



**Complete Statement of Charles V. Stern
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Before the Committee on Energy and Natural Resources
Subcommittee on Water and Power
United States Senate
Hearing to Consider Pending Legislation
June 18, 2015**

Chairman Lee, Ranking Member Hirono, and members of the subcommittee, my name is Charles Stern. I am a Specialist in Natural Resources Policy at the Congressional Research Service (CRS). Thank you for inviting CRS to testify. You asked that CRS provide testimony on three bills: S. 593, the Bureau of Reclamation Transparency Act; S. 1365, the Authorized Rural Water Projects Completion Act; and S. 982, the Water Rights Protection Act.

In serving Congress on a non-partisan and objective basis, CRS takes no position on these bills but has been asked by the Subcommittee to provide background and analysis of their potential effects. The statements presented in this testimony are based on an analysis of the legislation within the time available. CRS remains available to assist the Subcommittee in its consideration of this legislation, related issues, and potential concerns among affected stakeholders.

S. 593 – Bureau of Reclamation Transparency Act

In brief, S. 593, the Bureau of Reclamation Transparency Act, would require that the Bureau of Reclamation's (Reclamation) asset management reporting be expanded to include several new components. Specifically, it would require that Reclamation annually report to Congress estimated costs for repair needs and a categorical rating for major repair and rehabilitation needs of Reclamation's facilities. Reclamation currently makes some information available on its infrastructure management activities; the proposed new requirements are directed to be incorporated into those processes.

The Bureau of Reclamation is one of the two principal agencies charged with constructing and maintaining the federal government's largest investments in water infrastructure, the other being the U.S. Army Corps of Engineers. Other agencies and federal entities have played roles in water resource development. S. 593's requirements would apply only to the Bureau of Reclamation; thus it is the focus of this testimony.

The Bureau of Reclamation's assets are concentrated in the 17 western states and include dams, canals, pipelines, hydropower facilities, and related infrastructure. Some of these facilities were constructed as far back as Reclamation's original authorization in 1902, and most of them are more than 60 years old. In previous hearings, concerns have been raised about the perceived deterioration of Reclamation's infrastructure and the information (or lack thereof) on these conditions.

Two important considerations provide context for CRS's analysis of S. 593: First, a broad discussion of the distribution of management responsibilities across different types of Reclamation facilities. Second, Reclamation's current process for reporting on repair and rehabilitation needs of these facilities. I will briefly discuss each of these topics before moving on to discuss the bill itself.

First, I will discuss distribution of management responsibilities. As stated above, the majority of Reclamation's water resources facilities are more than 60 years old, and a system of shared responsibilities to plan, construct, finance, operate, maintain, and repair this infrastructure has emerged over time. Reclamation is unique among federal water resource agencies in that it does not manage much of the infrastructure that it owns. About two-thirds of the infrastructure owned by Reclamation has been transferred to local project sponsors for operations and maintenance. While Reclamation technically owns these assets (which are referred to as "transferred works"), it is not responsible for their day-to-day maintenance. The bureau conducts periodic maintenance reviews at transferred works through its Associated Facilities Review of Operations and Maintenance Examinations program. However, the results of these examinations are typically not made public.

"Reserved works," which are owned and operated by Reclamation, make up the remainder of Reclamation's assets. Most of these projects entail large, multipurpose assets that are owned and operated by Reclamation, and Reclamation's process of overseeing their operations and maintenance is generally more involved than that used for transferred works. Reclamation operates a Facility Maintenance and Rehabilitation Program that identifies, schedules, and prioritizes the needs of its reserved works, but again, the results of these reviews are typically not made public.

The mixed management structure of Reclamation facilities complicates reporting on rehabilitation and upgrades of its assets. In recent years Reclamation has undertaken efforts to improve this reporting. These included, among other things, a major review of its infrastructure management that concluded in 2008,¹ as well as annual asset management plans for FY2011 and FY2012. The latter reports provided a high-level summary of Reclamation's infrastructure management efforts, including discussions of how the bureau tracks and plans for management activities, aggregated estimates of maintenance requirements at regional and national levels, and some of the policy tools available to address these issues. Reclamation's last management plan (for FY2012) was published in May 2014.

