

Reclamation Manual

Policy

- Subject:** Use of Excess Capacity in Reclamation Projects for the Impoundment, Storage, and Carriage of Non-Project Water
- Purpose:** Sets forth Reclamation's objectives and policies with respect to the use of excess capacity for the impoundment, storage, and carriage of non-project water.
- Authority:** 43 U.S.C. 523-525 and 43 U.S.C. 2245.
- Contact:** Office of Policy, Reclamation Law and Revenues Management, D-5200; and Water Contracts and Repayment, D-5600
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1. **Introduction.** The Assistant Secretary - Water and Science approved *Principles Governing Voluntary Water Transactions That Involve or Affect Facilities Owned or Operated by the Department of the Interior* (the *1988 Principles*) dated December 16, 1988. The *1988 Principles* pertain, among other things, to the use of excess capacity in Reclamation projects for the storage and conveyance of non-project water. Within the framework provided by the *1988 Principles*, Reclamation has been, and continues to be, supportive of making excess capacity available under appropriate circumstances to assist in improving the management of the West's water resources. This policy statement supplements and expands upon the *1988 Principles* insofar as the *1988 Principles* pertain to the use of excess capacity in Reclamation projects for the storage and conveyance of non-project water.
2. **Applicability.** This policy statement applies only to facilities owned by Reclamation in projects constructed or acquired by it pursuant to the Reclamation Act of 1902, and acts amendatory thereof or supplementary thereto ("Federal reclamation law"). If title to facilities has been transferred to a non-Federal entity, the party desiring to use excess capacity in such facilities will need to contract with that non-Federal entity, not Reclamation.
 - A. **Water Conservation and Utilization Act Projects.** While the Warren Act (43 U.S.C. 523-525) has been applied in the past to excess capacity in projects constructed by Reclamation pursuant to the Water Conservation and Utilization Act of 1939, as amended (WCUA),¹ this will no longer be done and this policy statement does not apply to such projects. However, any contracts for the use of excess capacity in WCUA projects which exist as of the date of this policy statement will continue in full force and effect until they expire. The term (i.e., duration) of these contracts may not be extended by amendment, nor may such existing contracts be renewed.

¹Act of Aug. 11, 1939, ch. 717, 53 Stat. 1418, 16 U.S.C. §§590y - 590z-10.

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- B. **Project Water and Surplus Project Water.** In addition to contracting pursuant to the Warren Act for the use of excess capacity to store or convey non-project water, Reclamation has also entered into numerous contracts under the authority of that Act for the sale or rental of project water and of “surplus” project water. This policy statement does not apply to such contracts, but rather, applies only to the use of excess capacity in Reclamation projects for the storage and conveyance of non-project water.
3. **Definitions.** For the purposes of this policy statement:
- A. **Non-Project Water** means surface or ground water:
- (1) Pumped, diverted, and/or stored based upon the exercise of water rights which have not been appropriated or acquired by, or apportioned to, the United States or others, or which have not been decreed, permitted, certificated, licensed, or otherwise granted to the United States or others, for a Reclamation project, or
 - (2) Water not reserved or withdrawn from appropriation by the United States for, nor allocated by the United States to, a Reclamation project.
- B. **Excess Capacity** means diversion, storage, conveyance, or pumping capacity in project facilities which is excess to that needed to achieve a Reclamation project’s authorized purposes.
4. **Reclamation’s Objective.** In making excess capacity available for the storage and conveyance of non-project water, Reclamation’s objective is to assist in improving the management of the West’s scarce water resources by:
- A. Facilitating improvements in the reliability of non-project water supplies and in the efficiency of use of non-project water supplies,
 - B. Facilitating transfers of non-project water and water rights from willing sellers to willing buyers,
 - C. Assisting other water users who are experiencing operational problems or emergency situations with their own facilities, and
 - D. Maximizing the benefits received from Reclamation projects.
5. **Policies.** The following policies will govern Reclamation’s evaluation of and action on requests for new or renewal contracts under the Warren Act and under Section 305 of the Reclamation States Emergency Drought Relief Act of 1991 (43 U.S.C. 2245) (the Drought Relief Act) or other project-specific legislation for the use of excess capacity to store or

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convey non-project water. If a party seeks the amendment or extension of a Warren Act contract for the use of excess capacity which was entered into prior to the date of this policy statement, then such amendment or extension will be granted only if the contract is amended to conform in all regards to the requirements of these policies.

