Public Law 89-72
Solicitor Opinions

Attachment D

Solicitor Opinion No. 1

August 12, 1965

Memorandum

August 12, 1965

OFFICE OF THE SOLICITOR
FIELD SOLICITOR
BOISE, IDAHO
AUG 17 1965

To: Bonneville Power Administrator and Regional Heads, Interior Agencies

From: Office of the Regional Solicitor, Portland

Subject: P. L. 89-72 (S. 1229) - Federal Water Project Recreation Act (Approved July 9, 1965)
Legislative Memorandum No. 34

S. 1229 was reported on in our Legislative Memorandum No. 8, dated March 9, 1965. The legislative history of the Act is reflected in S. Rept. No. 149, H. Rept. No. 254 (on H.R. 5269, the companion bill), and H. Rept. No. 538, the Conference Report and in the floor debates. See unbound edition of Congressional Records, April 13, 1965, pp. 7623-7627 (Senate), and May 18, 1965, pp. 10497-10509 (House), June 23, 1965 p. 13946 (House), June 25, 1965, pp. 14276-14280 (Senate). Additional information pertinent to the legislative history may be found in Congressional Records: May 19, 1965, p. 10567; May 20, 1965, pp. 10724-10725; May 27, 1965, pp. 11532 and 11460; and June 28, 1965, p. 14313.

This law contains provisions that will have important and far-reaching impact on the future planning, development, and use of this nation's recreational resources. It provides uniform rules and policies for the treatment of recreation and fish and wildlife benefits and costs in connection with Federal multiple-purpose water resources projects.

General authority is given for the inclusion of recreation and fish and wildlife enhancement as project purposes in Federal water projects on par with ohter purposes, and general cost sharing and reimbursement policy for these purposes is prescribed.

This law establishes standard guidelines on the allocation of and the reimbursability of recreation and fish and wildlife costs of Federal multiple-purpose water-resource projects authorized after July 9, 1965. It also gives the Secretary of the Interior limited authority for recreation development on existing projects under his control. The law also provides for more active congressional participation in initiating Department of the Interior reclamation project investigations.

Overall Comments

Except for projects where Federal administration of recreation and fish and wildlife enhancement facilities is determined to be warranted, full development of recreation and fish and wildlife potential can be authorized after December 31, 1965, only if one or more non-Federal public bodies have made known their intention to participate in such development. Before project construction begins, an executed agreement to participate will be required. If such an agreement is executed, the Federal Government will bear up to one-half the separable project costs allocated to recreation and fish and

wildlife enhancement, the non-Federal public body will pay or reimburse the Federal Government for the remaining separable costs, and the Federal Government will bear all joint costs of the project allocated to recreation and fish and wildlife enhancement.

Projects authorized before the enactment of this Act with recreation and fish and wildlife development included on some other basis for cost allocation than provided in this Act will not be affected. But the uniform rules of this Act, particularly reflected in Section 2, for the treatment of recreation and fish and wildlife benefits and costs are applicable to projects for construction by the Department of the Interior and the Corps of Engineers authorized after the enactment of this Act. Projects authorized in the Calendar Year 1965 after the enactment of this Act may include recreation and fish and wildlife enhancement on the basis set forth in Section 2 of the Act without the required indication of intent in writing from a non-Federal public body to agree to administer project land and water areas for recreation or fish and wildlife enhancement pursuant to an approved plan for development as long as an agreement is executed prior to construction.

In the 88th Congress the Interior Committee supported a maximum limitation of 25 per cent on the amount that could be allocated to fish and wildlife and recreation benefits in any project. However, this Act provides for an allocation of the project cost up to not more than 50 per cent of the total project for fish and wildlife enhancement and recreation benefits. This limitation does not apply for projects of enhancement of anadromous fisheries, shrimp, or migratory birds protected by treaty. Nonreimbursable allocations to fish and wildlife purposes are limited to those for fish and wildlife enhancement. Costs for mitigation of fish and wildlife losses which would otherwise be caused by the project are to be assigned to the project purposes.

The following section-by-section analysis will answer many questions that may arise in the application of this Act. Specific problems in the application of the law may require further study.

Section 1 states congressional policy that (a) in the investigation and planning of any Federal navigation, flood control, reclamation, hydroelectric, or multi-purpose water-resource project, full consideration shall be given to the opportunities, if any, which the project affords for outdoor recreation and fish and wildlife enhancement and that, wherever any such project can reasonably serve either or both of these purposes, consistently with the provisions of this Act, it shall be constructed, operated, and maintained accordingly; (b) planning with respect to the development of the recreation potential of any such project shall be based on the coordination of recreational use of the project area with the use of existing and planned Federal, state, or local public developments; and (c) project construction agencies shall encourage non-Federal public bodies to administer project land and water areas for recreation and fish and wildlife enhancement purposes and operate, maintain, and replace facilities provided for those purposes unless such areas or facilities are included or proposed for

inclusion within a national recreation area, or are appropriate for administration by a Federal agency as a part of the national forest system, as a part of the public lands classified for retention in Federal ownership, or in connection with an authorized Federal program for the conservation and development of fish and wildlife. This last category includes wildlife refuges, wildlife ranges, game ranges, waterfowl production areas, wildlife management areas, national fish hatcheries, and areas for the protection and conservation of fish and wildlife that are rare or threatened with extinction. (S. Rept. No. 149, p. 10)

"Non-Federal public bodies" include such public entities as states, counties, municipalities, recreation districts, or other special purpose districts with sufficient authority to participate under the provisions of the Act. The term also includes a combination of two or more of the foregoing entities. (id)

Section 2(a) provides, that if non-Federal public bodies express an intent in writing before project authorization, and execute an agreement before institution of project construction, to administer project land and water areas for recreation or fish and wildlife enhancement, or both, pursuant to the plan for the development of the project approved by the head of the agency having administrative jurisdiction over it and to bear not less than one-half the separable costs (costs of providing lands, facilities, and project modifications) of the project allocated to either or both of said purposes, as the case may be, and all the costs of operation, maintenance, and replacement incurred therefor, then the Federal Government will bear the joint costs allocated to those purposes and up to one-half of the separable costs. (Project modifications include, for example, the raising of the height of a dam so as to provide increased storage capacity, or the construction of a subimpoundment in an arm of a reservoir, specifically for recreation or fish and wildlife enhancement.

The law contemplates that the Federal construction agency will work with non-Federal public interests to develop both a short-range and a long-range plan of development for recreation and fish and wildlife enhancement which should be provided at the project. For example, where there is little demand for recreation facilities, such facilities should be provided only to the extent local participation permits.

A statement of intent to participate by non-Federal public bodies is generally required by the Act if provision is to be made specifically for recreation and fish and wildlife enhancement at a project. However, in order not to delay authorization of projects on which planning has been completed by further referral of the project report to non-Federal public bodies, the Act waives this requirement for statement of intent to participate for projects authorized during Calendar Year 1965. For all projects, however, an executed agreement to participate will be required prior to initiation of project construction. If, after indicating intent to participate, non-Federal interests do not execute such an agreement, the project will be treated as though there had been no original statement of intent and will be constructed under provisions contained in Section 3.

Subsection 2(b) provides that non-Federal public bodies may pay or repay their share of costs of development (excluding those operations, maintenance, and replacement costs which they must bear directly) under either or both of the following methods, as determined appropriate by the head of the agency having jurisdiction over the project: (1) payment, or provision of lands or facilities required by the project, or (2) repayment, within 50 years of first use of the project for recreation or fish and wildlife purposes, with interest "at a rate comparable to that for other interest-bearing functions of Federal water resource projects." The source of repayment under (2) may be limited to a portion of the entrance and user fees collected at the project by non-Federal interests if the fee schedule and the percentage of the fees dedicated to repayment of the non-Federal share are established on a basis to achieve such repayment and are periodically reviewed. The latter provision allows non-Federal interests, if they so desire, to discharge their obligation to repay by charging fees to the recreation user and applying a portion of the fee toward repayment while applying the remaining portion toward their operation and maintenance costs.

It should be pointed out that, in the absence of an agreement for participation by a state or non-Federal public body, the use of the reservoir for outdoor recreation purposes would be limited and this, in turn, will reduce the benefits and the costs which can be allocated to these purposes.

Section 3 preserves a project's ~~full~~ potential for recreation and fish and wildlife for a 10-year period even though there is no agreement on local participation.

Subsection 3(a) recognizes that in some areas non-Federal interests may not want to participate in a project because they have sufficient recreation and fish and wildlife developments or because of other reasons. In such cases, water resources projects would not be held back because of the lack of non-Federal participation. In those instances, no facilities or project modifications are to be provided for recreation or fish and wildlife enhancement benefits unless (1) such facilities or modifications serve other project purposes and are justified thereby without regard to such incidental recreation or fish and wildlife enhancement benefits as they may have or (2) they are minimum facilities or modifications which are required for the public health and safety and are located at access points of certain roads. The likelihood that a project, even without ~~recreation facilities, may~~ be utilized for recreation is recognized. The ~~facilities for public safety include guard rails, turn-arounds at the end of roads, and minimum sanitary facilities. Parking, picnicking, swimming, or camping areas or facilities, or more elaborate sanitary facilities would not be provided under this subsection. Any costs allocated to recreation and fish and wildlife enhancement under these conditions would be nonreimbursable.~~

Most water resources projects provide some potential for recreation or fish and wildlife enhancement. Thus for this reason Subsection 3(b) provides for the acquisition or provision of lands in connection with any

project to preserve this potential even where there is no present indication of intent of non-Federal cost sharing as specified in Subsection 2(a). Under Subsection 3(b)(1), if within 10 years after initial operation of the project the non-Federal interests execute an agreement to participate in development of the recreation or fish and wildlife potential on the same basis as described above for agreements under Subsection 2(a), the Federal Government will then bear up to one-half the costs of the land, facilities, and project modifications for those purposes but there will be no reallocation of joint costs. Subsection 3(b)(2) provides that if such an agreement is not obtained, within ten years after initial operation of the project, the head of the agency having jurisdiction over the project may utilize the lands acquired pursuant to Subsection 3(b) for any lawful purpose within the jurisdiction of his agency, or may offer the land for sale to its immediate prior owner or his immediate heirs at its appraised fair market value. If the lands are not disposed of in this manner within 90 days, the head of the agency having jurisdiction may (1) transfer custody of the lands to another Federal agency that needs the lands and has authority to utilize them; (2) lease the lands to any non-Federal public body; or (3) transfer the lands to the General Service Administration for dispostion.

It is intended that in the event the prior owner or his immediate heirs cannot readily be found then a 30-day notice be given by publication in a local newspaper or newspaper of wide circulation in the project area, the 90-day period to begin to run with the first publication of notice in this way. The lands can be used or made available for any purpose not in conflict with the purposes for which the project was constructed and, except in connection with an offer to sell to the immediate prior owner or his immediate heirs, preference must be given to uses which promote the recreation and fish and wildlife enhancement potential of the project.

Section 4 provides that at projects, the construction of which has commenced or been completed as of the effective date of the act, Federal water resource agencies are authorized to lease recreation and fish and wildlife enhancement facilities and appropriate project lands to non-Federal public bodies which agree to administer the facilities and to bear the cost of operation, maintenance, and replacement of such lands and facilities. This section is designed to encourage non-Federal administration of the recreation and fish and wildlife enhancement features at existing Federal water resources projects.

Section 5 makes it clear that incremental or subsequent development of recreation and fish and wildlife enhancement at any project shall not be discouraged. Other programs, including that under the Land and Water Conservation Fund Act of 1965, can be used to develop recreation at projects that are not developed in accordance with other provisions of this Act. Development under such conditions will not, however, provide a basis for allocation or reallocation of any project costs to recreation and fish and wildlife enhancement.

Subsection 6(a) provides that the views of the Secretary of the Interior, developed in accordance with the organic act of the Bureau of Outdoor Recreation, shall be included in each water project report hereafter submitted to Congress. The Secretary's report will, whenever possible, indicate the extent to which the proposed project is in accord with state comprehensive recreation plans developed pursuant to the Land and Water Conservation Act of 1965.

Subsection 6(b) amends the first proviso of Subsection 2(d) of the Fish and Wildlife Coordination Act (72 Stat. 563; 16 U.S.C. § 622(d)) to make it clear that facilities recommended in project reports for fish and wildlife enhancement may be provided in accordance with the terms of this legislation, and it repeals the second proviso of that subsection of the Fish and Wildlife Coordination Act which applies to projects constructed under reclamation law. The effect of the repeal of the second proviso is twofold: First, it results in the costs of mitigation of project-occasioned damage to fish and wildlife being distributed among all project purposes the same as other project costs; and second, it terminates the reimbursement policy for costs allocated to fish and wildlife enhancement now set out in the Fish and Wildlife Coordination Act so that the reimbursement policy established by this Act may take effect.

Subsection 6(c) places a limitation of $28 million on water resource project funds that may be expended for land acquisition to accomplish the Federal Government's obligations to conserve and protect migratory waterfowl. These expenditures are in addition to those made from the Migratory Bird Conservation Fund for migratory waterfowl refuges. The 28 million dollar limitation applies only to expenditures for acquisition of lands or interests in lands which would otherwise not be acquired, when they are acquired at a water resource project for incorporation into a migratory waterfowl refuge. The limitation specifically does not apply to expenditures for the mitigation of damages to migratory waterfowl, since that is properly a project cost to be allocated to project purposes in the same manner as any other project cost. (S. Rept. 149, p. 13) This 28 million dollar ceiling is not itself an authorization for land acquisition. The authorization to acquire lands for these migratory refuges will be considered on a case-by-case basis in connection with authorization of individual water resource projects.

Subsection 6(d) provides that the Act shall not apply to the Tennessee Valley Authority or to projects constructed under the authority of the Small Reclamation Projects Act or the Watershed Protection and Flood Prevention Act.

Subsection 6(e) provides that such projects as local nonreservoir flood control, beach erosion control, small boat harbor, and hurricane protection projects shall be excluded from the cost-sharing and reimbursement provisions of the bill because existing policies cover these projects.

Subsection 6(f) states that the term "nonreimbursable" shall not be construed to prohibit the imposition of entrance, admission, and other recreation user fees or charges.

Subsection 6(g) provides that the provision of the Land and Water Conservation Fund Act of 1965 (78 Stat. 897), which calls for the use of the fund to help offset the capital costs of recreation at Federal projects, shall not be applied to projects at which non-Federal interests execute an agreement to share development costs and to bear the costs of operation and maintenance. The reason for this provision is that Federal recreation fees will not be charged at these projects. The offset provision applies, however, to the capital costs of projects where non-Federal interests do not assume responsibility for the administration of project areas for recreation.

Subsection 6(h) provides that all payments and repayments by non-Federal public bodies under the provisions of the Act shall be deposited in the Treasury as miscellaneous receipts, and revenue from the conveyance by deed, lease, or otherwise, of lands under Subsection 3(b)(2) of this Act shall be deposited in Land and Water Conservation Fund.

Section 7 is intended to provide the Secretary of the Interior with authority similar to that already available to the Secretary of the Army under Section 4 of the Flood Control Act of 1944, as amended (16 U.S.C. § 460(d)).

Subsection 7(a) provides that "the Secretary" (presumably of the Interior) is authorized to construct, operate, and maintain, or otherwise provide for, public outdoor recreation and fish and wildlife enhancement facilities in conjunction with "any reservoir heretofore constructed by him pursuant to the Federal reclamation laws or any reservoir which is otherwise under his control, except reservoirs within national wildlife refuges." (Emphasis added.) He may acquire or otherwise make available such adjacent lands or interest therein as are necessary for these purposes and may provide for public use and enjoyment of project lands, facilities, and water areas in a manner coordinated with the other project purposes. Not more than $100,000 of Federal funds shall be available to carry out the provisions of this subsection at any one reservoir. Lands, facilities, and project modifications for the purposes of this subsection can only be provided after an agreement in accordance with Subsection 3(b) of this Act has been executed. In other words, development could go forward only under an agreement with a local public body for cost sharing and administration.

The Conference Committee extensively rewrote Section 7 and its report states that Subsection 7(a) is applicable only to projects "heretofore constructed." In other words, the quoted limitation is applicable to all reservoirs affected by the subsection and not just to those constructed under the reclamation laws. As amended by the Conference Committee, Subsection 7(a) is inapplicable to projects authorized prior to the date of this Act but constructed after such date. A few larger projects may require separate legislation to secure funds above the $100,000 limitation in order to provide recreation facilities at some existing reclamation projects.

Subsection 7(b) authorizes the Secretary of the Interior to enter into agreements with Federal agencies or state or local public bodies for the administration of project land and water areas and the operation, maintenance, and replacement of facilities and to transfer project lands or

facilities to Federal agencies or state or local public bodies by lease agreement or exchange upon such terms and conditions as will best promote the development and operation of such lands or facilities in the public interest for recreation and fish and wildlife enhancement purposes.

Subsection 7(c) provides that lands under the jurisdiction of any other Federal agency may be devoted to recreation or fish and wildlife enhancement purposes under this section only with the consent of the head of such agency. Such lands may be transferred to the Secretary of the Interior. The latter is also authorized to transfer to the Secretary of Agriculture project lands and facilities for recreation or other national forest system purposes when such lands are adjacent to or within national forests, and such transfer shall be made, unless the Secretaries jointly agree otherwise, when the project is wholly within the exterior boundaries of a national forest. Lands so transferred will become national forest lands but, to the extent required for operation of the project for purposes other than recreation, the lands will be administered by the Secretary of the Interior. This subsection appears to be applicable only to reservoir projects under control of the Secretary of the Interior. The authority in this section would be inapplicable to Corps of Engineer projects.

Section 8, which was added to the bill by Senator Jackson, provides that effective on and after July 1, 1966, neither the Secretary of the Interior nor any bureau nor any person acting under his authority shall engage in the preparation of any feasibility report under reclamation law with respect to any water resource project unless the preparation of such feasibility report has been specifically authorized by law, any other provision of law to the contrary notwithstanding. The term "feasibility report" is defined in Section 10 to mean any report of the scope required by the Congress when formally considering authorization of a project. It does not include such preliminary studies as normally go into the making of reconnaissance grade reports. As originally passed by the Senate, this provision would have allowed preparation of such reports upon authorization of the Committee on Interior and Insular Affairs of either the Senate or House. This was comparable to the Corps of Engineers' authority.

Secretary Udall in his letter of July 6, 1965, to Budget Director Schultze indicated that Section 8 would rescind the feasibility report authority in Section 2 of the [illegible] June 17, 1902 (38 Stat. 388, 43 U.S.C. § 411), vested in the Secretary of the Interior and exercised by the Bureau of Reclamation since the original Reclamation Act of 1902. The Secretary expressed the view that Section 8 would deprive the executive of the initiative in determining the projects to be studied, and also expressed concern that the Bureau of Reclamation might not be able to use funds from the reclamation fund in connection with comprehensive feasibility investigations carried on by the Corps of Engineers which now has authority to undertake feasibility investigations on practically all of the major streams of the nation.

However, Senator Jackson in explaining Section 8 stated in part as follows:

"As I previously stated, I foresee no difficulty for the Department of the Interior under Section 3. I anticipate that an annual omnibus list of project feasibility reports will be presented to the Congress as an executive recommendation. Such an omnibus recommendation would be received shortly after the Congress convenes in each new session.

"Of course, the Secretary of the Interior could submit project feasibility report recommendations individually whenever circumstances might warrant such action. Such individual proposals, as well as the annual omnibus bill, will receive prompt consideration by the Senate Committee on Interior and Insular Affairs.

"The Secretary of the Interior must plan with foresight the potential water resource project development he intends to advocate before the Congress. In the interest of congressional efficiency and responsibility and in view of the increasing amount of taxpayers' funds involved in our water resources program, the Congress must fully participate in the project cycle. This, of course, does not mean that congressional approval is required for every preliminary investigation of the Department. We recognize that reconnaissance surveys are necessary to determine where potential projects are located and whether they merit further investigation. Once the Secretary of the Interior has determined, however, that a potential project is worthy of the detailed study necessary for its submission to the Congress for authorization, he must secure congressional approval to undertake the preparation of the project feasibility report." (Page 14276 Congressional Record, June 25, 1965)

Section 8 does not apply to situations where Congress has specifically authorized and directed surveys, feasibility reports, and studies, such as the investigations which the Department of the Interior was directed to undertake under Section 2 of the Colorado River Storage Project Act (P.L. 84-485). Also for further explanation of the applicability of Section 8, see Congressional Record, April 13, 1965, p. 7626.

Section 9 provides, in effect, that projects in which the sum of the allocations [illegible] and fish and wildlife enhancement exceeds the sum of the [illegible] irrigation, hydroelectric power, municipal, domestic, [illegible] water supply, navigation, and flood control shall not be [illegible] for authorization and construction under the Federal Reclamation Laws or under any River and Harbor or Flood Control Act except that this section shall not apply to any such project for the enhancement of anadromous fisheries, shrimp, or for the conservation of migratory birds protected by treaty, when each of the other functions of such a project has, of itself, a favorable benefit-cost ratio. Any project described in the general provision of this section and not falling into the exemption provision of this section should be recommended for

authorization as a recreation project or a project for fish and wildlife enhancement depending on which of these two purposes is predominant, if the project is worthwhile.

Section 10 defines certain terms used in the Act. Additional pertinent information as to the meaning of terms "separable costs" and "joint costs" is reflected in the Congressional Record, May 18, 1965, p. 16500.

Section 11 amends the Land and Water Conservation Fund Act of 1965 to make it clear any fees or charges for the use of recreation and fish and wildlife areas of water projects shall be credited to the land and water conservation fund and not go into special funds such as the reclamation fund. However, this shall not affect any contract heretofore entered into requiring that revenues collect at particular Federal areas be credited to specific purposes.

Section 12 provides that the Act may be cited as the "Federal Water Project Recreation Act."

For the Regional Solicitor

George D. Dysart

George D. Dysart
Assistant Regional Solicitor

Distribution: A, B, and C

FSMarch:dwj

Solicitor Opinion No. 2

September 9, 1965

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

2078

SEP 9 1965

Memorandum

To: Commissioner of Reclamation

From: Associate Solicitor, Water and Power

Subject: The application of Section 7(a) of P.L. 89-72 to heretofore constructed reservoirs

In your memorandum of August 9, 1965, entitled "Request for interpretation of ceiling limitation in Section 7(a) of P.L. 89-72 as applied to existing and previously authorized Reclamation projects" you ask whether the $100,000 limitation in the proviso to Section 7(a) was a limit on the total amount which could be spent under §7(a), or a limit on Federal funds only.

