

Reclamation Manual

Directives and Standards

Subject:	Contracting for Non-Project Use of Excess Capacity in Reclamation Project Facilities
Purpose:	To set forth the requirements for contracting for the use of excess capacity in Reclamation facilities. This Directive and Standard (D&S) establishes general requirements for excess capacity contracting, including identifying appropriate contracting authorities, and will assist Reclamation in addressing major rehabilitation and replacement needs of its facilities.
Authority:	The Reclamation Act of 1902 (ch.1093, 32 Stat. 388) and acts amendatory and supplementary thereto, especially Section 1 of the Warren Act of 1911 (Warren Act) (36 Stat. 925; 43 USC 523); the Interior Department Appropriation Act for 1928 (44 Stat. 943) (1927 Act); Section 14 of the Reclamation Project Act of 1939 (1939 Act) (53 Stat. 1197; 43 USC 389); Office of Management and Budget (OMB) Circular A-25 (July 8, 1993); project-specific authorizations; and acts amending and supplementing these laws and circulars.
Approving Official:	Director, Mission Assurance and Protection Organization (MAPO)
Contact:	Reclamation Law Administration Division (84-55000)

1. **Introduction.** Reclamation law authorizes contracts for the use of excess capacity in Bureau of Reclamation facilities. This Reclamation Manual (RM) D&S, *Contracting for Non-Project Use of Excess Capacity in Reclamation Project Facilities* (PEC 05-10), together with RM D&S, *Charges for Non-Project Use of Excess Capacity in Reclamation Project Facilities* ([PEC 05-11](#)), establishes requirements for contracts through which Reclamation makes excess capacity in Federal facilities available for storage or conveyance of non-project water. PEC 05-10 establishes basic contracting requirements. PEC 05-11 establishes Reclamation-wide methods for establishing the various charge components related to the non-project use of excess capacity. Together, these D&Ss provide a framework for Reclamation to develop funding for aging infrastructure needs throughout Reclamation by focusing pricing on project replacement costs and values—the replacement or “R” component of operation, maintenance, and replacement (OM&R).
2. **Applicability.** This D&S applies to Reclamation personnel involved in proposing, approving, negotiating, and executing contracts for the use of excess capacity in Reclamation projects and facilities.
3. **Requirements and Responsibilities:**
 - A. **Basis of Negotiation (BON) Requirements.** Where a BON and an approval memorandum are required, refer to RM D&S, *Preparing Bases of Negotiation for New and Amendatory Water Service, Repayment, and Other Water-Related Contracts*

Reclamation Manual

Directives and Standards

([PEC 06-01](#)) for the general requirements of the BON and approval memorandum. In addition to the requirements of PEC 06-01, excess capacity BONs will include the following:

- (1) identification of the facility or facilities in which excess capacity has been determined to be available,
- (2) the maximum annual quantity of excess capacity to be made available,
- (3) a determination that the use of such excess capacity will not impair the ability of the project to serve its authorized purposes,
- (4) the contract term, up to a maximum of 40 years, and
- (5) the pricing methodology and applicable considerations in accordance with PEC 05-11.

B. Excess Capacity Contracting. Excess capacity contracts will include the following.

- (1) **Evaporation and Spills.** Each excess capacity contract will identify the methodology used to quantify the loss due to evaporation during storage and conveyance that will be assessed against the non-project water and require the non-project water to be the first water spilled.
- (2) **Contract Term.** The contract will include a term to not exceed more than 40 years, or as provided pursuant to applicable reclamation law.
- (3) **Charges for Use of Excess Capacity.** Where contracting authority is already delegated, the regional director will develop pricing in accordance with RM D&S PEC 05-11. Each excess capacity contract will assess an OM&R charge. They will include fixed charges as appropriate.
 - (a) **Annual Operations and Maintenance (O&M) Component.** An appropriate share of annual costs of O&M of Reclamation facilities will be assessed in each excess capacity contract. This charge is for routine and recurring O&M of the Reclamation project facilities. In accordance with the 1927 Act, the annual O&M component will be identified for the purpose of meeting annual O&M needs for the project and will be used in the following ways.¹

¹The 1927 Act states, in relevant part, “That any moneys which may have been heretofore or may be hereafter advanced for operation and maintenance of any project or any division of a project shall be covered into the reclamation fund and shall be available for expenditure for the purposes for which advanced in like manner as if said funds had been specifically appropriated for said purposes” (Act of January 12, 1927, ch. 27, 44 Stat. 934).

