

## DEPARTMENT OF THE INTERIOR

## Bureau of Reclamation

## 43 CFR Part 429

RIN 1006-AA51

## Use of Bureau of Reclamation Land, Facilities, and Waterbodies

AGENCY: Bureau of Reclamation, Interior.

ACTION: Final rule.

**SUMMARY:** The Bureau of Reclamation (Reclamation) is adopting this final rule on the use of Reclamation land, facilities, and waterbodies. This final rule addresses activities involving the possession or occupancy of any portion of, and the extraction or disturbance of any natural resources from, Reclamation land, facilities, and waterbodies. This final rule supersedes the current rule which was originally published in 1983 and partially revised in April 2006.

**DATES:** This final rule is effective January 5, 2009.

**FOR FURTHER INFORMATION CONTACT:** Richard Rizzi, Mail Code: 84-53000, Bureau of Reclamation, P.O. Box 25007, Denver, CO 80225. Telephone: (303) 445-2900.

## SUPPLEMENTARY INFORMATION:

## I. Background

The current rule, 43 CFR part 429, titled Procedure to Process and Recover the Value of Rights-of-Use and Administrative Costs Incurred in Permitting Such Use (current rule), established the procedures to recover administrative costs associated with processing "right-of-use" applications and the value of rights-of-use granted by Reclamation to applicants for the use of Reclamation land. Sections of the current rule were modified, in part, in 2006 to correlate with 43 CFR part 423, titled Public Conduct on Bureau of Reclamation Facilities, Lands, and Waterbodies.

This final rule addresses activities involving the possession or occupancy of any portion of, and the extraction or disturbance of any natural resources from, Reclamation land, facilities, and waterbodies. Regulations addressing public access to Reclamation property and occasional public activities such as hiking, camping, boating, and hunting, and closures are contained in 43 CFR part 423.

The demand for use of Reclamation land, facilities, and waterbodies for many different kinds of activities has increased dramatically since Reclamation began building Federal

water supply, flood control, and hydropower projects over 100 years ago. With increased and varied uses has come confusion among the potential users of Reclamation land, facilities, and waterbodies about the process of applying for the various types of uses, the charges and fees associated with such uses, and other concerns. The current rule does not adequately address this confusion nor does it address prohibited and unauthorized uses of Reclamation's land, facilities, and waterbodies and associated penalties.

The Independent Offices Appropriation Act (IOAA) (31 U.S.C. 9701), September 13, 1982, as amended, sets forth Congress' intent that any use, permit, or similar thing of value provided by an agency is to be self-sustaining and that the IOAA authorizes agencies to prescribe rules establishing charges for such uses. The 1993 revision of the Office of Management and Budget (OMB) Circular A-25 established Federal policy directing that administrative costs be recovered for Government services and fees for the use or sale of Government goods or resources also be charged. OMB Circular A-25 provides information on the scope and types of activities subject to use fees and the basis on which these fees are established. It also provides guidance for agencies in implementing such fees and charges. The use of Reclamation land, facilities, or waterbodies is a use of Government resources, and as such, the IOAA and OMB Circular A-25 direct Reclamation to recover the costs and fees associated with the use of these resources.

Section 10 (43 U.S.C. 373) of the Reclamation Act of June 17, 1902, provides the Secretary of the Interior (Secretary) with the authority to issue rules as necessary for the purposes of carrying out the provisions of the Act. Section 10 (43 U.S.C. 387) of the Reclamation Project Act of 1939 provides the Secretary the authority, in his discretion, to grant leases, licenses, easements, and rights-of-way. These two Acts provide Reclamation with the general statutory authority to issue rules on authorizing or prohibiting uses of Reclamation land, facilities, and waterbodies.

This final rule addresses:

- (a) The possession or occupancy of any portion of, or the extraction or disturbance of any natural resource from, Reclamation land, facilities, and waterbodies;
- (b) The procedures to follow when the proposed use involves a Reclamation easement;
- (c) The procedures to apply for use of Reclamation land, facilities, and

waterbodies that involves the possession or occupancy of any portion of, or the extraction or disturbance of any natural resource from, Reclamation land, facilities, or waterbodies;

(d) The criteria Reclamation will use to evaluate applications;

(e) Our statutory authority and the basis for charging application fees, recovering administrative costs, and collecting use fees associated with authorized uses;

(f) Conditions under which application fees, administrative costs, or use fees may be waived or reduced if determined appropriate by Reclamation or as currently listed in OMB Circular A-25;

(g) The required terms and conditions associated with use authorizations;

(h) Prohibited uses of Reclamation land, facilities, and waterbodies and how Reclamation will resolve unauthorized uses;

(i) The criteria Reclamation will use to evaluate existing authorizations for otherwise prohibited uses of Reclamation land, facilities, and waterbodies; and

(j) The decisions and appeals process applicable to actions taken under this part.

## II. Revision of Existing Rule

On December 20, 1983, Reclamation published 43 CFR part 429 titled Procedure to Process and Recover the Value of Rights-of-Use and Administrative Costs Incurred in Permitting Such Use in the **Federal Register** at 48 FR 56223. Sections of this rule were revised on April 17, 2006, in the **Federal Register** at 71 FR 19802 to better correlate with 43 CFR part 423. The sections that were revised or added were § 429.1 Purpose, § 429.2 Definitions, § 429.3 Establishment of the value of rights-of-use, § 429.6 Applications for rights-of-use, § 429.12 Applicability, and § 429.13 General Restrictions.

On July 18, 2007, Reclamation published a notice in the **Federal Register** at 72 FR 39530 announcing the availability of the proposed rule for a 90-day public comment period ending on October 16, 2007. As a result of comments received, the proposed rule was revised. Reclamation again published a notice of the proposed rule in the **Federal Register** at 73 FR 42236 on July 18, 2008, for a 60-day public comment period ending on September 16, 2008. During the 60-day public comment period, informational meetings regarding the proposed rule were held in each of Reclamation's five regions.

When the public comment period closed on the proposed rule, Reclamation considered the comments and incorporated them, where appropriate. This final rule, titled Use of Bureau of Reclamation Land, Facilities, and Waterbodies, supersedes the 1983 version and its 2006 modifications in their entirety.

### III. Summary of Changes, Comments, and Responses

This section of the preamble describes changes from the proposed rule published on July 18, 2008, and provides responses to the comments received on that proposed rule by section. Approximately 260 individuals submitted comments during the 60-day comment period which ended on September 16, 2008.

Comments received that are similar in nature have been categorized by subject and in some instances have been combined with related comments. Comments and our responses on general issues not related to a specific section of the preamble or text of the proposed rule are arranged first. This section is followed by comments regarding the preamble of the proposed rule and our responses; and lastly, the changes we have made, comments received, and our responses related to specific sections of the text of the proposed rule.

#### General Comments and Responses

*Comment:* In its current form the proposed rule fairly manages the lands in Reclamation's charge and represents well the needs and desires of the people. It balances new and existing uses with an eye to the future.

*Response:* No response required.

*Comment:* The revised proposed rule provides for an acceptable process for fair and open decisions, and demonstrates that the public comment process does work and our government listens to its managing partners and the public at large.

*Response:* No response required.

*Comment:* It is more effective to manage a weed control program locally than from out of state.

*Response:* Weed control programs are managed at the local or regional office level.

*Comment:* Exclusions for the special circumstances at our reservoir should be made in the rule.

*Response:* We suspect that all holders of recreational and residential use authorizations would be quick to note the unique and special circumstances associated with their reservoir. But no reservoir is so unique that the requirements for Reclamation to manage its land, facilities, and waterbodies and

to comply with Federal requirements, such as the Independent Offices Appropriation Act and Office of Management and Budget Circular A-25, could be put aside. Rather, we have incorporated into this rule flexibility so that local Reclamation offices can factor in special circumstances in managing use authorizations. For example: Use fees are determined locally; minimum time frames have been established for certain deficiencies to be corrected, but the local Reclamation office can provide more time when needed; minimum time frames have been established as to when inspections must occur, but the local Reclamation office can provide more frequent inspections if warranted; etc.

*Comment:* Why doesn't a land use agency such as the U.S.D.A. Forest Service manage our large recreational area?

*Response:* We are continually exploring opportunities to work with managing partners including the U.S.D.A. Forest Service, National Park Service, Bureau of Land Management, Fish and Wildlife Service, and State and local agencies to manage our recreation areas through formal agreements. We have been very successful in this endeavor in that only 42 of the 289 recreation areas located on Reclamation lands and waterbodies are directly managed by Reclamation. However, to date, we have not been able to find a governmental entity that is willing to take over management of the recreation at the reservoir in question.

#### Preamble Comments and Responses

Only those sections of the preamble to the proposed rule that received comments are discussed in this section.

### IV. Informational Meetings

*Comment:* The meeting date in Albuquerque, New Mexico, conflicted with the monthly board meetings of the Carlsbad Irrigation District and the Elephant Butte Irrigation District preventing the two major districts in New Mexico from participating in the informational meeting.

*Response:* The dates and times for the informational meetings were established by the local office hosting the meeting and every attempt was made to meet the needs of the concerned public and to provide adequate advance notice of the meetings. The direct phone number for Reclamation's contact person was included in the published rule to allow for maximum availability to persons and groups unable to attend public meetings scheduled in their area. We regret that such a conflict occurred. Written comments were submitted by Elephant Butte Irrigation District and are

included in the comments section of this document.

