

MOON LAKE WATER USERS ASSOCIATION

WATER RIGHTS
SALT LAKE

Roosevelt, Utah

April 5, 1995

Charles A. Calhoun, Regional Director
Upper Colorado Regional Office
Bureau of Reclamation
125 South State Street, Room 6107
Salt Lake City, Utah 84138-1102

Attn.: UC-433

Re: Revision of Draft Guidelines and Criteria for
Evaluating Water Conservation Plans

Dear Sir:

The Moon Lake Water Users Association ("MLWUA") respectfully submits the following comments to the proposed Revision of Draft Guidelines and Criteria for Evaluating Water Conservation Plans ("Draft Guidelines and Criteria") by the United States Department of the Interior, Bureau of Reclamation ("USBR") dated January 10, 1995. At the outset, it should be noted that MLWUA supports water conservation, provided that the methods employed are affordable and cost effective. However, MLWUA respectfully submits that the Draft Guidelines and Criteria would impose burdensome, onerous and expensive duties and responsibilities on those who are subject to Section 210 of the Reclamation Reform Act of 1982 ("RRA").

MLWUA is a nonprofit Utah corporation of Roosevelt, Utah and is governed by a board consisting of nine directors. Its stockholders consist of eight separate irrigation and canal companies which own varying shares of MLWUA stock. MLWUA entered into a repayment contract with the Secretary of the Interior on June 22, 1934, (Ilr-762), with three supplemental contracts in 1935 and 1939 to repay the construction costs of the Moon Lake Project. MLWUA repaid to the United States the total costs of construction, with the last payment made on March 21, 1984.

The Moon Lake Project consists of the Moon Lake Dam and Reservoir, with a capacity of approximately 36,000 acre-feet, the Midview Dam, Duchesne Feeder Canal and Yellowstone Feeder Canal. However, the Midview Dam and Duchesne Feeder Canal are now owned and operated by the Ute Indian Tribe and Bureau of Indian Affairs. The Moon Lake Project waters are released into the Lake Fork System and are diverted into the canals owned and operated by its member companies by the River Commissioner in accordance with the number of shares each owns without regard to the acres of land

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irrigated under each system. Approximately 75,000 acres of land receive supplemental Moon Lake Project water apportioned to the member companies, which in turn convey and distribute those waters to their respective shareholders. Thus, MLWUA does not deliver Moon Lake Project water to the ultimate irrigation water recipients and has no say in the apportionment of those waters among the stockholders of its member companies. Except for the Yellowstone Feeder Canal, the member companies own the remaining conveyance canals and likewise MLWUA has no say in the improvements of such canals.

As noted above, the Moon Lake Project is a "paid out" project, and as such is not subject to the water conservation provisions of RRA Section 210. This matter was decided by Robert A. Olson, Acting Commissioner, in his Memorandum to the Regional Directors dated January 5, 1985. Thus, Acting Commissioner Olson decided as follows:

In addition to our usual water service and repayment contracts we must consider application of the water conservation requirement to "paid out" projects and projects constructed under the Small Reclamation Projects Act of 1956 (SRPA). The water conservation plan requirement of the Reclamation Reform Act will not apply to either "paid out" projects or existing SRPA projects. However, water conservation plans will be required by the Commissioner's policy memorandum of July 17, 1979, for all SRPA projects for which contracts are signed after that date.

The foregoing is wholly consistent with RRA Section 213(a), which provides:

The ownership and full cost pricing limitations of this title and the ownership limitations provided in any other provision of Federal reclamation law shall not apply to lands in a district after the obligation of a district for the repayment of the construction costs of the project facilities used to make project water available for delivery to such lands shall have been discharged by a district (or by a person within the district pursuant to a contract existing on the date of enactment of this Act), by payment of periodic installments throughout a specified contract term, including individual or district accelerated payments where so provided in contracts existing on the date of enactment of this Act.

In spite of the foregoing, the Draft Guidelines arbitrarily provide that:

Districts that have discharged the obligation for repayment of the construction costs of project facilities are not exempt under the law from water conservation plan requirements. RRA only relieves a paid out district from the ownership and full cost pricing provisions of Reclamation law and not the water conservation provisions.

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It just doesn't make any sense to exempt "paid out" projects from the ownership and full cost pricing limitations and then require "paid out" projects to comply with the water conservation provisions of RRA Section 210.

After all, the interest of the United States in the waters developed by Federal Reclamation projects was well stated by the United States Supreme Court in the leading case of Ickes v. Fox, 300 U.S. 82 (1937) and has been affirmed and reaffirmed in Nebraska v. Wyoming, 325 U.S. 589 (1945); California v. United States, 438 U.S. 645, 98 (1978); and Nevada v. United States, 463 U.S. 110 (1983). Thus, in Nevada v. United States, the Court quoted from Ickes v. Fox, as follows:

Although the government diverted, stored and distributed the water, the contention of the petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation [of the water] was made not for the use of the government, but, under the Reclamation Act, for use of the landowners....The government was and remained simply a carrier and distributor of the water, with the right to receive the sums stipulated in the contract as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. . . . The government's "ownership" of the water right was at most nominal; the beneficial interests in the rights confirmed to the Government resided in the owners of the land within the Project (citations omitted).

