

**THE BUREAU OF RECLAMATION'S TITLE
TRANSFER PROCESS AND POTENTIAL BENEFITS
TO FEDERAL AND NON-FEDERAL STAKEHOLDERS**

HEARING
BEFORE THE
SUBCOMMITTEE ON
WATER AND POWER
OF THE
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

JANUARY 17, 2018



Printed for the use of the
Committee on Energy and Natural Resources

Available via the World Wide Web: <http://www.govinfo.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

COMMITTEE ON ENERGY AND NATURAL RESOURCES

LISA MURKOWSKI, Alaska, *Chairman*

JOHN BARRASSO, Wyoming	MARIA CANTWELL, Washington
JAMES E. RISCH, Idaho	RON WYDEN, Oregon
MIKE LEE, Utah	BERNARD SANDERS, Vermont
JEFF FLAKE, Arizona	DEBBIE STABENOW, Michigan
STEVE DAINES, Montana	JOE MANCHIN III, West Virginia
CORY GARDNER, Colorado	MARTIN HEINRICH, New Mexico
LAMAR ALEXANDER, Tennessee	MAZIE K. HIRONO, Hawaii
JOHN HOEVEN, North Dakota	ANGUS S. KING, JR., Maine
BILL CASSIDY, Louisiana	TAMMY DUCKWORTH, Illinois
ROB PORTMAN, Ohio	CATHERINE CORTEZ MASTO, Nevada
SHELLEY MOORE CAPITO, West Virginia	TINA SMITH, Minnesota

SUBCOMMITTEE ON WATER AND POWER

JEFF FLAKE, *Chairman*

JOHN BARRASSO	CATHERINE CORTEZ MASTO
JAMES E. RISCH	RON WYDEN
MIKE LEE	BERNARD SANDERS
BILL CASSIDY	JOE MANCHIN III
ROB PORTMAN	TAMMY DUCKWORTH
SHELLEY MOORE CAPITO	TINA SMITH

BRIAN HUGHES, *Staff Director*
PATRICK J. MCCORMICK III, *Chief Counsel*
LANE DICKSON, *Professional Staff Member*
MARY LOUISE WAGNER, *Democratic Staff Director*
SAM E. FOWLER, *Democratic Chief Counsel*
CAMILLE TOUTON, *Democratic Professional Staff Member*

CONTENTS

OPENING STATEMENTS

	Page
Flake, Hon. Jeff, Subcommittee Chairman and a U.S. Senator from Arizona ...	1
King, Jr., Hon. Angus S., Subcommittee Ranking Member and a U.S. Senator from Maine	7

WITNESSES

Ewell, Austin, Deputy Assistant Secretary for Water and Science, U.S. Department of the Interior	8
Arrington, Paul L., Executive Director/General Counsel, Idaho Water Users Association, Inc.	13
Brown, Jerry, General Manager, Contra Costa Water District	21
DeVries, Michael, General Manager of Metropolitan Water District of Salt Lake & Sandy, and Director of Provo River Water Users Association	27
Phillips, Jason, Chief Executive Officer, Friant Water Authority, CA	33

ALPHABETICAL LISTING AND APPENDIX MATERIAL SUBMITTED

Arrington, Paul L.:	
Opening Statement	13
Written Testimony	15
Response to Question for the Record	57
Brown, Jerry:	
Opening Statement	21
Written Testimony	23
Responses to Questions for the Record	59
CleanWater Services:	
Letter for the Record	72
DeVries, Michael:	
Opening Statement	27
Written Testimony	29
Response to Question for the Record	61
Ewell, Austin:	
Opening Statement	8
Written Testimony	10
Responses to Questions for the Record	55
Family Farm Alliance:	
Statement for the Record	2
Flake, Hon. Jeff:	
Opening Statement	1
King, Jr., Hon. Angus S.:	
Opening Statement	7
Phillips, Jason:	
Opening Statement	33
Written Testimony	35
Responses to Questions for the Record	69

**THE BUREAU OF RECLAMATION'S
TITLE TRANSFER PROCESS AND
POTENTIAL BENEFITS TO FEDERAL
AND NON-FEDERAL STAKEHOLDERS**

WEDNESDAY, JANUARY 17, 2018

U.S. SENATE,
SUBCOMMITTEE ON WATER AND POWER,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:00 a.m. in Room SD-366, Dirksen Senate Office Building, Hon. Jeff Flake, Chairman of the Subcommittee, presiding.

**OPENING STATEMENT OF HON. JEFF FLAKE,
U.S. SENATOR FROM ARIZONA**

Senator FLAKE [presiding]. This hearing of the Senate Energy and Natural Resources Subcommittee on Water and Power will come to order.

The purpose of today's hearing is to receive testimony on the Bureau of Reclamation's title transfer process and potential benefits to federal and non-federal stakeholders. This is our latest in a series of hearings and roundtables as the Subcommittee prepares a water supply bill to deal with some of the pressing needs in Arizona and throughout the West.

We have heard proposals on better managing existing infrastructures, streamlining the permitting process for new infrastructure, storing floodwater for future use and improving access on project financing.

I look forward to today's discussion on how local ownership of water facilities can help speed up maintenance and improvements to Western water infrastructure. Voluntary title transfers are also an opportunity to relieve pressure on the federal budget.

Represented on the panel today are a number of water agencies who have repaid their obligations to the Bureau of Reclamation and have taken over operations of their projects. We also have panel members whose agencies have successfully received the title to their projects, and I also look forward to learning more about their experiences.

I would like to add into today's record the prepared testimony of Dan Keppen, Executive Director of the Family Farm Alliance, an organization that has pushed for improvements to the title transfer process for decades.

[The information referred to follows:]



P.O. Box 216 Klamath Falls, Oregon 97601
www.familyfarmalliance.org

**Testimony for the Hearing Record of Dan Keppen
Executive Director
The Family Farm Alliance**

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

**Hearing to Examine the Bureau of Reclamation's Title Transfer Process and
Potential Benefits to Federal and Non-Federal Stakeholders
January 17, 2018**

Chairman Flake, Ranking Member King, and Subcommittee Members:

Thank you for this opportunity to present testimony for the hearing record on behalf of the Family Farm Alliance (Alliance). My name is Dan Keppen, and I serve as the executive director for the Alliance, which advocates for family farmers, ranchers, irrigation districts, and allied industries in seventeen Western states. The Alliance is focused on one mission - To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers. Our members include irrigation districts and water agencies across the West that are responsible for the operation and maintenance of most of the Bureau of Reclamation's water supply and distribution facilities. Several of our members have worked with the federal government over the past two decades to transfer all or parts of Bureau of Reclamation (Reclamation) projects to these local operating entities. In fact, I would like to recognize two of the hearing witnesses, Mr. Paul Arrington, executive director of the Idaho Water Users Association, in that one of the first title transfers of a Reclamation district was approved by 105th Congress to the Burley Irrigation District (IDAHO) in 1998 and was facilitated by the Alliance, and Mr. Jason Phillips, CEO of the Friant Water Authority, a founding member of the Alliance.

The Family Farm Alliance supports the transfer of Reclamation-owned facilities to willing non-federal project beneficiaries, and would advocate for congressional authorization for the Secretary of the Interior to better facilitate the timely transfer of appropriate Reclamation projects or facilities into non-federal ownership.

Overview of Family Farm Alliance Philosophy

The members of the Family Farm Alliance believe that streamlined and efficient federal regulation and decision-making are the keys to sound Western water policy. Wherever possible and

practicable, meaningful delegation of decision-making authority and ownership responsibility should be transferred to the local level.

The Alliance believes that in the water arena, a “one size fits all approach” dictated from Washington is counterproductive and ineffective. Federal laws and regulations should be drawn to recognize that facts and circumstances can vary significantly from region to region. Given the federal ownership and liability for each Reclamation-owned water project, bureaucratic inefficiencies sometimes overlay the process of managing and operating this important water infrastructure, even though operations and maintenance are typically performed by non-federal state-based local entities, such as irrigation or water districts. Such facilities, known as “transferred works”, where project operation, maintenance and replacement responsibilities (other than title) are contracted to the non-federal entity, are still owned by the federal government, superimposing a layer of bureaucratic federal control over a project that has, for all intents and purposes, been transferred (other than in title) to the non-federal entity. Many of these projects are ripe for title transfer, yet there remain many barriers to an efficient transfer of title out of federal ownership to these local operating entities.

Role of Family Farm Alliance in Advancing Project Title Transfers

As noted above, Reclamation’s transfer of canals, natural flow water rights, pumping plants, roads and other assets to Burley Irrigation District (BID) in 2000 was a watershed moment in the history of Western irrigated agriculture and the title transfer process. In the years leading up to that transfer, the BID demonstrated its ability to operate, maintain and manage its facilities in a highly professional and competent manner. The effort to transfer the facilities into BID ownership took eight years after the district completed repayment of the Project’s construction cost.

The BID transfer was a primary objective of an initiative launched by the Alliance in 1997. That year, the Alliance distributed a survey to determine the level of interest among our members in developing a more coordinated and concerted effort to facilitate Reclamation project transfers to local water users. We decided to gather this information because of the lack of progress on pending legislation in Congress and a less than acceptable ability of Reclamation to process project transfer requests from local interests on a timely and effective basis.

Based on an overwhelmingly positive response received in these surveys, the Alliance Board of Directors established a “Project Transfer Council” and launched a related pilot project. The primary objective was to lay the groundwork for concerted Congressional action on project transfers with an immediate focus on helping both the Carlsbad (NEW MEXICO) and Burley irrigation districts with their project transfer legislation, both in Congress and with the Clinton Administration. By assisting both districts – both of which had been pursuing facilities transfers for quite some time and who were at the leading edge of title transfer efforts – we intended to create positive precedents others could follow.

In late 1997, the Alliance conducted a variety of organized activities intended to facilitate positive Congressional action on pending project transfer legislation. That effort was successful, and ultimately led to the historic transfer to BID two years later. Over a dozen other projects and facilities have been transferred to local interests since that time. Those local agencies are usually

the irrigation or water district that has fulfilled or is close to fulfilling its obligation to pay for construction of the project.

Benefits and Regulatory Challenges Associated with Title Transfers

The Alliance believes title transfers are one of several positive means of strengthening control of water resources at the local level. In addition, they can help reduce federal costs and liability, and allow for a better allocation of federal resources. Operational decisions are more timely 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. Title transfer allows for these operational and maintenance benefits to thrive, as title ownership of these facilities is placed with the local beneficiaries and the irrigation districts involved in managing these projects for their benefit. This allows for a broader portfolio of financing alternatives for cost effective reinvestment in these facilities to be made available at the local level.

Despite the benefits, local water agencies are many times discouraged from pursuing title transfer because the process is expensive and slow. Environmental analyses can be time-consuming, even for uncomplicated projects that will continue to be operated in the same manner as they always have been. National Environmental Policy Act (NEPA) and the procedures required to address real property and cultural and historic preservation issues are often very inefficient, time consuming and expensive. Moreover, every title transfer currently requires an act of Congress to accomplish, regardless of whether the project covers 10 acres or 100,000 acres.

“Managing for Excellence” Approach to Title Transfers

The challenge associated with title transfers has been a major concern for our members in recent years, as well. We spent considerable time ten years ago working with Reclamation on the title transfer process via the “Managing for Excellence” (M4E) process. M4E was Reclamation’s response to *Managing Construction and Infrastructure in the 21st Century Bureau of Reclamation*, a comprehensive report completed in 2006 by the National Research Council (NRC) of the National Academy of Sciences. Executing the action plan has been primary initiative for Reclamation. Alliance engagement in M4E and the related NRC study has been a priority with the Alliance since early 2005.

Through the M4E process, Reclamation developed a legislative concept for a programmatic approach intended to simplify transfer of federally owned irrigation facilities to the non-federal operating entity. The idea was to create a set of criteria to identify projects whose transfer to local ownership would not impact the environment or taxpayers. Facilities meeting the criteria could be transferred out of federal ownership by the Secretary of the Interior under a new standing authority to be granted by Congress. The Reclamation approach envisioned the use of existing procedures (such as a categorical exclusion) under the NEPA to streamline environmental reviews for proposed title transfers meeting the programmatic criteria.

In essence, Reclamation’s approach would have requested that Congress delegate to the Secretary of the Interior the authority to transfer the ownership of eligible water projects to the non-federal

operating entity. Consistent with the legislation, this could greatly reduce institutional barriers, such as time and expense that can impede transfers beneficial to both local interests and the federal government.

The Complexities and Importance of Project / Facilities Title Transfers

Reclamation projects were built to grow the West, with the implied intent that, once the repayment contracts were paid off, Reclamation would turn these projects over to the local districts to operate, and in due time, transfer the title to the facilities. That simple concept has morphed over the years into a process that can be expensive, uncertain and very lengthy.

The Alliance believes Congress could make the process of title transfer for some projects much more user-friendly through this approach; however, we question what kind of transfer process the Secretary and Reclamation recommend. Federal legislation could be introduced to create an improved, more efficient manner for title transfers to move forward, and Congress must continue to oversee Reclamation's implementation of any legislation in order to not create more barriers in the process.

The Alliance believes such legislation would help those project beneficiaries interested in title transfer, in that the process of passing federal legislation for each and every title transfer would be greatly simplified through Secretarial order. However, some projects will continue to be more complex and still require lengthy NEPA, Endangered Species Act (ESA) and other expensive processes even with any new authorities provided through legislation.

Take, for example, the Newlands Project in Nevada, the oldest Reclamation project in the West. Today, almost 100 years after taking over the operations and maintenance responsibilities of the Newlands Project and after having repaid all project construction costs, the transfer of Project facilities to the Truckee-Carson Irrigation District (TCID) has not been achieved.

Part of the reason transfer has not occurred relates to funding. TCID has analyzed the prospect of a facilities transfer several times, only to conclude that the NEPA process would cost millions of dollars, and resulting in an uncertain outcome. Some of the reasons for this expense include the fact that TCID has been for years dealing with complex issues in the operation of the Project related to the ESA, Tribal water rights, and the fact that the largest land owner in the TCID is the U.S. Fish and Wildlife Service.

TCID could not sustain such an outlay and still financially support its operational and maintenance duties. For example, TCID is currently planning to design, fund and construct the permanent repair to the Truckee Canal. The NEPA work associated with developing an Extraordinary Operation and Maintenance Environmental Impact Statement for that project alone will exceed \$8 million, an amount that exceeds the district's annual budget. District managers believe that the cost and scope of an environmental review associated with a proposed Newlands Project facilities transfer would dwarf those associated with this canal repair effort.

The magnitude of the cost and time required to address historic preservation and NEPA issues for more complicated project title transfers in other parts of the West is staggering. This has proved to

be daunting for other districts and effectively dampens enthusiasm for some districts to even begin undertaking transfer planning efforts. It is clear to the Alliance that other congressional efforts to streamline and simplify environmental review processes could greatly benefit these more complex title transfers.

This is abundantly clear when considering several of the other more controversial Reclamation projects – for example, the Central Valley Project (CALIFORNIA) or the Klamath Project (CALIFORNIA/OREGON). In order for title transfer to be successful for these and other more complicated projects, Congress must continue to play a major role in making title transfers more efficient and streamlined.

The Alliance believes the importance of transfers should be re-examined, with the understanding that there are many benefits to local entities and to the federal government that are yet to be measured. As outlined above, we know there are irrigation districts successfully operating and maintaining transferred works in the West that are interested in acquiring title to Reclamation facilities. Experience throughout the West demonstrates that when control and ownership of projects is assumed by local interests, the projects are run more cost effectively and with far fewer items of deferred maintenance and less bureaucratic red-tape. In addition, the federal government holds title to these facilities only because federal funds that have long since been repaid were used to help construct them.

Reclamation and Western water users continue to confront the massive challenges posed by our aging water infrastructure. Traditional funding opportunities that used to be provided by the federal government to tackle aging water infrastructure no longer exist. Now, where limited federal dollars are available for infrastructure projects, they are stretched to meet the competing needs of highways, airports, water and sewer projects in urban areas. However, if a local district gains title to its facilities, it can take advantage of several financing opportunities and partner with other local, state, federal and /or non-governmental programs to rehabilitate their facilities.

Finally, one other barrier for many title transfers in the past has been the continued use of federal project power at cost-based contracted rates to operate Reclamation projects after a title transfer. Many times, Reclamation projects were developed to include hydroelectric or other power sources that run pumps and other facilities at a low cost, thus ensuring these water supply development projects successfully and economically operated throughout their history. In many cases, these projects continue to require this power at these project rates in order to remain economically viable for the farms and ranches dependent on the water supply. The Alliance believes this issue must be resolved as many future title transfers will depend on the continuation of project power provided at current cost-based contracted rates.

On behalf of the Family Farm Alliance, I would like to thank Chairman Flake, Ranking Member King, and the Subcommittee for holding this important oversight hearing. Thank you for this opportunity to present the views of the Alliance for the hearing record.

Senator FLAKE. With that, I will now turn to the Ranking Member, Senator King.

**STATEMENT OF HON. ANGUS S. KING, JR.,
U.S. SENATOR FROM MAINE**

Senator KING. Thank you, Mr. Chairman, I am delighted to be here this morning.

This is one of those issues where there are significant differences between regions of the country.

In my State of Maine, water is an enormous asset. I remember having officials of a foreign company fly over Maine, and I asked them their impression. They said one word, water. They had never seen so many lakes and streams and access to water.

This is particularly an issue that is of grave importance to the West, but it is one that I am interested in and I am delighted to participate in this hearing.

We are going to talk today about the title transfer process where the Bureau of Reclamation does work with interested parties to transfer ownership of certain facilities. These transfers currently require an Act of Congress. They are legislative approaches that we are talking about that would remove Congressional approval requirement in some processes, and we are going to hear more about some of those opportunities today.

When done appropriately, I believe that title transfers can provide mutual benefits, and I hope we are going to hear about this from you gentlemen today, to the government and to the project partners. It can help address aging infrastructure, provide greater autonomy and flexibility in managing the facilities.

The parameters that define which projects make good candidates for title transfer are important, however. Not all title transfer proposals will be right for all parties and we need to ensure that the operation of these facilities are done in accordance, of course, with our environmental laws.

I look forward to hearing from our witnesses and learning more about the different perspectives of how title transfer can be an important tool in upgrading our country's aging infrastructure, if done in the right way.

Thank you, Mr. Chairman.

Senator FLAKE. Thank you, Senator King.

Thank you for joining us today. We appreciate your expertise. We will go ahead and do a couple of introductions and move on to the testimony.

