

Reclamation Manual

Policy

Subject:	Water-Related Contracts and Charges – General Principles and Requirements
Purpose:	To state basic principles and general policies for the Bureau of Reclamation’s water-related contracting program, for the benefit of promoting clarity and consistency in the program’s implementation.
Authority:	The Reclamation Act of 1902 (ch. 1093, 32 Stat. 388); the Sale of Water for Miscellaneous Purposes Act of 1920 (1920 Act) (41 Stat. 451; 43 USC 521); the Reclamation Project Act of 1939 (1939 Act) (Pub. L. 76-260; 43 USC 485, et seq.); the Water Conservation and Utilization Act of 1939 (WCUA) (Pub. L. 76-398; 16 USC 590y, et seq.); the Reclamation Safety of Dams Act of 1978, as amended (43 USC 506, et seq); Title IX, Subtitle G of the Omnibus Public Land Management Act of 2009 (43 USC 510b, et seq); and acts amending and supplementing these laws.
Approving Official:	Commissioner
Contact:	Mission Assurance and Protection Organization, Reclamation Law Administration Division (84-55000)

1. **Introduction.** Reclamation’s water-related contracting program provides water and related project benefits, in addition to recovering reimbursable costs in a manner that is consistent with relevant law. Program activities are conducted in a way that accommodates varying circumstances, changing demands, environmental needs, and Reclamation's obligations to American Indian tribes.
2. **Applicability.**¹ This Policy applies to all Reclamation personnel involved in water-related contracting activities, within the following parameters:
 - A. **Higher-Level Authorities.** This Policy does not override requirements imposed by project-specific legislation,² treaties, judicial directives, or other applicable higher-level authorities, such as Federal regulations and Executive Orders.
 - B. **Prospective Application to Contracts.** To the extent that this Policy establishes new requirements for water-related contracts, it will be applied prospectively to contracts executed, renewed, amended, or supplemented through the formal contracting process

¹ The requirements in this Policy apply generally to water-related contracting activities. Given the variability of circumstances affecting these activities, it is appropriate to note that requests can be made to the Commissioner for waivers from RM Policy requirements in accordance with Paragraph 4.A. of RM Policy, *Bureau of Reclamation’s Directives System (the Reclamation Manual (RM))* (RCD P03) and D&S, *Request for Waiver from a Reclamation Manual (RM) Requirement and Approval or Disapproval of the Request* (RCD 03-03). The Commissioner cannot waive requirements fixed by higher-level authorities.

² Including statutes and documents incorporated by reference into statutes, as well as compacts, settlements, and other agreements directed or ratified by Congress.

Reclamation Manual

Policy

between the contractor and Reclamation on or after its issuing date.³ Contract amendments and supplements executed solely to conform a contract to the discretionary provisions of the Reclamation Reform Act of 1982 (Pub. L. 97-293, Title II, § 201; 43 U.S.C. 390aa, *et seq.*) or that do not provide any additional or supplemental benefit do not initiate the application of new requirements established by this Policy.

- C. **Application of Water Use Definitions.** The definitions provided below for “irrigation use” and “municipal and industrial (M&I) use” do not apply to water uses established before the date on which a given contract becomes subject to this Policy under Paragraph 2.B. above.⁴ Water uses are deemed to have been established where there is evidence that Reclamation and the contractor both interpreted the contract to allow the uses. Appendix A to this Policy, *Applicability of Irrigation and M&I Definitions in PEC P05 Issued July 24, 2013*, illustrates this paragraph’s requirements.

3. Policy.

A. General Principles for Water-Related Contracting Activities.

(1) Requirement of a Contract.

