

APPENDICES

Appendix A Reclamation's Framework for the Transfer of Title

**FRAMEWORK
FOR THE
TRANSFER OF TITLE
BUREAU OF RECLAMATION PROJECTS
AUGUST 7, 1995**

The criteria and guidance outlined in this document applies to "uncomplicated" projects. "Uncomplicated" projects are generally defined in the Scope of Application section following. This guidance is intended to initiate the Bureau of Reclamation's title transfer process.

This guidance does not apply to the more complicated projects, e.g., large multi-purpose projects where there is no consensus among the project beneficiaries concerning the transfer, where more than one competent beneficiary has expressed an interest in acquiring title, or where the institutional and legal concerns cannot be readily resolved.

BACKGROUND: The Reclamation program was founded in 1902. Its original mission was one of civil works construction to develop the water resources of the arid Western United States to promote the settlement and economic development of that region. The results of that work are well known in the hundreds of projects that were developed to store and deliver water. That substantial infrastructure made Reclamation the largest wholesale supplier of water in the United States, the sixth largest electric power generator, and the manager of 45 percent of the surface water in the Western United States. Many of these projects were constructed at a time when there were no local communities and utilities. Today much of the West is settled and is, in some respects, the most urbanized region of the country. Reclamation owns and operates public utility facilities which, if located in other parts of the country, would likely be owned, operated, and funded by publicly regulated private corporations or local government agencies. While it has been Reclamation's policy for decades to transfer operation and maintenance of projects to local entities where and when appropriate, interest in the actual transfer of title (with its attendant responsibilities) is now growing.

PURPOSE

As part of the second phase of the National Performance Review (REGO II), Reclamation is undertaking a program to transfer title of facilities that could be efficiently and effectively managed by non-Federal entities and that are not identified as having national importance. This effort is a recognition of Reclamation's commitment to a Federal Government that works better and costs less. The transfer of title will divest Reclamation of the responsibility for the operation, maintenance, management, regulation of, and liability for the project. The transfer of title to a project will, in effect, sever Reclamation's ties with that project.¹

SCOPE OF APPLICATION OF FRAMEWORK

It is the intent of Reclamation to transfer title and responsibility for certain projects or facilities, when and where appropriate, to qualifying non-Federal interests. Uncomplicated projects are projects or facilities where there are no competing interests, the facilities are not hydrologically integrated with other projects, the financial arrangements are relatively simple and easily defined, and the legal and institutional concerns² associated with a transfer can be readily addressed. In other words, after meeting the requirements set forth in the Criteria section below, projects will be selected for title transfer on the basis of the transfer being achievable and able to move forward quickly.

For purposes of this document and the transfer of title to the projects, the terms "beneficiary" and "stakeholder" are defined as follows: (a) **beneficiary** refers to (i) contractors and others who receive direct benefits under the authorized purposes for that project and (ii) non-Federal governmental entities in the project area; (b) **stakeholder** is a broader term and includes the beneficiaries, as well as those individuals, organizations, or other entities which receive indirect benefits from the project or may be particularly affected by any change from the status quo.

CRITERIA FOR TITLE TRANSFER

Following are the six major criteria that must be met before any project is transferred:

- 1) The Federal Treasury, and thereby the taxpayer's financial interest, must be protected
- 2) There must be compliance with all applicable State and Federal laws
- 3) Interstate compacts and agreements must be protected
- 4) The Secretary's Native American trust responsibilities must be met
- 5) Treaty obligations and international agreements must be fulfilled
- 6) The public aspects of the project must be protected

¹ Note: Reclamation recognizes that the complete severance of the relationship between Reclamation and the transferee may not be possible in all instances.

² Such concerns include, but are not limited to, unresolved Native American claims, endangered species considerations, international or interstate issues, absence of consensus among beneficiaries, significant disagreements raised by the stakeholders, a need to prepare an Environmental Impact Statement, and substantive objections from other governmental entities.

GENERAL GUIDANCE FOR DETERMINING PROJECTS ELIGIBLE FOR TRANSFER

Reclamation Area offices will review projects nominated by an interested transferee and will pursue negotiations regarding those projects where the issues associated with transfer are relatively easy to resolve. This could include projects with multiple purposes and numerous stakeholders, but only if it is clear that outstanding issues are resolved and that there is consensus among the stakeholders.

Reclamation will not initiate negotiations on those projects where title transfer will involve a protracted process to ensure that the six criteria listed above are met.

