

# **4 IFR PROCEDURES 4**

## **COMPENSATION AND MITIGATION**

## **4.1 OBJECTIVES**

- To set out procedures for assessing compensation to affected communities according to the guidelines provided in the Policy, and for establishing effective and timely delivery mechanisms;
- To set out procedures and structures for informing, consulting with and involving affected communities in the preparation, implementation and monitoring of the arrangements for their compensation.

## **4.2 PRINCIPLES OF COMPENSATION PROCESS**

### **4.2.1 Application of Compensation**

Communities/ villages located along downstream river reaches which were predicted by the IFR studies (LHDA report series 648 and 678) to suffer resource losses (due to flow related changes in the rivers) above Minimum Degradation levels of impact, will be eligible immediately to receive compensation for these losses. This applies to IFR reaches 1, 2, 3, 7 and 8. The losses may include firewood and construction timber, fish, wild vegetables, medicinal plant resources and animal forage

In reaches where Minimum Degradation levels of impact were predicted, due to the low levels of impact predicted and the high degree of uncertainty associated with these predicted changes, the LHDA will require that associated resource losses be demonstrated before any compensation payment is made in these reaches. This applies to IFR reaches 4, 5 and 6 on the Senqu River.

This does not preclude other villages/ communities that were not identified in the IFR studies, from lodging claims for compensation. Such claims, if found to be valid, would be met.

### **4.2.2 Compensation for Resource Losses**

#### **4.2.2.1 Calculation of Compensation: Proximal Reaches**

Proximal reaches comprise river reaches 1, 2, 3, 7 and 8.

In general, compensation due will be calculated as the Present Value (2003 value) of the annual loss per river reach (as estimated in the IFR study), phased in over 8 years (as per the predictions of the IFR study), and capitalized at a discount rate of 8%, in perpetuity (defined as 50 years). Adjustments in the phasing-in period have been made for reaches 1, 2, and 3 to account for losses potentially incurred in the period that has elapsed since impoundment of the respective structures affecting those reaches.

Details of the calculations are provided in Appendix 4.1.

Compensation is calculated based on the IFR study predictions of total resource losses per reach, allocated to communities on the basis of the number of households in each community, ranging from high, medium to low impact, depending on the degree of access to resources in the riparian zone. To facilitate the delivery of compensation, communities will be grouped into clusters of communities that will decide on the use to which compensation will be put and establish institutions to manage the funds disbursed.

#### **4.2.2.2 Cash Payments – Proximal Reaches**

Compensation will be lump sum, cash payments by LHDA into community trust fund accounts, to be used under agreed conditions by the communities for their own resource replacement and/or other economic or community development programs.

At the conclusion of consultations on the payment procedure, the community will be mobilised into a formal structure (a Local Legal Entity (LLE)) in preparation for the receipt of the cash payment, and a community trust account will be set up by the LLE, in accordance with the laws of Lesotho.

There will be two payments:

- the first payment will be the Present Value of the resource losses for a period of ten years from the date of effectiveness of the Policy (2003) adjusted to take account of losses between impoundment and 2003 (*for details of the calculation, see Appendix 4.1*);
- the second and final payment will comprise the balance of compensation owing for the 50 year period, as calculated in 2003, less the first payment, and escalated to 2013 values, taking into consideration the findings of the 10-year review of Policy implementation.

#### **4.2.2.3 Compensation Payments – Distal Reaches**

For distal reaches (river reaches 4, 5 and 6 on the Senqu River) up to the border with South Africa, LHDA shall provide required funds from the contingency established in the annual operation budget to cover the required compensation/mitigation in these reaches should resource losses be found to occur.

The basis for the fund will be the estimates of resource loss values in these river reaches, as estimated in the IFR studies, adjusted through monitoring results to take account of discrepancies in the estimates.

Further procedures relating to impact verification and compensation in the distal reaches are laid out under 4.2.5.

#### **4.2.2.4 Compensation/Mitigation for Impacts other than Resource Losses**

The IFR study has shown that, while predictions of losses focus on the few identified key resources, the extent of potential impacts spreads much wider. The Adaptive Management System adopted in the IFR Policy involves affected communities and other stakeholders in ongoing assessment of downstream impacts, and makes provision for management to address new issues not identified in the IFR studies. LHDA has contingent liability under the Treaty and the IFR Policy to monitor all project impacts.