- (a) **For Project Benefits and Cost Recovery.** Except where a superseding Federal authority dictates otherwise, Reclamation is not authorized to deliver or store project or non-project water, permit the use of Federal facilities, or recover reimbursable project costs except pursuant to a contract authorized by Federal law.
- (b) **Before Construction.** Where Reclamation will undertake or fund construction costs on a new or existing facility, a repayment contract must be executed before construction commences or a construction contract is awarded. If an alternative to a contract is appropriate or the situation demands that work begins before a contract can be executed, a waiver from this requirement can be requested from the Commissioner pursuant to RM D&S, *Request for Deviation from a Reclamation Manual Requirement and Approval or Disapproval of the Request* (RCD 03-03).

³ These contracting actions are normally requested by the contractor, rather than being sought by the United States. For contracts entered pursuant to the authority of the Reclamation Safety of Dams Act of 1978, as amended (SOD Act) or Title IX, Subtitle G of the Omnibus Public Land Management Act of 2009, the definitions for “irrigation use” and “municipal and industrial (M&I) use” will be applied to determine the benefits, payment capacity, and repayment terms applicable to a water district for the purpose of repaying the required portion of the Federal investment made under the authority of those acts.

⁴ These definitions are intended primarily for distinguishing between the two categories of water use for purposes of determining appropriate contracting authorities and related matters. They do not interpret state laws. They are not intended to interfere with the application of other legal authorities available to Reclamation for providing water for other uses, such as fish and wildlife and recreation.

Reclamation Manual

Policy

- (2) **Authority to Contract.** Every contract must be executed pursuant to and identify appropriate Federal statutory authority, whether found in project-specific legislation, general Reclamation law, the WCUA, or elsewhere.
- (3) **Protection of Federal Interests.** Reclamation contracts must protect the interests of the United States and of the affected Federal projects, including the primary purposes for which they were authorized. These requirements include, but are not limited to, the following:
 - (a) **Compliance with Law.** In protecting the interests of the United States, Reclamation's contracts and its contracting process must comply with all applicable Federal, state, tribal, and local laws.⁵ These laws may include environmental, civil rights, and cultural resources protection laws, among others, as well as laws that may be later enacted. Reclamation's water-related contracts will be drafted in a manner that allows Reclamation to take actions necessary to comply with all applicable laws.
 - (b) **Consideration of Precedent.** Contracting personnel must give due consideration to the precedent that will be set at the local, regional, and Reclamation-wide levels by the contracts they participate in proposing, negotiating, approving, or executing.
 - (c) **Clear Language.** Each contract must be drafted to clearly express the mutual understandings of the parties concerning the broad purposes of the contract and the specific rights and obligations it is intended to create.
- (4) **Water Conservation Plans.** Contracts subject to Section 210(b) of the Reclamation Reform Act of 1982 will include a provision stating the associated requirements.

B. **General Water-Related Contracting Requirements.** Unless otherwise authorized by the Commissioner, Reclamation will negotiate water-related contracts in accordance with the general policies set forth below, as applicable.

- (1) **Preamble.** Each contract will begin with a preamble that identifies the contracting parties, the contract's purpose, and the Federal statutory authority.
- (2) **Explanatory Recitals.** Each contract will include explanatory recitals ("whereas" statements) to communicate the parties' understanding of the contract's purpose(s) and other clarifying matters, as the parties deem appropriate. Any relevant existing agreements will be identified within the explanatory recitals.

⁵ Subject to resolution of conflicts among these laws, where necessary.

