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Bureau of Reclamation

United States Department of the Interior

BUREAU OF RECLAMATION
Great Plains Region
Nebraska-Kansas Area Office
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JAN 10 2008

Mr. Justin D. Lavene
Assistant Attorney General
Office of the Attorney General
2115 State Capitol
Lincoln, NE 68509

Subject: Republican River Surface Water Purchases

Dear Mr. Lavene:

The following information is being provided in response to your request at the October 4, 2007, meeting concerning the process and authorities that may be available to allow the Republican River Natural Resource Districts (NRDs) or the Nebraska Department of Natural Resources (DNR) to purchase Reclamation project water to aid in Compact compliance by the State of Nebraska.

Based on a review of Reclamation policy and project authorities, a temporary sale or lease of project surface water may be made by the irrigation districts and Reclamation to the DNR or NRDs for the purpose of increasing streamflow below Guide Rock Diversion Dam to aid in Compact compliance by the State of Nebraska. Reclamation approval would be required for any such arrangements. This process requires that our Districts are not harmed. There are a number of details concerning the contracting, environmental clearance, and approval processes that would need to be worked through. Enclosed for your information is a copy of Reclamation Manual Policy WTR PO2 – Voluntary Transfers of Project Water.

The contracting, environmental, and approval process is estimated to be less than six months for a one-year temporary transfer involving less than 10,000 acre-feet of project water. Transfers that involve more than 10,000 acre-feet will require additional time for development of contract terms and conditions, environmental clearance, and approval delegation from the Commissioner's Office. It needs to be noted that the timing and source of the surface water to be transferred could make a significant difference in the environmental impacts as well as the effects to other projects, and other project purposes. The environmental clearance document would address these issues.

The following additional information is provided to confirm our position and understanding of the other surface water purchase issues discussed at the October 4, 2007, meeting in Lincoln:

1. Natural flow rights associated with the Frenchman Valley Irrigation District and Riverside Irrigation District are not Reclamation project water rights. Because of this, the water supply associated with these water rights is available for contracting directly from the respective districts (subject to mutual agreement between district and DNR/NRD) for aiding the State of Nebraska in achieving Compact compliance, whether used on Kansas Bostwick Irrigation District lands or as by-pass flows at Guide Rock.

2. The project water associated with Reclamation projects in Nebraska is available for lease or purchase on a temporary basis as accomplished in 2006 and 2007. Under this arrangement, the water purchased or leased from the respective districts (subject to mutual agreement between Reclamation, irrigation district(s), and DNR/NRD) for aiding the State of Nebraska in achieving Compact compliance would be limited for use only on the Kansas Bostwick Irrigation District lands. Limiting the use of the water to Kansas Bostwick Irrigation District lands significantly reduces the contracting, environmental, and approval process.

3. Any agreement for the purchase of Reclamation project water must be reached with all districts impacted by the planned purchase, with appropriate details shared with the State of Kansas as previously discussed.

It is important that you understand that Reclamation remains concerned that the State of Nebraska and the NRDs provide for "sustaining a balance between water uses and water supplies." We believe that protection and restoration of streamflows and inflows into the Federal reservoirs by reducing groundwater use is essential for equity among all water users, and to ensure that Nebraska achieve long-term Compact compliance. Purchase or lease of surface water should only be considered as a temporary aid in achieving Compact compliance during years of extreme water supply shortage. Reclamation is concerned if water is provided by Reclamation Districts in 2008, how will they be compensated given that they have not been fully reimbursed for the supplies provided in 2007?

If you have any questions, please contact me at 308-389-5300.

Sincerely,

AARON M. THOMPSON

Aaron M. Thompson
Area Manager

Enclosure

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NK-100 (SHughson)
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Reclamation Manual

Policy

Subject: Voluntary Transfers of Project Water

Purpose: Provides for transfers of project water in accordance with State and Federal law and supplements and expands upon the December 16, 1988, *Principles Governing Voluntary Water Transactions That Involve or Affect Facilities Owned or Operated by the Department of the Interior*, issued by the Assistant Secretary - Water and Science.

