

DRAFT RECLAMATION MANUAL RELEASE

Comments on this draft release must be submitted to Michael Pulskamp at mpulskamp@usbr.gov by 5 PM MDT, March 28, 2014.

Background and Purpose of the Following Draft Directive and Standard (D&S)

The attached Temporary Reclamation Manual Release (TRMR) D&S (FAC TRMR-61) is a revision to existing Reclamation Manual release, *FAC 04-08, Lease of Power Privilege (LOPP) Processes, Responsibilities, Timelines, and Charges*. FAC 04-08 has been revised to incorporate new LOPP process requirements established by Public Law 113-24 (enacted August 9, 2013).

The goal of providing stakeholders the opportunity to comment on the TRMR D&S is to enhance common understanding of how these new requirements were incorporated into the LOPP process. This TRMR is intended to benefit Reclamation by providing consistent procedures and timeframes for hydropower under a LOPP.

See the following pages for the TRMR D&S.

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Subject:	Lease of Power Privilege (LOPP) Processes, Responsibilities, Timelines, and Charges
Purpose:	Establish the process requirements and charges associated with development of hydropower at a Bureau of Reclamation facility where Reclamation has the authority for power development. The benefits of this Directive and Standard (D&S) are improved internal and external communication, efficiency, and transparency of LOPP requirements.
Authority:	Reclamation Act of 1902 (Act of June 17, 1902, 32 Stat. 388); the Town Sites and Power Development Act of 1906 (Act of April 16, 1906, ch. 1631, 34 Stat. 116); the Reclamation Project Act of 1939 (Act of August 4, 1939, ch. 418, 53 Stat. 1187) as amended; and other applicable laws, Executive Orders, judicial decisions, policies, regulations, and acts relating to individual dams or projects.
Approving Official:	Deputy Commissioner - Operations
Contact:	Power Resources Office, 86-51000

- 1. Introduction.** A LOPP is an arrangement given to a non-Federal entity to use a Reclamation facility for electric power generation consistent with Reclamation project purposes. A LOPP project must not impair the efficiency of Reclamation generated power or water deliveries, jeopardize public safety, or negatively affect any other Reclamation project purposes. The terms and conditions for the use of any Reclamation-owned facilities and lands related to the LOPP project will be addressed in the LOPP. A LOPP is used when Reclamation has authority to develop power on any or all features of a Federal project. This authority is based on the Town Sites and Power Development Act of 1906, the Reclamation Project Act of 1939, and project-specific statutes. The Town Sites and Power Development Act of 1906 authorized the Secretary of the Department of the Interior to lease surplus power or power privileges. The Reclamation Project Act of 1939, Section 9(c), as amended, authorizes a maximum term of 40 years for a LOPP, gives the first opportunity to enter into a LOPP at Reclamation conduits to irrigation districts and water users associations operating or receiving water from such conduits, and gives preference to municipalities and other public corporations or agencies and cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 and any amendments thereof. Section 9(c) also gives Reclamation the authority to collect specific charges for a LOPP.
- 2. Applicability.** This D&S applies to all Reclamation employees that work on LOPP activities, and is applicable to any LOPP project where a solicitation for a LOPP project is issued after the release of this D&S. This D&S does not apply to activities necessary for

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Federal development of a powerplant at a Reclamation site. If the Regional Director determines that it is in the best interest of Reclamation to investigate Federal development of the site, the timeframes in this D&S do not apply.

3. **Project-Specific Authorities Control.** LOPP processes may involve projects or facilities that are subject to project-specific statutes, regulations, judicial decisions, existing contracts, or other authorities. These specific authorities will control the LOPP process if there is a conflict with this D&S.
4. **Definitions.**
 - A. **Conduit.** Any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity or conveyance of water over or through a dam, its abutments, or foundation via existing or proposed conveyance features.
 - B. **Federal Energy Regulatory Commission (FERC) License.** A legal authorization issued by FERC to an entity authorizing the construction and operation of a hydroelectric project for a specified term, typically 30-50 years. Under the November 6, 1992, Memorandum of Understanding (1992 MOU) (Appendix A) between Reclamation and FERC, FERC licenses are issued at Reclamation facilities where power development was not authorized from project-specific statutes, Congressional reports, and other documents associated with those statutes.
 - C. **Formal Request for Development.** An official letter to the Regional Director from a potential non-Federal developer requesting that the LOPP process be initiated at a site or sites.
 - D. **Irrigation District.** The term Irrigation District means any irrigation, water conservation or conservancy, multicounty water conservation or conservancy district, or any separate public entity composed of two or more such districts and jointly exercising powers of its member districts.
 - E. **Lessee.** Any entity issued a LOPP.
 - F. **LOPP.** A LOPP is a contractual authorization issued by Reclamation to a non-Federal entity to use a Reclamation facility for electric power generation consistent with Reclamation project purposes.
 - G. **LOPP Lead.** The Reclamation employee that manages the Preliminary Lease and LOPP as determined by the Regional Power Manager or Area Office Manager.

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- H. **Preference Entity.** Municipalities and other public corporations or agencies, and also cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 and any amendments thereof.
 - I. **Preliminary Lease.** An agreement between Reclamation and the Preliminary Lessee that outlines the responsibilities of Reclamation and the Preliminary Lessee during the negotiation of the LOPP, and directs that the potential Lessee must enter into a cost recovery agreement to provide advance funding to Reclamation before Reclamation incurs any costs for work related to the Preliminary Lease or LOPP. A Preliminary Lease is non-transferrable and does not guarantee that a LOPP will ultimately be awarded.
 - J. **Preliminary Lessee.** An entity issued a Preliminary Lease.
 - K. **Renewable Energy Certificate (REC).** A verifiable certificate laying claim to and accounting for the associated attributes of generation from units that qualify as renewable generation under state regulatory requirements (such as Renewable Portfolio Standards) and in voluntary market programs.
 - L. **Reserved Work.** Those facilities owned by Reclamation where Reclamation has retained responsibility for carrying out operation and maintenance activities.
 - M. **Small Conduit Hydropower.** A hydropower plant constructed at a conduit with the capability of producing 5 megawatts or less of electric capacity.
 - N. **Transferred Work.** A Reclamation project facility where the operation and maintenance (O&M) of that facility is carried out by a non-Federal entity under the provisions of a formal O&M transfer contract.
 - O. **Water Users Association.** An organization that has a contract with Reclamation for the use of Reclamation project water.
5. **Responsibilities.**
- A. **Regional Directors.** Regional Directors, or their designees, are responsible for:
 - (1) notifying the Power Resources Office and the Dam Safety Office of a Formal Request for Development;
 - (2) determining jurisdiction for hydropower development no later than 30 calendar days after receipt of a Formal Request for Development;

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- (3) obtaining concurrence from the Senior Advisor, Hydropower, on jurisdiction;
- (4) notifying the irrigation district or water users association operating the applicable transferred conduit by letter within 14 calendar days after receiving the request to develop at a transferred conduit;
- (5) notifying all irrigation district(s) and/or water users association(s) receiving water from the applicable reserved conduit by letter within 14 days of receiving the request to develop hydropower at a reserved conduit;
- (6) contacting their power and water stakeholders and power marketing administration (PMA) to coordinate a meeting to determine interest in funding Federal development of the powerplant prior to the solicitation of any LOPP project potentially larger than 1 MW;
- (7) ensuring that the processes outlined below are carried out in the defined timeframes;
- (8) making the final determination on what entity will be awarded a Preliminary Lease;
- (9) sending the official notification of selection of the Preliminary Lessee no later than 7 calendar days after selection;
- (10) resolving requests for extensions of the timeframes related to the solicitation process and development under a Preliminary Lease and/or LOPP that are outlined in this D&S;
- (11) ensuring National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), Endangered Species Act (ESA), and other statutory compliance;
- (12) ensuring appropriate Tribal consultation for applicable projects;
- (13) notifying the Senior Advisor, Hydropower, regarding NEPA approach pursuant to Paragraph 9.C.(2) of this D&S;
- (14) resolving public safety, security, and O&M recommendations concerning the LOPP project's impact to Reclamation facilities;
- (15) reviewing and signing the LOPP upon concurrence from the Senior Advisor, Hydropower;