We begin this panel with Mr. Austin Ewell, Deputy Assistant Secretary for Water and Science at the U.S. Department of the Interior. Next, we will have Mr. Paul Arrington, Executive Director and General Counsel of the Idaho Water Users Association. Then we will have Mr. Jerry Brown, General Manager of Contra Costa Water District. Next is Mr. Mike DeVries, General Manager for the Metropolitan Water District of Salt Lake & Sandy, as well as the Director of Provo River Water Users Association. Finally, we have Mr. Jason Phillips, CEO of Friant Water Authority.

I want to thank you for the testimony that you will provide today. Please limit your testimony to no more than five minutes,

if possible, so we can maximize time for questions. Your full remarks, obviously, will be part of the record.

With that, the Committee recognizes Mr. Ewell.

STATEMENT OF AUSTIN EWELL, DEPUTY ASSISTANT SECRETARY FOR WATER AND SCIENCE, U.S. DEPARTMENT OF THE INTERIOR

Mr. EWELL. Good morning. Thank you very much for having me here today. I'd also like to thank Lane for organizing and helping with the rescheduling.

Chairman Flake, Ranking Member King and members of the Subcommittee, I am Austin Ewell, the Deputy Assistant Secretary for Water and Science at the Department of the Interior. The subject of today's hearing is one with which the Department is very familiar.

The Department strongly supports Congress' efforts to better facilitate the title transfer of Reclamation facilities to non-federal entities. We appreciate the opportunity to engage in this discussion to share our knowledge and experiences with title transfers and learn from the stakeholders sitting alongside me today.

For many years, Reclamation and interested stakeholders have been working together, along with other federal and state agencies and interested stakeholders, to negotiate the terms and conditions of specific title transfers. Unfortunately, even for simple transfers, this can be a time-consuming and costly process.

In many cases, otherwise non-complicated candidates for title transfer have not proceeded because of the cost and time it takes to complete the required process and receive Congressional approval.

Since 1996, Reclamation has transferred title to thirty projects or parts of projects across the West pursuant to various Acts of Congress. These title transfers generally have provided mutual benefits to both Reclamation and the non-federal entities involved.

Over time Reclamation recognized that there were many more entities that might be good candidates to take title, but had not pursued it for various reasons. In an effort to work with stakeholders who are interested in pursuing title transfers, Reclamation developed a process to facilitate additional title transfers in a consistent and comprehensive way known as the Framework for the Transfer of Title.

This process has allowed interested non-federal entities to work with and through Reclamation to identify and address issues that will enable title transfers to move forward. We have found that this process allows interested parties to address issues up front, before going to Congress to obtain a title transfer authorization. And while we have had some success, we see that the current process can be improved upon as it still takes too long and discourages some good candidates from coming forward.

The Department would welcome the opportunity to work with the Committee to draft title transfer legislation. There are a few key considerations which we believe should be considered in any potential legislation. First, the legislation should authorize the Secretary, through the Bureau of Reclamation, to administratively transfer title to projects and facilities based upon the establishment

of specific eligibility criteria. Second, the process to develop title transfer agreements under a title transfer program should be open, public, and transparent. Third, as there currently is no categorical exclusion that applies to title transfers under the National Environmental Policy Act, Reclamation believes that the development of a categorical exclusion, depending upon its structure and content, would be a logical and helpful tool. Fourth, the existence of hydropower on a Reclamation project provides additional complexities that need to be addressed by legislation, including issues related to Federal Energy Regulatory Commission licensing and federal power marketing by the Power Marketing Administrations. Because of this complexity, Reclamation has not transferred any facilities that have included power generation facilities, but we are open to working through these matters with the Committee and our stakeholders. Finally, Reclamation recommends statutory language to ensure Reclamation law continues to control project water regardless of the title transfer and especially in circumstances where only a portion of a project is being transferred. This is important to ensure the transfer does not have an adverse impact on other project beneficiaries.

In conclusion, we are encouraged by the Committee's interest in title transfer of Reclamation facilities and look forward to working with the Congress to achieve our mutual goal of ensuring title transfers are beneficial to all parties.

Thank you very much.

[The prepared statement of Mr. Ewell follows:]

**Statement of Austin Ewell
Deputy Assistant Secretary for Water and Science**

**U.S. Department of the Interior
Before the
Energy and Natural Resources Committee
Subcommittee on Water and Power
U.S. Senate
on**

Reclamation Title Transfer Practices

January 17, 2018

Chairman Flake, Ranking Member King, and members of the Subcommittee, I am Austin Ewell, the Deputy Assistant Secretary for Water and Science at the Department of the Interior. I am pleased to provide the views of the Department of the Interior (Department) on title transfer practices at the Bureau of Reclamation (Reclamation). The subject of today's hearing is one with which the Department is very familiar.

The Department strongly supports Congress' efforts to better facilitate the title transfer of Reclamation facilities to non-Federal entities. We appreciate the opportunity to engage in this discussion to share our knowledge and experiences with title transfers and learn from the stakeholders sitting alongside me today. As you may know, Reclamation provided testimony at a House title transfer hearing in June 2017, and we are tracking the issue closely during this Congress. This statement draws upon many of the themes expressed at that hearing.

Background

Under Reclamation law, title to Reclamation projects, lands, and facilities must remain with the United States until such time as a title transfer is authorized by Congress. For many years, Reclamation and interested stakeholders have been working together, along with other federal and state agencies and interested stakeholders, to negotiate the terms and conditions of specific title transfers. Unfortunately, even for simple transfers, this can be a time consuming and costly process. In many cases, otherwise non-complicated candidates for title transfer have not proceeded because of the cost and time it takes to complete the required process and receive congressional approval.

Since 1996, Reclamation has transferred title to thirty (30) projects or parts of projects across the West pursuant to various acts of Congress. These title transfers generally have provided mutual benefits to both Reclamation and the non-federal entities involved. Over time, Reclamation recognized that there were many more entities that might be good candidates to take title, but had not pursued it for various reasons. In an effort to work with stakeholders who are interested in pursuing title transfers, Reclamation developed a process to facilitate additional title transfers in a consistent and comprehensive way known as the *Framework for the Transfer of Title*¹. This

¹ https://www.usbr.gov/title/framework_title_transfer_2004_revision.pdf

process has allowed interested non-federal entities to work with and through Reclamation to identify and address issues that will enable title transfers to move forward. We have found that this process allows interested parties to address issues up front, before going to Congress to obtain a title transfer authorization. And while we have had some success, we see that the current process can be improved upon as it still takes too long and discourages some good candidates from coming forward.

Our strong support for title transfer legislation was referenced in the President's Fiscal Year 2018 budget request, which identifies "Bureau of Reclamation Title Transfer" as a legislative proposal we support. Our support for this concept is grounded in our aim to enable local water managers to make their own decisions to improve water management at the local level, while allowing Reclamation to focus management efforts on projects with a greater federal nexus. The enactment of title transfer legislation would be the culmination of Reclamation's longstanding experience with interested stakeholders.

Important Considerations for Title Transfer Legislation

Reclamation and the Department would welcome the opportunity to work with the Committee to draft Title Transfer legislation, and as stated at the House hearing referenced previously, there are a few key considerations which we believe should be considered in any potential legislation.

First, the legislation should authorize the Secretary, through the Bureau of Reclamation, to administratively transfer title to projects and facilities based upon the establishment of specific eligibility criteria. Those criteria should focus on ensuring that the terms and conditions of title transfer agreements protect the project purposes for which the facilities were authorized; protects the contractors and the other stakeholders of the facilities who enjoy benefits from these facilities; protects the public and tribal entities as well as the environmental resources that may be impacted by the Project facilities and protect the Federal financial investment. We look forward to working with the Committee on establishing and defining these criteria.

Second, the process to develop title transfer agreements under a title transfer program should be open, public, and transparent.

Third, as there currently is no categorical exclusion that applies to title transfers under the National Environmental Policy Act (NEPA), Reclamation believes that the development of a categorical exclusion, depending upon its structure and content and subject to approval by the Council on Environmental Quality, would be a logical and helpful tool. We would like to work with the Committee to clarify and define the conditions and requirements that ought to be included in the categorical exclusion that would be developed as a result of any potential legislation.

Fourth, the existence of hydropower on a Reclamation project provides additional complexities that need to be addressed by legislation, including issues related to Federal Energy Regulatory Commission (FERC) licensing and federal power marketing by the Power Marketing Administrations. For example, the transfer of Reclamation-owned and operated hydropower facilities to a non-federal entity would require the non-federal entity to obtain a FERC license to

continue operation of the hydropower facilities. This would likely add additional costs and burdens to the non-federal entity in that they would be required to both apply for the FERC license, an extensive process, and then once the FERC license is issued, to adhere to any operational conditions associated with that license. Historically, because of this complexity, Reclamation has not transferred any facilities that have included power generation facilities, but we are open to working through these matters with the Committee and our stakeholders.

Fifth, Reclamation recommends statutory language to ensure Reclamation law continues to control project water regardless of the title transfer and especially in circumstances where only a portion of a project is being transferred. This is important to ensure the transfer does not have an adverse impact on other project beneficiaries.

Conclusion

Reclamation strongly supports expanding the number of projects and facilities that are transferred out of Federal ownership and we believe that the process for making this happen is key to our success. We have found that we are most successful when the process is collaborative, open, and inclusive – so that all the stakeholders with an interest in the operations of the facilities have an opportunity to have their concerns and views heard. We believe a legislative pronouncement containing the concepts summarized in this statement will encourage more entities to pursue title transfer while making the process itself smoother and more trouble free.

In conclusion, we are encouraged by the Committee's interest in title transfer of Reclamation facilities, and look forward to working with the Congress to achieve our mutual goal of ensuring title transfers are beneficial to all parties.

This concludes my written statement. I would be pleased to answer questions at the appropriate time.

Senator FLAKE. Thank you.
Mr. Arrington.

**STATEMENT OF PAUL L. ARRINGTON, EXECUTIVE DIRECTOR/
GENERAL COUNSEL, IDAHO WATER USERS ASSOCIATION, INC.**

Mr. ARRINGTON. Thank you, Senator Flake.

Chairman Flake, Ranking Member King, members of the Subcommittee, my name is Paul Arrington. I'm the Executive Director and General Counsel for the Idaho Water Users Association. I appreciate the opportunity to present testimony today on behalf of Idaho Water Users relating to the Bureau of Reclamation's title transfer process.

At the outset, I'd like to express my appreciation to Lane and other members of the Committee staff for working to coordinate this hearing. I also want to express my appreciation to the Committee for moving forward with the nomination of Brenda Burman as a Commissioner of Reclamation. She has long been a friend of the water user community, and we look forward to working with her.

In Idaho, we feel especially lucky. We also get the opportunity to work with Lorri Grey, the Reclamation's Regional Director. Like Commissioner Burman, she is a friend of the water community. In fact, Lorri and I were chatting just last night about this testimony, and she reiterated to me that title transfer is a mutually beneficial program and that a streamline process is needed for many title transfer processes or opportunities.

One of the reasons I believe I was asked to testify today is because Idaho has a fairly rich history involving title transfer. In fact, one of the first successful Reclamation title transfers occurred in Idaho with the Burley Irrigation District in 1998. Since that time, three additional, excuse me, three additional entities have succeeded in obtaining title transfer. Another one is in the process right now and two others will commence the process shortly.

We've talked a little bit today through testimony and in opening comments about the benefits associated with title transfer, local control of water resources, reducing or eliminating federal cost and liability associated with owning aging infrastructure, greater flexibility in access to financing in the operation and control of facilities, greater enforcement of easements and easier permitting for things like easement crossings.

At the end of the day, in short, title transfer allows local water users to quickly and efficiently manage their system, something that can be difficult under federal ownership. The time and expense required due to NEPA analysis and getting/obtaining Congressional approval can be daunting and leads some to avoid going through the title transfer, some that might be qualified for it. In Idaho's experience, a title transfer can take upwards of ten years and \$200,000 to accomplish.

But there is another hurdle to title transfer that is impacting Idaho entities' desire and willingness to go through the process. That is the risk of losing project power through the title transfer process. This power provided a cost-based contracted rates is vital to the continued viability of these Reclamation projects.

One such entity is the A&B Irrigation District in Southern Idaho. This is an entity that relies on project power to maintain affordable assessments and the risk of losing project power causes it to choose not to participate in the title transfer process. A&B is located in a center of Idaho's Snake River plain. For nearly three decades water users throughout the plain have experienced declining water supplies. Wells have been redrilled, moved and abandoned as water users have worked to protect their water supplies.

Priority to the Administration is the norm throughout the plain. In 2009, the Idaho Water Resource Board adopted a comprehensive aquifer management plan that included a goal to change the aquifer budget by 600,000 acre-feet annually. The Department of Water Resources recently designated the area a groundwater management area.

Recharge is a tool to help this water supply. Importantly, areas accessible by A&B's canals are prime recharge areas that will benefit the whole plain, including Reclamation storage projects. Unfortunately, the risk of losing its project power, though, will prevent, may prevent, A&B from taking the opportunity to participate in the title transfer process.

While a valuable tool, title transfer can be approved. As this Subcommittee may contemplate possible legislation on title transfer, we would suggest the following considerations: First, not every title transfer should require a full NEPA analysis. As Mr. Ewell just discussed, there are opportunities, potentially, to have a categorical exemption for certain title transfers. Second, not all title transfers should require an Act of Congress. And third, access to project power should not be eliminated simply because of the title transfer process. Provisions should be included to provide that in certain circumstances access to project power may be maintained.

Thank you for the opportunity to testify today. I look forward to answering any questions you might have.

[The prepared statement of Mr. Arrington follows:]

**Testimony of Paul L. Arrington
Executive Director / General Counsel
Idaho Water Users Association, Inc.**

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

**Hearing on the Bureau of Reclamation's Title Transfer Process
January 17, 2018**

Chairman Flake, Ranking Member King, and Subcommittee Members:

Thank you for this opportunity to present testimony on behalf of Idaho water users relating to the Bureau of Reclamation's (Reclamation) Title Transfer process. My name is Paul Arrington. I am Executive Director and General Counsel for the Idaho Water Users Association (IWUA). We represent approximately 300 canal companies, irrigation districts, water districts, ground water districts, municipal and public water suppliers, hydroelectric companies, aquaculture interests, agri-businesses, professional firms, and individuals – all dedicated to the wise and efficient use of Idaho's water resources.

IWUA is closely associated with both the National Water Resources Association (NWRA) and the Family Farm Alliance. These organizations represent agricultural and municipal water providers, family farmers, ranchers and other water users throughout the western United States. Together, our groups work tirelessly to promote, aid and assist the development, control, conservation, preservation and utilization of Idaho's water resources – as well as the water resources of other western states. The Family Farm Alliance has provided the Subcommittee with additional written testimony on this matter. In addition, on June 8, 2017, both the Family Farm Alliance and NWRA submitted testimony relating to the then draft Reclamation Title Transfer Act in the House of Representatives (now H.R. 3281).

Idaho's Rich History of Title Transfer

Idaho has a rich history of Title Transfer involving Reclamation projects. In fact, one of the first Title Transfers of a Reclamation project involved the Burley Irrigation District in Southern Idaho in 1998.

Since that time, other successful Idaho Title Transfers include Nampa & Meridian Irrigation District in 2001, Fremont Madison Irrigation District in 2004, and American Falls Reservoir District #2 in 2008. Each of these Title Transfers were successful due, in large part, to the demonstrated ability by these entities to operate, maintain and manage their facilities in a highly professional and competent manner.

In addition, Pioneer Irrigation District, in Southwest Idaho, is currently working through the Title Transfer process and the Lewiston Orchards Irrigation District in Lewiston, Idaho will begin the

Title Transfer process in the coming years. Finally, the Minidoka Irrigation District is currently waiting on Reclamation to draft a Memorandum of Understanding outlining the issues to be addressed in a title transfer.

Idaho is not alone in its experience with title transfer. From Arizona to Washington State, water users and the federal government have benefited from title transfer. Many of these transferred projects have been operating successfully in a post title transfer environment for decades. I have attended several meetings with the NRWA and Family Farm Alliance and water users in Colorado, Washington State, and Utah that have also expressed interest in future title transfers.

Title Transfer is a Beneficial Process that Can be Improved

Over the past 115 years, Reclamation has planned, designed and constructed numerous irrigation projects in the West. These projects have become vital to the farms, ranches and rural communities that have sprung up because of these Reclamation investments. Many of these projects either have been paid for by the project beneficiaries or are close to being paid out. Yet, the process of transferring the title to these facilities is not automatic (as with a house or a car), and in fact can be so expensive, time consuming or complex that many irrigation districts don't even consider Title Transfer as a realistic option.

Title Transfer can and does benefit the nation's water user community. Reclamation characterizes the Title Transfer process as a "commitment to a Federal Government that works better and costs less."¹ "The transfer of title will divest Reclamation of the responsibility for the operation, maintenance, management, regulation of, and liability for the project and will provide the non-Federal entity with greater autonomy and flexibility to manage the facilities to meet their current needs."²

IWUA agrees with Reclamation. Title Transfer is a great program. Title Transfer allows for local control of Idaho's water resources. It reduces federal costs and liability associated with owning aging infrastructure. It allows operational decisions to be made in a timelier and more cost-effective manner. Financing for maintenance and rehabilitation is more accessible. Title Transfer will allow water users to quickly and efficiently address issues as they arise – something that is rarely possible under Federal ownership. For example, East Greenacres Irrigation District is a Reclamation project located in Post Falls, Idaho. Post Falls, like many areas in Idaho, is experiencing a significant population growth. At times, East Greenacres' pipelines cross through ground slated for development. Through negotiations with the developers, the pipelines are moved – however, the federal pipeline easements remain. In one such instance, an agreement to move a pipeline, and the ultimate moving of that pipeline, occurred nearly 10 years ago. Yet, the lots remain undeveloped because the federal easement remains on the property. In other words, even though the pipelines have been moved and no pipelines exist in the historical easement, a cloud remains on the title of those lots due to the existence of an easement that is no longer being used. Although requests to remove that federal easement have been in place for nearly a decade,

¹ *Framework for the Transfer of Title Bureau of Reclamation Projects* (updated Sept. 2004) (https://www.usbr.gov/title/framework_title_transfer_2004_revision.pdf).

² *Id.*

it remains on the property. Had it owned these facilities, East Greenacres could easily and quickly vacate the easement, allowing the development to move forward.

The benefits of Title Transfer are clear. However, the exorbitant time and expense required to accomplish a Title Transfer – due primarily to what we would consider to be excessive environmental review under NEPA – has been a deterrent for many water users. We support efforts to improve this process in a manner that will make Title Transfer more affordable and accessible.

