



January 13, 2012

VIA ELECTRONIC MAIL (mpulskamp@usbr.gov)

Michael Pulskamp
U.S. Bureau of Reclamation
P.O. Box 25007
Denver, CO 80225

Re: Draft Directive and Standard FAC 04-08

Dear Mr. Pulskamp:

We are 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 04-08 (the “Draft D&S”), which was released for public comment by Reclamation.

As a general matter, OWRC supports Reclamation’s goal of developing a more consistent Lease of Power Privilege (“LOPP”) process. OWRC also supports those provisions of the Draft D&S that prohibit LOPP projects from impairing the efficiency of Reclamation project water deliveries. Those 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 believes that additional protections should be incorporated into the Draft D&S 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 of hydropower projects. This letter identifies ways in which the Draft D&S can be revised to better protect the investments, interests, and rights of OWRC members and other entities that have existing water contracts with Reclamation.

A. Protection of Irrigation Water Delivery

The Draft D&S provides that “[a] LOPP project must not impair the efficiency of Reclamation project water deliveries.” Draft D&S ¶ 1. It is unclear whether this prohibits Reclamation from issuing a LOPP that adversely affects the operations of entities that deliver irrigation and other water supplies under contract with Reclamation. OWRC recommends that Reclamation revise Paragraph 1 of the Draft D&S to include the following underlined text:

A LOPP project must not impair the efficiency of Reclamation project water deliveries, adversely affect the operations of any Water Users' Association^[1] that has a water contract associated with the Reclamation project at issue, jeopardize public safety, or negatively affect any other Reclamation project purpose.

Similar changes should be made to other paragraphs of the Draft D&S, including the addition of the following underlined text:

- **Paragraph 6.C.:** To be considered for selection, the applicant's proposed LOPP project must not impair the efficiency of Reclamation project water deliveries, adversely affect the operations of any Water Users' Association that has a water contract associated with the Reclamation project at issue, impact structural integrity of the project or of any facilities used to deliver water for irrigation or other contract purposes, jeopardize public safety, or negatively affect any other Reclamation project purposes.
- **Paragraph 8.B.:** The LOPP lead will collect, and coordinate the review of, all studies from the preliminary lessee and/or lessee that are adequate for Reclamation to ensure that the efficiency of Reclamation project water deliveries will not be impaired, to ensure that the operations of any Water Users' Association that has a water contract associated with the Reclamation project at issue will not be adversely affected, to ensure the public safety and the continued safe operation and structural integrity of the Reclamation facilities, and to ensure compliance with NEPA, ESA and NHPA commitments.
- **Paragraph 8.G.:** Reclamation can deny the issuance of a LOPP or withdraw a previously issued preliminary lease or LOPP at any time based on inadequate design information, unsatisfactory environmental impacts, safety concerns, detrimental impact to the Reclamation project, adverse effects on the operations of any Water Users' Association that has a water contract associated with the Reclamation project at issue, or any other legitimate reason as determined solely by Reclamation.
- **Paragraph 8.H.(1):** Replace "impair the efficiency of the project for irrigation purposes" with "adversely affect the operations of any Water Users' Association that has a water contract associated with the Reclamation project at issue."

These changes make clear that Reclamation is prohibited from issuing a LOPP that could adversely affect OWRC's members that have existing water contracts with Reclamation.

B. Preferences

Various provisions of the Draft D&S relate to the manner in which Reclamation will choose between LOPP proposals. OWRC believes that the Draft D&S should require Reclamation to consider the compatibility between LOPP proposals and existing water contracts and prefer proposals that are more compatible with existing water contracts. As explained in Section A above, the Draft D&S should prohibit Reclamation from issuing a LOPP that could adversely

¹ Reclamation should also add the following definition to Paragraph 3:

- **Water Users' Association.** An entity organized and recognized under state laws that is eligible to enter into contracts with Reclamation to receive water from Reclamation for delivery to end users of the water and to pay applicable charges.

affect Water Users' Associations with existing contracts. OWRC recommends that Reclamation revise Paragraph 6.C of the Draft D&S to include the following underlined text (and remove the stricken text):

Reclamation will give more favorable consideration to proposals that (1) are well-adapted to developing, conserving, and utilizing the water and natural resources; ~~and~~(2) clearly demonstrate that the offerer is qualified to develop the hydropower facility and provide for long-term operations and maintenance; and (3) are designed to be compatible with existing Reclamation water contracts.

