D-5640
LND 9.0

JUN 29 1994

MEMORANDUM

To: Regional Director, PN, MP, LC, UC, GP
Attention: 400

From: Donald R. Glaser
Acting Director, Program Analysis Office

Subject: Application of the Acreage Limitation Provisions in Districts Utilizing Commingled Irrigation Water

By issuance of this westwide policy, we have completed planned corrective action 9.a identified in the fiscal year 1993 Alternative Management Control Review (AMCR) of the Reclamation Reform Act of 1982 (RRA) program. This corrective action was developed as a result of an identified control weakness that stated, "No policy exists concerning the proper application of the RRA provisions in districts that have commingling provisions in their contracts." The corrective action provided:

> "The regional RRA coordinators reexamine this issue, and develop and distribute a policy that allows either for a consistent application of the RRA provisions to districts that commingle water or explains why, how and when inconsistent application is acceptable."

In addition, the Office of Inspector General (OIG) issued a report on June 20, 1991, that highlighted the inconsistencies between regions on how the acreage limitation provisions were applied in districts utilizing commingled water (Reclamation Reform Act Enforcement Activities, Bureau of Reclamation [report number 91-I-929]). Reclamation concurred with the resulting recommendation for the establishment of policies and procedures to ensure consistent regional RRA enforcement including the Act's acreage limitation and reporting requirements in commingled water situations.

As the fiscal year 1993 AMCR reported, Reclamation found that the primary inconsistency in the application of the acreage limitation provisions in commingled districts centered on the submittal of the certification and reporting forms. The purpose of this policy is to establish a method that will provide for the consistent submittal of RRA certification and reporting forms in districts using commingled irrigation water.

Background

During 1989, a Commingling Analysis Team (Team) was formed to investigate the topic of consistent submittal of RRA forms in commingling districts and submit their findings to the RRA Task Force. The Team outlined several options based on the RRA, Solicitor's opinions, and the Acreage Limitation Rules and Regulations. One of the options the Team analyzed for resolution of the problem of inconsistent certification and reporting procedures was to develop policy recognizing and validating the current commingling method used in each region. Selecting this option, referred to as "status quo," was based on the premise that Section 225 of the RRA validates existing commingling provisions in contracts in force on October 1, 1981, and by extension, current certification procedures in commingling districts; even though, such procedures did not predate the enactment of the RRA. (Note: Section 426.18(a) of the Acreage Limitation Rules and Regulations reflects the language of Section 225.)

The Team found that there were two general methods, individual and district-wide, in place concerning the collection of certification and reporting forms in districts utilizing commingled water. The "individual" method provides that each landholder is responsible for full reporting of irrigable and irrigation land, and for the designation and selection of eligible and full-cost lands to district officials for the upcoming water year. With this responsibility, each landholder is required to submit certification and reporting forms, in compliance with section 426.10 of the Acreage Limitation Rules and Regulations.

The "district-wide" method of commingling concludes that certain lands were identified as eligible to receive irrigation water prior to the RRA. The key difference in this method is that rather than assuming that each landholder is receiving a proportional share of Reclamation irrigation water in the amount delivered; some landholders only receive Reclamation irrigation water, while others receive their irrigation water from other sources, even though no actual difference exists in the commingled irrigation water delivered. This method is being employed in at least one region. In that region, unlike the other regions, RRA forms are currently not required from all landholders who hold more than 40-acres and are subject to the acreage limitation requirements. As an example, in one district enough land eligibility for Reclamation irrigation water is established for landholders in 40-acre and under landholdings to account for all Reclamation irrigation water delivered to the district; therefore, no landholder in the district is required to complete an RRA form to be eligible to receive commingled water.

(It should be noted that there are other variations in the specific application of the acreage limitation provisions in commingled districts, but the two methods described above provide the most distinguishable differences.)