Reclamation Manual

Directives and Standards

- (i) **Reserved Works.** The annual O&M component of the OM&R charge will reflect those costs allocable to the use of excess capacity and will be paid annually in advance to Reclamation.
 - (ii) **Transferred Works.** Where responsibility for O&M of Reclamation project facilities has been transferred to a transferred works operating entity, the annual O&M component of the OM&R charge will be established by the operating entity and reflect those costs allocable to the use of excess capacity that will be assessed and paid as directed by the operating entity.
- (b) **Replacement Component.** The replacement component of the OM&R charge will be established as described in PEC 05-11. In accordance with the 1927 Act, the excess capacity contract will identify the replacement component and describe the purpose as providing funding for future extraordinary maintenance (XM) needs as described in Paragraph 4 of RM D&S, *Extended Repayment of Extraordinary Maintenance Costs* ([PEC 05-03](#)). The replacement component will be allocated to the project that is providing excess capacity, unless otherwise established by law.²
- (i) **Reserved Works.** For reserved works, the replacement component will be retained and used for project-specific XM.
 - (ii) **Transferred Works.** When excess capacity contracts are entered on transferred works, a formal commitment³ must be received from the transferred works operating entity affirming that the funds will only be used for defined purposes. Reclamation must receive the formal commitment prior to the conveyance or storage of non-project water pursuant to an excess capacity contract. The operating entity will then collect the replacement component from the excess capacity contractor and manage the replacement fund according to the agreed terms.
- (c) **Fixed Charge.** Any identified fixed charge will be credited in accordance with the requirements of Paragraph 3.G.(2) of RM D&S *Crediting Requirements for Incidental Revenues* ([PEC 03-01](#)), unless otherwise established by law.
- (4) **Acreage Limitations.** The storage and conveyance of non-project water in excess capacity contracts must be in accordance with the acreage limitation provisions of Federal reclamation law unless the project is exempt from the Reclamation Reform Act of 1982 (RRA).

²The funds developed through replacement components will reduce reliance on appropriated funds and therefore lower reimbursable costs across the project purposes to which those costs are allocated on any given project.

³In circumstances where the transferred works operating entity is a signatory to the excess capacity contract, no further commitment is required.

Reclamation Manual

Directives and Standards

- (a) **Acres Limitations for Contracts Entered Pursuant to the Warren Act.** Excess capacity contracts entered pursuant to the Warren Act will specifically identify the applicability of the 160-acre ownership limitation provisions of the Warren Act. Such contracts cannot be written to take advantage of, or if executed prior to the date of enactment of the RRA, as amended, cannot be amended to conform to the discretionary provisions of the RRA.
- (b) **Entities with a Contract Entered Pursuant to the Warren Act and a Water Service or Repayment Contract.** In cases where an entity has both a contract entered pursuant to the Warren Act and a water service or repayment contract for project water (i.e., the entity is both an excess capacity contractor and a project contractor), the acreage limitation provisions of the water service or repayment contract will prevail, notwithstanding the provisions of subparagraphs (ii) and (iii) below.
- (i) **Contracts Prior to October 1, 1981.** For water service or repayment contracts entered into prior to October 1, 1981, the RRA validates all provisions addressing the commingling of project and non-project water.
- (ii) **Contracts Executed on or After October 1, 1981.** For water service or repayment contracts entered into on or after October 1, 1981, the acreage limitation regulations provide that when non-project water is commingled in project facilities with project water which is subject to acreage limitations, then acreage limitation must be applied to the commingled water unless the party contracting to use excess capacity pays Reclamation an “incremental fee which reasonably reflects an appropriate share of the cost to the Federal Government, including interest, of storing or delivering the non-project water” [43 Code of Federal Regulations (CFR) §426.15(c)(2)]. The charges required by Paragraph 3.B.(3) above, will be deemed to constitute this incremental fee so long as these charges include the interest component required by 43 CFR §426.15(c)(2) and are in addition to any other charges due from the contractor (i.e., the entity which is both an excess capacity contractor and a project contractor) to Reclamation pursuant to its water service or repayment contract. If these conditions are met, then the acreage limitations will apply only to the project water.
- (iii) **Commingling.** Where project and non-project water are commingled in non-project facilities, the acreage limitations apply only to landholders who receive project water. See 43 CFR §426.15(c)(1) for the conditions for allowing the commingling of project and non-project water.

