November 16, 2018

Submitted Via Email: ttce@usbr.gov

Title Transfer
CE Coordinator, Bureau of Reclamation,
Mail Stop 84–53000, Denver Federal Center
Denver, CO 80523

RE: Comments on Proposal to Create Categorical Exclusion for Title Transfer
(Proposed Amendments to Departmental Manual – 516 DM 14)

To Whom it may Concern:

These comments are submitted in response to the Bureau of Reclamation’s (“Reclamation”) October 17, 2018 notice of proposed revisions and request for comments. Specifically, Reclamation seeks comments regarding a proposed revision to the Departmental Manual (“DM”) to establish “a new Categorical Exclusion (“CE”) for the transfer of title of certain projects and facilities from Reclamation to a qualifying non-Federal project entity” (the “CE Notice”).1 These comments are submitted on behalf of the Idaho Water Users Association (“IWUA”).

IWUA is a non-profit corporation formed in 1937. Originally named the Idaho State Reclamation Association, IWUA was subsequently renamed to reflect the broader-based mission of serving all water users of the State. IWUA represents canal companies, irrigation districts, water districts, ground water districts, municipal and public water suppliers, hydroelectric companies, aquaculture interests, agri-businesses, professional firms, and individuals throughout Idaho – all dedicated to the wise and efficient use of water. The purpose of IWUA is to promote, aid and assist the development, control, conservation, preservation and utilization of Idaho’s water resources.

I. Idaho’s Rich History of Title Transfer

When it comes to title transfer of Reclamation projects, Idaho has a rich history. In fact, one of the first title transfers of a Reclamation project involved the Burley Irrigation District in southern Idaho in 1998. Since that time, other successful title transfers in Idaho include Nampa & Meridian Irrigation District (2001), Fremont-Madison Irrigation District (2004), and American Falls Reservoir District #2 (2008). Each transfer was successful due, in large part, to the demonstrated ability by these entities to operate, maintain and manage their facilities in a highly professional and competent manner for several decades.

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1 83 FR 52503 (Oct. 17, 2018)
In addition, Pioneer Irrigation District, in southwest Idaho, is currently working through the title transfer process and the Lewiston Orchards Irrigation District in Lewiston, Idaho, will begin the title transfer process in the coming years. Finally, several irrigation districts throughout Idaho have expressed interest in title transfer – but have not yet engaged in the process due, in large part, to the time and expense involved.

Idaho is not alone in its experience with title transfer. Throughout the West, water users and the federal government have benefited from title transfer. Many of these transferred projects have been operating successfully in a post-title transfer environment for decades. As I have attended meetings with the National Water Resource Association (“NWRA”) and Family Farm Alliance, I am frequently approached by water users from throughout the western United States who have expressed their interest in future title transfers as well.

IWUA and its members are pleased to see Reclamation taking steps to streamline and expedite the title transfer process for “simple, uncomplicated projects.” The proposed rule will save both the federal government and entities involved significant time and resources and ensure continued local control and management of precious water resources.

II. Title Transfer is a Beneficial Process that Can be Improved

Title transfer is a process that can and does benefit the nation’s water user community. Reclamation characterizes the title transfer process as a “commitment to a Federal Government that works better and costs less.” “The transfer of title will divest Reclamation of the responsibility for the operation, maintenance, management, regulation of, and liability for the project and will provide the non-federal entity with greater autonomy and flexibility to manage the facilities to meet their current needs.” In fact, the CE Notice recognizes that title transfer “provides the non-federal entity with greater autonomy and flexibility to manage the facilities to meet their needs, in compliance with federal, state, and local laws and in conformance with contractual obligations.”

IWUA agrees with Reclamation: title transfer is a beneficial program. It enhances local control of local water resources. It reduces federal costs and liability associated with owning aging infrastructure. It allows operational decisions to be made in a timelier and more cost-effective manner. Finally, financing for maintenance and rehabilitation is more accessible.

Title transfer will allow water users to quickly and efficiently address issues as they arise – something that is rarely possible under federal ownership. For example, East Greenacres Irrigation District (“EGID”) is a Reclamation project located in Post Falls, Idaho. Post Falls, like many areas in Idaho, is experiencing significant population growth. At times, EGID’s pipelines cross through ground slated for development. Through negotiations with the developers, the

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2 83 FR at 52504.
4 *Id.*
5 83 FR at 52504.
pipelines are moved – however, the federal pipeline easements remain. In one such instance, an agreement to move a pipeline, and the ultimate moving of that pipeline, occurred nearly 10 years ago. Yet, the lots remain undeveloped because the federal easement remains on the property. In other words, even though the pipelines have been moved and no pipelines exist in the historical easement, a cloud remains on the title of those lots due to the existence of an unused easement. Although requests to remove that federal easement have been in place for nearly a decade, it remains on the property. Had EGID owned these facilities, it could easily and quickly vacate the easement, allowing the development to move forward.

Idaho’s rich history involving title transfer gives our water users a unique perspective on the current workings of the process. It is a complicated process. In fact, Reclamation’s checklist summarizing the information necessary to accomplish a title transfer is 8-pages long.6 There are clear opportunities for improvement to benefit the Federal Government and the water user entities.