As a result of the selection of the status quo option, the findings made by the Team remain unchanged. Since 1989 each region has continued to exercise its commingling arrangements differently. However, no policy was ever issued that explicitly justified the acceptability of the two general methods. Thus, the findings of the OIG and AMCR reports.

An advantage to the continuation of the status quo option is that each district utilizing commingled water could proceed with their current RRA administration and enforcement activities and Reclamation would not have to try to get such districts to agree to changes to their contracts or commingling agreements. The disadvantage experienced when preserving the "status quo" option is the continued inconsistency among the districts with their collection of certification and reporting forms from landholders and thus, application of the acreage limitation provisions.

Specifications

Section 426.10(d)(1) requires "full disclosure of irrigable and irrigation land owned and leased in all districts," and the annual requirement for the receipt of Reclamation irrigation water is the filing of a completed certification or reporting form. Therefore, as stated in Section 426.10(e), any land that receives Reclamation irrigation water must be identified on the appropriate certification and reporting forms.

Section 426.18(b) of the Acreage Limitation Rules and Regulations provides how Federal Reclamation law and the subject rules will be applied in commingled districts. In general, where the facilities utilized to commingle water are built either with or without funds provided by the Federal government, the acreage limitation provisions are applicable to landholders who receive Reclamation irrigation water.

In those districts utilizing the "district-wide" method, the difficulty encountered in applying the acreage limitation provisions is tracking excess and full-cost lands when landholding changes occur without the submittal of certification and reporting forms. This difficulty directly affects the establishment of the eligibility for specific parcels of land. With the absence of certification and reporting forms to support the eligibility of irrigable and irrigation lands, it would be necessary to conclude that all such land receiving irrigation water in districts subject to the acreage limitation provisions, not only are receiving non-Reclamation irrigation water, but are in fact "excess" lands. Accordingly, such land would have to be sold to an eligible buyer at an approved price if it were to be eligible to receive Reclamation irrigation water in the future. It would be difficult for Reclamation to enforce this determination; therefore, the submittal of the RRA forms is a critical program requirement even if the landholder determines that all irrigation water received is from non-Reclamation sources.

Policy Statement

Because of current contract provisions and commingling agreements, the consistent application of the acreage limitation provisions in districts utilizing commingling will only be reached over time as contracts and commingling agreements are renewed and amended for other purposes. As districts currently utilizing the "district-wide" method begin to use the "individual method," the capability for tracking excess and full-cost lands will be strengthened since such land will be identified on the appropriate RRA forms. The tracking of lands

receiving commingled water within the district will continue to be the responsibility of the district that initially contracted with the United States for repayment of the project. This responsibility coincides with the RRA forms collection activity.

Current contract relationships and commingling agreements in force, as of the date of this memorandum, will be honored until such time as a change is encountered. Whenever a contract or commingling agreement is initiated, renewed, or amended, it will include standard language addressing the application of the acreage limitation provisions in commingled districts, if applicable. Accordingly, the contracts will require full disclosure on RRA forms of all irrigable and irrigation lands that are capable of receiving Reclamation irrigation water.

Eventually, all land located in districts subject to the acreage limitation provisions will be compelled to comply with Section 426.10 of the Acreage Limitation Rules and Regulations. Within districts that are required to identify lands receiving Reclamation irrigation water and non-Reclamation irrigation water, those lands that are not declared on RRA forms will be considered as ineligible lands until such time as the landholder submits RRA forms that indicate otherwise.

It will be each district's responsibility to ensure that sufficient non-Reclamation irrigation water is available to irrigate the following situations if the land in question is to be irrigated: (1) those lands for which RRA forms are not submitted, (2) excess land, and (3) any full-cost land for which the full-cost rate is not to be paid. Each district will be responsible for identifying those lands receiving the non-Reclamation irrigation water, the amount of irrigation water delivered to those lands during the just completed water year, and the total supply of non-Reclamation irrigation water available by December 31 of each water year, if applicable. If sufficient quantities of non-Reclamation irrigation water are determined to not have been available during the water year, full-cost must be remitted to Reclamation for eligible lands that received irrigation water and are subject to the full-cost rate, as warranted, and Reclamation must be immediately notified of any additional deficiencies.