C. **Indian Trust Assets.** Reclamation’s Indian trust policy and procedures will be applied when considering requests for excess capacity contracts. Reclamation will agree to

Reclamation Manual

Directives and Standards

make excess capacity available only when this can be accomplished without impairing the Secretary of the Interior's trust obligations and without adverse effects on Indian trust resources, or when any adverse impacts can be adequately mitigated or compensated. The party or parties requesting the excess capacity contract bear the costs of any required mitigation or compensation.

- D. **Mitigation of Environmental Impacts.** Reclamation will only execute excess capacity contracts after considering whether and how adverse effects could be avoided and whether such effects should be mitigated. Mitigation requirements, if any, will be determined on a case-by-case basis. The party or parties requesting the excess capacity contract bear the cost of any required mitigation.
 - E. **Public Involvement.** Public participation is required for all excess capacity contracts; refer to RM Policy, *Water-Related Contracts and Charges—General Principles and Requirements* ([PEC P05](#)) for general public participation requirements for water-related contracts.
 - F. **Environmental Compliance.** The appropriate level of environmental documentation will be 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 prior to the execution of any excess capacity contract.
 - G. **O&M Contractor Consultation.** Before making a final decision concerning any request it receives for an excess capacity contract, Reclamation will notify, consult with, and take into account the views of the project contractors that receive water from the project facilities involved, and will coordinate with the operating entity if the facilities involved are transferred works.
4. **Definitions.**
- A. **Excess Capacity.** Diversion, storage, conveyance, or pumping capacity in Reclamation project facilities that is not needed to meet Reclamation's obligations for authorized project purposes.
 - B. **Excess Capacity Contract.** For purposes of this D&S, any contract entered under the authority of the Warren Act, or Section 14 of the 1939 Act, or any other applicable reclamation law, which facilitates diversion, storage, conveyance, or pumping of non-project water through available excess capacity, as defined above at Paragraph 4.A.
 - C. **Non-Project Water.** Surface or ground water:
 - (1) that is pumped, diverted, exchanged, and/or stored based upon the exercise of water rights that have not been appropriated or acquired by, or apportioned to, the United States or others, or which have not been decreed, permitted, certificated,

Reclamation Manual

Directives and Standards

licensed, or otherwise granted to the United States or others, for a Reclamation project, or

- (2) that is not reserved, allocated, or withdrawn from appropriation by the United States for a Reclamation project.

- D. **Operation and Maintenance (O&M).** The definition in Paragraph 4.K. of RM Policy, *Water-Related Contracts and Charges—General Principles and Requirements* ([PEC P05](#)) applies to this D&S.
- E. **Project Water.** The definition in Paragraph 4.L. of PEC P05 applies to this D&S.
- F. **Replacement.** See Paragraph 4 of [PEC 05-03](#) for relevant information regarding replacement.
- G. **Reserved Works.** Reclamation-owned facilities for which Reclamation manages and performs O&M, either through Reclamation personnel or through a maintenance contract.
- H. **Transferred Works.** Reclamation-owned facilities for which the responsibility to manage and perform O&M has been transferred by contract or agreement to a non-federal operating entity.
5. **Review Period.** The originating office will review this release every 2 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: _____