It is our opinion that the $100,000 limitation contained in the first sentence of the proviso to Section 7(a) is a limitation only on the amount of Federal nonreimbursable funds which may be used for the purposes of Section 7(a). The basis for our conclusion is contained in the express language of the statute and is supported by its legislative history.

Section 7(a) authorizes the Secretary to provide for recreation and fish and wildlife use at previously constructed Reclamation reservoirs or other reservoirs under the Secretary's control, with certain exceptions. The proviso states that not more than $100,000 shall be available for the purposes of Section 7(a) at any one reservoir. Lands, facilities and project modifications for the purposes of §7(a) may be provided only after an agreement in accordance with Subsection 3(b) of the Act has been executed.

The requirements of §3(b)(1) of the Act are that the agreement executed with the non-Federal public body provide that such body will administer the project land and water areas for recreation or fish and wildlife enhancement or both pursuant to the approved plan of development and that the public body will bear "not less than one-half" of the cost of lands, facilities, and project modification and all costs of operation, maintenance, and replacement. The "remainder" of the costs of lands, facilities, and project modifications shall be nonreimbursable.

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The significant feature of §3(b)(1) is that it imposes only a minimum of "not less than one-half" on the non-Federal public body contribution and not a maximum. There is no ceiling on the required non-Federal contribution. Because of this, the reference in §7(a) to $100,000 cannot be taken as a total project cost limitation. It can refer only to a limit on the "remainder" or Federal nonreimbursable share. The interpretation which we have applied is also supported by H.R. Rept. No. 538, Conference Report on S. 1229, 88th Congress, 1st Sess., 8-9 (1965), where, in discussing recreation development in existing projects, the $100,000 is expressly referred to as the Federal cost for development and acquisition. Since cost-sharing is required, the total cost allowable must obviously be greater than $100,000, and, since there is no ceiling set on the non-Federal contribution, there is no ceiling at all on total costs. Thus, for example, if the contracting non-Federal public body decided to contribute 90 percent of the total costs, the nonreimbursable Federal share would be 10 percent. Since $100,000 is available for this nonreimbursable Federal share, the total project cost could be one million dollars.

It should be noted that the §3(b) agreement required with §7(a) programs refers only to costs of lands, facilities, and project modifications and the cost of operation, maintenance, and replacement, whereas §7(a) also authorizes the Secretary to investigate and plan in respect to heretofore constructed reservoirs. No agreement appears necessary for the Secretary to engage in investigation and planning. However, the cost of such investigations and plans would have to be subtracted from the $100,000 in order to arrive at the amount of money which could be contributed as the Federal nonreimbursable remainder of the costs of lands, facilities, and project modifications. Thus, if $20,000 were spent on investigations and plans, only a maximum of $80,000 would be left to apply against the costs of lands, facilities, and project modifications. If those costs, for example, equal $200,000, the non-Federal public body would have to contribute $120,000.

Essentially, the scheme is that if total costs are $200,000 or less, the non-Federal public body must contribute one-half of the costs. If the total costs exceed $200,000, the non-Federal public body must contribute all amounts over $100,000.

What we have said can be applied without difficulty when the non-Federal public body directly contributes cash or kind to finance a §7(a) program. But when repayment financing is considered a further problem arises. P.L. 89-72 is not clear on whether the non-Federal public body's share of the funding of §7(a) programs can be financed through the repayment contract technique, where the United States advances the total project cost and then recoups the non-Federal share through payments spread out over a period of years.

Repayment financing is clearly authorized by Section 2(b)(2) of the Act in respect of future projects when recreation and fish and wildlife enhancement is authorized by project acts, and in respect of projects so authorized during the calendar year 1965. In one view of the Act the repayment technique permitted under §2(b)(1) could be interpreted as applicable only to such future projects and projects authorized in 1965 when costs are allocated according to Section 2(a), and not applicable in respect of programs under §7(a). Under this view, the non-Federal public body would be restricted to direct contributions in cash or kind to carry out a §7(a) program.

The alternative interpretation would consider that the financing techniques outlined in §2(b) were as available in respect of programs under §7(a) as programs under §2(a). If this interpretation were to be coupled with the interpretation that the $100,000 limitation applied only to the Federal nonreimbursable share, then the repayment technique could be utilized in respect of 7(a) programs where the total costs exceeded $100,000. This view interprets the proviso of §7(a) as meaning that no more than $100,000 shall be available for the Federal nonreimbursable share to carry out the purposes of Section 7(a) at any one reservoir. Thus, if the funds were available, the Federal agency could finance total costs greater than $100,000 as long as an appropriate repayment contract were executed which returned either one-half of the total costs or all amounts over $100,000, as the case may be. Further, following the guidelines of Section 2(b), interest would be charged, a 50-year repayment period would be allowed, and repayment could be financed from user fees subject to renegotiation every five years. In respect of §7(a) programs undertaken by the Bureau of Reclamation, however, it must be kept in mind at all times that P.L. 89-72 states also, in §6(h), that all repayment by non-Federal public bodies shall be deposited in the Treasury as miscellaneous receipts. Since repayment would not be credited to the Reclamation Fund, financing under a repayment plan should not be done from the Reclamation Fund.

In view of the liberal purposes of P.L. 89-72, and in order to implement those purposes most effectively, we are of the opinion that the Bureau should proceed upon the second interpretation offered above in respect to the use of repayment techniques.

Harry J. Hogan

Associate Solicitor
Water and Power

Solicitor Opinion No. 3

September 27, 1965

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

H-65-104.3.3

SEP 27 1965

Memorandum

To: Commissioner of Reclamation

From: Associate Solicitor, Water and Power

Subject: Application of Section 7(a) of P.L. 89-72 to heretofore constructed reservoirs

In our memorandum of September 9, 1965, responding to your memorandum of August 9, 1965, we stated as an alternative interpretation of 7(a) that the $100,000 posed a limitation for the Federal nonreimbursable share. We stated, "Thus, if the funds were available, the Federal agency could finance total costs greater than $100,000 as long as an appropriate repayment contract were executed which returned either one-half of the total costs or all amounts over $100,000, as the case may be." An inquiry was directed to this interpretation. After consultation with staff members of the House Committee on Interior and Insular Affairs, we wish to modify the interpretation placed upon 7(a) in the penultimate paragraph of our September 9 memorandum.

According to the members of the staff of the House Committee on Interior and Insular Affairs, the $100,000 is intended to be a limit on the amount of funds authorized for total Federal expenditure on each heretofore constructed reservoir for recreation or fish and wildlife enhancement purposes. Three examples follow: (1) If the total cost of a program under 7(a) were $100,000, that program could be totally financed from authorized Federal funds, $50,000 to be subject to repayment on the terms specified in Section 2(b) of the Act; (2) If the total cost of a project were $150,000, $100,000 of Federal money is authorized to be expended upon it, $75,000 of that $100,000 would be nonreimbursable under the formula, $25,000 would be subject to repayment, and the non-Federal public body would have to contribute $50,000 in cash or kind; (3) If a project's total cost were $200,000, $100,000 of Federal money would be available and all would be nonreimbursable, there would be no funds available for financing on a repayment basis, the non-Federal public body would have to put up $100,000.

Thus, as total project costs approach $200,000, the amount of authorized money available for repayment-type financing approaches zero. At project costs of $200,000 and beyond, no funds are authorized for repayment financing.

The problem posed by the interpretation, said to be most in accord with the intention of Congress, is that for projects with a total cost greater than $100,000, and where the non-Federal public body does not have the resources to make a substantial contribution in cash or kind, such projects will either not be undertaken or it will be necessary to secure additional authorization from Congress to invest larger amounts of Federal funds on a repayable basis.

Harry Pogan

Associate Solicitor
Water and Power

Solicitor Opinion No. 4

March 11, 1966

IN REPLY REFER TO:
A-66-2012.19

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

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Memorandum

To: Commissioner of Reclamation

From: Associate Solicitor, Water and Power

Subject: Section 7(a) of the Federal Water Project Recreation Act, P.L. 89-72, 79 Stat. 213, 216-17

In your memorandum of January 6, 1966, you requested our views and advice on Section 7(a) of P.L. 89-72. You specifically wished advice on the meaning of Section 7(a) where a recreation or fish and wildlife management unit does not encompass an entire reservoir or where such units are not directly associated with any reservoir. You specifically referred, as an example, to the development of these functions on the Lower Colorado River in accordance with the Secretary's Land Use Plan.

We understand that by "management unit" you were referring to the operation and maintenance of a recreation area or fish and wildlife enhancement area, or both, by a non-Federal public body under a contract with the Secretary pursuant to Section 3(b)(1) of the Act.

We find nothing in Section 7(a) or elsewhere in the Act which indicates that there must be only one such contracting non-Federal public body for a reservoir. Section 3(b)(1) provides for non-Federal bodies to administer areas for recreation or fish and wildlife. Thus, there may be a non-Federal public body administering an area for recreation, another administering it for fish and wildlife, or a single agency administering both functions. There is nothing in the Act to preclude two or more non-Federal public bodies contracting with the Secretary from administering recreation areas at the same reservoir. However, irrespective of the number of non-Federal public bodies administering the recreation or fish and wildlife programs, the federal expenditure at any given reservoir cannot exceed the $100,000 limitation in Section 7(a). The limitation is stated as $100,000 for any one reservoir, not for any one management unit.

The question of whether management units not directly associated with a reservoir may be included under the Section 7(a) program is more difficult. The Secretary is authorized ".... in conjunction with any reservoir . . ." to provide for recreation and fish and wildlife enhancement. The quoted language appears to be a limit

on the authority contained in that section. In plain language, "in conjunction" means "joined together, or in combination," while "reservoir" clearly means, without more, a body of impounded water. These words have no technical legal meaning. Thus, interpreted literally, the Secretary's authority under Section 7(a) appears limited to programs directly related to the use of an impounded body of water for outdoor recreation or fish and wildlife enhancement.

Support for this narrow reading of Section 7(a) is implicit in the legislative history. S. 1229, as reported by the Senate Committee on Interior and Insular Affairs, reads: "Sec. 7. The Secretary of the Interior is authorized as part of any water resource development project under his control heretofore authorized ..." (Emphasis added). See S. 1229, as reported April 7, 1965, with amendments. In the Section-by-Section analysis of S. 1229 contained in Senate Report No. 149, 89th Cong. 1st Sess. at page 14, it is stated that the purpose of Section 7 was to provide the Secretary authority equal to that already available to the Secretary of the Army. It is stated that since 1944 the Department of the Army has had basic statutory authority to provide recreation development at reservoir projects under its control and that this authority was expanded in 1962 to embrace water resource development projects generally. (See P.L. 87-874, 16 U.S.C. 460(d)).

The House Bill, H.R. 5269 in Section 7(a) also referred to water resource development projects and in its analysis of Section 7 also referred to the same Corps of Engineers' authority as the Senate Report. See H.R. 254, 89th Cong. 1st Sess. 4, 16 (1965). The reference to these legislative authorities for the Corps of Engineers suggests that the Congress clearly distinguished between reservoirs and water resource development projects.

The phrase "water resource development project" probably encompasses more, both physically and conceptually, than the term "reservoir." Therefore, when the Conference Committee substituted the words "in conjunction with any reservoir" for the broader terms "as a part of any water resource development project" it presumably intended to limit the Secretary's authority. The Committee's indicated knowledge of the Corps of Engineers' authorities and its history suggests an awareness of the differences and a conscious choice. If the term "water resource development project" had been retained, there would be no difficulty in arriving at the conclusion that the Secretary possessed authority under 7(a) to develop recreation and fish and wildlife enhancement quite beyond the confines of a reservoir. But the use of the more narrow word "reservoir", viewed against the legislative evidence stated above, prevents us from reaching that conclusion with respect to 7(a) as enacted.

Therefore, we conclude that Section 7(a) only authorizes the Secretary to engage in programs related to heretofore constructed reservoirs in the limited sense of an impoundment of water; the authority is not intended to cover water resource developments generally.

What is related to a reservoir cannot be answered in the abstract. The legality of marginal programs will depend upon their facts. It should be noted, however, that §7(a) expressly limits acquisition of land or interests in land, to land adjacent to the reservoir. As to the land acquisition part of a program, "related to", therefore, means "adjacent". Clearly other facilities for recreation or fish and wildlife enhancement that are developed on reservoir project land, or on adjacent land or interests in land acquired for the purpose, would also be related to the reservoir. Beyond this point there should be careful factual justification of the relationship to the reservoir of the proposed recreation or fish and wildlife enhancement facilities.

Following the above guidelines those recreational or fish and wildlife enhancement areas in proximity to, or justifiably related to any of the lower Colorado River impoundments can be brought under Section 7(a) programs. But, only $100,000 is available for each reservoir area along the lower Colorado where a non-Federal public body management unit can operate regardless of the number of management units thereon.

Harry J. Hogan
Associate Solicitor
Water and Power

Solicitor Opinion No. 5

September 19, 1966

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CONTROLLED

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

IN REPLY REFER TO:
G-66-2014.19

Memorandum

SEP 19 1966

To: Commissioner of Reclamation
Director, Bureau of Sport Fisheries and Wildlife
Director, Bureau of Outdoor Recreation

From: Solicitor

Subject: Repayment obligation of non-Federal public bodies under Section 2(b) of the Federal Water Project Recreation Act

Directors of various State fish and game departments and Interior personnel responsible for the administration of the Federal Water Project Recreation Act, 79 Stat. 213 (1965), 16 U.S.C. 460l-12 (Supp. I, 1965), have requested the Solicitor's office to examine the scope of the repayment obligation of non-Federal public bodies under Section 2(b) of the Act, 16 U.S.C. 460l-13(b), when the source of repayment is limited to entrance and user fees. Specifically, two questions have been presented:

1. If entrance and user fees fail to achieve total repayment within the 50-year period, is the remaining obligation of the non-Federal public body cancelled with no subsequent liability for the remaining amount?

2. Does the Act authorize the Secretary to enter into a repayment contract with a non-Federal public body which provides for the extension of the repayment period beyond 50 years whenever total repayment from entrance and user fees is not achieved within the 50-year period?

Section 2(b) of the Act reads as follows:

> "The non-Federal share of the separable costs of the project allocated to recreation and fish and wildlife enhancement shall be borne by non-Federal interests, under either or both of the following methods as may be determined appropriate by the head of the Federal agency

> having jurisdiction over the project: (1) payment, or provision of lands, interests therein or facilities for the project; or (2) repayment with interest at a rate comparable to that for other interest-bearing functions of Federal water resource projects, within fifty years of first use of project recreation or fish and wildlife enhancement facilities: Provided, That the source of repayment may be limited to entrance and user fees or charges collected at the project by non-Federal interests if the fee schedule and the portion of fees dedicated to repayment are established on a basis calculated to achieve repayment as aforesaid and are made subject to review and renegotiation at intervals of not more than five years."

Subsections 2(b)(1) and (2) describe the manner in which a non-Federal public body may repay its share of the enhancement features of a multipurpose project. Repayment may be achieved by a cash payment, donation of land, donation of facilities, or repayment over 50 years from the first use of the enhancement facilities at an interest rate comparable with other interest-bearing features of a project such as power. The selection of the appropriate method and source of repayment is made by the head of the agency having jurisdiction over the project.

The proviso to Section 2(b) provides, however, for an additional method of repayment. This proviso, which modifies the previous general language of Section 2(b)(2), states that "the source of repayment may be limited to entrance and user fees collected at the project by the non-Federal interests <u>if</u> the fee schedule and the portion of fees dedicated to repayment are established on a basis <u>calculated to achieve repayment</u> as aforesaid and are made subject to review and renegotiation at intervals of not more than five years." (Emphasis added). Generally, the Secretary may not enter into a repayment contract which limits the source of repayment to entrance and user fees until he determines (1) that this is an appropriate method of repayment; (2) that the fee schedule and portion of fees dedicated to repayment are <u>reasonably calculated</u> to achieve repayment within 50 years; and (3) that the non-Federal public body will agree to review and renegotiate the fee schedules and portion of fees dedicated to repayment at least every five years.

Due to the limited authority of many non-Federal public bodies to enter into long-term financial obligations, there is a definite necessity to limit the sources of repayment as well as liability to the collection of sufficient entrance and user fees at a project. Many States, counties, and cities are restricted in their authority to enter into contracts which pledge their general revenues and properties as security for the repayment obligation. In addition, bonding authority to finance participation in these Federal multipurpose projects is also limited. The only manner by which many non-Federal bodies can and will participate in the enhancement features of a multipurpose project would be under conditions that do not require them to pledge their general revenues as security for the repayment obligation. Similarly, many non-Federal public bodies will not enter into a repayment contract if the repayment obligation would make the non-Federal body liable to suit and collection for any deficiencies whenever the entrance and user fees fail to repay.

The purpose of the proviso to Section 2(b) is to overcome such difficulties and to encourage non-Federal participation in the enhancement features of a water resource project under such terms and conditions that the non-Federal bodies could legally and financially afford. (See H. Rept. 254 and S. Rept. 149, 89th Congress, 1st Session). To implement this objective of the Act and encourage extensive participation by non-Federal public bodies in the development and administration of enhancement features either or both of the questions posed should be answered affirmatively.

We must, however, answer the first question in the negative. Our conclusion is based primarily on the language of the proviso to Section 2(b) of the Act. It provides specifically that the fee schedules and charges initially established to achieve repayment may be reviewed and renegotiated at intervals of not more than five years. This section of the proviso appears designed to insure that there would be total repayment by the non-Federal public body, and is Congressional recognition that repayment obligations limited to revenues necessarily need administrative review and examination in order to fully protect the Federal investment in the project. It is logical and practical to review and reset fee schedules and charges when the debt service depends upon these fees. The legislative history of the Act favors this interpretation. 1/ There is no requirement, however, that the repayment limited to entrance

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1/ See Congressional Record, 89th Congress, 1st Session, p. 10505, and House Report 254, and Senate Report 149, 89th Congress, 1st Session.

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and user fees in fact occur within 50 years. It is our opinion that the Act authorizes the Secretary to renew the contract or extend the repayment obligation for an additional period in order that there will be total repayment. Thus, the answer to the second question is yes.

The proviso to Section 2(b) expressly provides that the source of repayment may be limited to entrance and user fees if the fees were established on the basis calculated to achieve repayment within the 50-year period from first use of the facility. It is obvious that full repayment within 50 years cannot be guaranteed by such calculated fee schedules when one considers the innumerable, variable and unknown factors influencing attendance at projects. If the fees calculated to achieve repayment in 50 years do not reach that goal, then the logic of the Act requires a time extension for repayment, since the obligation must eventually be met. The alternative would be for the United States to take over and collect fees until the obligation is paid. This step would be both administratively burdensome and essentially useless because the same result can be achieved by leaving the project in local hands. The authority to extend the repayment period is a necessary implication of the statute.

It is obvious that the success of a repayment program dependent upon fees and charges will be controlled by the manner in which the fees are initially established and reviewed and renegotiated each five years. It will be incumbent upon the contracting Bureaus to ensure by appropriate contract provisions that the fees and charges are truly "calculated to achieve repayment" within the allotted time, insofar as practical. We particularly foresee the need for contract provisions designed to resolve intractable disagreements and deadlocked negotiation. For example, to protect the Federal interest, it could be provided contractually that the Secretary will establish the fees after a set period of negotiation had elapsed without agreement.

To summarize our conclusions: (1) The amount of repayable costs owing, but unpaid, at the end of 50 years is not cancellable, (2) The Secretary may extend the time for repayment beyond 50 years when repayment has not been achieved in that period. The authority to extend the time of repayment should be adequate to cope with most, if not all, repayment problems which may arise in the future.

Edward Weinberg

DEPUTY Solicitor

Solicitor Opinion No. 6

February 28, 1967

A-67-1143.3

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

FEB 28 1967

Memorandum

To: Commissioner of Reclamation

From: Associate Solicitor, Reclamation and Power

Subject: Disposition of recreation revenues at Reclamation reservoirs administered for recreation by the Forest Service, USDA

In your memorandum of January 24, 1967, you requested our advice as to the relationship of several statutes to the disposition of revenues generated by recreation use of reclamation reservoirs where the land has been transferred to the Forest Service for administration pursuant to section 7(c) of Public Law 89-72, the Federal Water Projects Recreation Act (79 Stat. 213).

Section 2(a) of P.L. 88-578, as amended, the Land and Water Conservation Fund Act (78 Stat. 897), states, without ambiguity, that all proceeds from entrance and recreation user fees or charges collected or received shall be covered into the fund, notwithstanding any other provision of law. Only two exceptions to such disposition of recreation revenues are allowed; (1) where by law, states or political subdivisions share in revenues from Federal lands, and (2) contracts of the United States, executed prior to September 3, 1964, providing that such revenues derived from recreation uses, collected at a particular Federal area shall be credited to specific purposes, shall not be affected.

Thus, by its express terms, section 2(a) of P.L. 88-578 annuls any other statutory rights to recreational revenues, except those rights under exception (1) above, and those rights embodied in contracts under exception (2). The impact of section 2(a) upon the various reclamation statutes cited in your memorandum is as follows:

(1) Act of July 19, 1919 (41 Stat. 202). This Act does not provide for state or political subdivision sharing of revenues of any kind. It provides merely that receipts from leasing reclamation reserved or withdrawn land shall be covered into the reclamation fund. The

provision of section 2(a) of P.L. 88-578, as amended, covering into the Land and Water Conservation Fund all recreation revenues, notwithstanding any other provisions of law, removes such revenues from disposition under the Act of July 19, 1919. This result is supported by the history of section 2(a) of P.L. 88-578. As originally enacted it only affected dispositions of recreation revenues that could be made under any other provision of law that such proceeds shall be credited to miscellaneous receipts of the treasury. Such language would have kept in force the provisions of the Act of July 19, 1919 because the latter does not cover revenues into miscellaneous receipts, but rather into the reclamation fund. The amendment to section 2(a), contained in section 11 of P.L. 89-72, deleted the restrictive language referring to miscellaneous receipts and thus broadened the application of section 2(a). It was specifically intended to preclude the disposition of such recreation revenues into special funds like the reclamation fund. See H.R. Rept. 254, Federal Water Project Recreation Act, 89th Cong., 1st Sess. 12, 17 (1965).

(2) Subsection I of the Fact Finders Act of December 5, 1924. Subsection I, in pertinent part, refers to revenues from leasing of project grazing and farm lands and sale or use of town sites when the project is operated and maintained by the water users. Operation and maintenance by water users is performed under contract with the Secretary and many such contracts specifically provide for the crediting of Subsection I type revenues to the project. Subsection I, when embodied in a contract, thus creates contractual rights to lease revenues from project grazing and farm lands, and sale or use of town sites, in the project and water users. The second exception in section 2(a) of P.L. 88-578 can be applicable to such revenues, if the Federal land used for recreation was project farm or grazing land or a rented town site before being used for recreation, and if such land was leased for farming, grazing or town site uses and provided revenues for Subsection I purposes, pursuant to a contract executed before September 3, 1964.