### V. Procedural Requirements

*Comment:* The proposed rule will have a financial affect in excess of \$100 million on irrigation districts. It alters the budgetary obligations of all affected irrigation districts by decreasing revenue credits. The rule raises legal and policy issues with respect to revenue credits and it constitutes a major Federal action since it impacts existing repayment and operation and maintenance contracts with irrigation districts.

*Response:* It is Reclamation's responsibility to make this determination based on economic analysis. We did not receive any evidence that contradicts our analysis, which shows that the total amount of fees and charges we annually collect for uses of Reclamation land, facilities, and waterbodies is well under \$100 million. Additionally, revenues collected for the use of Reclamation land, facilities, and waterbodies must be handled in accordance with all statutory, regulatory, and policy requirements. Since such statutes, regulations, and policies have all been in place for years, even decades, this rule is not raising legal and policy issues.

#### Changes, Comments, and Responses Related to the Text of the Proposed Rule

##### Subpart A—Purpose, Definitions, and Applicability

Section 429.1 This section describes the purpose of 43 CFR part 429.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.2 This section establishes the definitions for terms that are used in part 429.

We made minor editorial changes to this section as compared to the previously proposed rule as well as expanding the definition of *private exclusive recreational or residential use* for clarification purposes.

*Comment:* Rewrite the definitions for *application* and *Reclamation*. For *application*, allow an authorized form provided by responsible water user organization; and for *Reclamation* include in the definition a water user organization that has assumed responsibility for the operation and maintenance of a project.

*Response:* Reclamation can only accept one of the two Office of Management and Budget (OMB) approved application forms listed under § 429.10: Form 7-2540 or SF 299. All

forms collected by a Federal agency which collects information from 10 or more individuals or entities on an annual basis must be approved by OMB and renewed by them on a 3-year basis. This does not preclude managing partners and water user organizations from using their own forms to facilitate activities for which they are responsible. Reclamation is an agency of the Federal government and as such the definition cannot be expanded to include a non-Federal entity.

*Comment:* The definition for *private exclusive recreational or residential use* should be modified to remove the statement "which create the perception of such exclusion." To equate exclusive to exclusion is irrational.

*Response:* We have removed the subject phrase from the definition of *private exclusive recreational or residential use*.

*Comment:* Language should be added which makes it clear that issuing authorizations for a particular facility to a particular applicant is not the exclusionary conduct that the rule seeks to prohibit.

*Response:* We made changes under § 429.4 to clarify which uses are not considered private exclusive use.

*Comment:* Boat docks should be defined "as lesser forms of private use." This terminology is used by the U.S. Army Corps of Engineers in their shoreline management guidelines.

*Response:* Although the U.S. Army Corps of Engineers' (COE) definition for private exclusive use does exclude such uses as boat docks and moorings, the definition goes on to state that those uses will be included in their shoreline management requirements. The COE shoreline management requirements include non-transferability of permits for any reason including sale of associated improvements or death of permittee and permits are issued for terms of 5 years or less. Reclamation has decided to go in a direction that allows for more flexibility for both the operators of Reclamation facilities and those who hold authorizations for existing private exclusive recreational and residential uses.

*Comment:* Add a definition for *commercial photography* to provide for the parallel treatment of filming and photography.

*Response:* We did not add a definition for commercial photography to the rule. Both commercial filming and photography are subject equally to Reclamation's requirements and processes as stated under § 429.3.

Section 429.3 This section describes the types of uses of and activities on Reclamation land, facilities, and

waterbodies that typically require a use authorization under part 429.

We made no changes to this section as compared to the previously proposed rule.

*Comment:* Traditional public uses of Reclamation land may be subject to the proposed new rule instead of 43 CFR part 423. The terms of § 429.3(c) and (f) would remove the ambiguity and potential conflict with the proposed new § 429.4(a) which exempts individual, non-commercial uses.

*Response:* In fact, many activities on Reclamation land, facilities, and waterbodies may be subject to both part 423 and part 429 of this chapter. The distinction between these two parts is that part 429 specifies for which activities use authorizations must be obtained and part 423 specifies what conduct by the public is or is not acceptable on Reclamation land, facilities, and waterbodies. Even though an activity may be authorized under part 429 of this chapter, use authorizations do not condone all possible conduct by the public.

Section 429.4 This section lists the types of uses of and activities on Reclamation land, facilities, and waterbodies that do not require authorization under part 429.

We made changes to this section as compared to the previously proposed rule for clarification purposes including the addition of a new paragraph (b) which provides examples of the types of buildings and structures used by concessionaires or managing partners that are not subject to this part.

*Comment:* Is written permission needed to boat or swim on Reclamation waterbodies?

*Response:* No. These activities are listed under § 429.4 as not being subject to the requirement and processes established under this part. They are, however, subject to part 423 of this chapter which relates to public conduct on Reclamation land, facilities, and waterbodies.

Section 429.5 This section addresses who is authorized under part 429 to issue use authorizations.

We made changed this section as compared to the previously proposed rule to add that a copy of all use authorizations issued by managing partners be provided to the local Reclamation office.

*Comment:* Reclamation is commended for amending the 2007 proposed rule. The changes allow for the efficient and effective relationship between Reclamation and water user organizations that have assumed contractual responsibility for the operation and maintenance of

Reclamation projects. Reclamation's efforts in balancing its ultimate responsibility for Federal land, with the practical realities of operating and managing Reclamation project are appreciated.

*Response:* No response required.

*Comment:* Do not make any changes to grazing leases or re-route the revenues collected for such leases issued by water user organizations.

*Response:* Under this section, water user organizations who have assumed responsibility for operation and maintenance of Reclamation land, facilities, or waterbodies pursuant to a contract with Reclamation may issue limited use authorizations. All revenues collected for the use of Reclamation land, facilities, and waterbodies must be handled in compliance with all statutory, regulatory, and policy requirements.

*Comment:* Requiring authorization from a water user organization constitutes an improper delegation of federal authority per 43 U.S.C. 387 which provides the Secretary with the authority to grant leases, license, easements, and rights-of-way. It may be proper for the Secretary to delegate this authority to Reclamation, but not to a water user organization.

*Response:* Only water user organization's who are authorized under their contract for operation and maintenance of Reclamation land, facilities, and waterbodies may issue limited use authorizations to third parties. Additionally, only Reclamation or another Federal agency may issue authorizations that convey an interest in Reclamation land, facilities, or waterbodies.

Section 429.6 This section details when water user organizations must approve Reclamation's use authorizations.

We changed this section as compared to the previously proposed rule. Section 10 of the Reclamation Project Act of 1939 as amended is the statutory authority for use authorizations under paragraph (a). Due to comments received, we requested a legal review within the Department of the Interior of this provision and this paragraph has now been revised to track with section 10.

Section 10 of the Reclamation Project Act of 1939 as amended is the statutory authority for use authorizations under paragraph (a). This paragraph has now been revised to track with Section 10.

We have added paragraph (c) which addresses the Regional Directors' discretionary authority to seek concurrence for all use authorizations not addressed in paragraph (a). This was

formerly addressed in paragraph (b) and limited to use authorizations of less than 25 years.

*Comment:* Delete the requirement that Reclamation obtain the approval of water user organizations for easements and rights-of-way for periods in excess of 25 years, and indicate that such a requirement is at the discretion of the regional director.

*Response:* Section 10 of the Reclamation Project Act of 1939 specifies that Reclamation will grant easements and rights-of-way for periods in excess of 25 years only with the written approval of any water user organization under contract obligation for repayment to Reclamation.

*Comment:* Rewrite this section to state that all use authorizations for easements and rights-of-way within a project or division are subject to the approval of any water user organization under contract obligation for repayment, and for those water user organizations who have assumed responsibility for operation and maintenance of that project or division. This requirement would not apply to any other type of authorization.

*Response:* Section 10 of the Reclamation Project Act of 1939 specifies that Reclamation will grant easements and rights-of-way for periods in excess of 25 years only with the written approval of any water user organization under contract obligation for repayment to Reclamation. We do, however, provide in the rule that at a minimum all affected water user organizations be notified prior to the issuance of any use authorization. Additionally, at the discretion of the Regional Director, the affected water user organization may be asked to formally concur with the issuance of the proposed use authorization.

#### Subpart B—Proposed Uses Involving Reclamation Easements

Section 429.7 This section discusses the use of land not owned by Reclamation, but where Reclamation holds easements.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.8 This section discusses whether fees are required for the use of Reclamation easements.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

#### Subpart C—Requesting Authorizations To Use Reclamation Land, Facilities, and Waterbodies

Section 429.9 This section explains what you should do before filing an application.

We made no changes to this section as compared to the previously proposed rule.

*Comment:* Revise this section to include discussion of a proposed use with the water user organization as described in § 429.5.

*Response:* In contacting Reclamation, a potential applicant will be referred to the appropriate water user organization if that organization has the contractual authority to issue use authorizations for the intended use. This issue will be more directly addressed in revisions to applicable Reclamation Manual Directives and Standards and handbooks rather than in this rule. Additionally, when Reclamation is responsible for issuing the use authorization, local Reclamation offices will continue to coordinate with water user organizations when applicable to determine whether a proposed use is compatible with the needs and purposes of the project.

Section 429.10 This section describes what application forms to use and how to determine which application form is appropriate to use.

We made no changes to this section as compared to the previously proposed rule.

*Comment:* Revise this section to add a water user organization's form authorized by Reclamation.

*Response:* Reclamation can only accept one of the two OMB approved application forms listed under § 429.10: Form 7-2540 or SF 299. All forms used by a Federal agency which collect information from 10 or more individuals or entities on an annual basis must be approved by OMB and renewed by them on a 3-year basis.