These and other reports and public documents issued by Reclamation generally have not included a list of facility-specific repair needs and associated estimates.² As noted in previous CRS testimony, some agencies, such as the Environmental Protection Agency and the Department of Transportation, publish "needs assessments" that include project level estimates for needed repairs and upgrades, although it should be noted that these agencies and the infrastructure they service are different than Reclamation. In any case, the availability of estimates for individual Reclamation facilities varies, and they are generally not compiled or regularly updated in a centralized, public report.

Similarly, to varying degrees Reclamation also reports its efforts to categorize the conditions of these facilities. Reclamation internally tracks and rates the condition of its dams and also utilizes a "Facility Reliability Rating" to categorize the condition of reserved works. Reclamation has in recent years also undertaken a program to categorize the condition of urban canals that may be vulnerable to full or partial

¹ The 2008 review was conducted in response to a 2006 National Research Council report and resulted in a number of changes to Reclamation's infrastructure management.

² However, Reclamation has provided higher level estimates of infrastructure needs. For instance, in 2012 Reclamation estimated that costs for needed repairs and upgrades throughout the West were approximately \$2.6 billion over the 2012-2016 time period. Some of these costs would be expected to be financed by water and power customers.

failure. However, this information is not standardized or available for all of Reclamation's infrastructure, nor is it regularly reported on.

S. 593 would make several changes to Reclamation's existing reporting process. It would require Reclamation to complete an Asset Management Report (building upon previous Asset Management Plans).³ This report would be published and made publicly available within 2 years of enactment, and updated every two years thereafter. Perhaps most prominently, Section 4(b) of the bill would require that the bureau's new Asset Management Report include an itemized list of repair needs at reserved works. This list would include both a cost estimate for repair needs at Reclamation facilities and a categorical rating for each item. Section 5 of the bill requires that the Secretary coordinate with the nonfederal operators of transferred works to develop and implement, to the maximum extent practicable, a similar ratings and cost estimate system for transferred works. That is, all Reclamation-owned infrastructure, including that operated and maintained by local sponsors, would be subject to some level of reporting. The bill would provide an exception to the public reporting requirements for sensitive or classified information, but would require that this information still be made available to Congress.

S. 593 does not address directly the management of projects by Reclamation or its local cooperators. Rather, its focus is on what information is made available to Congress and the general public about Reclamation facilities, and in what format. S. 593 would provide the Administration with some flexibility to determine how it would implement the bill; however, the extent to which the new requirements in the legislation would fit into existing processes or necessitate new ones is unclear. Similarly, it is unclear whether the bill's requirements would create new costs for Reclamation, such as costs resulting from the assessment and publishing of project repair estimates and/or ratings in the new report.⁴ Some may also raise concerns about whether Reclamation's repair estimates or ratings could result in increased operations and maintenance costs being assessed on users. The extent to which such a scenario would actually be the case may be a function of how Reclamation would interpret and implement the bill.

Finally, some may also question how much of the information that would be required by the legislation is currently available in existing sources (such as through Reclamation's annual budget justifications and/or other programmatic reports). While some of this information appears to be tracked by Reclamation, it is not available in a single, consolidated public report. Additionally, it is possible that a more in-depth review of the needs at some facilities, especially transferred works, could be required by this legislation.

S. 1365 – Authorized Rural Water Settlement Project Completion Act

S. 1365 would establish dedicated funding for ongoing and newly authorized rural water projects and water and hydropower-related settlement agreements with Indian tribes. This funding would be available without further appropriation over the 2015-2035 period.

The Bureau of Reclamation has been authorized to design and construct individual rural water supply projects in the western U.S. since 1980.⁵ Since that time, Congress has authorized Reclamation to

³ To date, these Asset Management Plans have to date been produced under Reclamation's general authorities.

⁴ The Congressional Budget Office estimated that a similar bill in the 113th Congress (S. 1800) would cost \$2 million Reclamation \$2 million to implement over the FY2015-F2019 period. See Congressional Budget Office, *Cost Estimate for S. 1800, the Bureau of Reclamation Transparency Act*, July 3, 2014, <http://www.cbo.gov/sites/default/files/s1800.pdf>.

