

Calendar No. 466

108TH CONGRESS }
2d Session }

SENATE

{ REPORT
{ 108-249

FISH PASSAGE AND SCREENING FACILITIES AT NON-FEDERAL WATER PROJECTS

MARCH 29, 2004.—Ordered to be printed

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

R E P O R T

[To accompany S. 1307]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 1307) to authorize the Secretary of the Interior, acting through the Bureau of Reclamation, to assist in the implementation of fish passage and screening facilities at non-Federal water projects, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. DEFINITIONS.

As used in this Act—

(1) “Secretary” means the Secretary of the Interior, acting through the Commissioner of Reclamation;

(2) “Reclamation” means the Bureau of Reclamation, United States Department of the Interior;

(3) “Fish passage and screening facilities” means ladders, collection devices, and all other kinds of facilities which enable fish to pass through, over, or around water diversion structures; facilities and other constructed works which modify, consolidate, or replace water diversion structures in order to achieve fish passage; screens and other devices which reduce or prevent entrainment and impingement of fish in a water diversion, delivery, or distribution system; and any other facilities, projects, or constructed works or strategies which are designed to provide for or improve fish passage while maintaining water deliveries and to reduce or prevent entrainment and impingement of fish in a water storage, diversion, delivery, or distribution system of a water project;

(4) “Federal reclamation project” means a water resources development project constructed, operated, and maintained pursuant to the Reclamation Act of 1902 (32 Stat. 388), and acts amendatory thereof and supplementary thereto;

(5) “Non-Federal party” means any non-Federal party, including federally recognized Indian tribes, non-Federal governmental and quasi-governmental entities, private entities (both profit and non-profit organizations), and private individuals;

(6) “Snake River Basin” means the entire drainage area of the Snake River, including all tributaries, from the headwaters to the confluence of the Snake River with the Columbia River;

(7) “Columbia River Basin” means the entire drainage area of the Columbia River located in the United States, including all tributaries, from the headwaters to the Columbia River estuary; and

(8) “Habitat improvements” means work to improve habitat for aquatic plants and animals within a currently existing stream channel below the ordinary high water mark, including stream reconfiguration to rehabilitate and protect the natural function of streambeds, and riverine wetland construction and protection.

SEC. 2. AUTHORIZATION.

(a) IN GENERAL.—Subject to the requirements of this Act, the Secretary is authorized to plan, design, and construct, or provide financial assistance to non-Federal parties to plan, design, and construct, fish passage and screening facilities or habitat improvements at any non-Federal water diversion or storage project located anywhere in the Columbia River Basin when the Secretary determines that such facilities would enable Reclamation to meet its obligations under section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1536(a)(2)) regarding the construction and continued operation and maintenance of all Federal reclamation projects located in the Columbia River Basin, excluding the Federal reclamation projects located in the Snake River Basin.

(b) PROHIBITION OF ACQUISITION OF LAND FOR HABITAT IMPROVEMENTS.—Notwithstanding subsection (a), nothing in this Act authorizes the acquisition of land for habitat improvements.

SEC. 3. LIMITATIONS.

(a) WRITTEN AGREEMENT.—The Secretary may undertake the construction of, or provide financial assistance covering the cost to the non-Federal parties to construct, fish passage and screening facilities at non-Federal water diversion and storage projects or habitat improvements located anywhere in the Columbia River Basin only after entering into a voluntary, written agreement with the non-Federal party or parties who own, operate, or maintain the project, or any associated lands involved.

(b) FEDERAL SHARE.—The Federal share of the total costs of constructing the fish passage and screening facility or habitat improvements shall be not more than 75 percent.

(c) NON-FEDERAL SHARE.—

(1) Except as provided in paragraph (4), a written agreement entered into under subsection (a) shall provide that the non-Federal party agrees to pay the non-Federal share of the total costs of constructing the fish passage and screening facility or habitat improvements.

(2) The non-Federal share may be provided in the form of cash or in-kind services.

(3) The Secretary shall—

(A) require the non-Federal party to provide appropriate documentation of any in-kind services provided; and

(B) determine the value of the in-kind services.

(4) The requirements of this subsection shall not apply to Indian tribes.