Section 429.11 Where the use authorization application forms can be found is provided in this section.

We made no changes to this section as compared to the previously proposed rule.

*Comment:* Revise this section to include wording that contact information for the appropriate water user organization can be obtained from any Reclamation office.

*Response:* The local Reclamation office will provide water user organization contact information when appropriate. This will be addressed more directly in revisions to applicable Reclamation Manual Directives and Standards and handbooks.

Section 429.12 The appropriate location for filing an application is listed in this section.

We made no changes to this section as compared to the previously proposed rule.

*Comment:* Revise this section to read: "File your application \* \* \* with the Reclamation office or water user organization having jurisdiction over the land. \* \* \*"

*Response:* Although some water user organizations may have assumed responsibility for the operation and maintenance of Reclamation land, facilities, and waterbodies pursuant to a contract with Reclamation, Reclamation still maintains jurisdiction over the subject land, facilities, and waterbodies. The location for filing an application should be coordinated between the local Reclamation office and water user organization.

Section 429.13 This section tells how long the application review process will take.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.14 The criteria Reclamation will consider when reviewing applications is described in this section.

We made no changes to this section as compared to the previously proposed rule.

*Comment:* This section does not include the best interests of the affected project beneficiaries, nor does it address the impacts of not receiving revenue credits which would create further financial burdens on the water user organizations.

*Response:* This rule complies with OMB Circular A-25 which directs the recovery of revenues for administrative costs incurred by Reclamation in the processing of use applications and for the use of Federal lands. Although the responsibility for operation and maintenance of Reclamation land, facilities, and waterbodies may be contractually transferred in some instances to a water user organization, they are owned by the United States. All revenues collected for the use of Reclamation land, facilities, and waterbodies must be handled in accordance with applicable Federal statutes, regulations, and policies.

Section 429.15 This section discusses whether Reclamation is required to issue use authorizations.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

#### Subpart D—Application Fees and Administrative Costs

Section 429.16 The amount of the application fee and when to pay the fee is described in this section.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.17 This section explains under what circumstances administrative costs will be collected.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.18 This section explains when administrative costs will be due and payable.

We made no changes to this section as compared to the previously proposed rule.

*Comment:* Administrative costs should include a reasonable charge for project related land, facilities, and waterbodies for the benefit of the project beneficiaries.

*Response:* OMB Circular A–25 provides our authority to collect administrative costs that are incurred by us in processing a use application for an authorization to use Reclamation land, facilities, or waterbodies. We do not have authority to collect administrative costs for any other entity.

Section 429.19 This section describes what the process is when the initial estimate for administrative costs is insufficient.

We made no changes to this section as compared to the previously published rule. We received no comments on this section.

Section 429.20 This section describes how to request a detailed explanation of the administrative costs.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.21 This section describes what occurs if the administrative costs are overpaid.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.22 This section discusses whether future administrative costs can be charged after a use authorization is issued by Reclamation.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

#### Subpart E—Use Fees

*Comment:* This subpart fails to include the best interests of the affected

project beneficiaries by not charging a reasonable fee for the project beneficiaries and not providing those reasonable fees as revenue credits to the benefit of the affected project.

*Response:* This rule complies with OMB Circular A–25 which directs the recovery of revenues for the use of Federal lands. Although the responsibility for operation and maintenance of Reclamation land, facilities, and waterbodies may be contractually transferred in some instances to a water user organization, they are owned by the United States. All revenues collected for the use of Reclamation land, facilities, and waterbodies must be handled in accordance with applicable Federal statutes, regulations, and policies.

Section 429.23 How Reclamation determines use fees is described in this section.

We made no changes to this section as compared to the previously proposed rule.

*Comment:* Increased fees have adverse impacts on cabin owners forcing them from their cabins.

*Response:* This rule does not set fees for cabins or any other use of Reclamation land, facilities, or waterbodies. Use fees are established on a case-by-case basis as determined by a valuation process or competitive bidding.

*Comment:* This section must be defined more clearly as well as accurately.

*Response:* The Reclamation Manual Directive and Standard, *Real Property Appraisal*, LND 05–01, which may be found at <http://www.usbr.gov/outlines> in depth the valuation process for determining use fees. The alternative method that may be used under this section for determining use fees is the competitive bidding process.

Section 429.24 This section explains when use fees should be paid.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.25 This section describes the length of time allowed to both submit a use fee payment and accept the offered use authorization.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

#### Subpart F—Reductions or Waivers of Application Fees, Administrative Costs, and Use Fees

Section 429.26 This section describes under what conditions

Reclamation may waive or reduce costs or fees.

We made minor editorial changes to this section.

*Comment:* This section does not take into consideration the affect that waiving fees would have on water user organizations. The requirement to collect fair market value should be retained.

*Response:* Section 6 of OMB Circular A–25 allows for a reduced fee or waiver under certain circumstances and we have simply incorporated this concept into this rule. As listed under § 429.23, we are required to collect a use fee based on a valuation or competitive bidding process unless the use fees have been waived by the applicable regional director. All revenues collected for the use of Reclamation land, facilities, and waterbodies must be handled in accordance with applicable Federal statutes, regulations, and policies.

*Comment:* Costs and fees associated with obtaining Reclamation's approval for an easement, right-of-way, or other authorized use should be automatically waived for applicants that are public entities.

*Response:* Public entities and others who believe they may be eligible for a waiver of some or all fees associated with the use of Reclamation land, facilities, or waterbodies may request such a waiver from the applicable Regional Director.

#### Subpart G—Terms and Conditions of Use Authorizations

Section 429.27 This section describes the general information that is contained in each use authorization.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.28 Terms and conditions that apply to all use authorizations from Reclamation are outlined in this section.

We made changes to this section as compared to the previously proposed rule. Under § 429.28(a)(3) we clarified when Reclamation may terminate a use authorization. These now include, but are not limited to, events such as a natural disaster or threats to public health and safety. We also modified § 429.28(a)(4) by deleting the condition that lack of use in a 2-year timeframe may result in the termination of a use authorization. We added the condition that failure to construct during the timeframe specified in the use authorization may constitute a presumption of abandonment and cause for termination.

*Comment:* The proposed rule allows existing docks to stay for now. However, it also gives Reclamation unilateral authority to terminate dock permits at any future point without public comment.

*Response:* We have revised § 429.28 to clarify under what conditions an authorization could be terminated without public comment. Additionally, § 429.32(a) has been revised to more clearly explain the public process that would be required prior to Reclamation making a determination that authorizations for existing private exclusive recreational and residential use would be terminated.

*Comment:* Under the proposed rule, individuals holding valid permits who do not construct or use their boat docks for a period of two years can lose their permits forever through a presumption of abandonment.

*Response:* We have revised § 429.28(a)(4) by removing the 2-year timeframe and adding the condition that construction must occur within the timeframe specified in the use authorization or the use authorization may be terminated.

*Comment:* It appears that this document may be in violation of First Amendment rights by denying the right to appeal.

*Response:* All final determinations made by Reclamation may be appealed using the process outlined in subpart I of this rule.

**Section 429.29** This section describes additional terms and conditions or requirements that will be included in a use authorization.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

**Section 429.30** This section explains whether a use authorization can be transferred or assigned to another individual or entity.

We made changes to this section as compared to the previously proposed rule to incorporate revisions made regarding the transfer of authorizations for existing private exclusive recreational or residential uses as described under § 429.32(e).

*Comment:* The proposed rule does not recognize homeowners' rights to transfer their dock permits should they sell their lakeside homes or pass them on to their heirs. Transfer authority is solely at the discretion of the local Reclamation office. This right should be recognized in the rule. Reclamation authority over transfers should be limited to record keeping and permit compliance.

*Response:* The conditions for transfer of use authorizations for existing private

exclusive recreational or residential uses are now under 429.32(e). Notification of transfers must be provided to Reclamation in advance of the transfer. Holders of use authorizations should keep in mind, however, that a use authorization for private exclusive recreational or residential use does not vest an interest in Reclamation land, facilities, or waterbodies with the holder of the use authorization.

#### Subpart H—Terms and Conditions of Use Authorizations

**Section 429.31** This section describes what the prohibited uses are on Reclamation land, facilities, and waterbodies.

We made changes to this section as compared to the previously proposed rule.

**Section 429.31(b)** now reflects that improvements made within the terms and conditions of an existing use authorization will not be considered a new private exclusive recreational or residential use. These improvements may include those necessary to maintain or repair the authorized use. Expansions of the authorized use within the terms and conditions of the existing authorization may also be allowed. Any such expansions should, however, be reviewed by the local Reclamation office prior to initiating the activity to ensure that the planned change is truly within the terms of the use authorization.

Additionally, § 429.31(b)(1) has been moved and incorporated into the definition of *private exclusive recreational and residential use* under § 429.2 and § 429.31(b)(2) has been moved to § 429.4(b)

*Comment:* Reword § 429.31(b) to state that uses outside an already existing permitted area would be prohibited. This would allow improvements, expansions, or repairs within the existing footprint of an existing authorized use.

*Response:* We have revised § 429.31(b) to incorporate the intent of this comment. Improvements, expansions, or repairs of the authorized use within the terms and conditions of the existing authorization may also be allowed. Any such improvements, expansions, or repairs should, however, be reviewed by the local Reclamation office prior to initiating the activity to ensure that the planned change is truly within the terms of the use authorization.

*Comment:* Prohibitions against new docks on lakes with limited public facilities are inconsistent with both Congressional mandates and agency principles. Requiring property owners

to use limited public boat dock moorings reduces recreational opportunities for the public.

