

Reclamation Manual

Directives and Standards

Subject: Deferment Contracts

Purpose: Provide the requirements for the development of deferment notifications and supplemental and amendatory contracts for the deferral of construction installments, or, when approved by the Congress, for restructuring construction repayment streams.

Authority: The Reclamation Act of 1902 (Act of June 17, 1902; 32 Stat. 388) (1902 Act), as amended and supplemented; and, in particular, Section 17 of the Reclamation Project Act of 1939 (Act of August 4, 1939; 53 Stat. 1198) (1939 Act); the Act of September 21, 1959 (73 Stat. 584; 43 U.S.C. § 485b-1) (Deferment Act); and the Act of November 24, 1971 (85 Stat. 488; 43 U.S.C. § 422k-1).

Contact: Contract Services Office, D-5600 (CSO)

1. **Introduction.** Reclamation enters into a variety of repayment contracts and other forms of obligations to recover the irrigation investment costs of Federal water supply and conveyance facilities. Contractors are occasionally unable to timely repay their annual construction charges when due because of circumstances beyond their control. This Directive and Standard describes the conditions for approving or denying requests for deferrals and the procedures for accomplishing payment of deferrals of the annual construction installments or modifying repayment streams. However, the timely repayment of these contractual obligations should be the main concern. During consideration of a deferral request, regions should ensure that contract repayment obligations are placed at a higher priority than secondary contractual commitments such as maintaining reserve funds for water conservation, water supply, and distribution system purposes.
2. **Objective.** The contracting objective is the timely determination of whether the deferral request meets the conditions established by the Congress. In those situations which meet congressional conditions, Reclamation may seek to negotiate and execute a deferment notification, or supplemental or amendatory contract that assures the recovery of the deferred installment within the time frame and conditions provided by the laws applicable to the project pursuant to the Secretary of the Interior's authority.
3. **Historical Background.**
 - A. **Congress.** Both the House of Representatives (86th Congress, 1st Session, Report No. 301) and the Senate (86th Congress, 1st Session, Report No. 873) cite the following language in the Secretary of the Interior's report recommending enactment of the Deferment Act giving the Department of the Interior:

“...the same leeway in administering contracts in hardship cases that a prudent businessman would exercise in dealing with his debtors and would expect his creditors to exercise in dealing with him.”

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The House and Senate Reports further noted that the deferment authority had proven its worth the few times in which it was necessary to be employed. Furthermore, its acceptability to the Congress was indicated by those few number of times it was employed (five times between 1939 and 1957).

- B. **Assistant Secretary.** The concern that deferments be judiciously used was reiterated by the Assistant Secretary - Land and Water Resources in his memorandum to the Commissioner, dated September 26, 1974, approving the Arch Hurley Conservancy District's deferment request. The Assistant Secretary's primary concern was that deferrals be approved only when they are necessary, in accordance with the Deferment Act, to protect the interests of the United States, and are not disadvantageous to the Federal Government. With this understanding, the Assistant Secretary requested that before deferrals are approved, all alternative courses of action available to the contractor should be explored prior to negotiation for a deferment.
4. **Construction Charges Eligible for Deferrals.** Construction charges, as defined in Section 2(d) of the 1939 Act (53 Stat. 1187; 43 U.S.C. §485a), mean:

“ . . . the amounts of principal obligations payable to the United States under water-right applications, repayment contracts, orders of the Secretary, or other forms of obligation entered into pursuant to the Federal reclamation laws, excepting amounts payable for water rental or power charges, operation and maintenance and other yearly service charges, and excepting also any other operation and maintenance, interest, or other charges which are not covered into the principal sums of the construction accounts of the Bureau of Reclamation.”

The definition allows the deferral of construction installments incurred pursuant to contracts executed under any one of the following authorities:

- A. **Repayment Contracts.** Contracts entered into pursuant to the 1902 Act and Section 9(d) of the 1939 Act (53 Stat. 1195; 43 U.S.C. § 485h (d)).
- B. **Water Service Contract Charges.** Charges credited as construction in contracts entered into pursuant to section 9(e) of the 1939 Act (53 Stat. 1196; 43 U.S.C. § 485h (e)).
- C. **Other Contracts.** Charges credited as irrigation construction in contracts under other authorities such as the Small Reclamation Projects Act (70 Stat. 1044), as amended; and for other projects under the administrative jurisdiction of Reclamation, even though those projects were not constructed under the provisions of Federal reclamation laws such as the Water Conservation and Utilization Act (Act of August 11, 1939; ch. 717, 53 Stat. 1418), as amended.