It should be noted that the Moon Lake Project water rights issued by the State of Utah stand in the name of and are owned by MLWUA. Those water rights do not provide fish and wildlife uses.

RRA Section 210(a) directs the Secretary to encourage prudent and responsible water conservation measures in the operations of non-Federal recipients of irrigation water from Federal Reclamation projects, where such measures are shown to be economically feasible for such non-Federal recipients. Key to the foregoing is the direction to the Secretary to encourage, not mandate, water conservation measures and the requirement that such conservation measures must be economically feasible. Water conservation measures are only economically feasible when the saved water results in increased production to pay the costs of the system improvements. It is respectfully submitted that the Draft Guidelines when considered in light of the evaluation criteria for a water conservation plan to be considered adequate by Reclamation (page 20, par. 5) mandate, rather than encourage, which would impose financial obligations on the small water users associations, such as MLWUA, that would be unbearable. For example, under the Environmental Compliance requirements (pp. 12,13):

(1) NEPA compliance documentation will be integrated with the conservation plan and the requirement that "the district will be responsible for appropriate studies, analysis and document

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preparation for each level of NEPA compliance" (p. 12) is wholly unrealistic and would be costly and burdensome.

(2) Satisfactory compliance with NEPA for water conservation plans requires consideration and evaluation of adverse impacts upon wetlands (p.12) would impose evaluation responsibilities on MLWUA that would be costly and burdensome.

(3) Water conservation plans will require compliance with the National Historic Preservation Act (p. 12) which would impose research responsibilities on MLWUA that would be costly and burdensome.

(4) Each water conservation plan will be evaluated to assure compliance with the Endangered Species Act ("ESA") could have far reaching adverse impacts on the ability of MLWUA to operate the Moon Lake Project. MLWUA respectfully suggests that the Section 7 consultation requirements should have no application to the "paid out" Moon Lake Project.

The criteria for evaluating water conservation plans and the listed elements (page 17, par. (1)-(9)) as elaborated on pages 18 through 25, inclusive, are oppressive and burdensome. Of particular concern are the elements described on page 20 under par. 5(a) covering a water measurement and accounting system, and under (5)(b) covering a water pricing structure. The existing water measurement and accounting system employed by MLWUA provides for the release of Moon Lake Project water into the Lake Fork System at the call of each member company. The re-diversion of those waters into the member companies' canals is regulated by the River Commissioner. The member companies then apportion the waters among their respective shareholders on the basis of stock ownership. Water pricing in the context of paragraph (5)(b) to the member companies would be prohibited by the MLWUA Articles of Incorporation, which provide for the levying of assessments on the basis of the number of shares of MLWUA stock owned by the member companies. Likewise, such water pricing structure by the member companies to their respective shareholders would be prohibited by their respective Articles of Incorporation. The sum and substance of it all is that the suggested water pricing structure, as laudable as it might be, is simply unrealistic and impossible to accomplish.

RRA Section 210(b) provides in substance that each district that has entered into a repayment contract or water service contract, shall develop a water conservation plan which shall contain definite goals, appropriate water conservation measures and a time scheduled for meeting the water conservation objectives. Nothing in the foregoing section requires submission to or approval by Reclamation of the water conservation plans. As MLWUA understands it, Reclamation's approval process would constitute the major federal action which triggers the NEPA process. The Draft Guidelines and Criteria seem to recognize that the submission and approval provisions are not mandatory. For example, page 7 of the Draft Guidelines provide that all districts that have specific requirements for development of water

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conservation plans should submit such plans according the Guidelines and Criteria with the noted exceptions. Thus, the Draft Guidelines should clearly spell out that submission and approval are not mandatory and the consequences, if any, of non-submittal.

MLWUA concurs with the concept stated on page 7, that the decision as to the use of the conserved water remains with each district. However, MLWUA disagrees with the notion that Reclamation funding assistance will be generally directed to those investments where a portion of the saved water could be dedicated to environmental restoration and enhancement. Water conservation is a matter of survival with MLWUA, its member companies and their respective shareholders. From their perspective, the use of the conserved water for Moon Lake Project purposes is the most beneficial use that can be made of those waters. To give preferential funding assistance to environmental restoration and enhancement is discriminatory, unfair and downright wrong.

Respectfully submitted this 5 day of April, 1995.

MOON LAKE WATER USERS ASSOCIATION

By 
Its President

Unanimously approved this 5 day of April 1995, by the Board of Directors of the MLWUA.

By 
Its Secretary - Manager