

# Reclamation Manual

## Directives and Standards

<b>Subject:</b>	Contracts for the Transfer of Operation, Maintenance, and Replacement Responsibilities for Federal Facilities
<b>Purpose:</b>	To set forth requirements for negotiating and executing contracts to transfer operation, maintenance, and replacement responsibilities for Federal facilities from the Bureau of Reclamation to non-Federal entities. This Directive and Standard clarifies requirements for transfers of operation, maintenance, and replacement responsibilities and will promote consistency in practices Reclamation-wide.
<b>Authority:</b>	Reclamation Act of June 17, 1902 (ch. 1093, 32 Stat. 388), especially section 6 (32 Stat. 389; 43 USC 491 and 498), and acts amendatory or supplementary thereto, especially section 5 of the Reclamation Extension Act of August 13, 1914 (Pub. L. 63-170; 38 Stat. 687; 43 USC 492 and 499); subsection G of the Second Deficiency Appropriation Act for 1924 (Fact Finders' Act) (Pub. L. 68-292; 43 Stat. 702; 43 USC 500); the Title to Movable Property Act of July 29, 1954 (Pub. L. 83-551; 68 Stat. 580), as amended (43 USC 499a and 499b); the Federal Water Project Recreation Act of July 9, 1965 (Pub. L. 89-72; 79 Stat. 213; 16 USC 4601-12, <i>et seq.</i> ); and project-specific legislation, as applicable
<b>Approving Official:</b>	Director, Mission Assurance and Protection Organization (MAPO)
<b>Contact:</b>	Reclamation Law Administration Division (84-55000)

1. **Introduction.** This Directive and Standard (D&S) sets forth requirements for negotiating and executing operation, maintenance, and replacement (OM&R) transfer contracts<sup>1</sup> in accordance with the authorities cited above. The purpose of an OM&R transfer contract is to transfer all or part of the responsibility for OM&R of Federal facilities, whether water or power, from Reclamation to a contractor and to establish the parties' duties during and after the transfer.
2. **Applicability.** This D&S applies to all personnel involved in negotiating, executing, and administering OM&R transfer contracts that are executed, amended, or supplemented after the date this D&S is in effect. It does not apply where the United States will retain the OM&R responsibility for a facility but contracts for specific items or services pursuant to

<sup>1</sup>For further requirements associated with the OM&R transfers, see Reclamation Manual (RM) D&S, *Review of Operation and Maintenance (RO&M) Program Examination of Associated Facilities (Facilities Other Than High- and Significant-Hazard Dams)* (FAC 01-04); *Completion of a Construction Activity* (FAC 01-05); *Review/Examination Program for High- and Significant-Hazard Dams* (FAC 01-07); *Operation and Maintenance (O&M) of Project Works That are Historic Properties* (LND 02-03); *Implementing Cost Sharing Authorities for Recreation and Fish and Wildlife Facilities* (LND 01-01); *Power Review of Operations and Maintenance (PRO&M) of Transferred Works* (FAC 04-15); and *Sustainable Operation and Maintenance Requirements for Certain Water-Related Contracts* (PEC 05-06).

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the Federal Acquisition Regulation or enters into grants or cooperative agreements, as defined in the Federal Grant and Cooperative Agreement Act of February 3, 1977 (Pub. L. 95-224; 31 USC 6301 - 6308).

### 3. Requirements and Responsibilities.

A. **Conditions Precedent for OM&R Transfer Contracts.** An OM&R transfer contract is appropriate when applicable requirements of FAC 01-05 have been met, along with all of the following conditions:

- (1) the contractor is authorized to perform<sup>2</sup> the OM&R responsibilities to be transferred, as demonstrated to the regional director's satisfaction;
- (2) the United States holds title to the subject lands and facilities;
- (3) the project facility, unit, or extension is substantially complete and stabilized and, where applicable, Reclamation has determined that the reservoir filling and monitoring criteria are in place;
- (4) the regional director has determined that the contractor:
  - (a) is legally organized;
  - (b) has, either internally or through agreement, the legal, financial, and engineering competencies necessary to perform the OM&R responsibilities to be transferred;
  - (c) has the technical competence to operate the facilities in coordination with other project features, if necessary;
  - (d) has, either internally or through agreement, the technical competence to ensure ongoing compliance with the National Historic Preservation Act for all historic properties for which O&M responsibility will be transferred, as further directed in LND 02-03;
  - (e) is capable of operating the facilities in such a manner that interstate compacts, international treaty commitments, and the Department of the Interior Secretary's trust responsibilities to Native Americans will not be adversely affected; and
  - (f) is otherwise acceptable as the entity responsible for performing the OM&R responsibilities to be transferred, as determined by the regional director;

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<sup>2</sup>The contractor must be authorized to perform the OM&R responsibilities to be transferred when the contractor is not the sole project water user and those responsibilities will be performed on behalf of others.

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- (5) there are no contractual prohibitions against transferring the OM&R responsibilities; and
- (6) the appropriate level of environmental documentation has been completed to ensure compliance with the National Environmental Policy Act, Endangered Species Act, National Historic Preservation Act, and other relevant laws, regulations, and Executive Orders.

**B. Additional Requirements for Projects with Multiple Beneficiaries.** Reclamation is responsible for safeguarding the best interests of its projects, including those of all authorized beneficiaries. In meeting this responsibility, Reclamation will consider the interests of all project beneficiaries in making decisions relating to a proposed OM&R transfer.

- (1) An entity requesting an OM&R transfer has the primary responsibility for identifying and taking all reasonable steps toward resolving any associated disputes with other project beneficiaries. Reclamation will strongly encourage the entity from which the request is expected to identify and resolve associated issues with other project beneficiaries before making its request. It is not the responsibility of Reclamation, or otherwise of the United States, to resolve such disputes among project beneficiaries for purposes of advancing a requested OM&R transfer, though the regional director will facilitate this interaction when deemed appropriate.
- (2) Where there is a dispute among project beneficiaries, the regional director will determine whether it is in the best interest of the project to move forward with the OM&R transfer process or to suspend it until the dispute has been resolved. In making this determination, the regional director will consider all affected interests, including those of the parties to the dispute, other affected beneficiaries, and the United States, along with any other relevant factors. The regional director will give particular consideration to information provided by an affected beneficiary indicating that a provision of the transfer may violate an applicable statute, regulation, or policy, and will seek guidance from the Office of the Solicitor, as appropriate.

**C. Contract Provisions.** The following will be included or addressed in OM&R transfer contracts:

- (1) **Preamble.** Each contract will begin with a preamble naming the parties to the contract and identifying the acts of Congress that authorize it.<sup>3</sup>

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<sup>3</sup>I.e., the applicable authorities cited in the statement of authorities in the heading to this D&S.

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- (2) **Recitals.** The contract will contain the appropriate explanatory recitals following the preamble.<sup>4</sup>
- (3) **Definitions.** Each contract will expressly define all of its key words and phrases.<sup>5</sup>
- (4) **Term of Contract.** A contract termination date is required in OM&R transfer contracts with contractors having only water service contracts. In such OM&R transfer contracts, the termination date will correspond with the termination date of the water service contract. If the water service contract has renewal provisions, the OM&R contract will have the same renewal provisions. All other OM&R transfer contracts will not have a termination date unless requested by the contractor. If the contractor requests a termination date for the OM&R transfer, the contract will specifically state that the termination of the OM&R transfer does not relieve the contractor from the obligation to pay its appropriate annual OM&R allocation to the project operator annually in advance.
- (5) **Contract Review and Update.** Each OM&R transfer contract will contain a provision for the review and update of the contract. The contract review must be performed at least every 15 years. A more frequent review will be established if determined to be appropriate by the regional director. The review and update will be limited to focus on the OM&R transfer contract's standard articles and incorporation of any new statutory requirements applicable to that OM&R transfer contract.
- (6) **Annual Reporting Requirements.** Each OM&R transfer contract will require the contractor to provide the following reports to the regional director annually:
  - (a) **Water Deliveries.** The contract will require the contractor to monitor the project water deliveries made through the project and provide a report of water deliveries, by purpose, made in the preceding calendar year to Reclamation within 60 days of the end of the calendar year.
  - (b) **Annual OM&R Work Forecast.** The contract will require the contractor to provide a forecast of the OM&R work the contractor expects for the relevant project facilities in the following year.
  - (c) **3-Year OM&R Work Forecast.** The contract will require the contractor to provide a 3-year forecast for anticipated OM&R needs of the relevant project facilities.