Lessons Learned from the Title Transfer Process

Idaho's rich history involving Title Transfer gives our water users a unique perspective on the current workings of the Title Transfer process. It is a complicated process. In fact, Reclamation's checklist summarizing the information necessary to accomplish a title transfer is 8-pages long.³

There are opportunities for improvement in this process. Perhaps the greatest hurdles for those desiring to take advantage of the Title Transfer process are the time and expense required to accomplish a transfer. The process can take nearly a decade and ultimately requires an act of Congress to complete. This is no small feat!

The Burley Irrigation District Title Transfer took 8-years to accomplish.

The Fremont Madison Irrigation District Title Transfer took nearly 10-years and \$300,000 to accomplish.

The Nampa & Meridian Irrigation District Title Transfer took nearly 10-years and over \$200,000 to accomplish. Importantly, however, the District was able to keep its costs down because it completed much of the analysis in-house.

The Pioneer Irrigation District Title Transfer is a unique story. Pioneer previously began the Title Transfer process in 2006 – even paying its own engineers to complete the NEPA review. However, that process was halted due to some unrelated issues. The process began anew in 2015. The new process is benefited by the previously completed research and analysis, which has allowed for the process to be truncated. Still, it is expected that the process will take at least 4-years to accomplish and cost nearly \$200,000 – not including legal fees, any additional engineering that may be required and any efforts necessary to seek and obtain Congressional approval for the transfer.

The Reclamation-determined requirements for environmental reviews are lengthy and expensive. For simple Title Transfers, where the projects will be transferred and ultimately continue operating in the same manner, the extensive NEPA process seems like an unnecessary expense.

³ *Title Transfer Checklist* (https://www.usbr.gov/title/Title_Transfer_Checklist-2009.doc).

Project Power Considerations and Title Transfer

Other entities may be interested in Title Transfer, but the current processes and policies are creating impediments to that process. In particular, current Title Transfer practices result in the limiting, or even the loss, of project power. This power, provided at cost-based contracted rates to Reclamation projects, is necessary for the continued viability of the project. Any risk in losing or limiting that Project Power is too much for some entities to take and they, therefore, dismiss the idea of Title Transfer. These projects require project power, even after a potential Title Transfer, in order to remain economically viable for the operations dependent on the water supply.

Burley Irrigation District, for example, utilizes project power for its operations. However, because of the Title Transfer process, its project power is now limited to a 20-year term contract that may, or may not, be renewed by Reclamation.

The Minidoka Irrigation District, along with the Burley Irrigation District, paid part of the cost to build the original Minidoka Dam Power Plant and utilizes project power for its operations. However, even though it paid to develop the ability to generate power as part of the Minidoka Project, if it goes forward with title transfer, it risks losing its project power – resulting in increased cost to its water users during a cycle of declining crop prices.

East Greenacres Irrigation District

East Greenacres has long demonstrated its ability to operate, maintain and manage its facilities in a highly professional and competent manner. Although East Greenacres is under contract with Reclamation for another decade, it could not consider Title Transfer due, in large part, to its reliance on project power to deliver water to its irrigation customers. If East Greenacres were to lose its project power, the increase in power costs, alone, would be crippling to the operations of their irrigation customers.

A&B Irrigation District

Another Idaho entity whose reliance on project power may prevent title transfer is A&B Irrigation District. A&B delivers both surface water and groundwater to 82,000 acres of prime farmland in Jerome and Minidoka Counties, in Southern Idaho. This Reclamation project includes over 180 deep wells, a pumping plant on the Snake River, canals, turnouts and over 700 farming units. A&B entered into its contract with Reclamation in 1962. Full payout of that contract is scheduled for 2020 (with only approximately \$35,000 of the original \$12.6 million construction cost remaining). The Reclamation contract provides that power generated at the Palisades power plant would be “set aside in perpetuity” for the benefit of A&B to provide the power “required for the operation of the pumping plants of the District.”

In the early 1980’s, A&B began experiencing groundwater declines and lost capacities that have continued to this day. Wells have been re-drilled, moved and abandoned as A&B has worked to protect its water supplies. A&B has filed two administrative water calls – wherein A&B asked the Idaho Department of Water Resources to curtail junior priority groundwater uses in an effort to obtain the water it is entitled to receive under its water rights. In 2015, A&B installed a

second pumping plant on the Snake River, along with 19-miles of buried pipeline, to deliver surface water to nearly 3,000 acres of land previously covered by failing groundwater supplies. This project cost A&B's landowners \$11.8 million and has been successfully funded and operated by the District over the past two years.

A&B is not alone in its struggles with a depleting aquifer. From 2002 through 2014, calls for priority administration were the norm on Idaho's Eastern Snake Plain Aquifer. In 2009, the Idaho Water Resource Board adopted a Comprehensive Aquifer Management Plan ("CAMP") that included a goal to change the aquifer budget by 600,000 acre-feet annually over a 20-year period. In 2016, the Idaho Department of Water Resources designated the Aquifer as a Groundwater Management Area – providing additional protections to an aquifer approaching "critical conditions."

Finally, in 2015, a monumental agreement was entered between surface water and groundwater users to take proactive steps to recover the aquifer. One of the primary tools for recovery is recharge, with the State of Idaho committing to recharge the aquifer at a rate of 250,000 acre-feet/year.

A&B desires to participate in recharge, including assisting with the State's program. In fact, areas accessible by A&B canals are prime recharge areas – modeling shows that recharge in these areas would benefit water users throughout the aquifer (including Reclamation's own storage facilities). However, A&B's project is not authorized to deliver water for recharge. It is an irrigation project. Since it is a Reclamation project it does not have the operational flexibility to deliver water for recharge in areas accessible by its canals and laterals – even though the recharge would benefit Reclamation by providing more water to Reclamation storage facilities.

Like the other Idaho irrigation entities discussed today, there is no question that A&B can operate, maintain and manage its facilities in a highly professional and competent manner. The District has operated the project since 1966. Title Transfer is viewed by A&B as an opportunity to improve flexibility in the operation of its system and to open up opportunities for water supply projects to assist the State of Idaho and protect and improve the Eastern Snake Plain Aquifer.

However, A&B cannot lose its project power. Without project power, A&B's assessments would nearly double – significantly impacting its irrigation customers' operations (forcing some farmers out of business). A&B cannot pursue Title Transfer if its project power would be taken away in the process. As a result, prime recharge areas accessible through A&B's system may not be utilized.

Title Transfer should not automatically result in the loss of project power. Opportunities should exist to maintain that benefit even after Title Transfer. To be sure, I recognize that this is a topic of contention with some in the public power community. However, as this Subcommittee knows, water and power users have many areas of mutual interest and I look forward to working with my colleagues in the public power sector to find common ground on this issue.

Conclusion & Suggestions for a Title Transfer Bill

In conclusion, while a valuable tool, Title Transfer processes can be improved. As this Subcommittee may contemplate possible legislation on Title Transfer, we would suggest the following considerations:

1. Not every Title Transfer should require full NEPA analysis. Some simple Title Transfers, particularly single use projects and those projects that will continue operating in the historical manner, should not be subject to the same rigorous NEPA analysis required for complex Title Transfers. Minimizing NEPA analysis requirements will eliminate much of the time and expense that has prevented more entities from taking advantage of the Title Transfer process.
2. Not every Title Transfer should require an act of Congress. Reclamation should have the authority to complete simple Title Transfers “in house” (such as single use projects and/or those that will continue operating in the historical manner). This would further allow for quicker processing of the Title Transfer.
3. Access to project power should not be eliminated because of Title Transfer. Farming and ranching operations throughout Idaho (and the west) rely on project power to maintain their economic viability. The loss of project power would significantly increase the cost of delivering water. Further, as explained in the A&B example provided above, water supply projects that would benefit both private and public water users (including Reclamation’s own reservoirs) are not happening due to the risk of losing project power in a Title Transfer.

Thank you, Chairman Flake, Ranking Member King, and Members of the Subcommittee for providing this opportunity to share Idaho’s experiences and suggested opportunities with the Title Transfer process. We appreciate the Subcommittee’s interest in this important topic and your efforts on this matter. I would be happy to take any questions the Subcommittee may have.

Senator FLAKE. Thank you, Mr. Arrington.
 I should note, Brenda Burman is a proud export from Arizona.
 Mr. ARRINGTON. Exactly. Great things, right?
 Senator FLAKE. Yes.
 Mr. Brown.

**STATEMENT OF JERRY BROWN, GENERAL MANAGER,
 CONTRA COSTA WATER DISTRICT**

Mr. BROWN. Good morning, Chairman Flake, Senator King and members of the Subcommittee. My name is Jerry Brown. I'm the General Manager of the Contra Costa Water District (CCWD). We are an urban water agency located in the eastern part of the San Francisco Bay Area region in Northern California.

CCWD is the oldest and largest M&I contractor within the Central Valley Project, providing high-quality water to approximately 500,000 residents and major industry. CCWD operates and maintains the Contra Costa Canal System, a unit of the Central Valley Project.

The Contra Costa Canal System began construction in 1937 and is an earthen canal, which was constructed and is owned by Reclamation. Because of adjacent development, the canal poses a safety and flood risk. Unfortunately, we have averaged one drowning per year since the canal was built.

CCWD has 100 percent repaid Reclamation for costs of construction, and our CVP contract allows for transfer of Contra Costa Canal System title to CCWD upon authorization by Congress.

In the mid-1990s, CCWD initiated and completed Reclamation's title transfer process but deferred the effort pending resolution of local stakeholder issues involving recreation.

Reclamation's process for evaluating suitability for title transfer is lengthy and thorough. Based on what we learned in that effort and having resolved the recreation issues, CCWD has recently re-initiated efforts to pursue title transfer through legislation.

CCWD is interested in title transfer because we plan to spend a half billion dollars to replace the canal with a buried pipe. The Contra Costa Canal System conveys nearly all of CCWD's water, and we prefer to own the facilities before making that level of investment. In addition, work on the canal system requires varying levels of coordination documentation with Reclamation for planning, engineering, maintenance and operation.

CCWD ownership of the Canal System would eliminate much of this duplicative consultation that increases cost and causes schedule delays. Title transfer will result in lower costs and reduced Administrative burden and will eliminate flood and other safety concerns.

Before deferring our previous title transfer effort, CCWD and Reclamation had worked for over two years on a transfer agreement. This included nine public negotiation sessions, environmental review and resolution of unique issues.

Based on our experience, the following recommendations will streamline the title transfer process:

Number one, Reclamation must assign an experienced program manager with authority to negotiate the transfer agreement with commitment of dedicated resources.

Number two, environmental review, including NEPA, ESA and National Historical Preservation Act, should leverage all the previous documents previously prepared for the facilities. Over the years since our title transfer effort, CCWD and Reclamation have completed NEPA reviews and other consultations with U.S. Fish and Wildlife Service and the State Historic Preservation Officer and these provide an efficient starting point. Newly required analysis should only focus on specific and not previously analyzed environmental impacts related specifically to the transfer of ownership. An Environmental Assessment/Finding of No Significant Impact was prepared for the previous title transfer effort and by the time the transfer process was deferred, U.S. Fish and Wildlife and SHPO had signed off on the additional permits as not being required. The significant amount of already completed recent reviews should be fully recognized and only for looking in new impacts specific to the title transfer of assets from Reclamation to CCWD should require additional review.

Number three, Reclamation should be encouraged and authorized to proceed with quitclaiming federal property interests where title documentation is incomplete. A significant amount of time was spent during the previous effort trying to locate missing records with limited success. To try to re-survey or otherwise develop legal descriptions for all properties would be costly and provide little value. The existing right-of-way has been successfully managed and maintained for over 80 years using the existing land rights and quitclaim of all federal property interests to CCWD will provide a complete transfer without title conflict. Other title transfer legislation has also followed the quitclaim deed process.

Number four, title transfer agreements should be allowed to proceed with contingencies for areas of uncertainty. For example, in our earlier transfer work we had a hazardous waste site that was included in the agreement, but actual transfer for that site was contingent upon Reclamation completing the cleanup as a follow-up.

Number five, Congress should ensure Reclamation has the necessary resources to process the title transfers in a timely manner.

And number six, definitive responsibilities and timelines should be established with accountability to Congress to ensure appropriate priority is given to title transfer tasks.

Thank you for this opportunity to testify on this topic of importance to CCWD and your consideration of measures to streamline the title transfer process.

[The prepared statement of Mr. Brown follows:]

**Statement of Jerry Brown, General Manager
Contra Costa Water District
Before the Senate Water and Power Subcommittee
Legislative Hearing on Title Transfer of Bureau of Reclamation project facilities
January 17, 2018**

Chairman Flake, Senator King and members of the Subcommittee—my name is Jerry Brown, and I am the General Manager of Contra Costa Water District (CCWD), an urban water agency located in the eastern part of the San Francisco Bay Area region in Northern California. CCWD is the oldest and largest M&I contractor within the Central Valley Project, providing high quality water to approximately 500,000 residents and many large industrial customers. CCWD operates and maintains the Contra Costa Canal System, a unit of the Central Valley Project (CVP), under Agreement with the U.S. Department of Interior, Bureau of Reclamation (Reclamation). The Contra Costa Canal System began construction in 1937 and is an earthen canal, which was constructed and is owned by Reclamation. Although the canal has been maintained, it still poses a safety and flood risk. Unfortunately, we have averaged one drowning per year since the canal was built.

CCWD has repaid Reclamation for costs of construction as set forth in the Long-term Renewal Contract between the United States and CCWD providing for Project Water Service and for Facilities Repayment (Contract No. 175r-3401 A-LTR1 May 10, 2005) (CVP Contract). Article 28.3 of the CVP Contract allows for transfer of title to the Contra Costa Canal System upon repayment of all outstanding capitalized costs of the facilities and upon authorization of Congress. CCWD initiated Title Transfer in the mid 1990's but deferred the effort after completing Reclamation's Title Transfer process and pending resolution of local stakeholder issues involving recreation. Reclamation's process for evaluating suitability for title transfer is lengthy and thorough. Building on what was learned in that effort, CCWD has recently reinitiated efforts to pursue Title Transfer through legislation.

Why Title Transfer Makes Sense for CCWD

CCWD is interested in Title Transfer because we plan to spend a half billion-dollars to replace the canal with a buried pipe. The Contra Costa Canal System conveys nearly all CCWD's water, and we prefer to own the facilities before making that level of investment. Title Transfer will result in lower costs and reduced administrative burden, provide greater flexibility in management of the asset, and will eliminate flood and other safety concerns.

Lower costs and reduced administrative burden are benefits that will also accrue to Reclamation. Currently, work on the Canal System requires varying levels of coordination and documentation with Reclamation for planning, design, project implementation, maintenance, and operation.

CCWD ownership of the Canal System would eliminate much of this duplicative consultation. We find ourselves doing much of the same work Reclamation conducts in its oversight and review responsibilities. Third parties including local cities, Contra Costa County, local and regional agencies, including recreation partners, and utilities working within the Canal System rights-of-way all of whom would also benefit from removing the additional layer of federal review and approval bureaucracy that increases costs and causes schedule delays.

CCWD has been responsible for O&M of the Canal System for almost 50 years and its staff is intimately familiar with the system. We have built the relationships with neighboring agencies, environmental groups and landowners required for effective system operation to meet local needs. Reclamation does not have the system familiarity or local inter-agency relationships. Elimination of Reclamation's coordination and oversight function would not result in any adverse impacts.

As a single purpose facility delivering M&I water, the Contra Costa Canal System is an ideal unit for Title Transfer. Not only does it meet all the criteria set forth by Reclamation in its Framework for the Transfer of Title, but CCWD has a long history of successful operations and maintenance of the Canal System, positive working relationships with federal, State and local regulatory agencies, and strong financial ratings. Title Transfer to CCWD will relieve the United States of any risk of canal failure.

Reforming and Streamlining the Title Transfer Process

Before deferring our previous Title Transfer efforts, CCWD and Reclamation had worked for over two years on the transfer agreement. This included nine public negotiation sessions, environmental review and various special issue considerations including power, contamination at one site, and incomplete land records. During those two years, significant progress was made and the parties were close to being complete with permitting and resolution of the special issues.

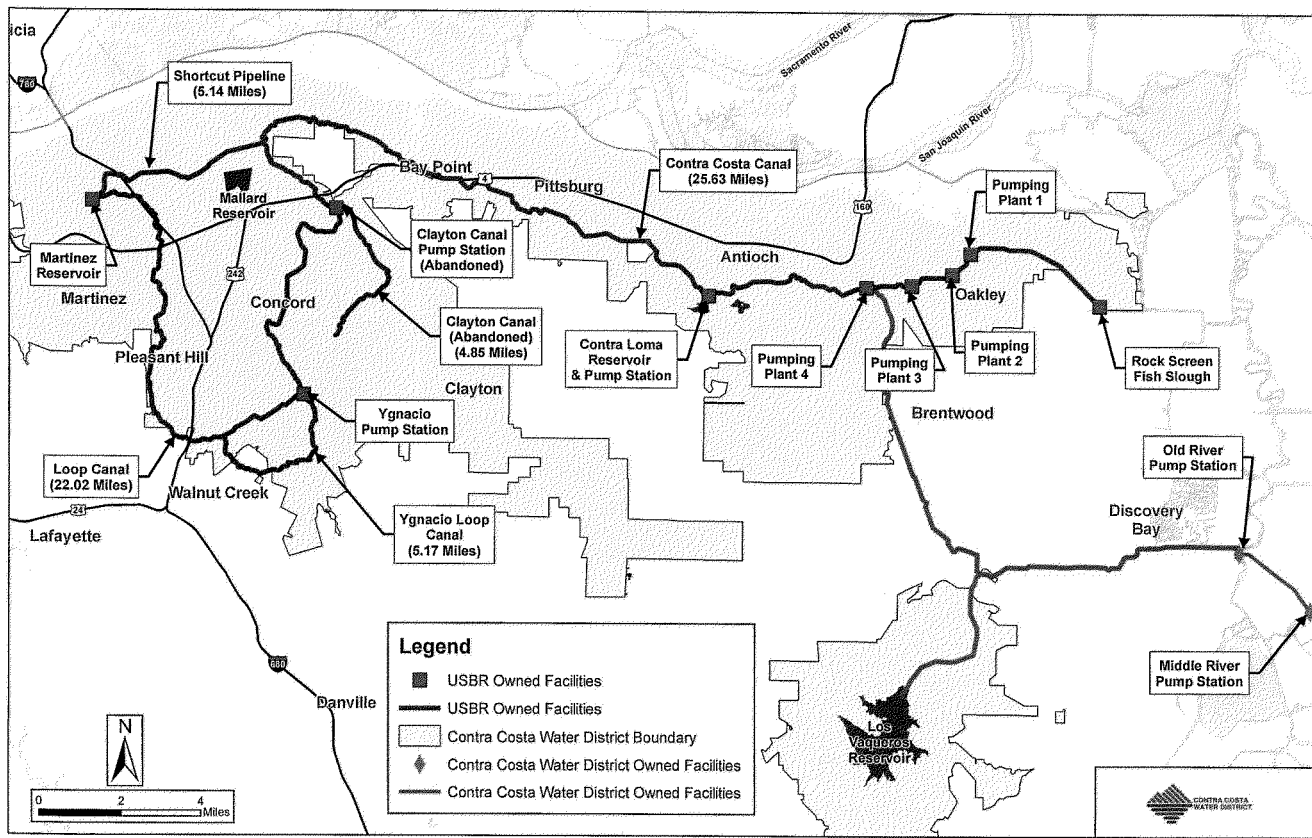
Based on our experience, the following recommendations will streamline the Title Transfer process:

- 1) Reclamation must assign an experienced Program Manager with authority to negotiate the Transfer Agreement with access to dedicated staff resources covering multiple disciplines including engineering, real property, environmental planning, cultural resources, public information, and legal.
- 2) Environmental review, including National Environmental Policy Act (NEPA), Endangered Species Act (ESA) and National Historical Preservation Act (NHPA), should leverage all the recent documents prepared for the facilities to be transferred, and permits governing ongoing operations and management of the Canal System. Over the years since the previous Title Transfer effort, CCWD and Reclamation have developed a large library of completed NEPA reviews and other consultations with United States Fish and

Wildlife Service (USFWS) and State Historic Preservation Officer (SHPO) that provide an efficient starting point. Newly required analyses should focus on specific environmental impacts related specifically to a transfer of ownership. An Environmental Assessment/Finding of No Significant Impact was prepared for the previous Title Transfer effort, and by the time the transfer process was deferred, USFWS and SHPO had signed off that additional permits were not required. The significant amount of already completed recent reviews should be fully recognized, and only the new impacts specific to the transfer of title of the assets from Reclamation to CCWD should require additional review.

