

Reclamation Manual

Directives and Standards

- Subject:** Use of Excess Capacity in Reclamation Projects for the Impoundment, Storage, and Carriage of Non-Project Water
- Purpose:** Supplements and provides implementation guidance for the Reclamation Manual policy WTR P04.
- Authority:** 43 U.S.C. §§523-25; 43 U.S.C. §2245; and various project specific statutes.
- Contact:** Reclamation Law and Revenues Management, D-5200; and Water Contracts and Repayment, D-5600
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1. **Contracting Process.** Reclamation will utilize a timely and economical process to review requests for contracts for the use of excess capacity and will negotiate and complete contracts for the use of excess capacity as expeditiously as possible.
 - A. **Public Involvement.** Public participation in the contract negotiation process will be in accordance with the then applicable Reclamation policies for public involvement regarding contract negotiations.
 - B. **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 which receive water from, and the views of the O&M contractors which are responsible for the operation and maintenance of, the project facilities involved before reaching a decision concerning any such request.
 - C. **Environmental Compliance.** Reclamation will use the NEPA process to identify the environmental and socio-economic impacts, if any, which the proposed use of excess capacity would have, and to identify, as appropriate, reasonable alternatives to the requesting party's proposed use of the excess capacity. In the event that current Resource Management Plans or other planning documents adequately address alternatives to the use of the excess capacity for the purposes sought, then the matter need not be addressed further. In determining the effects, if any, of a proposed use of excess capacity, what the magnitude of these effects is likely to be, and how such effects should be mitigated, Reclamation will consult with appropriate Federal, State, Tribal, and local authorities and comply with all applicable Federal laws.

In general, the parties benefitting from the use of the excess capacity must bear the costs for compliance with the NEPA requirement.

2. **Acreage Limitations.** The storage and conveyance of non-project water in excess capacity must be in accordance with the acreage limitation provisions of Federal

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reclamation law, including the specific 160-acre ownership limitation provisions of the Warren Act.

- A. **Contracts Subject to 160-Acre Limitation.** Storage and conveyance of non-project water in excess capacity pursuant to contracts written under the authority of the Warren Act is subject to the 160-acre ownership limitation of that 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), as amended, cannot be amended to conform to the discretionary provisions of the RRA.
- B. **Districts With a Warren Act Contract and a Water Service or Repayment Contract.** In cases where a district has both a Warren Act contract for the use of excess capacity to store or convey non-project water and a water service or repayment contract for project water (i.e., the district is both a contractor for the use of excess capacity and a project contractor), the acreage limitation provisions of the water service or repayment contract will prevail, notwithstanding the provisions of subparagraphs (2) and (3) below.
- (1) **Contracts Prior to October 1, 1981.** For water service or repayment contracts entered into prior to October 1, 1981, the RRA validates all provisions addressing the commingling of project and non-project water.
 - (2) **Contracts On or After October 1, 1981.** Contracts 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 which is subject to acreage limitations, then acreage limitations 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 nonproject water” [43 CFR §426.15(c)(2)]. The charges required by paragraph 5 below 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 district which is both a Warren Act contractor for excess capacity and a project contractor) to Reclamation pursuant to its water service or repayment contract. If these conditions are met, then acreage limitations will apply only to the project water.
 - (3) **Commingling.** The acreage limitation regulations further provide that when non-project water is commingled with project water in **non-project** facilities, then acreage limitations must be applied only to those landholders who receive project water; provided that the water requirements for eligible lands can be

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established and that the quantity of project water used is less than or equal to the quantity needed to irrigate the contractor's (i.e., the district which is both a Warren Act contractor for excess capacity and a project contractor) eligible lands as defined in those regulations [43 CFR §426.15(c)(1)].

3. **Indian Trust Assets.** Reclamation's Indian trust policy and procedures will be applied when considering requests for contracts for the use of excess capacity. 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 must be financed and borne by parties other than Reclamation (i.e., the party requesting a contract for the use of excess capacity or others, but not a project contractor or O&M contractor unless they voluntarily agree to do so).
4. **Mitigation of Environmental Impacts.** Reclamation will make excess capacity available for the storage and conveyance of non-project water only 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 must be financed and borne by parties other than Reclamation (i.e., the party requesting a contract for the use of excess capacity or others, but not a project contractor or O&M contractor unless they voluntarily agree to do so).
5. **Charges for Use of Excess Capacity.** Appropriate charges will be assessed for the use of excess capacity.
 - A. **Reclamation Operates and Maintains the Facilities.** If Reclamation operates and maintains the Reclamation project facilities in which non-project water is to be diverted, stored, impounded, pumped, or conveyed, then Reclamation will establish such charges, subject to paragraph 5C, for the use of excess capacity as are appropriate, which charges may consist of, but not be limited to the following:
 - (1) A component which reflects the original cost;
 - (2) The original cost indexed to current dollars;
 - (3) The estimated replacement cost;
 - (4) The outstanding repayment obligation, or other measure of cost, including interest as appropriate, of constructing the Reclamation project facilities involved; and

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- (5) A separate component which reflects the actual and reasonable cost of operating, maintaining and replacing these same facilities.
- B. An O&M Contractor Operates and Maintains the Facilities.** If an O&M contractor has assumed responsibility for and is directly funding the O&M of the Reclamation project facilities in which non-project water is to be diverted, stored, impounded, pumped, or conveyed, and if, and only if, Reclamation has entered into a contract consistent with this directive then:
- (1) **Actual and Reasonable OM&R Costs.** Unless otherwise determined by Reclamation, such O&M contractor may establish charges, subject to paragraph 5C, for the use of excess capacity which reflect the O&M contractor's actual and reasonable OM&R costs for diverting, storing, impounding, pumping, or conveying non-project water in and through the Reclamation project facilities involved, and
- (2) **Reclamation's Additional Charges.** Reclamation may establish such additional charges, subject to paragraph 5C, for the use of excess capacity as are appropriate, which charges may consist of, but not be limited to, the same components as are set forth in paragraph 5A, except that Reclamation will not include in its charge the costs of OM&R which are being charged by an O&M contractor pursuant to paragraph 5B(1).
- C. Just and Equitable Charges.** All charges established pursuant to this paragraph will be just and equitable as to the project contractors which receive project water from the Reclamation project facilities involved and will be in accordance with Reclamation Manual, *Charges for Use of Federal Assets* (PEC 01-01), as it now exists or may hereafter be amended.