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Issue Paper #: 4

Prepared By: Infrastructure Branch Director

Topic: PNP Ditch Eligibility

Public Assistance Program

FEMA-4145-DR-CO

ISSUE: The purpose of this memorandum is to provide guidance to PA field staff as to the eligibility of PNP ditch-irrigation companies impacted by the declared disaster event.

POLICY: Eligible PNP ditch-irrigation-reservoir companies are:

Irrigation facility means those facilities that provide water for essential services of a governmental nature to the general public. Irrigation facilities include water for fire suppression, generating and supplying electricity, and drinking water supply; they do not include water for agricultural purposes (44 CFR §206.221(e)(3)).

The Public Assistance Guide FEMA 322, June 2007 pg.18 also defines irrigation facilities, and considers them as a PNP Utility (which is considered critical PNP):

PNP Utility: A utility includes buildings, structures, or systems, even if not contiguous, of energy, communication, water supply, sewage collection and treatment, or other similar public service facilities. This includes PNP irrigation facilities that provide water for essential services of a governmental nature. Eligible irrigation facilities include those that provide water for fire suppression, generating electricity, and drinking water supply. They do not include facilities that provide water for agricultural purposes. When an irrigation facility element has mixed purposes (e.g., a pump), eligible damages may include the percentage of damages related to eligible purposes, i.e., pro-rated damages.

LEGAL ADVICE: Each ditch company project must be looked at carefully. We can use the percentage of shares held by eligible applicants to determine eligibility of the Federal cost share. The water shares held by cities, municipalities, and other governmental and quasi-governmental entities are normally eligible and the others used for agriculture or commercial ventures are not eligible. The shares held by eligible applicants can be used as a multiplier and prorate Federal share if the project is not to alleviate a compromise of the whole system. Commercial water use, to include generating power for a for-profit company (Xcel) rather than a civic power company (Hometown Power and Light, as an example), should be excluded while civic organizations (water, sewer, other ditch companies, etc.) should be included based on the nature of the owner and the owner asserted use of the resource.

Projects that involve the head gate structure which is necessary to feed the ditch facility may be considered eligible at 100% of their eligible costs (subject to the federal cost share).

GUIDANCE: Based on the advice by legal counsel, the following steps are taken to determine the eligibility of irrigation facilities (these first 4 steps will have been done during review of an applicant's Request for Public Assistance):

- 1) Confirm that the ditch company has status as Section 501(c)(12) of the Internal Revenue Code. The IRS does not issue certificates for 501(c)(12) companies. However, the State of Colorado does issue a certificate to ditch companies that are PNP's under State law. Please secure a copy of this certificate and assurance from the company that they filed taxes with the IRS as a 501(c)(12) company in the past.
- 2) Obtain a copy of the company's Articles of Incorporation and/or bylaws.
- 3) Additionally, request a list of shareholders, the amount of shares each holds and the total amount of shares.
- 4) With this documentation, The JFO will review the shareholders list and determine how many shares are owned by cities, municipalities, and other governmental and quasi-governmental entities and determine a percentage of eligible shares. Individual shares, shares for farms and private commercial companies are determined ineligible. A list of all approved ditch company RPA's is maintained by the JFO and is provided as an attachment to this guidance. The list will be updated as necessary
- 5) **The project specialist should inspect all damages sustained to the ditch, write up a detailed damage description for each site to include dimensions, quantities, GPS locations, photos, etc., scope of work consistent with the damage description, and a breakdown of cost items. Then the percentage of eligible shares should be applied to the total damage amount for the project worksheet. If a head gate or other primary control structure is damaged, please contact this office for further guidance on application of the pro rata allocation.**