Contract/Commingling Agreement Considerations

When an entity submits a proposal to establish a commingling procedure through a contract or commingling agreement, the acreage limitation topics listed below must be addressed by Reclamation to ensure consistency.

- Require that all irrigation and irrigable lands are included on RRA certification and reporting forms, and the district summary form provided to Reclamation.

- Require the Contractor to report annually, by an agreed upon date not to exceed December 31, on all actual Reclamation irrigation water deliveries that were made during the water year; included would be the availability of non-Reclamation irrigation water and to which lands such water was delivered.

- Identify the quantity of Reclamation irrigation water that will be furnished to the Contractor for delivery to eligible lands; in some cases this may need to be estimated.

- Ensure that lands which receive Reclamation irrigation water commingled with non-Reclamation irrigation water have paid, when applicable, the commingling fee as required by section 426.18(b)(ii) of the Acreage Limitation Rules and Regulations, or if not, that all provisions of the RRA have been met with regard to such land.

Additional commingling language may be needed for use in commingling agreements to more specifically identify the commingling situation. That language will be developed, when necessary, in addition to the standard commingling considerations previously provided.

This policy intends to provide for maintaining the current methods of application of the acreage limitation provisions in districts utilizing commingling through contractual relationships and commingling agreements in force until such time as renegotiation or an amendment is proposed. At that time, contracts currently utilizing the "district-wide method" or variation of such are to be revised to use the "individual method." All variations to the two general methods described in this memorandum are also included in the actions to be taken.

An attachment is included that lists all districts currently subject to the acreage limitation provisions and their commingling status for each region. This list will provide a baseline from which to begin the transformation toward consistency with regard to application of the acreage limitation provisions in such districts. Only those districts whose current method is listed as "District-wide" will be allowed to utilize that method. This allowance will terminate when the contract or commingling agreement with that district is renewed, amended, or discontinued.

The effective date of this policy will be January 1, 1995. Contracts staff in regional and area offices should be provided a copy of this memorandum. Any questions relating to this subject may be directed to Gene Munson at (303) 236-1061, extension 246.

Attachment

# LIST OF DISTRICTS UTILIZING COMMINGLED WATER

## Pacific Northwest Region

| District | Method of RRA Forms Collection |
|---|---|
| Medford Irrigation District | Individual |
| Rogue River Valley Irrigation District | Individual |
| Talent Irrigation District | Individual |

## Mid-Pacific Region

| District | Method of RRA Forms Collection |
|---|---|
| Anderson-Cottonwood Irrigation District | District-wide (all) |
| Arvin-Edison Water Storage District | |
| Banta-Carbona Irrigation District | |
| Colusa Drain Mutual Water Company | |
| Colusa Irrigation Company | |
| Ducor Irrigation District | |
| Fresno Irrigation District | |
| Fresno Slough Water District | |
| Glenn-Colusa Irrigation District | |
| Gravely Ford Water District | |
| Hills Valley Irrigation District | |
| James Irrigation District | |
| Kern-Tulare Water District | |
| Lower Tule River Irrigation District | |
| Maxwell Irrigation District | |
| Meridian Farms Water Company | |
| Natomas Central Mutual Water Company | |
| Pelger Mutual Water Company | |
| Pixley Irrigation District | |
| Pleasant Grove-Verona Mutual Water Company | |
| Porterville Irrigation District | |
| Princeton-Codora-Glenn Irrigation District | |
| Provident Irrigation District | |
| Rag Gulch Water District | |
| Reclamation District No. 1004 | |
| Reclamation District No. 108 | |
| Reclamation District No. 1606 | |
| Roberts Ditch Irrigation Company | |

