

## Chapter 12: LITIGATION HOLDS

1. **Purpose.** This IMH chapter outlines and assigns oversight, responsibilities, and standard operating procedures to subject matter experts and others to ensure that the Bureau of Reclamation meets its obligations to search for, identify, preserve, and collect documents, tangible things, and electronically stored information (ESI) during litigation and discovery. All Reclamation personnel involved in the litigation hold and discovery process must be familiar with these procedures.

Reclamation has a duty, under the *Federal Rules of Civil Procedure (FRCP)*, as amended, to search for and preserve potentially relevant information during litigation. These duties arise not only when litigation is filed, but exist as soon as litigation is reasonably anticipated. Recent FRCP amendments make clear litigation holds and discovery obligations apply to *all* forms of information and the media this information is stored upon, including ESI and all associated metadata.

These responsibilities and resulting procedures apply to all individuals, offices, and organizations at all levels of Reclamation, including contractors who provide records or information technology management services to Reclamation offices and program services.

**Authorities:** U.S. Code, Title 28, *Federal Rules of Civil Procedure (As Amended)*, Title V, Rules 26, 34, and 37; Department of the Interior SOL – *Information and Guidance for Managing the Discovery of Electronically Stored Information*, issued November 27, 2006; Records Disposal Act of 1943; Federal Records Act of 1950; Freedom of Information Act (FOIA) of 1967 and 1974; Federal Records Act of 1976; Safety of Dams Act of 1978; Paperwork Reduction Act of 1980; Privacy Act (PA) of 1988; Government Paperwork Elimination Act of 1998; E-Gov Act of 2002; 44 U.S.C. Chapters 21, 29, 31, 33, and 35; 36 CFR, parts 1220 through 1238; Office of Management and Budget (OMB) Circular A-130; OMB M-06-15, M-06-16, and M-07-16; Departmental Manual (DM), Part 370, Chapters 380 through 385 and 752; and the Reclamation Manual Directive and Standard, *Managing Information, Records, and Data Designated FOR OFFICIAL USE ONLY (FOUO)*, IRM 02-02.

2. **Definitions.**

A. *Electronically Stored Information.* Electronically Stored Information (ESI) is information that may be created, manipulated, communicated, stored, or utilized in electronic form. ESI includes e-mail, voice mail, instant messages, electronic business documents, e.g., word processing, spreadsheets, and calendars, and computer databases.

B. *Litigation Hold.* A directive to preserve information, regardless of form, that is relevant to current or reasonably foreseeable litigation.

C. *Document Production Team.* Reclamation's Document Production Team (DPT), consists of bureauwide contacts that assist in identifying, preserving, and producing

information relevant to active or reasonably foreseeable litigation. The DPT will support or participate in the implementation of litigation hold directives issued to Reclamation by the Department of the Interior Office of the Solicitor (SOL), Department of Justice (DOJ), or any other Federal court official, and will coordinate the collection and organization of the information, as necessary. It is important that Reclamation can prove that it has taken appropriate and reasonable measures to identify and preserve all potentially relevant information. Accordingly, the development, documentation, and implementation of a litigation hold plan is critical. The plan must include sufficient safeguards to ensure that all applicable personnel carry out their identification and preservation obligations. It must also ensure sufficient oversight and supervision by agency counsel in the preservation process so that a court or reviewing body would be satisfied that Reclamation has acted in good faith and with due diligence.

3. **Oversight**. The Information Management Division (IMD) is responsible for policy and guidance in all areas of bureau information management, creation, storage, access, assurance, and security in matters concerning development and implementation of Reclamation litigation hold and discovery practices. This responsibility extends to all potentially relevant information, regardless of format or media type, physical location, business value, or retention schedule (i.e., temporary or permanent).