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<sup>4</sup>These are normally introduced by the heading "WHEREAS." They serve to preface the operative terms of the agreement contained in the main body of the contract, which is normally introduced by the transitional heading "NOW THEREFORE."

<sup>5</sup>Normally at the beginning of a contract's main body, immediately following the explanatory recitals.

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- (7) **Title Transfer of Movable Property.** Title to Government movable property specifically identified within the “Performance of Work Statement” (see Paragraph 10 below) will be transferred to the contractor in accordance with the Title to Movable Property Act of July 29, 1954 (Pub. L. 83-551; 68 Stat. 580), as amended (43 USC 499a and 499b), to allow the contractor to efficiently perform its OM&R activities on the Federal facilities. In order to encourage the assumption of project OM&R responsibilities, the Secretary is also authorized to acquire movable property necessary for project OM&R activities from appropriated funds available for the project at the time OM&R is transferred. The value of the movable property, if not already part of the reimbursable project construction or OM&R costs, is to be repaid pursuant to a contract with the contractor.
- (8) **Affected Facilities.** The contract will include, internally or as an attachment, a specific description of all facilities for which OM&R is being transferred (canals, control works, bridges, hydropower facilities, pumping plants, etc.) and a map or maps identifying them. The description for all facilities for which OM&R is being transferred will be provided as digital GIS data in a standard format with metadata on media as an attachment, if possible. Alternatively, paper or digital maps will be submitted which contain latitude/longitude coordinates and descriptive labels sufficient to clearly identify each feature. For linear features, such as canals, the coordinate for the point of origin and a length in feet or miles will be provided.
- (9) **Transfer Inspection.** The OM&R transfer contract will provide that the transfer of OM&R responsibilities will not be completed until a transfer inspection, as described in FAC 01-05, has been performed and all associated processes have been completed. Concurrence signatures from the regional director, area manager, and the contracting organization’s authorized officials on the inspection report will indicate the completion of these associated processes. The cost status of the transfer inspection will be based upon the status of the facility (i.e., construction in progress versus plant in service) and payment of the transfer inspection costs will be determined in accordance with Paragraph 10 of FAC 01-05 or current requirements.
- (10) **Performance of Work Statement.** The contract will require the OM&R responsibilities of the United States and the contractor to be listed and described in a performance of work statement, which will incorporate information provided in the inspection report, RM D&S, *Reclamation Standard Water-Related Contract Articles, Standard Article 5: Operation and Maintenance of Transferred Works (Federal Construction)* (PEC 10-05), and other sources as appropriate. The information provided must clearly define the scope of work to be performed; the respective reimbursable cost obligations of the United States and the

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contractor; and the geographic, physical, and other boundaries within the contractor's control. Movable property for which title is to be transferred and the conditions for the transfer will also be identified.