- 3) Reclamation should be encouraged and authorized to proceed with quitclaiming federal property interests where title documentation is incomplete. A significant amount of time was spent during the previous effort trying to locate missing records with limited success. To re-survey or otherwise develop legal descriptions for all the properties without adequate documentation would be costly, and provide little value. The existing right-of-way has been successfully managed and maintained for over 80 years using the existing land right records and quitclaim of all federal property interests to CCWD is believed to provide a complete transfer of all rights without title conflict. Other title transfer legislation has also followed the quitclaim deed approach.
- 4) Title Transfer Agreements should be allowed to proceed with contingencies for areas of uncertainty. For example, in our earlier transfer work, an identified hazardous waste site was included in the agreement, but actual transfer was contingent on Reclamation completing the cleanup.
- 5) Congress should ensure Reclamation has the resources necessary to process Title Transfers in a timely way, without impacting ongoing work.
- 6) Definitive responsibilities and timelines should be established with accountability to Congress to ensure appropriate priority is given Title Transfer tasks. If authority to approve Title Transfers is delegated to the Secretary, an annual report should be provided to Congress indicating the status of current Title Transfers.

Thank you for this opportunity to testify on this topic of importance to CCWD, and your consideration of measures to streamline the Title Transfer process.



Senator FLAKE. Thank you, Mr. Brown.
Mr. DeVries.

**STATEMENT OF MICHAEL DEVRIES, GENERAL MANAGER OF
METROPOLITAN WATER DISTRICT OF SALT LAKE & SANDY,
AND DIRECTOR OF PROVO RIVER WATER USERS ASSOCIA-
TION**

Mr. DEVRIES. Good morning, Chairman Flake, Ranking Member King, Senator Lee and members of the Subcommittee. Thank you very much for the opportunity to testify today.

My name is Michael DeVries, and I serve as the General Manager of the Metropolitan Water District of Salt Lake & Sandy as well as a Director of the Provo River Water Users Association. I am pleased to be here today to provide perspective on the benefits of title transfer related to Bureau of Reclamation project facilities in Utah.

In 2006, the Salt Lake Aqueduct and related corridor, or SLA, were transferred to the District. The SLA is approximately 42 miles in length and 84 inches in outside diameter. It reaches from the toe of Dear Creek Dam to the Salt Lake Valley. It was completed in 1951, and it's critical to the water supply of the Salt Lake Valley. It is approximately, in approximately 20 years, rather, it will require major rehabilitation on the order of about \$300 million or more.

In 2014, the Provo Reservoir Canal and related corridor were transferred to the Association following a project that enclosed that canal. The current name of that facility is the Provo River Aqueduct, or PRA. The PRA is approximately 23 miles long and mostly 126 inches in diameter. The PRA is very critical to the water supply of north Utah County and the Salt Lake Valley.

The reconstruction of Terminal Reservoir which is a Salt Lake aqueduct facility, was a \$40 million project that is nearly completed. The District issued tax-exempt bonds to finance that project. That would not have been possible without title transfer.

The Provo Reservoir Canal enclosure that resulted in the creation of the PRA was a \$150 million project, and this enclosure was completed before title transfer. However, financing for that project would not have been possible absent a commitment that title transfer would transfer upon completion of the project.

We are grateful for the many years of cooperation and assistance with Reclamation but title transfer has enabled improved efficiencies for the District and Association that have led to significant cost savings.

The enclosure project that resulted in the PRA included new capacity for local public entities. And that participation was critical to the project. Those entities required a firm commitment of equal standing capacity, which would not have been possible, legally, under Reclamation ownership.

Reclamation's lands people managed the SLA and PRA corridors before title transfer. Management of the SLA corridor by the District and management of the PRA corridor by the Association has been significantly simplified for both the public served by those facilities and local entities that need to cross those corridors with roads, utilities, et cetera.

The enclosure project that created the PRA was intended to provide, and did provide, the following specific benefits, in addition to the general benefits previously described:

Number one, the capacity of the canal needed to be enlarged in order to accommodate the capacity needs for local entities, as well as Utah Lake System water from the Central Utah Project for Salt Lake County.

Number two, the canal had siphons to carry water under streams and highways. The siphons made the canal a drowning hazard. That hazard was eliminated by enclosure.

Number three, prior to enclosure use of the canal maintenance road for recreation created significant safety issues for the public, as well as the Association. The enclosure made possible a 20-mile-long, paved trail under management of Utah County which is now one of the State of Utah's most utilized trails at parks.

Number four, the canal was mostly unlined and perched on foothills above the valley floor. Enclosure of the canal has eliminated any flooding breach hazards.

Number five, with urbanization of lands along the canal, a lot of trash was dumped into the open canal. A very large majority of the water in the canal has been carried to culinary water treatment plants. Enclosure has improved public drinking water safety.

And number six, the mostly unlined canal lost, on average, approximately 8,000 acre-feet of water annually. Because enclosure allowed that water to be saved and used, the Salt Lake County ULS petitioners were able to give back 8,000 acre-feet of ULS water to the DOI to be used for restoration of flows in the lower Provo River which is critical habitat for the endangered June Sucker.

We are very grateful for the benefits that title transfer and the enclosure project have provided to our District and the Association. All involved would agree that an easier and more streamlined title transfer process would better serve the public, water entities and federal taxpayers.

In speaking with my colleagues from other water entities in Utah, I believe that they also would benefit from an easier title transfer process.

The general benefits for federal taxpayers, the District and Association have been evident with title transfer of the SLA and PRA.

We greatly appreciate your interest in title transfer and urge you to consider streamlining the process.

Mr. Chairman, we are committed to continuing to work with our delegation, this Committee and other Members of Congress who support title transfer. Thank you for this opportunity and your time and attention to this matter. I'd be pleased to answer any questions.

[The prepared statement of Mr. DeVries follows:]

STATEMENT OF

MICHAEL DEVRIES
GENERAL MANAGER OF METROPOLITAN WATER DISTRICT OF SALT LAKE &
SANDY
AND
DIRECTOR OF PROVO RIVER WATER USERS ASSOCIATION

BEFORE THE
ENERGY AND NATURAL RESOURCES SUBCOMMITTEE ON WATER AND
POWER
UNITED STATES SENATE

Title Transfer of Bureau of Reclamation Project Facilities in Utah

January 17, 2018

Chairman Flake, Ranking Member King, Senator Lee, and members of the Subcommittee, thank you very much for the opportunity to testify today. My name is Michael DeVries. I serve as the General Manager of Metropolitan Water District of Salt Lake & Sandy (the District), as well as Director of Provo River Water Users Association (the Association). I am pleased to be here today to provide perspective on the benefits of the transfer of Bureau of Reclamation project facilities in Utah.

Salt Lake Aqueduct

In 2006, the Salt Lake Aqueduct and related corridor (SLA) were transferred to the District. The SLA is approximately 42 miles in length, and 84" in outside diameter. It reaches from the toe of Dear Creek Dam to the Salt Lake Valley. It was completed in 1951. It is very critical to the water supply of the Salt Lake Valley. In something like two decades it will require a major rehabilitation project that will cost hundreds of millions of dollars.

Provo River Aqueduct

In 2014, the Provo Reservoir Canal and related corridor were transferred to the Association following a project that enclosed that canal. The current name of that facility is Provo River Aqueduct (PRA). The PRA is approximately 23 miles long and mostly 126" in diameter. It reaches from the mouth of Provo Canyon to approximately the Salt Lake County/Utah County line near the Jordan River. The PRA is very critical to the water supply of north Utah County and the Salt Lake Valley.

General Title Transfer Benefits

Increased Availability of Financing for Necessary Rehabilitation

Prior to title transfer of the SLA the District understood it needed to rebuild the SLA Terminal Reservoir, a 40 million gallon treated water reservoir constructed as a part of the SLA. It was a serious safety hazard. The reconstruction of Terminal Reservoir was a \$40 Million project that is nearly completed. The District issued tax-exempt bonds to finance the project. That would not have been possible without title transfer, as IRS private use rules treat money used to improve a federally owned facility as a “private use,” which is not eligible for tax-exempt bond financing.

The Provo Reservoir Canal enclosure that resulted in the creation of the PRA was a \$150 Million project. That enclosure project was completed before title transfer, but financing for that project would not have been possible absent a commitment that title would transfer upon completion of the project. A large portion of the financing came from the Utah Board of Water Resources, and politically it would not have been possible to borrow those funds absent a commitment the PRA would be transferred.

Reduced Federal and Local Costs

The District is one of the local sponsors for the Little Dell Project, which includes an Army Corps of Engineers’ constructed dam and reservoir. The Corps have very little day-to-day or year-to-year involvement with the operation and maintenance of that project, which is a distinct difference between how the Corps operates as compared to how Reclamation operates. Our experience is the federal dollars formerly spent by Reclamation on the federal “administration” of the SLA and the PRA simply failed to provide much value. In addition to potential savings in federal dollars, the District and Association spend far less time on red tape following title transfer.

The enclosure project that resulted in the creation of the PRA happened under the supervision of Reclamation. That added considerable expense, including the NEPA process, and the funds the Association was required to pay to Reclamation for Reclamation’s supervision. That supervision did not save the Association from also providing its own close supervision.

The reconstruction of SLA Terminal Reservoir was considerably cheaper than it would have been without title transfer. The District saved the NEPA process costs and the cost of Reclamation inspectors.

Improved Service to the Public

The enclosure project that resulted in the PRA included new capacity for local public entities. That participation was critical to the project. Those entities required a firm commitment of equal standing capacity, which would not have been legally possible under Reclamation ownership.

Reclamation’s lands people managed the SLA and PRA corridors before title transfer. They licensed non-project uses after seeking local project sponsor concurrence. The West-wide Reclamation standard form agreements are in many ways dated and do not reflect local laws or conditions. Management of the SLA corridor by the District and management of the PRA corridor by the Association is now much improved, both for the public served by those facilities and local entities that need to cross those corridors with roads, utilities, etc.

The Need for a Better Title Transfer Process

The enclosure project that created the PRA was intended to provide, and did provide, the following more specific benefits, in addition to the general benefits discussed above:

1. The capacity of the canal needed to be enlarged significantly to carry a new water supply from the Central Utah Project, Bonneville Unit, Utah Lake System (ULS) into the Salt Lake Valley.
2. The canal had four siphons to carry water under streams and highways. The siphons made the canal dangerous. Something like 26 people drowned in the canal over the years. The enclosure virtually eliminated this personal safety hazard.
3. The canal maintenance road was heavily used for recreation by the public before enclosure. This in spite of the dangers of the canal in terms of drowning hazards and pedestrian/bike/horse conflicts with maintenance vehicles and the dangers of highway crossings. Such recreation uses violated Reclamation policy, but stopping it was impractical. The enclosure project included the construction of a 20-mile long trail/linear park now managed by Utah County, including highway underpasses for the trail system. That would not have been possible without enclosure.
4. The canal was mostly unlined and perched on foothills above the valley floor. In 1988, the canal breached, causing very significant flood damage and lawsuits. Much of what was flooded in 1988 was open farmlands. Between 1988 and the enclosure much of that land had been developed. On two occasions after 1988 and before enclosure similar breaches were very narrowly averted. Enclosure virtually eliminated the canal breach hazard.
5. With urbanization of lands along the canal, a lot of trash was dumped into the open canal. While the canal served irrigation when it was constructed by Reclamation, for many years before the enclosure a very large majority of the water in the canal has been carried to culinary water treatment plants. Enclosure improved water quality and public drinking water safety.
6. The mostly unlined canal lost on average approximately 8,000 acre-feet (AF) of water annually. Because enclosure allowed that water to be saved and used, the Salt Lake County ULS petitioners were able to give back 8,000 AF of ULS water to DOI to be used for restoration of flows in the lower Provo River, which is critical habitat for the endangered June Sucker.
7. The canal could not be operated in the winter because of ice dams. Enclosure allows the PRA to be used as a backup to the two other large aqueducts that carry water from the Provo River System into the Salt Lake Valley.

It is only because of the extraordinary benefits of the enclosure project, and the fact that project could not happen without title transfer, that the District, the Association and others were ultimately able to incur the major expense and wear of Reclamation's title transfer process. It is only because of the extraordinary benefits of the enclosure project, and the fact that the enclosure project could not happen without title transfer, that the District, the Association and others were able to gain enough political support to overcome Reclamation resistance to title transfer.

The SLA title transfer was added to the same bill that transferred the PRA. But for the benefits of the enclosure project, the considerable general benefits of the SLA transfer would not have been enough to get the SLA title transfer over the Reclamation title transfer Rubicon. Reclamation employees feel the threat of a loss of budget and jurisdiction from title transfer, and it is just human nature to doubt others can do your job as well. They have many quiet ways to put sticks in the spokes of the already laborious Reclamation title transfer process. The fact that the District and the Association unexpectedly had to go back to Congress for a second bill to obtain title to the PRA is a good example of such a stick in the spokes. Without a better process that allows projects to be transferred in less time and with less expense, the small number of Utah Reclamation projects will not likely transfer, despite the merits of such transfers.

Congressional Support

I believe other title transfers in Utah will duplicate the general benefits federal taxpayers, the District and Association have seen with title transfer of the SLA and PRA. The Reclamation process for title transfer of the SLA and PRA was unduly expensive and laborious. I urge you to consider a streamlined process, particularly for projects that were authorized under the 1902 Reclamation Act and thus have only water supply and power development as authorized purposes.

Mr. Chairman, we are committed to continuing to work with our delegation, this Committee and other members of Congress who support the need for title transfers. Thank you for this opportunity and your time and attention to this important matter. I would be very pleased to answer any questions you may have.

Senator FLAKE. Thank you.
Mr. Phillips.

**STATEMENT OF JASON PHILLIPS, CHIEF EXECUTIVE OFFICER,
FRIANT WATER AUTHORITY, CA**

Mr. PHILLIPS. Good morning, Chairman Flake, Ranking Member King and members of the Subcommittee.

My name is Jason Phillips, Chief Executive Officer of the Friant Water Authority in California. Friant Water Authority is a public agency formed under California law to operate and maintain the Friant-Kern Canal, a component of the Central Valley Project owned by the Bureau of Reclamation. The Friant-Kern Canal is a 152-mile-long conveyance facility that delivers water to over a million acres of productive farmland, relied upon by over 15,000 farms and cities in the San Joaquin Valley.

Thank you for the opportunity to testify on the process for transferring ownership of Reclamation's facilities to non-federal interests. The Authority sees title transfer as a means to improve water management and address the challenges of aging infrastructure while at the same time reduce cost to the Federal Government and relieve it of potential liabilities.

The problem is that the current title transfer process remains lengthy, overly complex and costly for the non-federal parties. Time, cost and uncertainty are powerful disincentives to undertaking a title transfer effort. The existing requirements which sometimes serve little useful purpose, nevertheless, entail substantial time, complexity and cost.

The Friant-Kern Canal presents a good example of how title transfer can benefit both non-federal project beneficiaries and the federal taxpayer. The Authority is operated to maintain the Friant-Kern Canal under contract to Reclamation since 1986. Reclamation retains ownership of the canal and its related distribution works and administers the contracts governing the purchase and delivery of CVP water in the Friant Division. The Authority is responsible for all aspects of the canal's operation and maintenance as well as all the costs related to those activities.

Since taking over the responsibility for the canal in 1986, the Authority has taken an aggressive and proactive approach to maintenance and repairs. Despite those efforts, the water carrying capacity of the canal has greatly diminished, partly because of natural settling and partly because of land subsidence resulting from significant groundwater pumping in the valley because of drought.

The canal is completely gravity fed and ground subsidence has caused part of the canal to sink faster than others, significantly affecting the conveyance capacity of the canal. In fact, the drop is so severe that it has reduced our ability to deliver water to many Friant Division contractors by nearly 60 percent. This means that during the exceptionally wet 2016 and 2017 water years when the Friant-Kern Canal should have been facilitating recharge of badly depleted groundwater supplies, the canal could function at only 40 percent of capacity.

The Authority and Reclamation are currently exploring options to address the canal's subsidence problems, both in the short- and long-term and because the San Joaquin Valley is already facing an

estimated 2.5 million acre-foot per year water supply deficit, it is absolutely vital that the canal be restored to the original full capacity and doing so could cost up to \$400 million.

So with ownership of the canal, the Authority could move more rapidly and efficiently than the Federal Government in designing and carrying out repairs and would continue to operate and maintain the Friant-Kern Canal as it has for more than 30 years.

One of the impediments to engaging Reclamation's title transfer process is the complexity and cost associated with certain environmental permits required for title transfers because the transfers are considered major federal actions. For example, some of the Authority member irrigation districts considered acquiring title to small Reclamation distribution works within their district boundaries but the districts concluded that the cost of the permitting review alone would exceed the benefits of taking ownership to the small facilities, which the districts have operated, maintained and repaired for many decades.