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- (16) establishing a maximum timeframe for construction; and
 - (17) coordinating a meeting with their power and water stakeholders and PMA to determine the interest in a Federal purchase of the LOPP facilities pursuant to Paragraph 9.D.(9).
- B. **Senior Advisor, Hydropower.** The Senior Advisor, Hydropower, or his or her designee, is responsible for:
- (1) overseeing, reviewing, and revising Reclamation's LOPP D&S and processes;
 - (2) coordinating with Regional Directors and FERC regarding jurisdictional questions and issues;
 - (3) setting up an annual meeting with the regions, the Power Resources Office, the Dam Safety Office, and the Technical Service Center to discuss upcoming LOPP workload;
 - (4) reviewing the annual LOPP charge periodically at an interval of every 10 years to ensure consistency with the parameters of the Reclamation Act of 1939; and
 - (5) reviewing annual LOPP charges for a LOPP project where energy produced by the project replaces current consumption of Reclamation Project Use Power as defined in Reclamation Manual D&S, *Project Use Power* (FAC 04-06).
- C. **Chief, Dam Safety Office.** Prior to the award of a Preliminary Lease, the Chief, Dam Safety Office, is responsible for advising the Regional Director on public safety issues, the work required to correct those issues, and the timeline and estimated cost for that work.
- D. **Regional Power Manager or Area Office Manager.** The Regional Power Manager or Area Office Manager, as designated by the Regional Director, is responsible for:
- (1) notifying the Power Resources Office and the Dam Safety Office of the intent to issue a notice to solicit LOPP proposals prior to such issuance;
 - (2) notifying the appropriate PMA of the intent to issue a notice to solicit LOPP proposals prior to such issuance;

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- (3) notifying any entity with a Reclamation or PMA contract that relates to power, water use, or capacity right, associated with the project or projects involved in the LOPP proposal, and any other appropriate stakeholders of the intent to issue a notice to solicit LOPP proposals prior to such issuance;
- (4) preparing and ensuring publication of a public solicitation for applications for a LOPP within 60 calendar days of the formal determination of jurisdiction of authority;
- (5) creating a selection team to review the LOPP proposals; and
- (6) assigning a LOPP lead.

E. Selection Team. The selection team is responsible for:

- (1) reviewing all proposals received from the LOPP solicitation; and
- (2) providing a recommendation to the Regional Director for award of the Preliminary Lease.

F. LOPP Lead. The LOPP lead is responsible for:

- (1) coordinating before the LOPP solicitation with the Reclamation offices (i.e., the appropriate region and area offices, the Power Resources Office, the Dam Safety Office, and the Technical Service Center) that will be potentially involved in the LOPP to discuss the scope of the project, timelines, resources, public and dam safety issues, and other technical issues;
- (2) ensuring that under circumstances where a water user organization has operation, maintenance, and replacement (OM&R) transfer contracts associated with the existing Federal project, or where a power customer receives Reclamation generated hydropower from the existing Federal project, but are not a participant in the proposed LOPP, that a meeting will be held within 30 calendar days after the issuance of the Preliminary Lease between Reclamation, the Preliminary Lessee, and that water user/power customer to understand the roles and responsibilities in the LOPP process, and that the agreed upon terms, roles, and responsibilities resulting from this meeting will be documented in a manner agreeable to the parties involved;
- (3) coordinating a meeting with Reclamation and the Preliminary Lessee to discuss Reclamation's involvement in the public safety aspects of the project;

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- (4) coordinating and ensuring the collection of all necessary studies, analyses, designs, plans, specifications, and related material associated with the proposed powerplant facilities from the Preliminary Lessee and/or Lessee;
- (5) coordinating and ensuring the Reclamation review of all necessary studies, analyses, designs, plans, specifications, and related material associated with the proposed powerplant facilities within 45 calendar days of receipt of those studies from the Preliminary Lessee and/or Lessee;
- (6) creating and negotiating the LOPP contract;
- (7) ensuring the collection and accounting of the necessary funding from the Preliminary Lessee and/or Lessee, in advance of expenditures, to cover all Reclamation costs for work performed for the Preliminary Lease or LOPP; and
- (8) submitting to the Senior Advisor, Hydropower, copies of the following documents: public solicitation, Preliminary Lease, NEPA documentation (i.e., categorical exclusion, environmental assessment, or environmental impact statement), cost-recovery agreement, and LOPP contract.

6. Jurisdiction for Hydropower Development.

- A. **Development at Reclamation Conduits.** In accordance with Section 9(c) of the Reclamation Project Act of 1939, as amended, Reclamation has jurisdiction for authorizing all conduit hydropower development on Reclamation-owned facilities through LOPP.
- B. **Development at Reclamation Dams.** Requests to develop hydropower at Reclamation dams will be evaluated under the 1992 MOU between Reclamation and FERC (Appendix A) to determine which agency has jurisdiction over the project and to address potential jurisdiction issues between the two agencies. If Reclamation and FERC alter the 1992 MOU in the future, the version of the Reclamation-FERC agreement at the time of the LOPP solicitation will govern jurisdiction between the agencies. The Senior Advisor, Hydropower, and the respective Regional Director will coordinate and agree on jurisdiction before proceeding with the LOPP solicitation.

7. Solicitation and Selection of Lessee.

- A. Selection of a Preliminary Lessee and Lessee will be in accordance with Section 9(c) of the **Reclamation** Project Act of 1939, as amended. To be considered for selection, the

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proposed LOPP project must not impair the efficiency of Reclamation generated power or water deliveries, impact structural integrity of the project, jeopardize public safety, or negatively affect any other Reclamation project purposes.

(1) LOPP on dams:

- (a) Reclamation will solicit proposals for hydropower development on dams under a LOPP through a public process (such as the Federal Register) to ensure fair and open competition. LOPP solicitations will either be independently initiated by Reclamation or initiated by Reclamation upon receiving a Formal Request for Development by an interested party.
- (b) The solicitation for LOPP proposals will allow up to 150 calendar days from the date of publication for applicants to submit proposals, and the selection team will have 30 calendar days to review the proposals and provide a recommendation of award to the Regional Director.
- (c) Reclamation will give preference to all entities that qualify as Preference Entities, provided that the Preference Entity is well qualified to develop and provide for long-term O&M of the hydropower facility.
- (d) If one applicant is a Preference Entity and the other is not, Reclamation will inform the Preference Entity of the specific reasons why its plans are not as well qualified and afford up to 30 calendar days for the Preference Entity to render its plans at least as well qualified as the other plans. All other applicants will be informed of this action. If the plans of the Preference Entity are rendered at least as well qualified within the time allowed, Reclamation will favor the Preference Entity. If the Preference Entity's plans are not rendered at least as well qualified within the time allowed, Reclamation will favor the other applicant.

(2) LOPP on conduits:

- (a) **Transferred Conduits.** Upon receiving a Formal Request for Development, Reclamation will first offer the LOPP to the irrigation district or water users association operating the applicable transferred conduit. Following the offer, Reclamation will allow up to 60 calendar days for the irrigation district or water users association to either accept or reject the lease of power privilege.
 - (i) If the irrigation district or water users association has interest in developing the LOPP, the entity will be allowed 150 calendar days after acceptance to submit a proposal for hydropower development that includes the

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information required in sections 7.B.(4)(b) through 7.B(4)(i) in this D&S. During the 150 calendar day timeframe, no other entity is eligible to receive the LOPP. Once a proposal, deemed acceptable by the Selection Team, is received, the entity will be granted a Preliminary Lease.

