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MEMORANDUM

To: Regional Director, PN, MP, LC, UC, GP
Attention: PN-3300, MP-440, LC-4400, UC-440, GP-440

From: Alonzo D. Knapp
Manager, Reclamation Law, Contracts, and Repayment Office

Subject: Commingling Article

As you know, on June 29, 1994, a policy memorandum was issued concerning the application of the acreage limitation provisions in commingled districts. The Reclamation Reform Act of 1982 (RRA) policy established in that memorandum essentially states that the acreage limitation provisions will be applied consistently in all districts utilizing commingled water. The following was included:

"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." (See attachment 1, page 4.)

This conclusion reflects longstanding Reclamation policy on this issue. Specifically, on April 19, 1985, the Acting Commissioner issued a policy memorandum that included the following:

"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." (See attachment 2.)

The primary reason for this policy is that with the enactment of the RRA, the acreage limitation provisions are applied on a westwide basis. Consequently, it is no longer sufficient for district staff to know that a landholder is within his/her acreage limitation entitlements within that district. Rather, the landholder's entire westwide landholding must be within the

applicable acreage limitation entitlements. If an entitlement is exceeded, a portion of the land will be considered to be either excess and ineligible to receive Reclamation irrigation water or subject to application of the full-cost rate if Reclamation irrigation water is delivered, depending on the entitlement exceeded. It should also be noted that a willingness to pay the full-cost rate for Reclamation irrigation water deliveries does not result in the ability to receive such water on ineligible excess land. We are not aware of any method available, other than through the submittal of RRA forms, for Reclamation or districts to track the westwide holdings of individual landholders.

Even though we believe that in the long run districts would be better served to collect RRA forms from all landholders whose holdings exceed the RRA forms threshold, there may be districts who prefer to collect a reduced number of RRA forms and accept the fact that such action renders land for which RRA forms are not collected ineligible to receive Reclamation irrigation water. This accommodation is only available in those districts where the facilities utilized for commingling Reclamation irrigation water and nonproject water were constructed without funds made available pursuant to Federal reclamation law. Such districts work under the premise that some landholders only receive nonproject water and the remainder of the landholders only receive Reclamation irrigation water, even though there is no difference in the irrigation water delivered. This paper accounting can result in a great reduction in the number of RRA forms that must be collected in certain commingled districts, depending on the share of the total supply Reclamation irrigation water represents.

Accordingly, we have worked with Mid-Pacific regional staff to develop language for a sample contract article that allows for commingling of irrigation water, but addresses the situation where not all landholders who exceed the RRA forms threshold would submit RRA forms (see attachment 3). The wording found in the attachment may also be included in commingling agreements that are not part of contract actions. The attached sample contract article meets the following requirements:

1. Ensures Reclamation irrigation water is not delivered to ineligible land.
2. That land held in excess of ownership entitlements will not receive Reclamation irrigation water unless sold to an eligible buyer at an approved price.
3. The ownership entitlement is enforced on a westwide basis.
4. Allows for all regions to enforce the acreage limitation provisions in commingled districts in a consistent manner with regard to the basic tenants of Federal reclamation law.

On July 20, 1994, the Commissioner issued a memorandum concerning contracts and repayment policy (see attachment 4). The following was included: "In order to avoid unnecessary litigation, we must ensure that the parties to the contract share the same understanding of contract terms."

The July 20, 1994, memorandum also included the following: "8. Contract negotiations will be in strict compliance with the RRA, the accompanying rules and regulations, and applicable policy,"

We believe the attached sample contract article meets the standards the Commissioner established on July 20, 1994.

We understand that there may be occasions during contract and other negotiations where the district may wish to not include in their contract or commingling agreement all of the language, or similar versions thereof, that is found in the attached sample contract article. If Reclamation agrees to deletions, it will be important to ensure that the district understands all of the requirements established by the attached sample contract article and that the district will be subject to those requirements, regardless of whether they are included in their version of the contract article or agreement. In addition, the district needs to be aware that their ability to meet Reclamation requirements on this matter will become increasingly difficult as time passes, especially if ineligible land should be sold in intervening years.

In summary, we believe districts utilizing commingling must be made aware of specific RRA requirements as they enter into new, renewed, or amended contracts, or other commingling agreements. In those commingling situations where the RRA forms requirements will not be applied to all landholders, it will be incumbent on Reclamation's negotiators, as part of the negotiation process, to have the attached sample contract article included in its entirety. In lieu of that action, it will be critical for the negotiators to document the district's understanding of the requirements specified in the article, but not included in the contract or agreement itself, and the fact that the district will be subject to those requirements.

If you have any questions on this matter contact Richard Rizzi at (303) 236-1061, extension 235.

Alonzo D. Knapp

Attachments

cc: Commissioner, Attention: W-1000
Director, Policy and External Affairs, Attention: W-1500
Director, Operations, Attention: W-6000
(w/attach to each)