

Committee on Resources

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Written Testimony

Before the Subcommittee on Water and Power,
House Committee on Resources

Hearing on the H. R. 2257.—to convey the Lower Yellowstone Irrigation Project, the Savage Unit of the Pick-Sloan Missouri Basin program, and the Intake Irrigation Project to appurtenant Irrigation Districts

May 18, 2004

Written Testimony of Jerry Nypen
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on H. R. 2257,
Lower Yellowstone Reclamation Projects Conveyance Act

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Mr. Chairman and members of the Subcommittee, my name is Jerry Nypen. I am the manager of four irrigation districts located in the Lower Yellowstone Valley near Sidney, Montana. Thank you for opportunity to provide testimony on S.900, Lower Yellowstone Reclamation Projects Conveyance Act. We appreciate this committee's support for the transfer of Bureau of Reclamation features to local public entities.

We thank you Congressman Rehberg for introducing this Bill and for the diligent efforts of you and your staff in pursuing an important transfer for the people of the Lower Yellowstone Valley. We appreciate the Bureau of Reclamation's efforts in accomplishing transfers in the West and especially for the efforts of Mr. John W. Keys III and his staff to accomplish the transfer of the Lower Yellowstone Projects.

Background

There are three Federal irrigation projects involved in this legislation. They are the Lower Yellowstone, Savage, and Intake Projects, which are located adjacent to a 72-mile section of the Yellowstone River near the borders of the states of North Dakota and Montana. There are four irrigation districts involved; the Lower Yellowstone Irrigation Districts 1 and 2 operate the Lower Yellowstone Irrigation Project. Intake and Savage Irrigation Districts operate the Intake and Savage Projects.

The Irrigation Districts have had a very long partnership with the Bureau of Reclamation. The Bureau constructed the Lower Yellowstone Irrigation Project 94 years ago and transferred the facilities to the Lower Yellowstone Districts for operation and maintenance purposes 78 years ago. The Bureau also constructed the pumping units at Intake and Savage, 46 and 55 years ago. The Districts assumed operation and maintenance responsibilities shortly after the pumping units were constructed.

The Projects were constructed solely for irrigation purposes. Yellowstone River water is diverted and delivered to about 500 farms in the Lower Yellowstone Valley.

The Irrigation Districts are non-profit public corporations that operate under the auspices of Montana and North Dakota State Governments. Local elected officials administer them.

These projects have experienced an exceptional record of success. A small Federal investment of just over \$5 million currently yields over \$25 million in annual gross crop values. The cumulative yield in crop values is about \$1 billion. The economic spin-off has been tremendous. For example, the irrigation developments have allowed a local sugar factory to operate continuously since 1925, a factory having annual product sales of \$70 million while employing 350 people in the area. The Projects' resources continue to draw other industries. A 1.5 million bushel malting barley depot and a 1,000-cow dairy are the most recent additions to our area.

These Projects truly provide the most reliable contribution to national, state, and regional economies that can be obtained in this country. The public's investment in these Projects has been returned many times over. Perhaps those who have declared that it is not are not aware of the extension of benefits that irrigated agriculture offers.

Features to be transferred in this Bill include irrigation water rights, lands and easements, and physical water control features. Physical features include a low-head diversion dam, 5 small pumping units, about 400 miles of water conveyance ditches, and numerous water control structures.

Reasons for transfer:

The main reason we are pursuing transfer is to be assured that our irrigation projects will continue to secure and protect our sound and stable economy into the future. The Federal Government has jurisdiction here, but they cannot give us the assurance we need that public policy will protect our interests into the future.

We've always understood that the order of events under our contracts with the Bureau of Reclamation's was construction, settlement, transfer of operation and maintenance responsibility to local districts, recovery of the original cost, and finally the transfer of ownership. The master contracts between the Districts and the Bureau define this process very well. The purpose this legislation is to simply complete the last activity, the transfer of ownership.

The transfer will give our constituents the proprietary interest they anticipated and deserve. This will enable them to become true custodians of the public works that we have managed for decades. We have invested substantial dollars rehabilitating and replacing the federal infrastructure. For example, we have replaced all of the pumping units and the majority of the water distribution facilities at our expense. It is important for us to define the title to these works at this time.

