



Federal Register

Friday,
July 18, 2008

Part III

Department of the Interior

Bureau of Reclamation

43 CFR Part 429

**Use of Bureau of Reclamation Land,
Facilities, and Waterbodies; Proposed Rule**

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

43 CFR Part 429

RIN 1006-AA51

Use of Bureau of Reclamation Land, Facilities, and Waterbodies

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Bureau of Reclamation (Reclamation) proposes a rule on the use of Reclamation land, facilities, and waterbodies. The proposed rule addresses among other topics the cost recovery of fees for authorized uses involving the possession or occupancy of any portion of, and the extraction or disturbance of any natural resource from Reclamation land, facilities, and waterbodies; how to apply for a use authorization including what application forms to use; and what uses are prohibited and associated consequences. When finalized, the proposed rule will supersede the current rule which was originally published in 1983 and partially revised in April 2006.

DATES: Submit comments by September 16, 2008.

The dates of the informational meetings to be held regarding this proposed rule are listed in the **SUPPLEMENTARY INFORMATION** section of this proposed rule.

ADDRESSES: You may submit comments, identified by the number 1006-AA51, by one of the following methods:

—Use the Federal rulemaking Web site: <http://www.regulations.gov> and follow the instructions for submitting comments. Please use the docket identification number BOR-2008-0004 which has been assigned to this rule when submitting your comments to the rulemaking Web site.

—By mail to: Bureau of Reclamation, Denver Federal Center, P.O. Box 25007, Denver, CO 80225-0007, Attention: Richard Rizzi, Mail Code: 84-53000.

The locations of the informational meetings to be held regarding this proposed rule are listed in the **SUPPLEMENTARY INFORMATION** section of this proposed rule.

FOR FURTHER INFORMATION CONTACT: Richard Rizzi, Mail Code: 84-53000; Bureau of Reclamation; P.O. Box 25007; Denver, CO 80225. Telephone: (303) 445-2900.

SUPPLEMENTARY INFORMATION:

I. Background

The current rule, 43 CFR part 429, titled Procedure to Process and Recover the Value of Rights-of-Use and Administrative Costs Incurred In Permitting Such Use (current rule), established the procedures to recover administrative costs associated with processing "right-of-use" applications and the value of rights-of-use granted by Reclamation to applicants for the use of Reclamation land. Sections of the current rule were modified, in part, in 2006 to correlate with 43 CFR part 423, titled Public Conduct on Bureau of Reclamation Facilities, Lands, and Waterbodies.

This proposed rule addresses activities involving the possession or occupancy of any portion of, and the extraction or disturbance of any natural resources from, Reclamation land, facilities, and waterbodies. Regulations addressing public access to Reclamation property and occasional public activities such as hiking, camping, boating, and hunting, and closures are contained in 43 CFR part 423.

The demand for use of Reclamation land, facilities, and waterbodies for many different kinds of activities has increased dramatically since Reclamation began building Federal water supply, flood control, and hydropower projects over 100 years ago. With increased and varied uses has come confusion among the potential users of Reclamation land, facilities, and waterbodies about the process of applying for the various types of uses, the charges and fees associated with such uses, and other concerns. The current rule does not adequately address this confusion nor does it address prohibited and unauthorized uses of Reclamation's land, facilities, and waterbodies and associated penalties.

The Independent Offices Appropriation Act (IOAA) (31 U.S.C. 9701), September 13, 1982, as amended, sets forth Congress' intent that any use, permit, or similar thing of value provided by an agency is to be self-sustaining and that the IOAA authorizes agencies to prescribe rules establishing charges for such uses. The 1993 revision of the Office of Management and Budget (OMB) Circular A-25 established Federal policy directing that administrative costs be recovered for Government services and fees for the use or sale of Government goods or resources also be charged. OMB Circular A-25 provides information on the scope and types of activities subject to use fees and the basis on which these fees are established. It also provides guidance for agencies in implementing such fees

and charges. The use of Reclamation land, facilities, or waterbodies is a use of Government resources, and as such, the IOAA and OMB Circular A-25 direct Reclamation to recover the costs and fees associated with the use of these resources.

Section 10 (43 U.S.C. 373) of the Reclamation Act of June 17, 1902, provides the Secretary of the Interior (Secretary) with the authority to issue rules as necessary for the purposes of carrying out the provisions of the Act. Section 10 (43 U.S.C. 387) of the Reclamation Project Act of 1939 provides the Secretary the authority, in his discretion, to grant leases, licenses, easements, and rights-of-way. These two Acts provide Reclamation with the general statutory authority to issue rules on authorizing or prohibiting uses of Reclamation land, facilities, and waterbodies.

This proposed rule addresses:

(a) The possession or occupancy of any portion of, or the extraction or disturbance of any natural resource from, Reclamation land, facilities, and waterbodies;

(b) The procedures to follow when the proposed use involves a Reclamation easement;

(c) The procedures to apply for use of Reclamation land, facilities, and waterbodies that involves the possession or occupancy of any portion of, or the extraction or disturbance of any natural resource from, Reclamation land, facilities, or waterbodies;

(d) The criteria Reclamation will use to evaluate applications;

(e) Our statutory authority and the basis for charging application fees, recovering administrative costs, and collecting use fees associated with authorized uses;

(f) Conditions under which application fees, administrative costs, or use fees may be waived or reduced if determined appropriate by Reclamation or as currently listed in OMB Circular A-25;

(g) The required terms and conditions associated with use authorizations;

(h) Prohibited uses of Reclamation land, facilities, and waterbodies and how Reclamation will resolve unauthorized uses;

(i) The criteria Reclamation will use to evaluate existing authorizations for otherwise prohibited uses of Reclamation land, facilities, and waterbodies; and

(j) The decisions and appeals process applicable to actions taken under this part.

