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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