- (11) **Payment of OM&R Costs.** The OM&R transfer contract will identify Reclamation's responsibility for payment of the OM&R costs associated with the non-reimbursable project purposes. The contract will also state that the operator bears sole responsibility for funding OM&R work and will bill Reclamation for the OM&R costs associated with the non-reimbursable project purposes once work is completed.
- (12) **Standard Articles.** Each OM&R transfer contract will include all standard articles required for OM&R transfer contracts under RM Policy, *Reclamation Standard Water-Related Contract Articles* (PEC P10). Standard articles can be included by reference to the primary contracts that are supplemented by these contracts, if consistent with current standard articles.
- (13) **Sustainable OM&R Provisions.** Each OM&R transfer contract will include provisions necessary to meet the applicable requirements of RM D&S, *Sustainable Operation and Maintenance Requirements for Certain Water-Related Contracts* (PEC 05-06).
- (14) **Other Contract Provisions.** The contract will contain any other provisions that are required by law or policy, or that are appropriate to the particular OM&R transfer, for example provisions addressing:
  - (a) the collection and remittance to the United States of incidental revenues;
  - (b) compliance with the requirements of RM D&S, *Cultural Resource Management (CRM)*, (LND 02-01);
  - (c) operating provisions for meeting United States water delivery obligations to tribes, states, or other contractors;
  - (d) resolution of disputes;
  - (e) the development and approval of emergency action plans and the training for implementation of such plans;
  - (f) record-keeping services to be performed by the contractor on behalf of the United States;
  - (g) assumption by the contractor of the responsibility for reviewing and commenting on non-Federal activities that may or may not affect project works;

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- (h) special reviews or investigations to be conducted as requested or determined to be necessary by the Contracting Officer;
- (i) the documentation of anticipated extraordinary maintenance (XM) activities;
- (j) the development or adoption of a documented maintenance management plan and criteria for the respective facilities; and
- (k) other requirements specifically established by Congress for the relevant contract, project, or facilities.

D. **OM&R Contract Development Records.** In executing OM&R transfer contracts, project purposes, operations, and Reclamation's contractual obligations to others that are impacted by the project's operations must be protected. When executing an OM&R transfer contract, records will be developed to specifically document the provisions of the OM&R transfer contract and the negotiations and discussions that resulted in those provisions. Records will also be developed to identify additional Federal facilities which could be directly impacted by the OM&R transfer and the responsibilities of the entity receiving the OM&R transfer to avoid negative impacts to said Federal facilities.

E. **Documentation.** A copy of each executed OM&R transfer contract must be forwarded to MAPO, Attention: 84-55000 within 30 days of execution.

#### 4. Definitions.

- A. **OM&R.** Activities and actions necessary to ensure the continued structural integrity and operational reliability of project features. Note: For the purposes of this D&S, the term OM&R includes "operation and maintenance" (O&M), as defined in RM Policy, *Water-Related Contracts – General Principles and Requirements* (PEC P05), and also includes XM, as defined in RM D&S, *Extended Repayment of Extraordinary Maintenance* (PEC 05-03).
- B. **OM&R Transfer.** The transfer of all or part of the responsibility for the OM&R of Federal facilities from Reclamation to a non-Federal entity through an OM&R transfer contract. It does not refer to the transfer of title to such facilities from the United States to a non-Federal entity<sup>6</sup>. See Paragraph 6 of FAC 01-05 for information on the transfer of ancillary facilities, equipment, and supplies.
- C. **OM&R Transfer Contract.** A contract that effectuates and defines, and may establish conditions precedent for, an OM&R transfer in accordance with the authorities cited above.

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<sup>6</sup>Title to all project works will remain with the United States unless and until the Congress of the United States provides otherwise.

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5. **Review Period.** The originating office will review this release 4 years.



## RECLAMATION MANUAL TRANSMITTAL SHEET

Effective Date: \_\_\_\_\_

Release No. \_\_\_\_\_

Ensure all employees needing this information are provided a copy of this release.

### Reclamation Manual Release Number and Subject

### Summary of Changes

NOTE: This Reclamation Manual release applies to all Reclamation employees. When an exclusive bargaining unit exists, changes to this release may be subject to the provisions of collective bargaining agreements.

### Filing instructions

Remove Sheets

Insert Sheets

All Reclamation Manual releases are available at <http://www.usbr.gov/recman/>

Filed by: \_\_\_\_\_

Date: \_\_\_\_\_