Reclamation Manual

Policy

- (3) **Standard Articles.** See RM Policy, *Reclamation Standard Water-Related Contract Articles* (PEC P10).
- (4) **Identification of Facilities.** Contracts providing for the construction of facilities by the United States will describe the facilities and provide detailed maps showing their locations, where available.
- (5) **Construction Work to be Accomplished and Associated Responsibilities.** Contracts involving construction will describe the facilities to be constructed, identify reports that provide details of how and when construction will be accomplished and completed, and specify the parties' responsibilities for construction, liability, oversight, contributions of land and facilities, and ownership of title to the constructed facilities and associated property.⁶
- (6) **OM&R Responsibilities.** Contracts will specify the parties' responsibilities for the OM&R of project works.
- (7) **Term of Contract/Repayment Period.** Each contract will specify its term (duration), expiration date, and/or repayment period, as applicable.
- (8) **Water Supply and Delivery.** The following requirements apply to contracts providing for the delivery of water.
 - (a) **Source and Supply of Water.** Each contract will provide information and establish relevant requirements in accordance with RM D&S, *Requirement of a Water Measurement Article in Contracts and Amendments* (PEC 05-04). Each contract will additionally specify any restrictions on water delivery, such as a maximum delivery rate due to limited capacity, scheduling restrictions, or other factors. Amounts of water to be supplied must comply with applicable state water laws and the relevant terms of any permits, licenses, or other authorizing instruments.
 - (b) **Point of Delivery.** Each contract will identify the point or points at which the United States will be deemed to have delivered the water as required by the contract and will state that the United States is not responsible for losses or Project water quality degradation beyond that point. If a precise point of delivery is not known upon contract execution, the contract will state that it does not bind the United States until the parties have agreed to a point of delivery in writing, and that the parties will deem such agreement to be part of the contract.

⁶ A contract can only provide for construction of those facilities identified in the planning report Congress relied on in deciding to approve the work. This does not preclude design changes that will have no significant effect on the contractor's repayment ability or obligation and that are within the authorized cost ceiling.

Reclamation Manual

Policy

- (c) **Delivery Schedule and Initial Delivery Date.** Where applicable, contracts will specify the annual period during which water is to be made available (e.g., April 30 through October 15) and specify the initial water delivery (e.g., “the year following substantial completion of the project”).
- (d) **Authorized Uses.** Each contract will specify the authorized water uses, and any established allocation between uses. Water uses specified under a contract must comply with applicable state and Federal laws, the definitions provided in this Policy if applicable in accordance with Paragraph 2 above, and the relevant terms of any permits, licenses, or other authorizing instruments.⁷
- (e) **Lands to be Irrigated.** Each contract will specify the quantity and location of lands to be provided water for irrigation use, if any. A map of the contractor’s service area delineating the lands to be irrigated will be included, if available. Lands to be provided water for irrigation use must, unless otherwise provided by statute, be eligible in accordance with the requirements of RM Policy, *Determination of Irrigation Suitability of Proposed Project Lands, and Identification of Lands That May Receive Project Irrigation Water on Operating Projects* (PEC P12).
- (f) **Contract Compliance Reviews.** Each contract will include an express acknowledgment of Reclamation’s authority to conduct contract compliance reviews in accordance with PEC 05-08.
- (9) **Charges for Water and Use of Facilities.** Each contract will establish rates contractors will pay for the use of project water and/or facilities or the charges for their assigned shares of the project costs, as applicable. See PEC 05-01 for requirements and options relating to the establishment of appropriate charges.
- (10) **Identification of Environmental Compliance Documents.** Each contract will include an explanatory recital affirming that all environmental compliance requirements for its execution have been met and identifying any associated documents by date of issuance and document number or title.
- (11) **Contract Termination.** Each contract will specify any intended conditions under which either party can terminate the contract at a time other than the contract’s stated termination date, where applicable, and will include a statement of the agreed consequences of termination.
- (12) **Title to Project Facilities.** Each contract will state that title to project lands and facilities will remain in the United States until such time as Congress authorizes

⁷ State and Federal definitions may characterize the same water use differently, for example where a use is irrigation under applicable state water law but M&I under the applicable Federal contracting authority. Because these use designations apply to different legal questions, this does not normally create an issue

Reclamation Manual

Policy

title to be transferred and until title is actually transferred through required procedures.⁸