The Draft D&S requires that Reclamation give preference to municipalities and other public corporations or agencies ("Preference Entities"). However, the Draft D&S provides little guidance to Reclamation in choosing between LOPP proposals submitted by Preference Entities. OWRC believes that Reclamation can minimize the potential for conflicts between the ultimate lessee (*i.e.*, the entity that is issued a LOPP) and the current holder of a Reclamation water contract if Reclamation prefers LOPP proposals submitted by current holders of water contracts. Such a preference can be incorporated into the Draft D&S by revising Paragraph 6.D.(1) to include the following underlined text:

Reclamation will give preference to those entities that qualify as preference entities, provided that the proposal is at least as well-adapted to developing, conserving, and utilizing the water and natural resources as other submitted proposals, and that the preference entity is well qualified to develop and provide for long-term operations and maintenance of the hydropower facility. ~~As between preference entities, preference shall be given to an entity that has an existing water contract with Reclamation. This will reduce the potential for conflicts between the lessee and existing holders of water contracts. As between preference entities that have existing water contracts, preference shall be given to the preference entity with operation and maintenance responsibility of the Reclamation project facility at issue.~~

Where the operation and maintenance ("O&M") of a Reclamation project facility is carried out by a non-Federal entity under the provisions of a formal O&M transfer contract (a "Transferred Work"), the Draft D&S provides that the lack of a letter of cooperation from the operator of the Transferred Work *could* result in a low evaluation score when Reclamation has multiple proposals to consider. OWRC believes that the language of the Draft D&S should be revised to provide an explicit preference for proposals that include a letter of cooperation. Reclamation can incorporate such a preference by revising Paragraph 6.E.(1) to include the following underlined text:

If the LOPP solicitation is for a site that is a transferred work, that information must be revealed in the solicitation. Additionally, the solicitation should include a provision that indicates that failure to provide a letter of cooperation from the operator of the transferred work could result in a low evaluation score when multiple proposals are under consideration. ~~A proposal that includes a letter of cooperation will be preferred over a proposal that does not include a letter of cooperation so long as the proposal that includes the letter of cooperation satisfies the minimum standards set forth in Paragraph 6.C.~~

C. LOPP Conditions

Paragraph 6.H sets forth conditions that Reclamation must address in a LOPP. The draft provisions provide significant protections for the United States, but those provisions generally do not extend to entities that hold Reclamation water contracts. The following changes should be made to Paragraph 6.H to extend the protections to existing holders of Reclamation water contracts:²

- **Paragraph 6.H.(1):** The structural and operational integrity of existing Reclamation facilities, ~~or associated Federal projects, or facilities used to deliver water for irrigation or other contract purposes~~ must not be impaired by construction, operation, or maintenance of the lessee's powerplant facilities.
- **Paragraph 6.H.(2):** The preliminary lessee will provide the LOPP lead evidence of a comprehensive and sufficient performance bond for the construction of the project, and a comprehensive and sufficient surety bond to cover ~~costs—whether borne by Reclamation or a Water Users' Association—Reclamation costs~~ to remove facilities if the facility is abandoned by the lessee.
- **Paragraph 6.H.(3):** The Federal government will have the first right to purchase the powerplant should the lessee need to sell the facilities to which it has title. LOPPs shall not be transferred or facilities sold without written approval of the Reclamation regional director, except that Reclamation is not required to approve a lessee's transfer of a LOPP to a Water Users' Association that has a water contract associated with the Reclamation project at issue.
- **Paragraph 6.H.(4):** The existing paragraph should be replaced with the following paragraphs:
 - (4)(a): The Lessee shall have no claim against the United States or any Water Users' Association that has a water contract associated with the Reclamation project at issue and shall release the United States and such Water Users' Association, their officers, agents, and employees, from any and all liability for damage or loss of generation, direct or indirect, or to the powerplant and/or related facilities, or construction or modification thereof, as a result, *inter alia*, of any future changes made to meet authorized Federal purposes, or the failure of the facilities of the United States, or any changes made in releases from operations of the Federal irrigation facilities including, but not limited to: bypassing flows, flood control operations, or other aspects of the normal or extraordinary operations, maintenance of the Reclamation project or associated Water Users' Association facilities, or from any changes to the quantity, quality, or timing of water delivered by the Reclamation project.