In addition, recognising that losses of non-direct value (i.e. intangibles) have arisen from the Project, LHDA will study the extent of these losses (in the context of other Project losses and benefits) and will identify offset and other options for further development, as was done in the case of the Maluti Minnow.

#### **4.2.2.5 Technical Assistance**

Cash compensation payments will be complemented by technical assistance, to assist communities in developing their own resource replacement programmes, should they so desire. Technical assistance will enable communities to make informed choices as to different options, to benefit from design, advice and to manage the implementation process.

#### **4.2.2.6 Resource Replacement Programmes**

If groups of communities should request LHDA to help them implement specific resource replacement programmes, LHDA will consider each request on its own merits. The prerequisites for agreement are that the programmes:

- a) do not exceed the value of the community compensation payments;
- b) are economically and technically feasible, and
- c) the overall management costs do not exceed 25% of the programme (technical implementation) costs.

In the event that such resource replacement programmes are developed, LHDA shall act as an agent for the community trust in contracting services from and disbursing funds to agencies executing components or all of the programme. LHDA would be responsible for appointing a project manager, who would keep detailed records of all transactions and expenditures relating to programme implementation and would provide, to the relevant community trusts, an annual report on disbursements and achievements.

### **4.2.3 Mitigation of Public and Animal Health Impacts**

Monies designated for the mitigation of public and animal health impacts, as determined in the IFR study, will be divided proportionately in a similar manner amongst communities, and will be paid out as part of the lump sum payments to community trust accounts (see appendix 4.1).

#### 4.2.4 Compensation Implementation Plan in Proximal Reaches

LHDA shall carry out the compensation process in accordance with this Compensation Implementation Plan and Programme. In establishing these details, LHDA has taken account of its experience with upstream community compensation.

##### 4.2.4.1 Step 1: Establishment of Downstream Compensation Dedicated Task Team

A Downstream Compensation Dedicated Task Team (DCDTT) will be established that will be responsible for all aspects of the downstream compensation process. [This has commenced, with the mobilisation of a team of 8 persons to undertake initial community consultation (see Step 2)]

LHDA will use its upstream experience to determine how large a team will be required to complete the compensation process within a reasonable timeframe (LHDA's target is two years).

To ensure compliance with LHDA's Treaty obligations, the DCDTT will be pro-active in the compensation process.

##### 4.2.4.2 Step 2: First Round Community Consultation

Community consultation will be undertaken according to a systematic plan, in reaches 2, 1, 3, 7 and 8, in that order.

The DCDTT will initiate consultation with each community. The first round of communication [which was completed in reaches 1 and 2 by the end of 2002, and is being completed in reaches 7 and 8 during April and May 2003] makes contact, introduces communities to the concepts of instream flow requirements, the results of the IFR studies, the policy development process and concepts relating to compensation.

##### 4.2.4.3 Step 3: Detailed Preparation for Establishment of Local Legal Entities

At the same time as the initial consultation is occurring, LHDA shall verify data on the Population at Risk and develop a detailed plan for the LLE structures. For logistical and programming reasons LHDA will seek to minimise the number of LLEs established, while ensuring that the clustering of communities into LLEs reflects spatial, community affinity and political relationships on the ground. Community representation as expressed through traditional authority and local government structures is presently in a state of flux in Lesotho. A diagrammatic outline of potential relationships between the LLEs and interactions with other key stakeholders is shown below. This is not intended to be prescriptive, but is a potential model on which discussions with communities and local government can be based.



**Figure 4.1 : Potential model for interactions between key stakeholders in downstream compensation**

The research and planning process leading to the formation of LLEs will comprise:

- For each IFR river reach, drawing up accurate maps, showing the 5 km/ watershed boundary corridor and confirming the location and names of villages and settlements within the corridor [*Where the 5 km corridor crosses over into another watershed, the narrower watershed boundary shall be deemed to be the boundary of the affected population (the PAR), because river use is correlated with location in the watershed*].
- Map Area Chief jurisdictions;
- Map Community Council jurisdictions
- Deciding on marginal cases, that is, to include or exclude villages or towns in the list of communities to be compensated when they straddle the boundary of the PAR corridor;
- Enumerate the number of households in each community/ village;
- Group communities as members of potential LLEs, and draw up a list of potential LLEs [In no case shall an LLE comprise less than an entire co-residential community]

#### **4.2.4.4 Step 4: Establishment of Local Legal Entities**

At this stage, the mobilization of communities into formal groups in preparation for the establishment of Local Legal Entities (LLEs) and trust accounts, begins. This process will comprise:

- Detailed explanation and discussion of the compensation procedures;
- Confirmation by the communities of the acceptability of the proposed clustering for the formation of the LLE;
- Organizational development training with the community, so that they understand the requirements for LLE functions, criteria for candidate selection for the officers of the LLE, drawing up the LLE constitution, and legal requirements for the establishment and functioning of Community Trust accounts. Basic bookkeeping and account management skills will be included, as well as committee and trustee functions and management. Information will also be provided on the possible uses of the compensation, and on the technical assistance that will be available to communities to help them decide on projects and undertake their implementation;
- Nomination by the community or group of communities comprising the LLE, of candidates for the office bearers of their LLE, and voting in of office bearers;
- Drawing up the constitution and by-laws of the LLE; this shall be based on a draft provided by LHDA, but agreed with the candidate officers before registration of the LLE;

The LLE is then registered as a legal entity; this completes the process of its formation.

#### **4.2.4.5 Formalisation of Relationship between LLE and LHDA**

Following this is the signing of the Memorandum of Understanding (MOU), which will govern the relationship between the LLE and LHDA, and which will define the conditions attached to the disbursement of compensation funds, including the kinds of projects that are eligible.

LHDA shall draft a standard MOU as a basis for negotiation with all LLEs.

The Draft MOU will be workshopped with the elected officers of the LLE for each community or group of communities. Once agreement is reached, it will be approved by the LHDA and the LLE.

LHDA shall maintain a file for each LLE which shall contain copies of all legal documents and correspondence pertaining to the establishment and functioning of the LLE and its trust account.

#### **4.2.4.6 Step 5: Payment of First 10-year Tranche**

The payment of the first ten-year tranche of compensation monies into the Community Trust account will then proceed. Notification in writing, including a copy of the deposit slip, shall be sent to the LLE immediately thereafter.

The LLE shall acknowledge receipt of this confirmation, also in writing. LHDA shall send out an acknowledgement template, which has only to be signed by the LLE.

LHDA shall maintain a monthly record of payments made to and acknowledgements of receipt from the LLEs. Copies of the notification letters and signed acknowledgements shall be kept in each LLE file.

#### **4.2.4.7 Project Design and Execution**

To assist communities in utilizing the funds at their disposal for development projects, LHDA is committed to providing technical assistance. To implement this commitment, a Downstream Technical Assistance Service Unit (DTASU) shall be established (in LHDA or outsourced). The DTASU will benefit from the experience of the FOBs and will liaise closely with them.

The Unit is being established not to undertake development itself, but to facilitate the roll-out of community development projects made possible by access to the IFR compensation funds.

The purpose of the DTASU is to facilitate access to relevant information and service providers, to assist communities to decide how best to spend their money, and to assist in the monitoring and evaluation of trust fund expenditures.

The DTASU will consist of sufficient personnel to permit regular contact with affected LLEs and be strategically located and equipped to facilitate access by communities to its services, and its access to communities.

Criteria to be applied in the selection of personnel for the Unit, or selection of the contractor, include professional skills in the management of development projects, technical expertise in resource replacement projects (eg. Social forestry, agricultural production, fish farming) and/or engineering and business management skills.

The contracts of DTASU personnel or contractors shall be performance-based contracts, in which contract renewal is contingent on performance targets being met.

The Unit shall keep detailed records, updated monthly, of all community interactions and other related activities. The Unit shall annually review and evaluate its performance, producing an annual report which details its achievements against targets. The annual report shall also include a review of trust fund expenditures by communities. It shall include relevant problems and recommendations for improvements.

#### **4.2.4.8 Payment of Second Tranche**

The monitoring results will influence the calculation of each community's 2<sup>nd</sup> tranche award.

Should the audit show that a community had been undercompensated under the 1<sup>st</sup> tranche, the amount underpaid will be added to that community's 2<sup>nd</sup> tranche payment.

Should the audit show that a community had been overcompensated under the 1<sup>st</sup> tranche, that community would not be asked to repay the overpayment, nor would such overpayment be deducted from the 2<sup>nd</sup> tranche award.

#### **4.2.5 Distal Reaches**

Given the requirement to establish the manifestation of impacts in distal reaches, some time will elapse before compensation procedures in these reaches take place, if at all. LHDA has therefore not planned in detail how the process will work in distal reaches. Preference will be given to a process that involves community representatives, as and when they may be established in terms of the new local government Act.

