

# Reclamation Manual

## Directives and Standards

<b>Subject:</b>	Deferment Contracts
<b>Purpose:</b>	Provides the requirements for the development of deferment notifications and supplemental and amendatory contracts for the deferral of construction installments, or, when approved by the Congress, for restructuring construction repayment streams. The benefits of this Directive and Standard are to ensure the Bureau of Reclamation's compliance with Federal laws, in particular the Act of September 21, 1959 (73 Stat. 584, 43 U.S.C. § 485b-1).
<b>Authority:</b>	The Reclamation Act of 1902 (Act of June 17, 1902; 32 Stat. 388) (1902 Act), as amended and supplemented; and, in particular, Section 17 of the Reclamation Project Act of 1939 (Act of August 4, 1939; 53 Stat. 1198) (1939 Act); the Act of September 21, 1959 (73 Stat. 584; 43 U.S.C. § 485b-1) (Deferment Act); and the Act of November 24, 1971 (85 Stat. 488; 43 U.S.C. § 422k-1).
<b>Approving Official:</b>	Director, Mission Assurance and Protection Organization (MAPO)
<b>Contact:</b>	Reclamation Law Administration Division (84-55000)

1. **Introduction.** Reclamation enters into a variety of repayment contracts and other forms of obligations to recover the irrigation investment costs of Federal water supply and conveyance facilities. Contractors are occasionally unable to repay their annual construction charges when due because of circumstances beyond their control. This Directive and Standard (D&S) describes the conditions for approving or denying requests for deferrals and the procedures for accomplishing payment of deferrals of the annual construction installments or modifying repayment streams. In considering deferral requests, Reclamation's highest priority is ensuring the ultimate timely repayment of the contract obligation. Reclamation will place contract repayment obligations at a higher priority than secondary contractual commitments such as maintaining reserve funds for water conservation, water supply, and distribution system purposes.
2. **Applicability.** This D&S applies to Reclamation staff responsible for executing and administering contracts pursuant to the Deferment Act.
3. **Requirements and Responsibilities.**
  - A. **Deferment Action Requirements.** Regional directors are responsible for reviewing contractors' deferment requests and supporting documentation, approving or denying deferment notifications, and, if necessary, providing bases of negotiation (BONs) to the Director, MAPO (Director) recommending either approval or denial by the Commissioner.
    - (1) **Common Conditions for Deferment.** Reclamation will consider the following

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factors in deciding whether to approve a deferral request.

- (a) **Severe Adverse Weather Conditions.** Weather conditions that cause a partial or total loss of crops, including hailstorms, floods, early freezes, tornadoes, severe windstorms, and drought.
  - (b) **Damage to Project Facilities.** Damaged project facilities where the damage is not a result of poor operation and maintenance (O&M) and the repair is beyond the contractor's reserve account capabilities and funding pursuant to The Omnibus Public Lands Management Act of 2009, Title IX, Subtitle G (Pub. L. 111-11; 123 Stat. 1346; 43 U.S.C. § 510) is not available.
  - (c) **Inability to Obtain Operating Loans.** The inability to obtain operating loans from banks or other sources due to extraordinary circumstances of a significant number of the contractor's members, severely impacting farm operations within the contractor's service area.
  - (d) **Other Conditions.** The above list is not all-inclusive. Other conditions that may prevent the successful harvesting of a crop include, among other things, insect or other infestations, war, civil disobedience, pandemics, and acts of terrorism.
- (2) **Uncommon Conditions for Deferments.** The following conditions will not be used to support a deferral request.
- (a) **Financial Conditions.** Conditions that reflect normal agricultural business cycles that may be regional or national in nature or conversely affect a small minority of a contractor's constituents typically do not justify a deferment. Examples of these conditions may include low commodity prices, high interest rates, extraordinarily high operating costs, (e.g., unexpected high increases in power and energy costs, investment losses or unsatisfactory investment returns to individual water users, investment losses or unsatisfactory investment returns to contractor management, and bankruptcy or foreclosures of contractor's members). Notwithstanding this list, there may be occasions when one or more of these or other financial conditions would create a severe and undue hardship on a contractor that would warrant consideration for a deferment.
  - (b) **Inadequate O&M.** Damage to project facilities that the contractor could have prevented by an adequate annual O&M program. Reclamation must grant deferments if there are extenuating circumstances that explain the lack of an adequate O&M program. Such circumstances may include the expenditure of funds normally available for annual O&M for a series of emergency repairs occurring as a result of an aging facility. This condition may warrant deferment, but a long-term solution to the problem of the aging

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facility must also be considered at the time Reclamation analyzes the deferral request.