² Reclamation should also add the following definition to Paragraph 3:

- **Federal irrigation facilities.** Any canal, ditch, lateral, sublateral, drain, spillway, wasteway, siphon, pipeline, roadway, electrical transmission line, communication structure, stream gaging station, substation, switchyard, powerplant, fish ladder, fish screen, and any other appurtenant irrigation and power structures or facilities, or combination thereof, built or to be built as part of the Reclamation project.

- (4)(b): The lessee shall hold harmless the United States and any Water Users' Association that has a water contract associated with the Reclamation project at issue, their officers, agents, and employees, from any loss or damage of any nature whatsoever for which there is legal responsibility arising out of or connected with the lessee's construction, operations, and maintenance of the powerplant. The lessee shall name the United States and any applicable Water Users' Association as additional insureds to the lessee's public liability insurance, to the fullest extent allowed by Federal and state law. The lessee's insurance carrier shall agree to provide a defense of and indemnify the United States and any applicable Water Users' Association with respect to any alleged negligent or grossly negligent conduct committed by the lessee or its employees, officers, volunteers, or agents which fall within the coverage of the policy of the insurance. The Regional Director shall specify the amounts of the insurance in the LOPP.

Each policy shall have a certificate evidencing the insurance coverage. The insurance company shall provide an endorsement to notify the Regional Director 30 days prior to the effective date of cancellation or termination of the policy or certificate, or modification of the policy or certificate, which adversely affect the interests of the United States or any covered Water Users' Association in such insurance. The certificate shall identify the contract number, the name and address of the Regional Director, as well as the insured, the policy number and a brief description of contract services to be performed. The lessee shall furnish the Regional Director with a copy of an acceptable insurance certificate prior to beginning the work.

- **Paragraph 6.H.(5):** Access to and operation of the existing Reclamation facilities and facilities used to deliver project water for irrigation or other contract purposes must be sustained during the construction, operation and maintenance of the lessee's powerplant facilities.
- **Paragraph 6.H.(8):** The lessee will be required to compensate Reclamation and any affected Water Users' Association for lost generation and other interruptions to operations at Reclamation or Water Users' Association facilities due to construction, operations and maintenance, or any other extraordinary event at the lessee's facilities.

The following conditions should be added to Paragraph H to better protect the interests of the United States and the rights of entities that hold Reclamation Water Contracts:

- (9) In the event the LOPP is terminated, the facilities and equipment, or parts thereof, including such piping and control devices installed on Federal irrigation facilities that are necessary for unimpaired operation of the Federal irrigation facilities, shall be left in place and shall become the property of Reclamation. Reclamation at its discretion may modify any feature of the powerplant to permit unimpaired operation of the Federal irrigation facilities caused by cessation of operation of the powerplant. All such modification costs shall be borne by the lessee except the lessee shall not be responsible for modification costs to powerplant features designed solely to enhance the operation of the Federal irrigation facilities.
- (10) The lessee shall not initiate construction on any of those facilities that are or will be an integral part of or that could affect the integrity of the Reclamation project