*Response:* Under this rule, new public docks are not prohibited. When as a result of an appropriate public planning process a need for additional public facilities is shown, we will explore opportunities to construct needed facilities under existing project authorities or seek managing partners willing to construct and maintain such facilities.

*Comment:* New landscaping is prohibited under the proposed rule while existing authorizations are grandfathered. Since use authorizations for landscaping have not as yet been issued by the local office, these uses would now be prohibited and subject to civil and criminal penalties. Homeowners' efforts to improve the shoreline in accordance with the resource management plan should be encouraged.

*Response:* New landscaping that falls within the parameters of an existing authorization for private exclusive recreational or residential use will not be considered new private exclusive recreational or residential use as stated under § 429.31(b). Applications submitted for a use authorization for landscaping will be reviewed and evaluated on a case-by-case basis by the local or regional Reclamation office.

**Section 429.32** How Reclamation will address existing uses which are otherwise prohibited is discussed in this section.

The majority of comments received relate to this section of the proposed rule. Most of the commenters hold existing use authorizations for cabin sites or other recreational or residential uses, including boat docks, on Reclamation land, facilities, or waterbodies.

In response to comments received and to improve the clarity of this section, we have made several changes to this section as follow:

Paragraph (a) of this section more thoroughly describes the public process we will use when determining whether existing private exclusive recreational or residential uses remain compatible with public needs or project purposes. The minimum timeframe for such reviews has been increased from 5 years to 20 years, except for those instances where part 21 of this title requires reviews at least every 5 years. In addition, clarification was incorporated on how holders of existing use authorizations would be notified of opportunities for public participation.

Paragraphs (b), (c), and (d) of this section now address how and when

reviews of compliance with environmental, health and safety, and financial requirements will be conducted and how those results will be provided to the holder of the use authorization.

Paragraph (e) of this section was added to address the conditions for transferring existing authorizations for private exclusive recreational and residential uses.

Minor editorial changes were made to paragraph (f) (previously paragraph (e)) of this section.

No changes other than re-lettering were made to paragraphs (g), (h) and (j) (previously paragraphs (f), (g) and (i)) of this section.

A clarification was made to paragraph (i) (previously paragraph (h)) of this section concerning what use authorizations could not be renewed, transferred, etc.

*Comment:* The proposed rule provides no rationale for reversing the regulations previously proposed. Reclamation is not authorized to provide for private exclusive use. The proposed rule would violate Reclamation's Congressional mandate to provide for public recreation. We strongly object to the change in the proposed rule to allow private exclusive use to continue. Please do not privatize our public lands.

*Response:* Under this rule existing private exclusive recreational and residential uses will be discontinued when, through a public process, a determination is made that the needs of the public or of Reclamation projects are not being adequately met. We will continue to take into consideration the needs of the public in the management of these lands, facilities, and waterbodies.

*Comment:* The U.S.D.A. Forest Service regulations contain better protections for cabin owners and recognition of appropriate time periods which are omitted in this section.

*Response:* The U.S.D.A. Forest Service and Reclamation are governed by different Federal statutes, regulations, and policies that determine how both agencies manage cabin sites on Federal lands for which they have management responsibilities.

*Comment:* The term for compliance reviews should be expanded from 5 years to 20 years and reviews should be done on a lake-wide basis since individual dock compliance will occur at permit renewal.

*Response:* This section has been revised to reflect that we will conduct reviews for determinations as to compatibility with public needs and project purposes at least once every 20

years unless required otherwise by part 21 of this title. Compliance reviews for the criteria found under § 429.32(b) will be conducted once every 5 years since it is not appropriate to review, for example, an area any less frequently to determine if there are health and safety concerns.

*Comment:* The 90-day notification period to authorization holders for correction of identified deficiencies is not adequate in areas where weather limitations could impact their ability to bring their use into compliance with the requirements.

*Response:* Section 429.32(c) allows a minimum of 90 days to be provided to make corrections. Local managers will work with authorization holders to establish reasonable timeframes for curing deficiencies. Additionally, the compliance review reports will be provided to the holder of the use authorization by certified mail, return receipt requested.

*Comment:* Reclamation has no requirement to inform permit holders of expiring permits which could result in permanent loss of docks for unaware homeowners who miss renewal deadlines. Permit holders should be notified at least 90 days prior to permit expiration dates. Reclamation offices issuing permits should be given discretionary authority to reinstate lapsed permits where lack of notice or other extenuating circumstances can be shown.

*Response:* Section 429.32(d) has been revised to include written notification to the holder of an authorization for existing private exclusive recreational or residential use with the results of the compliance review that will be completed at least 6 months prior to the expiration date of the authorization. The notification will be sent at least 90 days prior to the expiration of the authorization and will include a reminder that it is time to renew the use authorization.

*Comment:* All dock permits should be for a term of 20 years.

*Response:* Under § 429.32(f) renewals of authorizations for all private exclusive recreational or residential will not exceed 20 year terms. The determination as to the appropriate length of the term which may be up to 20 years will be made on a case-by-case basis by the issuing Reclamation office.

*Comment:* Our existing use authorizations for private exclusive recreational and residential uses will not be renewed upon expiration.

*Response:* We will renew private exclusive recreational and residential use authorizations provided that the

requirements of this final rule continue to be met.

Section 429.33 This section describes the consequences for using Reclamation land, facilities, and waterbodies without authorization.

We made changes to this section compared to the previously proposed rule. Paragraph (a) of this section was rewritten and is now a new paragraph (g) which discusses when legal action under part 423 of this chapter may apply.

*Comment:* Potential penalties under this proposed rule give Reclamation officials the right to hand out jail terms to people failing to remove docks for which permits have lapsed or been denied.

*Response:* Reclamation officials cannot unilaterally impose jail terms for violations. Penalties for unauthorized use of Reclamation land, facilities, or waterbodies are established under part 423 of this chapter not under this rule. We have added a new paragraph (g) to this section to clarify that a violation may be subject to legal action including criminal prosecution under part 423 of this chapter.

*Comment:* Fines levied can be retroactively assessed to the date of infraction. Interest on penalties should accrue from the date an individual is notified in writing of any violation.

*Response:* We reviewed this issue and determined it is appropriate to charge use fees as well as any penalties and interest from the date that the unauthorized use commenced. Those that use Reclamation land, facilities, or waterbodies without authorization should not be treated the same as those who have complied with the requirements. The application of interest from the date the unauthorized use commenced incorporates this concept.

#### Subpart I—Decisions and Appeals

Section 429.34 The decisionmaker for Reclamation's final determinations is listed in this section and provides when that decision will be effective.

We made minor editorial changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.35 This section explains if and when an appeal can be made to a final determination.

We made changes to this section as compared to the previously proposed rule to clarify that the appeal process applies to final determinations and to specify that you can appeal a Regional Director's final determination to the Commissioner within 30 days of the

postmark date of a Regional Director's letter of final determination.

*Comment:* The 30-day appeal period should commence on the date of receipt of decision.

*Response:* We changed this section to state that you can appeal a Regional Director's final determination to the Commissioner within 30 days of the postmark date of a Regional Director's letter of final determination.

Section 429.36 This section describes if and when a Commissioner's decision can be appealed. The process

for and timeliness of such an appeal is also discussed in this section.

We added paragraph (c) to this section to clarify that the Commissioner's decision will take effect upon issuance and remain in effect unless a stay is specifically requested and granted by the Director, Office of Hearing and Appeals.

We received no comments on this section.

Section 429.37 This section discusses what happens to monies owed to the United States during an appeal process.

We made a change to this section as compared to the previously proposed rule to clarify that interest does not accrue when a stay has been issued at any point in the appeal process.

We received no comments on this section.

**VI. Distribution Table**

The following table indicates each section of the original 1983 rule, as modified in 2006, and where each was incorporated into the proposed rule or not included as the case may be.

Old section	New section
429.1	429.1.
429.2(a)–(n)	429.2.
429.3(a)	429.23.
429.3(b)	429.33(a) and (c).
429.3(c)	429.33(a) and (b).
429.4	429.26.
429.5	Removed.
429.6	429.7(b); 429.12; and 429.14.
429.6(a)	429.10.
429.6(a)(1)–(3)	Removed. Now contained in Application Forms.
429.6(b)	429.16; 429.20–429.22; and 429.26.
429.6(c)(1)–(4)	429.26.
429.6(d)(1)–(4)	429.13(a) and (b).
429.6(e)	429.19; 429.22.
429.6(f)	429.23–429.25.
429.6(g)	Removed. See Preamble.
429.7(a)	429.27–429.30.
429.7(b)	429.6.
429.7(c)	Removed.
429.7(d)	429.28(a)(3).
429.7(e)	429.28(a)(1).
429.7(f)	Removed.
429.8	429.28(a)(2), (3), and (4).
429.9(a)	429.28(a)(1).
429.9(b)	429.28(b).
429.10(a)	429.34(a) and (b); 429.35(a), (b), and (c).
429.10(b)	429.36(a) and (b).
429.11	Removed.
429.12(a)	429.1; 429.3–429.6.
429.12(b)	429.4(a).
429.12(c)	429.26.
429.12(d)	429.4(g).
429.12(e)	Removed.
429.13	429.1; 429.3.