The above interpretation of the relationship between Subsection I and section 2(a) of P.L. 88-578 preserves contract rights by viewing recreation revenues as lease revenues from project grazing and farm lands, even if the contract does not expressly refer to recreation revenues as lease revenues. Under the interpretation any kind of revenue from project

grazing and farm land is viewed as protected. It leans heavily on the statutory language in 2(a) that the Act shall not "affect" contracts, i.e. annul or detract from contractual rights to revenue, as liberally intended to preserve contract rights.

It should be noted, nonetheless, that section 2(a) of P.L. 88-578 can afford a more restrictive interpretation. It can be read as indicating that the contract must specify that recreation revenues as such from particular areas shall be used or credited for a specific purpose identified in the contract. Under such a reading contracts which merely referred to Subsection I grazing and farming lease revenues, but not to recreation revenues, would preserve no rights in the contractor. In addition, the lands involved would no longer be project grazing or farming lands when used for recreation.

Rights in revenues preserved by contracts would pertain whether or not the lands were retained in the jurisdiction of the Bureau of Reclamation or transferred to another agency such as the Forest Service. The amount of revenue which should be set aside for meeting the contractual commitment should be equivalent to what had been available when the land was under grazing or farm lease. To apply to the contract additional revenue generated by recreational development undertaken with appropriated funds would constitute, in our opinion, an unauthorized gift of federal property.

These conclusions apply to both public domain and acquired lands. Section 2(a) of P.L. 88-578 refers to "Federal lands." Subsection I also makes no distinction, referring only to "project" lands.

(3) Subsection J of the Fact Finders Act. Subsection J refers primarily to proceeds from the sale of surplus water under the Warren Act of February 21, 1911. Although there may be a conflict between the use of land for recreation and rights to profits from grazing and farm leases on the same land under Subsection I, we see no conflict at all as to Subsection J. Revenues under Subsection J, and under section 2(a) of P.L. 88-578 appear to derive from totally distinct uses of different forms of property. Thus, the disposition of revenues from the sale of surplus water under the Warren Act is not affected by the Land and Water Conservation Fund Act.

Your memorandum also posed a question as to the manner in which revenues should be handled in relation to certain statutes governing Forest Service operations. You cited, in particular, the Act of

March 4, 1907, as amended (34 Stat. 1270, 16 U.S.C. 499) and the Act of May 23, 1908, as amended (35 Stat. 260, 16 U.S.C. 500).

In our opinion the Act of March 4, 1907 (16 U.S.C. 499), which states that Forest Service and national forest revenues shall be covered into miscellaneous receipts in the treasury, is one of those acts no longer effective as to revenues derived from entrance, admission, and other recreation user fees and charges collected by the Forest Service at areas administered by it for recreation. It was rendered ineffective by the original wording of section 2(a) of P.L. 88-578, and remains that way after the amendment by section 11 of P.L. 89-72.

However, the Act of May 23, 1908 (16 U.S.C. 500), which calls for twenty-five percent of forest revenues to be returned to the states for public schools and public roads, remains effective as to recreation revenues. The legislative history of P.L. 88-578 expressly cites 16 U.S.C. 500 as an example of the provision of law preserved by the first exception in section 2(a). See H.R. Rept. No. 900, Land and Water Conservation Fund Act, 88th Cong., 1st Sess. 23 (1963). But, the same legislative history also points out that neither exception applies to funds from the sale of auto stickers or similar devices good for admission to areas generally. Id. at 24.

It is also our opinion that both exceptions apply to project land transferred to the Forest Service under the provisions of section 7(c) of P.L. 89-72. That section expressly states that such transferred land shall become national forest lands. Interior jurisdiction is retained only for reservoir operation in connection with the project. As national forest lands the recreation revenues derived therefrom are to be treated in the same manner as recreation revenues from other national forest lands, except that some part of such revenues from transferred lands may be applicable to pre-existing contracts under the second exception. Such revenues from transferred national forest land will thus be split at least two ways, and possibly three, as follows:

1. 25% to states and political subdivisions for public schools and roads.

2. Amounts necessary to apply to contract rights established before transfer and before September 3, 1964.

3. Remainder to Land and Water Conservation Use Fund.

The revenues referred to heretofore are gross revenues, not net. This is the clear import and intent of Section 2(a) of P.L. 88-578, in referring to "All proceeds..." Such intent is evidenced, too,

by section 2(c) of the Act. 2(c) also refers to "All proceeds..." from surplus property sales, but then deliberately excepts from such proceeds certain costs of sale and credits to special funds and contracts. If "All proceeds" referred to net proceeds the parenthetical exception in 2(c) would be redundant and meaningless. Further, that gross revenues are intended can be implied from the practice, as we understand it, of funding the Forest Service and national forest operations, maintenance and replacement, etc., from annual appropriations. See e.g. Public Law 89-435, 80 Stat. 183 (1966).

Finally, we wish to point out in respect of the twenty-five percent distribution under 16 U.S.C. 500, that an unintended windfall benefit may accrue to states and political subdivisions. At certain reservoirs where recreation is administered by the Forest Service recreational development is or will be substantial, and the revenues not inconsequential. We have in mind such areas as Lake Claire Engle, and Sugar Pine Reservoir of the Auburn-Folsom South Unit. We suggest that the propriety of allowing such windfall benefits, obviously beyond the contemplation of 16 U.S.C. 500, could be explored with the Bureau of Outdoor Recreation and the Forest Service. It would appear more appropriate to fix the states' share at a level equivalent to what would have been derived from the lands under prior resource exploitation without the added federal investment for recreation.

Harry J. Hogan

Associate Solicitor
Reclamation and Power

Solicitor Opinion No. 7

March 8, 1968

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

A-67-1147.5323

MAR 8 1968

Memorandum

To: Associate Solicitor, Reclamation and Power

From: Associate Solicitor, Parks and Recreation

Subject: Proposed Recreation Management Agreement with Shasta County at Keswick Reservoir

Your memorandum of January 25, 1968, requested our opinion as to whether the proposed recreation management agreement referred to above which would provide funds under the Land and Water Conservation Fund Act (16 U.S.C. § 460-1, et seq.) and under the Federal Water Project Recreation Act (P.L. 89-72) is legally permissable. It is our opinion that, notwithstanding the fact that the entire development may be encompassed under the term "recreation", the construction of the boat ramp and launching facility pursuant to the terms of the Land and Water Conservation Fund Act does not prohibit funding under P.L. 89-72 of other features, if it is determined that the respective developments are in fact separate projects for which the non-Federal portion of cost will be met locally.

As you are aware, we have previously taken the position that, where only one project exists, other Federal assistance would bar the use of Land and Water Conservation Fund Act funds. We have also stated that, if there were separate projects, Federal assistance under another authority for one project would not bar assistance under the Land and Water Conservation Fund Act for the other project. The project in each case must be clearly defined, so that it is clear that the two sources of Federal funding cannot be applied in such a way that they overlap.

Bernard R. Meyer

Bernard R. Meyer

Solicitor Opinion No. 8

September 11, 1969

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

September 11, 19[illegible]

Memorandum

To: Regional Solicitor, Portland

From: Associate Solicitor, Reclamation and Power

Subject: Projects excluded from the Federal Water Project Recreation Act, P.L. 89-72, by subsection 6(c)

For the purpose of planning local participation in recreation and fish and wildlife enhancement in connection with non-reservoir projects authorized under the "local protection" law (33 U.S.C. 701e), we concur with your conclusion of September 3, 19[illegible], that Section 8(a) of Public Law 89-72 would not apply. The exception in Section 6(c) of Public Law 89-72 pertaining to "nonreservoir local flood control projects" may be interpreted to cover nonreservoir "local protection" projects.

Edwin C. D[illegible]s
J. Lane Morthland
Acting Associate Solicitor
Reclamation and Power

ELondon:lb 9/11/69

cc:
Associate Solicitor, Parks and Recreation
Assistant Solicitor, Power

E. GODIN

Solicitor Opinion No. 9

July 1, 1971

July 1, 1971

Memorandum

To: Commissioner of Reclamation

From: Associate Solicitor, Water and Power Resources

Subject: Proposed use of P. L. 89-72 funds for development of a trout hatchery at Lake Mead, Boulder Canyon Project, Nevada.

Your memorandum of June 16, 1971, requests our advice regarding a proposal by the Nevada Department of Fish and Game to construct and operate a trout hatchery at Lake Mead. This proposal was forwarded to you by letter of June 11, 1971, from the Regional Director, Bureau of Reclamation, Boulder City, Nevada.

A part of the proposal is that the Bureau of Reclamation furnish the State $100,000.00 pursuant to the provisions of the Federal Water Project Recreation Act, Public Law 89-72. This would be in the nature of a grant, and the balance of the funds are to be furnished by the State except for $200,000.00 to be furnished by the Bureau of Outdoor Recreation.

This is not the type project contemplated by this Act and furthermore there are limitations in the Act expressly prohibiting the proposal. Section 1 of the Act excludes the application of the Act to areas or facilities included within a national recreation area. The hatchery is proposed for construction within the Lake Mead National Recreation Area so the limitation would clearly apply.

Section 7 of the Act, dealing with reservoir projects already constructed, also has a limitation or providing facilities only after entering into an agreement in accordance with subsection 3(b) of the Act. Subsection 3(a) of the Act makes section 3 inapplicable to areas within a national recreation area. It is therefore, our opinion that the provisions of Public Law 89-72 would not be available for the proposal as submitted by the Nevada Department of Fish and Game.

The Regional Director's letter of June 11, 1971, requests advice as to whether there are other authorities available. It is our suggestion, after consultation with the office of Associate Solicitor, Territories, Wildlife and Claims, that the State consider the possibilities of participation under either the Wildlife Restoration Act, (50 Stat. 917, as amended, 16 U.S.C. 669 et seq.) [illegible] the Pittman-Robertson Act, or the Fish Restoration Act (64 Stat. 430, as amended, 16 U.S.C. 777 et seq.) also known as the Dingell-Johnson Act.

/s/ J. Lewis Marthinsen,
Associate Solicitor
Water and Power Resources

cc: Regional Solicitor, Los Angeles
(w/c of incoming letter
and attachments)

Associate Solicitor, Territories, Wildlife and Claims
Associate Solicitor, Parks and Recreation

ECDavis:roe 6-29-71

Solicitor Opinion No. 10

February 22, 1979

February 22, 1979

Memorandum

To: Regional Director, Bureau of Reclamation

From: Regional Solicitor

Subject: Authority of the Bureau of Reclamation to Construct and Manage Future Recreation and Wildlife Mitigation and Enhancement Facilities--New Melones Project (Your memorandum, dated January 30, 1979)

This is in response to the following issues presented in your subject memorandum:

1. If the Corps of Engineers turns the New Melones Project over to the Bureau of Reclamation for operation and maintenance prior to constructing the initial recreation facilities, can the Bureau construct those facilities and, if the cost of that construction exceeds the amount appropriated by the Corps for those facilities, can the Bureau or the Corps seek additional appropriation?

Section 203 of the Flood Control Act of 1962 (76 Stat. 1173) provides in pertinent part:

> "The New Melones project, Stanislaus River, California, authorized by the Flood Control Act approved December 22, 1944 (58 Stat. 887), is hereby modified substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 453, Eighty-seventh Congress, at an estimated cost of $113,717,000: <u>Provided</u>, That upon completion of construction of the dam and power plant by the Corps of Engineers,

> the project shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws, except that the flood control operation of the project shall be in accordance with the rules and regulations prescribed by the Secretary of the Army. . . Provided further, that the Secretary of the Army, in connection with the New Melones project, construct basic public recreation facilities, acquire land necessary for that purpose, the cost of constructing such facilities and acquiring such lands to be nonreimbursable and nonreturnable. . ."

That Act specifically authorizes the Secretary of the Army, not the Secretary of the Interior, to constuct the public recreation facilities of the New Melones project. The Secretary of the Interior is simply authorized to operate and maintain the project pursuant to Federal reclamation law as an integral part of the Central Valley project. The relevant question, therefore, is whether or not the Secretary of the Interior is authorized by any other provision of Federal law to construct the initial recreation facilities at the New Melones project. In my opinion, the Secretary is not so authorized. Accordingly, the initial recreation facilities must be constructed by the Secretary of the Army. However, Section 203 of the Flood Control Act of 1962 does not specifically require that the recreation facilities be constructed prior to the transfer of the project to the Secretary of the Interior for operation and maintenance. Therefore, I see no problem with informing the Secretary of the Army that those recreation facilities may be constructed subsequent to that transfer. Accordingly, your first question must be answered in the negative.

2. Once the project is operating, future facilities will be needed to satisfy the projected demand. Does the Bureau have the authority to program and construct future recreation facilities at New Melones?

As discussed above, the Department of the Army, not the Department of the Interior, is the Federal agency authorized to construct the New Melones project. Additionally, the House Document referenced in the 1962 Flood Control Act reauthorizing the New Melones Project contains a letter from the Chief of Engineers to the Secretary of the Army concurring in the views and recommendations of the Board of Engineers for Rivers and Harbors which recommended modification of the New Melones project generally in accordance with the plan of the District Engineer. That plan provided:

> "Provision has been made in this report for providing lands and basic facilities for recreational purposes for access to the reservoir. . . The basic facilities for which an allowance has been included in the estimate are those needed during the first three years after completion of the project, and include access roads, boat launching ramps, camping and picnic facilities, water supply, and sanitary facilities. <u>It is anticipated that additional recreational development will be undertaken by concessionaires or other local interests as needed to develop the full recreational potential of the project. It is expected that these non-Federal costs would be self-liquidating."</u> (emphasis added).

Accordingly, as the 1962 Flood Control Act does not authorize the Bureau to program and construct future recreation facilities at the New Melones project, the relevant question again becomes whether or not Federal reclamation law authorizes the Secretary of the Interior to construct such future recreation facilities at a

project under his control. The only provision of Federal reclamation law which I find to be applicable is Section 3(b) of the Federal Water Project Recreation Act. That subsection provides that if lands are provided in connection with project construction to preserve the recreation potential of the project, that potential can be satisfied only if non-Federal public bodies execute an appropriate cost-sharing agreement with the Secretary within 10 years after initial operation of the project. Accordingly, your second question must also be answered in the negative.

3. The New Melones project will have wildlife mitigation and enhancement. Does the Bureau have the authority to transfer funds to a contracted managing agency such as the Bureau of Land Management or the California Department of Fish and Game for management of enhancement areas like we do for mitigation areas?

Section 4 of the Act of August 12, 1958 (72 Stat. 567) amending the first four sections of the Act of March 10, 1934, as amended, provides in pertinent part:

> "Such areas as are made available to the Secretary of the Interior for the purposes of this Act, pursuant to Sections 1 and 3 or pursuant to any other authorization, shall be administered by him directly or in accordance with cooperative agreements entered into pursuant to the provision of the first section of this Act and in accordance with such rules and regulations for the conservation, maintenance, and management of wildlife, resources thereof, and its habitat thereon, as may be adopted by the Secretary in accordance with general plans approved jointly by the Secretary of the Interior and the head of the department or agency exercising primary jurisdiction of such areas. . ."

Section 1 of that Act provides in pertinent part:

> "For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance and coordination of wildlife conservation and rehabilitation for the purposes of this Act and the United States, its territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling of losses of the same from disease or other causes, in minimizing damages from over abundant species, in providing public shooting and fishing areas, including easements as public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of this Act. . ."

In light of those provisions, the Bureau does have authority to contract with another agency to manage project lands for wildlife enhancement purposes. However, if the Bureau intends to finance that agency's management activities, that contract must, in my opinion, be formulated and executed pursuant to the Federal procurement regulations. Accordingly, such a management agreement may have to be put out to competitive bid rather than being negotiated with a predetermined Federal or State agency.

4. Wildlife mitigation facilities are currently being constructed by the Corps of Engineers. The wildlife management plans call for a monitoring of this mitigation area to insure that it is performing its function. If it does not fulfill its intended function, is the Bureau authorized to construct future wildlife mitigation features? If the entity managing wildlife resources at the project recommends construction of wildlife enhancement features in the future, are we authorized to construct these?

For the reasons set forth in our December 15, 1978 memorandum concerning the proposed modernization of the Trinity River Fish Hatchery, we conclude that the Bureau is authorized to construct future wildlife mitigation facilities for the New Melones project.

Charles R. Renda
Regional Solicitor
Sacramento Region

James E. Turner
For the Regional Solicitor

bcc:
Don Denney, Esquire
District Counsel
Corps of Engineers
Sacramento, CA

JETurner/cb

Solicitor Opinion No. 11

July 10, 1980

United States Department of the Interior
OFFICE OF THE SOLICITOR
P.O. BOX 1538
BILLINGS, MONTANA 59103

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July 10, 1980

Memorandum

To: Regional Director, Water and Power Resources Service, Billings, MT - Attn: 400

From: Field Solicitor, Billings

Subject: Recreation Management

Thank you for your memorandum of June 25, 1980, regarding the above subject. Please refer to our numerous memoranda and conversations regarding this and similar problems.

105
100

The questions which you pose are for the most part not susceptible of "yes" and "no" answers. However, as this office has previously stated, Water and Power Resources Service recreation authority is "very narrow." In addition, it is my understanding that recreation management funding is in the nature of operation and maintenance funding and is not available for capital improvements. In order to construct capital improvements, some ongoing construction program must exist with such capital improvements being a part of the authorized plan of development. It must be noted that recreation capital investment is limited to "minimum basic health and sanitary facilities." The term "minimum basic facilities" has been defined by the Congress of the United States as including ". . . guardrails, turnarounds at the ends of roads, and minimum sanitary facilities. Parking, picnicking, swimming, or camping facilities or more elaborate sanitary facilities, would not be provided under this subsection." (U.S. Code Congr. & Admin. News, 1965, pp. 1554-1555, H.R. 254, 89th Cong. 1st Sess., 3(a) P.L. 89-72.) I further note that by implication some access roads are anticipated if necessary for other project purposes or were in existence at the time of project construction. However, new road construction purely for recreation purposes is not authorized.

With the above in mind, your questions are answered below under corresponding number.

Question 1: How does our authority differ from the CORPS; and specifically, what are our basic authorities?

1. In addition to P.L. 89-72 (79 Stat. 213, 16 U.S.C. § 460 1-12 through § 460 1-21, the Corps of Engineers has a very specific recreation construction, operation and maintenance authority.

> The Chief of Engineers, under the supervision of the Secretary of the Army, is authorized to construct, maintain, and operate public park and recreational facilities at water resource development projects under the control of the Department of the Army, to permit the construction of such facilities by local interests (particularly those to be operated and maintained by such interests), and to permit the maintenance and operation of such facilities by local interests. (Flood Control Act of 1944, 58 Stat. 889, § 4, 16 U.S.C. § 460d.)

Water and Power Resources Service's sole recreation authority, except as may have been specifically enacted by Congress as to a particular project, is the Federal Water Project Recreation Act, P.L. 89-72, supra. Public Law 89-72 authorizes the Secretary of the Interior at existing projects ". . . to invesitgate, plan, construct, operate and maintain, or otherwise provide for public outdoor recreation. . . ." This authority is limited to a $100,000 federal capital investment at any one reservoir and is conditioned on local operation, maintenance and replacement and local 50 percent cost sharing.

Accordingly, the sole Water and Power Resources Service recreation capital construction authority, other than "minimum facilities which are required for public health and safety," is P.L. 89-72. In addition, "minimum facilities. . . " is so narrowly defined in P.L. 89-72 as to preclude any capital expenditure during project construction, without local cost sharing, except construction of ". . . turnarounds, guardrails, and minimum sanitary facilities."

Question 2: What constitutes "modern standards" with regard to replacement facilities? (Example - Does our authority allow replacing a dirt boat launching site with a concrete structure?)

2. The definition of "modern standards" is an area of substantial administrative latitude. However, this latitude is bounded by:

a. What is the minimum necessary for public health and safety? and

b. What is the minimum necessary under state and local laws, rules, and regulations?

As stated above, lacking local cost sharing and local operation and maintenance, no authority exists for capital expenditures at existing reservoirs. Expenditure of recreation management funds is limited to that necessary to operate, maintain and

replace existing facilities to the minimum standards necessary for public health and safety. Consequently, if a dirt or gravel boat ramp can be operated and maintained to protect public health and safety, it should not be improved. However, if minimum necessary public safety dictates a paved boat ramp at an existing site, such an improvement can be justified as an operation and maintenance expenditure.

Question 3: What constitutes a "capital improvement" with regard to recreation management funds?

3. I believe this question is answered above. However, at the risk of redundancy, any improvement of an existing facility over and above that necessary to operate and maintain at minimum standards necessary for public health and safety is a capital improvement. Consequently, it would appear that paving, improved sanitary facilities, and so on, unless required by some other provision of law or public health and safety, are capital improvements and not permissible under an operation and maintenance program.

Question 4: Can facilities be shifted from one place on the reservoir to another as part of the replacement process? (Example - boat ramps)

Question 5: Can campgrounds and roads be relocated under the authority of recreation management as "replacement and upgrading to modern standards?"

4 & 5. No, except as necessary due to operational changes of the reservoir, i.e., raising or lowering of water level. Replacement of facilities means just that--replacement in kind and in site. I am aware of no authority to relocate existing recreation facilities and upgrade them to modern standards except as a part of a project modification. Again, our authority is limited to operation, maintenance and replacement of existing minimum facilities required for public health and safety. Expenditure of recreation management funding beyond this level is simply not authorized under existing legislation.

Question 6: The discussion in your November 17, 1978, memorandum regarding section 3(a) of P.L. 89-72 cites Congressional Committee comments which seem to be somewhat more restrictive than our Service Instructions. The last paragraph on page 2 is very specific in eliminating parking, picnicking, swimming, or camping areas or facilities while the Service Instructions 215.1.6 leave much of this open to administrative determination. Please comment.

6. The Legislative History referred to herein and in our November 17, 1978, memorandum is an indication of the understanding of Congress as to the authority of Water and Power Resources Service as it existed in 1965 and as it would continue under P.L. 89-72. In the case of statutory construction, the Legislative History is the best evidence of the intent of Congress. Therefore, to the extent that the Service Instructions are less restrictive than the Legislative History of P.L. 89-72, it is my opinion that they are in excess of Water and Power Resources Service's authority and are without effect. Reliance upon them is at the sole risk of the administrator.