or any Water Users' Association facilities, as determined by the Regional Director or his designee (collectively, the "Regional Director"), until the designs, specifications, and construction plans thereof have been reviewed and approved by the Regional Director in writing. The Regional Director shall review all materials provided by the lessee and respond as quickly as possible, but within 30 days after said material is received. Unresolved differences regarding said review and approval shall be handled in accordance with the Memorandum of Understanding between FERC and Reclamation dated June 22, 1981, or as subsequently amended. The lessee shall have the sole responsibility to obtain any and all necessary Federal, state, and local permits, licenses, and plan approvals. Copies of such permits, licenses, and approved plans shall be submitted to Reclamation prior to commencement of construction, or following commencement of construction upon written approval of the Regional Director. The lessee shall also provide Reclamation with copies of all approved consultations with the State Historic Preservation Office and other appropriate agencies in respect to impacts to Reclamation land, water, or facilities. During construction of the hydroelectric facilities, use of explosives is prohibited without the review and approval of the Regional Director. If the lessee engages a third party to perform the work to be accomplished pursuant to the privileges herein granted, the lessee shall be responsible to the United States for the third party's work.

- (11) The Regional Director will inspect and approve the lessee's designs, schedules, and construction of those powerplant works that are directly related to the function and integrity of the relevant Reclamation project or any Water Users' Association facilities. Any third parties, such as construction contractors, as may be employed by the lessee, will be subject to the authority of the Regional Director as it pertains to construction of those powerplant works that are directly related to the function and integrity of the Reclamation project or Water Users' Association facilities. In the event that the Regional Director determines that any construction carried out by the lessee is unacceptable, the Regional Director has the right to suspend construction on that portion of the project deemed inadequate until such time as the construction is modified or an agreement is reached between the Regional Director and the lessee. The Regional Director shall notify the lessee and FERC of suspension of construction activities in accordance with the provisions of the Memorandum of Understanding described in Paragraph 6.H.(10) above. Prior to the commencement of any construction activities, a preconstruction meeting will be held at which the Regional Director, the lessee, and any third parties involved in construction as may be employed by the lessee will be present to determine construction and inspection schedules.
- (12) The lessee shall reimburse Reclamation for all its costs and expenses associated with the work performed under Paragraphs 6.H.(10)-(11), including an amount for administrative overhead. However, the lessee shall not be obligated to reimburse Reclamation for costs or expenses associated with the work performed under Paragraphs 6.H.(10)-(11) which (a) would have been performed whether or not a LOPP was issued or (b) Reclamation would be required to provide to the public or other entities at no charge.
- (13) Where the water supply available for a lessee's powerplant is water diverted into or from facilities owned or operated by a Water Users' Association with an

existing Reclamation water contract, operations of the powerplant shall be subordinate to all rights, both explicit and implied, of the Water Users' Association. Reclamation shall not guarantee the timing or quantity of flow to the powerplant. Neither Reclamation nor any Water Users' Association bears any liability or responsibility to maintain present or future flow through the powerplant.

- (14) The lessee shall design its facilities to include fail-safe emergency features that will prevent damage to Federal irrigation facilities and minimize the disruption to irrigation operations, such as an emergency bypass spillway weir, trip gate system, or other emergency water bypass acceptable to the Regional Director. Such emergency capability shall not require hydraulic or electrical power to safely operate as designed in an emergency.
- (15) The lessee shall leave the construction area in a clean and orderly state. Following the completion of construction, the lessee and the Regional Director shall conduct a joint inspection of the construction area to determine that the Federal land interest and irrigation facilities have been adequately restored to pre-project conditions or such necessarily modified conditions as are acceptable to the Regional Director. If it is determined by the Regional Director that any further work is needed to protect the United States' land interest and irrigation facilities, the Regional Director shall submit such requirements in writing to the lessee. The lessee shall have 60 days to comply with the Regional Director. In the event the lessee fails to restore the area in an acceptable condition, the United States will accomplish the necessary work. Within 30 days after demand is made to the lessee for payment of the costs associated with such rectification work, the lessee will make payment, thereof, to the United States.
- (16) Prior to initial production of electricity at the powerplant, and as a condition precedent thereto, the lessee and the Regional Director shall enter into an operating agreement covering the details of operations and maintenance of the lessee's hydroelectric project, facilities, and powerplant (the "Project"). The operating agreement shall specify that the releases of water into the Project will continue to be subject to the criteria, terms, and conditions established by Paragraph 6.H.(13). Said operating agreement shall include but not be limited to the following:
 - (a) Procedures to coordinate the operations of the powerplant with any Water Users' Association that could be affected by such operations. Such procedures shall be developed in coordination with such Water Users' Association;
 - (b) Procedures for Reclamation to alter flows that might otherwise be available to the powerplant in the event the lessee's powerplant operator is not readily available;
 - (c) Procedures to minimize the effect of a generator shutdown on any Water Users' Association that could be affected by such a shutdown; and
 - (d) Provision for the periodic inspection by Reclamation of those portions of the Project essential to unimpaired operations of the Reclamation project and the operation of any Water Users' Association that has a water