Generally, Reclamation will not pursue transfer of powerhouses and generating facilities where power is marketed by the Power Marketing Administrations or where such power is used for purposes not directly associated with project purposes.

GENERAL GUIDANCE APPLYING TO TRANSFERS

All transfers will be voluntary.

Reclamation's intent is to transfer projects to current project beneficiaries, including non-Federal governmental entities, or to entities approved by the current beneficiaries.

All transfers must have the consent of other project beneficiaries. If another beneficiary raises substantive objections which cannot be resolved, the project will remain in Federal ownership.

Reclamation will comply with National Environmental Policy Act and other applicable laws in all transfers.³

All transfers must ensure the United States' Native American trust responsibilities are satisfied. In addition, outstanding Native American claims that are directly pending before the Department and that would be directly affected by the proposed transfer will be resolved prior to transfer.

Reclamation officials will meet with representatives from all interested Federal and State agencies to consider their concerns early in the transfer process.

Potential transferees must be competent to manage the project and be willing and able to fulfill all legal obligations associated with taking ownership of that project, including compliance with Federal, State, and tribal laws that apply to facilities in private ownership and assumption of full liability for all matters associated with ownership and operation of the transferred facilities.

³ Reclamation is proceeding to develop a new Categorical Exclusion (CE) for those title transfers which would not significantly impact the environment and thus could be categorically excluded from a detailed NEPA review. Generally, Reclamation would anticipate such a CE would apply on projects involving transfer of title of Reclamation projects or facilities, in whole or in part, to entities who would operate and maintain the facilities or manage the lands so that there would be no significant changes in operation and maintenance or in land and water use in the reasonably foreseeable future. It is Reclamation's expectation that a CE would apply to a relatively small number of projects, i.e. some of the small single-purpose projects where no change in use is anticipated after the transfer.

Potential transferees must be able to demonstrate the technical capability to maintain project safety on a permanent basis and an ability to meet financial obligations associated with the project.

In general, it is Reclamation's expectation that, upon the transfer of title to a project, its jurisdiction over that project will be divested. Reclamation further recognizes that in some cases the complete divestiture of jurisdiction may not be attainable because the transferee still receives water supplied from a Reclamation facility, or only a portion of the project was transferred and the rest of the project remains in Federal ownership, or there are other extenuating circumstances. The degree to which the Reclamation Reform Act of 1982 will apply following transfer will be negotiated on a case-by-case basis.

The financial interests of the Government and general taxpayers will be protected. Transferees must agree to fair and equitable terms based upon the factual circumstances associated with each project. (See attachment which describes the valuation of projects.) Transferees will be expected to pay upfront the estimated transaction costs, such as costs associated with compliance with the National Environmental Policy Act, real estate boundary surveys, and so forth. Reclamation will not provide new loans to finance transfers.

No transferred Federal asset will be considered for federal assistance for project operation, maintenance, and replacement or capital construction purposes following completion of the transfer.

Prior to the initiation of detailed discussions on title transfer, Reclamation and the potential transferees will execute an agreement covering the responsibilities of all parties during the negotiations.

A base value will be determined for each project as it becomes the subject of serious negotiations for transfer. (See attached guidance on valuation.) The negotiated price for the project may deviate up or down from the base value. It will be necessary for Reclamation and the interested non-Federal entity to document how the factual circumstances and equitable treatment considerations justify such adjustments. In addition, Reclamation may consider future uses on the transferred lands and waters in establishing a price.

Potentially affected State, local, and tribal governments, appropriate Federal agencies, and the public will be notified of the initiation of discussions to transfer title and will have (1) the opportunity to voice their views and suggest options for remedying any problems and (2) full access to relevant information, including proposals, analyses, and reports related to the proposed transfer. The title transfer process will be carried out in an open and public manner.

Once Reclamation has negotiated an agreement with a transferee, Reclamation will seek legislation specifically authorizing the negotiated terms of the transfer of each project or feature.

ATTACHMENT

**V ALUATION POLICY AND FRAMEWORK FOR THE SALE AND TRANSFER
OF PROJECT FACILITIES AND RELATED ASSETS,
BUREAU OF RECLAMATION**

The criteria and guidance outlined in this document applies to "uncomplicated" projects. "Uncomplicated" projects are generally defined in the "Framework for the Transfer of Title."

