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:

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SUPPLEMENTARY INFORMATION:

DC-A-11

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

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

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

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

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

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

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,

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

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 B 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

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

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.

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

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.

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 ...."

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

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 ...."

:SUMPTION 4.

If the authorizing statute, as amended, or any documents :orporated by reference in the statute, specifically authorize :lamation to construct, operate, or maintain hydroelectric :ilities or powerplants, then Reclamation is presumed to have :isdiction even though the authorizing statute does not :cifically withdraw the Commission's authority over all lropower 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

. . . 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

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 Payette 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

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

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