Sartain Mutual Water Company
Sutter Mutual Water company
Swinford Tract Irrigation Company
Tisdale Irrigation & Drainage Company
Tranquillity Irrigation District
Tri-Valley Water District
Tulare Irrigation District
West Stanislaus Irrigation District
West Side Water District
County of Tulare (Master Contractor):
  Alpaugh Irrigation District
  Atwell Island Water District

Individual Contractors

Marchini Farms
Melvin Hughes

## Lower Colorado Region

| District | Method of RRA forms Collection |
|---|---|
| Central Arizona Irrigation and Drainage District | Individual |
| Maricopa-Stanfield Irrigation and Drainage District | Individual |

## Upper Colorado Region

| District | Method of RRA Forms Collection |
|---|---|
| Bostwick Park Water Conservancy District | Individual |
| Bridger Valley Water Conservancy District | (all) |
| Central Utah Water Conservancy District | |
| Collbran Conservancy District | |
| Crawford Water Conservancy District | |
| Dolores Water Conservancy District | |
| Emery Water Conservancy District | |
| Florida Water Conservancy District | |
| Hammond Conservancy District | |
| Middle Rio Grande Conservancy District | |
| North Fork Water Conservancy District | |
| Preston, Riverdale, and Mink Creek Canal Company | |

Provo River Water Users Association
Silt Water Conservancy District
Tri-County Water Conservancy District
Uintah Water Conservancy District
Uncompahgre Valley Water Users Association
Weber Basin Water Conservancy District

**Great Plains Region**

| District | Method of RRA Forms Collection |
|---|---|
| Central Nebraska Public Power and Irrigation District | Individual |
| Southeastern Colorado Water Conservancy District | Individual |

Attachment 2

# United States Department of the Interior

BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

IN REPLY REFER TO: D-410

APR 19 1985

Memorandum

To: Regional Director, Sacramento, California
Attention: MP-400

From: ACTING Commissioner

Subject: Certification and Reporting Requirements for Irrigation Land - Sacramento River Contractors

This memorandum sets forth policy regarding reporting requirements for Sacramento River water right contractors who commingle project and nonproject water.

Since all the land classified as irrigable within these districts falls within the definition of irrigation land under the acreage limitation rules and regulations, reporting or certification forms must be completed in order for the land to be eligible to receive project water. However, because the districts have a nonproject water supply, they are only obligated to have sufficient eligible acreage to utilize their project water supply.

For those landholders who do not report, their land will be ineligible for project water. With the approval of the Secretary, they may regain their eligibility by completing the required forms provided they can establish that their land would have been otherwise eligible for project water at the time they acquired it. However, we should caution that it may become extremely difficult to make this determination if the land has been bought and sold several times in the intervening years. Furthermore, the costs borne by the United States in helping reach such a determination will be charged to the petitioner.

Robert G. Dean

cc: Assistant Solicitor - Water and Power

Subject: Sample Commingling Contract Article

Water Acquired by the Contractor Other Than
from the United States

Water or water rights now owned or hereafter acquired by the Contractor other than from the United States and project water furnished pursuant to the terms of this contract may be simultaneously transported through the same distribution facilities of the Contractor.

1. Provided, That where the facilities utilized for commingling project water and nonproject water were constructed without funds made available pursuant to Federal reclamation law, the provisions of Federal reclamation law will be applicable only to the landholders of lands which receive project water: Provided, That the eligibility of land to receive project water can only be established through the certification and reporting requirements as specified in the Acreage Limitation Rules and Regulations (43 CFR Part 426): Provided further, That the water requirements of eligible lands can be established and the quantity of project water to be utilized is less than or equal to the quantity necessary to irrigate eligible lands: Provided further, That land that is not established as eligible through the submittal of certification forms will remain ineligible to receive project water until such time that certification forms indicating such land was not held in excess of established ownership entitlements on a westwide basis since January 1, 1995, are submitted to Reclamation.