- B. Types of Contracting Documents.** Instruments executed for deferment of payments must be in the form of deferment notifications, supplemental contracts, or amendatory contracts.
- (1) **Deferment Notifications.** Except for the deferment of a payment for up to 12 months, deferment notifications must not modify the provisions of the existing contract. Contractors shall not receive multiple or consecutive deferments within a 5-year period without the Commissioner's approval. The regions will provide the Director copies of all deferment notifications.
  - (2) **Supplemental Contracts.** Supplemental contracts must be negotiated and executed by the regional director following approval by the Commissioner. Reclamation requires supplemental contracts for any deferral that will affect payments by deferral for more than 12 months after the action of the deferment.
  - (3) **Amendatory Contracts.** Reclamation must use these contracts when Congressional approval is required or when other conditions are added, modified, or deleted in the contract. Amendatory contracts must be negotiated and executed by the regional director following the Commissioner's approval and upon Congressional approval, if necessary.
- C. Congressional Approval.** Congressional approval of an amendatory contract is required under any of the following circumstances:
- (1) the repayment period of the existing contract is extended beyond the project's statutory maximum period for repayment of construction costs,
  - (2) a reduction of the total amount payable is involved, or
  - (3) the contract is in other respects less advantageous to the United States than the existing contractual arrangements, except for the reduction in the present value of the repayment stream to the United States.
- D. BON.** Regional directors must submit a BONs for each supplemental and amendatory deferment contract to the Director. The Director will provide an assessment to the Commissioner as to whether the deferral is within the Secretary's authority and complies with Reclamation policy. The BON must include the following information:
- (1) **General Information.**
    - (a) contractor,

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- (b) project,
  - (c) general location,
  - (d) contract under which payment is due,
  - (e) amount of payment due,
  - (f) number of and years when previous deferments for the contractor were approved, and
  - (g) a brief justification of the type of contracting document to be used.
- (2) **Contract Authority.** The 1902 Act, as amended and supplemented, and in particular Subsection 17(b) of the 1939 Act, as amended by the Deferment Act, and other special authorizing acts of the Congress, if appropriate, must be cited as contracting authorities in any deferment contract action.
- (3) **Determination of Undue Burden.** The region will obtain written documentation from the contractor at the contractor's expense in support of its deferral request, including documentation that payment of the installment in question will cause it an undue burden. The regional director is responsible for making the initial determination whether payment of the installment will cause an undue burden on the contractor. The following three questions must be answered prior to Reclamation granting a deferment:
- (a) Will payment of the installment cause an undue burden on the contractor?
  - (b) Is there another practicable, timely source of funds for the contractor to draw upon to meet its obligation to the United States? These sources include, but are not limited to:
    - (i) contractor's current cash balance,
    - (ii) contractor's reserve funds, or
    - (iii) bank loans or other sources of credit.
  - (c) Will the contractor's ability to make future payments be jeopardized or otherwise significantly affected by approval of the deferment?
- (4) **Documentation Supporting the Need for a Deferment.** The following documentation must accompany the BON. An explanation for excluding any of this documentation must be discussed in the BON. The Contracts Handbook provides guidance on how to prepare supporting documentation.