This includes guidance for:

- Searching for and identifying potentially relevant information and materials;
- Preserving potentially relevant information and material, including ESI native file formats and associated metadata;
- Collecting potentially relevant information and material, including ESI native file formats and associated metadata, and delivering it to attorneys working the case(s);
- Data mapping ESI located as a result of the litigation hold and discovery process;
- Provide training to responsive management, Records and Information Management Officers (RIMOs), records liaisons, and other support staff, as applicable, on proper procedures and protocol for the notification, identification, preservation, indexing, and collection of potentially relevant information and materials;
- Ensuring that bureau management, records managers, analysts, and records liaisons follow litigation hold and discovery procedures and requirements;
- Providing technical assistance in the processing, review, analysis, and production of discovery information to the SOL, DOJ attorney(s), and/or other Federal court officials or lead agencies.

4. **Responsibilities.** Upon receipt of a formal litigation hold notice from the SOL, DOJ, or any Federal court official, Reclamation personnel must contact IMD or their respective RIMO to determine affected offices and employees. Outline searches for potentially relevant documents and ESI will be conducted.

The legal relevance of information being requested and preserved is made only by the attorneys working on the specific litigation.

5. **Procedures.** Reclamation will diligently work to respond within the specified timeframe and will manage the preservation of information that may be relevant to the pending or foreseeable litigation, until such time as the litigation hold is released. Reclamation will maintain up-to-date retention policies and procedures and take appropriate steps to prevent alteration, mutilation, or destruction, of the potentially relevant information.

In support of meeting these responsibilities, and in following guidelines specified by the FRCP, IMD's litigation point-of-contact (POC) shall:

- Ensure all relevant Reclamation personnel, including management, RIMOs, and records liaisons, get copies of the litigation hold correspondence;
- Place litigation holds in Reclamation's records management application (RMA) on all applicable records held in off-site Federal repositories such as the Federal Records Center;
- Issue search reports to assigned attorneys;
- Serve as liaison between assigned attorneys and Reclamation personnel;
- Establish a point of contact in the Information Technology Services Division (ITSD) to preserve and backup emails of all messages, attachments, and ESI related to the specific litigation hold.

In support of meeting Reclamation's litigation hold and discovery responsibilities, RIMOs shall:

- Track responses from all relevant offices;
- Index relevant records in Reclamation's RMA and mark them for litigation hold;
- Provide search results reports to IMD litigation POC;
- Work with local IT staff to search for and duplicate responsive electronic information and ESI for production to IMD litigation POC.

In support of meeting Reclamation's litigation hold and discovery responsibilities, bureau personnel shall:

- Promptly take all search and preservation actions as directed by IMD, the RIMOs, and/or records liaisons, or as directed in the formal litigation hold correspondence;
  - Consolidate and preserve information that already exists, and any information generated in the future;
  - If needed, obtain guidance and assistance from IMD, RIMOs, and records liaisons on the proper search and preservation processes of all records, electronic or otherwise, relevant to the hold notice;
  - Acknowledge other requested documentation deemed necessary to substantiate Reclamation's litigation hold and discovery process;
  - Notify their manager and IMD (or through the RIMO), in writing, of any difficulties encountered in compliance with the requested litigation hold actions;
  - Notify their manager and IMD (or through the RIMO), in writing, if contacted about a litigation hold and can certify at least one of the following:
    - they performed no work in relation to this hold;
    - they cannot locate documents related to this hold;
    - records have been destroyed in accordance with approved retention schedules.
6. **Release from Litigation Obligations.** Upon official notice from the SOL, DOJ, or Federal court official overseeing the litigation, Reclamation's Records Manager is the only official that can issue an agency-wide release from case-specific litigation hold responsibilities. IMD's litigation POC will ensure all RIMOs and affected employees are notified of this release.
7. **Penalties.** Violating a litigation hold directive by failing to take steps to preserve potentially relevant information would expose an employee to disciplinary actions. This can include dismissal, as well as personal liability for civil and/or criminal sanctions by the courts or law enforcement authorities (RM D&S RCD 05-03).