- (ii) If the irrigation district or water users association rejects the LOPP or fails to submit an acceptable proposal within the 150 calendar day timeframe, Reclamation will solicit proposals through a public process (such as a local news publication or Federal Register Notice) to ensure fair and open competition. Preference will apply as detailed in 7.A.(1)(c) and 7.A.(1)(d).
- (b) **Reserved Conduits.** Upon receiving a Formal Request for Development, Reclamation will first offer the LOPP to the irrigation district(s) or water users association(s) receiving water from the applicable reserved conduit. Following the offer, Reclamation will allow up to 60 calendar days for the irrigation district(s) or water users association(s) to either accept or reject the LOPP.
 - (i) If only one irrigation district or water users association has interest in developing the LOPP, the entity will be allowed 150 calendar days after acceptance to submit a proposal for hydropower development that includes the information required in sections 7.B.(4)(b) through 7.B(4)(i) in this D&S. During the 150 calendar day timeframe, no other entity is eligible to receive the LOPP. Once a proposal, deemed acceptable by the Selection Team, is received, the entity will be granted a Preliminary Lease.
 - (ii) If multiple irrigation districts and/or water users associations has interest in developing the LOPP, the entities will be allowed 150 calendar days after the last acceptance to submit proposals for hydropower development that includes the information required in sections 7.B.(4)(b) through 7.B(4)(i) in this D&S. During the 150 calendar day timeframe, no other entity is eligible to receive the LOPP. The Reclamation Selection Team will review all proposals and provide a recommendation to the Regional Director for award of the Preliminary Lease.
 - (iii) If the irrigation district(s) or water users association(s) reject(s) the LOPP or fail(s) to submit an acceptable proposal within the 150 calendar day timeframe, Reclamation will solicit proposals through a public process (such as a local news publication or Federal Register Notice) to ensure fair and open competition. Preference will apply as detailed in 7.A.(1)(c) and 7.A.(1)(d).

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B. Minimum Reclamation LOPP solicitation requirements are:

- (1) The LOPP solicitation must include the scoring criteria for how proposals will be evaluated.
- (2) If the LOPP solicitation is for a site that is a transferred work, that information must be revealed in the solicitation, and proposals must define how the LOPP project would operate in harmony with the Reclamation project and existing applicable contracts related to O&M of Reclamation project feature(s) being considered for modification. In these cases, a letter of cooperation or contractual arrangement from the operator of the transferred work will be considered favorably.
- (3) If the LOPP solicitation is for a site that is located on Tribal lands, that information must be revealed in the solicitation. In these cases, the solicitation will include a provision that indicates that a letter of cooperation from the Tribal government will be considered favorably.
- (4) Reclamation will require interested parties to submit a proposal explaining in as precise detail as is practicable how the hydropower potential at the site would be developed. The solicitation will require that a proposal provide:
 - (a) Information regarding whether the applicant qualifies as a preference entity. If the proposal is made by a group of entities or by a subdivision of an entity, then the application must explain whether and why the applicant or applicants qualify as preference entities.
 - (b) Information relevant to the qualifications of the proposing entity to plan and implement such a project, including but not limited to, information about preference status; type of organization; length of time in business; experience in funding, design, and construction of similar projects; industry rating(s) that indicate financial soundness and/or technical and managerial capability; experience of key management personnel; history of any reorganizations or mergers with other companies; and any other information that demonstrates the interested entity's organizational, technical, and financial ability to perform all aspects of the work. Proposals will include a discussion of past experience in developing, operating and maintaining similar facilities and provide references as appropriate.
 - (c) Geographical locations and descriptions of principal structures and other important features of the proposed development including roads and transmission lines. Proposals must estimate and describe installed capacity

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and the capacity of the power facilities under dry, average, and wet hydrological conditions. Proposals must also describe the daily, weekly, monthly, and annual pattern of expected generation under average, wet, and dry hydrological conditions; the ability of generation to provide ancillary services such as regulation, spinning reserves, and voltampere reactive support; and information on the reliability of the generation, potential maintenance outage schedule, and duration. If capacity and energy can be delivered to another location, either by the proposing entity or by potential third party transmission agents, the proposal must specify where that capacity and energy can be delivered. The proposal must describe the concepts and contractual arrangements (including the involved parties) related to transmission interconnection, power sales, and the proposed approach to third party transmission if required.

- (d) Existing title arrangements or a description of the ability to acquire title to or the right to occupy and use lands necessary for the proposed LOPP project, including such additional lands as may be required during construction.
- (e) A description of studies necessary to adequately define impacts of the proposed LOPP project on the Reclamation project, historic properties (if such are present), and the environment. The proposal must describe any significant environmental issues associated with the proposed LOPP project and the proposing entity's approach for gathering relevant data and resolving such issues to protect and enhance the quality of the environment. The proposal will explain any proposed use of the LOPP project for conservation and utilization of the available water resources in the public interest.
- (f) Plans for assuming liability for damage to the operational and structural integrity of the Reclamation project caused by construction, operation, and/or maintenance of the hydropower development.
- (g) The organizational structure planned for the long-term O&M of any proposed hydropower development.
- (h) A management plan, including schedules of these activities as applicable, to accomplish activities such as planning; NEPA compliance; NHPA compliance; ESA compliance; necessary studies; LOPP project development; design, construction, safety plan, and facility testing; and the start of hydropower production.
- (i) An estimate of development costs. These costs will include all investment costs such as the cost of studies to determine feasibility; NEPA compliance;

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NHPA compliance; ESA compliance; other statutory compliance; design; construction; financing as well as the amortized annual cost of the investment; annual OM&R expense for the hydropower development; lease payments to the United States; expenses associated with the Reclamation project; and anticipated return on investment. If there are additional transmission expenses associated with the development of the LOPP project, these expenses must also be included. The proposal must identify proposed methods of financing the LOPP project. The proposal must include an economic analysis that compares the present worth of all benefits and costs of the hydropower development.

8. Timeframes for Development Under a LOPP.

- A. **LOPP on Dams.** The Preliminary Lessee will be provided a maximum of 24 months from the date of issuance of the Preliminary Lease to complete the requirements set forth in the Preliminary Lease and to sign the LOPP. The Lessee will have a maximum of 1 year from the date of the execution of the LOPP to complete final designs, specifications, etc., and an additional 1 year to begin construction. A maximum of 4 years is allowed, from the date of the Preliminary Lease to the beginning of construction. Maximum timeframes for construction will be determined by the Regional Director. The above timeframes will only be extended for just cause resulting from actions and/or circumstances that are beyond the control of Reclamation or the Preliminary Lessee/Lessee. Just cause and timeframe adjustments will be determined solely by the Regional Director.
- B. **LOPP on Conduits.** The Preliminary Lessee will have a maximum of 15 months from the date of issuance of the Preliminary Lease to complete the requirements set forth in the Preliminary Lease and to sign the LOPP. The Lessee will be provided a maximum of 9 months from the date of the execution of the LOPP to complete final designs, specifications, etc., and an additional 1 year to begin construction. A maximum of 3 years is allowed, from the date of Preliminary Lease agreement to the beginning of construction. Maximum timeframes for construction will be determined by the Regional Director. The above timeframes will only be extended for just cause resulting from actions and/or circumstances that are beyond the control of Reclamation or the Preliminary Lessee/Lessee. Just cause and timeframe adjustments will be determined solely by the Regional Director.

9. Development, Construction, and O&M.

- A. Reclamation can deny the issuance of a LOPP or withdraw a previously issued Preliminary Lease or LOPP at any time based on inadequate design information,

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unsatisfactory environmental impacts, safety concerns, security concerns, detrimental impact to the Reclamation project, or any other legitimate reason as determined by the Regional Director.

