

Reclamation Manual

Policy

Subject: Reuse of Project Water

Purpose: Reaffirms and clarifies Reclamation's policy concerning the reuse of return flows from applications of project water.

Authority: Reclamation Act of 1902, and acts amendatory thereof and supplementary thereto, especially Reclamation Project Act of 1939 (43 U.S.C. 485), and the Water for Miscellaneous Purposes Act of 1920 (43 U.S.C. 521).

Contact: Contract Services Office, D-5600

1. **General Statement of Policy.** After delivery, the ability to control project water available for reuse due to waste (both treated and untreated), seepage, and return flows (collectively "return flows"), greatly enhances Reclamation's flexibility and efficiency in meeting the various competing demands on its projects. It is therefore Reclamation's policy to encourage and facilitate the reuse of project water within the bounds of state water laws and Reclamation's state-issued use permits. Reclamation will assert and protect its interest in return flows either under state law or as federal property. In furtherance of this policy, Reclamation should endeavor to monitor water after initial delivery to identify opportunities for successive uses, and will pursue contracts for reuse wherever it is practical and physically and legally tenable.

That Reclamation may control reuse of project water is inherent in principles of property law and has been upheld in federal case law. Reclamation may require contractual restrictions more stringent than those imposed by state water law. However, Reclamation's authority to enter contracts for the reuse of project water is subject to any limitations on use that may be imposed by applicable state laws and relevant water rights. Because laws vary from state to state, and because Reclamation's water rights may vary from project to project, the potential for and character of agreements made in furtherance of this policy will also vary. Reclamation will pursue this policy to the fullest extent that relevant laws, permits, and physical exigencies will allow, evaluating the potential for reuse on a case-by-case basis.

2. **Definition.**

- A. **Project water.** Surface or ground water, including project return flows, which is pumped diverted, and/or stored:

- (1) Based upon the exercise of water rights which have been appropriated or acquired by the United States or others, or which have been decreed, permitted, certificated, licensed, or otherwise granted to the United States or others, for a Reclamation project or a Water Conservation Utilization Act (WCUA) project, or

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- (2) Based upon a withdrawal or reservation of water from appropriation by the United States for a Reclamation project or a WCUA project, or
 - (3) In accordance with section 215 of the Reclamation Reform Act of 1982 (43 U.S.C. 390oo), or
 - (4) Based upon an act of Congress which allocated or apportioned water to a Reclamation project or a WCUA project.
3. **Contract provisions.** Reclamation's ownership interests in waste, seepage, and return flows from the application of project water (return flows) are described in varying detail in existing contracts. The most common contract provisions addressing Reclamation's ownership interests in return flows contain language similar to the following:

"The United States claims all of the waste, seepage, and return flow water derived from water delivered pursuant to this contract and the same is hereby reserved and retained by the United States for beneficial use on the project."

- A. In the absence of such a provision, Reclamation's administrative control over return flows may also be established by the "Rules and Regulations" provision, which is included in most Reclamation contracts. The language in these articles typically restates the general authority given the Secretary in the 1902 Act and the 1939 Act; i.e., to perform any of the necessary actions and to make any rules and regulations deemed necessary to carry out the provisions of Reclamation law, the implementation of the particular project plan, and the administration of the subject contract according to the 'true intent' of these applicable authorities.
- B. Even where not addressed by contract, Reclamation, at a minimum and within the boundaries of the Reclamation Project, retains return flow rights to the extent that they are established in the state water right and are not expressly granted to another entity by contract. In some circumstances, Reclamation return flow rights under state and/or Federal law define Reclamation's legal authority to assert administrative control over return flows, provided other contract provisions do not expressly state otherwise. In other circumstances, Reclamation may have the right to control project water to exhaustion.
- C. Generally, return flows are to be used "for the benefit of the project."¹ The 'benefit of the project' is sufficiently broad to provide for reuse of the water for purposes other

¹ It is important to note that even where there is only one principal project contractor, that entity does *not* supplant the project, for the purpose of determining what qualifies as a "benefit of the project." Rather, it remains for Reclamation to determine what qualifies as a "benefit of the project," as indicated by relevant statutes and project documents.

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than that of the initial use. For example, return flows from irrigation use may be subsequently applied for municipal uses and vice-versa, where both uses are consistent with the project authorization.

In some cases, the return flows are specifically designated for beneficial use by a project contractor, or within a contractor's boundaries. Regardless of the designation of beneficiaries, or lack thereof, Reclamation's rights to return flows should be asserted and protected. Where water rights are held in the name of the project contractor, Reclamation should encourage the contractor to assert and protect any rights it has to reuse the water. Where state law allows, Reclamation should assert its federal property right.

4. **Third-party contracts.**

- A. Reclamation projects often serve multiple water users and multiple purposes. In many cases, Reclamation and the water users have found it efficient to transfer responsibility for water deliveries to a central authority, e.g., a master conservancy district or municipality. This delegation of authority does not relinquish Reclamation's right to seepage or return flows.
- B. Third-party contracts must expressly provide that their terms are subject to the terms of the master contract. Reuse contracts with third parties must follow master contracts containing language to the effect that the third-party contractors are also not entitled to the use, or further distribution, of return flows.

5. **Authority for reuse contracting.** Reuse contracts may be made pursuant to the following authorities. The appropriate authority depends on the proposed use and the authorized project purposes.

- A. Reclamation Project Act of 1939, § 9(c) (43 U.S.C. 485h(c)) (M&I use).
- B. Reclamation Project Act of 1939, § 9(d) and 9(e) (43 U.S.C. 485h(e)) (Agricultural use).
- C. Water for Miscellaneous Purposes Act of 1920 (43 U.S.C. 521) (Conversion from agricultural use to miscellaneous other uses).

6. **Charges.** Charges will be considered on a case-by-case basis, relative to the contracting authority used and the situation of the project.