**VII. Procedural Requirements**

*1. Regulatory Planning and Review (Executive Order (E.O.) 12866)*

OMB has determined that this rule is not a significant rule and has not reviewed this rule under the requirements of E.O. 12866. We have evaluated the impacts of this rule as required by E.O. 12866 and have determined that it is not a significant regulatory action. The results of our evaluation follow:

(a) This rule will not have an effect of \$100 million or more on the economy. It would not adversely affect in any material way the economy, productivity, competition, jobs, environment, public

health or safety, or State, local, and tribal governments or communities. The original rule covered only Reclamation lands. It was modified in 2006 to explicitly incorporate uses of Reclamation facilities and waterbodies. The proposed rule requires collecting an initial, nonrefundable deposit of \$100 (referred to as the "application fee"), the recovery of additional administrative costs in excess of the initial application fee, and a fee for the use of Reclamation land. It should be noted that this rule reduces the initial application fee from \$200 (\$150 refundable under specific circumstances) to a nonrefundable \$100 application fee. The rule does not change the requirement for full cost

recovery of additional administrative costs in excess of the \$100 nonrefundable application fee or the requirement to collect the fee for use of Reclamation land, facilities, and waterbodies. Like the current rule, this rule provides for waivers or reductions of costs and fees under unique circumstances as determined to be appropriate by us in compliance with OMB Circular A–25.

(b) This rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Since this rule is specific to Reclamation land, facilities, and waterbodies, any impact on another agency would be minimal.

Nevertheless, nothing in this rule precludes us from cooperating with other agencies on proposed actions that may impact or require the use of Reclamation's land, facilities, and waterbodies. An example of our working with other agencies is this rule's requirement to use Standard Form (SF) 299, Application for Transportation and Utility Systems and Facilities on Federal Lands, under E.O. 13327. The purpose of E.O. 13327 is to promote the efficient and economical use of America's real property assets. This proposed rule also requires the use of Form 7-2540, Bureau of Reclamation Right-of-Use Application Form, for all other requested uses.

(c) This rule does not alter the budgetary effects of entitlements, grants, user fees, concessions, loan programs, water contracts, management agreements, or the rights and obligations of their recipients.

(d) This rule does not raise any novel legal or policy issues. The recovery of administrative fees and charging of application and use fees are required by the IOAA, OMB Circular A-25, and the current rule.

## 2. Regulatory Flexibility Act

The Department of the Interior (Interior) certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule does not impose a requirement for small businesses to report or keep records on any of the requirements contained in this rule. A small business's wish to apply to use Reclamation land, facilities, or waterbodies is strictly voluntary. One of the purposes of this rule is to provide small business applicants and others with the requirements they must follow when applying for such a use. An Initial Regulatory Flexibility Analysis is not required and, accordingly, a Small Entity Compliance Guide is not required.

## 3. Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule:

(a) Does not have an annual effect on the economy of \$100 million or more. There are no major changes in the costs or fees charged to applicants.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local, or tribal government agencies, or geographic regions. It is anticipated that

this rule will not result in significant increases in administrative costs or use fees for any one applicant, but it will clarify for the public the basis for determining such costs and fees.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. The cost to the private sector requesting use of Reclamation land, facilities, or waterbodies is a small fraction of a percent of an individual entity's total cost of doing business. Under this rule, such requests are made on a voluntary basis.

## 4. Unfunded Mandates Reform Act

This proposed rule does not impose an unfunded mandate or a requirement to expend monies on the part of State, local, or tribal governments or communities, or the private sector of \$100 million or more annually. This rule does not have a significant or unique effect on State, local, or tribal governments or communities, or the private sector. Requests from any of these entities to use Reclamation land, facilities, and waterbodies are strictly voluntary. If a requested use is authorized by Reclamation, the recovery of administrative costs and the payment of use fees associated with such use are required by law, OMB Circular, and regulation. There are provisions to allow a reduction or waiver of such costs and fees, at our discretion, when specific criteria are met. We are not imposing a duty, requirement, or mandate on State, local, or tribal governments or communities, or the private sector to request such uses. Thus, a statement containing information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

## 5. Takings (E.O. 12630 and E.O. 13406)

Under the criteria in E.O. 12630 and E.O. 13406, this proposed rule does not have any implications of takings of property rights. This rule sets forth the requirements for applying to use Reclamation land, facilities, and waterbodies. It also clarifies the basis for charging application and use fees, and for the recovery of administrative costs under the requirements of the IOAA and OMB Circular A-25. A Takings Implication Assessment is not required.

## 6. Federalism (E.O. 13132)

Under the criteria in E.O. 13132, the rule does not have any federalism implications to warrant the preparation of a Federalism Assessment. The rule is not associated with, nor will it have

substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. A Federalism Assessment is not required.

## 7. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Does not unduly burden the judicial system;

(b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

## 8. Consultation With Indian Tribes (E.O. 13175)

Under the criteria of E.O. 13175, Reclamation has evaluated this rule and determined that it would have no substantial effects on federally recognized Indian Tribes. This rule does not apply to land under the sovereign ownership of federally recognized Indian Tribes.

## 9. Paperwork Reduction Act

This rule does require information collection from 10 or more applicants and a submission under the Paperwork Reduction Act (PRA) is required. However, the information collection requirements associated with this rule have been previously submitted to OMB for review and have received approval under the requirements of the PRA. The SF 299, Application for Transportation and Utility Systems and Facilities on Federal Lands (used for access across our land, facilities, and waterbodies), was authorized by OMB No. 1004-0189, expiring on November 30, 2008. OMB also has approved the information collection in this rule (using the Bureau of Reclamation Right-of-Use Application Form 7-2540) and has assigned approval number 1006-0003, expiring on March 31, 2009. We estimate the burden associated with this latter information collection to be 2 hours per application. We use the information provided by applicants to determine the nature of the requested use and whether the requested use of our land, facilities, or waterbodies interferes with project operations or project security, or may create other issues. The information provided on the applications is also used to ensure, where appropriate and applicable, the technical and financial

resources of the applicant are sufficient to complete the construction of the infrastructure or project.

#### 10. National Environmental Policy Act of 1969

This rule does not constitute a major Federal action and would not have a significant effect on the quality of the human environment. Therefore, this rule does not require the preparation of an environmental assessment or environmental impact statement under the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), and its regulations.

#### 11. Information Quality Act

In developing this rule, there was no need to conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106–554).

#### 12. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in the E.O. 13211. A Statement of Energy Effects is not required.

#### 13. Clarity of This Regulation

We are required by E.O. 12866 and 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means each rule we publish must:

- Be logically organized;
- Use the active voice to address readers directly;
- Use clear language rather than jargon;
- Be divided into short sections and sentences; and
- Use lists and tables wherever possible.

#### List of Subjects in 43 CFR Part 429

Administrative practice and procedures, Public lands, Reclamation, Recreation and recreation areas, and Land rights-of-way.

Dated: November 17, 2008.

**Kris D. Polly,**

*Acting Assistant Secretary—Water and Science.*

■ For the reasons stated in the preamble, the Bureau of Reclamation revises 43 CFR part 429 as follows:

### PART 429—USE OF BUREAU OF RECLAMATION LAND, FACILITIES, AND WATERBODIES

#### Subpart A—Purpose, Definitions, and Applicability

Sec.

- 429.1 What is the purpose of this part?  
429.2 What definitions are used in this part?

429.3 What types of uses are subject to the requirements and processes established under this part?

429.4 What types of uses are not subject to the requirements and processes established under this part?

429.5 Who is authorized to issue use authorizations under this part?

429.6 When must water user organizations also approve use authorizations?

#### Subpart B—Proposed Uses Involving Reclamation Easements

429.7 Can I use land where Reclamation holds an easement?

429.8 Is there a fee for uses involving a Reclamation easement?

#### Subpart C—Requesting Authorization To Use Reclamation Land, Facilities, and Waterbodies

429.9 What should I do before filing an application?

429.10 What application form should I use?

429.11 Where can I get the application forms?

429.12 Where do I file my application?

429.13 How long will the application review process take?

429.14 What criteria will Reclamation consider when reviewing applications?

429.15 Is Reclamation required to issue a use authorization?

#### Subpart D—Application Fees and Administrative Costs

429.16 How much is the application fee and when should it be paid?

429.17 When will Reclamation collect administrative costs?

429.18 When do I have to pay the administrative costs?

429.19 What happens if the initial estimate for administrative costs is insufficient?

429.20 Can I get a detailed explanation of the administrative costs?

429.21 If I overpay Reclamation's administrative costs, can I get a refund?

429.22 Can Reclamation charge me additional administrative costs after I receive a use authorization?

#### Subpart E—Use Fees

429.23 How does Reclamation determine use fees?

429.24 When should I pay my use fee?

429.25 How long do I have to submit my payment for the use fee and accept the offered use authorization?

#### Subpart F—Reductions or Waivers of Application Fees, Administrative Costs, and Use Fees

429.26 When may Reclamation reduce or waive costs or fees?

#### Subpart G—Terms and Conditions of Use Authorizations

429.27 What general information appears in use authorizations?

429.28 What terms and conditions apply to all use authorizations?

429.29 What other terms and conditions may be included in my use authorization?

429.30 May use authorizations be transferred or assigned to others?

#### Subpart H—Prohibited and Unauthorized Uses of Reclamation Land, Facilities, and Waterbodies

429.31 What uses are prohibited on Reclamation land, facilities, and waterbodies?

429.32 How will Reclamation address currently authorized existing private exclusive recreational and residential uses?

429.33 What are the consequences for using Reclamation land, facilities, and waterbodies without authorization?

#### Subpart I—Decisions and Appeals

429.34 Who is the decisionmaker for Reclamation's final determinations?

429.35 May I appeal Reclamation's final determination?

429.36 May I appeal the Commissioner's decision?

429.37 Does interest accrue on monies owed to the United States during my appeal process?

**Authority:** 43 U.S.C. 373; 43 U.S.C. 373b; 43 U.S.C. 387; 43 CFR part 21; Public Law 108–447, Title VIII; 31 U.S.C. 9701, as amended.

