



Updated February 6, 2019

Title Transfer for Bureau of Reclamation Facilities

The Bureau of Reclamation (Reclamation), an agency within the Department of the Interior (DOI), was established to implement the Reclamation Act of 1902. As amended, this act authorizes the construction and operations of water resource projects for irrigation and other purposes in the 17 arid states west of the Mississippi River. Along with the U.S. Army Corps of Engineers, Reclamation is one of the two principal federal agencies that own and operate water resources facilities. Today, Reclamation manages 492 dams and 338 reservoirs, which are capable of storing and delivering approximately 140 million acre-feet of water annually. As of 2016, the agency's inventory of 4,000 constructed real property assets had a replacement value of \$99 billion.

Reclamation is an agency in transition; it faces questions of how it will manage its aging infrastructure inventory amid other priorities, including new mission responsibilities and construction projects. As a tool for the bureau to deal with its management challenges, some observers have proposed facilitating title transfer, a process by which ownership of certain qualifying Reclamation facilities may be transferred to nonfederal beneficiaries.

Background on the Current Title Transfer Process

Costs of Reclamation facilities are initially funded by the federal government, and users repay their allocated share of construction costs over extended terms (users also repay Reclamation for annual operations and maintenance expenses). Once construction costs have been repaid, responsibility for operations and maintenance of the project may be transferred from Reclamation to project beneficiaries, but the project remains under federal oversight and ownership and is subject to related requirements unless Congress explicitly authorizes its transfer.

In some cases, Reclamation may divest qualifying assets to users through the title transfer process. There are two main steps in the title transfer process: (1) review and approval of a proposed transfer by Reclamation and (2) authorization of the transfer by Congress (the two steps do not always occur in this order). Title transfer can be beneficial for both Reclamation and users under specific circumstances; it frees Reclamation from project-specific responsibilities, such as oversight of operations and design of future repair or construction efforts, and users may gain benefits associated with ownership of the underlying infrastructure (e.g., leveraging of assets for project upgrades/finance) and reduced reporting and administrative responsibilities. Reclamation has characterized title transfer as part of a “commitment to a Federal Government that works better and costs less.”

Under the current title transfer framework (established administratively in 1996), to be eligible for transfer, Reclamation must consider a project or facility to be “uncomplicated,” meaning that it is a single-purpose asset with simple financial arrangements. The project or facility also must have no competing interests, no hydrologic integration with other projects, and no legal and institutional concerns (e.g., Endangered Species Act considerations or disagreements among stakeholders). In some cases, a project with one or more of these issues may be eligible to move forward with title transfer if the proper operational and/or stakeholder agreements are obtained.

Pursuant to Reclamation's current title transfer framework, qualifying assets are eligible for transfer to users if the following criteria are met:

- Protection of the federal Treasury (i.e., the federal government is fully reimbursed for its financial interest in a project);
- Compliance with state and federal laws;
- Protection of interstate compacts and agreements;
- Fulfillment of Native American Trust responsibilities;
- Fulfillment of treaty obligations and international agreements; and
- Protection of the public aspects of a project.

Proposed title transfers must comply with the National Environmental Policy Act (NEPA; 42 U.S.C. §§4321 et seq.) and the National Historic Preservation Act (54 U.S.C. §100101), among other laws. Title transfers currently are considered “major federal actions” under NEPA, and in most cases they require an environmental assessment (EA) or an environmental impact statement (EIS), depending on the significance of the action. The costs for these reviews are shared between the transferee and the federal government. According to Reclamation, to date eight title transfers have undergone EAs that resulted in Findings of No Significant Impacts (FONSI) under NEPA, with no associated mitigation required.

Concerns with the Current Process

In 2014 House testimony, Reclamation expressed concern that the pace of title transfer was slowing due to cost and administrative burdens associated with the process. Overall, from 1996 to 2018, Congress authorized and Reclamation executed title transfer for 30 facilities. Whereas 20 title transfers were implemented from 1996 to 2006, 10 such transfers occurred from 2007 to 2018.

In 2014 testimony, Reclamation expressed concerns that the pace of title transfers was slowing due to cost and administrative burdens.

Individual facility title transfers have been proposed for authorizations in recent Congresses. For instance, in the 115th Congress, H.R. 6038, H.R. 6039, and H.R. 6040 all would have conveyed individual facilities to users.