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5. **Charges Not Eligible for Deferrals.** The definition disallows the deferral of the following charges:
 - A. Annual operation and maintenance (O&M) charges;
 - B. Interest on investments charges;
 - C. Charges not credited as construction pursuant to water service contracts (Section 9(e) of the 1939 Act);
 - D. Power charges; and
 - E. Construction and other charges associated with nonirrigation project purposes.

6. **Common Conditions for Deferment.** The following examples, based on past experience, are the type of conditions that may support a deferral request.
 - A. **Severe Adverse Weather Conditions.** Reasons often cited by irrigation contractors for requesting deferments are weather related. The principal weather conditions that often cause a partial or total loss of crops include hailstorms, floods, early freezes, tornadoes, severe windstorms, and drought.
 - B. **Damage to Project Facilities.** Deferments *may* be approved if the inability of a contractor to pay an installment is caused by damaged project facilities that are not a result of poor O&M, and the repair is beyond the contractor's reserve account capabilities.
 - C. **Inability to Obtain Operating Loans.** The inability to obtain operating loans from banks or other sources due to extraordinary circumstances of a significant number of the contractor's members could severely impact farm operations within the contractor's service area. Because this may prevent the contractor from receiving assessments from its members, the contractor may be prevented from meeting its repayment obligation to the United States.
 - D. **Other Conditions.** The above list is not an all-inclusive list of reasons for approving deferments. Other conditions that may prevent the successful harvesting of a crop could include, among other things, insect or other infestations, war, civil disobedience, and acts of terrorism.

7. **Uncommon Conditions for Deferments.** The following examples, based on past experience, are the type of conditions that may not support a deferral request.
 - A. **Financial Conditions.** Conditions that reflect normal agricultural business cycles that may be regional or national in nature or conversely affect a small minority of a

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contractor's constituents typically do not justify a deferment. Examples of these conditions may include low commodity prices; high interest rates; extraordinarily high operating costs, e.g., unexpected high increases in power and energy costs; investment losses or unsatisfactory investment returns to individual water users; investment losses or unsatisfactory investment returns to contractor management; and bankruptcy or foreclosures of contractor's members. Notwithstanding this list, there may be occasions when one or more of these or other financial conditions would create a severe and undue hardship on a contractor(s) that would warrant consideration for a deferment.

- B. Inadequate O&M.** The cause for the deferment request is the result of damage to project facilities that could have been prevented by an adequate annual O&M program. Deferments may be granted if there are extenuating circumstances that explain the lack of an adequate O&M program. Such circumstances may include the expenditure of funds, normally available for annual O&M, for a series of emergency repairs occurring as a result of an aging facility. A deferment may be warranted, but a long-term solution to the problem of the aging facility should also be considered at the time Reclamation analyzes the deferral request.
- 8. Types of Contracting Documents and Delegations of Authority.** Instruments executed for deferment of payments may be in the form of "Deferment Notifications," "Supplemental Contracts," or "Amendatory Contracts."
- A. Deferment Notifications.** Regional Directors are delegated the authority to defer payments for up to 12 months after the original due date. No contractor may receive multiple or consecutive deferments within a 5-year period without the Commissioner's approval of a basis of negotiation (BON). Deferment notifications are formal letters sent from the Regional Director to a contractor granting permission to delay a specific installment payment for a period not to exceed 12 months from the original payment due date. Except for the deferment of a payment for up to 12 months, these documents must not modify the provisions of the existing contract. A copy of all deferment notifications will be sent to the CSO.
- B. Supplemental Contracts.** These contracts are separate contracts which add conditions and/or obligations to those established in the existing contract. Supplemental contracts may be negotiated and executed by the Regional Director following approval by the Commissioner of a BON. Formal supplemental contracts are required for any deferral that will affect payments by deferral for more than 12 months after the action of the deferment.
- C. Amendatory Contracts.** Amendatory contracts are contracts which amend, change, or otherwise modify the terms and conditions of the existing contract. These contracts must be used when congressional approval is required or other conditions are added,

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modified, or deleted in the contract. Amendatory contracts may be negotiated and executed by the Regional Director following the Commissioner's approval of a BON and congressional approval is received, if necessary.