⁵ The first rural water project authorized for design and construction was the WEB project in South Dakota, first authorized in P.L. 96-355. Prior to this time, Reclamation was authorized to provide technical assistance for these projects.

construct a total of 12 Rural Water Supply projects throughout the West. As of 2015, six of these projects are complete, and six are ongoing. A 2014 report on rural water projects by Reclamation estimated that the total costs to complete the six ongoing projects would be about \$2.4 billion (after adjusting for expected inflation).⁶ The same report projected that at budgeted levels of about \$50 million per year, construction of these projects may not be completed until 2065 or later (for context, the FY2015 enacted amount for rural water projects was \$31 million, and the FY2016 proposed budget for these projects was \$36.5 million). These estimates do not account for potential new rural water supply projects, which Reclamation has been authorized to study since 2006.⁷ Reclamation has stated that demand for new rural water projects is and will continue to be significant; it estimated the range of potential future demand for these projects in the western states to be \$5 billion to \$9 billion (plus additional needs for tribal projects).⁸

Indian water rights settlements and other tribal agreements could also be significant in terms of future year costs relative to Reclamation's budget. Overall, a total of 29 Indian water rights settlements have been approved by Congress since 1978, including six settlements that have been approved since 2010. Congress has appropriated mandatory funding for some of these projects, while others have been funded with discretionary funds.⁹ CRS estimates that to date, Congress has appropriated more than \$2 billion in discretionary funding for these projects (without adjusting for inflation). According to the Department of the Interior, 20 other settlements between the federal government and federally recognized tribes are under negotiation or have negotiation teams appointed.¹⁰ These potentially could require congressional approval and/or future appropriations.

S. 1365 would establish a new fund in the Treasury, the Reclamation Rural Water Construction and Settlement Implementation Fund, and transfer to it \$115 million annually from 2015-2035. Within the proposed fund, the Secretary would be directed to establish two accounts: the Reclamation Rural Water Project Account and the Reclamation Infrastructure and Settlement Implementation Account. The \$115 million transferred into the fund annually would be divided between these accounts, with the Reclamation Rural Water Project Account to receive \$80 million annually and the Infrastructure and Settlement Completion Account to receive \$35 million annually (with accrued interest adding to the availability of both amounts). S. 1365 defines projects eligible to receive rural water account funding as those rural water projects authorized as of the date of the enactment of the bill, or else those authorized for study under the Rural Water Supply Act of 2006 and subsequently authorized for construction after the enactment of S. 1365. The bill also designates the Reclamation Infrastructure and Settlement Implementation Account as funding compensation for certain monetary claims of Indian Tribes whose land has been used for the generation of hydropower, or to complete work on approved Indian water rights settlements and other similar tribal agreements.

⁶ Bureau of Reclamation, *Assessment of Reclamation's Rural Water Activities and Other Federal Programs that Provide Support on Potable Water Supplies to Rural Communities in the Western United States*, October 7, 2014, <http://www.usbr.gov/ruralwater/docs/Rural-Water-Assessment-Report.pdf>. Hereinafter Reclamation Rural Water Assessment.

⁷ The Rural Water Supply Act of 2006 (P.L. 109-451) provided programmatic authority for Reclamation to work with rural communities, including tribes, in the 17 western states to assess water supply needs and conduct studies of these projects without individual acts of Congress. These projects would still need to be authorized for construction.

⁸ Reclamation Rural Water Assessment, p. 11. The extent to which the additional tribal needs cited in that report (\$1.5 billion) may overlap with potential future Indian Water Rights Settlements such as those proposed for funding in S. 1365 is unknown.