II. Revision of Existing Rules

On December 20, 1983, Reclamation published 43 CFR part 429 titled Procedure to Process and Recover the Value of Rights-of-Use and Administrative Costs Incurred in Permitting Such Use in the **Federal Register** at 48 FR 56223. Sections of this rule were revised on April 17, 2006, in the **Federal Register** at 71 FR 19802 to better correlate with 43 CFR part 423. The sections that were revised or added were § 429.1 Purpose, § 429.2 Definitions, § 429.3 Establishment of the value of rights-of-use, § 429.6 Applications for rights-of-use, § 429.12 Applicability, and § 429.13 General Restrictions.

On July 18, 2007, we published a notice in the **Federal Register** at 72 FR 39530 announcing the availability of the proposed rule for a 90-day public comment period ending on October 16, 2007. We requested that comments be submitted by the public using one of the following methods: posting on the Federal rulemaking web site, through emailing, or mailing to the listed address. As a result of comments received, the proposed rule has been revised and is being provided to the public for further comment through this publication in the **Federal Register**.

When the public comment period closes on this proposed rule, we will consider comments and incorporate them, where appropriate. The final rule will then be published in the **Federal Register**. That final rule, titled Use of Bureau of Reclamation Land, Facilities, and Waterbodies, will supersede the 1983 version and its 2006 modifications in their entirety.

III. Informational Meetings

Informational meetings regarding the proposed rule will be held in each of our five regions in the 17 western states. These meetings will be informational in nature only. Public comments offered at the meetings will not be recorded or accepted into the official record. You must submit your comments as instructed in the **ADDRESSES** section of this proposed rule. The dates, times, and locations of these meetings listed by Reclamation region follow:

Pacific Northwest Region

Moses Lake, Washington—Wednesday, July 30, 2008, 4 p.m., Big Bend Community College, 7662 Chanute Street NE.

Boise, Idaho—Wednesday, August 20, 2008, 4 p.m., Boise Public Library, 715 South Capitol Boulevard.

For further information regarding the meetings, please contact Diana Cross at telephone number 208-378-5020.

Mid-Pacific Region

Sacramento, California—Monday, August 18, 2008, 6 p.m., Federal Office Building, 2800 Cottage Way.

For further information regarding the meeting, please contact Peter Lucero at telephone number (916) 978-5101.

Lower Colorado Region

Boulder City, Nevada—Tuesday, August 5, 2008, 2 p.m., Lower Colorado Regional Office, Mead Building.

Phoenix, Arizona—Wednesday, August 6, 2008, 2 p.m., Phoenix Area Office, 6150 West Thunderbird Road.

Yuma, Arizona—Thursday, August 7, 2008, 9 a.m., Quartermaster State Historic Park, 201 N. 4th Avenue.

For further information regarding the meetings, please contact Robert Walsh at telephone number (702) 293-8421.

Upper Colorado Region

Grand Junction, Colorado—Wednesday, July 30, 1 p.m., Western Colorado Area Office, 2764 Compass Drive.

Albuquerque, New Mexico—Tuesday, August 12, 2008, 1 p.m., Albuquerque Area Office, 555 Broadway NE.

Salt Lake City, Utah—Monday, August 14, 2008, 1 p.m., Upper Colorado Regional Office, Bennett Federal Building, 125 South State Street.

For further information regarding the meetings, please contact Barry Wirth at telephone number (801) 524-3774.

Great Plains Region

Malta, Montana—Wednesday, August 20, 2008, 7 p.m., Marian Hills Golf Course.

Helena, Montana—Thursday, August 21, 2008, 7 p.m., Helena Regional Airport.

For further information regarding the meetings, please contact Mark Andersen at telephone number (406) 247-7609.

IV. Summary of Changes, Comments, and Responses

This section of the preamble describes changes from the proposed rule published on July 18, 2007, and provides responses to the comments received on that proposed rule by section. Nearly 1,300 comments were submitted by the public during the 90-day comment period. Of those comments, approximately 95 percent related directly to § 429.32, which discusses how we will address existing uses that are otherwise prohibited.

Comments received that are similar in nature have been categorized by subject. Comments and our responses on general issues not related to a specific section of the preamble or text of the proposed

rule are arranged first. This section is followed by comments regarding the preamble of the previously proposed rule and our responses; and lastly, the changes we have made, comments received, and our responses related to specific sections of the text of the previously proposed rule.

General Comments and Responses

Comment: Support was expressed for the proposed changes to the current rule and would like to see more private exclusive use areas converted to public use areas.

Response: Due to the overwhelming reaction received during the comment period, we have reconsidered this issue.

Comment: Appreciation was expressed for the high quality recreation related services provided to the public by our non-Federal managing partners.

