



March 28, 2014

Michael Pulskamp
U.S Bureau of Reclamation
Transmitted Via Email: mpulskamp@usbr.gov

RE: Draft Directive and Standard FAC TRMR-61

Dear Mr. Pulskamp;

I am writing on behalf of the Oregon Water Resources Congress (“OWRC”) and its Federal Caucus. OWRC is made up of and represents local governments in Oregon that deliver primarily irrigation water to water users. Many of these local governments have contracts with the U.S. Bureau of Reclamation (“Reclamation”) to receive water from, operate and maintain, and reimburse the United States for the cost of various Reclamation water projects. OWRC’s Federal Caucus includes Reclamation districts that deliver irrigation water, and in some cases water for other uses, in Oregon. These comments relate to Reclamation’s Draft Directive and Standard FAC TRMR-61 “Lease of Power Privilege Processes, Responsibilities, Timelines and Charges” (the “Draft D&S”), which was released for public comment by Reclamation on February 12, 2014.

The Draft D&S establishes the process requirements and charges associated with development of hydropower at a Bureau of Reclamation (“Reclamation”) facility where Reclamation has the authority for power development. Hydropower development at such facilities by non-federal entities occurs pursuant to a Lease of Power Privilege (“LOPP”), which is a contractual authorization issued by Reclamation. Reclamation’s goal in issuing the Draft D&S was to improve internal and external communication, efficiency, and transparency related to LOPP requirements.

On January 13, 2012, OWRC submitted extensive comments on a similar Draft Directive and Standard (FAC 04-08). As explained in that comment letter, OWRC supports Reclamation’s goal of developing a more consistent LOPP process. OWRC also supports Reclamation’s efforts to include provisions in its Directives and Standards that ensure LOPP projects will not impair the efficiency of Reclamation project water deliveries. Such provisions are necessary to protect the interests of the United States and the rights of those entities, such as OWRC’s members, that have existing water contracts with Reclamation. However, OWRC strongly urged Reclamation to incorporate additional protections into the draft to protect the interests and rights of those entities that have existing contracts with Reclamation. Those entities have made significant investments in their facilities, which could be adversely affected by the construction and operation of hydropower projects.

The mission of the Oregon Water Resources Congress is to promote the protection and use of water rights and the wise stewardship of water resources.

OWRC appreciates that Reclamation considered OWRC's previous comments in developing a 2012 temporary Directive & Standard related to the LOPP process (FAC TRMR-52), which was similar to the current Draft D&S. However, Reclamation's response to OWRC's 2012 comments and the provisions contained in the Draft D&S reflect Reclamation's view that it can adequately protect the interests of Water Users Associations,¹ with little or no input from Water Users Associations. In OWRC's view, Reclamation fails to recognize that Water Users Associations are often more familiar than Reclamation with the particular federal projects with which their contracts are associated. Although the Draft D&S provides certain preferences and protections to entities with Operation & Maintenance ("O&M") transfer contracts, the Draft D&S often does not extend those preferences and protections to other Water Users Associations. OWRC strongly urges Reclamation to revise the Draft D&S to better protect the interests of all Water Users Associations that could be adversely affected by the construction or operation of a hydropower development on a Reclamation facility.

This letter identifies a few examples of ways in which Reclamation could revise the Draft D&S to better protect the investments, interests, and rights of OWRC members and other Water User Associations. These examples are not intended to identify every provision of the Draft D&S that should be revised to better protect Water User Associations, but they illustrate the types of changes OWRC believes are necessary.

Paragraph 9.D of the D&S describes the minimum conditions that must be addressed in the LOPP contract. The provisions in that paragraph provide significant protections to the United States but generally do not extend the same protection to Water User Associations. For example, Paragraph 9.D(7) provides that the Lessee must agree to indemnify the United States "for any loss or damage resulting from actions under the LOPP and any act of neglect or omission of the Lessee in connection with its performance under the LOPP." Water User Associations should receive the same protection for loss or damage resulting from actions under the LOPP that affect Water User Associations' ability to delivery water to their members.

Along the same lines, Paragraph 9.D(7) also provides that "[t]he Lessee shall have no claim against the United States for loss of generation caused by the normal or extraordinary O&M of the Reclamation project." Again, Water User Associations should receive similar protection from claims by the Lessee for loss of generation caused by the normal or extraordinary O&M of the Reclamation project to the related facilities of the Water User Association.

Paragraph 9.D(8) requires the Lessee "to compensate Reclamation for lost generation and other interruptions to operations at Reclamation facilities due to construction, O&M, or any other extraordinary events at the Lessee's facilities." No similar provision is included in the Draft D&S to protect Water User Associations.

¹ The Draft D&S defines "Water User Association" as "[a]n organization that has a contract with Reclamation for the use of Reclamation project water."

The Draft D&S also fails to require sufficient involvement from Water User Associations where such associations are not participants in a proposed LOPP. Paragraph 10 of the D&S provides for limited involvement by Water User Associations that have transfer contracts associated with the proposed development site. However, the Draft D&S provides that such involvement will be “as appropriate.” This type of limited and discretionary involvement is not sufficient. OWRC urges Reclamation to explicitly provide for the inclusion of any Water User Association that has a contract associated with the relevant Reclamation facility if the association requests to be included.

Many Water User Associations, such as OWRC’s members, lack sufficient funds to analyze each LOPP proposal that is submitted to determine whether the proposed project could adversely affect the associations’ operations. This creates the potential for a LOPP to adversely affect OWRC’s members and leave those members without a viable means by which to protect their interests. Because Water User Associations are most familiar with their operations, they are in the best position to evaluate the potential impacts to their operations from a proposed project. As such, those entities submitting LOPP proposals should be required to reimburse Water User Associations for certain expenses incurred in reviewing design drawings, submissions to Reclamation and/or FERC, and other project-related documents (e.g., the cost of retaining third-party engineers, attorneys, and other consultants and professionals necessary to perform such review).

Lastly, the Draft D&S does not specify whether a fee is required to be paid by Water User Associations or other entities that are operating “transferred works”. It is OWRC’s position that fees should terminate or be reduced once the federal debt obligations for the construction of the project have been paid. We recommend that Reclamation provide additional detail about how the LOPP fee will be applied and used, including how it will be used by Reclamation to administer the program.

Conclusion

OWRC supports Reclamation’s goal of developing a more consistent LOPP process and those provisions of the Draft D&S that prohibit LOPP projects from impairing the efficiency of Reclamation project water deliveries. However, Reclamation should revise the Draft D&S as recommended in this letter to better protect the interests of those entities that have Reclamation water contracts. These entities have made significant investments in their facilities, and before Reclamation permits hydropower construction, it is important to ensure that there will be no adverse effects to the operations of existing contract holders. Thank you for the opportunity to share our comments and concerns.

Sincerely,
April Snell
Executive Director