Congress should act to appropriately focus the scope of permitting as they are applied to Reclamation title transfers. We would welcome the opportunity to work with the Committee to develop legislation to that end.

In cases where only the ownership of a project will change and not its operation or footprint, permitting review should either not apply at all or be addressed in a programmatic fashion.

The Committee should consider establishing criteria for waivers and exclusions for title transfers where no material change in project operation will occur until non-federal ownership.

Finally, the Authority joins the Family Farm Alliance and other water user organizations in urging Congress to grant the Secretary of Interior broad authority to make title transfers without the necessity of further action by Congress.

Thank you again for the opportunity to present the views of Friant Water Authority to the Subcommittee.

[The prepared statement of Mr. Phillips follows:]

**Testimony of Jason Phillips
Chief Executive Officer
Friant Water Authority, CA**

Before the

**Subcommittee on Water and Power,
U.S. Senate Committee on Energy and Natural Resources**

On

**The Bureau of Reclamation's Title Transfer Process
and Potential Benefits to Federal and Non-Federal Stakeholders**

January 17, 2018

Good morning Chairman Flake, Ranking Member King and Members of the Subcommittee.

My name is Jason Phillips, and I am the Chief Executive Officer of the Friant Water Authority in California. The Friant Water Authority (Authority) is a public agency formed under California law to operate and maintain the Friant-Kern Canal, a component of the Central Valley Project (CVP) owned by the Bureau of Reclamation (Reclamation).

Thank you for the opportunity to testify on Reclamation's process for transferring ownership – title – of its facilities to non-Federal interests that are eligible to take title under Reclamation Law. Like Reclamation, the Authority regards title transfer as a means of increasing the flexibility of non-Federal interests to improve water management and address the challenges of aging infrastructure, while at the same time reduce costs to the Federal government and relieve it of potential liabilities.

The Authority and its 15 member agencies are eager to engage Reclamation in discussions to acquire title to the Friant-Kern Canal and related distribution facilities (and possibly to the Madera Canal). But Reclamation's current title transfer process, though developed with substantial input from Reclamation's customers, remains lengthy, overly complex and costly for the non-federal parties. And once the administrative process is successfully completed, an act of Congress is still required to transfer the title to a facility from Reclamation to a non-federal entity. Time, cost and uncertainty are powerful disincentives to undertaking a title transfer effort.

To its credit, Reclamation has worked to improve the title transfer process, actively engaging with water-user organizations such as the Family Farm Alliance, of which the Authority is a founding member, to simplify and speed development of transfer agreements and implementing legislation.

The agency, however, can only go so far to facilitate a process that must conform to the requirements of existing laws, which sometimes serve little useful purpose but nevertheless entail substantial time, complexity and cost. Only Congress can address these issues, and the Authority is encouraged by the Committee's interest in doing so.

The Friant-Kern Canal presents a good example of how title transfer can benefit both the non-Federal project beneficiaries and the Federal taxpayer. It also illustrates how Congress can act to facilitate title transfers in a manner that continues to safeguard the interests of the public.

The Friant Division

The 152-mile-long Friant-Kern Canal and the 36-mile-long Madera Canal, together with Friant Dam and Millerton Lake on the San Joaquin River, form the Friant Division of the CVP. On average, the Division delivers 1.2 million acre-feet of irrigation water annually to approximately 15,000 farms on one million acres of the most productive farmland in the world. Friant Division deliveries also are vital to meeting the domestic water needs of many small communities in the San Joaquin Valley, as well as larger metropolitan areas, including the City of Fresno.

Built between 1945 and 1951, the Friant-Kern Canal carries water south from Millerton Lake along the foothills of the Sierra Mountains on the eastern edge of the San Joaquin Valley to its terminus at the Kern River, four miles west of Bakersfield. The canal is lined by concrete for most of its length, and has an initial capacity of 5,000 cubic feet per second (cfs) at the San Joaquin River that gradually decreases to 2,000 cfs at the Kern River. The width of the Canal ranges from 128 feet where it starts to 64 feet at its lower end.

The shorter Madera Canal carries water north from Millerton Lake on the San Joaquin River to the Chowchilla River. Completed in 1945, the Madera Canal has an initial capacity of 1,000 cfs that decreases to 625 cfs at its terminus.

The Authority (initially the Friant Water Users Authority) has operated and maintained the Friant-Kern Canal as a “transferred work” under contract to the Bureau of Reclamation since 1986. Reclamation retains ownership of the Canal and its related distribution works, and Reclamation administers the contracts governing the purchase and delivery of CVP water in the Friant Division. The Authority is responsible for all aspects of the Canal’s operation, maintenance and replacement (OM&R) as well as all costs related to those activities.

Two of the Authority’s member agencies receive water via the Friant Division’s Madera Canal, which is operated as a transferred work by the Madera and Chowchilla Water and Power Authority. The Madera and Friant-Kern canals are in similar circumstances and their operating authorities are interested in pursuing title transfers.

Other components of the CVP outside of the Friant Division also are operated as transferred works by non-federal authorities composed of project beneficiaries, but the Friant Division is unique in that its water users have fully repaid the capital construction costs allocated to the Friant Division. This action was authorized by the *San Joaquin River Restoration Settlement Act of 2009* (P.L. 111-11, Title X, Subtitle A, Sec. 10010).

Having paid their capital obligation, Friant Division water users are eligible to take title to its components.

The *Settlement Act* authorized the Interior Department to accept prepayment of Friant's outstanding capital obligation and to convert Friant Division "water service" (9(e)) contracts to "repayment" (9(d)) contracts. Friant water users subsequently paid approximately \$215 million to the Federal government for cost of constructing the elements of the Friant Division, including the Friant-Kern and Madera Canals and related distribution works. Per the *Settlement Act*, the \$215 million was deposited into the San Joaquin River Restoration Fund, where most of it remains available to implement the San Joaquin River Restoration Settlement, agreed to in 2006 by the Authority, the Federal government and a coalition of environmental organizations.

In late 2016, Congress approved similar "prepayment" provisions in the *Water Infrastructure Improvements for the Nation Act* (WIIN Act; P.L. 114-322, Sec. 4011), giving the Secretary general authority to accept early repayment of capital costs from project beneficiaries, and to make 9(e)-to-(9d) contract conversions. Because 9(e) water service contracts are not common anywhere but California, the WIIN Act provisions are likely to have the greatest effect there, potentially increasing requests for title transfers for elements of the CVP and other stand-alone Reclamation projects in the State.

Aging Infrastructure

The Friant Division was designed and is operated as a conjunctive-use project to convey surface water for direct beneficial uses, such as irrigation, *and* to recharge groundwater basins in the southern San Joaquin Valley. Relative to the amount of water runoff into Millerton Reservoir, 1.8 million acre-feet per year, the operational surface storage capacity of Friant Dam is minimal – only about 385,000 acre-feet. The ability to move significant water through the canals in wetter years to store in groundwater recharge basins is critically important to make the project work as intended. The system delivers two classes of water: Class I, the first 800,000 acre-feet of firm supply; and Class II, up to an additional 1.4 million acre-feet of non-firm supply available only during wetter years. Historically, the Friant Division has received a combination of Class I and Class II totaling about 1.2 million acre-feet annually. Much of the Class II water is directed to groundwater recharge.

This system has been hugely successful. When the Canal came on-line in 1951, severely depleted groundwater levels immediately began to rise and stabilize. As planned, ample groundwater supplies became available to carry farmers through in dry periods, and those groundwater supplies were replenished in wet years with surface water delivered via the Friant-Kern Canal.

At nearly 70 years old, the Friant-Kern Canal is the very definition of "aging infrastructure." Since taking over the responsibility for the Canal in the 1986, the Authority has taken an aggressively proactive approach to maintenance and repairs. Despite those efforts, however, the water-carrying capacity of the Canal has gradually diminished over time, partly because of natural "settling" and partly because of land subsidence resulting from groundwater pumping in the Valley. The Canal is a gravity-fed facility and does not rely on pumps to move water. Subsidence has caused parts of the Canal to sink in relationship to other parts. This negatively affects the Canal's ability to convey water. When the land elevation lowers, the Canal must be operated at a lower flow-stage to ensure that water doesn't overflow the banks.

From 2012-2017, California weathered its worst drought on record at the same time that increasingly stringent environmental regulations required more surface water to flow to the ocean. This forced San Joaquin Valley water users to rely heavily on groundwater supplies.

In addition, in 2014 and 2015 Reclamation made a decision not allocate any surface water to Friant water-supply contractors for the first time in the history of the project. This action caused most Friant districts to rely solely on groundwater resources to maintain their crops and protect decades of investments.

Groundwater pumping during the drought, including that done by non-Friant irrigators in the region, caused an alarming rapid subsidence below a portion of the Friant-Kern Canal. The drop is so severe that it has reduced our ability to deliver water to many Friant Division contractors by nearly 60 percent. This means that during the exceptionally wet 2016-2017 water year, when the Friant-Kern Canal should have been recharging badly depleted groundwater supplies, the Canal could function at only 40 percent of its capacity in areas with the greatest ability to store groundwater. A fact sheet on the subsidence problem is attached to my testimony.

The Authority and Reclamation are currently exploring options to address the Canal's subsidence problem both in the short-term and more permanently. The San Joaquin Valley is already facing an estimated 2.5-million-acre-foot per year water supply deficit, and in the near future a new State law regulating groundwater pumping could enlarge that shortfall during drought years. So it is absolutely vital that the Friant-Kern Canal be restored to its original full capacity. Doing so could cost as much as \$400 million.

Title Transfer Opportunities and Benefits

The cost for the capacity restoration of the Friant-Kern Canal is largely allocated to the Authority, although there would be considerable costs to Reclamation as well. Transferring ownership of the Canal to the Authority would significantly improve our ability to pay for the capacity restoration project, and reduce or eliminate any Federal costs. Owning the Canal means the Authority would have the asset necessary to secure favorable financing in the market. If the Canal remains in Federal ownership, securing affordable financing terms would be difficult if not impossible. Simply put, it's hard to borrow money with collateral that's not yours.

With ownership of the Canal, the Authority could move more rapidly and efficiently than Reclamation in designing and carrying out repairs. Normal operations, while still governed by existing contracts, laws and agreements, also would become more flexible and responsive to changing circumstances and needs when decisions are not slowed by review and approval of the Reclamation bureaucracy. The Authority would still be bound to meet all contractual obligations to water users, as well as its obligations under the San Joaquin River Settlement and other applicable environmental laws. And the Authority would continue to operate and maintain the Friant-Kern Canal as it has for more than 30 years.

At the same time, Reclamation would be freed from the costs associated with designing and overseeing capacity repairs to the Canal, as well as the cost of overseeing the normal day-to-day operations of the facility and any liability associated with its operations.

But Reclamation would continue to make water-delivery decisions, consistent with the existing contracts, laws, regulations, water rights and agreements that govern the operation of the CVP and the San Joaquin River. And Reclamation would continue to receive the revenues from the sale of CVP water through the Friant Division.

In other words, transferring title of the Friant Kern Canal to the Authority would not and likely could not, change the current operation of the facility, or saddle the Federal taxpayer with the cost of building the Canal – already repaid by Friant water users – or deprive the government of the revenues that the Canal will generate into the future. Instead, with a title transfer, Federal costs would decrease while the Authority’s ability to protect the original Federal investment in the project would increase.

Some might argue that transferring the Friant-Kern Canal to non-Federal ownership will undercut environmental protections provided by the Endangered Species Act (ESA), the Clean Water Act (CWA) and other federal and State laws. We see no merit in these assertions. All such laws will continue to apply to Friant-Kern Canal operations regardless of the facility’s ownership. For example, two of the largest water projects in California are on the Merced and Tuolumne rivers, tributaries to the San Joaquin River. Both projects were built and are owned and operated by non-Federal irrigation districts. These districts must comply with the Federal and California Endangered Species Acts, as well as Federal and State clean water, fishery and wildlife laws and regulations. In this regard, a locally owned Friant-Kern Canal would be no different from any other locally owned project.

Impediments and Recommendations

One of the impediments to engaging in Reclamation’s title transfer process is the complexity and cost associated with reviews under the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA), which apply to title transfers because they are considered major Federal actions. For example, some of the Authority’s member irrigation districts considered acquiring title to small Reclamation distributions works within their district boundaries. But the districts concluded that the cost of the NEPA review alone would exceed the benefits of taking ownership to these small facilities, which the districts have operated, maintained and repaired for many decades.

Congress should act to appropriately focus the scope and implementation of NEPA and NHPA as they are applied to Reclamation title transfers while maintaining a transparent process that is open to public participation. We would welcome the opportunity to work with the Committee to develop legislation to that end.

The Committee also should develop legislation to require NEPA and NHPA evaluations to focus on the particulars of an individual *title transfer itself*, and not on hypothetical and unlikely “alternatives” and outcomes, or on the “impacts” of existing, well-established operations that would not otherwise be subject to review.

Nor should a NEPA or NHPA reviews of a proposed title transfer include expected project repairs or rehabilitations by the non-Federal owner. Such projects will be reviewed and permitted separately under all applicable Federal and state laws and regulations in the normal course of events. There is no need delay a title transfer by including NEPA reviews of repair projects that will, or may occur in the future.

In cases where only the ownership of a project will change and not its operations or “footprint,” NEPA and NHPA reviews should be deemed to not apply or be addressed in a programmatic fashion through categorical exclusions. The Committee should consider establishing criteria for waivers and exclusions for title transfers where no material change in project operations will occur under non-Federal ownership.

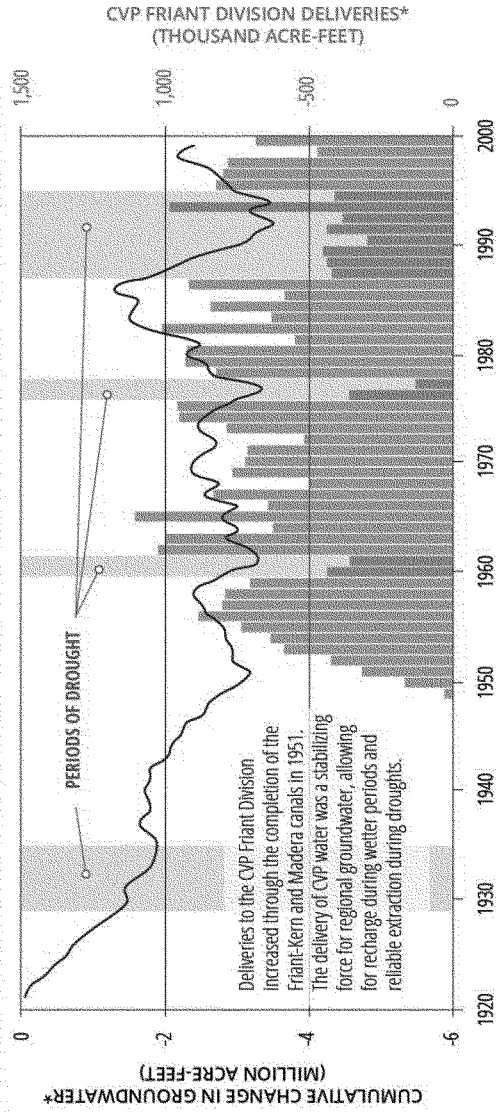
Reclamation has supported NEPA reviews of title transfers though categorical exclusions, but only for uncomplicated, stand-alone projects. This would appear to exclude components of large projects, such as the CVP’s Friant-Kern Canal. The Authority recommends that the committee consider establishing criteria that will ensure facilitation of title transfers and explicitly include large project elements, such as the Friant-Kern Canal, when no change in operations will occur as a result of a title transfer.

Finally, the Authority joins the Family Farm Alliance and other water-user organizations in urging Congress to grant the Secretary of Interior broad authority to make title transfers without the necessity of further action by Congress. Of course, such authority should be appropriately conditioned to ensure the fairness and transparency of the title transfer process, while also including specific direction and criteria, such as those the Authority has suggested above, to genuinely facilitate title transfers for all types of projects.

Recognizing the importance of Congress’ role in oversight of agency operations, the Authority welcomes the opportunity to work with the Committee to develop legislation that would provide periodic review by the Committee regarding implementation of title transfer legislation to ensure that both the agencies and the beneficiaries are meeting their obligations under the law in a timely fashion.

Thank you again for the opportunity to present the views of the Friant Water Authority to the Subcommittee. I am happy to answer any questions you may have.

**CVP WATER DELIVERIES TO THE FRIANT DIVISION
KEPT REGIONAL GROUNDWATER STABLE THROUGH MULTIPLE CYCLES OF DROUGHT**



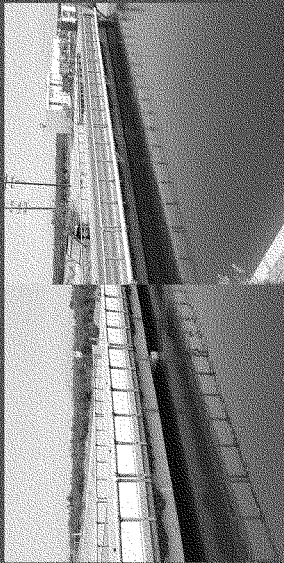
*Conditions represented for eleven Friant Division contractors with early participation in the CVP, and collectively representing about half of the Friant Division (55-percent of Class 1 and 46-percent of Class 2 contracts). Information for the combination of conditions at: Delano-Earlimart Irrigation District (ID), Ivanhoe ID, Lindmore ID, Lower Tule ID, Porterville ID, Saucelito ID, Shafter-Wasco ID, South San Joaquin Municipal Utility District, Stone Corral ID, and Tulare ID.



SUBSIDENCE — A CRITICAL CHALLENGE TO FRIANT-KERN CANAL WATER DELIVERIES



The Friant Water Authority is facing a critical challenge: right now, **one** of the ways we **reduced our ability to deliver water to many** Friant Division Contractor's **by nearly 60%.** It's a challenge that must be met today if we are to ensure our long-term commitment to delivering high quality dependable water to the growers needed by farmers and cities in the San Joaquin Valley.



Alarming Signs of Subsidence

Evidence of subsidence was noticed when, at full capacity, water in the canal was running up against bridges. It would normally pass under these easily.

The picture on the left shows water passing under the bridge at least 60% as it freely passed prior to the most recent subsidence. The picture on the right shows water hitting the bridge at flood capacity and a flow canal form.