The transfer will reduce costs for the Bureau and the Districts, and consequently the U. S. Taxpayer. The Federal Government is obligated to monitor and care for its assets. For example, they must be involved in actions of third parties such as permitting on public lands. They must be involved in reviewing and implementing Federal laws, rules and regulations on rehabilitation activity and conservation measures that are not of daily routine. The Bureau must spend a considerable amount of time listing, reviewing and reporting features and activities, a duplication of what we are required to do for the State of Montana. I would like to point out that our Projects are on the North Dakota/Montana State line and it is 375 miles to the Bureau's Area Office in North Dakota, and 300 miles to the Bureau's Area Office in Montana, which makes the Bureau's work more difficult and more expensive.

Financial Interests and Obligations:

The taxpayers' financial interests will be protected with this transfer. The Federal investment in constructing the projects was \$5,135,900 and the irrigation districts obligation was \$4,313,900. All of our debt obligations are paid except an outstanding debt for Savage Irrigation District of \$47,221. This debt will be paid prior to transfer.

A Pick-Sloan Missouri Basin Program feature allows a portion of the Savage Project's construction costs to be paid through the sale of power. The current value of this assignment is \$154,226. The Bureau of Reclamation's title transfer guidelines require that this be paid to the Secretary at the time of transfer.

We require about 640 acres of withdrawn lands for operation and maintenance activities. This land was not

included in the repayment debt and will be purchased by the Districts.

Local and Regional Support:

Local and regional supporters realize that the irrigation projects are the backbone of the area's economy. The irrigation projects offer the local communities the ultimate in economic stability. The projects are in a semi-arid area where irrigation water has provided consistent non-failing crop success since 1910. The communities realize that local control will guarantee that the projects will continue to operate in the same unfailing fashion.

We have received letters of support for this legislation from the County Commissioners of Richland County, the Sidney Chamber of Commerce, Richland County Economic Development, Williston Economic Development, and numerous businesses and private individuals. We have also received regional letters of support from the Governor of Montana, the Montana Water Resources Association, and the Upper Missouri Water Resources Association.

Yellowstone River Fishery Protection:

The project's source of water, the Yellowstone River, has a healthy fish population. The Bureau of Reclamation and others have identified 25 native species amongst 34 species known to exist. The pallid sturgeon, an endangered species listed in 1990, is known to utilize the lower reach of the Yellowstone River.

A very significant issue with this title transfer has been the concern for this fishery. The results of studies by the Bureau of Reclamation and others reveal that there is sufficient entrainment of fish in the Projects' Main Canal. The results also reveal that the diversion dam can affect migration of bottom dwelling species including the endangered pallid sturgeon. There is a strong cooperative effort underway to install a screening device in the Main Canal and a passage facility at the low-head diversion dam. Participants in studies and design are the Districts, Bureau of Reclamation, Corps of Engineers, U.S. Fish and Wildlife Service, and the Montana Fish, Wildlife, and Parks.

There is a Section 7, Endangered Species Act process in progress. A Biological Assessment was submitted to the U.S. Fish and Wildlife Service in August 2001. Although deadlines to complete the Section 7 have come and gone, H. R. 2257 allows another 5 years to complete it. We think this Legislation is necessary to complete this action.

Pick-Sloan Pumping Power:

Why has this title transfer not taken place after all the time has been spent trying to do so? The Districts had no idea when they started that there would be a question regarding the continuation of Federal power service.

We have received Pick-Sloan Missouri River Basin Program (P-SMBP) project use power for operating our community pumps since the projects were constructed. Non-eligibility would mean that Districts would pay for power at the preference power rate, but more importantly would pay for wheeling as well. The District constituents cannot afford these costs added to their existing District operation and maintenance assessments. Rates would go up from a Districts' average assessment of \$26 per acre to an average of \$60 per acre. The Savage District would experience a \$40 increase from \$30 to \$70. A recent economic study by the State of Montana concluded that net return for Lower Yellowstone Projects constituents is only about \$50 per acre. That tells us what we know as an impossible situation.

It is very important in this testimony to know our definition of project use power and preference power. Project Use Power is power from the Pick-Sloan system that is used to carry out the irrigation function. It is delivered to the Districts' main pumping plants. The rate is the general Pick-Sloan Program rate that would cover all operation and maintenance of the system. It is discounted due to the District's ability to pay. Today it is 1.076 cents per kilowatt-hour discounted to 0.25 cents per kilowatt-hour due to the ability-to-pay factor, unique feature of the Pick-Sloan Program.

Preference power on the other hand is power that is available for an entirely different function. It is power that is sold to preference customers for paying back the P-SMBP costs including the irrigation assistance. It is available off the Federal transmission system and the Districts would pay wheeling charges.