Authority: Reclamation Act of 1902, and acts amendatory thereof and supplementary thereto.

Contact: Office of Policy, D-5000

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 transfers of project water involving projects owned by Reclamation. Within the framework provided by the *1988 Principles*, Reclamation has been, and continues to be, supportive of voluntary transfers and conversions of project water in accordance with State and Federal law from existing to new users and/or uses. This policy statement supplements and expands upon the *1988 Principles* insofar as those principles pertain to transfers of project water.

2. **Applicability.**

   A. The *1988 Principles* and these policies apply to all transfers of project water except to the extent that such transfers are governed by legislation specific to a project and any rules and regulations, or other Reclamation guidance, promulgated pursuant to such legislation (e.g., transfers of project water made pursuant to the Central Valley Project Improvement Act and sales of water in the Colorado-Big Thompson Project). Furthermore, to the extent that a water service, repayment, or other type of contract in existence as of the date of these policies already governs the terms and conditions under which a project contractor and the end users thereof may make transfers of project water (e.g., existing provisions of Central Arizona Project contracts and provisions in existing contracts which allow for sub-contracts), then the following policies will apply only to the extent that the contract does not address matters covered by one or more of these policies. Finally, these policies will not supplant rules and guidelines for state water banks in existence as of the date of these policies. Generally speaking, proposals which satisfy the *1988 Principles* and the implementing policies set forth herein will be approved by Reclamation.

   B. In addition, the *1988 Principles* and these policies will be applied by Reclamation when resolving situations in which transfers of project water have occurred

inappropriately without Reclamation's prior approval; resulting in unauthorized users and/or uses of project water. Furthermore, Reclamation will apply these principles and policies to legislatively and judicially authorized or directed transfers of project water to the extent that such authorizations or directives leave Reclamation with the discretion to determine the terms of its approval of a transfer of project water.

C. The level of Reclamation requirements will be evaluated on a case-by-case basis or as specified by contract. When appropriate, additional Regional guidance may be developed to supplement these policies and guidelines to address particular local circumstances.

3. **Definitions.** For the purposes of this policy:

A. **Reclamation Project** means any project acquired or constructed pursuant to the authority of the Reclamation Act of 1902,[1] and all acts amendatory thereof and supplementary thereto. The term does not include projects constructed pursuant to the authority of the Small Reclamation Projects Act, as amended,[2] or to the Reclamation Wastewater and Groundwater Study and Facilities Act, as amended.[3]

B. **WCUA Project** means any project acquired or constructed pursuant to the Water Conservation and Utilization Act of 1939, as amended (WCUA),[4] and pursuant to the authority of the Interior Department Appropriation Act, 1940.[5]

C. **Project** means both Reclamation projects and WCUA projects.

D. **Project Water** means surface or ground water, including project return flows, which is pumped, diverted, and/or stored:

(1) Based upon the exercise of water rights which have been appropriated or acquired by the United States or others, or which have been decreed, permitted, certificated, licensed, or otherwise granted to the United States or others, for a Reclamation project or a WCUA project, or

(2) Based upon a withdrawal or reservation of water from appropriation by the United States for a Reclamation project or a WCUA project, or

[1]Act of June 17, 1902, ch. 1093, 32. Stat. 388.
[2]43 U.S.C. 422a,
[3]Title 16, P.L. 102-575.
[4]Act of Aug. 11, 1939, ch. 717, 53 Stat. 1418, 16 U.S.C. 590y - 590z-10.
[5]Act of May 10, 1939, ch. 119, 53 Stat. 685, 719.

(3) In accordance with section 215 of the Reclamation Reform Act of 1982 (43 U.S.C. 390oo), or

(4) Based upon an act of Congress which allocated or apportioned water to a Reclamation project or a WCUA project.