In addition, our review of the proposed recreation management legislation recently submitted by Water and Power Resources Service to Congress indicates that the existing recreation development and management authority is extremely restricted and will continue to be restricted even should that legislation be enacted. The legislation merely redefines "minimum facilities necessary for public health and safety" in much the same terms as the above Legislative History and authorizes recreation developments only to that level.

I hope the above discussion will be of assistance to you. If you have any questions concerning this matter, please feel free to call upon this office. We are available to meet with you at your convenience should you deem a meeting advisable.

Richard K. Aldrich
For the Field Solicitor

cc:
Associate Solicitor, Energy & Resources
Attn: Assistant Solicitor, Water
Regional Solicitor, Denver, CO

WATER AND POWER RESOURCES SERVICE

UM-400

JUN 25 1980

Memorandum

To: Field Solicitor, Billings, Montana

From: Regional Supervisor of Water and Land, Billings, Montana

Subject: Recreation Management

As you know, the Service has over the past several years been obliged to take over the recreation management activities at several UM Region reservoirs including Clark Canyon, Barretts, Fresno, Tiber, and Heart Butte. Our involvement has increased substantially at other reservoirs throughout the region. Because of this change in direction, we have dramatically increased our funding level in this area. The attention now given to recreation management has brought to light various deficiencies at some reservoirs which, heretofore, we had not thoroughly addressed. These include among other things overcrowded campgrounds, lack of adequate boat ramps, poor traffic patterns, and outdated sanitary facilities.

Administrative decisions must constantly be made, regarding not only the need for facilities proposed for installation or replacement, but also our authority limitations for constructing such. We have, in the past, discussed several proposals with your office and have received both written and verbal guidance. One example is the memorandum dated November 17, 1978, from your office to the Regional Director regarding Tiber Reservoir which states, "our authority to construct recreation facilities additional to the existing facilities is very narrow."

Based upon your memorandum, a responsible administrator should be capable of interpreting the meaning of the term "very narrow" sufficiently to stay within our authority. A more recent example involves the proposal to asphalt the Barretts Diversion Dam parking area and entrance road. The question is, does this constitute a capital improvement or can it be accomplished with recreation management funds? Your request for a written analysis spelling out the basis for our proposal seems reasonable in an obviously borderline situation.

Other questions which are being encountered:

1. How does our authority differ from the CORPS; and specifically, what are our basic authorities?

2. What constitutes "modern standards" with regard to replacement facilities? (Example - Does our authority allow replacing a dirt boat launching site with a concrete structure?)

3. What constitutes a "capital improvement" with regard to recreation management funds?

4. Can facilities be shifted from one place on the reservoir to another as part of the replacement process? (Example - boat ramps)

5. Can campgrounds and roads be relocated under the authority of recreation management as "replacement and upgrading to modern standards?"

6. The discussion in your November 17, 1978, memorandum regarding section 3(a) of P.L. 89-72 sites Congressional Committee comments which seem to be somewhat more restrictive than our Service Instructions. The last paragraph on page 2 is very specific in eliminating parking, picnicing, swimming, or camping areas or facilities while the Service Instructions 215.1.6 leave much of this open to administrative determination. Please comment.

These are a few of the questions which seem to arise most often. We recognize that administrative flexibility is inherent in most areas; however, some guidance is essential. If you could elaborate on these questions as concisely and specifically as possible, it would greatly assist us in making the correct decisions in these areas. Thank you for your consideration of this matter.

DENNIS E. SCHROEDER

bc: UM-400

Solicitor Opinion No. 12

September 11, 1980

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

WATER AND POWER RESOURCES SERVICE
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September 11, 1980

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Memorandum

To: Commissioner, Water and Power Resources Service

From: Assistant Solicitor, Branch of Water and Power
Division of Energy and Resources

Subject: Funding of Golf Courses and Tennis Courts Within the Provisions of Public Law 89-72, Chikaskia Project, Kansas-Oklahoma

Your August 7, 1980 memorandum requested our opinion on whether inclusion of a golf course and tennis courts in the proposed recreation plan of the proposed Chikaskia Project is within the purview of the Federal Water Project Recreation Act, 16 U.S.C. §§ 460l-12-460l-21. The recreation plan would be included in the Chikaskia Project feasibility report to be submitted to Congress. The National Park Service has recommended such development, and the city of Wichita has expressed willingness to administer the recreational developments.

Section 1(a) of the Federal Water Project Recreation Act, 16 U.S.C. § 460l-12, declares that

> It is the policy of the Congress and the intent of [this Act] that . . . in investigating and planning any Federal . . . reclamation . . . water resource project, full consideration shall be given to the opportunities, if any, which the project affords for outdoor recreation . . . and that, where ever any such project can reasonably serve [this purpose] consistently with the provisions of [this Act], it shall be constructed, operated and maintained accordingly. . . .

The term "outdoor recreation" is not defined in the Act or its legislative history. We believe that inclusion of a golf course and tennis courts in the proposed recreation plan associated with construction of Corbin Dam and Reservoir is for the purpose of outdoor recreation and is therefore within the purview of the Act.

You are, of course, aware that the requirements of the Act with regard to non-Federal written intent, cost-sharing, and repayment must be followed if the benefits of the recreation development are to be included in the economic justification of the project.

Louis D. Mauro
Assistant Solicitor
Branch of Water and Power
Division of Energy and Resources

Solicitor Opinion No. 13

January 19, 1981

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

M-36931

JAN 19 1981

Memorandum

To: Assistant Secretary, Land and Water Resources

From: Solicitor

Subject: Selection of the Proper Legal Instrument (Contract, Grant or Cooperative Agreement) under Federal Grant and Cooperative Agreement Act of 1977 (P.L. 95-224) to be used in Funding Construction of Recreation Facilities authorized under the Federal Water Project Recreation Act of 1965 (P.L. 89-72)

SUMMARY

The Regional Solicitor, Rocky Mountain Region, has requested us to issue an opinion to clarify some of the questions that have been raised regarding the application of the Federal Grant and Cooperative Agreement Act of 1977[1/] (hereinafter, "the Act") to funding construction under the Federal Water Project Recreation Act of July 9, 1965[2/] (hereinafter P.L. 89-72). The Act states that it is "An Act to distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, and for other purposes." The Senate Report[3/] which is a part of the legislative history of the Act states that "the Federal Grant and Cooperative Agreement Act of 1976 is an initial step to eliminate ineffectiveness and waste resulting from confusion

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1/ P.L. 95-224, Feb. 3, 1978, 92 Stat. 3, 41 U.S.C. 501 et seq.

2/ P.L. 89-72, 79 Stat. 213, 16 U.S.C. 460[-12, et seq.

3/ Senate Report No. 95-449, p.2, September 22, 1977, 95th Cong., 1st Sess.

over the definition and understanding of legal instruments used to carry out transactions and reflect basic relationships between the Federal Government and non-Federal entities."

The purpose of this opinion is to provide guidance to the Water and Power Resources Service in assisting it to make the proper selection of the legal instrument to be used in funding construction under P.L. 89-72. It is also our desire to discuss and interpret the Federal Grant and Cooperative Agreement Act of 1977 in a general manner so that the other bureaus and offices will have some guidance in making the proper policy determinations for selection of the appropriate legal instrument to carry out their programs.

To summarize what follows, it is my opinion that funding to the States for construction of recreational facilities at water projects is essentially an assistance type transaction with no substantial involvement between the executive agency acting for the Government and the States. Consequently, the use of a grant agreement would be appropriate in the instant matter.

II. Background

A. Federal Water Project Recreation Act of July 9, 1965: Generally --

P.L. 89-72 is the current authority under which the Water and Power Resource Service arranges for development and administration of outdoor recreation and fish and wildlife enhancement facilities. In order to encourage non-federal public bodies to administer, operate, maintain and replace such facilities, the Federal agency having administrative jurisdiction may bear 50% of the separable cost of a project allocated to recreation facilities and 75% of the separable cost of a project allocated to fish and wildlife enhancement facilities. Such facilities and appropriate project lands then may be leased to the non-federal public body which agrees to administer them.

B. Federal Grant and Cooperative Agreement Act of 1977: Generally --

Section 4 of the Act requires each federal agency to use a procurement contract as the legal instrument for the relationship between the agency and a State whenever the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government.

Sections 5 and 6 of the Act require the agency to use a grant or cooperative agreement whenever the principal purpose of the relationship between the agency and a State is the transfer of money, property, or services or anything of value to the State

to accomplish a public purpose of support or stimulation authorized by a federal statute, rather than acquisition by purchase, lease or barter, of property or services for direct benefit or use of the Federal Government.

The Act distinguishes between cooperative agreements and grants by requiring a determination of whether or not substantial involvement is anticipated between the executive agency and the State. If substantial involvement is anticipated, a cooperative agreement is to be used to accomplish the public purpose of support. If no substantial involvement is anticipated, then a grant agreement should be executed to accomplish the public purpose of support or stimulation authorized by the federal statute.[4/]

The Act itself does not authorize any federal agency to execute or participate in any procurement, grant or cooperative agreement. That authority must be found in some other source. But Section 7(a) of the Act does provide that ". . . each executive agency authorized by law to enter into contracts, grant or cooperative agreements, or similar arrangements is authorized and directed to enter into and use types of contracts, grant agreements, or cooperative agreements as required by this Act."

The determinations to enter into a procurement contract, cooperative agreement or grant are policy determinations to be made by the executive agency involved. Federal agencies have the flexibility to determine whether a particular transaction or class of transactions is procurement or assistance and, if assistance, whether it is of the nature suitable for a grant or a cooperative agreement. The agency's primary mission should influence its determination of whether the transaction is procurement or assistance, and the extent of its involvement. The classification of the transaction will become a public statement for public and Congressional review of how the agency views its missions, its responsibilities, and its relationship with the non-federal public body.

4/ For illustration of substantial involvement, See OMB interpretation of the Act contained at 43 F.R. 36863

III. Interpretation of the Federal Grant and Cooperative Agreement Act of 1977 and its Application to the Federal Water Project Recreation Act of July 9, 1965.

The Water and Power Resources Service and individual States, or subordinate public bodies of States, from time to time contemplate construction of recreational and fish and wildlife enhancement facilities at federal water projects. The non-federal entities will provide a portion of the separable project costs (a minimum of 50% of recreational facilities and a minimum of 25% of fish and wildlife enhancement facilities), and all of the costs of operation, maintenance and replacement of those facilities after they are constructed. Those facilities and the project land on which they are constructed may be leased by the federal agency to a non-federal public body for the period during which they are administered by it.

With that type of arrangement, the principal purpose of the instrument is not the acquisition by purchase, lease, or barter of property or services for the direct benefit or use of the Federal Government. Consequently, a procurement contract would not be appropriate. The principal purpose of such a transaction is the allocation of value to the non-federal entity to accomplish a public purpose of support authorized by federal statute, rather than acquisition by purchase, lease or barter of property or services for the direct benefit or use of the Federal Government. Because there is to be no substantial involvement of the federal agency in the administration of those facilities, a grant rather than a cooperative agreement would be the appropriate vehicle for accomplishing the public purpose of support.

The Office of Management and Budget has stated that:

> Consistent with the purposes of Pub. L. 95-224, agencies are encouraged to maximize competition among all types of recipients in the award of grants or cooperative agreements, in consonance with program purposes. 5/

This policy would not affect those programs wherein Congress has authorized the agencies to enter into cooperative agreements or grants with states. Thus, competition would not be required in the instant matter.

Any additional inquiries relative to this decision or related problems should be addressed to the Associate Solicitor, Division of General Law.

SOLICITOR

5/ Ibid.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

JAN 19 1981

M-36931

CONTRACT LAW - APPLICATION OF THE FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977 (P.L. 95-224) TO FUNDING FOR CONSTRUCTION OF RECREATIONAL FACILITIES UNDER THE FEDERAL WATER PROJECT RECREATION ACT OF JULY 9, 1965 (P.L. 89-72)

Federal Grant and Cooperative Agreement Act: Use of a Contract

Under section 4 of the Federal Grant and Cooperative Agreement Act, 41 USC 501 (1976), a contract would not be used to transfer funds from a bureau to a state for the purpose of constructing recreational facilities on Government owned land when the transaction is accompanied by a long term lease of the land to the State because the principal purpose of the relationship is for the benefit of the state and not "for the direct benefit or use of the Federal Government."

Federal Grant and Cooperative Agreement Act: Selection of instrument

Sections 5 and 6 of the Federal Grant and Cooperative Agreement Act require an agency to use a grant or cooperative agreement and not a contract whenever, as in the instant matter, the principal purpose of the relationship between the agency and the state is the transfer of money, property or services or anything of value to a state or local government or other recipient to accomplish a public purpose of support or stimulation authorized by a federal statute, rather than acquisition by purchase, lease, or barter, of property or services for direct benefit or use of the Federal Government.

Federal Grant and Cooperative Agreement Act: Distinction between Cooperative Agreements and Grants

If substantial involvement is anticipated between the agency and the state a cooperative agreement is to be used to accomplish the public purpose of support. If no substantial involvement is anticipated a grant agreement should be executed to accomplish the public purpose of support or stimulation authorized by federal statute. Because substantial involvement is anticipated in the instant matter, a grant agreement would be the proper vehicle for accomplishing the public purpose of support.

Solicitor Opinion No. 14

December 16, 1981

DEC 1 0 1981

Memorandum

To: Field Solicitor, Amarillo

Through: Regional Solicitor, Southwest Region

From: Associate Solicitor, Energy and Resources

Subject: Closed Basin Division, San Luis Valley Project, Colorado

By memorandum dated December 11, 1980, you requested our opinion on several specific problems involving the construction and operation of the Closed Basin Division. You enclosed your November 3, 1980, opinion on the subject, as well as an appendix of referenced exhibits (including a March 6, 1979, opinion by your predecessor). On February 19, 1981, this Office issued a memorandum partially addressing the questions you raised regarding state land acquisition. It is my understanding that three issues remain unresolved: (1) water use and priorities in times of water shortage, (2) quality of title for lands acquired from the State of Colorado for recreational areas, and (3) repayment contract credit for easement donations by the State of Colorado.

WATER PRIORITIES:

You presented the following questions on this issue:

> May sufficient water be provided to fish and wildlife, recreation, wetlands, environmental and conservation features of the project to meet basic needs of such features before the priorities set out in the Act of October 20, 1972, Pub. L. 92-514, 86 Stat. 964, Tit. 1, § 104 (1972) apply? Stated in the alternative, does Section 104 require that the first priority must be met before any water may be furnished to project facilities contemplated by the second priority? If water must be

> furnished to meet priority one needs before any water may be furnished for priority two needs, must the entire 600,000 acre-feet set out in priority one be furnished before any water may be furnished for priority two needs, or may proportionate annual deliveries be made to both?

The Closed Basin Division, San Luis Valley Project, Colorado, was authorized in 1972

> for the principal purposes of salvaging, regulating, and furnishing water from the closed basin area of Colorado; transporting such water into the Rio Grande; making water available for fulfilling the United States obligation to the United States of Mexico in accordance with the treaty dated May 21, 1906 (34 Stat. 2953); furnishing irrigation water, industrial water, and municipal water supplies to water deficient areas of Colorado, New Mexico, and Texas through direct diversion and exchange of water; establishing the Mishak National Wildlife Refuge and furnishing a water supply for the operation of the Mishak National Wildlife Refuge and the Alamosa National Wildlife Refuge and for conservation and development of other fish and wildlife resources; providing outdoor recreational opportunities; augmenting the flow of the Rio Grande; and other useful purposes, in substantial accordance with the engineering plans set out in the report of the Secretary of the Interior on this project. . . .

Reclamation Project Authorization Act of 1972 (the 1972 Act), Pub. L. No. 92-514, § 101, 86 Stat. 964.

Section 104(b) of the 1972 Act delineates the authorized water uses for the project in a "listed order of priority" as follows:

> (1) To assist in making the annual delivery of water at the gaging station on the Rio Grande near Lobatos, Colorado, as required by article III of the Rio Grande compact: <u>Provided</u>, That the

total amount of water delivered for this purpose shall not exceed an aggregate of six hundred thousand acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of January next succeeding the year in which the Secretary determined that the project authorized by this Act is operational.

(2) To maintain the Alamosa National Wildlife Refuge and the Mishak National Wildlife Refuge: Provided, That the amount of water delivered to the Alamosa National Wildlife Refuge shall not exceed five thousand three hundred acre-feet annually, and the water delivered to the Mishak National Wildlife Refuge shall not exceed twelve thousand five hundred acre-feet annually.

(3) To apply to the reduction and elimination of any accumulated deficit in deliveries by Colorado as is determined to exist by the Rio Grande Compact Commission under article VI of the Rio Grande compact at the end of the compact water years in which the Secretary first determines the project to be operational.

(4) For irrigation or other beneficial uses in Colorado: Provided, That no water shall be delivered until agreements between the United States and water users in Colorado, or the Rio Grande Water Conservation District acting for them, have been executed providing for the repayment of such costs as in the opinion of the Secretary are appropriate and within the ability of the users to pay.

As you point out in your memorandum, the issue of permissible uses arises only in years when an inadequate supply of water exists to meet the water deliveries set forth in priorities one and two, i.e., Rio Grande Compact requirements, and maintenance requirements for the two wildlife refuges. It is our opinion that neither the 1972 Act nor its legislative history authorizes a system of proportionate sharing among the listed priorities in Section 104(b).

To ascertain the meaning and intent of Section 104(b), "[w]e begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 103, 108 (1980). The words of a statute will be given their ordinary, contemporary common meaning, unless the statute contains another definition. Perrin v. United States, 444 U.S. 37, 42 (1979). As the 1972 Act contains no definition of "priority," we look to its ordinary meaning as it is used in Section 104(b).

Priority is defined in Black's Law Dictionary as a "legal preference or precedence," so that "when two persons have similar rights in respect of the same subject-matter, but one is entitled to exercise his right to the exclusion of the other, he is said to have a priority." Webster's defines priority as a "precedence . . . or order that takes priority over all others." Under Section 104(b) there exist several rights to the same subject matter, i.e., the water. We are concerned mainly, however, with the rights delineated in subsections (1) and (2) of Section 104(b). The ordinary, plain meaning of "priority" leads us to the conclusion that the use listed under subsection 104(b)(1) is to be exercised first, to the maximum entitlement under law and to the exclusion of the use permitted under subsection 104(b)(2), if a water shortage for all uses exists. After the requirements of subsection 104(b)(1) are fulfilled, then water may be used for the refuges; and if water is available after the maximum amounts are used for those refuges, then the uses under subsections 104(b)(3) and (4) may be fulfilled.

It is obvious that the very language of Section 104(b) precludes a system of proportionate sharing of water deliveries. In fact, the section would be meaningless if interpreted otherwise. In times of plenty, there would be no need to prioritize water usage; it is only when a shortage exists that a priority system is necessary. Moreover, as Section 101 already sets out the general purposes for which water may be delivered, it follows that Section 104 is a more specific qualifier of those uses. Had a "sharing" system been intended, there would be no need to set a priority list, i.e, the maximum amounts of water deliveries set out in subsections 104(b)(1) and (2) could have been inserted in Section 101, and the phrase "listed order of priority" omitted. As the statute reads otherwise, I can interpret that phrase only one way--in its ordinary sense.

Although I believe the statute to be clear on its face and devoid of any ambiguity, and that the "language of [Section 104(b)] is the best indication of legislative intent," American

Federation of Labor, Etc. v. Marshall, 570 F.2d 1030, 1036 (D.C. Cir. 1978), nevertheless, to lay the matter to rest, a brief review of the legislative history of the 1972 Act will indicate Congress did not intend that a "proportionate sharing" system be imposed.

The Closed Basin Division was envisioned primarily as a

> multiple-purpose water resource development which would salvage shallow ground water now non-beneficially consumed in the Closed Basin . . . and deliver it to the Rio Grande for beneficial use in accordance with the Rio Grande Compact. . . . H.R. Doc. No. 369, 91st Cong., 2d Sess. (III) (1970)

The plan also would provide a "small portion of the water so salvaged" to the Alamosa National Wildlife Refuge. Id.

In its report to the President regarding the project, the Bureau of Reclamation made several recommendations regarding wildlife, some of which were adopted by Congress, e.g., that conservation and development of fish and wildlife be included as an authorized purpose of the project, and that project authorization include the Mishak National Wildlife Refuge. Others, e.g., that the project provide approximately 5,300 acre-feet of water per year for the Alamosa Refuge area, and that 8,000 acre-feet per year for the Mishak Refuge be obtained from the well field in lieu of surface water in exchange for well water, id. at 24-25, were adopted with slight modifications--Alamosa's 5,300 acre-feet was set as a maximum and only as a second priority, Mishak was authorized for a maximum of 12,500 acre-feet.

Section 4 of the Senate bill (S.520), as introduced, listed as a last priority water to maintain the Alamosa Refuge. In a May 19, 1972, letter to Sen. Henry M. Jackson, Chairman of the Committee on Interior and Insular Affairs, the Secretary of the Interior took exception to that priority.

> The bill provides that the first and second priorities on water made available by the project would be--(1) to deliver into the Rio Grande 60,000 acre-feet of water per year based on a 10-year moving average (roughly equivalent to the annual treaty obligation), and (2) to deliver water to meet Colorado's past Compact deficits.

* * *

> [W]e favor providing that making water available to the Alamosa National Wildlife Refuge to mitigate adverse effects on fish, wildlife and recreational values will be a first priority for the project, rather than last priority as the bill now provides, and we believe that water should also be provided on the same basis to the Mishak National Wildlife Refuge, which is also designed for mitigation of such effects. . . .

That Committee reported the bill, with amendments, on June 30, 1972. S. Rep. No. 947, 92d Cong., 2d Sess. Amendment two inserted as a second priority: "To maintain the Alamosa National Wildlife Refuge and the Mishak National Wildlife Refuge." (emphasis added.)

> This amendment makes clear the purpose of the Division to provide water supplies to both wildlife refuges. It further clarifies the order of priorities of the water supplies of the project. The primary reason for the authorization of the project, of course, is to salvage water for delivery to the Rio Grande. In view of the Federal investment, the first priority on that delivery must be for the national commitment to Mexico. The wildlife purposes require a firm supply, and the Committee has been assured that supply can be accommodated along with significant deliveries to the river. Id. at 5. (emphasis added).

On July 25, 1972, the House introduced its own bill on the Closed Basin Division, H.R. 16012. This bill was similar in content to S.520; however, a proviso was inserted to the subsection dealing with priority of water use for the wildlife refuges, placing a maximum delivery of 5,300 and 12,500 acre-feet per year for the Alamosa and Mishak Refuges, respectively. See 118 Cong. Rec. 16975 (1972). The House noted that the main purpose of the project was to provide assistance in meeting the treaty obligation under Article III of the Rio Grande Compact. In describing the project, the House stated

> The first 60,000 acre feet per year will be credited to the current year obligation,

> and after the needs of the wildlife refuges are met, the remainder will be applied against the accumulated deficit.