- A. **Purposes for Which Excess Capacity may be Used.** Excess capacity will be made available only for the storage and conveyance of non-project water to be used for irrigation,² except in the case of the projects identified in section 305 of the Drought Relief Act or in other project-specific legislation, in which event excess capacity can be made available for the storage and conveyance of non-project water for such additional purposes as are specified by such legislation.
- B. **Contract Required.** Except as specifically provided by statute or by contract, no person, nor agency or entity, public or private, may make use of excess capacity in Reclamation project facilities to divert, store, impound, pump, or convey non-project water without having first entered into a contract with Reclamation.
- (1) **Requirements.** Reclamation will not enter into a contract unless and until the requirements and conditions set forth in this policy statement are met.
 - (2) **O&M Contractor Agreement.** In addition, when responsibility for the O&M of the facilities involved has been assumed from Reclamation by a project contractor or other entity (collectively, "O&M contractor"), Reclamation will not enter into a contract unless and until it or the party desiring to use excess capacity in such facilities has made appropriate arrangements (by contract, letter agreement, operating instructions, or otherwise) with the O&M contractor for the use of excess capacity.
 - (3) **Contract Term.** The term (i.e., duration) of contracts for the use of excess capacity will be in accordance with the then applicable policies on the term of contracts.
- C. **Protection of Project Purposes, Operations, and Contractors.** Reclamation will not allow the use of Reclamation project facilities for the storage and conveyance of non-project water unless excess capacity exists and project operations and Reclamation's contractual obligations to its project contractors, O&M contractors, or others can and will be protected.
- (1) **Excess Capacity Must be Available.** The storage and conveyance of non-project water will be allowed only at times and in amounts for which there is

²This limitation is imposed by the Warren Act.

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facilities capacity excess to the purposes and needs of the Reclamation project involved.

- (2) **Project Water Rights.** The storage and conveyance of non-project water will be allowed only if this will not impair Reclamation's ability to protect the water rights for and the yield of its projects and to meet its statutory or regulatory obligations.
- D. **Compliance With Federal Law.** Reclamation will not enter into contracts for the use of excess capacity unless and until the requirements of contracts applicable to project service from the facilities involved, of Federal reclamation law (including, but not limited to, the requirements, restrictions, and limitations of the Warren Act and, if applicable, section 305 of the Drought Relief Act), and of all other applicable Federal laws (including, but not limited to, NEPA and the Endangered Species Act) are met. The party requesting the contract will be required to pay Reclamation's costs for negotiating and entering into a contract to the extent and in the manner required by the then applicable policies concerning payment of Reclamation's contracting costs.
- E. **Compliance With Other Laws.** The party requesting a contract for the use of excess capacity for the storage or conveyance of non-project water will be responsible for complying with all applicable State, tribal, and local laws, including, but not limited to, those concerning the appropriation, diversion, storage, and use of water and changes of water rights. Such party must bear all costs associated with its compliance with State, tribal, and local laws. It must also bear all costs of compensating third parties whose legally cognizable interests under State, tribal, or local laws will be affected by the use of excess storage or carrying capacity for the impoundment, storage, and carriage of non-project water.
- F. **Charges for Use of Excess Capacity.** Appropriate charges will be assessed for the use of excess capacity.
- G. **Disposition of Revenues Received.** Revenues generated from the charges assessed pursuant to WTR 04-01, *Use of Excess Capacity in Reclamation Projects for the Impoundment, Storage, and Carriage of Non-Project Water* (paragraph 5), for the use of excess capacity will be handled in the following manner:
 - (1) **Revenues Covered Into Reclamation Fund.** As required by law, revenues received by Reclamation from the charges assessed will be covered into the Reclamation Fund, and will not be credited to the project involved unless the authorizing legislation for the project specifically requires a different disposition of revenues.

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- (2) **O&M Charges Paid to O&M Contractor.** All charges established by an O&M contractor will, unless otherwise determined by Reclamation, be paid by the party which contracts with Reclamation for the use of excess capacity directly to such O&M contractor, not to Reclamation, at such times and in such manner as the O&M contractor may direct.
- H. **Limitation on Charges by the Contractor.** A party which contracts with Reclamation for the use of excess capacity for the storage and conveyance of non-project water may not itself impose on its water users any charge for the use of such excess capacity which exceeds the charge paid by to Reclamation and, if applicable, to an O&M contractor, however, that such party may also charge its water users such additional amounts as are necessary to cover the party's reasonable administrative costs in contracting with Reclamation for the use of excess capacity.
- I. **Power for Pumping Requirements.** If the use of excess capacity for the storage and conveyance of non-project water requires electrical power for pumping, then the party using such excess capacity must provide its own source of power or pay a non-project rate.
- J. **No Right to the Power Benefits Arising From Non-Project Water.** The party contracting for the use of excess capacity to store or convey non-project water will have no rights to any benefits that might be obtained from additional head for, or water going through, Reclamation-owned electric power generators at Reclamation project facilities as a result of storage or conveyance of non-project water.