

3/18/2016 NOTICE: NOTICE: Reclamation has temporarily suspended work on this release. As soon as new revision dates are determined, that information will be posted on this site.

DRAFT RECLAMATION MANUAL RELEASE

Comments on this draft release must be submitted to Ms. Yolanda Smith via email at ysmith@usbr.gov by March 18, 2016.

Background and Purpose of the Following Draft Directives and Standards (D&S)

The Reclamation Manual (RM) is used to establish Bureau of Reclamation-wide requirements, assign program responsibility and establish, and document Reclamation-wide methods of doing business. This draft addition to the RM is intended to set forth the requirements for contracting for the use of excess capacity in Reclamation project facilities.

This draft RM D&S, *Contracting for Non-Project Use of Excess Capacity in Bureau of Reclamation Project Facilities*, PEC 05-10, establishes the requirements for excess capacity contracting and identifies the treatment of the various excess capacity charge components.

Please note that draft RM D&S, *Charges for Non-Project Use of Excess Capacity in Bureau of Reclamation Project Facilities*, PEC 05-11, is also available for comment at this time (<http://www.usbr.gov/recman/drafts/pec05-11webdraft.pdf>).

This draft D&S along with PEC 05-11 are new releases and together supersede the provisions of current RM D&S, *Use of Excess Capacity in Reclamation Projects for the Impoundment, Storage, and Carriage of Non-Project Water*, WTR 04-01.

See the following pages for the draft D&S.

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Directives and Standards

- Subject:** Contracting for Non-Project Use of Excess Capacity in Reclamation Project Facilities.
- Purpose:** To set forth the requirements for contracting for the use of excess capacity in Reclamation facilities. These Directives and Standards establish general requirements for excess capacity contracting, including identifying appropriate contracting authorities, and will assist Reclamation in addressing major rehabilitation and replacement needs of its facilities.
- Authority:** The Reclamation Act of 1902 (ch. 1093, 32 Stat. 388), and acts amendatory and supplementary thereto (Federal reclamation law), especially Section 1 of the Warren Act of 1911, the Interior Department Appropriation Act for 1928, Section 14 of the Reclamation Project Act of 1939, Office of Management and Budget (OMB) Circular A-25 (July 8, 1993), and project specific legislation, as appropriate.
- Approving Official:** Director, Policy and Administration
- Contact:** Reclamation Law Administration Division (84-55000)
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1. **Introduction.** Reclamation law provides the framework to contract for use of excess capacity in Bureau of Reclamation facilities. As Reclamation's projects and facilities have aged, Reclamation's role in administering projects has shifted from a focus on construction to a focus on maintenance and management. These Directives and Standards (D&S) recognize these changes and establish requirements for contracts through which Reclamation makes excess capacity in Federal facilities available for storage or conveyance of non-project water.
2. **Applicability.** This D&S applies to Reclamation personnel involved in proposing, approving, negotiating, and executing contracts for the use of excess capacity in Reclamation facilities.
3. **Definitions.**
 - A. **Excess Capacity.** Diversion, storage, conveyance, or pumping capacity in Reclamation project facilities that is available at times it is not needed to meet Reclamation's obligations for authorized project purposes.
 - B. **Excess Capacity Contract.** For purposes of this D&S, any contract entered under the authority of the Warren Act of February 21, 1911 (Warren Act) or Section 14 of the Reclamation Project Act of August 4, 1939 (Section 14), which facilitates diversion, storage, conveyance or pumping of non-project water through available excess capacity, as defined above at Paragraph 3.A.