Indeed, even though the benefits of title transfer are clear, the exorbitant time and expense required to accomplish a title transfer – due primarily to what we would consider to be excessive or unnecessary environmental review under NEPA – have become a deterrent for many water users. The process can take nearly a decade and ultimately requires an act of Congress to complete. This is no small feat! For example,

- The Burley Irrigation District Title Transfer took 8-years to accomplish.
- The Fremont-Madison Irrigation District Title Transfer took nearly 10-years and $300,000 to accomplish.
- The Nampa & Meridian Irrigation District Title Transfer took nearly 10-years and over $200,000 to accomplish. Importantly, however, the District was able to keep its costs down because it completed much of the analysis in-house.
- The Pioneer Irrigation District Title Transfer is a unique story. Pioneer previously began the Title Transfer process in 2006 – even paying its own engineers to complete the NEPA review. However, that process was halted due to some unrelated issues. The process began anew in 2015. The new process is benefited by the previously completed research and analysis, which has allowed for the process to be truncated. Still, however, it is expected that the process will take at least 4-years and cost nearly $200,000 – not including legal fees, any additional engineering that may be required and any efforts necessary to seek and obtain Congressional approval for the transfer.

The Reclamation-determined requirements for environmental reviews are lengthy and expensive. They can also take up significant time and effort of local Reclamation staff. For simple title transfers, where the projects will be transferred and ultimately continue operating in the same manner, the extensive NEPA process is an unnecessary expense and forces Reclamation to take on work that detracts from other more important duties and tasks.

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III. A Categorical Exclusion for the Title Transfer Will Improve the Process and Reduce Costs

Many title transfers involve nothing more than a change of ownership. For these simple transactions, the facilities will continue to operate in the same manner and for the same purpose as they historically operated. This is the case for each of the title transfers completed and contemplated in Idaho. Each of those entities continues to use the facilities they now own for water delivery. While it is true that some title transfers will be more complicated and will require additional review, that increased review is not necessary for many title transfers and only works to prevent transfers due to excessive time and expense.

The proposed CE would add a new paragraph “F” to the current list of categorical exclusions. It provides:

F. Title Transfer Activities

(1) “Transfer from Federal ownership of facilities and/or interest in lands to a qualifying entity where there are no competing demands for use of the facilities, where the facilities are not hydrologically integrated, where, at the time of transfer, there would be no planned change in land or water use, or in operation, or maintenance of the facilities and where the transfer would be consistent with the Secretary’s responsibilities, including but not limited to the protection of land and water resources held in trust for federally recognized Indian tribes and ensuring compliance with international treaties and interstate compacts.”

The NEPA CE includes a list of 8 considerations to determine whether a “non-federal entity would generally be eligible to be considered for the title transfer CE.”

IWUA appreciates the simplicity and clarity of the proposed language. Title transfers that meet the clear criteria outlined in the proposed language should not be subject to NEPA analysis.

One point does warrant further discussion. To qualify for the NEPA CE, the language states that the qualifying entity must ensure that “there would be no planned change in land or water use, or in operation, or maintenance of the facilities.” This has been the case with each of the Idaho title transfers – in that the entities now holding title continue to use the transferred facilities to deliver Reclamation water to Reclamation lands within Reclamation projects. Operations continue in the same manner as they were historically conducted. The transfers have saved Reclamation time and resources in not having to oversee or manage these projects that have been capably operated by the local irrigation entities. The transfers have also allowed the entities to use their facilities to assist the State of Idaho in important water conservation actions such as managed groundwater recharge.

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7 83 FR 52504 (italics in original).
8 83 FR 52504.
9 In this sense, it is not necessarily true that “transfer of title of a project or set of facilities will, in effect, sever Reclamation’s ties with that project or those conveyed facilities.” 83 FR 52504 (emphasis added).
It is true that title transfer divests Reclamation of ownership and responsibility relative to the conveyed facilities. The eligible entity will then be responsible for all decisions relating to the transferred facilities. However, it is not necessarily true that all “ties” with Reclamation are severed.

In addition, the continued operation and maintenance of some facilities will require continued access to project power generated at Reclamation facilities. This power, provided at cost-based contracted rates to Reclamation projects, is necessary for the continued viability of certain project. These projects require project power, even after a potential title transfer, in order to remain economically viable for the operations dependent on the water supply. In other words, project power is necessary to effectuate the delivery of water, consistent with the historical operations. This is the case with the Burley Irrigation District, for example, which continues to use project power for its operations – even though the facilities were transferred nearly 20-years ago.

Other entities, including A&B Irrigation District in southern Idaho, would not be able to consider title transfer without the ability to maintain project power use. A&B delivers both surface water and groundwater to 82,000 acres of prime farmland in Jerome and Minidoka Counties. This Reclamation project includes over 180 deep wells, two pumping plants on the Snake River, canals, turnouts and over 700 farming units. A&B’s contract with Reclamation provides that power generated at the Palisades power plant would be “set aside in perpetuity” for the benefit of A&B to provide the power “required for the operation of the pumping plants of the District.” Without project power, A&B’s assessments would nearly double – significantly impacting its irrigation customers’ operations (forcing some farmers out of business). As such, the operations of the A&B project following title transfer must include the right to use the continued use of project power.

For these reasons, IWUA and its members have worked with a broad range of stakeholders throughout the nation to resolve concerns about the use of project power for transferred facilities. Generally, there is agreement that project power may be used when the qualifying entity (1) has historically been responsible for a proportionate share of the operation and maintenance expenses for federal facilities that generate power used for the delivery of Reclamation project water; and (2) agrees to continue to be responsible for a proportionate share of operation, maintenance and capital costs for federal facilities that generate power used for delivery of Reclamation project water after title is conveyed.

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IWUA supports Reclamation’s efforts to streamline the title transfer process by creating a NEPA CE for simple transfers. We look forward to working with our local Reclamation offices to accomplish simple title transfers following adoption of the NEPA CE.

Sincerely,

Paul Arrington
Executive Director & General Counsel

cc: Senator James Risch
Senator Mike Crapo
Congressman Raul Labrador
Congressman Mike Simpson
Governor C.L. “Butch” Otter
Brenda Burman, Commissioner (USBR)
Lorri Gray, Regional Director (USBR, Pacific Northwest Region)