H.R. Rep. No. 1380, 92d Cong., 2d Sess. 3 (1972). (emphasis added).

These words, "The first 60,000 acre feet per year," could not be clearer. By no stretch of the imagination can a percentage or a proportionate sharing of the water be read into that language. In any year, 60,000 acre feet goes to credit the treaty obligation. After this is satisfied, the refuges may receive their deliveries authorized by statute, and then water may be used to eliminate the deficit and for other beneficial purposes.

You suggest that Congress may have contemplated minimum sharing of available water since the project could not lawfully exist without accommodation of environmental and conservation interests. There is a presumption, however, that a legislature acts with knowledge of the existing law and that "new statutes will harmonize rather than conflict with existing statutes." Travelers Express Co., Inc. v. State of Minnesota, 506 F. Supp. 1379 (D. Minn. 1981). In that light, we must assume that Congress was aware of the environmental laws and concerns regarding this project when it passed the 1972 Act, and, therefore, it would be improper for us to read into the statute what is not there (i.e., water to go for fish and wildlife, etc. before the water is used for the priorities listed in 104(b)). Moreover, Congress did provide for environmental concerns: it established the Mishak Refuge and specifically authorized water deliveries to it and the Alamosa Refuge; made conservation and development of fish and wildlife resources a project purpose; and elevated the maintenance of those two refuges from last priority to second priority, following the use of water for the main purpose for which the legislation was passed. Our interpretation of Section 104(b) does not conflict with existing environmental laws.

In summary, it is our opinion that Section 104(b) of the Act requires that, in times of water shortage insufficient to meet all the needs of the project, the first 60,000 acre-feet per year be allocated to fulfill the treaty obligation of Article III of the Rio Grande Compact. Water available after this requirement is met then will be used to provide water to the lower priority Alamosa and Mishak National Wildlife Refuges, up to the statutory maximum.

STATE LAND ACQUISITION--RECREATION AREAS:

You have asked what quality of title must be acquired from the State of Colorado for recreational areas. It is the policy of

this Department to acquire fee title for such lands; however, we believe lesser interests may be acquired, as described below.

Section 105 of the 1972 Act requires the State of Colorado to convey easements and rights-of-way over lands owned by the state that are needed for wells, channels, laterals, and wildlife refuge areas. Recreational areas are omitted from this section. Land acquisition requirements for recreational areas, however, are covered under Section 106 of that Act:

> Conservation and development of the fish and wildlife resources and the enhancement of recreation opportunities in connection with the closed basin division of the San Luis Valley project works authorized by this Act shall be accordance [sic] with the provisions of the Federal Water Project Recreation Act. (emphasis added).

Section 7(a) of the Federal Water Project Recreation Act [Recreation Act] authorizes the Secretary of the Interior, in conjunction with existing reservoirs,

> to investigate, plan, construct, operate and maintain, or otherwise provide for public outdoor recreation . . . facilities, to acquire or otherwise make available such adjacent lands or interests therein as are necessary for public outdoor recreation . . . use. . . . 16 U.S.C. § 460l-18(a). (emphasis added).

The "lands or interests therein" language of this section is clearly intended to authorize the acquisition of fee title to or less than fee interests in State lands.

This Department's policy regarding acquisition of lands for reservoir projects and correlative purposes, however, is more restrictive. Department regulations require that fee title be acquired for lands "needed to meet present and future public requirements for outdoor recreation, as may be authorized by Congress." 43 C.F.R. § 8.2(b). This published policy specifically prohibits easements in lieu of fee title for lands determined to be of substantial value for enhancement of public outdoor recreation. 43 C.F.R. § 8.3(c).

The State of Colorado makes provision for the sale of State lands by public advertisement only. In other words, prospective purchasers bid for those lands which are up for sale. Colo. Rev. Stat. § 36-1-124. Under this statutory scheme, there would be no assurance that the United States would be successful in a bid

to acquire fee title to State lands. Accordingly, the United States should initiate condemnation proceedings against the State for the desired lands.

It is also our opinion that the Bureau of Reclamation may deviate from the above Department policy and acquire less than fee interests, as authorized by the Recreation Act. Since that policy is published in the Code of Federal Regulations, however, we believe the Bureau should publish in the Federal Register notice of the course of action it proposes to take in acquiring less than fee interests for recreation areas, as well as the reasons for that action.

REPAYMENT CONTRACT CREDIT:

Finally, you requested our views on the following issue:

> May the appraised value of all interests donated by the State of Colorado be credited against its obligations under a repayment contract pursuant to Public Law 89-72 (supra) or may only the value of land or interests therein donated for 89-72 purposes be credited against those obligations?

It is our opinion that only lands or interests therein donated by the State of Colorado for Pub. L. No. 89-72 purposes may be credited against its obligations under a repayment contract entered into pursuant to that law.

Section 106 of the 1972 Act, as noted in the preceding discussion, requires that recreation development authorized by the Act proceed in accordance with the provisions of the Recreation Act. The Recreation Act requires a 50 percent cost sharing between the United States and non-Federal interests. 16 U.S.C. §§ 460l-14 and 460l-18. The non-Federal interest must bear the non-Federal share of the separable project costs allocated to recreation. One method for calculating that share is by "provision of lands, interests therein, or facilities for the project." 16 U.S.C. § 460l-13(b)(1). Clearly, and in the context of the Recreation Act, only land or interests in land furnished for a recreation purpose may be considered as a "credit" towards a repayment contract entered into pursuant to Pub. L. No. 89-72.

> Section 2(b), however, provides that one method of such payment by the non-Federal body may be in lands or facilities for the particular recreation project. Therefore, if State-owned land or an

> existing facility is to be incorporated into an expanded development, a transfer of title to the non-Federal lands and facilities thereon to the United States may be utilized as a method of partial payment, taking the amount of the contribution as either (1) the fair market value on the date of the contract in the case of lands . . . presently in State ownership; or (2) actual cost to the State of lands specifically acquired for transfer to the United States as payment. (emphasis added). Memorandum by Associate Solicitor Meyer (September 23, 1966).

We concur with this interpretation of Section 2(b) of the Recreation Act. Moreover, in our opinion, this interpretation may be expanded to include as payment not only title to donated lands, but transfer of less than fee interests as well.

Alexander H. Good
Associate Solicitor
Division of Energy and Resources

Solicitor Opinion No. 15

August 23, 1984

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

AUG 23 1984

BLM.ER.0020

Memorandum

To: Acting Commissioner, Bureau of Reclamation

From: Associate Solicitor, Energy and Resources

Subject: Jurisdiction Over and Use of Reclamation Withdrawn Lands Within National Forests

You recently requested legal advice on several questions concerning the jurisdiction and use of Bureau of Reclamation (Reclamation) withdrawn lands within the Tonto National Forest in Arizona. The central issue raised in your inquiry is under what circumstances Reclamation is required to obtain a right-of-way from the U.S. Forest Service (USFS) before using previously withdrawn Reclamation lands within a national forest. For the reasons that follow, I conclude that no USFS right-of-way is required for lands covered by a Reclamation withdrawal within the Tonto National Forest, regardless of the specific project for which it was withdrawn.

I. Facts

In your letter, you state that the Reclamation withdrawal predates the establishment of the Tonto National Forest. You also refer to the contention of the U.S. Forest Service that since the Reclamation withdrawn lands are now to be used for the Central Arizona Project (CAP), rather than for the Salt River Project, for which they were originally withdrawn, the original Reclamation withdrawal must now be revoked and rewithdrawn, with the result that the forest withdrawal would then be first in time and therefore preeminent.

II. Applicable Law

Withdrawals have been used in the administration of the public lands since the late 1800's. They began purely as an administrative practice to remove certain lands from the purview of certain public land laws, either to establish a federal reserve or to transfer jurisdiction over a given parcel to another federal agency. This administrative practice was finally given legal recognition and credence by the Supreme Court in U.S. v. Midwest Oil Co., 236 U.S. 459 (1915).

Today there are three principal purposes accomplished through the vehicle of withdrawal:

1. Restricting or eliminating the applicability of specific public land laws to specific portions of the public lands, including for example, entry laws, mining laws and mineral leasing laws;

2. Transferring jurisdiction from one federal agency to another; and

3. Reserving land for a specific public purpose or use.

Often, of course, a withdrawal will accomplish two or more of the above purposes simultaneously. Reclamation withdrawals, for example, transfer jurisdiction to the Bureau of Reclamation, restrict the applicability of most public land laws, and reserve other lands for specific purposes such as irrigation works.

A withdrawal is effected by means of a public land order, which sets forth the purposes of the withdrawal and defines the scope and terms of the restrictions and/or reservations. The language of the order creating a withdrawal is therefore crucial in establishing the relative effects of various withdrawals.

In situations where there are overlapping withdrawals, one must first look to the specific language of the withdrawal orders to determine relative dominance. This would best demonstrate the intent of the party or parties creating the withdrawals. Simple priority in time cannot be used to establish conclusively the relative dominance of the withdrawals. A later withdrawal in time may be dominant if it contains language to that effect and is properly made. In this respect the later withdrawal can be viewed as amending the previous order.

Presidential Proclamation No. 795 (Jan. 13 1908) which expanded the Tonto National Forest to encompass the Bureau of Reclamation lands now in controversy contains the following language:

> Provided also that since the withdrawal made by this proclamation and any withdrawal made for national irrigation works are consistent, both shall be effective upon the lands

withdrawn, but the withdrawal for national irrigation works shall be the dominant one and may, when necessary, be changed to a withdrawal for irrigation from such works. (Emphasis added).

In my opinion, this language demonstrates quite effectively that the Reclamation withdrawals in the Tonto National Forest are dominant. To the extent that the lands can be managed compatibly by both agencies to accomplish their respective purposes, such co-administration is acceptable. However, whenever the respective management schemes or uses of the agencies conflict, the dominant Reclamation withdrawal takes precedence. This is true regardless of whether the Reclamation withdrawal is a first or second form withdrawal.[1]

I conclude, therefore, that since Reclamation itself has administrative jurisdiction over the subject lands, it does not have to apply to the USFS for rights-of-way for project construction within the Reclamation withdrawals in the Tonto National Forest.

I disagree with the USFS argument that, since the previous Reclamation withdrawal was for a different project, the present Reclamation withdrawal would have to be revoked before the CAP could be constructed and the USFS withdrawal would therefore have time-priority. First of all, as mentioned earlier, time priority does not determine which withdrawal is dominant. Furthermore, the Reclamation withdrawal transfers jurisdiction over the specified lands to Reclamation and places these lands under Reclamation's administration. 37 Op. Atty. Gen. 431 (1934); 43 U.S.C. §§ 373, 373a, and 416 (as amended); Act of June 17, 1902, (as amended), 32 Stat. 390, 38 Stat. 690; and 43 C.F.R. Subpart 2374. The fact that an authorized project is not built changes neither the nature of the withdrawal nor its effect on the status of the land. Until such a withdrawal is relinquished, Reclamation's jurisdiction remains. See 43 C.F.R. Part 2370. As long as Reclamation retains jurisdiction over the land and its withdrawal is dominant, it need not apply to any other agency for a right-of-way for project purposes. Furthermore, the Secretary of the Interior is empowered by Section 204 of FLPMA to "make, modify, extend, or revoke withdrawals" within the limitations imposed by the same section. 43 U.S.C. § 1714(a)(emphasis added). It would be a simple matter to modify an existing

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1 "First form" and "second form" withdrawals are administrative designations used to distinguish between lands withdrawn for irrigation works, such as dams, reservoirs, canals, etc., and lands to be irrigated from such works, respectively. The Bureau of Reclamation has jurisdiction over lands withdrawn in either category unless otherwise agreed between agencies by cooperative agreement. These designations and distinctions are no longer used by Reclamation, but still exist on the books for some of the earlier Reclamation withdrawals.

withdrawal to change the project for which it is made, without ever having to first revoke the previous withdrawal and without interrupting Reclamation's administration of the land.

If you require additional information or if we can be of further assistance in this matter in any way, please contact Scott Loveless of my staff, at 343-4444.

Lawrence J. Jensen

Lawrence J. Jensen
Associate Solicitor
Energy and Resources

United States Department of the Interior

BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

IN REPLY
REFER TO:
420

OCT 4 1984

Mr. R. Max Peterson
Chief, Forest Service
P.O. Box 2417
Department of Agriculture
Washington, D.C. 20013

Dear Mr. Peterson:

We are enclosing a memorandum which we have recently received from our Solicitor. This memorandum advises us that we may utilize for the Central Arizona Project, without any further action on our part, the lands withdrawn for the Salt River Project.

Based on the legal support granted by this memorandum, we intend to occupy and use our withdrawn lands within the Tonto National Forest for our planned construction, operations, maintenance and support activities of the Central Arizona Project. We are also proposing to the Bureau of Land Management to modify the subject withdrawal(s) to indicate they are for the Central Arizona Project

Any legal questions or comments should be directed to Mr. Scott Loveless, telephone 343-4444. Other questions should be directed to Mr. Terence Cooper, telephone 343-5204.

Sincerely yours,

[illegible] Wasserman

Commissioner

Enclosure

bc: Code 130; Assoc. Sol-E&R
Regional Director, Boulder City, Nevada
E&RC, D-400

WBR:TCooper:pc:9/5/84:343-5204:CPT TC24

United States Department of the Interior

BUREAU OF RECLAMATION
LOWER COLORADO REGIONAL OFFICE
P.O. BOX 427
BOULDER CITY, NEVADA 89005

OCT 15 1984

IN REPLY REFER TO: LC-420
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OCT 12 1984

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Memorandum

To: Project Manager, Phoenix, Arizona
Attention: 330-1000

From: ACTING Regional Director

Subject: Jurisdiction Over and Use of Reclamation-Withdrawn Lands Within National Forests (Assistant Solicitor's memorandum dated August 23, 1984)

Enclosed is a copy of the subject memorandum. This memorandum sets forth some instances where the use of Bureau of Reclamation (Reclamation) withdrawn lands within a national forest would not require a Forest Service right-of-way.

While the major thrust of the Solicitor's memorandum deals with a specific problem occurring on the Tonto National Forest, the accompanying and supporting discussions are applicable to many situations where we have withdrawn national forest lands for Reclamation projects.

Any questions regarding the enclosed memorandum should be directed to Mr. Bob Wilborn at (FTS) 598-7427.

Roy D. Gear

Enclosure

United States Department of the Interior

BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

OCT 22 1984

IN REPLY
REFER TO: 420

OCT 15 1984

Memorandum

To: Regional Director, Boulder City, Nevada

From: ASSISTANT Chief, Division of Water and Land

Subject: Modification of Withdrawals Made for the Salt River Project and Being Utilized for the Central Arizona Project.

Attached is an October 4, 1984, letter to the Chief, Forest Service, forwarding a copy of the Solicitor's August 23, 1984, memorandum on using withdrawn lands located within the Tonto National Forest.

In the Solicitor's August 23 memorandum it is stated:

> "Furthermore, the Secretary of the Interior is empowered by Section 204 of FLPMA to" make, modify, extend, or revoke withdrawals within the limitations imposed by the same section. "43 U.S.C. 1714(a) (emphasis added). It would be a simple matter to modify an existing withdrawal to change the project for which it is made, without ever having to revoke the first withdrawal and without interrupting Reclamation's administration of the land."

Based on this, we suggest that you request BLM to modify the appropriate withdrawal(s) by changing the project for which the land is currently withdrawn to the Central Arizona Project.

Any questions regarding this suggestion should be directed to Mr. Terence G. Cooper FTS 343-5204.

Attachment

(Sgd) Frank E. Ellis

bc: Director, BLM (320)
Project Manager, Arizona Project's Office
P.O. Box 9980
Phoenix, AZ 85068;
D-400;
Regional Director PN, MP, UC, SW, UM, LM

WBR:TCooper:mho:10/11/84:343-5204:CPT-TC9MHO

Solicitor Opinion No. 16

March 26, 1986

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ROUTE TO INITIALS DATE
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United States Department of the Interior

OFFICE OF THE SOLICITOR
DENVER REGION
P.O. BOX 25007
DENVER FEDERAL CENTER
DENVER, COLORADO 80225

March 26, 1986

LBR.RM.0260

Memorandum

To: Chief, Division of Water and Land Technical Services, Engineering and Research Center, Bureau of Reclamation
Attention: Dick Crysdale

From: Regional Solicitor, Rocky Mountain Region

Subject: Clarification on Federal Water Project Recreation Act (Public Law 89-72) Provisions

You state the Bureau (Bureau of Reclamation) has two projects in Texas which are developed primarily for municipal and industrial water pruposes. The Bureau has no letter of intent nor can it find any governmental entity willing to manage recreation at these two projects. Based on these facts and provisions in Public Law 89-72, you have asked the following questions:

1. Must the Bureau develop minimum facilities for public health and safety?

The answer to this seems to be yes. The Solicitor, in a memorandum to the Secretary of the Interior dated August 13, 1965, concerning "Construction authority contained in the Federal Water Project Recreation Act," stated:

> . . . Further, because water development projects inevitably draw visitors, minimum facilities to ensure public health and safety have long been provided. Authority to provide such minimum health and safety facilities is considered as included in any general authorization of project construction, operation and maintenance.

This means that before Public Law 89-72 was enacted, there was authority and a requirement to provide such minimum facilities. Section 3 of the act does provide that such minimum facilities may be provided in the absence of an indication of intent by a non-Federal public body. [16 U.S.C. § 460 l-14(a)]. The legislative history of the act describes these minimum facilities as "guard rails, turn-arounds at the ends of roads, and minimum sanitary facilities." The committee went on to say that "parking,

picnicking, swimming, or camping areas or facilities, or more elaborate sanitary facilities, would not be provided under this subsection."

2. Must the Bureau manage the minimum facilities and any incidental recreation occurring at those projects in the absence of a governmental agency to manage recreation?

It would appear that there would be little to manage under the example of minimum facilities described above. There would be some maintenance. As to incidental recreation, it would be my opinion that the Bureau, under the act, is not required to manage fishing, swimming, or picnicking just because it has constructed a reservoir for other purposes. If the Bureau had provided facilities to encourage such activities, then the Bureau would be required to manage such facilities.

3. In absence of a management commitment and recreation facilities, can the Bureau close the projects to public access for recreation use of project lands and the reservoir?

No, unless there is an area of known danger or an area in which such activities would interfere with the purpose or the operation and maintenance of the project.

4. In the absence of a management commitment from a governmental agency, can the Bureau enter into a contract with the private sector to develop, operate and maintain recreation areas at a project reservoir?

No. The act provides that if such management commitment is not forthcoming from a non-Federal public body, the head of the agency who has jurisdiction over the project may do the following in this order:

1. Utilize the lands for any lawful purpose within the jurisdiction of his agency.

2. May offer the land for sale to its immediate prior owner or his immediate heirs at its appraised fair market value as approved by the head of the agency at the time of offer.

3. Or, if a firm agreement by said owner or his immediate heirs is not executed within 90 days of the date of the offer, may transfer custody of the lands to another Federal agency for use for any lawful purpose within the jurisdiction of that agency.

4. May lease the lands to a non-Federal public body.

5. May transfer the lands to the Adminsitrator of General Services for disposition in accordance with the surplus property laws of the United States. [16 U.S.C. § 460 l-14(b)(2)]

If I may be of further assistance, please advise.

Ralph O. Canaday
For the Regional Solicitor
Rocky Mountain Region

cc: Associate Solicitor, Division of Energy and Resources

Solicitor Opinion No. 17

August 15, 1986

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

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LBR PS 1800

Memorandum

To: Regional Solicitor, Pacific Southwest Region

From: Assistant Solicitor, Branch of Water and Power
Division of Energy and Resources

Subject: Transfer of Jurisdiction over Federal Reclamation Project Lands to the Secretary of Agriculture

This is in response to your April 23, 1986, memorandum asking our opinion regarding a Bureau of Reclamation proposed transfer of lands in the Central Valley and Orland Projects, California, to the Secretary of Agriculture. You certified five questions to this office, the answers to each depending on whether the Secretary of Interior has authority to transfer these lands to the Secretary of Agriculture under section (c) of the Federal Water Project Recreation Act of July 9, 1965, Pub. L. 89-72, 79 Stat. 216, 16 U.S.C. § 460l-18 (hereafter "Act").

I have concluded that these transfers may be made only in light of certain conditions and upon the recommendation of the appropriate Washington office officials.

The Department of the Interior through the Bureau of Reclamation (hereinafter the "Bureau") and the Bureau of Land Management has withdrawn 7200 acres, divided among three projects, to construct irrigation and water storage facilities near the Mendosino National Forest in California. These facilities include Stoney Gorge Dam, containing 1280 acres of water surface area and 1205 acres of dry land surface area; East Park Dam, with 1820 acres of water surface and 2300 acres of dry land surface area; and Red Bluff Dam, with 100 acres of water surface and 485 acres of dry land surface area. Since the completion of these dam sites, the Bureau of Reclamation has been managing the property as primitive recreation areas. The property also is leased to local grazing interests. The fees generated from the grazing leases contribute toward repayment of the project's construction costs under Subsection I of the Fact Finders' Act of December 5, 1924, 43 Stat. 703, 43 U.S.C. § 501.

Under the proposed transfer, the Secretary of the Interior would transfer jurisdiction of the dry land surface area to the Secretary of Agriculture to be developed as recreation sites. None of these areas are contiguous to or within the boundaries of the national forest. Interior would retain the use and

management of the water in the reservoirs and title to the Reclamation zone. In addition, under the Red Bluff Dam transfer, Interior would retain easements around the diversion dam and the right to use the land in emergency or flood situations.

The stated purpose of the Federal Water Project Recreation Act of July 9, 1965, Pub. L. 89-72, 79 Stat. 216, 16 U.S.C. § 460l-18, is to "provide uniform rules and policies for the treatment of recreation and fish and wildlife benefits and costs in connection with federal multiple-purpose water resources projects of the Department of the Interior and the Corps of Engineers." Under this Act, water project development agencies are to consider water recreation and fish and wildlife enhancement needs during the planning process for new projects and provide for those needs as appropriate. Congressional Record, June 25, 1965, H. 14276.

According to Section 3 of the Federal Water Project Recreation Act, the agency with jurisdiction over the project can

1) use the withdrawn land for any lawful purpose within the jurisdiction of the agency;

2) sell the property to its prior owner at the appraised fair market value;

3) transfer custody of the land to another federal agency for any lawful purpose within its jurisdiction;

4) lease the land to a non-federal public body; or

5) transfer the land to the General Services Administration for sale as excess land.

