



April 3, 2012

Mr. Owen Walker  
U.S. Bureau of Reclamation  
P.O. Box 25007  
Denver, CO 80225

*Sent via email to: [owalker@usbr.gov](mailto:owalker@usbr.gov)*

**Re: Draft Policy, PEC P05; Draft Policy, PEC P09; Draft Directive and Standard (“D&S”), PEC 05-01; Draft D&S, PEC 09-01**

Dear Mr. Walker:

We are writing on behalf of the Oregon Water Resources Congress (“OWRC”) and its Federal Caucus. OWRC is made up of and represents irrigation districts, water control districts, and other local government entities in Oregon that deliver primarily irrigation water to water users. Many of these local governments have contracts with the U.S. Bureau of Reclamation (“Reclamation”) to receive water from, operate and maintain, and reimburse the United States for the cost of, various Reclamation water projects. OWRC’s Federal Caucus includes Reclamation districts that deliver irrigation water, and in some cases water for other uses, in Oregon. These comments relate to proposed changes to the Reclamation Manual through Draft Policy, PEC P05; Draft Policy, PEC P09; Draft Directive and Standard (“D&S”), PEC 05-01; Draft D&S, PEC 09-01, which Reclamation released for public comment.

We agree with many of the concerns expressed in the public comments submitted by other agricultural water supply entities and will limit our comments to the areas of greatest concern. Additionally, it is our understanding that Reclamation intends to revise the Draft D&S and reissue for further public comment. We strongly urge Reclamation to further revise the Draft D&S, re-release for additional public comment, and postpone finalizing until its implications are fully understood and negative impacts minimized.

There appears to be no mandate or time constraint that necessitates that revisions to the D&S take place now. The stated purpose of these changes is to “clarify” Reclamation authority; yet many of proposed changes would enhance Reclamation authority over contracts and create great uncertainty for irrigation districts and the water users they serve. The proposed changes have the potential to significantly increase the rates OWRC members will pay for certain water they deliver under water supply contracts with Reclamation. This increase in rates follows from Reclamation’s proposed narrowing of the definition of “irrigation use,” which could result in the reclassification of certain water delivered by OWRC members from “irrigation use” to “municipal and industrial (M&I) use.” Because the rate Reclamation charges for M&I water is generally higher than the rate it charges for irrigation water, the proposed changes will have a significant financial impact on OWRC members and the water users they serve.

OWRC appreciates the commitment Reclamation made to set M&I rates that are “workable.” In response to the first round of public comments, Reclamation stated:

We have flexibility to work with districts to set workable rates, which should be more clearly indicated in our revised drafts. . . . [I]t does not benefit Reclamation to price water above the means of water users, and the market rate considerations are explicitly designed to prevent pricing Reclamation water out of the market.

However, as explained in detail below, OWRC opposes Reclamation’s proposed definition of irrigation use because the definition is too narrow. Further, OWRC seeks clarification from Reclamation regarding its interpretation of various provisions of the draft policies and draft D&Ss.

**A. Reclamation should expand the proposed definition of “irrigation use” beyond commercial agricultural use.**

Reclamation’s proposed definition of “irrigation use” is too narrow and should be expanded to include irrigation uses beyond commercial agricultural irrigation use. During the first public comment period, Reclamation received numerous comments opposing the proposed definition and challenging Reclamation’s authority to adopt such a narrow definition. Reclamation made no changes to the definition based on those comments and failed to adequately justify the basis for departing from its longstanding interpretation of irrigation use. OWRC agrees with the previous commenters that the proposed definition (1) is a significant departure from Reclamation’s longstanding interpretation; (2) is inconsistent with the intent of Congress; and (3) intrudes on the primacy of state law. Instead of repeating those comments in this letter, OWRC urges Reclamation to reexamine those comments and to reconsider its decision not to revise the proposed definition of irrigation use.

Regarding the interaction between state and federal law, the proposed definition of irrigation use is inconsistent with state definitions of irrigation and irrigation use. For example, Oregon defines “irrigation” as “the artificial application of water to crops or plants by controlled means to promote growth or nourish crops or plants. Examples of these uses include, but are not limited to, watering of an agricultural crop, commercial garden, tree farm, orchard, park, golf course, play field or vineyard and alkali abatement.” OAR 690-300-0010(26).

