project beneficiaries; however, the title or ownership of any facility must remain in federal

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<sup>1</sup> <http://www.usbr.gov/main/about/fact.html>

<sup>2</sup> [Id at 1](#)

ownership until Congress enacts legislation specifically authorizing such a transfer. Since 1996, more than three dozen Reclamation projects have been transferred or authorized to be transferred to local entities.<sup>3</sup>

A title transfer can provide a number of benefits to water users. A transfer can reduce regulatory paperwork and staff time at both the federal and local levels, reduce the federal backlog on repairing and upgrading infrastructure and help improve the environment and public safety. Additionally, a title transfer can reduce federal liability since the local entity assumes a transferred facility's liability.

At a June 2017 Water, Power and Oceans Subcommittee (Subcommittee) legislative hearing, Mr. Dan Keppen, Executive Director for the Family Farm Alliance stated in his written testimony, “[Title Transfers] can help reduce federal costs and liability, and allow for a better allocation of federal resources. Operational decisions are timelier and many times are more cost effective when made at the local level.

Further, maintenance and rehabilitation of our aging federally owned facilities is more effectively financed and constructed by the local agencies currently responsible for these activities.”<sup>4</sup> It is because of these and other benefits of title transfers that Reclamation included in its Fiscal Year 2018 budget language reaffirming the agency's commitment to facilitate title transfers when they are mutually beneficial to all parties.<sup>5</sup>

A number of factors influence whether a title transfer can occur. The local water district or beneficiary needs to assess whether or not the costs associated with the process is worth the benefits of taking ownership of the facility. According to the Bureau of Reclamation's “Title Transfer Checklist,” entities should consider transaction costs (i.e. costs to comply with the Endangered Species Act, National Environmental Policy Act, and National Historic Preservation Act), the future liability of the facility being transferred, the amount owed to the federal government and the potential impacts on third-parties (such as power interests), among others.<sup>6</sup>

Conversely, the federal government assesses whether the transfer meets certain criteria including: the American taxpayers financial interest must be protected; there must be compliance with all federal and state laws; the Secretary's Native American trust responsibilities must be met and the public aspects of the project must be protected, to name a few.<sup>7</sup> If the federal government and the beneficiary agree to a transfer, a Memorandum of Understanding or a Memorandum of

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<sup>3</sup> U.S. Bureau of Reclamation, Title Transfer of Projects and Facilities, *Title Transfer of Projects and Facilities of the Bureau of Reclamation*; available at: <http://www.usbr.gov/title/>

<sup>4</sup> [Submitted Testimony of Mr. Dan Keppen, Executive Director, The Family Farm Alliance, before the House Water, Power and Oceans Subcommittee legislative hearing, June 08, 2017, p. 3.](#)

<sup>5</sup> [Bureau of Reclamation Fiscal Year 2018 Budget in Brief, pg BH-36](#)

<sup>6</sup> Bureau of Reclamation, *Title Transfer Checklist*; available at: [https://www.usbr.gov/title/Title Transfer Checklist-2009.doc](https://www.usbr.gov/title/Title%20Transfer%20Checklist-2009.doc)

<sup>7</sup> [https://www.usbr.gov/title/framework\\_title\\_transfer\\_2004\\_revision.pdf](https://www.usbr.gov/title/framework_title_transfer_2004_revision.pdf)

Agreement must be signed to implement the transfer. In addition, Congress must codify the transfer in law, regardless of the size or scope of the transfer.

At a time when many of Reclamation's aging facilities depend on the uncertain federal appropriations process, the transfer of a Reclamation facility to a local irrigation district could allow that district to upgrade or repair the facility by leveraging private financing through ownership. For example, the Provo River Water Users Association (Association) in Utah wanted to pipe an open canal to enhance public safety and reduce evaporation in order to conserve water for humans and wildlife species, but did not have the financial capabilities to accomplish it (See Picture 1). Unlikely to receive funding from the federal government, the Association



**Picture 1:** Piping of the Provo Reservoir Canal in Utah, Source: Bureau of Reclamation, Upper Colorado Region

decided to pursue a title transfer in order to finance the project themselves. Congress eventually enacted legislation to convey the facility, which allowed water users to use their ownership as collateral to acquire a loan in order to complete the project.<sup>8</sup>