Some additional perspective on P-SMBP is also important. The intent of the Flood Control Act of 1944 is to perform 4 main functions. They are 1) Irrigation, 2) Flood Control, 3) Navigation, and 4) Power. The main theme in 1944 was to reduce flooding, increase navigation on the river below Sioux City, Iowa, and develop irrigation in the upper basin states. The irrigation has two main purposes, provide economic development in the upper basin states and replace the rich bottom farmland that are flooded by the reservoirs in Montana and the Dakota's. The Projects in this Legislation fit the theme well and are a great success to the P-SMBP.

Federal Project/non-Federal Project Issue

The power customers insist that project use power is limited to Federal Projects only. It is an eligibility issue due to language in the 1944 Flood Control Act. The Act ties project use power to Federal Projects. Federal projects would be the only way to develop 6,000,000 acres of irrigation in a structured time frame. Many attempts had already been made by non-Federal entities to build canal systems and pump water to elevated acres, but most of them failed because of the lack of expertise and adequate revenue. One of the first tasks of the Bureau of Reclamation in project development was to establish irrigation districts to assume responsibility. Projects were operated and maintained by the Bureau during a development phase until they were transferred to the irrigation districts for that purpose. It was necessary to retain ownership of the features so that there was assurance that the district's repayment obligation was met. After repayment obligations are met, title transfer takes place, just as is mentioned in the repayment contracts.

Sidney Water Users Irrigation District, and another upstream, Kinsey, are 2 irrigation districts nearby that operate non-Federal projects that obtain Pick-Sloan's project use power. They are like our Projects; they were developed from the same mold; they were all identified in the Bureau of Reclamation's Yellowstone Pumping Division in 1939 to be served by the Fort Peck power facilities. All of the districts were included in the P-SMBP plan for wide-scale development of the Missouri River Basin. Sidney Water Users and Kinsey operate non-federal projects, and they were put into the P-SMBP by Congressional action. It seems very inappropriate that our Districts who have been operating Federal Projects and have been in the P-SMBP's Program now for over 50 years are being declared non-eligible for the Program because they are going from Federal to non-Federal status.

Those that oppose the power section of this bill have stated when referring to our eligibility status, "you either are or you aren't a Federal Project". But how can I stand and look directly across the river at a non-federal project receiving project use power and think that this rule is valid.

We cannot believe that it was ever the intent of the Pick-Sloan Program to abandon the project use power service because of title transfer. It was the catalyst that made them feasible to construct and the catalyst that allows them to continue to operate for public benefit. But the 44 Act does not address the issue of title transfer even though it is a prescribed procedure. It is time for this Congress to correct this oversight.

Precedent Issue

The second concern the power customers have is that this Bill will induce a precedent. Their concern is dramatized as they contend that it could destroy the integrity of the entire P-SMBP. They fear a precedent that would allow all non-federal irrigation entities to obtain project use power. But Federal ownership has not been a condition for receiving Pick-Sloan project use power in the past. The Sidney Waterusers, Kinsey, Haidle, and Hammond irrigation developments in the Lower Yellowstone Valley, and the Hilltop and Gray Goose irrigation districts in South Dakota are all involved in non-Federal facilities and receive Congressionally authorized Irrigation Pumping Power. The authorities are the 1944 Flood control Act, P.L. 102-575, and P.L.99-662. The Bureau has discredited these situations as not applicable examples. But the undisputed fact is that Congress has authorized these entities to receive P-SMBP project use power when title to their irrigation works remains in the name of the districts.

There has been precedent for maintaining existing power contracts involving title transfers as well. Public Law 105-351, a transfer of the Minidoka Project to the Burley Irrigation District, provides for continuation of "Project Reserved Power" under existing contract terms. Public Law 106-221, transfer of the Gila Project to the Wellton-Mohawk Irrigation and Drainage District, provides for continuation of "Project Priority Use Power" in accordance to existing contract terms. In both cases, Federal power benefits continue and more importantly, the terms of the existing Federal/District contracts prior to transfer remained in effect after the transfer. It is interesting to note that in these two cases, the Federal Government owned the transmission lines to the main pumping units and they were transferred to the Districts. Federal power is delivered across non-Federal lines near our Projects and even though this is a Pick-Sloan responsibility, it

presents a very contentious issue in negotiating the power service after transfer.