Response: We will continue to work with our existing managing partners and seek out additional managing partners, when appropriate, to provide high quality recreation opportunities.

Comment: It appears that the intent of the proposed rule is to phase out all private access to Reclamation waterbodies. This would have an adverse effect on recreational boating and fishing as a whole as well as on the economies of neighboring communities. Amend the rule to strongly favor recreational uses.

Response: We do not intend to phase out the public's use of our waterbodies. Recreational use of these waterbodies will continue under this proposed rule.

Comment: The current rule is adequate and there is no need for revision.

Response: Although some adjustments were made in the revision that was published in 2006, additional revisions are needed to incorporate current Federal regulations and policies concerning the use of Federal land and cost recovery for those uses.

Comment: Clarification is needed to describe which bodies of water or facilities will be subject to authorizations and fees.

Response: All waterbodies and facilities that are directly managed by Reclamation are subject to the authorization requirements and fees specified in the current rule and will continue to be so under the provisions of the proposed rule.

Comment: A number of commenters, including managing partners, expressed concern that they did not receive adequate notice regarding the proposed rule making.

Response: We are providing a 60-day public comment period in conjunction with the publishing of this proposed

rule and sending a copy of this proposed rule to each commenter who previously provided an address in a timely manner. Additionally, informational meetings as listed in the **SUPPLEMENTARY INFORMATION** section of this proposed rule are being conducted during the 60-day comment period.

Comment: All water user organizations operating Reclamation projects under project operation and maintenance contracts should be specifically exempted from this proposed rule.

Response: Under § 429.4(b)(5) of this proposed rule, operation and maintenance activities on Reclamation land, facilities, and waterbodies authorized by contracts with water user organizations or Reclamation contractors do not require a use authorization.

Comment: Reclamation should be maximizing its return for the use of Reclamation lands, facilities, and waterbodies by charging fees appropriately.

Response: The proposed rule will comply with OMB Circular A-25 which directs the recovery of administrative costs and use fees.

Comment: Reclamation wants to eliminate all recreational and residential uses and replace them with grazing or agricultural permits at Nelson Reservoir in Montana.

Response: Nelson Reservoir is known to provide valuable public recreational opportunities. We have no plans to eliminate all recreational and residential uses at Nelson Reservoir and replace them with grazing or agricultural permits.

Comment: Specific requirements addressing riparian zone protection should be included in all grazing permits.

Response: Terms required in all use authorizations issued by Reclamation are listed under § 429.28 of the proposed rule. Additional terms and conditions or requirements are determined on a case-by-case basis to meet local, environmental compliance, and other legal requirements as stated under § 429.29 of the proposed rule.

Comment: It is unclear as to how this rule will affect non-Federal managing partners and their ability to continue to administer the Reclamation land and facilities that have been transferred to them at reservoirs for recreation and related purposes.

Response: Paragraph 429.4(b) specifically excludes sites managed by non-Federal managing partners from the requirements associated with issuing recreational use authorizations that do not violate Subpart H of these

regulations (e.g., allow for new private exclusive recreational or residential uses). Depending on the agreement between Reclamation and the non-Federal entity, the entity may also be authorized to issue use authorizations under Paragraph 429.5.

Comment: The mandated placement of fencing between private property and the lakeshore at Lake Cascade, Idaho, will have a negative affect on adjacent homeowners and many people who recreate in the area.

Response: Any operational or management plans for fencing at Lake Cascade, Idaho, are not mandated by or directly related to this proposed rule.

Preamble Comments and Responses

Only those sections of the preamble to the proposed rule that received comments are discussed in this section.

IV. Procedural Requirements

Comment: This section should include a meaningful analysis of Reclamation's intent for proposing Subpart H of the proposed rule.

Response: The reason we are including Subpart H is because it is our responsibility to notify the public of uses that are prohibited on Reclamation land, facilities, and waterbodies; thus the primary purpose of Subpart H. Based on the comments received in 2007, we have revised our approach with regard to existing private exclusive recreational and residential use, while maintaining the prohibition on any new such uses.

1. Regulatory Planning and Review (Executive Order (E.O.) 12866)

Comment: Under paragraph (a) this is a significant rule which under E.O. 12866 will have an effect of \$100 million or more on the economy due to additional financial burdens being placed on the public.

Response: The proposed rule actually lessens some of the impacts placed on the economy. As an example, the application fee is reduced from \$200 to \$100 in the proposed rule. The total amount of fees and charges we annually collect for uses of Reclamation land, facilities, and waterbodies is well under \$100 million.

Comment: Paragraph (b) states that this rule would not create a serious inconsistency or otherwise interfere with actions of another Federal agency. Other Federal agencies, however, seemingly continue to allow for private exclusive recreational or residential uses.

Response: Each Federal agency has authorities, regulations, and policies that are unique to their mission and

responsibilities and will necessarily result in differing practices for the management of lands and resources. How we address private exclusive recreational and residential uses has no impact on how other Federal agencies address that issue.

2. Regulatory Flexibility Act

Comment: Because this rule expands use fees and authorizations to include navigable waterbodies and facilities, many associated small businesses will be required to submit reports to the agency to comply with the fee determining process.

