



National Association of Environmental Professionals

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November 16, 2018

Title Transfer CE Coordinator
Bureau of Reclamation
Mail Stop 84-53000
Denver Federal Center
Denver, CO 80225

The National Association of Environmental Professionals (NAEP) is an interdisciplinary organization dedicated to developing the highest standards of ethics and proficiency in the environmental professionals. NAEP represents approximately 5,000 members and affiliated environmental professionals working across the country in the public and private sectors. Throughout the last five decades, NAEP has worked in collaboration with the Council on Environmental Quality (CEQ) to identify best practices for the implementation of National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* NAEP members have extensive experience with developing and applying categorical exclusions (CatExs). We also have extensive experience in conducting evaluations to assess the appropriate level of environmental review for water projects in the western United States to support the decision-making process undertaken by Federal agencies, including the Bureau of Reclamation (Bureau). The comments provided in this letter reflect review undertaken by the NEPA Practice Group, a sanctioned committee of the NAEP.

The NAEP respects the history of the Bureau. The Bureau was given the authority and privilege to purchase, operate, and maintain land for the purpose of “reclaiming” land in order to undertake storage and irrigation projects and open up the American West. Federal funding supports 180 projects in 17 western states, providing agricultural, household and industrial water to about one-third of the West. The Bureau is also a major American generator of electricity, with 56 power plants on-line, generating 35 billion kilowatts. Many of these projects involved the use of eminent domain. With other projects, the Bureau has easements in perpetuity.

The NAEP has reviewed the listed environmental assessments used to support the proposed CatEx, and it is clear the title transfer, *per se*, is typically a minor action. The transfer is a simple exercise in paperwork, resulting in the federal government placing its trust—the public trust—and public resources in the hands of a non-federal entity.

It is understood that the transfer would include not just a facility, but in some cases, buried appurtenant infrastructure which could be located on private or federal, state, or other public property. Transfer divests the Bureau of all responsibility for the operation, maintenance, management, regulation of, and liability for the project.

NAEP offers 10 comments and clarifying questions in relation to the Bureau's proposal:

- (1) How will operations of the facilities be carried out in such a manner that the public interest is maintained?
- (2) How will trust resources (Indian and non-Indian) be maintained in a manner similar to that of the federal government?
- (3) How can a non-federal entity manage tribal trust resources?
- (4) Will the Bureau delegate federal authority in order to ensure proper management and protection of public trust resources?
- (5) Will the Bureau apply this CatEx in any large and complex reclamation projects such as the Federal Columbia River Power System, those that are part of the Northwest Power Act, as well as the Colorado River system and others?
- (6) In the West, the public trust doctrine may affect decisions regarding the allocation of Reclamation Project water. The public trust doctrine mandates that states have an affirmative duty to take the public trust into account in the planning and allocation of water resources and to protect public trust resources. While this doctrine has thus far applied only to state allocation of water resources, the doctrine may also apply to water use decisions of the federal government. (See, for example, Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis Law Review 269, 1980). How will the Public Trust Doctrine impact your decision to turn a public water project over to a private entity?
- (7) As an example, the Northwest Power Act requires that the Bureau manage and operate NPA projects in a way that is *"consistent with the purposes of this chapter and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated."* How would you ensure a non-federal entity complied? Would the Northwest Power Planning Council Program approve any applications of the new CatEx to projects in their purview? There are other examples in other states that must also be considered.
- (8) The Notice, as well as the EAs listed in the Notice as examples of the NEPA review of previous transfers, do not address several important topics listed. How will the project requirements be met for the following topics?
 - Illegal water deliveries, over-appropriation (e.g., the Umatilla Basin controversy)
 - Maintaining instream flow
 - Ensuring tribal trust
 - Re-allocation of water
 - Discretion in mitigation
 - Addressing damages to subject facilities caused by unforeseen circumstances (forces of nature, time)
 - Addressing damages downstream caused by subject facilities (dam failure, slope failure, flooding)
 - Congressional approval (all transfers require Congressional approval)
- (9) The Notice does not indicate what public noticing would be conducted under the proposed CatEx, nor is there any indication of transparency in the process of determining the applicability of the new exclusion. Note that the Department

of Energy uses a similar categorical exclusion and requires online posting of all applicable documentation supporting the use of the exclusion to facilitate transparency and public disclosure (see CatExs at 10 CFR 1021 Subpart D, Appendix B, B1.24 and B1.25; see posting requirement at 10 CFR 1021.410(e)).

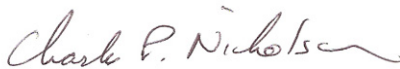
- (10) It is unclear in the Notice how the proposed CatEx would be able to evaluate the full impacts of the proposed land transfer, including indirect effects, reasonable alternatives to be evaluated, and/or cumulative effects. It is possible that establishing this CatEx would pave the way for more frequent implementation of these types of actions, and the cumulative impact of wide scale disposal of federal lands may not be known without a detailed analysis.

We encourage the Bureau to re-consider the drafting of this proposal. If, after considering the above comments, as well as those received from others, the Bureau determines that project title transfers are candidates for a CatEx, we strongly recommend that the Bureau issue a revised notice of proposed revisions to its NEPA procedures.

Thank you,



Marie C. Campbell
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