This valuation policy does not apply to the more complicated projects (e.g., large multi-purpose projects where there is no consensus among the project beneficiaries concerning the transfer, where more than one competent beneficiary has expressed an interest in acquiring title, or where the institutional and legal concerns cannot be readily resolved.)

When transfer negotiations are initiated, the Bureau of Reclamation will estimate the base value for Federal facilities and related assets proposed for transfer. Prior to initiating negotiations, there must be an agreement between the Bureau of Reclamation and the potential transferees concerning the sharing of costs to complete the transaction.

Accelerated contract payout, early payment, or prepayment are different transactions from sale of the facility (transfer of title). Such transactions will not be construed as "contracts for sale of property."

The base value of a facility proposed for transfer is defined as the value of the assets being transferred (including facilities, lands, and other related assets) as if they were under continued Federal control. More specifically, this valuation assumes that the new owner would (1) receive all remaining revenues due the Federal Government for repayment of the capital costs of facilities being transferred, as well as for existing operation and maintenance deficits; (2) receive all other Federal revenues from the assets (e.g., leases for grazing, commercial purposes, etc.); (3) be responsible for funding operation and maintenance of all aspects of the projects; and, accordingly, receive all future O&M payments, and (4) bear all liability associated with ownership and operation of the transferred facility.

Since each project, storage facility, canal, diversion, and conveyance structure is different, it is essential that negotiations and the assessment of value be handled on a case-by-case basis to account for the unique characteristics and conditions associated with each. For example, if assets not needed for operating project facilities can be sold separately, standard appraisal techniques might be used.

The base value for the facilities proposed for transfer is to be based on the present value of all future Federal revenue streams for the assets being transferred. Reclamation will only transfer logical elements of projects. In those situations in which only certain project features are being transferred, it will be necessary to prorate the future revenue streams. When irrigation facilities are transferred, the present worth of the corresponding share of aid-to-irrigation payments will be included as part of the base value of the irrigation facilities. The present worth of these

payments may be paid either directly by the transferee or through agreements with project hydropower beneficiaries.

Computation Methodology

Base value. Base value will be calculated as the present worth of the United States' anticipated revenue streams including (1) water revenues, including revenues from existing water service and repayment contracts and their renewals, any operation and maintenance deficits owed to the Federal Government that are outstanding as of the date of the transfer (but excluding future payment for O&M and other direct reimbursements), and projected full-cost pricing revenues; (2) revenues from any additional or modified water delivery contracts expected to be implemented because of additional or changed demand (e.g., municipal and industrial use instead of irrigation use); (3) revenues from water transfers; (4) revenues from the sale of preference and commercial power, including revenues received as "aid to irrigation;" and (5) all revenues from miscellaneous sources such as lease of facilities, lease of lands, and miscellaneous fees and charges.

These revenues will be discounted to present worth using Treasury yield rates current at the time of the transaction. The rates will be determined using maturities comparable to the duration of the revenue stream, such as the remaining repayment period (e.g., 15-year rates for a 15-year remaining repayment period). For periods over 30 years, the 30-year rate will be used. These rates will be established Reclamation-wide from information supplied by the Department of the Treasury in accordance with OMB Circular A-129. In those cases where the purchaser is an entity that has access to tax-free financing, an amount equal to the income taxes foregone would be added to the present worth in accordance with OMB Circular A-129.

In some cases, where projected Federal revenues clearly do not reflect the residual values of the asset(s), other standard appraisal techniques may be used.

Adjustments to base value. Adjustments to base value would be based on the reasonable expectation that conditions will be altered in the foreseeable future after title is transferred compared with the conditions prior to the transaction. Such altered conditions might include operational changes, new end-uses of water or project assets, or changes in the obligations and responsibilities from those specified above. Adjustments from the base value may be either upward or downward. For example, if the terms and conditions did not require the new owners to maintain public recreation, the lost recreation benefits would be added to the purchase price. On the other hand, if terms and conditions were negotiated that increased public uses of water at the expense of contract deliveries, this could lower the transfer price. Other adjustment to base value may be warranted to reflect the residual value of project assets. However, it is anticipated that there will be few, if any, adjustments to base value for the projects or facilities addressed by this guidance.

Review and Approval

Reclamation will employ the services of an independent financial advisor(s) to ensure the reasonableness and accuracy of the analyses pertaining to project valuation.

While there is no specific set of prior conditions to which each negotiated transaction must adhere, the terms and conditions agreed upon must pass the test of public scrutiny, administrative review (including OMB and Treasury review under Circular A-129), and Congressional action.