- B. Reclamation reserves the right to conduct or direct the completion of analyses, designs, and data collection which directly affect public safety aspects of the facilities into which the Lessee's powerplant facilities are to be integrated. Reclamation will review all analyses, designs, plans, specifications, and related material associated with all other features of the proposed powerplant and appurtenant facilities (i.e., those features which do not directly affect public safety). Work shall not proceed with various aspects of the project until Reclamation's approval has been obtained. Reclamation will oversee the construction effort, including on-site inspection, focusing primarily on the work which directly affects the public safety aspects of their facilities.
- C. At minimum, the actions to be completed during the Preliminary Lease prior to the LOPP contract are as follows:
 - (1) The LOPP lead will collect, and coordinate the review of all studies from the Preliminary Lessee that are necessary for Reclamation to ensure that the efficiency of Reclamation generated power or water deliveries will not be impaired, to ensure the public safety and the continued safe operation and structural integrity of the Reclamation facilities, and to ensure compliance with NEPA, ESA, and NHPA commitments. A value engineering study is not required. A listing of studies that the LOPP lead will consider is included in Appendix B.
 - (2) NEPA, ESA, NHPA, and other statutory compliance will be the financial responsibility of the Preliminary Lessee and will be completed during the Preliminary Lease phase prior to execution of the LOPP. Terms and conditions resulting from NEPA, ESA, NHPA, and other statutory compliance will be incorporated in the LOPP and will be the financial responsibility of the Lessee.
 - (a) Reclamation categorical exclusion (CE) 516 DM 14.5C(3) is appropriate to use for LOPP projects if the scope of the project is consistent with the terms of the CE, and there are no extraordinary circumstances. Key considerations in determining if the project is consistent with the terms of the CE are:
 - (i) the project is a small conduit hydropower project; or
 - (ii) the project has the following characteristics:
 - (aa) would utilize an existing dam or conduit;

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- (bb) points of diversion and discharge of the LOPP powerplant would be in close proximity to the existing infrastructure and would not significantly affect the flow patterns of the water source;
 - (cc) there would be no increase or change in timing of diversions and discharges; and
 - (dd) the primary purpose of the infrastructure would remain, e.g., most commonly irrigation.
- (b) Consideration for a CE does not guarantee that a CE will be appropriate. The extraordinary circumstances considered are contained in 43 CFR 46.215, and are provided in Appendix C. In cases where the project does not meet the above criteria or where any extraordinary circumstances exist, a higher level of NEPA evaluation will be required.
- (3) Reclamation will share its plans with the Preliminary Lessee to correct public safety related issues at the Reclamation facility which are known at the time of the LOPP contract negotiations. Public safety issues which emerge at a later date could require adjustments to the location, design, construction, and/or operations of the Lessee's powerplant facilities. Costs associated with such adjustments will be the responsibility of the Lessee.
- (4) At those Reclamation projects where Reclamation, through a PMA, has responsibility for repayment of a portion of the project, or is otherwise provided right of first refusal by law, that PMA will be given the first opportunity to purchase the energy and, if applicable, RECs produced by the project. The PMA is not obligated to purchase the generation from the proposed hydropower facility. At the time the Preliminary Lease is issued, the Preliminary Lessee must coordinate with the PMA to offer the energy and RECs produced under the LOPP for purchase. The PMA will have 60 calendar days from the time the Preliminary Lessee makes the initial offer to sell the energy and/or RECs to the PMA to make a decision whether to purchase the energy and RECs. If such a decision cannot be made within that timeframe, the Lessee will have the right to market the energy and RECs produced by the project to others.

D. At a minimum the following conditions must be addressed in the LOPP contract:

- (1) The structural and operational integrity of existing Reclamation facilities or associated Federal projects must not be impaired by construction, operation, or maintenance of the Lessee's powerplant facilities. Powerplant construction, operation, or maintenance must not: interfere with the existing or future project

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operations; jeopardize existing water rights; alter compliance with environmental requirements or commitments; impair the efficiency of the project for irrigation purposes; impair the operations of, or entitlements to, Reclamation hydroelectric facilities; impair security; impede the correction of public safety deficiencies; or create any public safety related deficiency, recreation hazards, or other safety problems.

- (2) Title to the Federal facility, and any modification to the facility, remain with the United States. Title to the proposed installed powerplant facility is held by the Lessee unless legislated or contracted otherwise.
- (3) Access to and operation of the existing Reclamation facilities must be sustained during the construction and OM&R of the Lessee's powerplant facilities.
- (4) Reclamation will inspect the powerplant and related facilities to the extent necessary to ensure public safety and compliance with NEPA, ESA, NHPA, and other statutory commitments. Reclamation's inspections will be in addition to inspections performed by the Lessee. The LOPP will contain provisions requiring the Lessee to address any recommendations issued by Reclamation within the timeframes determined by the Regional Director. Costs associated with the implementation of these recommendations will be the responsibility of the Lessee. Reclamation reserves the right to shut down the operation of the powerplant or remedy problems at the expense of the Lessee if the recommendations are not followed or if an emergency situation exists.
- (5) Physical security of existing facilities shall be maintained by Reclamation, or its designee, during construction and O&M activities. The Lessee shall not interfere with Reclamation security activities and will be subject to search, background checks, etc., as deemed necessary by Reclamation to protect the physical and information technology security of Reclamation facilities. The Lessee will be responsible for any incremental security costs incurred by Reclamation that result from the construction of the Lessee's proposed powerplant and associated and associated facilities. The Lessee will be required to have security procedures and practices commensurate with security requirements, as determined by Reclamation.
- (6) The Lessee must provide the LOPP lead evidence of a comprehensive and sufficient performance bond for the construction of the project, and a comprehensive and sufficient commercial surety bond to cover any costs for the removal of the facilities and the clean-up or restoration of the site due to the installation or operation of the Lessee's plant. The amount of the bonds will be determined on a project-by-project basis.

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- (7) Reclamation will not be responsible for the economic and technical feasibility of the Lessee's powerplant facility, and the Lessee must agree to indemnify the United States for any loss or damage resulting from actions under the LOPP and any act of neglect or omission of the Lessee in connection with its performance under the LOPP. The Lessee shall have no claim against the United States for loss of generation caused by the normal or extraordinary O&M of the Reclamation project including, but not limited to, the quantity, quality, or timing of water or power delivered by the Reclamation project. The Lessee will be required to modify operations required by any future legal constraints associated with the operation of the Reclamation project.
 - (8) The Lessee will be required to compensate Reclamation for lost generation and other interruptions to operations at Reclamation facilities due to construction, O&M, or any other extraordinary event at the Lessee's facilities.
 - (9) Reclamation will have the first right to purchase the powerplant should the Lessee need to sell or dispose of the facilities in which it has title. LOPPs shall not be transferred or facilities sold without written approval of the Reclamation Regional Director.
10. **Projects on Transferred Works.** Under circumstances where a water user organization has OM&R transfer contracts associated with the proposed Reclamation-owned development site but are not a participant in the proposed LOPP, then LOPP contracts will include their involvement, as appropriate. The Lessee shall share in the cost of OM&R of the existing Federal facilities that benefit the proposed installed power facility. If there is a possibility that these costs may apply, the LOPP solicitation will indicate it as such.
11. **LOPP Charges.**
- A. **Administrative Charges.** Prior to any work conducted by Reclamation for the Preliminary Lease or LOPP, the Preliminary Lessee and/or Lessee shall provide in advance of expenditures the necessary funding to cover all Reclamation costs. These costs include any and all work related to NEPA, NHPA, ESA, other statutory compliance; development; construction; O&M; inspections; security of the Lessee's power facilities; review of all other necessary studies, analyses, designs, plans, specifications, and related material associated with the proposed powerplant; and any other related administrative costs. Reclamation shall give the Preliminary Lessee and/or Lessee an itemized and detailed estimate of these costs based on its understanding of the LOPP project, and the Preliminary Lessee and/or Lessee shall pay in advance in accordance with an agreed upon funding plan. Any increase in funding requirements beyond the originally agreed upon amount will be negotiated with the Preliminary Lessee and/or Lessee before Reclamation incurs those costs. Any unused

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funds will be returned to the Preliminary Lessee and/or Lessee without interest. Reclamation shall set up a new cost authority number to keep track of all Reclamation costs related to the LOPP project.

B. Annual LOPP Charge.

- (1) The Reclamation Act of 1939, Section 9(c), states:

Any sale of electric power or Lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper.

- (2) Calculation of LOPP payments will begin after the initial successful startup and testing of the generating equipment, or within 20 days of the commencement of initial startup and testing of the generating equipment, whichever comes first. The rate will be reviewed every 10 years to ensure that it is consistent with the parameters of the Reclamation Act of 1939. This charge will not apply to existing LOPP agreements where a rate has been negotiated prior to the issuance of this D&S.

- (a) **Standard LOPP Charge.** The annual LOPP charge is set at 3 mills per kWh of gross energy produced by the facility, measured at the generator, to the United States for the use of the Reclamation facility. This rate will increase each year commensurate with inflation based on the average of the previous 5 years of the non-seasonally adjusted United States city average Consumer Price Index (CPI) for all items. If the 5-year CPI average shows no change or deflation, the LOPP rate will remain the same as the previous year's rate. The methodology that was used to calculate the Standard LOPP charge is included in Appendix D.