E. **Project Contractor** means any individual or entity which has a repayment or water service contract or other agreement with the United States that provides for the use of project water by such individual or entity.

F. **End User** is an individual or entity which receives project water from a project contractor.

G. **Change in the Type of Use** means a change from the historical beneficial use to which project water has been put to a different beneficial use, with project water being considered to have been changed from an existing irrigation use to another type of use only if the project water involved is no longer used to irrigate crops or any other vegetation or becomes a chemically treated, potable water supply.

H. **Transfer of Project Water** or **Transfer** means:

(1) Any transaction in which a project contractor leases or sells, on a temporary or permanent basis, all or a portion of the project water to which the project contractor is entitled:

(a) To another project contractor or other individual or entity which is located outside of the selling or leasing project contractor's boundaries (or, if the selling or leasing project contractor is an individual or entity which does not have legal boundaries, then outside of a project's service area), whether or not there is a change in the type of use of the project water involved, or

(b) To any individual or entity which is located within the selling or leasing project contractor's legal boundaries (or, if the selling or leasing project contractor is an individual or entity which does not have legal boundaries, then within a project's service area), when there is a change in the type of use of the project water involved.

(2) Any transaction in which an end user leases or sells, on a temporary or permanent basis, all or a portion of the project water to which the end user is entitled:

(a) To an individual or entity located outside of the legal boundaries of the project contractor within which the selling or leasing end user is located, whether or not there is a change in the type of use of the project water involved, or

(b) To an individual or entity which is located within the legal boundaries of the project contractor within which the selling or leasing end user is located, when there is a change in the type of use of the project water involved.

(3) Any situation in which there is a change in the type of use, on a temporary or permanent basis, made of project water even though the change is effected without a lease or sale of project water from a project contractor and/or end user to another individual or entity (i.e., it is the project contractor and/or end user itself which continues to use project water, but converts it from the existing use to a new use).[6]

A "transfer of project water" is not synonymous with, and may or may not involve, a "change of water rights" or a "transfer of water rights" within the meaning of the applicable state's water laws. Whether or not any given transfer of project water will require a "change of water rights" or a "transfer of water rights" pursuant to a state's water laws and procedures will depend, among other things, upon the decreed or permitted place of use and type of use of project water rights as compared to the place of use and type of use to be made of project water as the result of a proposed transfer. Determinations in this regard will need to be made on a case-by-case basis, considering the facts of each case and the water laws of the pertinent state.

4. **Objectives Which Reclamation Seeks to Achieve.** Reclamation's overall objective is to facilitate voluntary transfers of project water between willing parties in a timely and economical manner pursuant to State and Federal law and in such a way that the Federal government is in no lesser financial position than it would have been had a transfer not occurred. In addition, Reclamation will, in such situations as it deems appropriate, encourage parties to undertake voluntary transfers of project water. However, Reclamation will not compel transfers unless so required by legislative directive or judicial decision.

5. **Policies.** Regardless of whether or not Reclamation owns the water rights for a project, and, when it does, regardless of the nature of Reclamation's ownership interest in such

[6] Accordingly, when a project contractor or end user is itself the one who continues to use untreated, raw project water which is converted from the irrigation of commercial crops to the irrigation of other vegetation (including, but not limited to, lawns and ornamental shrubbery used in residential and commercial landscaping; gardens; golf courses, parks, and other developed recreational facilities, commercial nurseries, and pasture for animals raised only for personal pleasure and use), then such a conversion is not a "change in the type of use" of project water and is, therefore, not a "transfer of project water" subject to this policy.

water rights, Reclamation has an interest in and legal responsibilities with respect to transfers of project water and the resulting uses of project water by virtue of: (i) Federal statutes which require that anyone receiving project water must have a contract with the Secretary of the Interior, (ii) Reclamation's obligations to ensure that uses of project water are in accordance with a project's individually authorized purposes or other generally authorized purposes, (iii) contracts which Reclamation has with existing project contractors, and (iv) Federal ownership of facilities. To effect these interests and legal responsibilities, proposed transfers of project water must be in accordance with the *1988 Principles* and the following policies.