A Legacy of Innovative Water Management

The Friant Division was designed to bring stability to the San Joaquin Valley's groundwater supply, which was threatened at the beginning of the 1900s by decades of groundwater pumping. The Friant Division's two canals, the Friant Kern and the Madras, source high quality surface water from the San Joaquin River that supports crops, cities, and groundwater recharge. This investment to establish the Friant Division has paid off by providing stable surface and groundwater supplies that created and sustain a world-class agricultural sector that in turn supports numerous communities and businesses. But in recent years, several challenges have reduced the ability of the Friant Division's existing infrastructure to serve its intended purposes.

The Challenge

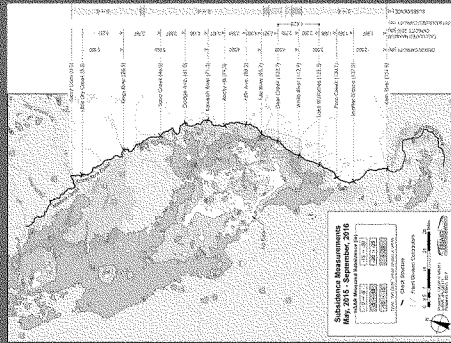
In early 2017, Friant Water Authority discovered a problem related to land subsidence that affects the Friant Kern Canal's carrying capacity and its ability to deliver water to Friant contractors near the southern portion of the canal.

Subsidence and Canal Operations

The Friant Kern Canal was designed as a gravity flow facility and does not rely on pumps to move water. Subsidence (which is the gradual sinking of an area of land) has caused parts of the canal to sink in relation to other parts. This inequality affects the canal's ability to convey water. When the land elevation lowers, the canal must be operated at a lower flow stage to ensure that water doesn't overflow the banks.

Brought to the Boiling Point

From 2012-2017, California weathered its worst drought on record at the same time that increasingly stringent environmental regulations required more surface water to flow to the coast. This forced San Joaquin Valley water users to rely heavily on groundwater supplies. In addition, in 2014 and 2015, the Federal Reclamation made a decision not to allocate to Friant contractors their water supply from the San Joaquin River. This action caused most Friant districts to rely solely on groundwater resources to maintain their crops and protect decades of investments in what is among the highest value, highest production agricultural areas in the world.





What Does Canal Subsidence Mean to You?

It means that even in 2017 – one of the wettest years on record in the San Joaquin River basin – Friant Water Authority cannot physically move the amount of water we should be able to deliver to farms and communities on the San Joaquin Valley's eastside. It means that the Friant Division cannot operate to its full capability or in the way it was designed.

Is This a New Problem?

The Friant-Kern Canal's carrying capacity has been compromised by various factors, including subsidence, since it began operation in 1951. In the past, water managers could manipulate canal operations to help mitigate some of the lost capacity. However, the new problem that emerged in 2017 is driven by rapid and severe land subsidence in the Corcoran/Tulare Basin areas, which are adjacent to the Friant-Kern Canal near Deer Creek. During 2015-2016, land elevations have dropped by two feet near Corcoran. There

is no way to operate the canal to eliminate impacts to water users caused by this amount of subsidence.

Impacts to Contractors

All Friant Contractors who rely on the Friant-Kern Canal will be affected by changes in operations necessary to cope with the subsidence problem as reduced capacity along the canal will likely impact long-standing transfer or exchange partnerships among Friant Contractors, which have helped to balance water supply throughout the Friant Division. The Contractors downstream from the subsidence area (including Arvin-Edison WSD, Shafter-Wasco ID, South San Joaquin MUD, Kern-Tulare WD, Delano-Earlimart ID, Terra Bella ID, Saucelito ID, and Tea Pot Dome WD) will be most affected, however, because they may not get the amount of water they want during the time they need it. This may require farmers to turn to groundwater to make up for the shortage, which could exacerbate the subsidence that is causing the problem in the first place.

Senator FLAKE. Thank you, Mr. Phillips, and thank you all for your testimony. Let me just start.

Mr. Ewell, Reclamation's FY'18 budget stated a proposal to facilitate greater title transfers was being developed by the Administration. What is the status of that proposal? What details can you give us at this point in terms of the Administration looking to address this issue?

Mr. EWELL. Yes, thank you, Senator.

The current program is being worked on closely and in a very collaborative manner with OMB. As that is continuing its process we hope to have something up this way in the coming weeks, as it relates to it.

Generally, as, kind of, echoed by the stakeholders here today, the idea that a list of criteria, specific criteria, would be established and ultimately that the taxpayer and the Federal Treasury would be protected.

Senator FLAKE. Great.

For all the non-federal witnesses, to some extent or another in your testimonies you talk about the challenge and expense associated with NEPA and historic preservation reviews and the current processes as being a problem. Can you go a little deeper into that?

Also, Mr. Brown, you made a suggestion that previous NEPA or Historic Preservation Act reviews can be utilized where possible. Can you talk first a little about that?

Mr. BROWN. Sure.

As I mentioned there were many public sessions, public documents that were made available to the stakeholders and other parties. We do extensive analysis of every action on the canal right away. All that we're really seeking is going forward that there's a recognition of the past work and an incorporation of that, that we don't go back and redo that or duplicate it.

Really, the facilities being 80 years, it's a culmination of a lot of different activities and events and almost to the number of them, they've all been analyzed in some various fashion under NEPA and the Preservation Act and so we are very concerned and very protective of the cultural resources, the historic nature of the facilities and we would just like to see that those things be recognized as adequate as we move forward.

Senator FLAKE. Thank you.

Anybody else on that subject?

Mr. DeVries, your organization has had the benefit of having completed a transfer. Can you talk a little about the potential future operations, how the potential future operations are being considered by the Bureau in your process? I would be interested in anybody else who wants to discuss their experience here, but you specifically mentioned it. Do you want to talk about that?

Mr. DEVRIES. Sure. Thank you, Senator.

Relative to the operations, maintenance and replacement related obligations, I feel that the title transfer process, communications of such responsibilities from Reclamation to our District and Association, that that process has been a smooth process. I feel that we've effectively managed and handled that in coordination with Reclamation. They've been supportive. That has worked out well.

I think where we've had the biggest challenge relates to the corridors and lands management related to the corridor, specifically the Salt Lake Aqueduct. When we took over that facility, there were a lot of encroachments that needed immediate attention. It was a big enough issue that we ended up having some state legislation passed to prevent adverse possession with some of the encroachments that related to the corridor because we had taken local ownership of that. So the big challenge that we had was going in and cleaning up a lot of remnants of encroachments that were probably just not handled the way they should have been prior to our taking over and maybe that wasn't communicated as effectively as it should have been relating to that process.

Senator FLAKE. Thank you.

Mr. DEVRIES. Thank you.

Senator FLAKE. Senator King.

Senator KING. Mr. Ewell, all of you have testified that the length of time, I think somebody had said, a couple hundred thousand dollars, ten years. Why does it take so long? What are the obstacles?

Mr. EWELL. Thank you, Senator, for the question.

I think ultimately as the process is taking place there are, kind of, two components which probably have added length to the process. The first is entering, historically, into the MOA with the particular stakeholders. And last, as it relates to the legislative process.

At the end of the day we believe that working with the stakeholders up front and being able to identify a number of these matters early on and allowing us to then enter into a title transfer agreement with the parties would help facilitate and expedite the process.

Senator KING. You are suggesting that Congress would slow down something? I am shocked, shocked.

Mr. EWELL. Senator, I'm new to public service in DC, but there seems to be a theme there at times.

Senator KING. Well, I was wondering, there is a concern of Congress losing, entirely, the control over transfers of important public assets. One option might be instead of just abrogating the control with criteria, would be a Congressional veto within a certain period of time. In other words, make your deal, submit it to Congress. If Congress doesn't act within 90 days, it is deemed approved. Then at least Congress would have an opportunity to review, if it chose. It would be, kind of, intermediate steps. So I commend that to you for your thinking as another alternative as we are approaching this.

Let me ask about the NEPA question. Mr. Arrington, I think all of you have mentioned it. As I understand it, the problem is that NEPA is being applied simply for the handing of a deed, not for an action, not for a new dam or a new pump or anything else, and that is the problem.

That is the problem you have identified. Am I correct?

Mr. ARRINGTON. Absolutely.

One of the main things to stress on a lot, on a majority of the title transfers we're talking about here, we're talking single function or single purpose or few purpose entities that are going to be operated in the same way, post title transfer. And so, it really is

simply a handing of a deed. These organizations have, for years, operated and maintained these systems even though Reclamation has owned them. They operate them, they maintain them, they clean them and now they're just taking title to them. And so, they'll transfer that paper is what is——

Senator KING. But if there was a contemplated major change in the facility, if it was transferred from public ownership, NEPA didn't apply to the transfer but then the new owner would be exempt from NEPA, would they not because it would not be a federal action or am I incorrect?

Mr. ARRINGTON. No, that's correct.

I think that gets back to what Mr. Ewell was talking about earlier about a categorical exemption that identifies specifically what opportunities would fit under a categorical exemption. It wouldn't apply to every single title transfer.

There may be a title transfer that would need a little more detailed review and maybe more NEPA, but for most of what we're seeing, at least in particular in the four that have happened in Idaho, the facilities were operated the same way after, there has been no change.

Senator KING. I think there needs to be some creative thinking about it because we don't want to exempt from NEPA a transfer which would lead to a substantial change and environmental impact. On the other hand, if it is just a transfer with no change in operation, I think you are talking about creating criterion and categorizing these transfers.

Mr. ARRINGTON. I agree with you.

Senator KING. Are these transfers always permanent or are they for a term of years? Are they fee simple or can they be 20 years? What is the pattern?

Mr. ARRINGTON. Well, I can speak from our experiences. They're permanent transfers. I haven't—I'm not aware of any that are transfers for a period of years.

Senator KING. Okay.

Final question. I noticed, Mr. Brown, you listed five criteria, or six, I think, of things that needed to be part of this. One is one sentence which is actually quite significant. I want to be sure I have the exact words. "Congress should ensure Reclamation has the resources necessary to process title transfers in a timely way without impacting ongoing work."

There is a lot in that sentence because around here we often talk about cutting the bureaucracy and cutting the size of government, diminishing the size of government. I think we need to recognize that when we do things like that we cut the ability of government to respond to processes like what you are talking about.

When I talk to my constituent services people in Maine, one of the biggest problems they have is there is nobody to answer the phone at various federal agencies or it takes forever to process a piece of paper. So we can't both talk about improved government service and starving the bureaucracy at the same time. We need people who have the ability to respond to these programs. I think that is an important point that is implicit in your comment. Is that correct, Mr. Brown?

Mr. BROWN. That's correct.

Senator KING. Thank you.

Thank you, Mr. Chairman.

Senator FLAKE. Thank you.

Senator Lee.

Senator LEE. Thank you very much, Mr. Chairman.

Thanks to each of you for being here. I want to thank all of you for what you do to promote efficient, effective water management policies.

I want to thank those of you who traveled out from the West and particularly you, Mr. DeVries, for being here. It is good to have a Utah on the panel. In fact, I would like to start my questions with you, Mr. DeVries.

You stated in your written testimony that prior to the title transfer that took place the money that the Bureau of Reclamation spent on the Salt Lake and Provo River aqueducts provided relatively little value because it mostly duplicated work that was already being conducted by the Districts and the Water Users Associations. Am I understanding your testimony correctly in that regard?

Mr. DEVRIES. That is correct.

And specifically to the operations and maintenance-related activities, the majority of that activity was already being handled by our District and the Association anyway.

The right-of-way or encroachment issues related to the corridors, however, that was something that, as I mentioned, was something that we had to do quite a bit of catch-up work to get things under control, in essence. And we're still—that's still in progress.

Senator LEE. Was that the only activity, prior to title transfer, what was happening through the Bureau of Reclamation that could not be handled or was not being handled effectively by the Water Users Associations and Districts?

Mr. DEVRIES. Well, really the main thing that was happening, and it was more related to the Salt Lake aqueduct corridor, again, was the corridor management of the properties and lands related to that corridor. So that was something that we feel now that we're able to handle that locally. We're able to respond and be more efficient with the process of taking care of encroachments, taking care of crossings, anything related to that corridor.

Senator LEE. At a lower cost?

Mr. DEVRIES. At a lower cost, correct.

Senator LEE. You also mentioned in your written testimony that NEPA played a significant role, the federal NEPA requirements added rather substantial costs to the enclosure project along the Provo River Canal, but the reconstruction of the terminal reservoir, on the other hand, was done following the title transfer. Is that right?

Mr. DEVRIES. That is correct.

Senator LEE. And my understanding is that saved the District a lot of money because it did not have to go through the NEPA process.

Mr. DEVRIES. That's correct. It was an interest-free loan because it was locally owned, in essence.

Senator LEE. Can you give me a rough approximation as to how much money the water district saved because of the fact that this reconstruction occurred after the title transfer?

Mr. DEVRIES. You know, I don't have those exact numbers, Senator. My guess is probably on the order of millions of dollars because the loan, again, was interest-free. So I'd have to get exact numbers or have to do more analysis to get you an exact number.

Senator LEE. Okay, but it was likely in the millions of dollars?

Mr. DEVRIES. Correct.

Senator LEE. And were the environmental conditions worse during the project or are the environmental conditions today worse as a result of the fact that this didn't go through the NEPA process but was instead subject to local authorities, local laws?

Mr. DEVRIES. You know, I think because we—so obviously, we had the savings of not having to go through NEPA. Environmentally, there really were no negative impacts to not going through NEPA. It basically was reconstruction, same footprint, same site. So, really there was nothing that would have—it would have not helped the process to have to go through a NEPA process in this case.

Senator LEE. Can you walk us through some of the steps taken by the State of Utah and by the Provo River Water Users Association to make sure that the environment was protected?

Mr. DEVRIES. Yeah.

So, I think, again, the key here is any work, reconstruction, replacement or other activities related to these facilities, either the PRA or the SOA, any work that's done, like obviously we're going to be looking out for any potential impacts, environmentally speaking and work closely with the state, along those lines.

But in every case, it's always been in the same footprint, same area, so the likelihood of any impacts is pretty slim anyway as far as environmentally speaking. But nonetheless, it is something we are sensitive to and work closely with the state on.

Senator LEE. While saving millions of dollars.

Mr. DEVRIES. Right.

Senator LEE. Because of the lack of need to go through the federal NEPA legislation.

You still get the same environmental protection, the same. The environment is no less protected, even while millions of dollars in compliance costs are being saved.

Mr. DEVRIES. Correct.

And I would add that additionally we don't have to have Reclamation inspectors involved with any projects when it comes to reconstruction. So that is handled locally with our entities as opposed to having multiple layers of inspectors which adds additional costs as well.

Senator LEE. Thank you, Mr. DeVries.

Mr. DEVRIES. Thank you.

Senator LEE. Thank you, Mr. Chairman.

Senator FLAKE. Thank you.

It is nice to have Senator Smith on the Subcommittee, and I just want you to know all three of us are jealous of the 10,000 lakes you have, speaking of water.

[Laughter.]

But I appreciate you being here. Your turn.

Senator SMITH. Thank you very much, Chair Flake, and I am happy to be here.

I want to just start out by saying that I want to thank all of our witnesses for being here today and you know, I, too, have spent a lot of time when I was Lieutenant Governor trying to figure out how to make government work better, more efficiently, more cost-effectively. So I share that goal.

I just want to ask a couple of things.

As Senator Flake was saying, we do not have a lot of Bureau of Reclamation projects in Minnesota, in my state, the Land of 10,000 Lakes, but the Bureau is the second largest producer of hydropower in the country and many of the rural electric co-ops that actually provide electricity to about 75 percent of the geographic mass of Minnesota, and also the municipal utilities, rely on purchasing electricity from Bureau hydro facilities around the country. So it is really important to me that, for Minnesota, any changes that we might make to the title transfer process would not affect electricity rates in Minnesota where we have very competitive rates.

Mr. Ewell, could you just comment on that and help me understand how this might work?

Mr. EWELL. Sure, thank you, Senator.

Senator SMITH. In regard to the co-ops.

Mr. EWELL. My pleasure.

As you pointed out there are certain complexities that relate to hydropower projects. And in particular, as I had mentioned in my testimony, with FERC licensing as well as the Power Marketing Administrations. And due to those complexities, historically Reclamation has not transferred, of the 30 projects since 1996, none of those have had a power component to it. However, we're very much willing to work with the stakeholders and the Committee on a particular project because each one is unique by its nature, but to work on that to see if there is a way to protect and maintain those very matters that you had raised.

Senator SMITH. Okay, thank you.

To follow up on the questions that Senator King was asking, how would that work? As I understand it the Administration is asking for some sort of a categorical exemption from Congressional review. How would that work with these, with the hydro question, as well as, you know, I am also concerned, of course, about the categorical exemption from making sure that environmental safeguards are followed?

Mr. EWELL. No, understood and thank you for the follow-up question.

As mentioned earlier, as it relates to those projects and kind of as the current legislation that's being worked on in conjunction with other departments and OMB which we hope to have up here in the coming weeks, but that criteria would look at more single purpose projects such that those that don't have complexities in relation to them that would qualify for that potential categorical exclusion. It would be possible that the more complex project would then need to still go through that NEPA process.

Senator SMITH. I look forward to continuing to work on that. I think that that is a really important issue.

I just want to ask one more question with the time that I have.

As you were saying, Minnesota has lots and lots of water, but surprisingly we don't have very much water at all in the southern part of our state. We have real issues with droughts and water shortages which have a significant impact on rural economic development which brings me to the Lewis and Clark project which is very important, a big pipeline to bring water into southern Minnesota and on to Iowa. This project is about 73 percent complete and it still needs significant resources to be completed. In fact, the state has stepped in to fund the project while we are awaiting federal funds.

I am just wondering, since I have you here, if you will commit to working with me on the completion of this really important project for rural economic development in Minnesota?

Mr. EWELL. Thank you for the question, Senator.

I'm happy to work with you and any stakeholders as it relates to projects. Part of my reason in coming to Washington, DC, was to serve and to work with those stakeholders and customers of Reclamation to try to complete projects and fulfill the mission of Reclamation.

I look forward to it. Thank you.

Senator SMITH. Well, thank you. That will be very important.

I will look forward to talking with you more about the funding in the President's 2019 funding request which will be very important to us finishing the project.

Mr. EWELL. Thank you.

Senator FLAKE. Thank you.

Senator Risch.

Senator RISCH. Thank you, Senator Flake.

Senator Smith, welcome to the Committee.

When I was Lieutenant Governor I missed the class on the ranking of the states for hydropower. Where does Idaho rank on that? [Laughter.]

I would not have looked at Minnesota as number two.

Senator SMITH. Well, it is because we purchase so much hydropower from other states, Senator.

Senator RISCH. Ahhh—

Senator SMITH. Otherwise, yes, we have very little hydropower in our state. We buy it mostly from other places, including Canada.