- (b) **Discounted LOPP Charge.** For entities that are already responsible for project O&M repayment for the site of the LOPP project, recognition of that contribution to O&M will be made through a reduction of the LOPP charge. The reduced annual LOPP charge is set at 2 mills per kWh of gross energy produced by the facility, measured at the generator, to the United States for the use of the Reclamation facility. This rate will increase each year commensurate with inflation based on the average of the previous five years of the non-seasonally adjusted United States city average CPI. If the 5-year

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CPI average shows no change or deflation, the LOPP rate will remain the same as the previous year's rate. The methodology that was used to calculate the Discounted LOPP charge is included in Appendix D.

- (c) **Offsetting Reclamation Project Use Power.** For a LOPP project where energy produced by the project replaces current consumption of Reclamation Project Use Power (PUP), and that Reclamation generation can be marketed through the PMA, the annual charge may be lowered upon review by the Senior Advisor, Hydropower provided that the LOPP charge plus the additional benefit of the marketed generation are sufficient to repay the costs identified in the Reclamation Act of 1939. Where the LOPP powerplant is offsetting project needs other than that provided by Reclamation PUP, the full LOPP charge pursuant to Paragraphs 11.B.(2)(a); and 11.B.(2)(b) of this D&S shall apply.

- 12. **Disposition of Annual LOPP Charges.** Unless otherwise directed by specific project authorizations, in accordance with Section 5 of the Town Sites and Power Development Act of 1906, the LOPP charge paid by the Lessee to Reclamation shall be deposited in the Reclamation fund as a credit to the Reclamation project and are applied against the total outstanding reimbursable repayment obligation for reimbursable project construction costs of the Federal project on which the LOPP is issued pursuant to the existing construction cost allocation (not applied only against power construction costs). If the outstanding reimbursable repayment obligation for project construction costs is satisfied, then the LOPP payments will be held as a statutory credit for the project or program until an eligible reimbursable project expense is incurred against which the credit can be applied. While LOPP payments are not considered incidental revenues, Paragraphs 6.A., 6.A.(1), and 7 of Reclamation Manual D&S, *Crediting Requirements for Incidental Revenues* (PEC 03-01) describe how Reclamation will apply LOPP credits to the project.
- 13. **No Rights Created by D&S.** Like all other D&S documents, this D&S is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities its officers, employees, or agents, or any other person.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Notice of
Memorandum of Understanding
Between the Federal Energy Regulatory Commission
and the
Department of the Interior, Bureau of Reclamation

(January 4, 1993)

AGENCY: Federal Energy Regulatory Commission

ACTION: Notice of Memorandum of Understanding

SUMMARY: On November 6, 1992, the Chairman of the Federal Energy Regulatory Commission and the Department of the Interior's Assistant Secretary for Water and Science signed a Memorandum of Understanding that establishes a process for the early resolution of issues related to the development of non-federal hydrodevelopment at Bureau of Reclamation facilities.

EFFECTIVE DATE: November 6, 1992

FOR FURTHER INFORMATION CONTACT:

Barbara Christin
Office of the General Counsel
Federal Energy Regulatory Commission
825 N. Capitol Street, N.E.
Washington, D.C. 20426
Phone: (202) 208-0773

SUPPLEMENTARY INFORMATION:

DC-A-11

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MEMORANDUM OF UNDERSTANDING
BETWEEN THE
FEDERAL ENERGY REGULATORY COMMISSION
AND THE
BUREAU OF RECLAMATION
DEPARTMENT OF THE INTERIOR
FOR
ESTABLISHMENT OF PROCESSES FOR THE EARLY RESOLUTION OF ISSUES
RELATED TO THE TIMELY DEVELOPMENT OF
NON-FEDERAL HYDROELECTRIC POWER AT BUREAU OF
RECLAMATION FACILITIES

In the interest of mutual cooperation for the expeditious non-Federal development of hydroelectric energy, this Memorandum of Understanding is executed between the Federal Energy Regulatory Commission (Commission), pursuant to the authority contained in the Federal Power Act (FPA), 16 U.S.C. § 791a et seq., Section 210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3, and the Electric Consumers Protection Act of 1986, Pub. L. 99-495, and the Bureau of Reclamation (Reclamation), pursuant to the Reclamation Act of 1902, 43 U.S.C. § 391 et seq., as amended and supplemented, and the interdepartmental work provision of 47 Stat. 417, 31 U.S.C. § 1535.

WHEREAS, the Commission is authorized to issue preliminary permits and licenses to non-Federal entities for the development of hydroelectric powerplants under its jurisdiction, including powerplants utilizing Federal dams or other facilities where hydroelectric power has not been reserved exclusively for Federal development under Federal reclamation law, either congressionally or administratively, or where hydroelectric power development has not been reserved for non-Federal development under reclamation

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law; and

WHEREAS, Reclamation is authorized both administratively and congressionally to construct water resources projects throughout the 17 Western States, including hydroelectric power facilities; and

WHEREAS, Reclamation is authorized to grant leases of power privilege to non-Federal entities for the development of hydroelectric powerplants under its jurisdiction; and

WHEREAS, Reclamation is agreeable to the development of hydroelectric power by non-Federal entities under the FPA on Reclamation projects where hydroelectric power development has not been reserved exclusively for development under Federal reclamation law, either congressionally or administratively, or where hydroelectric power development has not been reserved for non-Federal development under reclamation law, and where such hydroelectric power developments are compatible with the purposes for which the Reclamation projects were authorized; and

WHEREAS, Reclamation and the Commission recognize the need to establish criteria and guidelines to assist in determining whether the Commission or Reclamation has jurisdiction over non-Federal hydroelectric power development at particular Reclamation projects; and

WHEREAS, the process of non-Federal development of hydroelectric power at Federal facilities often begins informally with early consultations with either or both agencies by prospective applicants, and begins formally either with an application to the

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Commission for a preliminary permit or license or a request to Reclamation for a lease of power privilege; and
WHEREAS, from time to time issues arise between the Commission and Reclamation concerning whether the Commission has authority to license non-Federal hydroelectric power development at a particular Reclamation project; and

WHEREAS, both agencies desire to establish administrative processes and joint guidelines by which such issues can be resolved in a timely and legally sound fashion;

NOW THEREFORE, because it is in the public interest that the agencies work together to ensure timely development of renewable hydroelectric power resources at existing Reclamation facilities, the Commission and Reclamation agree to the following:

ARTICLE 1. Commission Procedures. Upon the filing with the Commission of an application for a preliminary permit or a license for a hydroelectric power development located at or within a Reclamation project, the following procedures will be used:

A. Distribution of Applications. Commission staff will ensure that Reclamation receives a copy of the filed application within 15 calendar days of such filing.

B. Reclamation Review of Permit Applications. Reclamation shall preliminarily review each permit application and, if it objects to the proposed hydroelectric power development on the ground that it is reserved for development under Federal reclamation law, shall, within 45 days of the filing date of the

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application, so advise the applicant and the Commission in writing and, to the extent possible at this stage of review, give to the applicant and the Commission the reasons therefor, with citations to and, where feasible, copies of relevant statutory texts, legislative history, administrative authorizations, and feasibility reports.

C. Reclamation Review of License Applications.

Reclamation shall review each license application and, if it objects to the proposed hydroelectric power development on the ground that it is reserved for development under Federal reclamation law, shall, within 60 days of the filing of the application, so advise the applicant and the Commission in writing, giving both the applicant and the Commission the reasons therefor, with citations to and, where feasible, copies of relevant statutory texts, legislative history, administrative authorizations, and feasibility reports.

D. Preliminary Determination on Jurisdiction. Commission staff shall preliminarily review each license or preliminary permit application proposing hydroelectric development at or within a Reclamation project to determine whether the Commission's authority to license non-Federal hydroelectric power development has been withdrawn.

(1) If Commission staff, after reviewing the information submitted by Reclamation, concludes that the Commission's authority has been withdrawn, it shall then take appropriate action on the application and state the grounds

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therefor.