9. **Congressional Approval.** Congressional approval of an amendatory contract is required under any of the following circumstances:
 - A. The repayment period of the existing contract is extended beyond the project's statutory limit for repayment of construction costs;
 - B. A reduction of the total amount payable is involved; or
 - C. The contract is in other respects less advantageous to the United States than the existing contractual arrangements, except for the reduction in the present value of the repayment stream to the United States.

10. **Responsibilities.** The following describes the responsibilities of the contractor, Regional Directors, CSO, and the Solicitor's Offices in the development and review of deferment requests. Regional Directors are responsible for the initial review of deferment requests and determining the appropriate action to be taken. The Regional/Field Solicitor's Offices will provide the Regional Directors a legal review: (1) of deferment notifications and (2) deferment BONs submitted for the Commissioner's approval or denial. The CSO will review BONs submitted for the Commissioner's approval or denial and will develop the Commissioner's approval/denial memoranda. The Washington Solicitor's Office will provide the Commissioner a legal review of BONs and approval/denial memoranda.
 - A. **Contractor.** The contractor is responsible for providing written information establishing that payment of the installment due creates an undue burden on the contractor and explaining the cause of an undue burden, e.g., drought; how and to what extent that cause will affect the contractor's ability to pay the installment due; and the alternative courses of action considered for making the payment and why those actions were not taken. Some of these alternatives may be the use of emergency and reserve funds, increasing water charges or assessments to users, issuance of bonds or other financial arrangements with non-Federal lending institutions, or assistance from other Federal programs, i.e., the Farm Service Agency in the Department of Agriculture. The supporting information will also discuss how the contractor's long-term financial viability will be affected by the deferment and what actions the contractor is taking to reduce the need for future deferments. Appendix A provides additional detail for information to be included in a deferment request. The contractor is also responsible for the payment of Reclamation's O&M costs of reviewing the deferment request. (See Reclamation Manual Policy *Collection of Operation and Maintenance (O&M) Costs Associated With the Administration of Water-Related Contracting Activities*, WTR P01

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and Reclamation Manual Directive and Standard *Collection of Operation and Maintenance (O&M) Costs Associated With the Administration of Water-Related Contracting Activities*, WTR 02-01.)

- B. **Regional Director.** Regional Directors are responsible for (1) reviewing the contractor's request for deferment and supporting documentation and (2) either (a) approving or denying a deferment notification or (b) providing a BON to the CSO recommending either approval or denial by the Commissioner, in accordance with the delegations of authority discussed herein. Regional Directors may advise contractors what supporting information in accordance with Appendix A is necessary for consideration of a deferment; but, except for an ability-to-pay study, if necessary, Regional Directors shall not create the supporting information on behalf of a contractor.
- C. **CSO.** The CSO will review the deferral package to provide an assessment as to whether the deferral is within the congressional authority provided to the Secretary and Reclamation policy. Among the issues reviewed are (1) has the contractor provided sufficient information to establish that an "undue burden" would be imposed on the water users if the water users were required to make the payment in question according to the original repayment schedule, (2) will the proposed deferment cause subsequent "undue hardships" on the water users in succeeding years, (3) will the deferment be repaid within the repayment period for the project in question, and (4) is the deferment in other respects not less advantageous to the United States than the existing contract arrangements. The CSO will develop the approval or denial for the Commissioner's signature, and will notify the Congress of all deferments granted.
- D. **Solicitor.** The Solicitor's Office will review the deferral package to assess whether the request is within the congressional authority provided to the Secretary. Among the legal issues that will be reviewed by the Solicitor's Office is: (1) whether the contractor has provided sufficient information to establish that an "undue burden" would be imposed on the water users if the water users were required to make the payment in question according the original repayment schedule, (2) whether any deferral approval contains the appropriate "findings" by the Department that the payments in question cannot be made without an "undue burden" on the water users, and (3) whether the deferral approval meets the statutory exceptions to the general requirement in the Deferment Act that deferrals be approved by the Congress.
11. **BON.** A BON for all supplemental and amendatory contracts shall be submitted in writing to the CSO for the Commissioner's approval. The following information is essential to the BON on a deferment action:
- A. **General Information.** The following information provides the project background, repayment history, amount due, and other relevant information:

- (1) Contractor;