#### Subpart A—Purpose, Definitions, and Applicability

##### § 429.1 What is the purpose of this part?

The purpose of this part is to notify the public that any possession or occupancy of any portion of, and the extraction or disturbance of any natural resources from Reclamation land, facilities, or waterbodies are prohibited without written authorization from Reclamation, unless excepted as listed in § 429.4. This part describes:

(a) How to apply to Reclamation for a use authorization to allow your activity on Reclamation land, facilities, and waterbodies;

(b) How Reclamation reviews and processes your application, including the criteria for approval or denial of your application;

(c) The requirement for collection of application and use fees and the recovery of administrative costs;

(d) How Reclamation determines and collects costs and fees;

(e) Prohibited uses on Reclamation land, facilities, and waterbodies;

(f) How Reclamation will address existing authorized uses which are otherwise prohibited, including the criteria for approval or denial of requests to renew these use authorizations;

(g) The process and penalties associated with resolution of unauthorized uses; and

(h) How to appeal an action or determination made under this part.

**§ 429.2 What definitions are used in this part?**

The following definitions are used in this part:

*Administrative costs* means all costs incurred by Reclamation in processing your application and all costs associated with evaluating, issuing, monitoring, and terminating your use authorization on Reclamation land, facilities, and waterbodies. Administrative costs are distinct and separate from application and use fees and typically include, but are not limited to:

- (1) Determining the use fee;
- (2) Evaluating and documenting environmental and cultural resources compliance;
- (3) Performing engineering review;
- (4) Preparation of the use authorization; and
- (5) Personnel and indirect costs directly associated with these actions.

*Applicant* means you as any person or entity (such as a private citizen, business, non-governmental organization, public entity, Indian tribe, or foreign government) who submits an application requesting use of Reclamation land, facilities, and waterbodies.

*Application* means either Form 7-2540 or SF 299. The choice of application form is dependent on the type of use requested.

*Application fee* means a \$100 nonrefundable charge, which you must submit with your application to cover the costs of our initial review of your request. Application fees are distinct and separate from administrative costs and use fees.

*Commissioner* means the senior executive of the Bureau of Reclamation, Department of the Interior.

*Consent document* means a written agreement or notification listing conditions which will prevent unreasonable interference with our easement on non-Reclamation land.

*Cultural resource* means any prehistoric, historic, architectural, sacred, or traditional cultural property and associated objects and documents that are of interest to archaeology, anthropology, history, or other associated disciplines. Cultural resources include archaeological resources, historic properties, traditional cultural properties, sacred sites, and cultural landscapes that are associated with human activity or occupation.

*Easement* refers to an interest in land that consists of the right to use or control the land for a specific purpose, but does not constitute full ownership of the land.

*Environmental compliance* means complying with the requirements of the National Environmental Policy Act; the Endangered Species Act; the Clean Water Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; applicable regulations associated with these statutes; and other related laws and regulations.

*Form 7-2540* means the Bureau of Reclamation Right-of-Use Application form required for all proposed uses of Reclamation land, facilities, and waterbodies, except those associated with construction and/or placement of transportation, communication, and utility systems and facilities.

*Grantee* means you as the recipient or holder of a use authorization regardless of the contractual format.

*Interior* means the United States Department of the Interior.

*Managing partner* means a Federal or non-Federal public entity that manages land, facilities, or waterbodies through a management agreement with Reclamation entered into pursuant to the Federal Water Project Recreation Act, as amended.

*Part 21 of this title* means Title 43 of the Code of Federal Regulations part 21, which is titled Occupancy of Cabin Sites on Public Conservation and Recreation Areas.

*Part 423 of this chapter* means Title 43 of the Code of Federal Regulations part 423, which is titled Public Conduct on Bureau of Reclamation Facilities, Lands, and Waterbodies.

*Possession or occupancy* and possess or occupy mean to control, use, or reside on Reclamation land, facilities, or waterbodies.

*Private exclusive recreational or residential use* means any use that involves structures or other improvements used for recreational or residential purposes to the exclusion of public uses that are not associated with the official management of a Reclamation project. This includes, but is not limited to the following:

- (1) Cabin sites and associated improvements (including those currently defined in part 21 of this title); mobile homes, residences, outbuildings, and related structures; and associated landscaping, patios, decks, and porches;
- (2) Boat houses, docks, moorings, piers, and launch ramps;
- (3) Floating structures or buildings, including moored vessels used as residences or unauthorized business sites;
- (4) Sites for such activities as hunting, fishing, camping, and picnicking (other than transitory uses allowed under part

423 of this chapter) that attempt to exclude general public access; and

(5) Access routes to private land, facilities, or structures when other reasonable alternative means of access is available or can be obtained.

*Public entity* means States, political subdivisions or agencies thereof; public and quasi-governmental authorities and agencies; and agencies of the Federal Government.

*Public needs* mean the recreational requirements of the general public at areas where existing authorized private exclusive recreational or residential uses are present.

*Reclamation* means the Bureau of Reclamation, United States Department of the Interior.

*Reclamation facility* means any facility under our jurisdiction. The term includes, but is not limited to, buildings, canals, dams, ditches, drains, fish and wildlife facilities, laterals, powerplants, pumping plants, recreation facilities, roads, switchyards, transmission and telecommunication lines, and warehouses.

*Reclamation land* means any land under the jurisdiction of, or administered by, Reclamation and may include, but is not limited to, the following:

- (1) All land acquired by Reclamation through purchase, condemnation, exchange, or donation for Reclamation project and water related purposes;
- (2) All land withdrawn by Reclamation from the public domain for Reclamation purposes; and
- (3) All interests in land acquired by Reclamation, including easements and rights exercised by the United States under the 1890 Canal Act (43 U.S.C. 945).

*Reclamation law* means the Reclamation Act of June 17, 1902 (32 Stat. 388, 43 U.S.C. 371 *et seq.*), and all Acts which supplement or amend the 1902 Act.

*Reclamation project* means any land, facilities, or waterbodies used for water supply, water delivery, flood control, hydropower, or other authorized purposes including fish, wildlife, and recreation administered by Reclamation under Federal laws.

*Reclamation waterbodies* means any body of water situated on Reclamation land and under Reclamation jurisdiction. Examples of Reclamation waterbodies include, but are not limited to, reservoirs, lakes, and impoundments.

*Regional Director* means any one of the representatives of the Commissioner, or their delegates, who are responsible for managing their respective region's land, facilities, and

waterbodies and for the decisions made under this part.

*Standard Form (SF) 299* means the form titled Application for Transportation and Utility Systems and Facilities on Federal Lands used when requesting permission for construction and/or placement of transportation, communication, or utility systems and facilities.

*Unauthorized use* means use of Reclamation land, facilities, and waterbodies without proper authorization.

*Use authorization* means a document that defines the terms and conditions under which we will allow you to use Reclamation land, facilities, and waterbodies. Use authorizations can take the form of easements, leases, licenses, permits, and consent documents. This document is also referred to as a "right-of-use" in part 423 of this chapter.

*Use fee* means the amount due to Reclamation for the use of Federal land, facilities, or waterbodies under our jurisdiction or control. Use fees are distinct and separate from application fees and administrative costs.

*Valuation* means the method used to establish the fee for a use authorization by appraisal, waiver valuation, or other sound or generally accepted business practice.

*Water user organization* means any legal entity established under State law that has entered into a contract with the United States pursuant to the Federal reclamation laws.

*We, us, or our* mean Reclamation.

*You, your, I, me, or my*, mean an applicant, grantee, or unauthorized user.

**§ 429.3 What types of uses are subject to the requirements and processes established under this part?**

Possession or occupancy of, or extraction or removal of natural resources from, Reclamation land, facilities, or waterbodies require a use authorization in accordance with this part. Typical uses of or activities on Reclamation land, facilities, or waterbodies regulated by this part include, but are not limited to the following:

- (a) Commercial filming and photography;
- (b) Commercial guiding and outfitting;
- (c) Commercial or organized sporting events;
- (d) Grazing, farming, and other agricultural uses;
- (e) Infrastructure, such as transportation, telecommunications, utilities, and pipelines;
- (f) Organized recreational activities, public gatherings, and other special

events that involve the possession or occupancy of Reclamation lands;

(g) Removal of, or exploration for, sand, gravel, and other mineral resources;

(h) Timber harvesting, or removal of commercial forest products or other vegetative resources; and

(i) Any other uses deemed appropriate by Reclamation, subject to the exclusions listed in § 429.4.

**§ 429.4 What types of uses are not subject to the requirements and processes established under this part?**

(a) Individual, non-commercial use of Reclamation land, facilities, or waterbodies for occasional activities such as hiking, camping for periods of 14 days or less during any period of 30 consecutive days, sightseeing, picnicking, hunting, swimming, boating, and fishing, consistent with applicable laws, regulations and policies. Public conduct associated with these activities is governed by part 423 of this chapter;

(b) Buildings and structures used by concessionaires or managing partners to facilitate their operations or that are made available by them for the general, non-exclusive use of the public.

Examples include, but are not limited to the following:

- (1) Boat docks available for short-term use by the public;
- (2) Marina slips available for rent by the public;
- (3) Publicly available boat ramps;
- (4) Houseboats available for short-term rent by the public;
- (5) Stores and restaurants;
- (6) Employee housing; and
- (7) Rental cabins, hotels, campgrounds, and other short-term lodging facilities.