(2) If Commission staff is unable to determine conclusively that the Commission's authority to license a non-Federal hydroelectric power development at the facility or site has been withdrawn, or preliminarily determines that the Commission's authority to license a non-Federal hydroelectric power development at the facility or site has not been withdrawn, it shall so advise the applicant and Reclamation in writing, providing the rationale for its determination, with citations to and, where feasible, copies of relevant statutory texts, legislative history, administrative authorizations, and feasibility reports.

(3) Staff of either agency may, within 30 days of Commission staff's notification to Reclamation and the applicant under D(2) above, request a meeting to discuss and attempt to resolve any differences between the agencies. If Reclamation changes its position after the meeting, it shall, within 30 days of the meeting, so notify the Commission and the applicant, in writing. Commission staff shall proceed to issue public notice of the acceptance of such application for processing only after any such meetings that have been requested have taken place.

E. Formal Reclamation Comments. If, after issuance of public notice of the acceptance of a preliminary permit or license application for processing (both pursuant to paragraph D of this Article 1), Reclamation continues to object to the proposed hydroelectric power development on the ground that it

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has been reserved for development under Federal reclamation law, it shall, within the comment period and deadline for intervention established in the public notice of the acceptance of the permit or license application, either file formal comments or a motion to intervene (which motion will include formal comments). In either event, Reclamation shall submit its final position on the issue, giving reasons therefor, with citations to and, where feasible, copies of relevant statutory texts, legislative history, administrative authorizations, and feasibility reports. In the case of a license application, Reclamation shall also, either in response to the public notice of the license application or in response to the public notice that the application is ready for environmental review, whichever comes later, submit (through the Interior Department) conditions for inclusion in the license pursuant to Section 4(e) of the FPA.

F. Final Commission Action. After completion of the above-described procedures, the Commission, or its staff, will review all the information in the record of the preliminary permit or license proceeding on the issue of the Commission's authority and take whatever action on the preliminary permit or license application it deems appropriate.

ARTICLE 2. Reclamation Procedures. Upon receipt by Reclamation of a request for a lease of power privilege for a hydroelectric power development located at or within a Reclamation project, the following procedures will be used:

A. Distribution of Applications. Reclamation will ensure

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that the Commission receives a copy of the request within 15 calendar days of its receipt.

B. Reclamation Review. Before proceeding in any manner to act upon a request for a lease of power privilege, Reclamation shall make a determination as to whether hydroelectric power development is reserved at the project in question under Federal reclamation law.

(1) If Reclamation determines that hydroelectric power development is not reserved under Federal reclamation law, and that the Commission's authority to license such hydroelectric development has not been withdrawn, then Reclamation shall deny the request for a lease of power privilege, so notify the requestor in writing, and provide a copy of this notification to the Commission.

(2) If Reclamation preliminarily determines that hydroelectric power development is reserved under Federal reclamation law, then it shall, in writing, so notify the requestor and the Commission and give to the Commission the reasons therefor, with citations to and, where feasible, copies of relevant statutory text, legislative history, administrative authorizations, and feasibility reports.

C. Commission Review and Response. Commission staff shall review all requests for leases of power privilege for which Reclamation has made a determination under paragraph B(2) above.

(1) If, within 60 days of receipt of the information provided by Reclamation pursuant to paragraph B(2) above,

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Commission staff does not submit comments, or submits comments stating that it does not object to Reclamation's determination under paragraph B(2) above, then Reclamation will proceed to act upon the request for a lease of power privilege according to its procedures.

(2) If it preliminarily determines that the Commission's authority to license such hydroelectric development has not been withdrawn, Commission staff shall, within 60 days of receipt of the information provided by Reclamation pursuant to paragraph B(2) above, so advise Reclamation and the requestor in writing, providing the appropriate rationale to explain its conclusion. Staff of either agency may, within 30 days of Commission staff's notification to Reclamation and the requestor under this paragraph, request a meeting to discuss and attempt to resolve any differences between the agencies. If Commission staff changes its position after the meeting, it shall, within 30 days of the meeting, so notify Reclamation and the requestor, in writing. If Commission staff and Reclamation cannot, after a reasonable effort and period of time, reach agreement on which agency has jurisdiction, then Reclamation will notify the requestor that Reclamation will not act upon the request for a lease of power privilege. The requestor will be advised by Reclamation to file a preliminary permit application or a declaration of intention with the Commission in order to obtain a final determination as to which agency has jurisdiction. The Commission and Reclamation will then follow the procedures in

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Article 1, paragraphs E and F.

ARTICLE 3. Hydropower Developments Located Both Inside and Outside of Reclamation Projects. In the event that non-Federal hydropower facilities would be located inside and outside of the boundaries of a Reclamation project, and if hydroelectric power development is reserved under reclamation law, then the Commission shall have jurisdiction over the portion of the facilities located outside the boundaries of the Reclamation project and Reclamation shall have jurisdiction over the portion of the facilities located inside the boundaries of the Reclamation project. If hydroelectric power development is not reserved under reclamation law, then the Commission shall have jurisdiction over the entire non-Federal hydropower development. If the Commission and Reclamation agree that hydroelectric power development has been reserved under reclamation law, then the two agencies shall coordinate their respective processes for acting on license applications and requests for leases of power privilege. If Commission staff and Reclamation disagree, then the procedures set forth in Article 2, paragraph 8 will be followed.

ARTICLE 4. Application of Guidelines. (1) Both agencies agree to apply the guidelines attached to this Memorandum of Understanding as Exhibit A to all applications to develop non-Federal hydroelectric powerplants and facilities at or within Reclamation projects and to all applications to surrender licenses authorizing such development that are pending as of the

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date of execution of this Memorandum of Understanding or that are filed thereafter. Final authorizations for non-Federal hydroelectric powerplants and facilities at or within Reclamation projects are not affected by this Memorandum of Understanding; except for a situation where any request for lease of power privilege has been granted by Reclamation at a site where (a) at the time the lease was granted, a license or preliminary permit application for the site was pending before the Commission; (b) the license or preliminary permit application is pending before the Commission as of the date of execution of this Memorandum of Understanding; and (c) construction under the lease of power privilege has not commenced as of the date of execution of this Memorandum of Understanding.

(2) In reviewing, pursuant to Articles 1, 2, and 3 above, the authorizations under which a Reclamation project or facility was constructed to determine if the Commission's jurisdiction to license non-Federal hydroelectric projects at the site has been withdrawn, both agencies agree to apply the guidelines attached to this Memorandum of Understanding as Exhibit A. Authorizations not addressed by the attached guidelines will be reviewed and interpreted by each agency in the manner it deems appropriate.

ARTICLE 5. Environmental Compliance. For non-Federal hydroelectric powerplants and facilities involving Reclamation projects, facilities, and lands which are, in whole or in part, subject to the Commission's jurisdiction, the Commission shall, to the extent permitted by law, be the lead agency for the

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purposes of compliance with the National Environmental Policy Act (NEPA) and other applicable regulatory statutes. At Reclamation's request, the Commission will grant Reclamation cooperating agency status in the preparation of environmental impact statements pursuant to NEPA.

ARTICLE 6. Nothing in this Memorandum of Understanding shall be interpreted as modifying or limiting the legal rights and authorities of either agency, including the applicability of administrative procedures under the FPA and the Administrative Procedure Act (5 U.S.C. § 522 et seq.), and the availability of judicial review of a final Commission order under Section 313 of the FPA.

ARTICLE 7. Nothing in this Memorandum of Understanding shall be construed as limiting or modifying Reclamation's rights to intervene in Commission proceedings, in accordance with applicable law and regulations, on grounds other than jurisdictional conflicts.

ARTICLE 8. Nothing in this Memorandum of Understanding shall be construed as interpreting or modifying the requirements of Section 2402 of the Energy Policy Act of 1992 or impairing the authorities of the National Park Service at Reclamation projects administered as part of the National Park system or of other agencies of the Interior Department not party to this agreement.

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ARTICLE 9. This Memorandum of Understanding shall remain in effect until terminated by either party in writing.