Response: The current rule requires that applicable use fees be paid for authorized uses of Reclamation waterbodies and facilities pursuant to OMB Circular A-25; the proposed rule does not expand on that requirement. Additionally, the proposed rule does not impose a reporting or recordkeeping requirement on small businesses.

3. Small Business Regulatory Enforcement Fairness Act

Comment: The expansion of fees and cost recovery to facilities and waterbodies could result in increased costs or prices for consumers, individual industries, etc.

Response: Section 429.1 of the current rule requires that applicable fees and cost recovery be assessed for the authorized use of Reclamation lands as well as facilities and waterbodies. The proposed rule does not expand on that requirement.

5. Takings (E.O. 12630 and E.O. 13406)

Comment: Reclamation's determination that this proposed rule would have no implications for takings of private property rights is invalid.

Response: This rule applies only to Reclamation land, facilities, and waterbodies. Any private personal property lawfully placed on Reclamation land, facilities, or waterbodies is there only by our permission through a use authorization. No real property rights are conveyed for Reclamation land, facilities, and waterbodies through such a use authorization. Additionally, Reclamation is not responsible for maintaining the value of private personal property, particularly when the authorized uses are not in compliance with the terms of the existing use authorization.

10. National Environmental Policy Act of 1969 (NEPA)

Comment: This action does have a significant effect on the quality of the human environment because of the

impacts it would have on development in major urban areas. There is a need for an environmental assessment or environmental impact statement pursuant to NEPA.

Response: The proposed rulemaking is a categorically excluded action pursuant to Department of the Interior Departmental Manual 516, Chapter 2, Appendix 1, Exclusion 1.10. As applications for specific use authorizations are evaluated under the proposed rule, the appropriate Reclamation office will determine the type of NEPA analysis that is warranted for the specific use requested.

13. Clarity of This Regulation

Comment: In general, the proposed rule is vague, confusing, and/or inconsistent in content.

Response: Changes have been made to the previously proposed rule to clarify sections that were specifically identified by commenters as unclear. We have also made editorial changes to improve the readability of the proposed rule.

Changes, Comments, and Responses Related to the Text of the Proposed Rule

Subpart A—Purpose, Definitions, and Applicability

Comment: The effects of §§ 429.3, 429.4, and 429.5 on non-Federal managing partners are not clear and appear to be contradictory. Section 429.3(d) states that grazing, farming, and other agricultural uses require an authorization under this part. Section 429.4(b), however, states that activities at sites managed by non-Federal managing partners under Public Law 89-72 do not require authorization under this part. Additionally, § 429.5 states that only Reclamation is authorized to issue use authorizations under this part.

Response: Section 429.4(b) lists uses that are not subject to this proposed rule and specifically includes “recreational activities at sites managed by non-Federal managing partners under Public Law 89-72, titled Federal Water Project Recreation Act, July 9, 1965, as amended . * * *” Therefore §§ 429.3(d) and 429.5 would not apply to our non-Federal managing recreation partners for recreational related uses.

Section 429.1 This section describes the purpose of 43 CFR part 429.

To be consistent with changes made at § 429.32, we added paragraph (f) to this section that describes how we will address existing permitted uses which are otherwise prohibited, including the criteria for approval or denial of requests to renew or transfer these permits. The paragraphs following were

appropriately renumbered. Minor editorial changes were made to this section as compared to the previously proposed rule.

Section 429.2 This section establishes the definitions for terms that are used in part 429.

We made changes to this section as compared to the previously proposed rule by adding definitions for the following terms: *easement, managing partner, part 21 of this title and public needs*. We also broadened the definition of *water user organization*.

Comment: The definition for private exclusive recreational or residential use is ambiguous and should more clearly explain what the extended period of time is that creates such a use.

Response: The inclusion of a time component does create confusion and would wrongly imply that certain exclusive uses could be allowable for a limited time without a use authorization. We have now removed the reference to “extended periods of time.” Normal recreational activities, including camping for up to 14 days within a 30 day period, are specifically exempted by section 429.4(a). We have also provided examples of the most common instances of private exclusive recreational and residential use in the definition itself.

Comment: The definitions in the proposed rule for *Reclamation land* and *Reclamation facility* should be amended to restore the words from the current rule under § 429.6. This change would limit the applicability of the proposed rule to those lands and facilities that are in the control and custody of Reclamation; and would recognize that although Reclamation lands continue to be owned by the United States, they are managed by and placed in the custodial control of the water user organizations with whom Reclamation holds contracts.

Response: This proposed rule applies to all land and facilities under our jurisdiction. It is our responsibility to manage these lands in the best interest of the United States and in compliance with applicable Federal statutes, regulations, and policies.

Section 429.3 This section describes the types of uses of and activities on Reclamation land, facilities, and waterbodies that typically require a use authorization under part 429.

We made only minor editorial changes to this section as compared to the previously proposed rule. It should be noted that part 5 of this title addresses some types of filming and photography on certain areas under the jurisdiction of the Department of the Interior. However, part 5 of this title is

specific to other agencies within the Department of the Interior not including Reclamation.

Comment: Section 429.4 is not needed since the uses that require authorization are listed in § 429.3. Only individuals who are seeking an authorization will be using this rule.

Response: If there are common uses that do not require authorization, it is important that we notify the public in this proposed rule.