Continuing with P-SMBP project pumping power for our districts certainly doesn't offer a green light for any non-federal entities to receive the same. Congress must approve all developments, and irrigation entities must be public and pay their respective costs of the assigned power facilities. In our opinion a prerequisite for an irrigation entity having a legitimate issue of precedent would include the following conditions: 1) must be a public entity, 2) must be custodian of a project that was constructed by the Federal Government, 3) must possess a contract rate-of-delivery from the irrigation suballocation, 4) must have paid the cost of power facilities associated with an assigned share of the irrigation suballocation.

We do not understand the fear of rampant irrigation development that the preference power customers have eluded would happen with passage of this bill. Only 28 districts representing only 120,000 acres in the entire Missouri River Basin have evolved in the last 64 years since the relationship between irrigation and pumping power began. Water on the Yellowstone and Missouri main stem is fully appropriated in Montana. There is some reserved water available for about 90,000 acres, but individuals, not public irrigation developments, are steadily consuming most of this. Other states experience the same conditions of low water availability. Significant irrigation development will just not happen.

There is also a limit on the amount of power that can be used for Pick-Sloan irrigation development. The irrigation suballocation is a unique feature of the Pick-Sloan Program to encourage irrigation development. It represents 15.8% of the total Pick-Sloan power capacity of 2,600 megawatts. A small portion of this has been used leaving about 13% of the total Pick-Sloan capacity remaining. This means that there can only be at best about 350 more megawatts used for irrigation development, not an amount that would destroy the P-SMBP as the power customer's fear.

Congress must also approve all assignments of the irrigation suballocation as required by the McGovern Amendment. This is a safety shield for controlling the use of power for irrigation.

The Districts in this title transfer legislation have been assigned a rate of capacity from the irrigation suballocation. It is cumulatively about 1 megawatt (the suballocation is 400 megawatts and the system capacity is 2,600 megawatts). The Districts have met the obligations assigned to them for this power. The Savage Irrigation District has paid their share of the cost of power facilities associated with power delivered to them. The other older Districts were not involved in paying for power facilities, but regardless, a share has been assigned to them by contract. Knowing this, it is difficult to understand why the Districts would be severed from the suballocated power because of title transfer.

If this severance is made with the Districts, what happens to power that was associated with the suballocation? The allocation cannot be adjusted because of the conditions of the McGovern Amendment, so we presume that it becomes uncommitted even though it was assigned and duties were paid.

You will find that the preference power community is very concerned about the irrigation benefits of the Pick-Sloan Program. They benefit dearly by unaccomplished irrigation development, especially the deferred portion of the irrigation suballocation. They benefit by the low cost power that it produces, and they benefit from the low cost investment capital that exists and that is continuously received on its behalf.

The deferred portion of the irrigation suballocation produces about 1.6 billion kilowatt-hours of electricity from its 350-megawatt capacity. The cost of this power is very low because the taxpayer investment in these power facilities, generators, transformers, transmission lines, etc. that are associated therewith is interest-free and repayment is deferred. It won't be repaid until 50 years after these facilities are assigned to an irrigation project. Putting this power in the mix definitely complements the preference power rate.

The Irrigation Districts have considered the issues of opposition on the power service many times and have offered several compromises. We have agreed to discontinue the ability-to-pay feature that requires us to pay full cost for the project use power. We have offered to pay a price for project use power equivalent to the preference power rate. These accommodations raise the rates from 0.25 cents per kilowatt-hour to 1.08 cents per kilowatt-hour to 1.7 cents per kilowatt-hour.

Senator Conrad Burns, Commissioner John Keys, and the Districts have been working diligently in efforts to compromise and put together a plan that would be affordable to the Districts. We think now that such a compromise has been found. The details are as follows:

- The existing Bureau/District power contracts for delivery of project use power shall stay in effect until they expire in the year 2020.
- A linear annual step increase in fees shall be implemented during the last seven years of the contract beginning in year 2014 and ending in 2021 (8 step increases)
- Western Area Power Administration shall issue preference power contracts for the full contract rate of delivery after the existing Bureau/District contracts are terminated to each of the Districts involved in this transfer. Full contract rate of delivery shall be maintained throughout all future contracts.

This establishes a transition period that allows the Districts time to implement programs to substantially reduce the power usage through institutional and physical changes. Time is needed to establish resources that will cut power consumption by 40%. This is indeed challenge and a risk the Districts are willing to take.

The Districts are accepting preference power service, a move that certainly neutralizes the precedent concern.

Mr. Chairmen, we hope that you will accept this compromise and we hope that by amending the Bill to incorporate the same, that the title transfer will be accomplished. This concludes my testimony. I would be happy to answer any questions you may have.