Martin L. Allday,
Chairman, Federal Energy Regulatory Commission

John M. Sayre,
Assistant Secretary for Water and Science, Department of the Interior

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Exhibit A

I. CONGRESSIONAL AUTHORIZATION

In determining which agency has jurisdiction over the development of non-Federal hydropower at sites within congressionally authorized Reclamation projects, the Commission and Reclamation will apply, to the maximum extent practicable, the following presumptions. These presumptions may be challenged. The challenging agency, which bears the burden of proof, may offer evidence from any source. Some evidence will be deemed more persuasive than other evidence. The following evidence is listed in descending order of persuasiveness: (1) statutory language; (2) materials incorporated by reference into the statute; (3) House and Senate documents and reports; (4) documents submitted to Congress, such as Feasibility Reports and Definite Plan Reports; (5) other legislative history, such as floor debates or hearing transcripts; (6) Definite Plan Reports, or supplements thereto, that are issued after the administrative or statutory authorization; and (7) any other information.

PRESUMPTION 1.

If neither the authorizing statute, as amended, nor any documents incorporated by reference in the statute, mention hydropower development as a project purpose, then the Commission is presumed to have jurisdiction.

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Example: Baker Project, Upper Division, Pub. L. No. 87-706, 76 Stat. 634 (1962). "That for the purposes of providing irrigation water, controlling floods, conserving and developing fish and wildlife, and providing recreational benefits, the Secretary of the Interior, ...is authorized to construct, operate, and maintain the facilities of the upper division of the Baker Federal Reclamation project, Oregon. The principal works of the project shall consist of a dam and reservoir, pumping plans, and related facilities."

PRESUMPTION 2.

If the authorizing statute, as amended, or any documents incorporated by reference in the statute, appear to specifically reserve hydropower development exclusively to the United States or to specifically withdraw the Commission's jurisdiction, then Reclamation is presumed to have jurisdiction.

Example: Palo Verde Diversion Project, Pub. L. No. 83-752, § 2(c), 68 Stat. 1045 (1954). "...Provided, That there shall be and is hereby reserved to the United States or there shall be made available to it, as the case may require, the exclusive right to utilize ... said dam, appurtenant works, lands, and interests in land for such development, generation, and transmission of electric power and energy as may hereafter be authorized by law"

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Uncompahgre Valley Project, Pub. L. No. 75-698, 52 Stat. 941 (1938). "... That whenever a development of power is necessary for the irrigation of lands under the Uncompahgre Valley reclamation project, Colorado, or an opportunity is afforded for the development of power under said project, the Secretary of the Interior is authorized to enter into a contract for a period not exceeding forty years for the sale or development of any surplus power ..."

All American Canal, Boulder Canyon Project Act, Section 7, 45 Stat. 1057, 1062 (1928). "The said districts or other agencies shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal"

PRESUMPTION 3.

If the authorizing statute, as amended, or any documents incorporated by reference in the statute, only list hydropower as one of several project purposes, without further detail, then the Commission is presumed to have jurisdiction.

Example: Central Valley Project, Rivers and Harbors Act of 1937, 50 Stat. 850 (subsequently amended). "That the entire Central Valley Project ... is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of

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the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes"

PRESUMPTION 4.

If the authorizing statute, as amended, or any documents incorporated by reference in the statute, specifically authorize Reclamation to construct, operate, or maintain hydroelectric facilities or powerplants, then Reclamation is presumed to have jurisdiction even though the authorizing statute does not specifically withdraw the Commission's authority over all hydropower development within the project.

Example: Colorado River Storage Project, Colorado River Storage Project Act, Pub. L. No. 84-485, 70 Stat. 105 (1956). "Secretary is hereby authorized (1) to construct, operate, and maintain the following initial units... consisting of dams, reservoirs, powerplants, transmission facilities, and appurtenant works: Curecanti, Flaming Gorge, Navajo (dam and reservoir only), and Glen Canyon

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. . . and (2) to construct, operate, and maintain the following additional reclamation projects (including power-generating and transmission facilities related thereto), hereinafter referred to as participating projects: [initial authorization listed eleven projects -- other projects added from time to time]."

PRESUMPTION 5.

If the authorizing statute, as amended, or any documents incorporated by reference in the statute, specify the number, capacity, or location of powerplants authorized for federal development, then Reclamation is presumed to have jurisdiction for that specified development. Beyond the specified development, the Commission is presumed to have jurisdiction.

Example: Central Valley Project, Trinity River Division,
Pub L. No. 84-386, 69 Stat. 719 (1955). "[T]he Secretary of the Interior ... is authorized to construct, operate, and maintain ... the Trinity River division consisting of ... hydroelectric powerplants with a total generating capacity of approximately two hundred thirty-three thousand kilowatts"

Central Valley Project, American River Division,
63 Stat. 852 (1949). "A hydroelectric powerplant with a generating capacity of approximately one hundred and twenty thousand kilowatts, and

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necessary hydroelectric afterbay powerplants"
Columbia Basin Project, Grand Coulee Dam, Pub. L.
No. 89-448, 80 Stat. 200 (1966). "[T]he Secretary
of the Interior is hereby authorized to construct,
operate, and maintain a third powerplant with a
rated capacity of approximately three million six
hundred thousand kilowatts ... at Grand Coulee Dam
...."

II. ADMINISTRATIVE AUTHORIZATIONS

If the Reclamation project was administratively authorized,
the agencies must examine the authorizing feasibility reports
that were adopted in accordance with the approval procedures
governing at the time to determine appropriate jurisdiction. In
reviewing the feasibility reports, the reasoning set out in
Section I above shall apply.

Example Baker Project, Lower Division, approved by the
President March 18, 1931.
Boise Project, except for Black Canyon Dam and
Powerplant in Pavette Division. Arrowrock Dam
authorized by the Secretary January 6, 1911.
Deadwood Dam and Reservoir approved by the
President October 19, 1928. Payette Division
approved by the President December 19, 1935.
Anderson Ranch Dam and Reservoir authorized by the
Secretary August 12, 1940.
Orland Project, authorized by the Secretary

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October 5, 1907.

Rio Grande Project, except for Elephant Butte Dam and Powerplant and Caballo Dam, authorized by the Secretary December 2, 1905.

III. CONGRESSIONAL AND ADMINISTRATIVE AUTHORIZATIONS

In some cases, Reclamation projects were initially authorized administratively, but then legislation was subsequently passed that, for example, re-authorized the project, authorized additional project features, modified the previously authorized project, or affected some other aspect of the project such as authorization to dispose of surplus power produced at the project. For projects having both administrative and congressional authorizations, in order to determine which documents must be examined, we must first determine whether only one type of authorization applies to the particular site in question. If the site in question: (1) is or is not mentioned in any of the administrative authorizations, and was subsequently authorized by legislation, then the relevant statutory texts and legislative history will prevail over the administrative authorization; or (2) was administratively authorized, but none of the congressional authorizations apply, then the authorizing feasibility reports must be examined. In either case, the reasoning set out in Section I above shall apply.

Example: Uncompahgre Project. Authorized (originally called Gunnison Project) by the Secretary March 14, 1903. Rehabilitation work and construction of

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Taylor Park Dam approved by the President November 6, 1935. Statute authorizing sale and development of surplus power enacted June 22, 1938, 52 Stat. 941.

Salt River Project. Authorized by the Secretary March 14, 1903. Rehabilitation and betterment authorized by act of October 7, 1949, 63 Stat. 724. Statute authorizing sale of surplus power enacted September 18, 1922, 42 Stat. 847.

Boise Project. Black Canyon Dam and Powerplant in Payette Division. Black Canyon Dam authorized by the Secretary June 26, 1922. Payette Division authorized by the Secretary December 19, 1935. Power development restrictions, 43 Stat. 390, 415 (June 5, 1924). Revenues from Black Canyon powerplant, 45 Stat. 1562 (March 4, 1929). Authorization for feasibility studies for additional power, 94 Stat. 1505.

This Memorandum of Understanding was signed by the Chairman of the Federal Energy Regulatory Commission and the Assistant Secretary for Water and Science, Department of the Interior, on November 6, 1992.