Section 429.4 This section lists the types of uses of and activities on Reclamation land, facilities, and waterbodies that do not require authorization under part 429.

We made editorial changes to this section as compared to the previously proposed rule.

Comment: Paragraph (a) of this section states the types of activities that do not require authorization under this part which raises a concern regarding the well-being and safety of managing water user organization employees as they are performing their operation and maintenance duties on a daily basis. This paragraph seems to allow the general public access to all facilities. Such accessibility will not only increase operation and maintenance costs as a result of increased wear on roadways, but also dumping, vandalism, and opportunities for accidents.

Response: Access to lands, facilities, and waterbodies under our jurisdiction is administered under 43 CFR part 423. Water user organizations should work through their local Reclamation office to establish closures for areas or facilities such as canals, laterals, or water pipelines that are unsafe or not appropriate for general public access as established under Subpart B of 43 CFR part 423.

Comment: Paragraph (b)(5) of this section which suggests that Reclamation contracts for water supply or water operations do not require Reclamation authorization is directly contradictory to § 429.5 which states that water user associations have no authority to permit uses of Reclamation property.

Response: Paragraph (b)(5) of this section states that Reclamation contracts for water supply or water operations do not require a use authorization. Under paragraph (b)(6) of this section water user associations are not required to obtain use authorizations for their contractual operation and maintenance activities on Reclamation land, facilities, or waterbodies.

Comment: There is no need to list the uses that do not need authorization since we have listed those that do under § 429.3.

Response: We have provided information in this section specifying what common uses do not require authorization for clarification and as notification to the general public and our managing partners.

Comment: Clearly list what activities are authorized on Reclamation land. Be specific to water conveyance facilities.

Response: We have listed uses requiring an authorization at § 429.3. These uses must be authorized when they are on Reclamation land, facilities, or waterbodies which includes water conveyance facilities.

Comment: Clarify what activities managed by other Federal agencies or Interior bureaus are exempted from authorization under this part.

Response: Activities managed by other Federal agencies on Reclamation land, facilities, or waterbodies must be covered by an agreement or authority as specified in paragraph (b) of this section. For example, some recreation sites on Reclamation lands along the Colorado River are managed by the National Park Service through statutory authority.

Comment: Differentiating between how lands are managed directly by Reclamation or by other Federal agencies or bureaus will create disparate treatment.

Response: Each Federal agency has its own missions and authorities. These divergent missions and authorities will necessarily result in differing practices for the management of lands and resources.

Comment: The 14-day limit for camping should be increased.

Response: Reclamation's 14-day limit in any 30-day period is established under 43 CFR part 423.33(b). This proposed rule does not address that limitation.

Section 429.5 This section addresses who is authorized under part 429 to issue use authorizations.

We have made changes to this section as compared to the previously proposed rule to state that recreation managing partners and water user organizations whose existing contracts with Reclamation allow them to do so may issue some limited use authorizations to third parties for activities on Reclamation land, facilities, and waterbodies provided those limited use authorizations meet the requirements listed in this section. It should be noted that all revenues collected for the use of Reclamation land, facilities, and waterbodies must be handled in compliance with all statutory, regulatory, and policy requirements.

Comment: Water user organizations are specifically prohibited by this

section from authorizing the use of project lands and as a result existing use authorization that they have issued may be nullified.

Response: Water user organizations who have assumed responsibility for operation and maintenance of Reclamation land, facilities, or waterbodies pursuant to a contract with Reclamation may issue limited use authorizations to third parties for activities on Reclamation land, facilities, or waterbodies when all of the requirements listed in § 429.5 have been met.

Comment: The proposed rule contradicts the terms of existing contracts between Reclamation and water user organizations for operation and maintenance of Reclamation projects.

Response: Water user organizations who have assumed responsibility for operation and maintenance of Reclamation land, facilities, or waterbodies pursuant to a contract with Reclamation may issue limited use authorizations to third parties for activities on Reclamation land, facilities, or waterbodies when all of the requirements listed in § 429.5 have been met.

Comment: The proposed rule would adversely affect water user organizations' ability to issue grazing permits and collect subsequent revenues from those permits creating a financial burden on the water user organizations and their farmers.

Response: As noted above, we have made modifications that may allow for use authorizations to be issued by water user organizations. Financial issues can be impacted by project-specific laws, but in all cases revenues should be handled in accordance with all applicable statutes, regulations, and policies.

Section 429.6 This section details when water user organizations must approve Reclamation's use authorizations.

This section has been changed compared to the previously proposed rule to reflect provisions found in section 10 of the Reclamation Project Act of 1939 (43 U.S.C. 387) and to express the need for compatibility between use authorizations and a managing water user organization's ability to operate and maintain the facilities for which they have contractual operation and maintenance responsibility.

Comment: Retain the language in the current rule or add language to the proposed rule that clearly states that water user organizations will continue to be alerted to uses that might interfere

with their operation and maintenance of Reclamation project lands.

Response: We have made changes to this section to re-incorporate some of the language in the current rule and to more clearly express the need for compatibility between requested uses and water user organizations' ability to manage the facilities for which they have contractual operation and maintenance responsibility.

Subpart B—Proposed Uses Involving Reclamation Easements

Section 429.7 This section discusses the use of land not owned by Reclamation, but where Reclamation holds easements.