Some have criticized specific aspects of the title transfer process, in particular the environmental study requirements and the need for congressional authorization of individual title transfers. These observers have argued that the current process is onerous, costly, and uncertain. They note that some beneficiaries who otherwise would be interested in title transfer choose not to pursue the process because of its current requirements. In congressional testimony, some users noted examples of previous title transfers that took 8-10 years to implement. Proponents of efforts to facilitate title transfer believe that a reformed process has the potential to benefit both water users and Reclamation.

Although most agree that title transfer can be beneficial under some circumstances, a difference in opinion remains over what changes to the process are warranted. Proposed modifications have come in the form of both administrative/regulatory changes (e.g., altered NEPA study requirements) and legislative changes (e.g., broad authority for Reclamation to transfer title to certain project types, without additional congressional approval). Both sets of proposals are discussed below.

Proposed NEPA Categorical Exclusion

A category of actions may be excluded from further NEPA review if a federal agency determines that the actions will not normally have an individually or cumulatively significant effect on the environment and neither an EA nor an EIS is required. This is known as a *categorical exclusion* (CE) under NEPA.

On October 17, 2018, Reclamation proposed that a new NEPA CE be created to facilitate title transfer for a limited set of simple, “uncomplicated” projects. To be eligible for the CE, projects must not have competing demands for transferred facilities or be hydrologically integrated with facilities that would impact other users, among other criteria. Reclamation pointed to its eight previous EA/FONSIs for title transfers as evidencing the need for this CE.

Programmatic Title Transfer Authority Proposal

Several bills proposed in recent Congresses have aimed to facilitate more title transfers by providing Reclamation with a broad, non-project-specific authority (also referred to as *programmatic authority*) to carry out title transfers that meet certain criteria without the express approval of Congress. In the 115th Congress, H.R. 3281 and S. 2560 would have provided this authority but approached the issue differently. In the 116th Congress, S. 47 (Natural Resources Management Act) would authorize title transfer authority

that largely mirrors the language previously proposed in S. 2560.

Sections 8001-8007 of S. 47 would establish a process whereby title of an eligible project or part of a project (i.e., specific facilities) could be transferred to a qualifying entity without congressional authorization, as long as the Secretary of the Interior notifies Congress 90 days prior to the proposed conveyance and Congress does not disapprove with a joint resolution before the proposed date of conveyance. Similar to proposals in prior Congresses, the bill excludes hydropower facilities from eligibility for programmatic transfer. The bill would direct the Secretary of the Interior to establish minimum eligibility criteria for transfers; these criteria appear to largely mirror the current criteria discussed above.

Some stakeholders have noted that potential loss of the ability to purchase project power (i.e., low-cost power produced by a Reclamation project that is available to water users to cover pumping and other costs) is a potential deterrent for some users considering title transfers. Section 8006 of S. 47 would allow a transferred facility to continue receiving project power if the transferee is receiving power as of the date of the bill’s enactment; the power would be used for the delivery of Reclamation project water; and the transferee agrees to be responsible for a proportionate share of operations, maintenance, and capital costs associated with this benefit.

A primary issue related to programmatic title transfer authorities has been what limits to place on the scale and type of projects authorized for transfer. Neither bill explicitly limits the title transfer authority to “uncomplicated” projects, as defined in the existing Reclamation title transfer framework (i.e., single-purpose, noncontroversial projects). However, Section 8004 of S. 47 would provide that if the facility to be transferred is a dam or water diversion facility affecting a body of water containing an endangered species or critical habitat under the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 et seq.), it must continue to comply with ESA to the same extent as is currently the case. The bill also would provide that dam and diversion works that are part of the Central Valley Project in California are not eligible for this authority (presumably, these facilities still would need to pursue individual title transfer authorities from Congress).

Most Reclamation project water users support legislative efforts to streamline the title transfer process. However, some have expressed concerns with the potential for programmatic title transfer authority to allow larger or more complex title transfer projects to move forward without congressional input. Some also have expressed a general hesitancy with providing Reclamation the authority to carry out transfers without existing levels of congressional oversight.

Charles V. Stern, Specialist in Natural Resources Policy

IF10924

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.