contract associated with the Reclamation project at issue to ensure that the safety, operations, and maintenance of Federal irrigation facilities are not compromised.

D. Water User Involvement

Paragraph 9 of the Draft D&S provides for the involvement of water users where the water users have operation, maintenance, and replacement transfer contracts associated with the existing Reclamation project but where the water users are not participating in the proposed LOPP. However, the draft provision requires such involvement only when “appropriate.” This gives Reclamation significant discretion in determining when to involve water users in drafting LOPPs. Given that these water users have existing contracts with Reclamation, their involvement in drafting LOPPs should not be a matter of discretion. Rather, these water users’ involvement should be required. As such, OWRC recommends that Reclamation make the following changes to Paragraph 9:

Under circumstances where a Federal water user or Federal power customer organization has operation, maintenance, and replacement (OM&R) transfer contracts associated with the existing Federal project but are not a participant in the proposed LOPP, then LOPP contracts will include their involvement to ensure that their contractual rights are protected in the LOPP, ~~as appropriate.~~

E. Reimbursement for Consulting Fees

Many water users’ associations, such as OWRC’s members, lack sufficient funds to analyze each LOPP proposal that is submitted to analyze 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 users’ 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 users’ 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).

OWRC recommends that Reclamation add the following new Paragraph 6.1 to the Draft D&S to address this issue:

6.1 Reimbursement for Consulting Fees

- A. Unless the entity that submits a proposal for hydropower development under a LOPP includes waivers from Water Users’ Associations that could be affected by the proposal and that have water contracts associated with the Reclamation project at issue, the entity must agree to reimburse each Water Users’ Association from which it did not obtain a waiver for certain expenses incurred in reviewing the proposal. Reimbursable expenses include the cost of retaining third-party engineers, attorneys, and other consultants and professionals to review design drawings, submissions to regulatory agencies, and other project-related documents. Reimbursable expenses shall include eligible costs

incurred during review of the LOPP proposal and during the term of any preliminary lease.

- B. Reclamation shall consider the review performed under Paragraph 6.1.A as part of its selection of a lessee (or preliminary lessee) under Paragraph 6 and its decision to issue a LOPP under Paragraph 8.

CONCLUSION

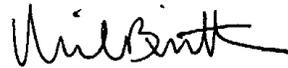
OWRC supports Reclamation's goal of developing a more consistent LOPP process and those provisions of the Draft D&S that prohibit LOPP projects from impairing the efficiency of Reclamation project water deliveries. However, Reclamation should revise the Draft D&S as recommended in this letter to better 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.

If you need any additional information, please contact April Snell, Interim Executive Director (Aprils@owrc.org). Thank you for the opportunity to share our comments and concerns.

Sincerely,



April Snell
Interim Executive Director



Mike Britton, OWRC Federal Caucus Chair
North Unit Irrigation District

On Behalf of the Following Reclamation Districts:

Hermiston Irrigation District
Medford Irrigation District
North Unit Irrigation District
Ochoco Irrigation District
Owyhee Irrigation District
Stanfield Irrigation District

Talent Irrigation District
The Dalles Irrigation District
Tualatin Valley Irrigation District
Vale Oregon Irrigation District
West Extension Irrigation District
Westland Irrigation District