We have made changes to paragraphs (a), (b), and (c) of this section compared to the previously proposed rule. These changes are intended to improve the clarity of this subpart and not to change its intent or purpose.

Comment: Reclamation should be required to issue a consent document if the use does not unreasonably interfere with its easement. Doing so would increase the revenues being collected.

Response: Reclamation lacks the authority to require users of private lands to pay use fees to Reclamation for the use of those private lands. When issuing a consent document is determined to be compatible with the intended project purposes for which the easement was obtained, all other appropriate and applicable fees are collected as required by regulation and policy.

Section 429.8 This section discusses whether fees are required for the use of Reclamation easements.

We made only minor editorial changes to this section as compared to the previously proposed rule. We received no comments on this section.

Subpart C—Requesting Authorizations To Use Reclamation Land, Facilities, and Waterbodies

Section 429.9 This section explains what you should do before filing an application.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.10 This section describes what application forms to use and how to determine which application form is appropriate to use.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.11 Where the use authorization application forms can be found is provided in this section.

We made no changes to this section as compared to the previously proposed rule.

Comment: The forms as currently drafted do not include enough specificity regarding the required information to be submitted with an application. The current rule at § 429.6 is clearer and more detailed in listing what is required.

Response: This comment will be taken into consideration as we review Reclamation's Right-of Use Form 7-2540 for possible adjustments this year.

Section 429.12 The appropriate location for filing an application is listed in this section.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.13 This section tells how long the application review process will take.

We made minor editorial changes to this section as compared to the previously proposed rule.

Comment: Seven days should be an adequate amount of time to acknowledge receipt of an application and a determination to either accept or deny the request should be made within fourteen days.

Response: While we will strive to respond to all applicants as quickly as possible, there are certain times of the year when the volume of applications exceeds our staff resources. Consequently we may not be able to respond within seven days. In order to meet the time frames suggested by this comment at such peak times, we would have to increase our staffing resources which would lead to higher fees for all applicants. We believe the approach we have selected is in the best interest of all parties.

Section 429.14 The criteria Reclamation will consider when reviewing applications is described in this section.

We made minor editorial changes to this section for clarity.

Comment: The criteria used in reviewing applications are too broad and cannot be applied fairly and impartially.

Response: We review each use application as it is submitted on a case-by-case basis considering the criteria under § 429.14. As stated on the submitted application forms, we may request additional information as necessary to assist us in making a determination as to whether the proposed use of Reclamation land, facilities, or waterbodies is appropriate.

Comment: Add an additional criterion that would require the proposed activity

receive the consent of any affected water user organization.

Response: Although we have not incorporated this comment into the criteria under § 429.14, we have made changes to § 429.6 to more specifically address this issue.

Section 429.15 This section discusses whether Reclamation is required to issue use authorizations.

We changed this section by adding a statement to the effect that all use authorizations must meet required criteria prior to issuance.

Comment: Reclamation should not have the authority to issue authorizations at its discretion. Reclamation should be required to have a justification for declining an application.

Response: We issue use authorizations at our discretion in order to protect the interests of the United States, as all use authorizations must be compatible with the purposes for which the Reclamation managed lands are being administered.

Subpart D—Application Fees and Administrative Costs

Section 429.16 The amount of the application fee and when to pay the fee is described in this section.

We made minor editorial changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.17 This section explains under what circumstances administrative costs will be collected.

We made no changes to this section as compared to the previously published rule. We received no comments on this section.

Section 429.18 This section explains when administrative costs will be due and payable.

We made minor editorial changes to this section as compared to the previously published rule.

Comment: The administrative costs associated with the application process are not well-defined.

Response: Administrative costs are determined on a case-by-case basis depending on the staff time required to evaluate and process the application, and to monitor, and terminate the use authorization when necessary. The definition of *administrative costs* in § 429.2 provides a listing of the most common elements associated with administrative costs. In addition, § 429.20 provides that upon written request an explanation of the administrative costs for a particular application will be provided.

Section 429.19 This section describes what the process is when the

initial estimate for administrative costs is insufficient.

We made no changes to this section as compared to the previously published rule. We received no comments on this section.

Section 429.20 This section describes how to request a detailed explanation of the administrative costs.

We made no changes to this section as compared to the previously published rule. We received no comments on this section.

Section 429.21 This section describes what occurs if the administrative costs are overpaid.

We made minor editorial changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.22 This section discusses whether future administrative costs can be charged after a use authorization is issued by Reclamation.

We made changes in paragraph (b) of this section to more clearly state how use authorization holders will be notified of additional required fees and payments due.

Comment: The language in this section is ambiguous and arbitrary because it does not provide businesses with a fair basis upon which to predict costs. Fees for monitoring costs and the adjustment of fees to meet current conditions could have adverse effects on existing operations.

Response: We cannot anticipate all administrative type costs in the future. Thus, we must have the ability to collect additional administrative costs when necessary.

Subpart E—Use Fees

Section 429.23 How Reclamation determines use fees is described in this section.

We made no changes to this section as compared to the previously proposed rule.

Comment: The valuation basis for determining fees is not adequately defined and should be more fully developed and researched.

Response: The valuation process is established in our Directives and Standards, LND 05-01 Real Property Appraisal, which may be found on our Internet site.

