

# Reclamation Manual

## Directives and Standards

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| <b>Subject:</b>            | Conversions of Project Water from Irrigation Use to Municipal and Industrial Use   |
| <b>Purpose:</b>            | To set forth Bureau of Reclamation water-related contracting requirements for formalizing conversions of project water from irrigation use to municipal and industrial (M&I) use, for the benefits of facilitating authorized conversions and ensuring that water deliveries are consistent with applicable state and Federal law.   |
| <b>Authority:</b>          | The Reclamation Act of 1902 (ch.1093, 32 Stat. 388); the Sale of Water for Miscellaneous Purposes Act of 1920 (41 Stat. 451; 43 USC 521) (1920 Act); the Interior Department Appropriations Act, 1939 (Hayden-O'Mahoney Amendment) (52 Stat. 322; 43 USC 391a-1 and 392a); the Reclamation Project Act of 1939 (1939 Act) (53 Stat. 1187; 43 USC 485, <i>et seq.</i> ); the Water Conservation and Utilization Act of 1939 (WCUA) (53 Stat. 1418; 16 USC 590y, <i>et seq.</i> ); the Water Supply Act of 1958 (WSA) (72 Stat. 320; 43 USC 390b); the Renewal of Water Supply Contracts Act of June 21, 1963 (77 Stat. 68; 43 USC 485(h)); and acts amending and supplementing these laws |
| <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 conversions of project water (conversions) from irrigation use to M&I use. These conversions are a subset of the conversions addressed in Reclamation Manual (RM) Policy, *Transfers and Conversions of Project Water* (PEC P09), which states further requirements. This D&S is intended to advance Reclamation's policy of supporting and facilitating conversions in accordance with Reclamation law, as stated in Paragraph 3 of PEC P09.
- 2. Applicability.**<sup>1</sup> This D&S applies to all Reclamation personnel involved in water-related contracting activities, within the following parameters:
  - A. Higher-Level Authorities.** This D&S does not override applicable requirements imposed by project-specific legislation,<sup>2</sup> treaties, judicial directives, or other higher-level authorities, such as Federal regulations and Executive Orders.

<sup>1</sup>The requirements set forth in this D&S apply generally to water-related contracting activities. Where circumstances warrant it, requests can be made to the Commissioner for deviations from RM Policy requirements in accordance with RM Policy, *Bureau of Reclamation's Directives System - Reclamation Manual* (RCD P03) and D&S, *Request for Deviation from a Reclamation Manual Requirement and Approval or Disapproval of the Request* (RCD 03-03). The Commissioner cannot waive requirements fixed by higher-level authorities.

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

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- B. **Prospective Application to Contracts.** To the extent that this D&S establishes new requirements for water-related contracts, it will be applied prospectively to contracts executed, renewed, amended, or supplemented through the formal contracting process between the contractor and Reclamation on or after its issuing date. 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 D&S.
3. **Identifying Conversions Subject to this D&S.** Whether a proposed transaction constitutes a conversion subject to this D&S depends on the applicable definitions of the relevant water use terms, which must be determined in each case. The definitions provided under Paragraph 3 of RM Policy, *Water-Related Contracts and Charges – General Principles and Requirements* (PEC P05) apply in accordance with Paragraph 2 of that Policy. Where the relevant terms are not defined by PEC P05, the contract itself, or higher-level authorities, the intention of the parties must be determined based on:
- A. evidence of knowledge and conduct of the parties regarding water uses during the life of the contract;
  - B. documentation associated with the contract’s execution;
  - C. Reclamation policy in effect at the time the contract was executed; and/or
  - D. other evidence deemed appropriate by both parties.
4. **Formalizing<sup>3</sup> Conversions.** All conversions of project water that are subject to this D&S must be formalized either through contract administration or a contract action, as set forth below. Regardless of how a given conversion is formalized, all applicable requirements of Federal, state, tribal, and local laws, rules, and regulations must be met. Conversions that occur without meeting all procedural requirements are subject to the unauthorized use resolution processes set forth in RM D&S, *Contract Compliance Reviews* (PEC 05-08).
- A. **Contract Administration.** A conversion of project water will be formalized without a contract action if the parties concur that it is clearly authorized by applicable contractual provisions or applicable provisions of Federal law, unless the parties determine that a contract action is desirable or necessary for other reasons. Any requirements imposed by contract or state or Federal law must be met. Contractual authority to convert project water does not override applicable requirements, limitations, or conditions imposed by the state on the relevant water rights.

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<sup>3</sup>The term “formalize” is used herein to refer to the completion of the formal processes required to convert project water from irrigation use to M&I use in compliance with applicable contractual provisions and law.