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- (2) Project;
 - (3) General location;
 - (4) Contract under which payment is due;
 - (5) Amount of payment due; and
 - (6) Number of, and years when, previous deferments for the contractor were approved.
- B. Type of Contract Document.** The type of contract proposed for the deferment should be stated with a brief justification for the selection.
- (1) Supplemental contract; or
 - (2) Amendatory contract.
- C. Contract Authority.** The 1902 Act, as amended and supplemented, and in particular Subsection 17(b) of the 1939 Act, as amended by the Deferment Act, and other special authorizing acts of the Congress, if appropriate, should be cited as contracting authorities in any deferment contract action.
- D. Determination of Undue Burden.** The requesting contractor is responsible for providing written documentation in support of its deferral request, including documentation that payment of the installment in question will cause it an “undue burden.” The Regional Director is responsible for making the initial determination whether payment of the installment will cause an “undue burden” on the contractor. The following three questions must be answered prior to granting a deferment:
- (1) Will payment of the installment cause an “undue burden” on the contractor?
 - (2) Is there another practicable, timely source of funds for the contractor to draw upon to meet its obligation to the United States? These sources include, but are not limited to:
 - (a) Contractor’s current cash balance;
 - (b) Contractor’s reserve funds; or
 - (c) Bank loans or other sources of credit.
 - (3) Will the contractor’s ability to make future payments be jeopardized or otherwise significantly affected by approval of the deferment?

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- E. **Documentation Supporting the Need for a Deferment.** The following documentation should accompany a BON. An explanation for excluding any of this documentation should be discussed in the BON. Other information in addition to the following should also be included, if available. See Appendix A for additional information.
- (1) The contractor's financial statements disclosing its inability to make the required payment;
 - (2) Letters from local banks, the Farm Service Agency, and any other knowledgeable source detailing why the contractor is ineligible for a loan or other financial assistance, for paying the installment due; and
 - (3) A financial analysis supporting the contractor's inability to pay its annual construction obligation. This may include an ability-to-pay study.
- F. **Region's Position.** State the region's position on whether or not the deferment should be approved and why; and also describe the specific contract terms. The proposed repayment terms should be set forth and supported by evidence that a shorter repayment schedule and/or a partial payment would result in an undue burden on the contractor.
12. **Elements for Notifications and Contracts.** The following minimum elements should be included in the respective deferment notifications and contracts:
- A. **Deferment Notifications.**
- (1) The amount of the deferment;
 - (2) Identification of the contract under which the installment proposed for deferment is obligated and payment history under the contract;
 - (3) Identification of the event (undue burden);
 - (4) A deadline date beyond which the installment deferment cannot be extended; and
 - (5) Previous deferment history of the contractor.
- B. **Supplemental and Amendatory Contracts.**
- (1) The specific acts of the Congress pursuant to which the contract is being written, including particularly Section 17 of the 1939 Act, as amended;
 - (2) Identification of the contract under which the installment proposed for deferment is obligated and payment history under the contract;

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- (3) Previous deferment history of the contractor;
 - (4) Identification of the event (undue burden);
 - (5) A statement that the deferment contract is only an interim solution and not to be construed as a basis for the terms of any other amendatory contract that may be negotiated. (This provision is not necessary if the Congress has approved the specific amendatory contract to resolve long-term repayment problems.);
 - (6) Identification of the installments to be deferred and a schedule of repayment. To the extent possible, deferred installments should be repaid on the same dates as the contractor's normal installments are due;
 - (7) The current standard contract articles. The contract may reference the standard contract articles in the original contract, as appropriate; and
 - (8) Any other provisions, as the Commissioner may direct, which are required by law, policy, or rules and regulations.
13. **Contract Distribution.** Request the return of a signed copy of the contract with a copy of the entity's resolution setting forth the authority of the contractor's official to execute the contract on behalf of the entity.
14. **Charges for Delinquent Payments.** Charges for delinquent installments pursuant to the original contract, if applicable, shall not be imposed on a deferred installment.
15. **Environmental Compliance.** National Environmental Policy Act compliance will be completed with a Categorical Exclusion Checklist. The exclusion category for this action is 516 DM 14.5 D14 (Approval, renewal, transfer, or execution of an original, amendatory, or supplemental water service or repayment contract where the only result will be to implement an administrative or financial practice or change.).
16. **Notification of the Congress.** Pursuant to Subsection 17(b) of the 1939 Act, the CSO will develop a letter to notify the Congress each year of all deferments approved during that calendar year.