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- C. **Non-Project Water.** Surface or ground water:
- (1) that is pumped, diverted, exchanged, and/or stored based upon the exercise of water rights that have not been appropriated or acquired by, or apportioned to, the United States or others, or which have not been decreed, permitted, certificated, licensed, or otherwise granted to the United States or others, for a Reclamation project, or
 - (2) that is not reserved, allocated, or withdrawn from appropriation by the United States for a Reclamation project.
- D. **Operation, Maintenance, and Replacement.** The definition in Paragraph 3.K. of Reclamation Manual (RM) Policy, *Water-Related Contracts – General Principles and Requirements* (PEC P05) applies to this D&S.
- E. **Project Water.** The definition in Paragraph 3.L. of PEC P05 applies to this D&S.
4. **Responsibilities.**
- A. **Director, Policy and Administration (POLICY).** POLICY is responsible for establishing directives and standards for water-related contracting, and for ensuring that proposed water-related contract actions to be approved by the Commissioner meet the associated requirements. POLICY will review a submitted basis of negotiation (BON) to verify compliance with the cited authorities, general Reclamation law and policy, and this D&S, and will prepare a delegation of authority in the form of an approval memorandum for the Commissioner's signature, pursuant to the requirements of Paragraph 6.N.(4) of RM Delegations of Authority.
 - B. **Regional Directors.** Regional directors develop BONs and are responsible for the negotiation, execution, and administration of excess capacity contracts within their regions in accordance with authority delegated to them by the Commissioner. Regional directors are also responsible for ensuring that excess capacity contracts are negotiated in a manner that protects the interests of the United States and of the affected Federal projects, and are in accordance with applicable approval memoranda.
5. **BON Requirements.** Where contracting authority is already delegated, the regional director will develop pricing in accordance with RM D&S, *Charges for Non-Project Use of Excess Capacity in Reclamation Project Facilities*, (PEC 05-11). Where a BON and an approval memorandum are required, refer to RM D&S, *Preparing Bases of Negotiation for New, and Amendatory Water Service, Repayment, and Related Contracts* (PEC 06-01) for the general requirements of the BON and approval memorandum. In addition to the requirements of PEC 06-01, the following requirements apply to BON requests for excess capacity:
- A. identification of the facility or facilities in which excess capacity has been determined to be available;

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- B. identification of the maximum annual quantity of excess capacity that has been requested;
 - C. a determination that the use of such excess capacity will not impair the ability of the project to serve its authorized purposes;
 - D. the requested term for the excess capacity contract, up to a maximum of 40 years;
 - E. identification of the pricing methodology and applicable considerations in accordance with PEC 05-11.
6. **Excess Capacity Contracting.** Reclamation must include provisions in excess capacity contracts as follows:
- A. **Evaporation and Spills.** Each excess capacity contract shall identify the methodology to quantify the loss due to evaporation during storage and conveyance that will be assessed against the non-project water. Each excess capacity contract shall also require the non-project water to be the first water to be spilled.
 - B. **Contract Term.** Excess capacity contracts shall be for a term of not more than 40 years.
 - C. **Charges for Use of Excess Capacity.** The excess capacity contract will assess an OM&R charge and fixed charge (as applicable).
 - (1) **Annual O&M Component.** An allocable share of annual costs of O&M of Reclamation facilities will be assessed in each excess capacity contract. This charge is for routine and recurring O&M of the Reclamation project facilities. In accordance with the Interior Department Appropriations Act for 1928, dated January 12, 1927 (1927 Act), the annual O&M component will be identified for the purpose of meeting annual O&M needs for the project and will be used in the following ways:
 - (a) **Reserved Works.** The annual O&M component of the OM&R charge will reflect those costs allocable to the use of excess capacity and will be paid annually in advance to Reclamation.
 - (b) **Transferred Works.** Where responsibility for O&M of Reclamation project facilities has been transferred to a transferred works operating entity, the annual O&M component of the OM&R charge will be established by the operating entity and reflect those costs allocable to the use of excess capacity that will be assessed and paid as directed by the operating entity.
 - (2) **Replacement Component.** The Replacement component of the OM&R charge will be established as described in PEC 05-11. In accordance with the 1927 Act, the excess capacity contract will identify the Replacement component and describe the purpose as providing funding for future Extraordinary Maintenance

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(XM) needs as defined in Section 3(B) of PEC 05-03. The Replacement component will be allocated 50% to the project that is providing excess capacity and 50% to be used Reclamation-wide, unless otherwise established by law.

- (a) **Reserved Works.** For reserved works, 50% of the “R” component will be retained and used for project-specific XM.
 - (b) **Transferred Works.** For transferred works, 50% of the “R” component will be paid to the operating entity as identified in the contract. When excess capacity contracts are entered on transferred works, a formal, legally binding commitment¹ must be received from the transferred works operating entity to specify the project-specific funds will only be used for XM. The formal commitment must be received prior to the conveyance or storage of non-project water pursuant to an excess capacity contract.
 - (c) **Reclamation-wide.** Use of the Reclamation-wide portion of the “R” component will be prioritized as described in Paragraph 7, below.
- (3) **Fixed Charge.** Any identified Fixed charge will be credited in accordance with the requirements of Paragraph 5.G.(2) of RM D&S *Crediting Requirements for Incidental Revenues*, PEC 03-01, unless otherwise established by law.
- D. **Acreage Limitations.** The storage and conveyance of non-project water in excess capacity must be in accordance with the acreage limitation provisions of Federal reclamation law.
- (1) **Acreage Limitations for Contracts Entered Pursuant to the Warren Act.** Excess capacity contracts entered pursuant to the Warren Act will specifically identify the applicability of the 160-acre ownership limitation provisions of the Warren Act. Such contracts cannot be written to take advantage of, or if executed prior to the date of enactment of the Reclamation Reform Act of 1982 (RRA), cannot be amended to conform to the discretionary provisions of the RRA.
 - (2) **Entities With a Contract Entered Pursuant to the Warren Act and a Water Service or Repayment Contract.** In cases where an entity has both a contract entered pursuant to the Warren Act and a water service or repayment contract for project water (i.e., the entity is both an excess capacity contractor and a project contractor), the acreage limitation provisions of the water service or repayment contract will prevail, notwithstanding the provisions of subparagraphs (b) and (c) below.
 - (a) **Contracts Prior to October 1, 1981.** For water service or repayment contract entered into prior to October 1, 1981, the RRA validates all provisions addressing the commingling of project and non-project water.