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- (a) The contractor's financial statements disclosing its inability to make the required payment.
  - (b) Letters from local banks, the Farm Service Agency, and any other knowledgeable source detailing the reason the contractor is ineligible for a loan or other financial assistance for paying the installment due.
  - (c) A financial analysis supporting the contractor's inability to pay its annual construction obligation. An ability-to-pay study is sufficient, but not required, to meet this condition.
- (5) **Regional Position.** The region must state its position on whether the deferment should be approved and why and specifically describe the requested contract terms. The proposed repayment terms must be set forth and supported by evidence that a shorter repayment schedule and/or a partial payment would result in an undue burden on the contractor.
- E. **Elements for Notifications and Contracts.** The deferment notifications and contracts must include the following minimum elements:
- (6) **Deferment Notifications.**
    - (a) The amount of the deferment.
    - (b) Identification of the contract under which the installment proposed for deferment is obligated and payment history under the contract.
    - (c) Identification of the event (undue burden).
    - (d) A deadline date beyond which the installment deferment cannot be extended.
    - (e) Previous deferment history of the contractor.
  - (7) **Supplemental and Amendatory Contracts.**
    - (a) The specific acts of Congress pursuant to which the contract is being written, including particularly Section 17 of the 1939 Act, as amended.
    - (b) Identification of the contract under which the installment proposed for deferment is obligated and payment history under the contract.
    - (c) Any other relevant history of the contractor or contract.
    - (d) Identification of the event (undue burden).

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- (e) A statement that the deferment contract is only an interim solution and not to be construed as a basis for the terms of any other amendatory contract that may be negotiated. (This provision is not necessary if Congress has approved the specific amendatory contract to resolve long-term repayment problems.)
  - (f) Identification of the installments to be deferred and a schedule of repayment. To the extent possible, the contractor must repay the deferred installments on the same dates the normal installments are due.
  - (g) The current standard contract articles, except as provided in Paragraphs G, H, and I, below.
  - (h) Any other provisions, as the Commissioner may direct, as required by law, policy, or rules and regulations.
- F. **Contract Distribution.** The region must request the return of a signed copy of the contract with a copy of the entity's resolution setting forth the authority of the contractor's official to execute the contract on behalf of the entity.
- G. **Charges for Delinquent Payments.** The region shall not impose charges for delinquent installments pursuant to the original contract, if applicable, on a deferred installment.
- H. **Environmental Compliance.** The region will complete National Environmental Policy Act compliance with a Categorical Exclusion Checklist. The exclusion category for this action is 516 DM 14.5 D14 (approval, renewal, transfer, or execution of an original, amendatory, or supplemental water service or repayment contract where the only result will be to implement an administrative or financial practice or change).
- I. **Notification of the Congress.** Pursuant to Subsection 17(b) of the 1939 Act, the Director will develop a letter to notify the Congress each year of all deferments approved during that calendar year.
4. **Definitions.**
- A. **Amendatory Contracts.** Contracts that amend, change, or otherwise modify the terms and conditions of the existing contract.
  - B. **Construction Charges Eligible for Deferrals.** "Construction charges" as defined in Section 2(d) of the 1939 Act (53 Stat. 1187; 43 U.S.C. §485a) to mean "the amounts of principal obligations payable to the United States under water-right applications, repayment contracts, orders of the Secretary, or other forms of obligation entered into pursuant to the Federal reclamation laws, excepting amounts payable for water rental or power charges, O&M and other yearly service charges, and excepting also any other O&M, interest, or other charges which are not covered into the principal sums of the

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construction accounts of the Bureau of Reclamation.” The definition includes construction installments incurred pursuant to contracts executed under any one of the following authorities:

- (1) **Repayment Contracts.** Contracts entered into pursuant to the 1902 Act and Section 9(d) of the 1939 Act (53 Stat. 1195; 43 U.S.C. § 485h (d)).
  - (2) **Water Service Contract Charges.** Charges credited as construction in contracts entered into pursuant to Section 9(e) of the 1939 Act (53 Stat. 1196; 43 U.S.C. § 485h (e)).
  - (3) **Other Contracts.** Charges credited as irrigation construction in contracts under other authorities such as the Small Reclamation Projects Act (70 Stat. 1044), as amended and obligations for payment of aid-to-irrigation; and for other projects under the administrative jurisdiction of Reclamation, even though those projects were not constructed under the provisions of Federal reclamation laws such as the Water Conservation and Utilization Act (Act of August 11, 1939; ch. 717, 53 Stat. 1418), as amended.
- C. **Deferment Notifications.** Formal letters sent from the regional director to a contractor granting permission to delay a specific installment payment for a period not to exceed 12 months from the original payment due date.
- D. **Supplemental Contracts.** Separate contracts that add conditions and/or obligations to those established in the existing contract.
5. **Review Period.** The originating office will review this release every 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: \_\_\_\_\_