Congressional Record, June 25, 1965, H. 14276.

Your memorandum of April 23, 1986, asks as a general matter whether the Bureau of Reclamation can transfer withdrawn project lands to the Secretary of Agriculture under the Federal Water Project Recreation Act. This Act allows for such a transfer but specifies that prior to such a transfer, two criteria must be satisfied. The first is that the use made of the transferred property must not conflict with the project construction thereon. Pub. L. 89-72, 79 Stat. 216, 16 U.S.C. § 460l-18(c). The second, also contained in subsection (c) of the Act, states,

> The Secretary of the Interior is authorized to transfer jurisdiction over project lands <u>within or adjacent to the exterior boundaries of national forests</u> and facilities thereon to the Secretary of Agriculture for recreation and other national forest system purposes.

The key words contained in this passage are "within or adjacent to." As explained in the Congressional Record on June 25, 1965, the Secretary of the Interior "is authorized to transfer jurisdiction over project lands within or adjacent to exterior boundaries of the national forest and facilities thereon to the Secretary of Agriculture for recreation and other national forest system purposes, and such transfer shall be made in each case in which the project reservoir area is located wholly within the exterior boundary area of the national forest" unless otherwise agreed by the Secretaries of Interior and Agriculture. Congressional Record, June 25, 1965, H. 13868.

To determine the congressional intent of the above cited passage, common canons of statutory construction dictate that the words used in the statute be given their plain meaning. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, et al., 467 U.S. 837, 104 S.Ct. ___, 81 L.Ed.2d 694 (1984). As applied to this statute, the plain meaning of the word "adjacent" as described by the Random House College Dictionary is "near or close; next or contiguous." p. 16 (1968). Using that same authority, the ordinary meaning of the word "within" is "inside of; in; not beyond or exceeding." p. 1512 (1968).

Inserting the plain meaning of the word "within" into the present fact situation, it is clear that these Bureau of Reclamation project lands do not fall within the category of lands Congress intended the Secretary to have authority to transfer. These project lands are not "inside of; not beyond or exceeding" the boundares of national forest lands. The plain meaning of the word "adjacent" poses a different question. Although the lands in question are not "next or contiguous" to natural forest lands, the lands may fall within the technical factual definition of "near or close." We do not have sufficient information to make that determination, which is a factual determination that must be made by the Bureau.

Courts consistently have held that factual determinations should be made in light of the circumstances surrounding each case within the framework of the congressional intent behind the legislation. United States v. Cooper, 312 U.S. 600, L.Ed.2d 1071, 61 S.Ct. 742 (1941). Congress intended that the Bureau of Reclamation consider recreation and fish and wildlife benefits in connection with multiple-purpose water resource projects. Congressional Record, June 25, 1965, H. 14276. Congress gave the Bureau the authority to transfer or sell certain specified categories of excess Reclamation project lands to governmental or private entities best able to maximize those recreation and fish and wildlife benefits. In determining how best to carry out the intent of Congress, the Bureau should consider the management feasibility including costs to the entity potentially gaining control of the property, the benefit to the public, and the enhancement of recreation and fish and wildlife values. The Bureau should also consider the administration's policy to reduce the federal government's holding of small, isolated tracts of

land. In light of these considerations, it is desirable to seek guidance from appropriate Washington office policy officials before a final decision is made on whether the subject Reclamation lands should be transferred or sold under this Act. Until that policy guidance is received the specific answers to your remianing questions need not be addressed. If the lands in question are recommended for transfer after consideration of the above factors, we will provide any further legal guidance that may be necessary to effect the transfer.

Gary Fisher

Gary J. Fisher

cc: Commissioner, BOR

Solicitor Opinion No. 18

July 17, 1987

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

LBR.ER.0329

JUL 17 1987

Memorandum

To: Commissioner, BOR

From: Assistant Solicitor, Branch of Water and Power
Division of Energy and Resources

Subject: Interpretation of the Federal Water Project Recreation Act

By memorandum dated May 29, 1987, you requested our opinion regarding several issues related to the Bureau's authority under the Federal Water Project Recreation Act[1] (hereafter "the Act").

Our review of the legislative history of the Act leads us to conclude, as explained below, that 1) the Secretary of the Interior has conditional authority to enter into cost-sharing agreements with non-federal public bodies to develop project lands and waters for recreation and 2) Reclamation may operate and maintain "turned back" recreation areas on an interim basis in a manner consistent with its resource capabilities. Our interpretation of the specific issues presented follows.

I. Whether the Federal Water Project Recreation Act can be interpreted as giving the Secretary "blanket authority" to enter into cost-sharing agreements on all Reclamation projects with non-federal entities for recreational purposes, rather than only on projects for which recreation is specifically authorized in the legislation as a project purpose?

A stated purpose of the Act is to provide the Secretary of the Interior with basic statutory authority similar to that which was already available to the Secretary of the Army at the time of enactment.[2] Specifically, subsection 7(a) of the Act authorizes the Secretary, "to investigate, plan, construct, operate, and maintain, or otherwise provide for public outdoor recreation . . . [and] to acquire or otherwise make available such adjacent lands or interests therein as are necessary for public outdoor recreation." (76 Stat. 216, 16 U.S.C. 460l-18(a).)

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1 Public Law 89-72, 79 Stat. 213, 16 U.S.C. 460l-12.

2 S. Rep. No. 149, 89th Cong., 1st Sess. 14 (1965).

This general authority to develop water resource projects for recreation, however, is not without conditions. Before undertaking to provide lands, facilities, and project modifications for recreation in excess of those incidental to authorized project purposes or necessary for the public health and safety, subsection 3(b) (79 Stat. 215, 16 U.S.C. 460l-12) of the Act requires non-federal entities to agree, in writing, to assume responsibilities for administering the project lands and waters for recreation. Such an agreement must, as referenced by your question, require participating non-federal entities to share not less than one-half the separable costs for such development and all of the operation and maintenance and replacement costs. (79 Stat. 214, 16 U.S.C. 460l-12.) Subsection 2(b) of the Act makes provision for the method of payment by non-federal public bodies and, in cases of repayment, requires full repayment with interest within 50 years of first use of the project for recreation. In the absence of such an agreement, the Secretary has no authority to provide recreation facilities or make project modifications for recreation.[3]

Language adopted in the Conference Report[4] in consideration of S. 1229, and enacted as subsection 7(a) (79 Stat. 216, 16 U.S.C. 460l-18(a)) of the Act, limits the Secretary of the Interior's spending authority for recreational project development to $100,000 for each pre-existing project facility. This provision was adopted in lieu of House-passed language which would have authorized the Secretary to construct and operate recreation facilities and acquire lands for such purposes for any project provided that no appropriation for existing projects could be made until 60 legislative days after a report recommending such development had been submitted to Congress and then only if neither the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources had disapproved such proposal. Because the compromise provision excluded the 60-day waiting period, Congress appears to have specifically rejected the notion of statutorily requiring oversight approval of recreational project development at existing project facilities. However, any interpretation of the authority granted to the Secretary of the Interior to enter into cost-sharing agreements with non-federal entities for recreation must take into consideration the parameters established under the aforementioned provisions. While use of the term "blanket authority" may be somewhat overreaching, it is clearly the intent of the Act to grant the Secretary authority, as discussed above

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[3] Section 5, however, provides that, pursuant to agreement with the head of the federal agency, "nothing [contained in the act] shall be construed as preventing or discouraging post-authorization development of any project for recreation or fish and wildlife enhancement or both by non-federal public bodies." (79 Stat. 215, 43 U.S.C. § 460l-16.)

[4] H.R. Cong. Rep. No. 538, 89th Cong., 1st Sess. 8 (1965).

to, develop water project facilities for recreation in instances where recreation was not a specifically authorized project purpose.

II. Whether a recreation area which is "turned back" to Reclamation, for whatever reason, can be operated and maintained by Reclamation at its past level of management pending the identification of another management entity.

The Bureau of Reclamation does not have general authority to permanently manage its own lands for recreational purposes absent specific authority from Congress. Therefore, it has been the policy of Reclamation to encourage other qualified agencies to assume the responsibilities for these functions. This policy was clearly reaffirmed by Congress when it passed the Act.[5] Nevertheless, Reclamation cannot divest itself of its basic interest in the land, even though management of lands may have been assigned to another agency or "turned back" by the assignee.

The Reclamation Instructions (Series 210, Part 215.8) state:

> The Reclamation Regional Directors are responsible for implementing the land use plan in the management of lands where other interests are not involved, or where no other qualified administering agency is available, or where areas have been turned back by managing agencies, or on lands specifically designated for project operations. All appropriate sources of funding and resources should be used to ensure proper management. These funds might include O&M, recreation management, Soil and Moisture Conservation, youth programs, land management, or special appropriations funds. On projects where Reclamation is specifically authorized and directed to develop and manage recreation and other uses, necessary funds for these purposes will be requested through the normal budgeting process.

Therefore, it is in keeping with established Reclamation policy to maintain "turned back" recreation facilities on an interim basis pending the identification of another management agency. This, we believe, follows the general intentions of Congress to foster sound stewardship of public lands.

How long and to what extent Reclamation may assume interim management responsibilities, however, are not subjects which seem to have been firmly addressed by law or in departmental guidelines. It is our opinion that, in the absence of specific guidance, these decisions must be made on a case-by-case basis,

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[5] Public Law 89-72, 79 Stat. 213, 16 U.S.C. 460l-12.

taking into consideration such factors as the extent and availability of human and financial resources within Reclamation to handle these duties, the appropriateness of granting or renewing concessionaire contracts, their compatibility with sound recreational land use, and, the maintenance of only those facilities necessary for the safety, health, and protection of the visiting public during the interim management period. To repeat, it must be the foremost goal of Reclamation to find a new management agent, or get specific congressional authorization for long term management, of these turned back areas.

Title VI of the Reclamation Development Act of 1974 (Public Law 93-493, 88 Stat. 1494) provided Reclamation with permanent authorization to manage public recreation facilities at Lake Berryessa of the Solano Project after Napa County, California, terminated its operating agreement with the United States. In that instance, several million dollars of private capital already had been invested at the recreation area and no alternative agency to manage the area had been identified. In departing from existing policy with respect to new projects where 50-50 cost sharing of separable costs is the norm, $3 million for construction and operation and maintenance of new recreation works was appropriated. The legislative history indicates that this departure was warranted "as there is no realistic expectation of securing a management contract until certain existing conditions are corrected and the Bureau of Reclamation appears to be the only entity available to accomplish this objective."[6] P.L. 93-493 provides some general guidance where conditions indicate a limit to Reclamation's interim management authority. In such instances, it is appropriate for the Interior Department to seek congressional approval for Reclamation to have permanent recreation authority over a specific area.

Gary Fisher

Gary J. Fisher

cc: Chief, Division of Water and Land

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[6] H.R. Rep. No. 93-1206, 93d Congress, 2d Sess. 17 (1974).

Solicitor Opinion No. 19

October 26, 1988

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

LBR.ER.0329

OCT 20 1988

Memorandum

To: Chief, Finance Branch
Division of Coordination and Finance
Office of Administration
Bureau of Reclamation

Through: Chief, Division of Program Coordination and Finance
Office of Administration
Bureau of Reclamation

From: Assistant Solicitor
Branch of Water and Power
Division of Energy and Resources

Subject: Disposition of Recreation Fees from Reclamation Projects

This is in response to your memorandum of March 30, 1987, requesting an opinion regarding the disposition of recreation fees from Bureau of Reclamation projects. Your concerns were raised as a result of a December 10, 1986, opinion by our Pacific Southwest Regional Office which considered the disposition of franchise fees and recreation fees from several Bureau projects in California and found that recreation and camping fees must be deposited in the Land and Water Conservation Fund. Our research indicates that congressional enactments since the date of that Opinion may have rendered it obsolete. Therefore, we are revisiting the question of the proper disposition of those fees. Your specific questions and our conclusions are set out below.

QUESTIONS AND SUMMARY OF CONCLUSIONS

1. At the present time, must recreation fees collected at reclamation projects be deposited in the Land and Water Conservation Fund?

Conclusion: No. Language in the 1987 Omnibus Budget Reconciliation Bill specifically repealed the provision calling for any recreation fees to be paid into the Land and Water Conservation Fund.

2. Should recreation fees from previous years that have been deposited into the Reclamation Fund be transferred to the Land and Water Conservation Fund?

Conclusion: No. The Reclamation Fund falls within an exception included in the initial Land and Water Conservation Fund Act of 1965. That exception was removed in 1966, but was reinstated in 1968 with an effective date of 1971. Therefore, all fees collected before 1966 and after 1971 are properly placed in the Reclamation Fund.

BACKGROUND AND ANALYSIS

The conclusions stated above are based on an analysis of the legislative history of the Land and Water Conservation Fund Act. That history has followed a shifting path over the years, with Congress changing directions several times. The following discussion outlines that legislative history.

The Reclamation Act of 1902 called for a self-sustaining reclamation fund supported by proceeds from the sale of public lands in the western states. Act of June 17, 1902, ch. 1093, § 1, 32 Stat. 388, 43 U.S.C. § 391. The fund would be set aside to pay for the construction of irrigation works in the arid states and assessed costs of works would be returned to the fund for use in constructing other projects. Swigart v. Baker, 229 U.S. 187, 194 (1913).

The fund, as initially established, was inadequate because public land sale receipts had no direct relation to reclamation construction costs and because arrearages on repayments exceeded expectations. See 2 R. Clark, Water and Water Rights § 111.1 (1967). In order to bolster the fund, Congress passed numerous acts which required revenues from a variety of additional sources be paid into the fund. Id.

One such act was the Hayden-O'Mahoney Amendment, adopted in 1938. That amendment directed that repayment costs and other moneys received in connection with any irrigation project should be paid into the reclamation fund. See 43 U.S.C. § 392a. It is our understanding that with passage of the Hayden-O'Mahoney Amendment, it became the Bureau's practice to deposit all fees from reclamation projects into the Reclamation Fund subject to the exceptions of the Amendment. Fees generated by recreational facilities at reclamation projects were among those deposited to the Reclamation Fund.

In 1964, Congress passed the Land and Water Conservation Fund Act. Pub. L. No. 88-578, 78 Stat. 897, 16 U.S.C. §§ 460l-4-l-11. The purpose of the Act was to establish a fund to be used to acquire and develop outdoor recreation facilities.

As originally enacted, the Land and Water Conservation Fund Act authorized three sources of revenue: proceeds from the sale of federal surplus real property; federal motorboat fuels tax proceeds; and entrance, admission, and user fees collected at federal outdoor recreation areas. Pub. L. No. 88-578, 78 Stat. 897.

The Act included an exception, however. As first adopted, the Act provided in part:

> Sec. 2(a) ". . . there shall be covered into the land and water conservation fund in the Treasury of the United States . . . all proceeds from entrance, admission, and other recreation user fees or charges collected or received by the . . . Bureau of Reclamation . . . provided that nothing in this act shall affect . . . <u>any provision of law that provides that any fees or charges collected at particular Federal areas shall be used for or credited to specific purposes or special funds as authorized by that provision of law</u>. . . . (Emphasis added).

The Hayden-O'Mahoney Amendment clearly provided that "all moneys received . . . in connection with any irrigation projects . . . shall be covered into the reclamation fund." 52 Stat. 291, 322. Therefore, it appears that following enactment of the Land and Water Conservation Fund Act, recreation fees from Reclamation projects should have continued to be placed in the Reclamation Fund.

That analysis is supported by the legislative history of the Act, which cites the Reclamation Fund as an illustration of other legislation earmarking receipts for specific funds. S. Rep. No. 1364, 88th Cong., 2d Sess., <u>reprinted</u> in 1964 U.S. Code Cong. & Ad. News 3633, 3650.

Congress tacitly recognized that interpretation when, a year later, it amended the Act. The Federal Water Project Recreation Act amended Section 2, subsection (a) of the Land and Water Conservation Fund Act to read "provided, that nothing in this act shall affect . . . any contract heretofore entered into by the United States that provides that such revenues collected at particular Federal areas shall be credited to specific purposes." Pub. L. No. 89-72, § 11, 79 Stat. 213. In other words, the original language was narrowed by deleting the exemption for fees that were otherwise disposed of by law, and instead limited the exemption only to fees that were subject to <u>pre-existing contracts</u>.

The legislative history for this amendment confirms that Congress not only intended to narrow the exemption, but may have had the Bureau in mind in doing so. House Report No. 254 (89th Cong., 1st Session) states, at page 17:

> Section 10 [of P.L. 89-72, before renumbering] relates to the Land and Water Conservation Fund Act of 1965. It amends that act to make it clear any fees or charges for the use of recreation and fish and wildlife areas at

> water projects shall be credited to the land and water conservation fund and not go into special funds such as the reclamation fund. (Emphasis added.)

Consequently, as of 1966, all recreation fees generated by any reclamation project were to be placed in the Land and Water Conservation Fund unless a pre-existing contract for a specific reclamation project provided otherwise.

In 1968, Congress changed its signals again when it reexamined the Land and Water Conservation Fund Act and passed Public Law 90-401, 82 Stat. 354. The primary objective of the law was to strengthen the fund by providing new sources of revenue under the Outer Continental Shelfs Land Act.

Public Law 90-401 was also to return "to the individual agencies the power to fix [recreation] fees and provide that such fees as were collected by the individual agencies should be covered into the fund, credited to the collecting agency, and be available for appropriation for the use of the collecting agency." See Conference Report No. 1598, 1968 U.S. Code Cong. and Ad. News at 2631. Most important for the question at hand, Public Law 90-401 repealed subsection (a) of Section 2 of the Land and Water Conservation Fund Act, which had exempted only those revenues collected under a pre-existing contract. The 1968 law provided:

> (b) It is not the intent of the Congress by this repealer to indicate that Federal agencies which have under their administrative jurisdiction areas or facilities used or useful for outdoor recreation or which furnish services related to outdoor recreation shall not exercise any authority they may have . . . or any authority they may hereafter be given, to make reasonable charges for admission to such areas, for the use of such facilities, or for the furnishing of such services. Except as otherwise provided by law or as may be required by lawful contracts entered into prior to September 3, 1964, providing that revenues collected at particular Federal areas shall be credited to specific purposes, all fees so charged shall be covered into a special account under the Land and Water Conservation Fund and shall be available for appropriation, without prejudice to appropriations from other sources for the same purposes, for any authorized outdoor recreation function of the agency by which the fees were collected. (Emphasis added).

Pub. L. No. 90-401, 82 Stat. 354 (1968).

Thus, in addition to creating special recreation fee accounts for individual agencies, Public Law No. 90-401 restored the original exemption language of the Land and Water Conservation Fund Act. The provision was to take effect March 31, 1970, and until that date, revenues derived from repealed subsection (a) would continue to be placed in the Land and Water Conservation Fund.

In 1970, Congress directed the Secretary of the Interior to complete a policy survey of user and entrance fees. At the same time, the effective date of subsection (b) of Public Law 90-401 was extended to December 31, 1971. Until that date, revenues were to continue to be deposited to the Land and Water Conservation Fund. Pub. L. No. 91-308, 84 Stat. 410.

In 1972, in response to the Secretary's completed survey, Congress enacted Public Law 92-347, with the aim of completely revising the recreation fee program. Although this law repealed much of Public Law 90-401, key provisions regarding the disposition of fees were retained:

> (e) Except as otherwise provided by law or as may be required by lawful contracts entered into prior to September 3, 1964, providing that revenues collected at particular Federal areas shall be credited to specific purposes, all fees collected shall be covered into a special account in the Treasury of the United States to be administered in conjunction with, but separate from, the revenues in the Land and Water Conservation Fund. Revenues in the special account shall be available for appropriation, without prejudice to appropriations from other sources for the same purposes, for any authorized outdoor recreation function of the agency by which the fees were collected. . . .
>
> (f) . . . nor shall it repeal or modify . . . any provision of law that provides that any fees or chargs (sic) collected at particular Federal areas shall be used for or credited to specific purposes or special funds as authorized by that provision of law.
>
> Pub. L. No. 92-347, 86 Stat. 459.

Thus Public Law 92-347 retained both the broader exceptions clause and the special recreation fee accounts provisions of P.L. 90-401.

It should be noted that Public Law 92-347 also distinguished between "admission fees" and "special recreation use fees." Admission or entrance fees could be charged "only at designated units of the National Park System administered by the Department

of the Interior and National Recreation Areas administered by the Department of Agriculture." 86 Stat. 459. Special recreation fees were to be imposed by all agencies providing specialized facilities, equipment, or services at federal expense. It was these fees which would be deposited in special accounts for the collecting agency. See H.R. Rep. No. 742, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News, 2823, 2827.

Minor amendments to the fee provisions of the Act were made in 1973 and 1974. See Public Law 93-81 and 93-303. These amendments addressed the types of sites or facilities for which fees could be charged and did not change the provisions regarding disposition of fees.

In 1980, Congress again addressed the issue of disposition of recreation fees, and included in the fiscal year 1981 Department of the Interior and Related Agencies Appropriations Act, language providing in part:

> Notwithstanding the provisions of Public Law 90-401, revenues from recreation fee collections by Federal agencies shall hereafter be paid into the Land and Water Conservation Fund, to be available for appropriation for any or all purposes authorized by the Land and Water Conservation Fund Act of 1965, as amended, without regard to the source of such revenues.
>
> Pub. L. No. 96-514, 94 Stat. 2960. Now at 16 U.S.C. § 460l-5a.

While the Amendment appears to apply to all recreation fees, the legislative history indicated its purpose was to abolish the separate recreation accounts that had first been established in 1968 and maintained for the Bureau of Land Management, National Park Service, Fish and Wildlife Service, and Forest Service. The accounts were considered to have only created bookkeeping burdens without increasing any agency's overall recreation funding. See S. Rep. No. 985, 96th Cong., 2d Sess. (1980).

Public Law 96-514 did nothing, however, to change the exception in section 4(f) of the Land and Water Conservation Fund Act for fees otherwise disposed of by law. Consequently, after 1980, with the elimination of special recreation fee accounts, all revenues were to be placed into the Fund "[e]xcept as otherwise provided by law or as may be required by lawful contracts entered into prior to September 3, 1964, providing that revenues collected at particular Federal areas shall be credited to specific purposes. . . ." 16 U.S.C. § 460l-6a(f).

The Land and Water Conservation Fund Act had thus come full circle and recreation fees were to be disposed of in essentially the same manner as contemplated in the 1965 Act. As we have

noted, and as acknowledged by Congress, that method of disposition included covering funds into the Reclamation Fund where "provided by law." As a result, all recreation fees collected at reclamation projects since December 31, 1971 (the effective date of Public Law 90-401) should be deposited in the Reclamation Fund and not transferred to the Land and Water Conservation Fund.