2. Provided, That where the facilities utilized for commingling project water and nonproject water were constructed with funds made available pursuant to Federal reclamation law the nonproject water will be subject to Federal reclamation law: Provided further, That if the district collects and pays to the United States an incremental fee, as established by Reclamation, which reasonably reflects an appropriate share of the cost to the Federal

Government, including interest, of storing or delivering the nonproject water, the nonproject water will not be subject to Federal reclamation law.

Attachment 4

# United States Department of the Interior

BUREAU OF RECLAMATION
Washington, D.C. 20240

IN REPLY REFER TO:
W-6400

JUL 20 1994



MEMORANDUM

To: Director, Office of Program Analysis
Director, Office of Operations
Director, Office of Policy and External Affairs
Regional Director, PN, MP, LC, UC, GP
Attention: 100, 400

From: Daniel P. Beard
Commissioner

Subject: Contracts and Repayment Policy

## Introduction

The Bureau of Reclamation's (Reclamation) past contracting practices have concentrated on defining repayment terms and on providing long-term assurances of water supplies to water users. As a corollary, Reclamation has not historically reserved for itself the flexibility to improve the management of existing projects, shift water supplies to meet growing demands for municipal and environmental uses, or address contemporary resource management needs. This has placed the United States in a disadvantageous position to respond to changing public values.

One of my primary objectives is to ensure that Reclamation's future contracting and repayment policies and procedures are in accord with our goal of being a premier water resources management agency. Flexibility contained in future contracts will be oriented to assist in achieving the Bureau's multiple objectives. Toward this end, we need to revise our policies and procedures to ensure that Reclamation has considerably more flexibility and discretion in the management of the water, land, and power resources associated with our projects than has historically been the case. Detailed guidance for implementing the policies set forth in this memorandum will follow as soon as possible. It is also of paramount importance that we keep emerging water needs, environmental concerns, and sound business practices at the forefront of our considerations.

## Alternatives to Contracts

Reclamation can maximize its discretion and flexibility by seeking alternatives to contracts whenever practical. Thus, if formal contractual arrangements for the recovery of reimbursable

project costs or to protect the interests of the United States are not required, we will utilize less formal operating agreements, letters of intent, and other less restrictive documents to memorialize the terms and conditions of an agreement. Such instruments must be approved in advance, with concurrence by the Solicitor and the Assistant Secretary - Water and Science, by the Commissioner. Requests for approval to use these instruments should be addressed to the Program Analysis Office, which will promptly process such requests and obtain concurrence and comments from other organizational components as appropriate.

Agreement on Contract Terms

In order to avoid unnecessary litigation, we must ensure that the parties to the contract share the same understanding of contract terms. Therefore, where a party to a contract is engaged in litigation over the meaning of specific contract terms or otherwise has expressed disagreement with the Bureau of Reclamation's understanding of terms, the Bureau should not enter into a new contract containing those same terms. In such situations, the Bureau should insist that the parties resolve differences before entering into a new contract, and set out with specificity the meaning of the terms for the purpose of the new contract.

New or Renewal Contracts

With the foregoing precepts in mind, the following policies shall henceforth govern the negotiation and administration of new repayment contracts and new water service contracts including renewals, under the authority of Reclamation law, including, but not limited to: the Reclamation Project Act of 1939, the Water Supply Act of 1958, the Warren Act, the Small Reclamation Projects Act, and the Safety of Dams Act.

1. Contracts will ensure that the Federal investment and Reclamation's administrative costs are recovered in an effective and businesslike manner. When negotiating these aspects of a contract, consideration needs to be given to the full extent of Reclamation's cost recovery objectives and policies, and to all sources of repayment for a given project, not just to the narrow issues presented by a given contract.

2. Contracts will provide for the appropriate balancing of all water uses, including new water demands, recreation, instream flow needs, enhancement of fish and wildlife habitat and resources, and water quality. Contracts will be drafted in a manner that will permit and encourage water transfers to occur and aid in our objective of providing water to a broader spectrum of water uses.