A common theme throughout the various reclamation laws passed by Congress is deference to state water law. As the Ninth Circuit observed, “[t]he legislative history of the 1902 Reclamation Act makes clear that the ‘principles underlying and governing water rights’ under the Act were to be the existing beneficial use concepts of western water law.” *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 853 (9th Cir. 1983). Given Congress’ intent to rely on state water law to define water rights under the 1902 Reclamation Act, Reclamation should defer to state definitions of irrigation use.

If Reclamation decides to finalize a narrow definition of irrigation use, OWRC urges Reclamation to revise the way in which the presumption operates for tracts of land that are less than 10 acres in size. The proposed definition of irrigation use creates a presumption that the use of water on tracts of land that are less than 10 acres in size is an M&I use, not an irrigation use.

This places a significant burden on irrigation districts in which many tracts are less than 10 acres in size. Some OWRC members have delivered water to tracts that are less than 10 acres in size since they first entered water supply contracts with Reclamation. Yet, under the proposed definition of irrigation use, Reclamation would presume that water delivered to those tracts is M&I water. Where the use of water under a contract with Reclamation remains consistent with the historical use of the water under the contract, Reclamation should adopt a presumption that the use is consistent with the contract. This approach would reduce the burden for irrigation districts that have historically supplied irrigation water to tracts of land that are less than 10 acres in size.

**B. Reclamation should clarify whether past conversions will automatically trigger a contract action upon Reclamation’s finalization of the proposed changes.**

The revised version of each draft policy and draft D&S includes the following sentence in the “Applicability” section: “[This Policy (or D&S)] applies *prospectively* to contracts executed, renewed, amended, or supplemented on or after its issuing date.” (Emphasis added.) This could be interpreted to mean that the proposed changes would not apply to past conversions—at least not until it is necessary, for a reason other than the past conversion, to execute, renew, amend, or supplement a contract. Put differently, under this interpretation, a conversion that occurred prior to the effective date of the proposed changes would not trigger Reclamation’s obligation to undertake a contract action. However, Reclamation would be required to reclassify certain irrigation uses as M&I uses upon the execution, renewal, amendment, or supplementation of a contract that was triggered by some event other than a conversion that preceded the effective date of the proposed changes.

Under an alternative interpretation of the “Applicability” section, past conversions are beyond the reach of the proposed changes, even in future contract actions, because the proposed changes apply only to conversions that take place after the proposed changes become effective. In other words, the proposed changes would grandfather all conversions that preceded the effective date of those changes. Under this interpretation, contract actions will be required only for conversions that occur after the proposed changes become effective.

Both interpretations of the “Applicability” section set forth above could be interpreted as being in tension with Draft D&S, PEC 09-01, which states: “All conversions of project water that are subject to this D&S must be formalized either through contract administration or a contract action.” Draft D&S, PEC 09-01, § 6. This sentence, unlike the prospective application language contained in each draft policy and draft D&S, suggests that once the proposed changes are finalized, Reclamation must automatically undertake contract actions with respect to all projects in which conversions have occurred. However, the interpretations set forth in the preceding paragraphs can be reconciled with Draft D&S, PEC 09-01 because it applies to “[a]ll conversions of project water *that are subject to this D&S.*” *Id.* (emphasis added). Conversions of project water that precede the effective date of the proposed changes are not subject to Draft D&S, PEC 09-01—at least not until it is necessary to execute, renew, amend, or supplement the relevant contract. Additionally, it appears that contract renewal was not originally a trigger for applying new D&S requirements and simply renewing an existing contract should not necessitate the same treatment as a new or amended contract, which is concerning given the lack of clarity in applicability.

In sum, OWRC seeks clarification from Reclamation regarding whether past conversions require Reclamation to undertake contract actions and, if so, when Reclamation's obligation to undertake a contract action is triggered.