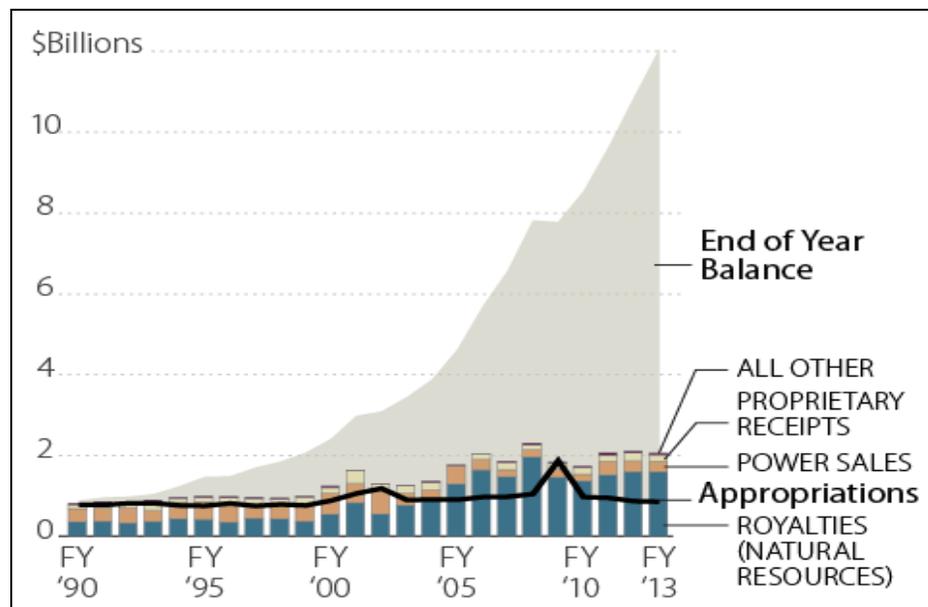
⁹ For example, Title X of P.L. 111-11 created a new fund, the Reclamation Water Settlements Fund, and scheduled \$1.2 billion in deposits to the fund, without further appropriation, over the 2020-2029 period. Several specific settlements are to receive priority consideration for this funding, with any remainder available to fund other eligible settlements.

¹⁰ <http://www.usbr.gov/native/waterrights/waterrights.html>.

Funding directed toward the new accounts in S. 1365 would come from that which currently accrues to the Reclamation Fund. As noted in CRS Report R41328, the Reclamation Fund, which funds most traditional Reclamation activities, has a surplus due to receipts from natural resource royalties on public lands significantly exceeding appropriations from the fund (see **Figure 1** below).¹¹ For 19 of the past 20 years, receipts accruing to the Reclamation Fund have exceeded discretionary appropriations from it by more than \$100 million; over the past 10 years receipts have exceeded appropriations by an average of \$920 million per year. As of the end of FY2014, the Reclamation Fund's balance was \$13.1 billion and is expected to continue to grow. S. 1365 would direct a portion of the revenues which would otherwise accrue to the Reclamation Fund to certain types of projects. This is similar to a mechanism enacted in P.L. 111-11 (2009), in which funds that would have otherwise accrued to the Reclamation Fund over the 2020-2029 period were designated to fund certain Indian Water Rights settlements, without further appropriation.¹²

Figure 1. Reclamation Fund Receipts and Appropriations

FY1990-FY2013



Source: CRS, with Bureau of Reclamation Data

Ever since Congress made Reclamation projects subject to congressional appropriations in the Reclamation Extension Act of 1914, funding for most Reclamation projects has been subject to congressional approval. S. 1365 would direct the Administration to allocate annual funding for each new account among eligible projects, potentially with limited additional input from congressional appropriators.

¹¹ Although under Reclamation's original authorizing legislation in 1902 the Reclamation Fund was available for expenditure without further appropriations, Congress revised its approach in the Reclamation Extension Act (1914) to limit Reclamation's expenditures to only those items for which funds are made available annually by Congress. See 43 U.S.C. § 414. Thus, most Reclamation projects have been and continue to be funded in discretionary appropriations acts.

¹² See P.L. 111-11, Title X. If enacted, mandatory funding for Indian Water Rights Settlements under S. 1365 would appear to add to and/or supplement this funding.