(d) GRANTS AND COOPERATIVE AGREEMENTS.—Any financial assistance made available pursuant to this Act shall be provided through grant agreements or cooperative agreements entered into pursuant to and in compliance with chapter 63 of title 31, United States Code.

(e) TERMS AND CONDITIONS.—The Secretary may require such terms and conditions as will ensure performance by the non-Federal party, protect the Federal investment in fish passage and screening facilities or habitat improvements, define the obligations of the Secretary and the non-Federal party, and ensure compliance with this Act and all other applicable Federal, State, and local laws.

(f) RIGHTS AND DUTIES OF NON-FEDERAL PARTIES.—All right and title to, and interest in, any fish passage and screening facilities constructed or funded pursuant to the authority of this Act shall be held by the non-Federal party or parties who own, operate, and maintain the non-Federal water diversion and storage project, and any associated lands, involved. The operation, maintenance, and replacement of such facilities shall be the sole responsibility of such party or parties and shall not be a project cost assignable to any Federal reclamation project.

SEC. 4. OTHER REQUIREMENTS.

(a) **PERMITS.**—The Secretary may assist a non-Federal party who owns, operates, or maintains a non-Federal water diversion or storage project, and any associated lands, to obtain and comply with any required State, local, or tribal permits.

(b) **FEDERAL LAW.**—In carrying out this Act, the Secretary shall be subject to all Federal laws applicable to activities associated with the construction of a fish passage and screening facility or habitat improvements.

(c) **STATE WATER LAW.**—

(1) In carrying out this Act, the Secretary shall comply with any applicable State water laws.

(2) Nothing in this Act affects any water or water-related right of a State, an Indian tribe, or any other entity or person.

(d) **REQUIRED COORDINATION.**—The Secretary shall coordinate with the Northwest Power and Conservation Council; appropriate agencies of the States of Idaho, Oregon, and Washington; and appropriate federally recognized Indian tribes in carrying out the program authorized by this Act.

SEC. 5. INAPPLICABILITY OF FEDERAL RECLAMATION LAW.

(a) **IN GENERAL.**—The Reclamation Act of 1902 (32 Stat. 388), and Acts amendatory thereof and supplementary thereto, shall not apply to the non-Federal water projects at which the fish passage and screening facilities authorized by this Act are located, nor to the lands which such projects irrigate.

(b) **NONREIMBURSABLE AND NONRETURNABLE EXPENDITURES.**—Notwithstanding any provision of law to the contrary, the expenditures made by the Secretary pursuant to this Act shall not be a project cost assignable to any Federal reclamation project (either as a construction cost or as an operation and maintenance cost) and shall be non-reimbursable and non-returnable to the United States Treasury.

SEC. 6. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such amounts as are necessary for the purposes of this Act.

PURPOSE OF THE MEASURE

The purpose of S. 1307 is to authorize the Secretary of the Interior, acting through the Bureau of Reclamation, to assist in the implementation of fish passage and screening facilities at non-Federal water projects.

BACKGROUND AND NEED

In December 2000, NOAA issued a Biological Opinion on the Federal Columbia River Power System (FCRPS), operated by the Bureau of Reclamation (Reclamation), the U.S. Army Corps of Engineers (Corps), and Bonneville Power Administration. The Biological Opinion concluded that hydropower operations at both Reclamation and Corps facilities are insufficient to avoid jeopardy to 8 of the 12 Columbia River Basin salmon and steelhead species listed as threatened or endangered under the Endangered Species Act. To avoid jeopardy, the Biological Opinion proposes a reasonable and prudent alternative which includes certain “off-site” actions, such as significant improvements to habitat, hatcheries, and harvest.

One of Reclamation’s responsibilities under the Biological Opinion involves resolving fish passage and fish screening problems at non-Federal diversions in certain priority sub-basins. The work will improve tributary habitat in up to 15 sub-basins in the Columbia River Basin. Reclamation is currently using existing authority to perform technical assistance in some of these sub-basins located in Oregon, Washington, and Idaho. In its decision document accepting the requirements of the Biological Opinion, Reclamation agreed to seek the authority to fund construction of projects in order to implement fully its habitat improvement commitment under the Bio-

logical Opinion and to help overcome jeopardy from the operation of the FCRPS hydropower projects.