(c) While not subject to other requirements and processes established under this part, the following types of uses must be in compliance with the requirements in subpart H of this part:

- (1) Recreational activities at sites managed by non-Federal managing partners under Public Law 89-72, titled Federal Water Project Recreation Act, July 9, 1965;
- (2) Activities managed by other Federal agencies or Interior bureaus by agreement or under other authority;
- (3) Activities at sites directly managed by Reclamation where fees or fee schedules are established for general public recreation use;
- (4) Uses authorized under concession contracts on Reclamation land, facilities, and waterbodies;
- (5) Reclamation contracts for water supply or water operations;
- (6) Authorized operation and maintenance activities on Reclamation

land, facilities, and waterbodies undertaken by water user organizations, or their contractors, or by Reclamation contractors;

(7) Agreements and real property interests granted for the replacement or relocation of facilities, such as highways, railroads, telecommunication, or transmission lines or infrastructure governed by Section 14 of the Reclamation Project Act of August 4, 1939 (43 U.S.C. 389). Payments to equalize land values may still be required and administrative costs may still be recovered; and

(8) Activities specifically authorized under other Federal statutes or regulations.

**§ 429.5 Who is authorized to issue use authorizations under this part?**

Unless otherwise provided by law or regulation, only Reclamation or another Federal agency acting for Reclamation under delegated authority is authorized to issue use authorizations that convey an interest in Reclamation land, facilities, or waterbodies. Recreation managing partners under the Federal Water Projects Recreation Act, 16 U.S.C. 4601 *et seq.*, and water user organizations who have assumed responsibility for operation and maintenance of Reclamation land, facilities, or waterbodies, and provide a copy of the use authorization to the local Reclamation office, pursuant to a contract with Reclamation may issue limited use authorizations to third parties for activities on Reclamation land, facilities, or waterbodies when all of the following apply:

(a) The recreation managing partner or water user organization is authorized to do so under its contract with Reclamation;

(b) Such limited use authorizations do not convey ownership or other interest in the Federal real property;

(c) The uses authorized are not permanent or for an indefinite period;

(d) The limited use authorization does not provide for an automatic right of renewal;

(e) The limited use authorization is fully revocable at the discretion of Reclamation; and

(f) All revenues collected for the use of Reclamation land, facilities, and waterbodies are handled in compliance with all statutory, regulatory, and policy requirements.

**§ 429.6 When must water user organizations also approve use authorizations?**

(a) Use authorizations for easements and rights-of-way for periods in excess of 25 years are also subject to approval

from water user organizations under contract obligation for repayment of the project or division. This requirement does not apply to any other type of use authorizations.

(b) At a minimum, the appropriate water user organizations will be notified of all use authorizations prior to their issuance to avoid potential conflicts between the requested use authorization and the water user organizations' need to operate and maintain the facilities for which they have contractual responsibility.

(c) At the discretion of the responsible Regional Director, concurrence of the appropriate water user organizations not addressed in paragraph (a) of this section may be requested.

### Subpart B—Proposed Uses Involving Reclamation Easements

#### § 429.7 Can I use land where Reclamation holds an easement?

(a) To prevent conflicts where Reclamation holds an easement on land owned by others, you should submit an application for the proposed use. If after review of the application, Reclamation determines that your requested use would not unreasonably interfere with Reclamation's easement, a consent document may be issued to you. The consent document will contain the conditions with which you must comply to ensure that your use will not unreasonably interfere with Reclamation's use of its easement.

(b) In accordance with subpart C of this part, you should submit either SF 299 or Form 7-2540 to the local Reclamation office to request a consent document.

(c) If you are not the underlying landowner, you must also secure the permission of the landowner for your requested use of the area covered by Reclamation's easement.

#### § 429.8 Is there a fee for uses involving a Reclamation easement?

Reclamation will not charge a use fee for a consent document. However, depending upon the complexity of your requested use and issues associated with it, Reclamation may charge an application fee and administrative costs, unless waived in accordance with subpart F of this part.

### Subpart C—Requesting Authorization To Use Reclamation Land, Facilities, and Waterbodies

#### § 429.9 What should I do before filing an application?

Before filing an application, it is important that you contact the local Reclamation office to discuss your

proposed use. This discussion can help expedite your application process.

#### § 429.10 What application form should I use?

You must use one of the following application forms depending on the nature of your requested use:

(a) Use SF 299 to request a use authorization for the placement, construction, and use of energy, transportation, water, or telecommunication systems and facilities on or across all Federal property including Reclamation land, facilities, or waterbodies.

Examples of such uses are:

- (1) Canals;
- (2) Communication towers;
- (3) Fiber-optics cable;
- (4) Pipelines;
- (5) Roads;
- (6) Telephone lines; and
- (7) Utilities and utility corridors.

(b) Use Form 7-2540 to request any other type of use authorization.

Examples of such uses are:

- (1) Commercial filming and photography;
- (2) Commercial guiding and outfitting;
- (3) Commercial or organized sporting events;
- (4) Grazing, farming, and other agricultural uses;
- (5) Organized recreational activities, public gatherings, and other special events;
- (6) Removal of, or exploration for, sand, gravel, and other mineral materials;
- (7) Timber harvesting, or removal of commercial forest products or other vegetative resources; and
- (8) Any other uses deemed appropriate by Reclamation.

(c) Application forms may not be required where Reclamation solicits competitive bids.

#### § 429.11 Where can I get the application forms?

Both forms can be obtained from any Reclamation office or from our official internet Web site at <http://www.usbr.gov>. These forms contain specific instructions for application submission and describe information that you must furnish. However, when you submit either form to your local Reclamation office for review, the form must contain your original signature as the applicant.

#### § 429.12 Where do I file my application?

File your completed and signed application, including the \$100 nonrefundable application fee, with the Reclamation office having jurisdiction over the land, facility, or waterbody

associated with your request.

Reclamation office locations may be found on <http://www.usbr.gov>, the official Reclamation Internet Web site.

#### § 429.13 How long will the application review process take?

(a) Reclamation will acknowledge in writing your completed and signed application and application fee within 30 calendar days of receipt. Reclamation may request additional information needed to process your application, such as legal land descriptions and detailed construction specifications.

(b) The processing time depends upon the complexity of your requested use, issues associated with it, and the need for additional information from you.

(c) Should your requested use be denied at any time during the review process, Reclamation will notify you in writing of the basis for the denial.

#### § 429.14 What criteria will Reclamation consider when reviewing applications?

Reclamation will consider the following criteria when reviewing applications:

- (a) Compatibility with authorized project purposes, project operations, safety, and security;
- (b) Environmental compliance;
- (c) Compatibility with public interests;
- (d) Conflicts with Federal policies and initiatives;
- (e) Public health and safety;
- (f) Availability of other reasonable alternatives; and
- (g) Best interests of the United States.

#### § 429.15 Is Reclamation required to issue a use authorization?

No. The issuance of a use authorization is at Reclamation's discretion. At a minimum, the criteria listed at § 429.14 must be considered prior to issuance of any use authorizations. Not all requests will be authorized. If issued, Reclamation will provide only the least estate, right, or possessory interest needed to accommodate the approved use.

### Subpart D—Application Fees and Administrative Costs

#### § 429.16 How much is the application fee and when should it be paid?

You must remit a nonrefundable application fee of \$100 to cover costs associated with our initial review of your application, unless the payment is waived pursuant to subpart F of this part. This initial review will determine if your requested use is appropriate for consideration and not likely to interfere with Reclamation project purposes or operations.

**§ 429.17 When will Reclamation collect administrative costs?**

Reclamation will collect, in advance, its administrative costs for processing your application, except as provided under subpart F of this part.

**§ 429.18 When do I have to pay the administrative costs?**

(a) Following the initial review, you will be notified in writing whether your application appears to be appropriate for further processing. At that time, Reclamation will give you an initial estimate of administrative costs required to continue processing your application.

(b) You must pay these initial, estimated administrative costs before Reclamation can continue to process your application, unless you are granted a waiver of administrative costs under subpart F of this part. If payment is not received within 90 days after the estimate is provided to you, Reclamation may close your file. If this occurs and you later wish to proceed, you must submit both a new application and another \$100 nonrefundable application fee.

**§ 429.19 What happens if the initial estimate for administrative costs is insufficient?**

If the initial estimate to cover Reclamation's administrative costs is found to be insufficient, Reclamation will notify you in writing of the additional amount needed. You must pay the amount requested before Reclamation will continue processing your application.

**§ 429.20 Can I get a detailed explanation of the administrative costs?**

Yes, you are entitled to receive an explanation of all administrative costs relevant to your specific application.

You must request this information in writing from the Reclamation office where you submitted your application.

**§ 429.21 If I overpay Reclamation's administrative costs, can I get a refund?**

If, in reviewing your application, Reclamation uses all the monies you have paid, you will not receive a refund regardless of whether you receive a use authorization. If the money collected from you exceeds administrative costs, a refund of the excess amount will be made to you consistent with Reclamation's financial policies.

**§ 429.22 Can Reclamation charge me additional administrative costs after I receive a use authorization?**

(a) After you receive your use authorization, Reclamation may charge you for additional administrative costs incurred for activities such as:

- (1) Monitoring your authorized use over time to ensure compliance with the terms and conditions of your use authorization; and
- (2) Periodic analysis of your long-term use to adjust your use fee to reflect current conditions.

(b) If your additional payment is not received by Reclamation within 90 days after notification to you in writing of the additional administrative costs, Reclamation may take action to terminate your use authorization.