- C. **BON Required.** Contracts for which the Commissioner has not delegated general approval authority to the regional directors require BONs and approval memoranda, in accordance with PEC P06 and PEC 06-01.
- D. **Public Participation.**
 - (1) Reclamation will notify the public of proposed contract actions.
 - (2) Contract negotiations will be conducted in a manner that provides opportunities for the public to observe and provide meaningful input. Contract negotiations will be in strict compliance with subsection 9(f) of the 1939 Act (Pub. L. 76- 260, as amended by section 226 of Pub. L. 97-293; 43 USC 485h(f)) and with 43 CFR 426.22. See also RM Policy, *Public Involvement in Reclamation Activities* (CMP P03), and D&S, *Public Involvement in Reclamation Activities* (CMP 04-01).
- E. **Prohibition on Use of Certain Contract Authorities.** The execution of contracts identified below is prohibited without further delegation of authority from the Commissioner:
 - (1) Contracts for the sale of surplus water pursuant to the provisions of Section 2 of the Warren Act;
 - (2) Contracts entered pursuant to the provisions Section 5 of the Small Reclamation Projects Act of August 6, 1956 (43 U.S.C. §422e); and
 - (3) Contracts entered pursuant to the provisions of the Rehabilitation and Betterment Act of October 7, 1949 (63 Stat. 650).
- 4. **Definitions.** Except where an RM Policy or a D&S specifies otherwise, and in accordance with Paragraph 2 above, the following definitions apply to any Reclamation Policy or D&S addressing water-related contracting activities.
 - A. **Contract Action.** Any action that creates, renews, amends, or supplements a water-related contract to which Reclamation is a party or for which Reclamation's approval or concurrence is required.

⁸ A statement meeting this requirement is included in Reclamation Standard Contract Article 5, as it appears in RM D&S, *Reclamation Standard Water-Related Contract Articles, Standard Article 5: Operation and Maintenance of Transferred Works (Federal Construction)* (PEC 10-05) and need not be repeated in contracts that contain that article.

Reclamation Manual

Policy

- B. **Contract Amendment.** A formally executed modification to an existing water-related contract that changes existing conditions, rights, or obligations within the existing scope of the contract.
- C. **Contract Supplement.** A formally executed modification to an existing water-related contract that adds new conditions, rights, or obligations and may expand the scope of the existing contract.
- D. **Contract Water.** Project water or non-project water made available under a water-related contract.
- E. **Contracting Officer.** In reference to a specific contract, the Reclamation official with present authority to negotiate, execute, and/or administer the contract, as applicable.
- F. **Interim Contract.** A short-term contract that is expressly intended to be replaced with a long-term contract or a contract for an authorized interim use of project water that is allocated to another project purpose but that is not yet needed for that purpose.
- G. **Irrigation Use.**⁹ The use of contract water to irrigate land primarily for the production of commercial agricultural crops or livestock, and domestic and other uses that are incidental thereto.
- H. **Long-Term Contract.** A contract with a term of more than 10 years.
- I. **M&I Use.** The use of contract water for municipal, industrial, and miscellaneous other purposes not falling under the definition of “irrigation use”¹⁰ or within another category of water use under an applicable Federal authority.¹¹
- J. **Non-Project Water.** The definition appearing at Paragraph 3.A. of RM Policy, *Use of Excess Capacity in Reclamation Projects for the Impoundment, Storage, and Carriage of Non-Project Water* (WTR P04) applies to this Policy where the water is made available under a water-related contract.

⁹ This definition reflects Reclamation water-related contracting laws—most explicitly Section 202 of the Reclamation Reform Act of 1982 (RRA), which defines the term “irrigation water” as “water made available for agricultural purposes from the operation of Reclamation project facilities pursuant to a contract with the Secretary” (43 USC 390bb(5)).

¹⁰ The use of contract water to irrigate land for non-agricultural uses (except to the extent that some of these uses may be incidental to uses that are primarily agricultural) falls under the definition of M&I use. In addition, commercial agricultural uses that do not require irrigation, such as fish farms and livestock production in confined feeding or brooding operations falls under the definition of M&I use.