**C. Contract actions to formalize conversions should be structured so as not to require review under the National Environmental Policy Act (“NEPA”) or the Endangered Species Act (“ESA”) or to require Reclamation to update contract boilerplate.**

Assuming that Reclamation will finalize changes to the Reclamation Manual requiring the formalization of conversions through contract actions, OWRC urges Reclamation to structure the contract actions so as not to require review under NEPA or the ESA or to require an update to contract boilerplate, particularly where the contract action is undertaken for the sole purpose of formalizing a conversion. If NEPA and ESA review are required for every conversion, it will place a significant burden on OWRC members as well as Reclamation itself, and will likely result in water not being put to the most beneficial use. Where a contract action is undertaken for the sole purpose of formalizing a conversion, there will be no environmental impact and no harm to threatened or endangered species. This is because the formalization process will have no tangible effects. The sole purpose of the formalization process is to reclassify the type of use to which water is being applied. That is, the only real change after formalization would be the cost of the water provided for M&I uses. Further, a contract action to formalize conversions should not be used as an opportunity for Reclamation to update contract boilerplate and subject contract holders to additional requirements.

If Reclamation concludes that NEPA and ESA review are necessary, the review should take place in conjunction with the revisions to the Reclamation Manual, rather than at the time each conversion is undertaken.

**D. Reclamation should clarify that the proposed definition of “irrigation use” is limited to the water supply rate setting context and should not extend to other Reclamation contracts.**

Certain irrigation districts purchase power at reduced rates under agreements between Reclamation and various utilities. These agreements often refer to the use of the power for irrigation purposes, such as pumping. If the proposed changes to the definition of irrigation use were applicable to such agreements, the irrigation districts could be subject to arguments that they are no longer entitled to their favorable power rates for the pumping of water put to M&I use under the proposed definition.<sup>1</sup>

At a meeting between Reclamation and irrigation district managers in Hermiston, Oregon, Reclamation indicated that the proposed definitional changes were not intended to apply to district power contracts. However, OWRC is not aware of any specific written commitment

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<sup>1</sup> Because the proposed definitions “appl[y] prospectively to contracts executed, renewed, amended, or supplemented on or after [the Policy’s effective date],” the power rate issue would arise only upon the execution, renewal, amendment, or supplement of a contract for the purchase of power at reduced rates. Draft Policy PEC P05, § 2.

from Reclamation regarding this position. OWRC seeks written confirmation from Reclamation that the proposed definition of irrigation use is limited to the water supply rate setting context, along with the legal analysis supporting that position.

**E. Conclusion.**

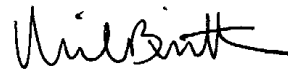
OWRC urges Reclamation to (1) broaden the proposed definition of irrigation use to include all irrigation uses, (2) clarify whether the proposed changes, if finalized, would require Reclamation to formalize conversions that preceded the effective date of those changes (and, if so, when); (3) explain whether contract actions can be structured such that NEPA and ESA review are not required and such that Reclamation will not update contract boilerplate; and (4) provide written confirmation that the proposed definition of irrigation use is limited to the water supply rate setting context. Because Reclamation's response to these comments is necessary to understand the potential effects of the proposed changes, OWRC also urges Reclamation to hold a third public comment period after Reclamation provides its response to the comments it receives during the current public comment period.

Changes to the D&S should be done judiciously, and in cooperation with the stakeholders most affected by the changes, not hastily implemented at the cost of the agricultural water community and the state, national, and international economies it supports.

Sincerely,



April Snell  
Interim Executive Director



Mike Britton,  
OWRC Federal Caucus Chair

On Behalf of the Following Reclamation Districts:

Hermiston Irrigation District  
Klamath Irrigation District  
Medford Irrigation District  
North Unit Irrigation District  
Ochoco Irrigation District  
Owyhee Irrigation District  
Ridgeview Irrigation District  
Rogue River Valley Irrigation District

Stanfield Irrigation District  
Talent Irrigation District  
The Dalles Irrigation District  
Tualatin Valley Irrigation District  
Vale Oregon Irrigation District  
West Extension Irrigation District  
Westland Irrigation District