Opponents of this change may argue that mandatory funding for these projects outside of the regular discretionary budget process is not merited and would in essence prioritize these projects over Reclamation's traditional activities. Supporters of previous versions of this legislation have argued that underfunding these projects could jeopardize access to reliable water supplies for eligible communities. Even if these projects were to receive significant increases in their discretionary appropriations, some might point out that if they are not financed in a manner that circumvents Reclamation's regular budget and appropriations process, they could make up an increasing portion of Reclamation's budget and thereby detract from traditional mission areas.

Regarding rural water projects, some may ask whether these communities are eligible for other types of federal funding to assist with development of water infrastructure. As noted in CRS Report RL30478, several federal agencies other than the Department of the Interior may provide aid to communities to assist with these needs.¹³ These include the U.S. Department of Agriculture (Rural Utilities Service and Natural Resources Conservation Service), the Department of Housing and Urban Development (Community Development Block Grants), the Department of Commerce (Economic Development Administration), the U.S. Army Corps of Engineers Civil Works Program (Environmental Infrastructure), and the Environmental Protection Agency (Clean Water State Revolving Fund and Drinking Water State Revolving Fund loan programs). However, it is worth noting that the authorities for each of these programs are unique, and the eligibility and/or competitiveness of individual communities for these funds may vary.¹⁴ Furthermore, some argue that if current trends continue, future water supply needs are likely to outstrip the availability of future federal appropriations.

As noted above, Congress has in some past cases provided mandatory funding for Indian Water Rights Settlements. Thus, unlike rural water projects, the bill's proposed funding approach for these projects is not without precedent. However, the wording of section 301 is notably broad compared to that enacted by Congress in previous legislation providing mandatory funding for these settlements, and could thus potentially fund a wide range of these agreements.

S. 982 – Water Rights Protection Act

Finally, you also asked CRS to provide abbreviated background on federal reserved water rights as they relate to S. 982, the Water Rights Protection Act.

Federal reserved water rights often arise in questions of water allocation and uses related to federal lands. These rights coexist with water rights administered under state law. Federal reserved water rights were first recognized by the U.S. Supreme Court in *Winters v. United States* in 1908.¹⁵ Under the *Winters* doctrine, when the federal government reserves land from the public domain for a federal purpose, it also reserves water resources sufficient to fulfill the purpose of the reservation.¹⁶

¹³ For a more detailed discussion, see CRS Report RL30478, *Federally Supported Water Supply and Wastewater Treatment Programs*, coordinated by Claudia Copeland.

¹⁴ For example, USDA's Rural Utility Service funds projects in cities and towns with a population of 10,000 or less (or to unincorporated areas, regardless of population), while P.L. 109-451 (which authorizes study of potential future Reclamation Rural Water projects) defines these as areas with a population of no more than 50,000.

¹⁵ *Winters v. United States*, 207 U.S. 564 (1908). For more information on *Winters* doctrine, see CRS Report RL32198, *Indian Reserved Water Rights Under the Winters Doctrine: An Overview*, by Cynthia Brown.

¹⁶ In 1976, the Supreme Court noted, "as long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." See *Cappaert v. United States*, 426 U.S. 128 (1976).

Although the Winters Doctrine was originally interpreted as applying to Indian reservations, it has since been applied to other federal land reservations, including water uses in national forests, national parks, national monuments, and other areas. As a result, federal agencies have in some cases asserted or negotiated reserved water rights in accordance with federally authorized purposes. For example, the National Park Service has a reserved water right for flows in the Gunnison River in Black Canyon of the Gunnison National Park.¹⁷ In some cases, assertion of the reserved water rights by federal agencies has been controversial and has been denied by courts.¹⁸

Generally, the critical factor in determining reserved water rights has been the intent of Congress (either expressed or implied) that such rights be created. Among the many questions associated with federal lands and water rights are how limitations on these rights are applied under various circumstances and how federal management objectives are affected when water rights are held by federal agencies and others.

This concludes my written statement. I would be happy to answer any questions you may have at the appropriate time.

¹⁷ National Park Service, “Water Right Quantification Decreed for Black Canyon of the Gunnison National Park.” January 24, 2012. http://www.nature.nps.gov/water/Homepage/Black_canyon.cfm.

¹⁸ *U.S. v. New Mexico*, 438 U.S. 696 (1978).