¹In circumstances where the transferred works operating entity is a signatory to the excess capacity contract and the use of the funds is described in that contract, no further commitment is required.

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- (b) **Contracts On or After October 1, 1981.** For water service or repayment contracts entered into on or after October 1, 1981, the acreage limitation regulations provide that when non-project water is commingled in project facilities with project water that is subject to acreage limitations, then acreage limitation must be applied to the commingled water unless the party contracting to use excess capacity pays to Reclamation an “incremental fee which reasonably reflects an appropriate share of the cost to the Federal government, including interest, of storing or delivering the non-project water” [43 CFR §426.15(c)(2)]. The charges required by Paragraph 6.C. above, will be deemed to constitute this incremental fee so long as these charges include the interest component required by 43 CFR §426.15(c)(2) and are in addition to any other charges due from the contractor (i.e., the entity which is both an excess capacity contractor and a project contractor) to Reclamation pursuant to its water service or repayment contract. If these conditions are met, then the acreage limitations will apply only to the project water.
- (c) **Commingling.** The acreage limitations regulations further provide that when non-project water is commingled with project water in non-project facilities, then the acreage limitations must be applied only to those landholders who receive project water; provided that the water requirements for eligible lands can be established and that the quantity of project water used is less than or equal to the quantity needed to irrigate the contractor’s eligible lands as defined in those regulations [43 CFR §426.15(c)(1)].
7. **Funding Prioritization of Reclamation-wide Replacement Component Funds.** The following criteria will be considered when determining the priority for use of the Reclamation-wide portion of the Replacement component:
- A. **Engineering Need.** The engineering need of the project is the extent to which the ability of a project to deliver its intended benefits is threatened by existing or potential conditions.
- B. **Consequences of Failure.** The consequences of failure is a measure of the potential damages and the project benefits that would be lost if a project facility were to fail.
- C. **Financial Considerations.** The financial consideration is a measure of a project beneficiary’s ability to repay obligations to the United States that would result from expenditure of the requested XM funding.
- D. **Efficiency Opportunities.** The efficiency opportunities are improvements to project operation and water management that might result from the requested XM.
- E. **Scheduling.** Scheduling is a measure of the time that is expected for the requested XM to be completed.

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8. **Indian Trust Assets.** Reclamation's Indian trust policy and procedures will be applied when considering requests for excess capacity contracts. Reclamation will agree to make excess capacity available only when this can be accomplished without impairing the Secretary of the Interior's trust obligations and without adverse effects on Indian trust resources, or when any adverse impacts can be adequately mitigated or compensated. The costs of any required mitigation or compensation shall be funded by the party or parties requesting the excess capacity contract.
9. **Mitigation of Environmental Impacts.** Reclamation will only execute excess capacity contracts after considering whether and how adverse effects could be avoided and whether such effects should be mitigated. Mitigation requirements, if any, will be determined on a case-by-case basis. The costs of any required mitigation shall be funded by the party or parties requesting the excess capacity contract.
10. **Public Involvement.** Public participation is required for all excess capacity contracts; refer to RM Policy, *Water-Related Contracts – General Principles and Requirements* (PEC P05) for general public participation requirements for water-related contracts.
11. **Environmental Compliance.** The appropriate level of environmental documentation will be completed to ensure compliance with the National Environmental Policy Act, Endangered Species Act, National Historic Preservation Act, and other relevant laws, regulations, and Executive Orders prior to the execution of any excess capacity contract.
12. **O&M Contractor Consultation.** In addition to its public involvement procedures, when Reclamation receives a request to enter into a contract for the use of excess capacity it will, as appropriate, notify, consult with, and take into account the views of the project contractors who receive water from, and the views of the O&M contractors who are responsible for the OM&R of, the project facilities involved before reaching a decision concerning any such request.