Lois D. Cashell
Lois D. Cashell
Secretary

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1. At a minimum, the lease of power privilege (LOPP) lead will ensure that the following topic areas are considered for study based on project requirements:
 - A. public and dam safety impacts/modifications (Note: the Bureau of Reclamation reserves the right to conduct or direct these activities including design, construction, and construction inspection at the cost of the lessee);
 - B. site characteristics and existing facilities;
 - C. land rights, including but not limited to acquisitions, easements, leases, licenses, consent documents, and other use authorizations;
 - D. hydraulics and hydrology;
 - E. sedimentation study;
 - F. water rights;
 - G. project features and design;
 - H. power production;
 - I. environmental analysis suitable for Reclamation's use in the National Environmental Policy Act, National Historic Preservation Act, Endangered Species Act compliance, and other statutory compliance;
 - J. safety assessment;
 - K. security assessment;
 - L. operation and maintenance plan; and
 - M. project development plan and construction schedule.
2. Additional studies may be requested by the LOPP Lead.

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EXAMPLE OF A CATEGORICAL EXCLUSION CHECKLIST

Evaluation of Criteria for Categorical Exclusion

- | | | |
|----|---|------------------------|
| 1. | This action or group of actions will have a significant effect on the quality of the human environment. | No _ Uncertain _ Yes _ |
| 2. | This action or group of actions will involve unresolved conflicts concerning alternative uses of available resources. | No _ Uncertain _ Yes _ |
| 3. | This action will have significant adverse effects on public health or safety. | No _ Uncertain _ Yes _ |
| 4. | This action will have an adverse effect on unique geological features such as wetlands, wild or scenic rivers, rivers placed on the nationwide river inventory, refuges, floodplains, or prime or unique farmlands. | No _ Uncertain _ Yes _ |
| 5. | This action will have highly controversial effects. | No _ Uncertain _ Yes _ |
| 6. | This action will have highly uncertain environmental affects or involve unique or unknown environmental risk. | No _ Uncertain _ Yes _ |
| 7. | This action will establish a precedent for future actions. | No _ Uncertain _ Yes _ |
| 8. | This action is related to other actions with individually insignificant but cumulative significant environmental effects. | No _ Uncertain _ Yes |
| 9. | This action will adversely affect properties listed or eligible for listing in the National Register of Historical Places. | No _ Uncertain _ Yes |

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- | | |
|---|----------------------|
| 10. This action will adversely affect a species listed or proposed to be listed as endangered or threatened. | No _ Uncertain _ Yes |
| 11. This action threatens to violate Federal, State, Local, Executive or Secretarial orders, or Tribal Law or requirements imposed for protection of the environment. | No _ Uncertain _ Yes |
| 12. This action will affect Indian Trust Assets. | No _ Uncertain _ Yes |
| 13. This action will have a disproportionately high and adverse human health or environmental effects on low income or minority populations. | No _ Uncertain _ Yes |
| 14. This action will limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites. | No _ Uncertain _ Yes |
| 15. This action will contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species. | No _ Uncertain _ Yes |

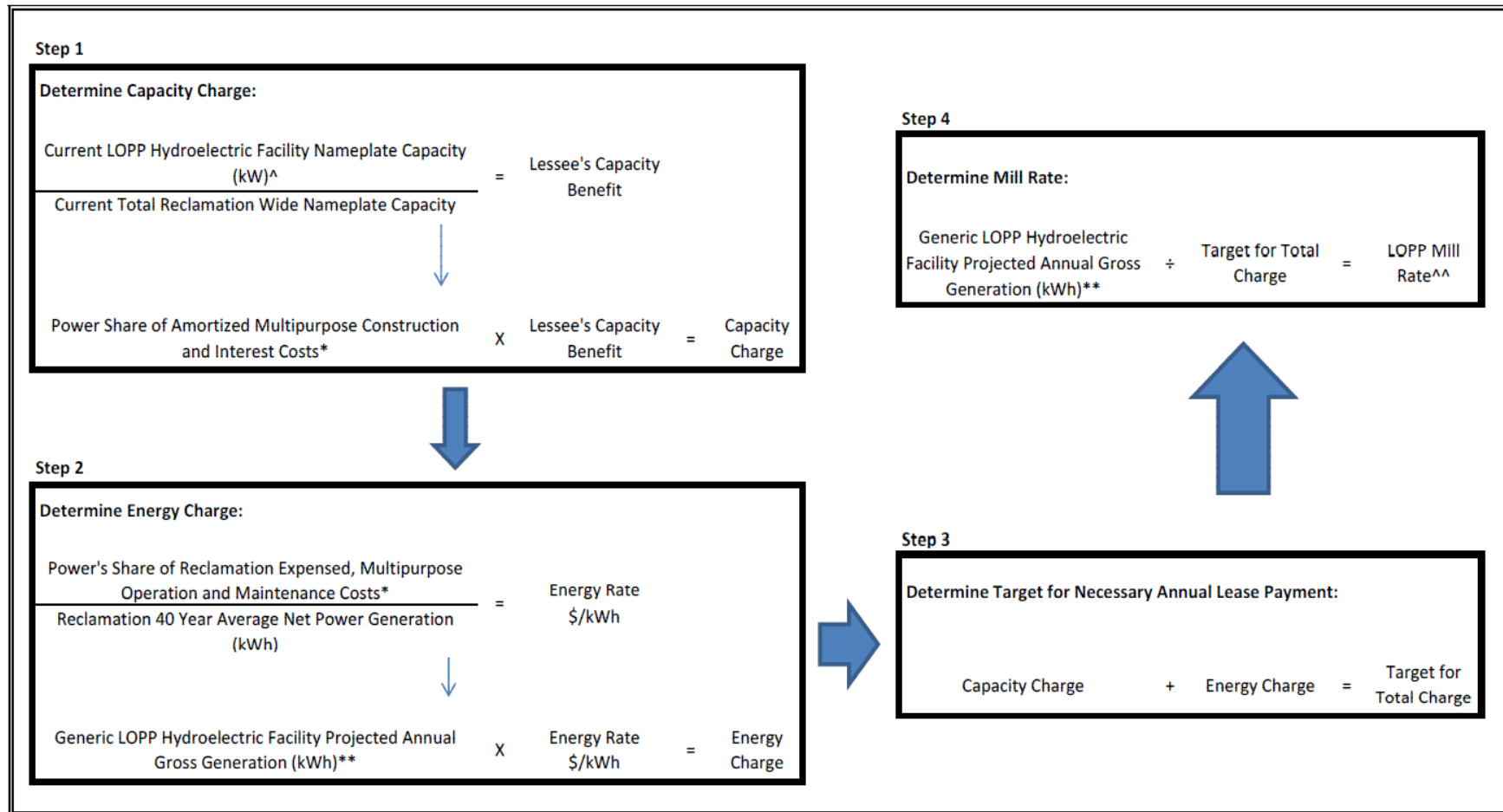
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Standard Lease of Power Privilege Rate Methodology



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Notes:

^Any capacity number can be used since the calculation is proportional to the overall Reclamation number. For this analysis a 1 MW plant is used.

*Collected from each region and combined to calculate a Reclamation total cost.

**Reclamation capacity factor over the last 40 years (1970-2010) is approximately 38%. For this analysis the 40 year capacity factor will be used to forecast a generic LOPP annual generation figure.

^^Mill rate must capture AT LEAST the "Target for Total Charge". Round the LOPP Mill Rate to next largest .5 Mill/kWh charge. If \$0.0023 set to 2.5 mills, if \$0.0027 set to 3 Mills, etc.

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Discounted Lease of Power Privilege Rate Methodology

Step 1

Determine Percentage Capacity Charge in Standard LOPP Rate:

$$\frac{\text{Capacity Charge}}{\text{Capacity Charge} + \text{Energy Charge}} = \text{Percentage Capacity Charge in Standard LOPP Rate}$$



Step 2

Determine Discounted Charge:

$$\text{Percentage Capacity Charge in Standard LOPP Rate} \times \text{Standard LOPP Rate} = \text{Discounted LOPP Rate}^{^^}$$

Notes:

^^Round the Discounted LOPP Mill Rate to next largest .5 Mill/kWh charge. If \$0.0023 set to 2.5 mills, if \$0.0027 set to 3 Mills, etc.