Senator RISCH. Well, next of all I am from Lewis and Clark Country. Are you going to also try to tell me that Lewis and Clark explored Minnesota when they went through there? We are going to have some difficulties, I think.

[Laughter.]

Senator SMITH. Oh, I bet we will get along, Senator.

[Laughter.]

Senator RISCH. Well, thank you so much.

The southern part of our state is extremely dry and would be very much desert like a lot of the other intermountain western states. We have a real interest in this since most of these are conveyances that have been done or a lot of the conveyances that have been done, have been done in Idaho.

Mr. Chairman, I really do not have any questions, but what I do want to do is thank you for holding this hearing. I hope we can actually make some progress in this area because it is really important that as we move ahead with the fact that Idaho has two-thirds of the Reclamation assets in Idaho are managed by non-federal entities. It is really important when they need to do one of these conveyances that we do it in a less cumbersome manner than what we have.

So thank you for the hearing, and I hope we can actually get some drafting done and get something done. And thank you to the witnesses, although I could not be here, I did see some of it on TV.

Paul, welcome to Washington. I have no doubt that you will do as well as your predecessor did who had a long range, as you know, in that and is Mr. Water in Idaho.

Thank you, Mr. Chairman.

Senator FLAKE. Well, thank you. Thank you, Senator Risch.

Just one follow-up question, if I can, with Mr. Phillips. There was some discussion, and we had a little discussion here, about the continued applicability to some of these rules with the transfers. You said in your statement, "All such laws will continue to apply through the Friant-Kern Canal operations regardless of facility's ownership." Is that generally the case?

Mr. PHILLIPS. Well certainly in California the similar law would still apply and, in fact, if we wanted to do anything different than current operations it's possible that federal law would apply to those actions, if we wanted to make any major infrastructure changes.

So, we might not—

Senator FLAKE. So if it is just an ownership change, no problem.

Mr. PHILLIPS. Yeah.

Senator FLAKE. But if there is change in operations?

Mr. PHILLIPS. Exactly.

And I wanted to give one example of one of our districts who, just a couple years ago, we repaid all of our contracts in 2010, over 30 districts. One of those districts that has the pipelines that it uses to distribute water off of the canal and then also the house that it uses for administration, there's never any federal employees there. They've owned it or not owned it, but they've used it for decades. And when they approached Reclamation with we'd be interested in title transfer, Reclamation said, just for those pipelines and for the one admin building, you need to transfer us \$1 million so that we can start the permitting process. And that's the last discussion they've had, obviously. And so that gets into what are they doing, what is the need for that?

Senator FLAKE. Thank you. Thank you. I appreciate that.

I thank you all for sharing your experience or expertise and experience, insights, here today.

Last Congress we were able to put together a water supply bill that addressed many of the needs from across the West. I think between this bill and the Subcommittee's hearings, we have the material to go to work on another water supply and drought bill that deals with a number of the certainty and supply and operations issues that you all discussed today.

For the information of the members, questions may be submitted for the record before the close of business on Thursday. The record will remain open for two weeks. We ask the witnesses to respond as promptly as possible and your responses will be made part of the record. With the thanks of the Committee, the Committee stands adjourned.

[Whereupon, at 11:53 a.m. the hearing was adjourned.]

APPENDIX MATERIAL SUBMITTED

**U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water & Power
January 17, 2018 Hearing: The Bureau of Reclamation's Title Transfer
Process and Potential Benefits to Federal and Non-Federal Stakeholders
Questions for the Record Submitted to Mr. Austin Ewell**

Questions from Ranking Member Maria Cantwell

Question 1: How would Reclamation ensure that multiple beneficiaries are protected in any potential title transfer?

Response: An open, public and transparent process is essential to the successful transfer of title of Reclamation projects or parts of projects. Reclamation has memorialized that lesson in its *Framework for the Transfer of Title* guidance, which notes that all transfers must have the consent of other project beneficiaries. Beyond project beneficiaries, any legislation that authorizes Reclamation to conduct title transfers without additional congressional approval needs to ensure that affected state, local, and tribal governments, appropriate federal agencies, parties to interstate water compacts and treaties, and the public continue to have the opportunity to voice their views and suggest options for remedying any problems.

Question 2: What would you see as Congress's role for more complex projects, such as those involving preference power rates or other complicating factors?

Response: Reclamation projects such as large multipurpose projects where there is no consensus among the project beneficiaries concerning the transfer, where multiple competent but competing beneficiaries have expressed an interest in acquiring title, or where the institutional and legal concerns cannot be readily resolved are not considered good candidates for administrative title transfer, and therefore would benefit from the oversight of Congress. Projects that involve power marketed by the Power Marketing Administrations or projects that have preference power rates add additional complexity to the transfer process, and therefore should require congressional approval before title can be transferred out of Reclamation ownership.

Question 3: How do you ensure that in these transfers, the public interest is protected and that the intent of Congress in construction of these facilities remains?

Response: In addition to ensuring the public has the opportunity to participate in an open, public and transparent process as noted above, Reclamation's existing guidance and recommended eligibility criteria referenced in our testimony is designed to both ensure that the transfer protects not only the interest of the non-federal entities interested in taking title, but also the authorized purposes for which the projects were developed and the public interest as well.

Question from Senator Jeff Flake

Question: The Bureau of Reclamation's Framework on Transfer of Title indicates that "future uses on transferred land and waters" should be considered in determining the price for a project and previous experience has shown a range of future operations being considered in NEPA

**U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water & Power
January 17, 2018 Hearing: The Bureau of Reclamation's Title Transfer
Process and Potential Benefits to Federal and Non-Federal Stakeholders
Questions for the Record Submitted to Mr. Austin Ewell**

reviews for a title transfer. Please explain how potential future operations should be predicted, assessed and/or documented during the title transfer process.

Response: In negotiating a title transfer, Reclamation must balance the benefits available to a transferee, including greater autonomy and flexibility to manage the facilities to meet current needs, with Reclamation's interest in ensuring the Reclamation project continues operations consistent with the authorized project purposes. Reclamation must consider future uses in order to determine the appropriate compensation to the United States, which includes the equivalent of the net present value of any repayment obligation to the United States or other income stream the United States derives from the assets to be transferred. It has been Reclamation's experience that during the development of a potential title transfer agreement, the associated public process provides an important forum for recipients of title to outline their goals and intentions, as well as allowing other stakeholders to inquire how their interests would be protected if the title transfer were to be approved.

**U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water & Power
January 17, 2018 Hearing: The Bureau of Reclamation's Title Transfer
Process and Potential Benefits to Federal and Non-Federal Stakeholders
Question for the Record Submitted to Mr. Paul Arrington**

Question from Senator Jeff Flake

Question: The Bureau of Reclamation's Framework on Transfer of Title indicates that "future uses on transferred land and waters" should be considered in determining the price for a project and previous experience has shown a range of future operations being considered in NEPA reviews for a title transfer. Please explain how potential future operations should be predicted, assessed and/or documented during the title transfer process.

Answer:

First, thank you for this additional question and the continued thought you give to this very important issue. As stated in my testimony during the hearing, Idaho has a long history of title transfers and Idaho water users continue to view title transfer as a means to provide greater flexibility in the operation of their systems.

It is Idaho's experience that transferred projects continue to operate in the same historical manner after the title transfer. These projects were developed, in many cases, over a century ago, to provide water delivery and drainage services to the landowners within their boundaries. Water rights were perfected under Idaho law provided for the specific purposes of the project. Today, Idaho's economy relies in large part on the agricultural operations supported by these facilities. In areas where urbanization has extended into agricultural areas, these projects still operate to deliver irrigation water to subdivisions, golf courses, schools, etc. In short, Idaho's experience is that there is no change to "future uses on transferred land and waters" following title transfer.

Assuming or predicting a change in the future use of a project can have significant consequences to a title transfer and, in many cases, may not even be a feasible consideration. Such considerations could make the simplest title transfers very complex.

For example, water rights are issued for specific uses on specific lands, and any future changes to project purposes using underlying state water rights will be controlled by the state through a public process. Such changes could not be guaranteed. It would not be practical to speculate about possible future changed uses of the water rights during the title transfer process.

Further, state laws provide clear obligations and liabilities for water delivery entities relating to the operation and maintenance of water facilities. Even as urbanization occurs around these facilities, they are operated and maintained for their same purpose. Urbanization does not change the use of these facilities or the obligations and liabilities associated.

Finally, as stated, most of these facilities have been in operation for well over a century. Millions of acres of prime farmland are irrigated each year as a result of these facilities. Tens of thousands of homeowners receive the water required to irrigate their lawns and communities irrigate their

**U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water & Power
January 17, 2018 Hearing: The Bureau of Reclamation's Title Transfer
Process and Potential Benefits to Federal and Non-Federal Stakeholders
Question for the Record Submitted to Mr. Paul Arrington**

golf courses and schools through these facilities. It is not practical to consider altering the uses of these facilities.

Speculating as to future uses would not be helpful in a title transfer. Absent a clear and identified path for future operations, a title transfer should not predict, assume or speculate about changed future operations.

I appreciate that the Subcommittee has some level of concern that an entity could take advantage of an abbreviated title transfer process, with abbreviated NEPA requirements, only to change some aspect of the transfer works when the process is completed. Such a change may avoid NEPA analysis of impacts that, some may feel, should have been considered as part of the transfer process.

However, I do not see this as a reason to limit the streamlined title transfer process. Title transfer is sought, in large part, to provide the local entity with local control of these facilities. Title transfer provides flexibility in the continued operations. During the hearing, the Subcommittee heard multiple examples of how title transfer provides greater flexibility in operations and management currently in federal ownership but under local control. Part of that flexibility is the right to review operations and, if needs or opportunities arise, change the way those facilities operate. If an entity, following title transfer, desires to change some aspect of the use of the transferred works, that entity would be solely responsible for the cost, liability and other obligations of those operations.

In some instances, the local entity may know of specific future changed or additional uses for the project. In those instances, the NEPA process can consider the future use. Absent a clear plan, however, NEPA should presume that the facilities will be operated in a manner consistent with the historical operations.

U.S. Senate Committee on Energy and Natural Resources
 Subcommittee on Water & Power
 January 17, 2018 Hearing: The Bureau of Reclamation's Title Transfer
 Process and Potential Benefits to Federal and Non-Federal Stakeholders
 Questions for the Record Submitted to Mr. Jerry Brown

Questions from Senator Jeff Flake

Question 1: The Bureau of Reclamation's Framework on Transfer of Title indicates that "future uses on transferred land and waters" should be considered in determining the price for a project and previous experience has shown a range of future operations being considered in NEPA reviews for a title transfer. Please explain how potential future operations should be predicted, assessed and/or documented during the title transfer process.

There are several factors that may be considered in evaluating the price and future operations including the type of project or facilities, origination of land (acquired vs withdrawn), repayment structure and status, and contractual language. In the case of the Contra Costa Canal, the facilities were constructed and land was acquired by Reclamation as part of the Central Valley Project (CVP) for the sole purpose of providing water service to the Contra Costa Water District (CCWD). The capital costs for all facilities and land acquired for the Contra Costa Canal has been repaid by CCWD. CCWD's existing CVP contract specifies that title of the facilities will be transferred "*upon repayment of all outstanding capitalized costs of one or more of the Project Works, and upon appropriate authorization of Congress*". All investments made by the federal government and taxpayers has been repaid by CCWD with interest. In cases similar to the Contra Costa Canal, it would not be appropriate to negotiate a price when all costs have been repaid and the existing contract specifies the financial terms of title transfer.

There may be some instances where the cost of facilities has not been repaid, or lands used were transferred from other federal purposes ("withdrawn lands") to support a project. In these instances, it might be appropriate to establish a price during title transfer to ensure federal taxpayers are compensated for transferring non-reimbursed facilities or withdrawn lands to a non-federal entity. Another consideration in determining the price should be the depreciated value or remaining useful life of the facilities. Many projects are at or near the end for their useful life and carry a significant liability and requirement for reinvestment by the local entity to renew or replace.

For future operations, consideration should be given to whether the project facilities and land are going to continue to operate in the public domain and for the intended purposes. The Contra Costa Canal facilities are the primary water conveyance source for the region serving over 500,000 people, and must continue to operate in perpetuity to meet this need. CCWD has been responsible for operations and maintenance of the Contra Costa Canal facilities since 1972 and transferring the title to CCWD will not have an impact on future operations or other public benefits such as recreation. It would be a reasonable approach to include consideration of the underlying need of the existing facilities to define the level of NEPA review for title transfers.

U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water & Power
January 17, 2018 Hearing: The Bureau of Reclamation's Title Transfer
Process and Potential Benefits to Federal and Non-Federal Stakeholders
Questions for the Record Submitted to Mr. Jerry Brown

Question 2: In your testimony you highlighted challenges with incomplete title documentation and the time spend to locate missing records. Please explain the delays that you have experienced in this area and provide a few more details about your suggestion on using a quitclaim approach.

As would be expected with facilities of this age, size, and acquisition history, a number of discrepancies and gaps in property records were identified as part of the review for the previous title transfer effort. These include easements for public roadway and utilities crossings of the canal system, missing third-party agreements or land rights, and non-recorded agreements or easements. A significant amount of time was spent trying to locate missing records. To re-survey or otherwise develop legal descriptions or establish records for all the properties would be costly, and not provide significant value. Lands of this vintage often have conflicting land descriptions with neighboring land records, and a precise survey location of the existing facilities is immaterial to their existing presence, use and need. A Quit Claims process was agreed to during the previous negotiation sessions with Reclamation. It was also envisioned at the time that an escrow account of \$100,000 (1996 dollars) would be established and funded by Reclamation and used during the three years following the transfer by CCWD to pay for the value of any parcels or easements it acquires to resolve meaningful disputes resulting from defects in the title being conveyed by Reclamation. Such an approach provides the lowest cost to an equitable administration of property rights.

To
U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water & Power
Response to Question for the Record Submitted to Mr. Mike DeVries
from the Honorable Senator Jeff Flake
January 17, 2018 Hearing: The Bureau of Reclamation's Title Transfer
Process and Potential Benefits to Federal and Non-Federal Stakeholders

Question: The Bureau of Reclamation's Framework on Transfer of Title indicates that "future uses on transferred land and waters" should be considered in determining the price for a project and previous experience has shown a range of future operations being considered in NEPA reviews for a title transfer. Please explain how potential future operations should be predicted, assessed and/or documented during the title transfer process.

Response:

I am grateful for the opportunity to address this question. I appreciate your continued interest in the issue of title transfer.

Previous Utah Title Transfers

I believe the approach that best addresses these issues is reflected in the Provo River Project Transfer Act, Pub. L. 108-382, Section 3(c). Provo River Water Users Association (Association) was required to hold the United States economically harmless. It did so by paying the present value of what the United States expected to receive from the Association under the repayment contract, and the present value of what the United States expected to receive, based on historical experience, in the way of fees paid by third parties for use of project lands. The payment of Metropolitan Water District of Salt Lake & Sandy (District) was the same formula, except with respect to the Salt Lake Aqueduct.

In fairness, others seeking title transfers in Utah should be treated similarly.

I believe that beyond holding the United States economically harmless in the manner described speculating about new and different possible future uses of facilities and water could be problematic and unwise for a variety reasons.

There is Little Opportunity for Significant Changes to Existing Project Infrastructure in Utah

In Utah, water is seriously over-appropriated in all but a few isolated outlying areas.

Entitlements to water from Reclamation projects have been allocated for a long time. With the exception of a soon-to-be-delivered supply from the Central Utah Project Utah Lake System (ULS), the water from Reclamation projects in Utah is in full use or the same is planned on the near horizon.

Reclamation project facilities in Utah are site specific. The surface water in question is captured and stored in the mountains, and transported by gravity to and used in the valleys. The function of these facilities is dependent upon their current locations and elevations.

Many of the Reclamation facilities in Utah are largely located in highly urbanized areas, quickly urbanizing areas, or are confined by adjoining federal lands.¹ A large majority of Utah's population is located in a highly urbanized and narrow band, the Wasatch Front. Approximately 63% of Utah is federally owned.²

As a result of these factors and more, opportunities for expanding the capacity of, or changing the location or footprint of, existing Reclamation project facilities are very limited, or non-existent. The enclosure of the Provo Reservoir Canal in 2010 to in part carry ULS water in addition to water previously carried in the Provo Reservoir Canal may be the only significant example.

There May Be Little Opportunity to Make Changes in the Uses of Project Water in Utah, At Least in the Near Term

Treating surface water to culinary quality standards is a very expensive proposition, in terms of infrastructure and operating costs. I am not aware of plans to treat water from the small number of Utah Reclamation projects that are the subject of repayment contracts where that water is not already being treated.

It is my understanding that the water from most of the Utah Reclamation projects at issue is already being used for at least secondary irrigation in urban and suburban developments to a greater or lesser extent, particularly in the areas where growth has been and will be healthy.

State and Local Interests Dominate When it Comes to Water Rights For Reclamation Projects That are Subject to Repayment Contracts

All water in Utah belongs to the public.³

When a repayment contract is involved, the United States' ownership interest in project water is "at most nominal." In *Ickes v. Fox*,⁴ the Supreme Court described beneficial ownership of water rights in irrigation projects built under Reclamation Acts:

Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners;

¹ See https://nationalmap.gov/small_scale/printable/images/pdf/fedlands/UT.pdf.

² <https://fas.org/sgp/crs/misc/R42346.pdf>.

³ Utah Code Ann. § 73-1-1.

⁴ 300 U.S. 82 (1937)

and by the terms of the law and of the contract already referred to, the water rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. The government was and remains simply a carrier and distributor of the water, with the right to receive the sum stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.

In *Nevada v. United States*,⁵ the Supreme Court rejected the United States' claim of ownership rights confirmed in its name by the Orr Ditch decree for the Newlands Reclamation Project:

Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.

The Solicitor adopted and acknowledged the holding of Nevada in its M Opinion, M-36966, explaining, "the water user who puts the project water to beneficial use obtains a vested property interest in the water right." The "beneficial ownership of reclamation project water rights is in the water user who puts the water to beneficial use." M opinions are binding on DOI.

In *Strawberry Water Users Association v. United States*,⁶ the Utah Supreme Court recognized "the right of use rests with Strawberry," the water users association, and Reclamation has "mere title."

The Idaho Supreme Court has reached the same conclusion:

Based upon the United States Supreme Court cases, the Reclamation Act, the Idaho Constitution, Idaho statutory and case law, it is clear that the entity that applies the water to beneficial use has a right that is more than a contractual right. The irrigation entities in this case act on behalf of those who have applied the water to beneficial use and repaid the United States for the costs of the facilities.⁷

It should be pointed out that with respect to the Moon Lake Project and the Spring City Division of the Sanpete Project the United States does not even have nominal title to the water rights for those projects.