In a challenge to the legal sufficiency of the 2000 FCRPS Biological Opinion, the Federal District Court of Oregon ruled that the Biological Opinion was flawed in that certain actions to be undertaken were not reasonably certain to occur, partially because the agencies lacked authority for those actions. S. 1307 is intended to resolve this authority issue for Reclamation's tributary habitat and fish passage improvement responsibilities.

LEGISLATIVE HISTORY

S. 1307 was introduced by Senator Smith on June 20, 2003. The Subcommittee on Water and Power held a hearing on S. 1307 on October 15, 2003. S. Hrg. 108-271. At the business meeting on March 10, 2004, the Committee on Energy and Natural Resources ordered S. 1307 favorably reported with an amendment in the nature of a substitute.

COMMITTEE RECOMMENDATION

The Committee on Energy and Natural Resources, in open business session on March 10, 2004, by a unanimous voice vote of a quorum present, recommends that the Senate pass S. 1307, if amended as described herein.

COMMITTEE AMENDMENT

During the consideration of S. 1307, the Committee adopted an amendment in the nature of a substitute to address concerns raised by the Administration during the October 15, 2003 Water and Power Subcommittee hearing. The amendment adds a cost-share provision and provides that in addition to fish passage and screening facilities, funds may also be used for habitat improvements. The amendment also deletes language in the bill as introduced pertaining to environmental compliance. The amendment does not authorize the acquisition of land for habitat improvements. The amendment is further described in the section-by-section.

SECTION-BY-SECTION ANALYSIS

Section 1 defines key terms used in the Act. Within the scope of fish passage improvement strategies, referred to in section 1(3), the Committee intends that non-Federal entities may seek funds under this Act to decommission facilities no longer needed.

Section 2(a) authorizes the Secretary to plan, design, and construct, or provide financial assistance to non-Federal parties to plan, design, and construct, fish passage and screening facilities or habitat improvements at any non-Federal water diversion or storage project located in the Columbia River Basin. In authorizing the Secretary of the Interior, acting through the Bureau, to assist in the implementation of fish passage and screening facilities at non-Federal water projects, the Committee intends for the Secretary to give due deference to State priorities concerning the location of fish passage and screening facilities, and to work in close concert with the Governors of each State and appropriate State agencies to ensure coordination.

Subsection (b) states that nothing in the Act authorizes the acquisition of land for habitat improvements.

Section 3(a)(1) provides that the Secretary may only undertake the actions authorized in the Act after entering into a voluntary, written agreement with the non-Federal party or parties who own, operate, or maintain the project or any associated lands involved.

Subsection (b) limits the Federal share of the costs to 75 percent.

Subsection (c)(1) states that the written agreements between the Secretary and the non-Federal parties shall provide that the non-Federal party agrees to pay the non-Federal share of the total costs.

Subsection (c)(2) allows the non-Federal share to be in the form of cash or in-kind services.

Subsection (c)(3) is self-explanatory.

Subsection (c)(4) is self-explanatory.

Subsection (d) provides that any financial assistance made available under this Act shall be provided through grant agreements or cooperative agreements.

Subsection (e) allows the Secretary to require terms and conditions to ensure performance by the non-Federal parties, protect Federal investments, define obligations of the Secretary and the non-Federal parties, and ensure compliance with all applicable Federal, State and local laws.

Subsection (f) provides that all right and title to, and interest in, all fish passage and screening facilities constructed or funded under the Act shall be held by the non-Federal parties. Additionally, this subsection provides that the operation, maintenance, and replacement of the facilities shall be the sole responsibility of the non-Federal parties and shall not be a project cost assignable to any Federal reclamation project.

Section 4(a) allows the Secretary to assist a non-Federal party with obtaining or complying with any State, local, or tribal permits.

Subsection (b) provides that the Secretary shall be subject to all Federal laws applicable to activities associated with the construction of a fish passage and screening facility or habitat improvements.

Subsection (c)(1) requires the Secretary to comply with any applicable State water laws.

Subsection (c)(2) states that nothing in the Act affects any water or water-related right of a State, an Indian tribe, or any other person or entity.

Subsection (d) requires the Secretary to coordinate with the Northwest Power and Conservation Council, appropriate State agencies, and appropriate Indian tribes in carrying out the programs authorized in the Act.