A. **Authorized Project Purposes.** A change in the type of use of project water may be made only if the new use is an authorized project purpose or is within the scope of the Sale of Water for Miscellaneous Purposes Act of 1920 (43 U.S.C. 521) or other applicable statute.

B. **Reclamation Approval Requirements.** Transfers of project water will require Reclamation's approval, unless already provided for by statute, judicial decision, or a water service, repayment, or other form of contract in existence as of the date of these policies. Regardless of Reclamation's approval authority, either the transferror or transferee, or sometimes both, depending upon the relevant circumstances, must have a contract with Reclamation for the delivery of project water. In addition, further implementing agreements may be required.

C. **Protection of Project Purposes and Project Contractors.** Subject to compliance with, and evaluation of analysis prepared pursuant to paragraph 5D, Reclamation will approve proposals for the transfer of project water as long as project purposes and operations and Reclamation's contractual obligations to others are protected. In addition to its public involvement procedures, when Reclamation receives a proposal to transfer project water it will, as appropriate, notify, consult with, and take into account the views of the other project contractors which receive project water from, and of any other entities which have assumed responsibility for the operation and maintenance of, the project involved before reaching a decision concerning such proposal.

D. **Compliance With Federal Law.** In addition to complying with the Federal laws and contracts applicable to project service from the project involved, transfers of project water must also be in accordance with all other applicable Federal laws, including, but not limited to the National Environmental Policy Act and the Endangered Species Act, and must not impair the Secretary of the Interior's trust obligations to Native Americans.

E. **Compliance With State and Other Laws.** Transfers of project water must comply 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.

F. **Pricing of Project Water by Sellers and Lessors.** To the extent permitted by law, the seller or lessor of project water (either a project contractor or an end user) will be allowed to establish the price at which it will sell or lease project water to a buyer or lessee, with the proceeds of such sale or lease to be retained by the selling or leasing project contractor or end user.

G. **Charges Payable to Reclamation for Transferred Project Water.** The individual or entity which will have a repayment or water service contract or other agreement with the United States for the use of project water after it has been transferred will be responsible for paying appropriate charges to Reclamation for the transferred project water.

(1) At a minimum, the charges fixed by Reclamation for transferred project water will ensure that the Federal Government will be in no lesser financial position than it would have been had a transfer not occurred.

(2) When a transfer of project water involves a change in the type of use from irrigation to a different beneficial use, and the capital costs allocable to a project's irrigation purpose have not been repaid, subsidies associated with the provision of project water for irrigation purposes will not follow the transferred project water. Charges payable to Reclamation for transferred project water will be consistent with the new use to which the transferred water is put. On projects where contractual obligations for the repayment of construction costs allocable to irrigation purposes have been fulfilled, charges payable to Reclamation for the transferred project water will be negotiable. In either situation, Reclamation will not attempt to recapture the value of past subsidies in setting charges for transferred project water.

H. **Disposition of Revenues Received by Reclamation.** Revenues received by Reclamation from the charges established pursuant to paragraph G above will be credited in accordance with the provisions of the authority under which the contract for the transfer of project water is made and the applicable policies in effect at the time.

I. **Reallocation of Construction Costs.** It is not necessary to consider reallocation of project construction costs for short-term or temporary transfers of project water. Cost reallocation should only be considered if the transfer is permanent and then only on a

case-by-case basis and in consultation with the Solicitor's Office and the Office of Policy.

J. **Term of Contracts.** The term (i.e., duration) of contracts or assignments for the transfer of project water will be in accordance with the then applicable laws and policies on the terms of contracts, but the period should not exceed the remaining term of the repayment, water service, or other form of contract which is the source of the project water being transferred.