In 1987, Congress once again amended the Act with enactment of the Omnibus Budget Reconciliation Act of 1987. Section 5201(d) states:

> (d) Repeals--(1) Title I of Public Law 96-514 is amended by striking out the following provisions which appear under the heading "Land and Water Conservation Fund": "Notwithstanding the provisions of Public Law 90-401, revenues from recreation fee collections by federal agencies shall hereafter be paid into the Land and Water Conservation Fund, to be available for appropriation for any or all purposes authorized by the Land and Water Conservation Fund Act of 1965, as amended, without regard to the source of such revenues."
>
> Pub. L. No. 100-203, 101 Stat. 1330, 1330-266.

As a result, all recreation fees now are to be deposited into special accounts, available for appropriation to the collecting agency in the year following receipts, and not into the Land and Water Conservation Fund. H.R. Rep. No. 391(II), 100th Cong., 1st Sess., reprinted in 1987 U.S. Code Cong. & Admin. News, 2313-1, 2313-382.

If you have further questions on this matter, please call Barbara Geigle at 343-2748.

Patricia S. Bangert

Patricia S. Bangert

Solicitor Opinion No. 20

January 4, 1991

United States Department of the Interior
OFFICE OF THE SOLICITOR
P.O. BOX 31394
BILLINGS, MONTANA 59107-1394

TAKE PRIDE IN AMERICA

JAN 7 '91

January 4, 1991

LBR.BL.B520

MEMORANDUM

TO: Regional Director, Bureau of Reclamation, Billings
Attention: GP-420

FROM: Richard K. Aldrich, Field Solicitor
Pacific Northwest Region (Billings)

SUBJECT: Contract No. 4-AG-5C-02650, McGee Creek Recreation, McGee Creek Project, Oklahoma (Recreation Management)

You have requested that this office provide advice on four issues with regard to compliance with the Federal Water Project Recreation Act (Public Law 89-72) and other Federal laws and regulations.

1. The proposed contract provides for the accumulation of interest on the unpaid balance with no billings sent to the State during the 10-year development period.

We believe that Congress has given the Secretary the authority to defer repayment obligations on an interim basis and to renegotiate a contract to account for such an adjustment. This would include interest. The Secretary, in his good discretion, may provide for a lump sum interest payment at any time in the renegotiated contract period. We suggest that the Bureau provide annual statements on interest accrued to date.

2. Development of recreation facilities by the State proportionate to accumulated interest instead of paying Reclamation the accumulated interest on the unpaid balance.

We conclude that Congress has not given the Secretary the authority to have interest paid through additional facilities. The interest owing is due the United States and Congress has not authorized and appropriated its expenditure.

3. Considering that the expenditures by the State are subject to State appropriations as in Article 20, where does this leave Reclamation with respect to debt collection, and is it legal for Reclamation to include such a provision in a contract?

We believe that Reclamation is in a difficult position concerning debt collection. You have contracted away the right to demand payment. While the Oklahoma legislature holds the key to payment of past and current obligations, Reclamation should review its internal rules concerning future contracts with unreliable contractors.

As to the legality of Article 20, we understand that the contract was entered into pursuant to Section 2(b) of Public Law 89-72. Subpart (b)(1) provides for up front delivery. While the statute can be construed to allow incremental up front delivery, i.e. as we build -- they build, we do not believe Congress intended there to be any potential for lack of payment. We conclude that Congress has not given Reclamation the authority to allow a contracting entity not to be obligated.

4. Whether the unpaid obligation referred to in article 5d of the contract is $1,347,500 (the total expended by Reclamation), $722,500 (50 percent of the total expended by Reclamation, or a different amount with the accumulation of interest during construction. We believe that the in kind obligation would be $1,347,500, but a repayment obligation would be $722,500.

We conclude that you are correct. The in kind obligation is a Sec. 2(b)(1) payment and is based on the contractual obligations accepted by each party. A repayment obligation is a Sec. 2(b)(2) repayment and is based on product delivered.

Please feel free to contact the office if you have any questions.

John C. Chaffin
For the Field Solicitor

Solicitor Opinion No. 21

June 3, 1991

United States Department of the Interior
OFFICE OF THE SOLICITOR
P O BOX 31394
BILLINGS, MONTANA 59107-1394

TAKE PRIDE IN AMERICA

June 3, 1991

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LBR.BL.0337

MEMORANDUM

TO: Regional Director, Bureau of Reclamation, Billings
Attention: GP-122

FROM: Richard K. Aldrich, Field Solicitor
Pacific Northwest Region (Billings)

SUBJECT: Section 504 of the Rehabilitation Act and Public Law 89-72

You have asked this office to address several issues concerning Reclamation compliance with Section 504 at Reclamation Facilities where construction of recreation facilities is governed by Public Law 89-72 (P.L. 89-72). We provide the following:

Does the Rehabilitation Act of 1973 provide Reclamation with the authority to:

1. Expend funds, at areas we manage, associated with bringing recreation facilities into § 504 compliance when recreation is not an authorized project purpose, and when the facilities are considered above and beyond that necessary to meet minimum health and safety needs?

No - we do not believe the general provisions of Section 504 provide superceding authority for construction at Reclamation recreation facilities, when recreation facilities are not an authorized project purpose.

2. Change the interpretation of "minimum basic facilities" under P.L. 89-72 to include access to facilities for the physically challenged?

Yes - we believe that Section 504 can be read to expand the definition of minimal health and safety needs.

3. Cost-share Section 504 compliance activities with non-federal managing agencies that manage Reclamation recreation areas when the limits imposed by P.L 89-72 have been reached.

We do not believe Section 504 provides Reclamation with a waiver of the 100,000 spending limit under P.L. 89-72.

4. Enter into an agreement providing funds to a nonprofit organization such as the Physically-Challenged Access to the Woods (PAW) for § 504 compliance (outdoor activities) at areas where recreation is not an authorized purpose?

Reclamation does not need § 504 to enter into such agreement and § 504 does not provide authority for Reclamation to exceed the spending cap under P.L. 89-72.

5. Use challenge grants to bring facilities into compliance?

To the extent that Reclamation uses the term "challenge grant" to obtain a line item appropriation for cost-sharing moneys, this office continues to advise that it recommends that authorization by appropriation is disfavored.

To the extend that Reclamation uses "challenge grants" merely as grants of money to specific organization for use at specific locations, it appears as though this arrangement does not conflict with the P.L. 89-72 ceiling cap.

John C. Chaffin
For the Field Solicitor

Solicitor Opinion No. 22

January 27, 1995

United States Department of the Interior

OFFICE OF THE SOLICITOR
SUITE 6201, FEDERAL BUILDING
125 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84138

OFFICIAL FILE COPY
JAN 31 1995

January 27, 1995

Memorandum

To: Regional Director, Bureau of Reclamation, Upper Colorado Region, Attn: Darrell P. Welch, UC-454

From: Regional Solicitor, Intermountain Region

Subject: Authorization and Cost Share Requirements for Facilities Provided for Under P.L. 89-72

You have asked for an interpretation of the restrictions on cost sharing for recreation and fish and wildlife facilities under the amended provisions of P.L. 89-72. We conclude that there are three basic scenarios for cost sharing covered by the provisions of the Act. The first is a facility which was authorized by the provisions of P.L. 89-72 for which a management and cost sharing agreement with a non-federal partner was in place during the planning and construction phase. Under section 2(a), the non-federal partner must agree to bear not less than half of the costs of construction, operation, maintenance and replacement for both recreation and fish and wildlife facilities. The second possibility is a facility authorized by P.L. 89-72 for which no management and cost sharing agreement was entered into during the construction phase. For such projects, minor facilities may be constructed on a non-reimbursable basis without a non-federal partner or construction of new facilities or expansion of existing facilities may be undertaken upon execution of a management and cost share agreement under the provisions of section 3. Finally, a facility which was not authorized under the provisions of P.L. 89-72 may still have investigation, planning, construction, operation, maintenance or other provision made for recreation or fish and wildlife use under section 7 of P.L. 89-72 by meeting the conditions of sections 3(b) or (c).

BACKGROUND

When the Reclamation Act of 1902 was passed, the only authorized purpose of Reclamation projects and facilities was to provide water for irrigation of farmland. This situation has changed dramatically over the years and now there are numerous purposes for Reclamation projects and facilities. Recreation and fish and

wildlife uses of Reclamation facilities have evolved over time. While the construction of large storage reservoirs and canals had an immediate impact on recreation and fish and wildlife and provided numerous opportunities for enjoyment of these resources, it was some time before the impacts and opportunities were legislatively recognized. Congressional authorization to develop these resources began with an Act to promote the conservation of wildlife, fish and game, and for other purposes passed on March 10, 1934. Various acts expanded upon this initial authorization, including the Fish and Wildlife Coordination Act of August 14, 1946, and the Colorado River Storage Project Act of April 11, 1956, until Congress passed P.L. 89-72, the Federal Water Project Recreation Act, on July 9, 1965.

P.L. 89-72 was passed to meet specific Congressional policy goals. The Act was amended by Title XXVIII of P.L. 102-575, the Reclamation Recreation Management Act, on October 30, 1992. The Reclamation Recreation Management Act states that the Congress felt the original provisions of P.L. 89-72 were too restrictive and did not allow for a reasonable federal contribution to the costs of developing recreation at federal water facilities. Section 1 of P.L. 89-72 provides:

> It is the policy of the Congress and the intent of this Act that (a) in investigating and planning any Federal navigation, flood control, reclamation, hydroelectric, or multiple-purpose water resource project, full consideration shall be given to the opportunities, if any, which the project affords for outdoor recreation and for fish and wildlife enhancement and that, wherever any such project can reasonably serve either or both of these purposes consistently with the provisions of this Act, it shall be constructed, operated, and maintained accordingly; (b) planning with respect to the development of the recreation potential of any such project shall be based on the coordination of the recreation use of the project area with the use of existing and planned Federal, State, or local public recreation developments; and (c) project construction agencies shall encourage non-Federal public bodies to administer project land and water areas for recreation and fish and wildlife enhancement purposes and operate, maintain, and replace facilities provided for those purposes unless such areas or facilities are included or proposed for inclusion within a national recreation area, or are appropriate for administration by a Federal agency as a part of the national forest system, as a part of the public lands classified for retention in Federal ownership, or in connection with an authorized Federal program for the conservation and development of fish and wildlife. (79 Stat. 213; 16 U.S.C. § 460*l*-12)

Most importantly, however, P.L. 89-72 makes recreation and fish and wildlife uses approved, primary purposes of Reclamation projects. This elevation to a primary

purpose allows a portion of the construction costs of the entire project, as well as a portion of the project water supply, to be allocated to recreation or fish and wildlife purposes.[1] This allocation of costs and water supply to recreation or fish and wildlife purposes allows these uses to be considered and planned for in their own right, rather than as incidental uses of facilities which are authorized for other purposes. However, this elevation and allocation raised new issues of reimbursement for construction costs and for operation and maintenance (O&M) costs. Further, for a number of reasons, P.L. 89-72 is seldom used to authorize dam construction or major land acquisitions. Instead of using P.L. 89-72 to authorize multipurpose construction, other authorities such as section 8 of the Colorado River Storage Project Act of April 11, 1956, are usually employed and P.L. 89-72 is usually reserved for facilities that are exclusively recreation and fish and wildlife.

It must be understood that P.L. 89-72 is an alternative recreation authorization where management and operation of the facilities so authorized are not going to be carried out by the federal government. Thus, the Act is an authorization for a non-federal entity to manage certain activities upon federal lands.[2] P.L. 89-72 establishes three basic sets of circumstances where federal cost sharing will be made available. Each of those sets of circumstances also has conditions which must be met by Reclamation and the non-federal managing agency as well as restrictions that apply depending upon the conditions that have been met.

DISCUSSION

I. Cost Sharing Where Recreation and Fish and Wildlife Are Planned and Authorized Project Purposes And Signed Agreements Predate Implementation

Section 2 of P.L. 89-72 deals with a situation where recreation or fish and wildlife functions have been planned into the authorization and construction of a project and the non-federal management partner has committed to a cost share agreement. This section acts like section 9 of the Reclamation Project Act of

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[1] Throughout this opinion the phrase "recreation or fish and wildlife" will be used. This must not be understood to mean that Reclamation must choose one or the other, it merely circumvents the annoying use of and/or.

[2] Where the federal government is going to manage recreation or fish and wildlife activities on Reclamation project, the authorization would come from P.L. 88-578 or some other statute.

1939, 43 U.S.C. § 485h, by allowing cost allocations for new projects.[3] Section 2(a) provides that, if a non-federal management partner has signed an agreement which shares costs for both construction and O&M costs allocated to recreation or fish and wildlife purposes, then the portion not borne by the non-federal partner is non-reimbursable. Section 2(a) provides:

> (a) If, before authorization of a project, non-Federal public bodies indicate their intent in writing to agree to administer project land and water areas for recreation or fish and wildlife enhancement or for both of these purposes pursuant to the plan for the development of the project approved by the head of the agency having administrative jurisdiction over it and to bear not less than one-half the separable costs of the project allocated to either or both of said purposes, as the case may be, and not less than one-half the costs of operation, maintenance, and replacement incurred therefor—
>
> (1) the benefits of the project to said purpose or purposes shall be taken into account in determining the economic benefits of the project;
>
> (2) costs shall be allocated to said purpose or purposes and to other purposes in a manner which will insure that all project purposes share equitably in the advantages of multiple-purpose construction: *Provided,* That the costs allocated to recreation or fish and wildlife enhancement shall not exceed the lesser of the benefits from those functions or the costs of providing recreation or fish and wildlife enhancement benefits of reasonably equivalent use and location by the least costly alternative means; and
>
> (3) not more than one-half the separable costs and all the joint costs of the project allocated to recreation and fish and wildlife enhancement shall be borne by the United States and be nonreimbursable.
>
> Projects authorized during the calendar year 1965 may include recreation and fish and wildlife enhancement on the foregoing basis without the required indication of intent. Execution of an agreement as aforesaid shall be a prerequisite to commencement of construction of any project to which this subsection is applicable.

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[3] That section 2 of P.L. 89-72 was meant to apply prospectively is clear from the last paragraph of the section which allows projects authorized in 1965 to include recreation or fish and wildlife components without the requisite cost share agreement in place.

Section 2(b) provides a choice of methods by which the non-federal partner may pay the costs for which they have accepted responsibility. Section 2(b) states:

> (b) The non-Federal share of the separable costs of the project allocated to recreation and fish and wildlife enhancement shall be borne by non-Federal interests, under either or both of the following methods as may be determined appropriate by the head of the Federal agency having jurisdiction over the project: (1) payment, or provision of lands, interests therein, or facilities for the project; or (2) repayment, with interest at a rate comparable to that for other interest-bearing functions of Federal water resource projects, within fifty years of first use of project recreation or fish and wildlife enhancement facilities: *Provided,* That the source of repayment may be limited to entrance and user fees or charges collected at the project by non-Federal interests if the fee schedule and the portion of fees dedicated to repayment are established on a basis calculated to achieve repayment as aforesaid and are made subject to review and renegotiation at intervals of not more than five years. (79 Stat. 214; 16 U.S.C. § 460/-13)

The chief advantage of using section 2 for providing construction and O&M funding is that the funds and allocation of resources to promote and achieve recreation or fish and wildlife purposes can be built into the project as well as the water supply. This method eliminates much of the conflict that can arise when recreation or fish and wildlife purposes are included in a project only as add-ons which do not, then, achieve the full consideration that may be desired.

II. Cost Sharing Where Recreation or Fish and Wildlife Cost Sharing Agreements Have Not Been Executed Initially

However, even where no cost sharing partner has come forward to satisfy the requirements of section 2 for the provision of recreation or fish and wildlife functions in the initial planning, some funding for construction and O&M is still available from federal sources under certain circumstances. Section 3 of the Act details the circumstances under which recreation or fish and wildlife construction and O&M costs may be allowed on a cost sharing basis even if no agreement or planning was provided in initial stages. Section 3 also allows for the expansion or modification of recreation or fish and wildlife facilities which have been previously authorized under the provisions of P.L. 89-72.

Section 3(a) provides for facilities for recreation or fish and wildlife uses if they also serve other project purposes or are minimal in nature. These minimal facility costs are totally non-reimbursable. Section 3(a) states:

> (a) No facilities or project modifications which will furnish recreation or fish and wildlife enhancement benefits shall be provided in the

absence of the indication of intent with respect thereto specified in subsection 2(a) of this Act unless (1) such facilities or modifications serve other project purposes and are justified thereby without regard to such incidental recreation or fish and wildlife enhancement benefits as they may have or (2) they are minimum facilities which are required for the public health and safety and are located at access points provided by roads existing at the time of project construction or constructed for the administration and management of the project. Calculation of the recreation and fish and wildlife enhancement benefits in any such case shall be based on the number of visitor-days anticipated in the absence of recreation and fish and wildlife enhancement facilities or modifications except as hereinbefore provided and or the value per visitor-day of the project without such facilities or modifications. Project costs allocated to recreation and fish and wildlife enhancement on this basis shall be nonreimbursable.

Section 3(b) allows Reclamation to provide lands and water areas as a basis for recreation or fish and wildlife development as well as construction of facilities to a non-federal partner under certain conditions. Those conditions appear in section 3(b)(1) and are that the non-federal partner must agree to pay one half of the cost of: 1) construction of facilities, 2) planning and 3) O&M. If these conditions are met, the lands may be provided and planning and construction may proceed with the federal portion of the costs being non-reimbursable.[4] However, section 3(b)(2) requires that lands which were acquired for recreation or fish and wildlife purposes which are not used for that purpose within 10 years under the conditions set forth in section 3(b)(1) should be disposed of. Section 3(b) provides:

(b) Notwithstanding the absence of an indication of intent as specified in subsection 2(a), lands may be provided in connection with project construction to preserve the recreation and fish and wildlife enhancement potential of the project:

(1) If non-Federal public bodies execute an agreement after initial operation of the project (which agreement shall provide that the non-Federal public bodies will administer project land and water areas for recreation or fish and wildlife enhancement or both pursuant to the plan for the development of the project approved by the head of the agency having administrative jurisdiction over it and will bear not less than one-half the costs of lands, facilities, and project modifications provided for either or both of those purposes, as the case may be, and

[4] The disadvantage of providing facilities under section 3(b) as opposed to section 2(a) is that there will generally be no allocation of a water supply where the facilities have been, in essence, added on instead of being included and agreements signed in the initial stages.

not less than one-half the costs of planning studies, and the costs of operation, maintenance, and replacement attributable thereto) the remainder of the costs of lands, facilities, and project modifications provided pursuant to this paragraph shall be nonreimbursable. Such agreement and subsequent development, however, shall not be the basis for any reallocation of joint costs of the project to recreation or fish and wildlife enhancement.

(2) If, within ten years after initial operation of the project, there is not an executed agreement as specified in paragraph (1) of this subsection, the head of the agency having jurisdiction over the project may utilize the lands for any lawful purpose within the jurisdiction of his agency, or may offer the land for sale to its immediate prior owner or his immediate heirs at its appraised fair market value as approved by the head of the agency at the time of offer or, if a firm agreement by said owner or his immediate heirs is not executed within ninety days of the date of the offer, may transfer custody of the lands to another Federal agency for use for any lawful purpose within the jurisdiction of that agency, or may lease the lands to a non-Federal public body, or may transfer the lands to the Administrator of General Services for disposition in accordance with the surplus property laws of the United States. In no case shall the lands be used or made available for use for any purpose in conflict with the purposes for which the project was constructed, and in every case except that of an offer to purchase made, as hereinbefore provided, by the prior owner or his heirs preference shall be given to uses which will preserve and promote the recreation and fish and wildlife enhancement potential of the project or, in the absence thereof, will not detract from that potential. (79 Stat. 214; 16 U.S.C. § 460/-14)

Section 3(c) allows for expansion or modification of existing facilities.[5] The expansion or modification of existing facilities can proceed if the need for them is established and a non-federal partner will agree to manage them and pay up to one half of the construction, planning and O&M costs of the expanded facilities. Section 3(c) provides:

> (c) (1) Any recreation facility constructed under this Act may be expanded or modified if—
>
> (A) the facility is inadequate to meet recreational demands; and
>
> (B) a non-Federal public body executes an agreement which provides that such public body—
>
> (i) will administer the expanded or modified facilities pursuant to a plan for development for the project that is approved by the agency with administrative jurisdiction over the project; and
>
> (ii) will bear not less than one-half of the planning and capital costs of such expansion or modification and not less than one-half of the costs of the operation, maintenance, and replacement attributable to the expansion of the facility.
>
> (2) The Federal share of the cost of expanding or modifying a recreational facility described in paragraph (1) may not exceed 50 percent of the total cost of expanding or modifying the facility.

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[5] Some questions have arisen from the fact that section 3(c) only states "recreation" instead of "recreation and fish and wildlife". The questions are based on the issue of whether, given the omission, the provisions of section 3(c) can be applied to fish and wildlife uses and facilities as well as recreation uses and facilities. The Reclamation Recreation Management Act which added section 3(c) to P.L. 89-72 uses the word "recreation" throughout and never uses "fish and wildlife". Thus, we must conclude that the provisions of section 3(c) are only available for recreation uses. However, section 3(b) allows expenditures for "lands, facilities and project modifications" while section 3(c) allows expenditures for facilities to be "expanded or modified." The only difference here is the authorization to expand existing facilities under section 3(c). Nevertheless, section 3(b) allows new construction or modification of existing facilities. Thus, to the extent that work for fish and wildlife facilities would qualify as new construction or modification of existing construction, it could be allowed under section 3(b); however, expansion of existing facilities is not allowed by this section.

III. Cost Share and Management Agreements for Projects Not Authorized Under P.L. 89-72

P.L. 89-72 also makes provision for recreation or fish and wildlife facilities at reservoirs which were not authorized and planned using the provisions of the Act. Thus, if a project was authorized before 1965 or was authorized without reference to P.L. 89-72, section 7 of the Act allows that project to plan and construct recreation or fish and wildlife enhancement facilities under the same conditions imposed by section 3(b) or (c). Section 7 states:

> (a) The Secretary is authorized, in conjunction with any reservoir heretofore constructed by him pursuant to the Federal reclamation laws or any reservoir which is otherwise under his control, except reservoirs within national wildlife refuges, to investigate, plan, construct, operate and maintain, or otherwise provide for public outdoor recreation and fish and wildlife enhancement facilities, to acquire or otherwise make available such adjacent lands or interests therein as are necessary for public outdoor recreation or fish and wildlife use, and to provide for public use and enjoyment of project lands, facilities, and water areas in a manner coordinated with the other project purposes. Lands, facilities and project modifications for the purposes of this subsection may be provided only after an agreement in accordance with subsection (b) or (c) of section 3 of this Act has been executed.