Section 5(a) provides that the Reclamation Act of 1902 and Acts amendatory or supplementary thereof and thereto, shall not apply to the non-Federal water projects where fish passage and screening facilities authorized by this Act are located or to the lands irrigated by the projects.

Subsection 5(b) provides that expenditures made by the Secretary pursuant to this Act are not project costs assignable to any Federal Reclamation project and are non-reimbursable and non-returnable to the United States Treasury.

Section 6 authorizes appropriations.

COST AND BUDGETARY CONSIDERATIONS

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

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 24, 2004.

Hon. PETE V. DOMENICI,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1307, a bill to authorize the Secretary of the Interior, acting through the Bureau of Reclamation, to assist in the implementation of fish passage and screening facilities at nonfederal water projects, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Julie Middleton.

Sincerely,

DOUGLAS HOLTZ-EAKIN,
Director.

Enclosure.

S. 1307—A bill to authorize the Secretary of the Interior, acting through the Bureau of Reclamation, to assist in the implementation of fish passage and screening facilities at nonfederal water projects, and for other purposes

Summary: S. 1307 would authorize the Bureau of Reclamation to participate in the planning and construction of fish passage and screening facilities and habitat improvement projects at nonfederal water storage projects located in the Columbia River Basin in the Pacific Northwest if the facilities would enable the bureau to meet its obligations under the Endangered Species Act. The federal share of the construction costs of such projects would not exceed 75 percent. In addition, the Federal government would not hold title to any fish passage or screening facilities constructed under this bill, nor would the Federal government be responsible for the operation and maintenance of those facilities.

Assuming appropriation of the necessary amounts, CBO estimates that implementing S. 1307 would cost about \$22 million over the 2005–2009 period. This bill would not affect direct spending or revenues. S. 1307 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 1307 is shown in the following table. The costs of this legislation fall within budget function 300 (natural resources and environment).

	By fiscal year, in millions of dollars—				
	2005	2006	2007	2008	2009
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Estimated Authorization Level	4	4	5	5	6
Estimated Outlays	3	3	5	5	6

Basis of estimate: For this estimate, CBO assumes that S. 1307 will be enacted before the end of fiscal year 2004 and that the necessary amounts will be appropriated in each fiscal year starting in 2005. Based on information from the Bureau of Reclamation and historical spending patterns of similar construction projects, CBO estimates that implementing the projects outlined in this bill would cost \$22 million over the 2005–2009 period.

According to the bureau, hundreds of individual fish screening and fish passage projects could be constructed under this bill at an average cost of around \$40,000 per project. CBO estimates that the Federal share of the cost of construction of these fish passage and screening facilities would be \$4 million to \$6 million annually over the 2005–2009 period. This estimate assumes that the bureau's efforts under the bill during the next several years would be limited to projects identified within the Federal Columbia River Power System, where the bureau currently has obligations under the Endangered Species Act. The bureau, however, would have the authority to participate in additional projects throughout the Columbia River Basin in order to meet any future obligations under the Endangered Species Act that have not yet been determined.

Intergovernmental and private-sector impact: S. 1307 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Federal Costs: Julie Middleton; Impact on State, Local, and Tribal Governments: Marjorie Miller; and Impact on the Private Sector: Selena Caldera.

Estimate approved by: Robert A. Sunshine, Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 1307. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 1307, as ordered reported.

EXECUTIVE COMMUNICATIONS

On March 5, 2004, the Committee on Energy and Natural Resources requested legislative reports from the Department of the Interior and the Office of Management and Budget setting forth executive views on S. 1307. These reports had not been received at the time the report on S. 1307 was filed. The testimony provided by the Department of the Interior at the Subcommittee hearing follows:

STATEMENT OF JOHN W. KEYS, III, COMMISSIONER, BUREAU OF RECLAMATION

Madam Chair and Members of the Subcommittee, I am John Keys, Commissioner of the Bureau of Reclamation

(Reclamation). I am pleased to be here today to present the Department of the Interior's (Department) views on S. 1307, which would authorize the Secretary of the Interior, acting through the Bureau of Reclamation, to assist in the implementation of fish passage and screening facilities at non-federal water projects. As discussed more fully below, the Administration could support passage of this bill with the suggested modifications.