Except as expressly stated otherwise by Congress, Congress intended state water law to apply to Reclamation projects. "It generally can be said that state law governs the distribution of water from federal projects unless Congress expresses a different approach."⁸

⁵ 463 U.S. 110 (1983)

⁶ 2006 UT 19, ¶ 35, 133 P.3d 410

⁷ *United States v. Pioneer Irrigation Dist.*, 157 P.3d 600, 609 (Idaho 2007).

⁸ *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981) (citing *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978)).

From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects. First, and of controlling importance to this case, the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law. . . . Second, once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law.⁹

In the rare circumstances when Congress has expressed a limitation on use of project water—acreage limitations—it has said clearly that such limitations do not apply after a project is paid-out.¹⁰

State and Local Development of Water, and Freeing Up Water Markets, is Sound Policy

Under the Reclamation Act,

It is declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.¹¹

Note, this says the United States should cooperate with states and local interest in “developing water supplies for domestic, municipal, industrial and other purposes” from all manner of federal projects—“navigation, flood control, irrigation or multiple purpose projects.”

In 2003, then-Secretary of the Department of the Interior implemented Water 2025 to address prevention of conflicts about water in the West. That program says the following with respect to the administration of water:

Since 1866, federal water law and policy has deferred to states in the allocation and administration of water within their boundaries. This policy will be honored and enhanced by Water 2025.¹²

Water 2025 further “recognize[d] that state and local governments should have a leading role in meeting the [water] challenges [the West faces], and that the Department of the Interior should

⁹ *California v. United States*, 438 U.S. 645, 665-67 (1978).

¹⁰ 43 U.S.C. § 390mm(a).

¹¹ 43 U.S.C. § 390b(a).

¹² *Water 2025: Preventing Crises and Conflict in the West* at 3, available at: https://books.google.com/books?id=rK6Rea6uRZ4C&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

focus its attention and existing resources on areas where scarce federal dollars can provide the greatest benefits to the West and the rest of the Nation.”¹³

Reclamation and DOI policy supports changes in use from irrigation to Municipal and Industrial uses. The current Reclamation policy on Transfers and Conversions of Project Water, PEC P09 (2017), provides the following introduction:

Reclamation supports transfers and conversions of project water as means of promoting flexibility in water management and maximizing project benefits. Reclamation will work with affected State, local, and tribal governments, project partners, and water users to facilitate transfers and conversions within the framework of relevant legal authority.¹⁴

It announces the following as Reclamation’s “general policy”: “to encourage and facilitate transfers and conversions of project water within the limits of applicable law and Reclamation’s responsibilities for protecting the interests of the Federal government.”¹⁵

Despite this stated policy, in recent years Reclamation has greatly increased the bureaucratic burden, and greatly expanded the federal role in these changes in use. Reclamation broadened what qualifies as a “conversion of contract water,” making more changes in the use of water subject to the requirements of PEC P09. “Conversion of contract water” is currently defined as “A change in primary purpose for the use of contract water (e.g., from irrigation use to M&I use, as those terms are defined under Paragraph 3 of PEC P05).”¹⁶ PEC P05 in turn defines “irrigation use” as “The use of contract water to irrigate land primarily for the production of commercial agricultural crops or livestock, and domestic and other uses that are incidental thereto.”¹⁷

Footnote 6 to that policy provides that “irrigation use”

does not include uses such as watering golf courses; lawns and ornamental shrubbery used in residential and commercial landscaping, household gardens, parks and other recreational facilities; pasture for animals raised for personal purposes or for nonagricultural commercial purposes; cemeteries; and similar uses (except to the extent that some of these uses may be incidental to uses that are primarily agricultural). It also does not include commercial agricultural uses that do not require irrigation, such as fish farms and livestock production in confined feeding or brooding operations.¹⁸

¹³ *Id.* at 2.

¹⁴ PEC P09 at 1, available at: <https://www.usbr.gov/recman/pec/pec-p09.pdf>.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 2.

¹⁷ PEC P05 at 3, available at: <https://www.usbr.gov/recman/pec/pec-p05.pdf>.

¹⁸ *Id.* at 3, n.6.

The current definition of “irrigation use,” incorporated into the definition of “conversion of contract water,” is directly contrary to prior Reclamation Policy. WTR P02 (2001), a predecessor of PEC P05 and P09, says the following:

[W]hen a project contractor or end user is itself the one who continues to use untreated, raw project water which is converted from the irrigation of commercial crops to the irrigation of other vegetation (including, but not limited to, lawns and ornamental shrubbery used in residential and commercial landscaping; gardens; golf courses, parks, and other developed recreational facilities, commercial nurseries, and pasture for animals raised only for personal pleasure and use), then such a conversion is not a “change in the type of use” of project water and is, therefore, not a “transfer of project water” subject to this policy.

The 2001 Memorandum that went to Regional Directors explaining the adoption of that policy says:

The Bureau of Reclamation has many old projects where the only authorized project purpose is irrigation. If “irrigation” were interpreted, as a matter of Federal reclamation law, to mean only the irrigation of commercial crops, with the irrigation of vegetation for other purposes (e.g., lawns and ornamental shrubbery used in residential and commercial landscaping; gardens, golf courses, parks and other developed recreational facilities; commercial nurseries, and pasture for animals raised only for personal pleasure and use) being considered a municipal and industrial (M&I) use or miscellaneous use of project water, then we would have many projects where the project water is being used for unauthorized purposes.

It appears that even before 2001, the practice of Reclamation for nearly 100 years had reflected Reclamation’s 2001 interpretation of “irrigation” to include these various non-agricultural irrigation uses.

Although current Reclamation policy expands the changes in what had long been understood to be “irrigation uses” that are now subject to its requirements, it recognizes the importance of conservation. Under PEC P09,

Where a contractor foregoes its own consumptive uses of contract water, temporarily or permanently, to allow the water to be used for environmental, conservation, or similar purposes under a formal state program designed for those purposes, and the contractor has obtained Reclamation’s approval of the arrangement, the change is not a conversion of contract water for purposes of this Policy for PEC 09-01.¹⁹

This exclusion of conservation from the definition of “conversion of project water” aligns with Reclamation’s System Conservation Pilot Program (SCPP). According to the Upper Colorado River Basin Commissioner, the SCPP is

¹⁹ PEC P09 at 2.

a program designed to explore potential solutions in regards to declining water levels in Lakes Mead and Powell, as well as the potential for long-term drought in the Upper Colorado River Basin. The program implements and tests on-the ground water conservation opportunities which may be helpful in managing ongoing record drought conditions in the Colorado River Basin. The purpose of the program is to explore and learn about the effectiveness of temporary, voluntary and compensated measures that could be used when needed, to help maintain water levels in Lake Powell at a level necessary for hydroelectric power production and to protect Colorado River compact entitlements.²⁰

SCPP projects between 2015 and 2017 in the Upper Basin are estimated to have conserved approximately 21,383 acre-feet.²¹ Projects in the Lower Basin Phase 1 and 2 were estimated to conserve more than 110,000 AF.²²

What we have been seeing over the past few decades is a move toward free markets that result in the highest and best use of water. In 1987, professor David Getches wrote, “society benefits from making fuller, more productive use of water resources, not from rigorous obedience to an awkward system that defines water rights based on historical practices.”²³

Expanding on this view, Marc Reisner and Sarah Bates offered the following commentary on the state of western water:

Our approach to western water is now very much at odds with environmental protection, which has become one of society’s greatest concerns. It is at odds with the free market economic system, whose fundamental efficacy has been rediscovered by Democrats and Republicans alike. It cuts against the grain of America’s oldest public virtue: Yankee thrift and efficiency. . . .

The Bureau of Reclamation . . . is still very much like the Bureau of Reclamation: its “new mission” largely undefined, its new priorities still unclear or greatly hampered by policies and laws it has not moved to change. And the western states, for their part, have not responded well (with some notable exceptions) to the sweeping changes of the past two decades: the shriveling importance of the agricultural economy, the explosive growth of water-short cities, the desperate deterioration of water-dependent ecosystems, and the environmental concern that the vast majority of their own citizens now share.

And yet it is in the case of western water that one of the most interesting lessons of modern times is being learned—that free market economics and environmental

²⁰ http://www.ucrcommission.com/RepDoc/SCPPDocuments/SCPP_15_18.pdf.

²¹ *Id.*

²² <https://www.usbr.gov/lc/region/programs/PilotSysConsProg/pilotsystem.html>.

²³ D. Geches, *Water Use Efficiency: The Value of Water in the West*, Public Land & Resources L. Rev., vol. 8 (1987).

preservation are not nearly so incompatible as many have thought. Allowing water in the West to gravitate to its highest economic use could be enormously beneficial to rivers, wetlands, wildlife, and whole ecosystems. But a more rational scheme of priority, allocation, and end use has been subverted by a system almost Soviet-like in its inefficiency, its unyielding laws, its abrogation of power to a distant priesthood of planners and lawyers and engineers whose attitude toward nature, not to say efficiency, seems one of indifference—or, at best, passing interest.²⁴

Water 2025 sought to tackle many of the same “sweeping changes” identified by Reisner and Bates. In doing so, it recognized that “[w]ater banks and markets are essential to avoiding crises in critical areas of the West.” It explained,

the Department of the Interior strongly supports the use of these mechanisms to allow water to be shifted between competing water uses because they are based on a recognition of the validity of existing rights. Water banks also avoid or reduce the conflict, crisis, and headache that results when water uses are changed through regulatory or other means. More importantly, water banks can provide a mechanism for preserving irrigated agriculture and meeting other water supply needs.²⁵

Allowing water allocation to be the subject of efficient markets, free of federal bureaucracy, will save federal administrative dollars, reduce the need for new water projects, and mitigate conflict over this scarce resource.

Changes in use of water should be counted as one of the possible benefits to come from title transfer, but not in terms of speculation as to when and how that may come about in any particular project, and not in terms of increasing the cost to the water users representative seeking title transfer.

A pre-title transfer review of speculated, possible future changes in facilities and uses of water after title transfer could easily become overwhelming. Consider, for example, the NEPA process, which typically involves consideration of an actual, proposed action, at least one alternative, and a no-action alternative. Even when the details of the proposed action are known, this process can be very time consuming and expensive. A similar evaluation of speculative possible future changes in facilities and use of water after title transfer could easily become overwhelming. Whatever evaluation is to be made of possible changes to facilities and water uses as a part of the title transfer process, we would strongly suggest that such evaluation be less formal, and be left to Congress. We would not suggest that such evaluations be left to an agency that may have a bias toward keeping projects under federal control.

4812-7177-2764, v. 1

²⁴ M. Reisner & S. Bates, *Overtapped Oasis, Reform or Revolution for Western Water*, 146-147 (1990).

²⁵ *Water 2025: Preventing Crises and Conflict in the West* at 16.

**U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water & Power
January 17, 2018 Hearing: The Bureau of Reclamation's Title Transfer
Process and Potential Benefits to Federal and Non-Federal Stakeholders
Questions for the Record Submitted to Mr. Jason Phillips**

Questions from Senator Jeff Flake

Question 1: The Bureau of Reclamation's Framework on Transfer of Title indicates that "future uses on transferred land and waters" should be considered in determining the price for a project and previous experience has shown a range of future operations being considered in NEPA reviews for a title transfer. Please explain how potential future operations should be predicted, assessed and/or documented during the title transfer process.

Response:

Generally speaking, NEPA reviews should be confined to a range options for future operations that include only realistic possibilities. In the case of the Friant-Kern Canal, that range is very narrow because, if transferred, the Canal would continue in its primary role of providing water supply service to the Friant Division long-term contractors (Friant Contractors). In the foreseeable future, the Canal would still be used to provide water for direct application to crops, for municipal and industrial uses, and also convey water for groundwater banking in various groundwater recharge facilities in the San Joaquin Valley. These functions are required and governed by existing long-term contracts with Reclamation and by State law. This would not change with title transfer.

However, two factors, driven by recent changes in State of California groundwater use and groundwater policy, could influence the efficacy and scope of Canal operations.

First, the Friant-Kern Canal faces several risks that have emerged from long-standing groundwater overdraft in the San Joaquin Valley. Groundwater pumping outside the boundaries of the Friant Division has resulted in staggering levels of subsidence along the Friant Kern Canal (three feet of vertical displacement over two years). Importantly, the cause of subsidence is not within the control of the Friant Water Authority. While recent implementation of California's *Sustainable Groundwater Management Act* (SGMA) may ultimately address the groundwater overdraft that caused the recent subsidence, the Friant Water Authority will neither be certain of nor in control of such factors that can erode the capacity of the facility.

Second, the implementation of SGMA will create an increasing demand for conveyance and transfer of both surface and groundwater supplies throughout the San Joaquin Valley. The Friant-Kern Canal can provide conveyance opportunities that span more than 180 miles of the San Joaquin Valley, including intersections with seven river systems.

**U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water & Power
January 17, 2018 Hearing: The Bureau of Reclamation's Title Transfer
Process and Potential Benefits to Federal and Non-Federal Stakeholders
Questions for the Record Submitted to Mr. Jason Phillips**

The effects of SGMA will include an increased demand for conveyance along the Friant-Kern Canal as a result of these natural interconnectivities.

The only foreseeable change in use of Reclamation lands or the right-of-way is what may be needed to implement a project or projects to correct or mitigate existing and future subsidence of the Canal.

Question 2: In your testimony you indicate that subsidence has reduced the Friant-Kern Canal's ability to deliver water by nearly 60 percent. What does this loss mean in terms of volume of water that cannot be delivered, and what does that mean for farms, businesses, and communities in the area?

Response:

A 20-mile portion of the Friant-Kern Canal has subsided three feet in the past two years, degrading that segment to 60 percent of its designed capacity. The resulting constriction most acutely affects six Friant Division long-term contract holders (Friant Contractors) who receive water along the southernmost 52 miles of the canal¹. These contractors irrigate 330,000 acres of land in Tulare and Kern counties, two of the five most productive agricultural counties in the United States.

The capacity restriction presents severe challenges for the Friant Division, whose conjunctive-use design relies on the delivery of Class 2 contract supplies. The Friant Division Class 2 contract supplies are generally available only during wetter years and high-flow events, and delivery of that water was intended to replenish regional groundwater supplies during periods of higher water availability. Approximately 1.4 million acre-feet of Class 2 contracts are distributed throughout the Friant Division, with more than a third located below the capacity constriction. Historically, year-to-year availability of Class 2 water has fluctuated between 0 and 100 percent, with a long-term average reliability of 36 percent.

The Friant Water Authority estimates that subsidence prevented the delivery of 300,000 acre-feet in 2017. In some cases this required impacted districts to purchase water elsewhere at considerable cost. However, the long-term effect of subsidence on Class 2 reliability is the more important measure. Without correction, the six contractors below the constriction will likely have their Class 2 reliability reduced by almost half (resulting

¹ The six Friant Division contractors directly affected by the subsidence-caused capacity constriction are Saucelito Irrigation District (ID), Delano-Earlimart ID, Kern Tulare Water District, South San Joaquin Municipal Utility District, Shafter-Wasco ID, and Arvin-Edison Water Storage District.

**U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water & Power
January 17, 2018 Hearing: The Bureau of Reclamation's Title Transfer
Process and Potential Benefits to Federal and Non-Federal Stakeholders
Questions for the Record Submitted to Mr. Jason Phillips**

in a reduction of long-term average reliability from 36 to 19 percent). This reduction is equivalent to the supply needed to sustain 50,000 acres of land, or 15 percent of the land in the six affected districts. These losses are recoverable if the canal is repaired.

Maintaining lands with proven and reliable supplies such as these will be important in the coming years, as the greater San Joaquin Valley could lose 30 percent of its irrigated lands to the implementation of the State of California's *Sustainable Groundwater Management Act* (SGMA).

-- ### --



January 30, 2018

The Honorable Lisa Murkowski, Chair
 The Honorable Maria Cantwell, Ranking Member
 The Honorable Jeff Flake, Chair, Subcommittee on Water & Power
 The Honorable Angus King, Ranking Member, Subcommittee on Water & Power
 Committee on Energy and Natural Resources
 United States Senate
 Washington, DC 20510

RE: January 17th Subcommittee on Water & Power Hearing to Examine the Bureau of Reclamation's Title Transfer Process and Potential Benefits to Federal and Non-Federal Stakeholders

Dear Chairs Murkowski & Flake and Ranking Members Cantwell & King:

On behalf of Clean Water Services (CWS), located in Washington County, Oregon, I am writing to share our perspective on the issue of title transfer of Bureau of Reclamation facilities, which was discussed in the Water and Power Subcommittee hearing on January 17, 2018.

Clean Water Services is the water resources management utility in the Tualatin River Watershed. Clean Water Services builds and operates wastewater treatment facilities, constructs and maintains drainage, water quality, and stream enhancement projects, and manages flow in the Tualatin River. CWS provides sanitary and stormwater services to more than 600,000 customers in Washington County and its twelve member cities.

CWS believes that title transfer of Bureau of Reclamation facilities to their non-federal sponsors could provide benefits to both the nation's water community and the federal government. It could hasten needed environmental and safety benefits at the Hagg Lake project. Additionally, it provides water users with the ability to quickly and efficiently make key operational and maintenance decisions. Transferring title of Bureau of Reclamation facilities to non-federal sponsors will also reduce the federal government's costs and liability associated with aging infrastructure.

The current title transfer process is often slow and expensive, and as a result, many water entities are discouraged from pursuing this path. Clean Water Services strongly supports efforts to streamline and expedite the title transfer process. CWS is pleased to see that the Subcommittee is examining the Bureau of Reclamation title transfer process and looking for ways to achieve efficiencies that might encourage more entities to consider title transfer.

CWS is closely monitoring federal action on the issue of title transfer. A decade ago, Clean Water Services and other Tualatin Project repayment contractors had been seriously examining title transfer of Hagg Lake, Scoggins Dam and associated lands in our basin. During the examination of the facility, significant seismic issues were discovered. As a result, the facility is now one of Reclamation's top priorities under its Safety of Dams program.

Clean Water Services remains interested in exploring title transfer of the Tualatin Project major works. Congressional legislation to address some of the current challenges associated with the title transfer process could make it a more favorable option.

We would be happy to provide the Subcommittee with more detailed information about our views on title transfers, as well the Hagg Lake/Scoggins Dam project. Thank you for your attention to this very important issue.

Sincerely,



Bill Gaffi
General Manager

cc Senator Ron Wyden
Chair Andy Duyck, Clean Water Services/Washington County

