

April 15, 2004

**SOUTHEASTERN COLORADO WATER ACTIVITY ENTERPRISE
POLICY CONCERNING SALE OF
RETURN FLOWS FROM FRYINGPAN-ARKANSAS PROJECT WATER**

1. Pursuant to its Repayment Contract with the United States, the Southeastern Colorado Water Conservancy District ("SECWCD") through the Southeastern Colorado Water Activity Enterprise ("SECWAE") retains dominion and control over all Return Flows from Fryingpan-Arkansas Project water ("Fry-Ark Return Flows"). The purpose of this policy is to set forth a fair and orderly policy for the handling of sales of Fry-Ark Return Flows, consistent with the Allocation Principles and other policies of the SECWCD. This policy, and the terms herein, may be changed from time to time by the board of the SECWAE.

2. Fry-Ark Return Flows from Project water allocations to entities served thereby should be made available where physically possible (but not for resale outside the entity) on the basis of water which they acquire from the Project. The District's decreed Allocation Principles (§ 11) provide such a first right of refusal for cities and towns receiving Project water. This right has been extended by the SECWCD to all eligible entities receiving Project water by allocation, subject to the restrictions generally applicable to use of Fry-Ark Return Flows, to the extent such entities' reuse of their own return flows (directly or by exchange) is physically possible and can be administered.

Irrigation entities that receive Project water allocations may exercise this first right of refusal to repurchase Fry-Ark Return Flows resulting from their own Project water allocations, to the extent such return flows are initially unsold and then exchanged into storage by SECWCD. If the storage of such return flows prevents storage in Pueblo Reservoir pursuant to the Winter Water Storage Program ("WWSP") by eligible WWSP participants that lack their own storage facilities, then the first right of refusal to purchase any stored return flows remaining unsold shall go to such WWSP participants to the extent that their WWSP storage that year was prevented by such return flow storage.

3. Eligible entities as provided in the District's Water Allocation Policy that desire to purchase Fry-Ark Return Flows may apply each year, in writing, in accordance with this policy and the SECWCD Allocation Principles and Policies. (The Fountain Valley Authority shall submit a single application stating the amount requested by each of its member entities.)

4. Entities that have sold their primary water supply but are otherwise eligible for an allocation of Fryingpan-Arkansas Project water may purchase excess Fry-Ark Return Flows for well augmentation purposes. Sales of Fry-Ark Return Flows to entities that have sold their primary water supply will only be considered after all other requests have been satisfied.

5. Each applicant must state the amount of Fry-Ark Return Flows requested and describe all proposed uses in its application to purchase Fry-Ark Return Flows. If the request is for irrigation, the applicant must certify the number of acres to be irrigated by their wells. If the application is for a combination of municipal and irrigation, the application must list the amounts of Fry-Ark Return Flows requested for each type of use. Applicants are

required to submit any additional information regarding such use as requested by the SECWAE.

6. Any eligible applicant that wishes to exercise its first right of refusal in any year must notify the SECWAE of its intention to exercise such right in its Fry-Ark Return Flow application that year.
7. Applications for Fry-Ark Return Flows by eligible irrigation entities under their first right of refusal, as provided in ¶ 2 above, must be made by board Resolution of the eligible entity. Individual shareholders may not request Fry-Ark Return Flows under the first right of refusal. An irrigation entity that wishes to exercise its first right of refusal for a portion of its shareholders, will be sold Fry-Ark Return Flows only from deliveries of Project water to its own delivery system, and will be further limited to a pro-rata portion of the total Fry-Ark Return Flow available to the entity based on the percentage of shares held by those shareholders for whose use the entity is requesting Fry-Ark Return Flows.
8. Individuals who apply (either individually or as members of group plans) to purchase Fry-Ark Return Flows from the SECWAE who are also shareholders under irrigation entities that receive an allocation of Project water may not exercise the first right of refusal, but are entitled to an equitable share in the first sale of available Fry-Ark Return Flows.
9. Staff shall determine an applicant's eligible irrigated acres for Fry-Ark Return Flows in consultation with the Bureau of Reclamation. (4-15-04)
10. The SECWAE Allocation Committee will estimate the amount of Fry-Ark Return Flow water available for sale in a given year, and Fry-Ark Return Flows will be sold based on such estimate. The SECWAE cannot guarantee, however, a certain amount of Fry-Ark Return Flow water at a given time because the SECWAE does not control when or at what rate First-Use Project water will be delivered after allocations are made.
11. Return flows sold for augmentation of agricultural well depletions and lagged depletions created by pumping in the current plan year will be based upon the deliveries of agricultural Project water in the current plan year and all return flows including the delayed return flows from these deliveries. (3-18-04)
12. After payment to the SECWAE purchasers may, pursuant to a decreed plan for augmentation or upon approval by the Colorado State Engineer of their well augmentation or replacement plan and/or substitute supply plan, be permitted to use Fry-Ark Return Flows under the terms set by the SECWAE, and in accordance with the administration of the Division Engineer.
13. The purchaser of Fry-Ark Return Flows shall not resell, assign, lease, or trade Fry-Ark Return Flows without written consent of the SECWAE, except cities, towns, special districts and domestic water companies may resell Fry-Ark Return Flows purchased from the SECWAE within their service areas. Likewise, if the Fountain Valley Authority purchases Fry-Ark Project Return Flows, then it is entitled to sell, assign, lease, or trade such return flows to any member entity within the Fountain Valley Authority.
14. Fry-Ark Return Flow water shall not be used, sold, or disposed of outside the SECWCD.