Let me begin by saying that the Subcommittee is aware of the tremendous effort currently underway in the Pacific Northwest to address the needs of the many salmon and steelhead species listed as threatened and endangered under the Endangered Species Act (ESA). Congress has provided significant support to these efforts by providing authority and funding to numerous federal agencies to address the needs of the various life stages of these species.

Among these efforts is a Biological Opinion issued by the National Marine Fisheries Service (now NOAA Fisheries) in December 2000 concerning the operation of the Federal Columbia River Power System (FCRPS) of the Columbia River. The FCRPS includes 14 major dams on the Columbia and Snake Rivers operated as an integrated system by the U.S. Army Corps of Engineers and Reclamation for flood control and hydropower generation. The Bonneville Power Administration transports and markets the power generated by the system. As required by section 7 of the ESA, these three action agencies have consulted with NOAA Fisheries on the operation of the FCRPS.

In 2000, NOAA Fisheries found that the operation and configuration of the hydropower system could not be modified enough to prevent jeopardy to 8 of the 12 listed anadromous species affected by the system. Consequently, to avoid jeopardy, NOAA Fisheries identified a reasonable and prudent alternative which included numerous actions that could improve the survival of those species in what are known as the other "H's"—harvest, hatcheries and habitat. Among the actions recommended to Reclamation is a habitat initiative to improve tributary spawning and rearing conditions by working with private parties to screen diversions and to provide fish passage at non-federal water diversion structures. Screen and passage projects provide near-term benefits. There is an immediate benefit to the species by reducing fish mortality and providing access to better tributary migration, spawning, and rearing habitat. Improved adult access to tributary habitat produces more juveniles, and juveniles enjoy generally higher survival rates in the first spawning season in which these projects are in place.

Reclamation currently has the authority to provide engineering design and environmental compliance assistance to the owners of non-federal water diversion facilities, but lacks the authority to fund the construction of fish screens and passage at such facilities. In its Findings and Commitments on the 2000 FCRPS Biological Opinion, Reclamation agreed to seek such authority from the Congress. The Ad-

ministration requested this authority last year in a proposal that was provided to Congress. Although S. 1307 would not provide habitat restoration authority as requested in the Administration's proposal, it does provide much of the same authority as that proposed bill.

The need for this authority has been highlighted in the ongoing litigation concerning the FCRPS Biological Opinion. In May of this year, the U.S. District Court for the District of Oregon ruled that the 2000 Biological Opinion is flawed because some anticipated future actions by federal agencies are not reasonably certain to occur. Reclamation's lack of authority to fund the construction of needed screen and migration barrier projects on non-federal facilities falls within this category. This deficiency would be eliminated by the passage of S. 1307.

S. 1307 would also provide Reclamation with the authority to fund such screening and passage projects should they be necessary in order for the non-FCRPS Reclamation projects within the Columbia River Basin in the States of Washington and Oregon to comply with section 7(a)(2) of the ESA. At the request of Reclamation water users in Idaho, Reclamation projects in the Snake River Basin would not be included under this authority. A further provision of S. 1307 specifies that the authority would only be utilized when Reclamation determines that it would enable the agency to meet its obligations under section 7 of the ESA. The Administration supports these provisions.

The legislation would also confirm that the ownership of non-federal projects and land, operation and maintenance responsibilities for those projects, and their affiliated water rights as defined by state water law, shall remain with the private owner. Moreover, section 5 of the bill specifies that these screen and fish passage projects are not Reclamation projects subject to federal reclamation law. We support these limitations as well.

We note that owners of the non-federal projects receiving assistance under this legislation will benefit from bringing their facilities into compliance with the ESA. It is appropriate to require some degree of cost sharing from those individuals who may substantially benefit from these actions. We strongly encourage the Subcommittee to consider a cost-share requirement of 35 percent, including the value of in-kind services.

In conclusion, if enacted, S. 1307 would provide Reclamation with much needed authority and flexibility in helping us comply with the ESA by avoiding jeopardy to endangered and threatened salmon species. We urge the Subcommittee to act expeditiously on this bill and to include an appropriate cost share provision. We stand ready to work with the Subcommittee in that regard.

Madam Chair, this concludes my testimony. I welcome any questions that you or Members of the Subcommittee may have.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill S. 1307, as ordered reported.