LHDA deems it prudent to take advantage of the time lag to allow local government structures to be formed and empowered, since the situation is currently in a state of flux. Payment of compensation monies to the distal reaches will almost certainly be made through public, representative bodies, and not through the establishment of LLEs. Memoranda of Understanding will be established between the LHDA and the representative local government structures, to control the uses of the funds paid out.

LHDA shall be responsible for the monitoring required to establish the occurrence of impacts. IFR monitoring of biophysical parameters (Procedures 3) will be the means by which flow related impacts in these reaches will be tracked, and independent review of monitoring results will be conducted annually.

Should monitoring show resource losses to be manifest, an instruction will be given immediately to the DCDTT to begin preparations for payment from the contingency fund to these areas. The DCDTT shall within six (6) months of this instruction draw up a programme for compensation, and shall pay out the first 10-year tranche within a year of approval of the programme by the Project Authorities.

#### **4.2.6 Review**

Communities will have the right to request a review of their compensation allocation, based on losses that may have arisen that were not taken into account in the original allocation. The LHDA Conflict Resolution Policy procedures will be followed in resolving such situations.

#### **4.2.7 Trust Account Monitoring**

LHDA shall annually conduct a review of every trust account's transactions and expenditure. Where suspicions of irregularities arise, LHDA may call for a formal audit.

## **APPENDIX 4.1**

### **METHOD FOR CALCULATING COMPENSATION**

The lump sum compensation amount is calculated as the annual losses predicted to accrue to communities, projected over 50 years. To take account of changes in the value of money over such a time period, the Present Value of annual loss values for 50 years per reach (as estimated in Contract 678 (Table E.2, 678-F-002 Section 4, page E-3)) is calculated, that is, the annual losses are capitalised, at a discount rate of 8%, for a period of 50 years. This gives the total lump sum per proximal reach as at 1 January 2003.

Where losses have been incurred prior to 1 January 2003 (due date) e.g. reaches 1, 2 and 3 due to earlier impoundment dates, the losses for these years (i.e. losses prior to 2003) have been aggregated and included as lumpsum in year 2003 for the respective reaches. To maintain the 50 year compensation period for all reaches, the annual amounts in respect of the losses prior to 2003 have been offset (deducted from) amounts due at the end of the 50 year period for each of the respective reaches. (See Phasing-in for reaches 1, 2 and 3 below).

The division of this lump sum amongst communities within the reach will be based on the number of households in each community, the clustering of communities in the LLEs and the location of communities.

The spreadsheet overleaf displays the calculation for the proximal reaches, reaches 1, 2, 3, 7 and 8. The assumptions used in the calculations are listed below:

- Base date for calculation and due date for initial payments: 01 January 2003
- Period: As defined in the IFR Policy (50 years)
- Discount rate: As defined in the IFR Policy (8%)
- Escalation rate: 7.5% (the resource loss values were reported as 1999 values; these have to be escalated to 2003 values)
- Public and animal health mitigation costs have been incorporated into the calculations, in the proportions shown in the spreadsheet.
- The downstream flow scenarios used to project the annual resource loss values per reach are shown in the first box on the left of the spreadsheet.
- The phasing-in of impacts is reflected in the percentage losses assumed to occur over an 8-year phase-in period, as shown in the second box on the left-hand side of the spreadsheet. To take account of differing impoundment dates affecting reaches 1, 2 and 3, the following adjustments in the phasing-in have been made:
  - ◆ Reach 1: Phasing in period reduced to 5 years; Matsoku Weir was commissioned in 2001, therefore 2-year period already lapsed. The annual losses for the 2-year lapsed period have been included as a lumpsum in year 2003. The amount due in years 2051 and 2052 have been reduced accordingly.
  - ◆ Reach 2: No phase-in: The annual losses since impoundment (commenced 1996), of 7-year lapsed period have been included as a lumpsum in year 2003. The amounts due from 2046 to 2052 have been reduced accordingly.;
  - ◆ Reach 3: Phasing in period reduced to 5 years. 100% of Matsoku was still flowing until 2001. Therefore, 2-year period already lapsed. As is the case for Reach 1 the annual losses for the 2 year lapsed period have been included as a lumpsum in year 2003. The amounts due in year 2051 and 2052 have been reduced accordingly.

The first tranche payment (for the first 10-year period) per reach is shown, as is the remaining 40-year tranche. The 2003 Present Value rate will be escalated by the inflation rate when paid out in 2014, as adjusted according to the audit results at that time