Section 429.24 This section explains when use fees should be paid.

We made minor editorial changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.25 This section describes the length of time allowed to both submit a use fee payment and accept the offered use authorization.

We made minor editorial changes to this section as compared to the previously published rule. We received no comments on this section.

Subpart F—Reductions or Waivers of Application Fees, Administrative Costs, and Use Fees

Section 429.26 This section describes under what conditions Reclamation may waive or reduce costs or fees.

We made changes to paragraph (a) of this section to better define how a determination for fee waiver or reduction is made.

Comment: This section is confusing and arbitrary. The conditions under which a waiver can be granted are too broad and not well defined. Most applicants would qualify to apply for a waiver or a reduction in fees.

Response: The table found under paragraph (a) of this section specifically lists under what situations we may determine that it is appropriate to reduce or waive fees.

Comment: No change should be made to the language in the current rule regarding fee waivers or reductions.

Response: We are making changes to this section to comply with the Independent Offices Appropriation Act (IOAA) (31 U.S.C. 9701), September 13, 1982, as amended and the 1993 revision of the Office of Management and Budget (OMB) Circular A-25. The IOAA sets forth Congress' intent that any use, permit, or similar thing of value provided by an agency is to be self-sustaining and that agencies may prescribe rules establishing charges for such uses. OMB Circular A-25 established Federal policy which requires administrative costs be recovered for Government services, and fees for the use or sale of Government goods or resources also be charged.

Comment: This section should be eliminated and no fee waivers should be allowed.

Response: Under certain circumstances, fee waivers may be allowed under the current rule and section 6 of OMB Circular A-25.

Comment: Allowing fee waivers or reductions would limit the revenues currently being generated and returned to Reclamation and in some instances water user organizations.

Response: Section 6 of OMB Circular A-25 allows for a reduced fee or waiver under certain circumstances.

Subpart G—Terms and Conditions of Use Authorizations

Section 429.27 This section describes the general information that is contained in each use authorization.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.28 Terms and conditions that apply to all use authorizations from Reclamation are outlined in this section.

We made minor editorial changes in this section as compared to the previously proposed rule.

Comment: We disagree with paragraph (a)(3) of this section which requires terms in every use authorization allowing Reclamation to unilaterally terminate a use authorization.

Response: It is our responsibility to properly manage the land under our jurisdiction. On occasion we may need to terminate a use authorization and even do so unilaterally. However, such instances are rare and limited to very unusual circumstances which we have specified in this section.

Section 429.29 This section describes additional terms and conditions or requirements that will be included in a use authorization.

We made minor editorial changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.30 This section explains whether a use authorization can be transferred or assigned to another individual or entity.

We made minor editorial changes to this section as compared to the previously proposed rule. We received no comments on this section.

Subpart H—Terms and Conditions of Use Authorizations

Section 429.31 This section describes what the prohibited uses are on Reclamation land, facilities, and waterbodies.

We made minor editorial changes to this section as compared to the previously proposed rule.

Comment: A state transportation agency opposes paragraph (b)(1)(v) of this section. The agency is concerned that this section will be in direct opposition to their policies and will deny property owners access to existing easements.

Response: For property owners that currently have authorization to access their existing easements, this proposed rule does not include any changes. Those who are crossing Reclamation lands without authorization will need to follow the procedures to obtain authorization. The documentation of these access situations will benefit and protect all parties.

Section 429.32 How Reclamation will address existing uses which are otherwise prohibited is discussed in this section.

We have revised the approach with regards to existing private exclusive recreational and residential uses that were not previously addressed by 43 CFR part 21. Specifically, under the July 2007 proposed rule such uses would have eventually had to be removed. Under the revised rule, such uses can remain if certain criteria are met, and they will be treated in a manner very similar to that outlined in 43 CFR part 21.

Under § 429.32(b)(1), we have added additional criteria to which all existing authorized private exclusive recreational and residential uses of Reclamation land, facilities; and waterbodies, including those defined under 43 CFR part 21, are subject.

The overall majority of comments received relate to this section of the proposed rule. Most of these commenters hold existing use authorizations for cabin sites or other recreational or residential uses, including boat docks, on Reclamation land, facilities, or waterbodies.

Comment: Many commenters are concerned that their existing use authorizations for private exclusive recreational and residential uses will not be renewed upon expiration.

Response: We will renew private exclusive recreational and residential use authorizations provided that the requirements of this proposed rule are met. Some cabin sites are also governed by 43 CFR part 21, and those regulations (which govern all Department of the Interior agencies, not just Reclamation) are not affected by this rulemaking; however, because the monitoring and enforcement procedures in this proposed rule are actually based on the existing rules in 43 CFR part 21, this dual regulatory coverage should have little practical impact. Such renewals will be for a period not to exceed 20 years and will be subject to periodic reviews that could potentially result in an early termination.

Comment: Holders of existing use authorizations for private exclusive uses stated that they have invested a significant amount of money in improvements located on Reclamation land, facilities, or waterbodies, and do not want to lose that investment.

Response: A use authorization for private exclusive recreational or residential use does not vest an interest in Reclamation land, facilities, or waterbodies with the holder of the use authorization. Any physical improvements made by the holder of the

use authorization should be done so with the understanding that the ownership of the land, facilities, or waterbodies will continue to remain with the United States.