¹¹ This definition is intended to distinguish M&I use from irrigation use for purposes of contracting to deliver water for these uses and to recover appropriate Federal costs. It is framed broadly to allow water to be made available for a wide variety of uses under Reclamation’s M&I and miscellaneous use contracting authorities. It is not intended to interfere with the application of Federal authorities under which a water use may or must be characterized and contractually addressed as a use other than either irrigation or M&I, such as authorized fish and wildlife or recreational uses.

Reclamation Manual

Policy

- K. **Operation and Maintenance (O&M) or Operation, Maintenance, and Replacements (OM&R).**¹² The ongoing, regular, or routine operation, maintenance, repairs, replacements, and other activities and actions necessary for continued structural integrity and operational reliability of project facilities required for the delivery of contract water. See Paragraph 3 of RM D&S, *Extended Repayment of Extraordinary Maintenance Costs* (PEC 05-03) for definitions of the terms “Extraordinary Maintenance” (XM) and “Emergency Extraordinary Maintenance” (EXM).
- L. **Project Water.** Surface or ground water, including project seepage and return flows, that is developed by, pumped or diverted into and/or stored in Reclamation facilities:
- (1) based on the exercise of water rights that have been appropriated or acquired by the United States or others, or that have been decreed, permitted, certificated, licensed, or otherwise granted to the United States or others, for a Reclamation project; or
 - (2) based on a withdrawal or reservation of water from appropriation by the United States for a Reclamation project; or
 - (3) in accordance with section 215 of the Reclamation Reform Act of 1982 (Pub. L. 97-293, Title II; 43 USC 390oo); or
 - (4) based on an act of Congress that allocates or apportions water to a Reclamation project.
- M. **Reclamation Law.** Those laws, beginning with the Reclamation Act of 1902 and excluding the WCUA, which Congress enacts or has enacted to authorize Reclamation to perform its mission, whether these are original, amending, or supplementing laws, and whether they establish general or project-specific authority.
- N. **Reclamation Project or Project.** Any project acquired or constructed pursuant to Reclamation law or the WCUA or constructed by the United States Army Corps of Engineers (USACE) and explicitly designated, made a part of, or integrated into a Reclamation project by statute. For purposes of this Policy, the term does not refer to projects constructed pursuant to the Small Reclamation Projects Act of 1956 (Pub. L. 84-984; 43 USC 422a, *et seq.*) or the Reclamation Wastewater and Groundwater Study and Facilities Act of 1992 (Pub. L. 102-575, Title XVI), or USACE projects that have not been designated, made part of, or integrated into a Reclamation project by statute, even where Reclamation markets water from them.
- O. **Repayment Contract.** A water-related contract establishing terms for, among other things, the recovery of a share of reimbursable project costs, normally within a fixed period within a statutory maximum. Repayment contracts are authorized under general

¹² The terms “O&M” and “OM&R” are often used interchangeably within Reclamation. This Policy uses the term “OM&R” hereinafter.

Reclamation Manual

Policy

or project-specific legislation, or a combination of both. The contracting authority must be consulted for associated requirements. Types of repayment contracts¹³ available under Reclamation's general contracting authorities include:

- (1) **Irrigation Repayment Contract.** A repayment contract made pursuant to subsection 9(d) of the 1939 Act or Section 4 of the WCUA to make project water available for irrigation use and establish the contractor's associated obligations to pay annual project OM&R costs and to repay portions of project construction costs allocated to irrigation (without interest). See Paragraph 4.A. of RM D&S, *Water Rates and Pricing* (PEC 05-01) regarding pricing for irrigation repayment contracts.
 - (2) **M&I Repayment Contract.** A repayment contract made pursuant to subsection 9(c)(1) of the 1939 Act or Section 4 of the WCUA to make project water available for M&I use and establish the contractor's associated obligations to pay annual project OM&R costs and to repay portions of project construction costs allocated to M&I with interest.¹⁴ See Paragraph 5.A. of PEC 05-01 regarding pricing for M&I repayment contracts.
 - (3) **Safety of Dams Repayment Contracts.** See RM D&S, *Safety of Dams Repayment* (PEC 05-05).
 - (4) **XM Repayment Contracts.** Repayment contracts are available for costs associated with XM under some circumstances pursuant to Title IX, Subtitle G of the Omnibus Public Land Management Act of 2009 (Pub. L. 111-11; 43 USC 510). See PEC 05-03 for options and requirements associated with this authority.
- P. **Short-Term Contract.** A contract with a term of 10 years or less, including, but not limited to, interim and temporary contracts, as defined herein.
- Q. **Temporary Contract.** A non-renewable contract with a term of 1 year or less.
- R. **Water-Related Contract.** Any repayment or water service contract and any other legally binding agreement executed pursuant to Reclamation law or to the WCUA that:
- (1) makes water available from or through the facilities of a Federal project that Reclamation manages, operates, or funds; or

¹³ Contracts may be combinations of contract types and make water available for more than one type of use.

¹⁴ Required interest charges include interest during construction and interest on investment, as applicable according to the terms of RM D&S, *Interest During Construction* (FIN 07-20-10) and RM D&S, *Interest on Investment* (FIN 06-30C). The terms "interest during construction" and "interest on investment" are used herein as defined at Paragraphs 3.A. and 3.B. of PEC 05-05.

Reclamation Manual

Policy

- (2) establishes OM&R responsibilities for such facilities and/or other responsibilities related to ensuring that such facilities continue to serve their intended purposes; or
 - (3) makes water available to the United States.
- S. **Water Service Contract.** A water-related contract to provide project water at contractually established water rates¹⁵ pursuant to subsection 9(c)(2) or 9(e) of the 1939 Act, Section 9 of the WCUA, the 1920 Act, or other authority. Water service contracts are authorized under general or project-specific legislation, or a combination of both. The contracting authority must be consulted for associated requirements. Types of water service contracts¹⁶ available under Reclamation's general contracting authorities include:
- (1) **Irrigation Water Service Contract.** A water service contract made pursuant to subsection 9(e) of the 1939 Act to make project water available for irrigation use and establish the contractor's associated water rates, annual project OM&R charges, and other charges as applicable. See Paragraph 4.B. of PEC 05-01 regarding the establishment of water rates for irrigation water service contracts.
 - (2) **1920 Act Contract.** A contract made pursuant to the provisions of the 1920 Act that provides for the delivery of project irrigation water for miscellaneous purposes, including M&I water use, from a project that was authorized only for an irrigation purpose and establishes the contractor's associated water rates and annual project OM&R charges. See Paragraph 5.C. of PEC 05-01 regarding the establishment of water rates for 1920 Act contracts.
 - (3) **M&I Water Service Contract.** A water service contract made pursuant to subsection 9(c)(2) of the 1939 Act or Section 9 of the WCUA to make project water available for M&I use and establish the contractor's associated water rates and annual project OM&R charges. See Paragraphs 5.B. and 5.D. of PEC 05-01 regarding the establishment of water rates for M&I water service contracts under subsection 9(c)(2) and the WCUA, respectively.
- T. **Water Users' Association.** An entity organized and recognized under state laws that is eligible to enter into contracts with Reclamation to receive contract water for delivery to end users of the water and to pay applicable charges.¹⁷
- U. **Review Period.** The originating office will review this release every 4 years.

¹⁵ Although water service contract rates normally include a component reflecting a share of project construction costs, they are not repayment contracts

¹⁶ Contracts may be combinations of contract types and make water available for more than one type of use.

¹⁷ The term "water users' association" is intended, for purposes of this Policy, to refer to a variety of entities with different names and differing functions. These entities may be identified under their enabling authorities and elsewhere by terms such as "association," "conservancy district," "irrigation district," "municipality," etc.