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- B. Contract Actions.** Project authority will be used to formalize conversions of project water from irrigation use to M&I use, as appropriate. Where a conversion from irrigation use to M&I use is desired or occurs in a project without authority to provide water for M&I use, Reclamation will formalize the conversion through a contract action pursuant to one of the following authorities if the relevant conditions are met and the conversion and required contract action otherwise meet all applicable requirements. Any required contract actions will be accomplished according to applicable water- related contracting Policy and D&S in effect at the time. Contract actions for which authority has not been delegated to the regional directors require an approval of a basis of negotiation (BON) in accordance with RM Policy, *Bases of Negotiation for New and Amendatory Water Service, Repayment, and Related Contracts* (PEC P06) and RM D&S, *Preparing Bases of Negotiation for New and Amendatory Water Service, Repayment, and Other Water-Related Contracts* (PEC 06-01).
- (1) **1920 Act.** The 1920 Act is Reclamation’s general authority for providing project irrigation water for purposes other than irrigation use.<sup>4</sup> The water uses authorized under the 1920 Act are within the meaning of the term “M&I use,” as defined in PEC P05. The authority to contract pursuant to the 1920 Act is subject to the following conditions:
- (a) **Approval of the Affected Water Users’ Association(s).**
- (i) The contract must be approved by the affected water users’ association(s) prior to execution. If the water users’ association itself requests the contract, its request constitutes its approval. Approval must also be obtained from any other water user organizations whose interests are affected.
  - (ii) All potentially impacted water user organizations must be notified and allowed adequate time before the transaction is to be completed to make any objections.
  - (iii) If, in the judgment of the contracting officer, other water user associations’ interests may be affected, their approval must also be obtained.
  - (iv) Although Reclamation will participate in resolution of disputes over prospective transfers upon request, it remains the responsibility of the contractor to ensure that conflicts with third parties are resolved.

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<sup>4</sup>Note that this is different from converting irrigation water to M&I water where authority for both exists within project legislation. The 1920 Act authorizes Reclamation to execute contracts to provide water from irrigation-only projects for uses other than irrigation without creating an M&I project purpose. This authority is also available where M&I is an authorized purpose, but the amount of water is fixed and is insufficient to meet demand, so long as the irrigation water is available and the requirements of the 1920 Act, this D&S, and PEC P09 are otherwise met.

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- (b) **No Other Practicable Source.** Contracts to provide irrigation water for other uses pursuant to the 1920 Act will only be executed where there is no other practicable source of water to meet the demand, as determined by the contracting officer. For purposes of this Paragraph, water is from a practicable source if it is reasonably within the means of the water user to obtain and use it, in light of relevant circumstances such as costs, existence of delivery systems, legal rights, and other factors as determined appropriate by the contracting officer on a case-by-case basis.
  - (c) **No Detriment to Project Irrigation or Senior Water Rights.** Contracts to provide irrigation water for other uses pursuant to the 1920 Act must not be detrimental to the project's ability to serve its authorized irrigation purpose or to legally established senior water rights.
- (2) **WSA and Subsection 9(c)(2) of the 1939 Act.** Subsection 9(c)(2) will be used to execute contracts to provide M&I water from supplies made available pursuant to the WSA.<sup>5</sup> The authority to execute these contracts is subject to the following conditions:
- (a) **No Adverse Impact to Irrigation Efficiency.** Contracts to furnish water for M&I purposes pursuant to subsection 9(c)(2) must not impair the efficiency of the project for irrigation purposes, as determined by the contracting officer.
  - (b) **Congressional Approval.** No contract will be executed without the required congressional approval or a finding by the contracting officer that congressional approval is not required, in accordance with the terms of the WSA.
- (3) **WCUA.** Contracts to furnish water for M&I purposes pursuant to the WCUA must not impair the efficiency of the project for irrigation purposes, as determined by the contracting officer.
5. **Rate Setting for Conversions from Irrigation Use to M&I Use.** An appropriate rate must be determined for project water converting from irrigation use to M&I use. Rates will be established in accordance with this Paragraph and Paragraph 7 of RM D&S, *Water Rates and Pricing* (PEC 05-01), unless clear, specific direction on the pricing of the converted water is established in an existing contract or in project- or contract-authorizing documents.

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<sup>5</sup>The WSA authorizes storage capacity to be included in any Reclamation project reservoir for present or anticipated future demand or need for M&I water supplies. Unlike the 1920 Act, the WSA *does* create an M&I project purpose, and the resulting water supply is contracted for as M&I water under subsection 9(c)(2) of the 1939 Act. The WSA can be applied to projects authorized prior to its enactment.

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- A. **Minimum Rate-Setting Standards.** At a minimum, rates for project water converted from irrigation use to M&I use will:
- (1) ensure that the Federal government is not worse off financially than it would have been had the conversion not occurred;
  - (2) be calculated to avoid effectively extending benefits intended only for irrigation uses to non-irrigation uses; and
  - (3) include or be calculated to reflect an appropriate portion of the cost the Federal government incurred in appropriating project construction funds, with interest on the outstanding repayment obligation, if applicable.
- B. **Establishing Rates that Permit Conversions.** Within the minimum standards stated above, rates must reflect prices that buyers are willing to pay and sellers are willing to accept, to avoid discouraging conversions. Because the factors affecting incentives vary, the amount that can be charged in accordance with this Paragraph must be determined on a case-by-case basis.
6. **Documentation.** All conversions of project water from irrigation use to M&I use must be documented in a manner adequate to serve as an official administrative record, including conversions where the operation and maintenance of the associated project facilities have been transferred to a non-Federal operator. Documentation will include all information required in formalizing the conversion in accordance with this D&S and PEC P09. The documentation requirements for M&I rate-setting set forth at Paragraph 8 of PEC 05-01 apply to pricing decisions for conversions. BONs submitted for the Commissioner's approval will include or be accompanied by the documentation required hereunder. Records required under this Paragraph will be adequate to ensure compliance with contractual, legal, and policy requirements and limitations.
7. **Definitions.** The definitions provided in PEC P09 apply to this D&S. The definitions provided in PEC P05 apply to this D&S, subject to the parameters stated under Paragraph 2 above and within PEC P05.
8. **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: \_\_\_\_\_