Some view the transfer of Reclamation projects to local water users as a way to encourage new non-federal investment in water infrastructure, but many entities involved in such title transfers have been daunted by these complex and time-consuming administrative and congressional processes.<sup>9</sup> For example, at a 2004 Subcommittee oversight hearing, Mr. Tom Knutson, former General Manager of the Loup Basin Reclamation District testified that it took over eight years for a simple title transfer that he characterized as “low hanging fruit” in the Middle Loup Division in western Nebraska to become law.<sup>10</sup> Another title transfer of nine acres and two buildings in eastern Washington's Yakima-Tieton project took over four years to pass Congress despite its non-controversial nature.<sup>11</sup>

In light of these difficulties, many of Reclamation's water customers sought reforms to the title transfer process which resulted in the agency's “Managing for Excellence”

<sup>8</sup> P.L. 108-382, October 30, 2004. Web: <https://www.gpo.gov/fdsys/pkg/PLAW-108publ382/pdf/PLAW-108publ382.pdf>

<sup>9</sup> [Testimony of Mr. Jeremy Sorensen, before the House Water, Power and Oceans Subcommittee Oversight Hearing on “Empowering States and Western Water Users Through Regulatory and Administrative Reforms.” April 13, 2016, p. 1](#)

<sup>10</sup> Testimony of Mr. Tom Knutson, General Manager, Loup Basin Reclamation District, before the House Water and Power Subcommittee oversight hearing, March 24, 2004.

<sup>11</sup> P.L. 110-229, Section 506. Web: <https://www.gpo.gov/fdsys/pkg/PLAW-110publ229/pdf/PLAW-110publ229.pdf>

administrative reform effort.<sup>12</sup> Although Reclamation has taken steps to streamline the process, many of the agency's water customers believe additional improvements are needed.

H.R. 3281 underscores Reclamation's commitment to transfer existing federal infrastructure into local ownership by simplifying and expediting the title transfer process. Modernizing this process will afford water users with greater control over and more efficient management of their water and water-related facilities while also reducing liability for the American taxpayer.

### **Major Provisions/Analysis of H.R. 3281:**

*Section 3* authorizes the Secretary of the Interior (Secretary) to convey all right, title, and interest in any eligible facility to a qualifying entity if the following criteria is met: the Secretary notifies Congress in writing of the proposed conveyance, and the reason for the conveyance, not less than 90 days before making the conveyance, and Congress does not pass a joint resolution disapproving the conveyance before that date. In addition, there is a written agreement between the Secretary and the qualifying entity for the interests in water being conveyed (if included); and interests in eligible facilities shall be conveyed by a written agreement between the Secretary and the qualifying entity (developed in consultation with existing water and power customers). Entities that operate and maintain an eligible facility at the time that the Secretary attempts to facilitate a conveyance shall have the right of first refusal to receive the conveyance under this Act.

*Section 4* requires the Secretary to establish criteria to determine which facilities are eligible for title transfer under this Act. At a minimum, the criteria shall include: the qualifying entity agrees to take title; the proposed transfer will not have an "unmitigated significant effect on the environment"; the qualifying entity intends to use the property for substantially the same purposes the property was being used prior to the transfer; the transfer is consistent with the Secretary's responsibility to protect land and water resources held in trust for federally recognized Indian Tribes; the transfer is consistent with the Secretary's responsibility to ensure compliance with international treaties and interstate compacts; and the qualifying entity agrees to pay any outstanding repayment obligation to the United States as consideration for the transfer.

*Section 5* states that no conveyance under this act may adversely impact power rates or repayment obligations. This section also directs the Secretary to apply a categorical exclusion process under the National Environmental Policy Act of 1969 on eligible facilities under this Act.

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<sup>12</sup> Bureau of Reclamation, "Managing for Excellence: An Action Plan for the 21<sup>st</sup> Century": Web: <https://www.usbr.gov/excellence/merweb.pdf>

*Section 6* establishes that once a conveyance takes place, the United States shall not be held liable for any damages, except for those caused by acts of negligence committed by the United States or its employees prior to any conveyance.

*Section 7* affirms that a conveyed property shall no longer be considered part of a Federal reclamation project, and that transfers of an entire project shall not be eligible for any benefits other than those available to a non-Federal reclamation project.

**Cost**

The Congressional Budget Office has not completed a cost estimate of the bill at this time.

**Administration Position**

At a June 2017 Water, Power and Oceans Subcommittee hearing, the Administration indicated support for the legislation, stating that “[t]he Department strongly supports the Committee’s work to better facilitate the title transfer of Reclamation facilities to non-Federal entities.”

**Effect on Current Law**

None.