15. Fry-Ark Return Flows purchased and used for well augmentation are considered to be used to extinction. Any Fry-Ark Return Flows purchased by a city, town, special district, the Fountain Valley Authority, or a domestic water company, without further payment, may be used to extinction by that entity pursuant to court decree. Any Fry-Ark Return Flows purchased, but not used to extinction, will return to the Arkansas River stream system after the purchaser's approved use, and are the property of the SECWCD. Purchasers shall not waste Fry-Ark Return Flows.
16. Failure to apply for Fry-Ark Return Flow in a given year does not prevent application in future years. Failure to exercise a right of first refusal in a given year does not prevent exercise in subsequent years.
17. A purchaser of Fry-Ark Return Flow shall bear transit losses and evaporation losses, if any, associated with the Fry-Ark Return Flows it purchases as assigned by the Division Engineer.
18. The submission of an application for Fry-Ark Return Flows constitutes the Applicant's agreement that (a) it is subject to and will comply with all applicable federal and state laws, including the Reclamation Reform Act of 1982 and the regulations thereunder, the SECWCD's decreed Allocation Principles, the SECWCD's Water Allocation Policy, the SECWAE's Policy Concerning Sale of Fry-Ark Return Flows from Project Water, relevant portions of the SECWCD's Contract with the United States, and the terms and conditions of the SECWAE's accompanying letter; (b) it will hold harmless, indemnify and defend the SECWCD and SECWAE from any liability, expense or damages which the SECWCD and SECWAE, their directors, agents and employees may suffer arising from any failure of the Applicant to so comply, including any assessment of administrative cost against the SECWCD or SECWAE pursuant to 43 C.F.R. § 426.24 (1995); and (c) it has no claims against the SECWCD or SECWAE for past provision of water.
19. The price and the terms of payment for the purchase and right to use Fry-Ark Return Flow are determined annually (or more frequently in its discretion) by the Board of Directors of the SECWAE.

SPECIAL PROVISIONS

- A. Pursuant to the SECWCD'S January 1989 Stipulation with Colorado Springs, Pueblo, and the Arkansas Valley Ditch Association in Case Nos. 84CW56 and 88CW43 (Water Division No. 2), except as allowed by decree of the Water Court in Case No. 01CW151, Fry-Ark Return Flows from agricultural irrigation use below Pueblo Reservoir currently may be purchased only for use downstream from the point(s) of accretion to the stream, and only for groundwater use or other uses furthering a congressionally authorized purpose of the Fryingpan-Arkansas Project which do not require a re-diversion from the surface flows of the Arkansas River. The 1989 Stipulation similarly restricts the use of unmeasured municipal Fry-Ark Return Flows from below Pueblo Reservoir, absent a new court decree.
- B. Subject to the limitations of the 1989 Stipulation regarding upstream exchange, the policy of SECWAE is that purchasers of Fry-Ark Return Flows may store Fry-Ark Return Flows in Project reservoirs in space allotted for their Project water. Fry-Ark Return Flows from trans-mountain Project water shall not be subject to spill from

Project reservoirs, and Fry-Ark Return Flows from east slope Project water shall be in the category of last to spill from Project reservoirs. Fry-Ark Return Flows purchased and stored by irrigation entities in Project space are subject to the 80%/20% water use rule in ¶ 8 of the SECWCD Water Allocation Policy, for which the percentages shall be applied to each entity's combined amount of Project water allocated and Fry-Ark Return Flows purchased and stored each year.

C. A purchaser of Fry-Ark Return Flows who has not previously obtained a decree for use of such return flows, by its application agrees to the following, and agrees to filing of a stipulation with these terms in any water court case involving Fry-Ark Return Flow waters purchased from the SECWAE:

The Southeastern Colorado Water Conservancy District and Applicant, _____, stipulate and agree to the following, which language shall be included in any decree entered in any water court case:

1. Purchase and use of Fryingpan-Arkansas Project water and purchase and use of Return Flows from Fryingpan-Arkansas Project water will be made consistent with the decrees and Allocation Principles of the Southeastern Colorado Water Conservancy District (as they may from time to time be amended), and such policies, procedures, contracts, charges, and terms as may be lawfully determined from time to time by the Southeastern Colorado Water Conservancy District in their discretion. The decree in this case does not give Applicants any rights of ownership or rights to purchase or receive allocation of Fryingpan-Arkansas Project water or Return Flows from Fryingpan-Arkansas Project water, but does not alter any existing right the Applicant may otherwise have.
2. The description of, reference to, or omission of description of or reference to, Fryingpan-Arkansas Project structures and the decrees of the Southeastern Colorado Water Conservancy District for the Fryingpan-Arkansas Project in the decree in this case does not in any way amend, limit, or act to the detriment of those decrees.
3. The use of Fryingpan-Arkansas Project facilities, including, but not limited to, storage in Fryingpan-Arkansas Project reservoirs and exchanges with or substitution for Fryingpan-Arkansas Project water and Return Flows therefrom will be made consistent with the decrees, Allocation Principles, policies, procedures, contracts, charges and terms as may be lawfully determined from time to time by the United States Bureau of Reclamation, or the Southeastern Colorado Water Conservancy District in their discretion. The decree in this case does not give Applicant any rights of ownership or right to use Fryingpan-Arkansas Project facilities, but does not alter any existing rights Applicant may otherwise have.
4. We acknowledge the Southeastern Colorado Water Conservancy District owns the Return Flows from Project water, and that the Southeastern Colorado Water Conservancy District through the Southeastern Colorado Water Activity Enterprise has maintained dominion and control over these Return Flows and has the right to sell these Return Flows. We acknowledge the Southeastern Colorado Water Conservancy District has not abandoned its rights to use or sell Return Flows from Project water. We agree not to assert the Southeastern Colorado Water Conservancy District or the Southeastern

Colorado Water Activity Enterprise has lost dominion or control over, or has abandoned or surrendered, the Return Flows from Project water.