3. Contracts will be written to avoid or eliminate non-essential explanatory recitals and other restatements of past agreements, accomplishments, or rights of parties other than the United States.

4. Contracts will promote improved water management and conservation and require water conservation plans (with implementation schedules) pursuant to the authority of section 210 of the Reclamation Reform Act of 1982 (RRA), as amended.

5. Pricing and rate-setting provisions will promote efficient use of project water supplies. Our pricing policy is to recognize market prices and/or the value of water in specific situations. We will rely less on cost-based or replacement cost-based methods of pricing and setting rates. In addition, wherever possible, we will eliminate or avoid using take-or-pay provisions, which tend to encourage excessive or unnecessary use of water.

6. Contracts will provide for reasonable beneficial use determinations by Reclamation and require that the inappropriate or wasteful use of water be eliminated. Contracts should also provide for suitable and effective enforcement actions in the event there is inappropriate or wasteful use of water.

7. Contracts will be written for the shortest possible term consistent with good business practices and effective water management. The working presumption is that this period is 25 years or less. Contractors might be offered a "menu" of possibilities from which they could select the most suitable terms. Rather than offering a 25 year contract for a specific quantity of water, the contractor could be offered a 5, 10, 15, or 20 year contract, with different quantities and repayment terms for each contract. Another possibility might be to avoid long term "dropdead" contracts, and develop short-term contracts of 10 years that could be renewed annually, providing the user with a more or less permanent 10 year contract. Under this approach, when the Government decided that it no longer desired to renew, the user would have 10 years to make other arrangements.

8. Contract negotiations will be in strict compliance with the RRA, the accompanying rules and regulations, and applicable policy, including the requirement to announce negotiations in advance, and will be conducted in a manner that provides opportunities for the public to observe and provide meaningful input.

9. Subject to delegation of authority and approval of a basis of negotiation, each Regional Director will be responsible and accountable for conducting contract negotiations and drafting proposed contracts.

10. Meetings held prior to the approval of the basis of negotiation for the purpose of gathering and exchanging factual information will be clearly identified as such and conducted in a manner that would not prejudice the pending approval of the basis of negotiation or the contract negotiations.

Amendatory Contracts

We will negotiate contract amendments to achieve as many of the preceding policy objectives as are applicable to a given situation as a condition of agreeing to the additional benefits sought by the water user. If Reclamation cannot obtain sufficient concessions of value to the United States to justify providing additional benefits to the water user, then we will exercise our option of simply not agreeing to contract amendments.

Repayment Contracts

Repayment contracts, although having a fixed repayment period, have implications lasting far beyond the original contract term. After payout of construction costs, water users often pay only O&M costs. O&M costs alone are not sufficient to maintain the services that are provided; replacement costs are major additional costs that have not always been collected. Thus, for paid-out repayment contracts, I want us to remedy the existing situations and avoid future situations where water users pay only a part of the costs associated with providing project benefits after payout of construction costs. There are at least three options available to address this problem: (1) charge for replacement costs, (2) levy a charge that is commensurate with the value of water, or (3) transfer title of the facilities to the water users. Water users must be encouraged to assume greater responsibility for all costs and to recognize the public values associated with Reclamation projects. I expect to see improved cost recovery that in turn will result in water prices that more nearly reflect market value and will encourage water conservation.

Preparation of Policies and Procedures

I am assigning the Director, Office of Program Analysis, in consultation with the Office of the Solicitor, the Director, Office of Operations, and the Regional Directors, to develop new policy guidance and procedures, and standardized contract provisions, to ensure the implementation of the above principles, and to analyze and recommend means for dealing with existing repayment contracts. Also, I am assigning the Director, Office of Program Analysis, to review Reclamation's beneficial use determinations. Your interest in and support for these important activities is appreciated.