Thus, the cost share requirements for construction, planning and O&M functions for non P.L. 89-72 facilities are the same as the requirements for facilities where P.L. 89-72 was a factor in authorization but where no cost share and management agreement was obtained before authorization and construction.

CONCLUSION

For the foregoing reasons we conclude that there are three basic scenarios for cost sharing covered by the provisions of the Act. The first is a facility which was authorized by the provisions of P.L. 89-72 for which a management and cost sharing agreement with a non-federal partner was in place during the planning and construction phase. Under section 2(a), the non-federal partner must agree to bear not less than half of the costs of construction, operation, maintenance and replacement for both recreation and fish and wildlife facilities. The second possibility is a facility authorized by P.L. 89-72 for which no management and cost sharing agreement was entered into during the construction phase. For such projects, minor facilities may be constructed on a non-reimbursable basis without a non-federal partner or construction of new facilities or expansion of existing

facilities may be undertaken upon execution of a management and cost share agreement under the provisions of section 3. Finally, a facility which was not authorized under the provisions of P.L. 89-72 may still have investigation, planning, construction, operation, maintenance or other provision made for recreation or fish and wildlife use under section 7 of P.L. 89-72 by meeting the conditions of sections 3(b) or (c).

If you have any further questions, please feel free to contact the undesigned.

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CBR:mdn:01\27\95:Chris:General:Cost Share Requirements (SHARE)

Solicitor Opinion No. 23

May 16, 2006

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

May 15, 2006

To: Acting Commissioner
Bureau of Reclamation

From: Barbara Gieseke, Assistant Solicitor
Branch of Water and Power, Division of Land and Water Resources

Subject: Applicability of the Federal Lands Recreation Enhancement Act

This memorandum responds to the Bureau of Reclamation's (Reclamation) request that the Solicitor's Office answer specific questions about the effects of the Federal Lands Recreation Enhancement Act (the Act or FLREA), Pub. L. 108-447, Title VIII, on Reclamation's recreation programs.

From the outset, it should be noted that FLREA provisions apply to recreation fees charged under FLREA. Except as specified in the Act, FLREA does not repeal or alter Reclamation's existing authorities to charge fees or provide recreation facilities. FLREA provides *alternate* authority to charge fees at certain Reclamation sites that meet FLREA criteria. At those sites, Reclamation can charge either the FLREA fee or the existing fee, but not both, since the Act provides that "[t]he Secretary shall establish the minimum number of recreation fees and shall avoid the collection of multiple or layered recreation fees for similar uses, activities, or programs." FLREA, sec. 803. FLREA also provides authority for special use permits under section 803(b). Generally, if the fee is charged under FLREA, it should be credited to the FLREA fund established by the Act, with 80 percent of the fee reinvested in the recreation site. If the fees are collected under another authority, then their disposition and crediting is not affected by FLREA and the funds should continue to be credited in the same way they were before passage of FLREA. Note, however, that FLREA funds may not be "taken into account" for a list of certain laws or for revenue allocation laws generally, as established by section 814(b) of the Act.

A. Reclamation's Existing Authorities

Before Congress enacted FLREA, Reclamation managed most of its recreation areas under the Federal Water Project Recreation Act of 1965, Pub. L. No. 89-72, 79 Stat. 213, *codified at* 16 U.S.C. § 460*l*-12 et seq., as amended (the 1965 Recreation Act) and the Reclamation Recreation Management Act of 1992, Title XXVIII of the Reclamation Projects Authorization Act of 1992, P.L. 102-575, *codified at* 16 U.S.C. § 460*l*-33a. It also had recreation management authority under the Land and Water Conservation Fund Act of 1965, 88 Pub. L. 578,

578, 78 Stat. 897, *codified at* 16 U.S.C. § 460*l*-6a *et seq.*, as amended (LWCFA) and some project-specific authorities. Reclamation also has authority to charge special recreation permit fees under its interpretation of several statutes, primarily the Reclamation Recreation Management Act, *codified at* 16 U.S.C. § 460*l*-33a, P.L. 102-575, 106 Stat. 4600 (title XXVIII of the Reclamation Projects Authorization Act of 1992) (1992 Act).

2. Federal Water Project Recreation Act of 1965

Under the 1965 Recreation Act, Reclamation has managed recreation facilities under what it calls the "minimum rule." Section 3(a) of the 1965 Recreation Act requires that, unless Reclamation has a non-federal managing partner or project-specific legislation providing otherwise, it may only construct basic recreation-related facilities. Reclamation has interpreted "basic facilities" to include "guardrails, turnarounds at the ends of existing roads, and pit toilets." Reclamation also interprets "the minimum rule" to allow facility improvements necessary for accessibility and for the health and safety of visitors as part of these facilities. Reclamation generally does not charge fees for use of these basic facilities. In some areas, non-federal managing partners have built recreation facilities that they later turn back to Reclamation to own and operate. In these situations, Reclamation continues to charge fees in the same way the non-federal managing partner did. Reclamation collects fees for use of these facilities under the 1992 Act, which amends the 1965 Recreation Act.[7]

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[7] The New Melones recreation area is the only area that Reclamation directly managed under the authority of the LWCFA. Reclamation collected recreation user fees for a variety of uses such as campgrounds and special events pursuant to the LWCFA (16 U.S.C. § 401-6a(b) and c); however, this authority was repealed by FLRFA (Section 813a).

Section 3(a) provides: "No recreation facilities will be provided in the absence of a non-federal operator unless: "(1) such facilities . . . serve other project purposes and [are] justified without regard to such incidental recreation or fish and wildlife enhancement benefits; 2) they are *minimum facilities* which are required for the public health and safety and are located at access points provided by roads existing at the time of project construction or constructed for the administration and management of the project." 1965 Recreation Act, sec. 3(a) (emphasis added).

[8] The 1992 Act provides:

> Upon a determination that any such fee, charge, or commission is reasonable and appropriate, the Secretary, acting through the Commissioner of Reclamation, is authorized to establish--
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> (A) filing fees for applications and other documents concerning entry upon and use of Reclamation lands;
>
> (B) recreation user fees; and
>
> (C) charges or commissions for the use of Reclamation lands.

2. *Land and Water Conservation Fund Act of 1965*

FLREA, section 813a, repealed Reclamation's authority under the LWCFA.

3. *Reclamation Recreation Management Act of 1992*

Under the 1992 Act, Reclamation was authorized to expand recreation facilities and to establish recreation user fees and "charges or commissions for the use of Reclamation lands" after determining that such fee is "reasonable and appropriate." Sec. 2805(b)(B)(C). Funds expended by the Secretary in carrying out the provisions of this title are non-reimbursable under federal Reclamation law.

4. *Federal Lands Recreation Enhancement Act*

FLREA provides authority for Reclamation to charge three types of fees: standard amenity recreation fees, expanded amenity recreation fees, and special recreation permit fees. FLREA, secs. 803(f)-(h). Standard amenity recreation fees and expanded amenity recreation fees may be charged only for recreation areas that meet defined criteria in the Act. For special recreation permit fees, FLREA provides the Secretary authority to issue "a special recreation permit fee and charge a special recreation permit fee in connection with the issuance of the permit, for specialized recreation uses of federal recreational lands and water, such as group activities, recreation events, motorized recreational vehicle use." FLREA, sec. 803. In contrast to the standard amenity fee and expanded amenity fee criteria, FLREA contains no criteria defining where special use permits may be charged.[4] Thus, under FLREA, special use permit fees may be charged on any federal recreation lands and waters. "Federal recreation lands and waters" are defined by the Act as: "lands or waters managed by a Federal land management agency," which includes Reclamation under the Act.

FLREA requires that 60 to 80 percent of the revenue generated by these fees be reinvested for recreation amenities, facilities, and services at the site at which they were collected. FLREA, sec. 807(c)(1). The balance is available for expenditure "agency-wide." FLREA, sec. 807(c)(2).

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[4] The Independent Offices Appropriation Act (IOAA), 31 U.S.C. § 9701, authorizes the head of each federal agency to "prescribe regulations establishing the charge for a service or thing of value provided by the agency." *Id.* § 9701(b). The IOAA requires that charges be "fair and based on the Government's costs, the value of the service or thing to the recipient, the public policy or interest being served, and other relevant facts." *Nebraska Trails Council v. Surface Transp. Bd.*, 170 F.3d 901, 903 (8th Cir. 1997). Your original memorandum did not present questions about IOAA, so we do not address it in this memorandum.

B. Specific Questions

This section responds to Reclamation's specific questions about the effects FLREA may have on its authority to provide recreation facilities and collect fees.

1. Does FLREA amend or repeal Reclamation's authority to allow non-Federal public bodies to manage Reclamation project recreation areas pursuant to the Federal Water Project Recreation Act?

FLREA does not amend or repeal Reclamation's authority to allow "non-Federal public bodies" to administer project recreation areas under the Recreation Act. The 1965 Recreation Act directs Reclamation to "encourage non-Federal public bodies to administer project land and water areas for recreation and fish and wildlife enhancement purposes and operate, maintain, and replace facilities provided for those purposes. . . ." 16 U.S.C. § 460*l*-12e. FLREA does not amend or repeal this authority.

2. Does FLREA amend or repeal Reclamation's authority to

a) directly manage and provide basic recreation facilities pursuant to the Federal Water Project Recreation Act of 1965? See 16 U.S.C. § 460*l*-14(a)

FLREA does not amend or repeal Reclamation's authority under the 1965 Recreation Act to provide "minimum facilities which are required for the public health and safety . . . at access points provided by roads existing at the time of project construction or constructed for the administration and management of the project." 16 U.S.C. 460*l*-14(a). FLREA gives Reclamation alternate authority to charge fees at improved recreation facilities at these sites, if the sites meet certain FLREA criteria. See FLREA, secs. 803(f), (g), (h).

b) . . . or to collect fees at these areas pursuant to 16 U.S.C. 460*l*-33(a)

Reclamation collects fees at basic recreation areas pursuant to the 1992 Act. The 1992 Act authorizes Reclamation to charge "reasonable and appropriate" recreation user fees. Section 813 of FLREA includes a list of repealed or superseded fee authorities,[1] which does not include the 1992 Act. Therefore, FLREA does not amend or repeal this authority.

FLREA gives Reclamation authority to charge a FLREA recreation fee in lieu of the one charged under the 1992 Act, if certain criteria are met. See FLREA, secs. 803(f)-(h). Reclamation cannot charge both fees because FLREA requires that recreation fees charged under

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[1] For example, section 813(b) specifically repeals certain provisions of the LWCFA and other laws.

FLREA "shall be in lieu of fees charged for the same purposes under any other provision of law." FLREA sec. 814(b).

If the recreation areas are being managed by a non-federal party, FLREA does not affect the non-federal party's authority to charge fees, either. FLREA provides that "[s]ubject to the [illegible] any other provision of this Act, a third party may charge a fee for providing a good or service to a visitor at a unit or area of the Federal land management agencies *in accordance with an other applicable law or regulation*." Sec. 814(e)(emphasis added).

3. When Reclamation collects fees pursuant to the 1992 Act, 16 U.S.C. § 469l-33(a), for recreation areas it manages under the 1965 Recreation Act, are the fees credited to the Reclamation fund pursuant to the Interior Department Appropriation Act of May 9, 1938 (43 U.S.C. § 392a), which provides: "All moneys received by the United States in connection with any irrigation project . . . shall be covered into the reclamation fund, except in cases where provision has been made by law or contract for the use of such revenues for the benefits of users of water from such project . . . ."

At projects where the 1938 Act revenue crediting provisions apply (i.e., where no other law or contract has provided for use of the revenues for the benefit of the project water users), the recreation fees charged *under the 1992 authority* would properly be credited to the Reclamation fund. FLREA states that nothing in the Act shall "repeal or modify . . . any provision of law that provides that any fees or charges collected at particular Federal areas be used for or credited to specific purposes or special funds as authorized by that provision of law" except as provided in subsection 814(b) of FLREA. Although subsection 814(b) of FLREA lists the Reclamation Act of 1902, section 1, among other laws, this does not affect the crediting of recreation fees collected under the 1992 Act to the Reclamation Fund under the 1938 Act at projects where the 1938 Act determines revenue crediting (again, where there is no other specific statute directing Reclamation to handle revenue allocation differently). Subsection 814(b) does, however, affect the accounting of fees collected at Reclamation lands *under FLREA authority*, as discussed below.

4. Section 813(a) of FLREA repealed certain provisions of the LWCFA and provides in section 807(c)(1) that not less than 80 percent of recreation fees (unless reduced to not less than 60 percent by the Secretary) collected at a specific area that meets the standard amenity criteria of Section 803(f) must be retained at that recreation area, and that the revenues in excess of that amount can be distributed agency-wide pursuant to Section 807(c)(2). Can the portion of FLREA fees that are distributed agency-wide be used

(a) at recreation areas that are managed directly by Reclamation under the 1965 Act and do not meet the FLREA standard amenity criteria;

Yes. The portion of FLREA fees that are distributed agency-wide may be used at 1965 Recreation Act sites, whether they meet the standard amenity criteria or not. See discussion below.

b) at those areas [that are managed directly by Reclamation under the 1965 Act] that do meet the standard amenity criteria;

Yes: the portion of FLREA fees that are available agency-wide may be used at 1965 Recreation Act sites, whether they meet the standard amenity criteria or not. Note, however, that "funds generated under FLREA may not be "taken into account" for purposes of the 1965 Recreation Act. See discussion below. Note, too, that FLREA fees may be charged at sites only if they meet the specific FLREA-criteria.

c) as a cost share with State and local agencies that manage recreation areas for Reclamation under the 1965 Recreation Act.

Yes. The 20 percent funds may be used as the federal government's cost share with State and local agencies managing recreation areas under the 1965 Recreation Act. See discussion below. Note, however, that FLREA does not provide Reclamation with any additional *authority* to spend money at these sites.

Discussion of Answers to Question 4

FLREA provides that the balance of recreation fees collected at a site and not reinvested in that site (20 percent of funds) "shall remain available to that [agency] for expenditure on an agency-wide basis, without further appropriation, until expended." Sec. 807(c)(2). This section contains no prohibitions on the use of those funds.[1]

Another section of the Act affects how FLREA funds are accounted for, however. As discussed previously, FLREA does not repeal or modify laws that "provide[] that any fees or charges collected at particular Federal areas be used for or credited to specific purposes or special funds as authorized by that provision of law, [except as provided in subsection (b)]." Sec. 814(a). Subsection 814(b) provides that "[a]mounts collected *under this Act . . . may not be taken into account for the purposes of* any of the following laws." Sec. 814(b) lists 15 laws and a catchall sixteenth provision of "any other provision of law relating to revenue allocation." Sec. 814(b)(1)-(16).

Most of the listed legal provisions in section 814(b) tell agencies how to allocate or share revenues collected at federal lands. For example, section 1012 of the Bankhead-Jones Farm Tenant Act, which is one of the laws listed in section 814(b) of FLREA, provides that "the Secretary shall pay to the county in which any land is held by the Secretary under this title, 25 per centum of the net revenues received by the Secretary for the use of the land during such year on the condition that they are used for school or road purposes, or both." Thus, pursuant to

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[1] FLREA does not give an agency any additional authority, however. If Reclamation did not have authority to take a particular action or to spend appropriations for a particular purpose prior to FLREA, FLREA does not provide such authority.

section 814(b) of FLREA, the counties affected by the Bankhead-Jones Act will not receive a percentage of the net revenues collected under FLREA.

The 1965 Recreation Act is listed in its entirety in subsection 814(b) of FLREA. See section 814(b)(1) *listing* "The Federal Water Project Recreation Act (16 U.S.C. § 460d-2 et seq.)." This prohibition should not be read to apply generally to the purposes of the 1965 Recreation Act (recreation and fish and wildlife benefits), but only to the revenue allocation and cost-sharing provisions therein. A prohibition on recreation expenditures would be inconsistent with the purposes of FLREA. *See FLREA, sec. 801; see also House Committee on Resources Report on H.R. 3285, the Federal Lands Recreation Enhancement Act*, H.Rpt. 108-790 (1994). The 1965 Act should be considered within this exception to the extent that it directs the allocation of project costs and benefits.

Several provisions of the 1965 Recreation Act address the allocation of costs and benefits of non-Federal administration of project land and water areas. *See, e.g.*, 460*l*-13(a)(1) (the benefits of a 1965 Recreation Act project to recreation and fish and wildlife purposes shall be taken into account in determining the economic benefits of the project); 460*l*-13(b)(the source of repayment may be limited to entrance and user fees or charges collected at the project by non-Federal interests); 460*l*-16, and § 460*l*-20. Amounts collected at those sites under FLREA should not be taken into account when carrying out the relevant provisions of the 1965 Recreation Act.

5. If Reclamation uses the agency-wide FLREA revenues (section 807(c)(2)) for enhancement of a [non-FLREA] recreation area, is it limited to using the revenues to enhance the areas so that it meets the section 803(f) standard amenity criteria of FLREA?

No. Reclamation is not limited to using the agency-wide FLREA revenues to turn non-FLREA recreation sites into FLREA recreation sites.

6. FLREA directs all recreation revenues be placed into the special recreation account established under Section 807(a) and expended in accordance with Section 808. If there is project-specific legislation directing specific crediting for revenues generated on

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The 1965 Act allows for the development of recreation and fish and wildlife benefits at multi-purpose federal water projects. In investigating and planning any Federal reclamation, hydroelectric or multiple-purpose water resource project, Reclamation must give full consideration to the opportunities the project affords for outdoor recreation and for fish and wildlife enhancement. Wherever any such project can reasonably serve these purposes consistently with the provisions of this Act, "it shall be constructed, operated, and maintained." The 1965 Act also provides that agencies "shall encourage non-Federal public bodies to administer, operate and maintain, and replace project land and water areas and facilities," except in some limited, listed circumstances. 16 U.S.C. § 460*l*-12.

that project, including recreation revenues, are the recreation revenues for that project credited to the special recreation account pursuant to section 807(a) or in accordance with the special legislation pursuant to section 814(b)(16) of FLREA?

For instance, if a participating project of the Colorado River Storage Project is generating recreation revenues, would recreation revenues be credited to the Upper Colorado River Basin Fund under the CRSPA of 1956 (43 U.S.C. § 620d) or to the special recreation fund established by Section 807(a) of FLREA?

FLREA directs that all revenues generated by FLREA recreation fees be placed into the special agency accounts established under section 807(a) and be expended in accordance with section 808. It also provides that FLREA generated funds may not be taken into account for the purposes of any other revenue allocation law. Sec. 814(b)(16). Reclamation should credit the funds as provided in the statute authorizing the collection of the fees or to miscellaneous Department of the Treasury receipts in the absence of any specific direction.

In the CRSPA example above, if Reclamation charges a recreation fee for Colorado River Storage Project sites under FLREA, then the money collected goes to the FLREA account. If Reclamation charges a recreation fee under CRSPA authority, it should credit the funds to the Upper Colorado River Basin Fund. Similarly, if recreation revenues are generated on the Boulder Canyon Project under FLREA, the revenues should be credited to the special recreation account established by Section 807(a) of FLREA. In no event may revenues generated under FLREA be allocated to the Colorado River Dam Fund, as expressly stated in section 814(b)(10) of FLREA.

7. Reclamation issues concession contracts pursuant to the Reclamation Act of 1902 and collects the corresponding franchise fees based on revenues received from third parties. Prior to passage of FLREA, Reclamation has credited the concession revenue based on the status of the land involved in the concession contract. If the lands are acquired, the revenue is credited to the project in accordance with Reclamation policy, and if the lands are withdrawn, the revenue is credited to the Reclamation fund in accordance with the Sundry Civil Expenses Appropriations Act of July 19, 1919 (43 U.S.C. § 394).

Does FLREA provide authority for Reclamation to issue concession contracts? If FLREA does not provide authority, will the revenues collected from concession contracts issued pursuant to the Reclamation Act of 1902, as amended and supplemented, be credited to the recreation account established by FLREA in section 807(a) or continue to be credited based on land status pursuant to Section 814(c) of FLREA.

Reclamation currently enters concession contracts for the provision of some recreation services on Reclamation lands under the authority of the 1902 Act, the 1939 Act, and the 1965 Recreation Act. Where Reclamation is charging concession fees for Recreation services under the 1902 Act, the 1939 Act, and the 1965 Act, it should continue crediting those revenues in the

same way it did prior to passage of FLREA. FLREA does not provide any additional explicit authority for Reclamation to issue concession contracts.

8. We believe Reclamation has authority to issue special recreation use permits. In the past, Reclamation has credited the revenues from these permits based on the status of the lands involved. Specifically, if the lands are acquired, the revenues are credited to the project in accordance with Reclamation policy, and if the lands are withdrawn, the revenues are credited to the Reclamation fund pursuant to the Sundry Civil Expenses Appropriations Act of 1920. Our review of FLREA did not find any provision that repeals Reclamation's authority to issue special recreation use permits or credit the revenues from those permits as described in this paragraph. Is this interpretation correct?

Yes. If a fee is charged under authority other than FLREA (i.e., the 1992 Recreation Management Act), then Reclamation should continue to credit it the same way it has in the past. If Reclamation begins charging a fee under the FLREA grant of authority (§803(h)), it should credit the revenues as set out in FLREA.

9. Section 803(h) of FLREA provides authority for Reclamation to issue special recreation use permits and requires revenues from the permits be credited to the special account established by section 807(a) of FLREA. . . . We believe that if the recreation site was authorized pursuant to the Federal Water Projects Recreation Act of 1965, as amended, and Reclamation chooses to issue a special use permit for that recreation area pursuant to section 803(h) of FLREA, the revenue returned to the FLREA special fund cannot be used at the recreation site authorized by the Recreation Act of 1965. Is this interpretation of FLREA correct?

No. As discussed in response to Question 4, above, FLREA funds can be used at the Recreation Act of 1965 sites. In reaching a different result, Reclamation may be interpreting the phrase "may not be taken into account for the purposes of [the 1965 Recreation Act]" as meaning that the 20 percent of FLREA funds authorized for expenditure "agency-wide" may not be used for any of the purposes (recreation and fish and wildlife enhancement) of the 1965 Recreation Act. We believe that the prior reading of the statutory provision, which allows expenditure of these funds at 1965 Recreation Act sites, is more consistent with the purpose of both statutes and is therefore the better reading of the statute.

If you would like to discuss this matter further, please feel free to call me or Megan Walline, at (202) 208-4379.