Comment: The holders of use authorizations are better stewards of the land than Reclamation. They invest many hours in not only keeping their own authorized use area cleaned up, but also cleaning up adjacent areas.

Response: We recognize that many holders of use authorizations are responsible caretakers. As the manager of those Federal lands, however, we have the ultimate responsibility for those Federal lands, and we must make certain that they are managed in the best interests of the United States.

Comment: It is ambiguous and unclear as to when 43 CFR part 21 applies. Specifically list which segments of 43 CFR part 21 will be followed or specify that it will be followed in its entirety.

Response: We have decided to use the requirements in 43 CFR part 21 to develop the requirements that will apply to all existing private exclusive recreational and residential use authorizations. This should result in consistent treatment of uses regardless of whether the part 21 regulations technically apply. For example, personal cabin sites were subject to the part 21 regulations if they were authorized directly by Reclamation, but similar sites were exempt from these regulations if the area was managed under a concession contract. Now, both types of sites will be subject to this proposed rule which mimics the procedures previously established in part 21. The cabin sites directly authorized by Reclamation remain under 43 CFR part 21 as well.

Comment: Section 429.32(a) states that renewal requests for cabin sites administered under 43 CFR part 21 will be reviewed by the Commissioner and approved where appropriate. The term appropriate sends a foreboding message and is ambiguous.

Response: The responsibility for renewing use authorizations for recreational or residential uses has been returned to the appropriate field office under this proposed rule.

Comment: Clearly define under what rare exceptions waivers would be granted by the Commissioner for renewals of recreational or residential uses of Reclamation land.

Response: The requirement for a waiver in order to renew an existing private exclusive recreational or residential use authorization has been removed from this proposed rule.

Comment: Non-profit organizations that hold use authorizations for activities such as summer youth camps should not be subject to the same regulations and fee requirements as for-profit organizations.

Response: Section 429.26(a) of the proposed rule and the table that follows describe under what circumstances we may determine that it is appropriate to reduce or waive fees. Item 5 of the table specifically applies to non-profit or educational entities when the use provides a general public benefit.

Comment: If private boat docks are eliminated as a result of this proposed rule, public boat docks which are not always conveniently located and are over used will receive increased pressure.

Response: Provided that existing authorized boat docks meet the requirements, this proposed rule would not prevent the use authorization from being renewed.

Section 429.33 This section describes the consequences for using Reclamation land, facilities, and waterbodies without authorization.

We made changes to paragraphs (b), (e), and (f) of this section for clarification purposes only. In addition, we added a new paragraph under (b) to specify how the interest rate to be applied to the use fee for unauthorized uses will be determined.

Comment: Existing commercial outfitters and/or concessionaires should have a preferential right of renewal for their authorizations. Other Federal agencies and Department of the Interior bureaus utilize this method.

Response: Through Reclamation policies and directives, we have instituted a process of fair and open competition with regard to concession and similar contracts.

Comment: There is no valid reason for capping the fees that can be collected for unauthorized use to 6 years.

Response: We have removed the 6 year cap on collecting use fees for unauthorized uses of Reclamation land, facilities, and waterbodies. The applicable statute of limitations will be applied based on the circumstances associated with each unauthorized use.

Subpart I—Decisions and Appeals

Comment: The appeal process follows a path within the Department of the Interior. A fair appeal process would include a representative small group rather than a supervisor to supervisor system.

Response: The appeals process includes a two tier approach. First a review by a Reclamation office other than the office that made the final

determination. Next, if the appellant still disagrees with that decision, the matter can be reviewed by an outside agency should the appellant choose to pursue the issue. We believe this is a fair process.

Section 429.34 The decisionmaker for Reclamation's final determinations is listed in this section and provides when that decision will be effective.

We made minor editorial changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.35 This section explains if and when an appeal can be made to a final determination.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.36 This section describes if and when a Commissioner's decision can be appealed. The process for and timeliness of such an appeal is also discussed in this section.

We made minor editorial changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.37 This section discusses what happens to monies owed to the United States during an appeal process.

We made minor editorial changes to this section as compared to the previously proposed rule. We received no comments on this section.

V. Distribution Table

The following table indicates each section of the original 1983 rule, as modified in 2006, and where each was incorporated into the proposed rule or not included as the case may be.

Old section	New section
429.1	429.1.
429.2(a)–(n)	429.2.
429.3(a)	429.23.
429.3(b)	429.33(a) and (c).
429.3(c)	429.33(a) and (b).
429.4	429.26.
429.5	Removed.
429.6	429.7(b); 429.12; and 429.14.
429.6(a)	429.10.
429.6(a)(1)–(3) ...	Removed. Now contained in Application Forms.
429.6(b)	429.16; 429.20–429.22; and 429.26.
429.6(c)(1)–(4) ...	429.26.
429.6(d)(1)–(4) ...	429.13(a) and (b).
429.6(e)	429.19; 429.22.
429.6(f)	429.23–429.25.
429.6(g)	Removed. See Preamble.
429.7(a)	429.27–429.30.
429.7(b)	429.6.
429.7(c)	Removed.
429.7(d)	429.28(a)(3).