**Subpart E—Use Fees**

**§ 429.23 How does Reclamation determine use fees?**

The use fee is based on a valuation or by competitive bidding. Use fees may be adjusted as deemed appropriate by Reclamation to reflect current conditions, as provided in the use authorization.

**§ 429.24 When should I pay my use fee?**

(a) If Reclamation offers you a use authorization, you must pay the use fee in advance, unless you are granted a waiver under subpart F of this part.

(b) Your use authorization will clearly state the use fee. Should periodic payments apply, your use authorization will also describe when you should pay those periodic use fees.

**§ 429.25 How long do I have to submit my payment for the use fee and accept the offered use authorization?**

You have 90 days to accept and return the use authorization and required fees, otherwise Reclamation may consider the offer to be rejected by you and your file may be closed. If this occurs and you later wish to proceed, you must submit a new application and another \$100 nonrefundable application fee. You may not commence your use of Reclamation's land, facilities, or waterbodies until Reclamation has issued a use authorization to you. A use authorization will only be issued upon receipt by Reclamation of all required costs and fees, and the use authorization signed by you.

**Subpart F—Reductions or Waivers of Application Fees, Administrative Costs, and Use Fees**

**§ 429.26 When may Reclamation reduce or waive costs or fees?**

(a) As determined appropriate and approved and documented by the applicable Regional Director, the application fees may be waived, and charges for administrative costs or use fees may be waived or reduced as indicated by a ✓ in the following table:

Situations where costs and fees may be reduced or waived	Application fee	Administrative costs	Use fee
(1) The use is a courtesy to a foreign government or if comparable fees are set on a reciprocal basis with a foreign government .....	✓	✓	✓
(2) The use is so minor or short term that the cost of collecting fees is equal to or greater than the value of the use .....	✓	✓	✓
(3) The use will benefit the general public with no specific entity or group of beneficiaries readily identifiable .....	✓	✓	✓
(4) Applicant is a public entity or Indian tribe .....	✓	✓	✓
(5) Applicant is a non-profit or educational entity and the use provides a general public benefit .....	✓	✓	✓
(6) Applicant is a rural electric association or municipal utility or cooperative .....	✓	✓	✓
(7) The use directly supports United States' programs or projects .....	✓	✓	✓
(8) The use secures a reciprocal land use of equal or greater value to the United States .....	✓	✓	✓
(9) Applicant for a consent document is the underlying owner of the property subject to Reclamation's easement .....	✓	✓	(1)
(10) The use is issued under competitive bidding .....	✓	✓	(2)

<sup>1</sup> Not applicable.

<sup>2</sup> Set by Bid.

(b) When a statute, executive order, or court order authorizes the use and requires specific treatment of administrative cost recovery and collection of use fees associated with that use, that requirement will be followed by Reclamation.

#### **Subpart G—Terms and Conditions of Use Authorizations**

##### **§ 429.27 What general information appears in use authorizations?**

Each use authorization will contain:

- (a) An adequate description of the land, facilities, or waterbodies where the use will occur;
- (b) A description of the specific use being authorized together with applicable restrictions or conditions that must be adhered to;
- (c) The conditions under which the use authorization may be renewed, terminated, amended, assigned or transferred, and/or have the use fee adjusted; and
- (d) Primary points of contact and other terms and conditions.

##### **§ 429.28 What terms and conditions apply to all use authorizations?**

(a) By accepting a use authorization under this part, you agree to comply with and be bound by the following terms and conditions during all construction, operation, maintenance, use, and termination activities:

(1) The grantee agrees to indemnify the United States for, and hold the United States and all of its representatives harmless from, all damages resulting from suits, actions, or claims of any character brought on account of any injury to any person or property arising out of any act, omission, neglect, or misconduct in the manner or method of performing any construction, care, operation, maintenance, supervision, examination, inspection, or other activities of the grantee.

(2) The United States, acting through Reclamation, Department of the Interior, reserves rights to construct, operate, and maintain public works now or hereafter authorized by the Congress without liability for termination of the use authorization or other damage to the grantee's activities or facilities.

(3) Reclamation may, at any time and at no cost or liability to the United States, terminate any use authorization in the event of a natural disaster, a national emergency, a need arising from security requirements, or an immediate and overriding threat to public health and safety.

(4) Reclamation may, at any time and at no cost or liability to the United

States, terminate any use authorization for activities other than existing authorized private exclusive recreational or residential use as defined under § 429.2 if Reclamation determines that any of the following apply:

(i) The use has become incompatible with authorized project purposes, project operations, safety, and security;

(ii) A higher public use is identified through a public process described at § 429.32(a)(1); or

(iii) Termination is necessary for operational needs of the project.

(5) Reclamation may, at any time and at no cost or liability to the United States, terminate any use authorization if Reclamation determines that the grantee has failed to use the use authorization for its intended purpose. Further, failure to construct within the timeframe specified in the terms of the use authorization may constitute a presumption of abandonment of the requested use and cause termination of the use authorization.

(6) Reclamation may, at any time and at no cost or liability to the United States, terminate any use authorization if the grantee fails to comply with all applicable Federal, State, and local laws, regulations, ordinances, or terms and conditions of any use authorization, or to obtain any required permits or authorizations.

(b) The Regional Director may, upon advice of the Solicitor, modify these terms and conditions with respect to the contents of the use authorization to meet local and special conditions.

##### **§ 429.29 What other terms and conditions may be included in my use authorization?**

Reclamation may include additional terms, conditions, or requirements that address environmental law compliance, the protection of cultural and natural resources, other interests of the United States, and local laws and regulations.

##### **§ 429.30 May use authorizations be transferred or assigned to others?**

Your use authorization may not be transferred or assigned to others without prior written approval of Reclamation, unless specifically provided for in your use authorization or as provided under subpart H of this part for existing private exclusive recreational and residential uses. Should you wish to transfer or assign your use authorization to another individual or entity, you must contact the Reclamation office that issued your use authorization prior to taking such action.

#### **Subpart H—Prohibited and Unauthorized Uses of Reclamation Land, Facilities, and Waterbodies**

##### **§ 429.31 What uses are prohibited on Reclamation land, facilities, and waterbodies?**

(a) Reclamation prohibits any use that would not comply with part 423 of this chapter.

(b) Reclamation prohibits any use that would result in new private exclusive recreational or residential use of Reclamation land, facilities, or waterbodies as of the effective date of this part. Improvements that are within the terms and conditions of an existing authorization will not be considered new private exclusive recreational or residential use.

##### **§ 429.32 How will Reclamation address currently authorized existing private exclusive recreational or residential uses?**

The administration and potential renewal of use authorizations, existing as of January 1, 2008, for private exclusive recreational or residential uses of Reclamation land, facilities, and waterbodies, as defined in this part, will be administered in accordance with the following requirements.

(a) Existing private exclusive recreational or residential uses must be compatible with public needs and with authorized project purposes, project operations, safety, and security. A review of whether existing private exclusive recreational or residential uses is compatible with public needs and authorized project purposes, project operations, safety, and security will be made at least once every 20 years, except where part 21 requires a more frequent review.

(1) Reclamation will only make final determinations regarding the compatibility of existing private exclusive recreational or residential uses with public needs or project purposes through a public process involving one or more public meetings. Examples of such public processes include resource management plan development, recreation demand analysis studies, and project feasibility studies.

(2) Reclamation will notify in writing all potentially affected holders of existing authorizations for private exclusive recreational or residential use regarding the opportunities for public participation when any action is proposed that could lead to an incompatibility determination.

(3) Determinations that existing private exclusive recreational or residential uses are not compatible with public needs will be published in the **Federal Register**.

(4) If a determination of incompatibility with public needs is made, affected use authorizations may be extended up to 5 years from the date of publication in the **Federal Register**, if the Regional Director determines that such extension is necessary to the fair and efficient administration of this part.

(b) Reclamation will conduct a compliance review of all existing private exclusive recreational or residential uses at least once every 5 years to determine if the following criteria are being met:

(1) Environmental requirements;  
(2) Public health and safety requirements; and  
(3) Current in financial obligations to Reclamation.

(c) Reclamation will provide the holder of the use authorization with a written report of the results of the compliance review by certified mail, return receipt requested. The report will state whether the existing use meets the required criteria listed in paragraph (b) of this section and will list any deficiencies that can be corrected. A minimum of 90 days will be provided to make corrections identified in the report. Failure to correct the deficiencies within the time provided in the report will result in termination of the use authorization.

(d) In addition to the compliance reviews described above, Reclamation will initiate a review of the existing private exclusive recreational or residential uses for compliance with the required criteria listed in paragraph (b) of this section at least 6 months prior to the expiration date of the existing use authorization. Reclamation will provide the holder of the use authorization with a written report of the results of the compliance review results by certified mail, return receipt requested. The report will state whether the existing use meets the required criteria under this section as applicable and will list any deficiencies that must be corrected prior to a renewal of the use authorization. A minimum of 90 days will be provided prior to the expiration of the permit to make corrections identified in the report. In addition, this report will serve as a reminder that it is time to seek renewal of the use authorization and provide information on the process that needs to be followed.

(e) Reclamation must be notified in advance by certified mail, return receipt requested, of any transfers of use authorizations for existing private exclusive recreational or residential uses.

(f) Any renewal of use authorizations for existing private exclusive

recreational or residential uses of Reclamation land, facilities, and waterbodies will not exceed 20-year terms. Any such renewals will be subject to the periodic reviews described in paragraphs (a) and (b) of this section and these reviews could potentially result in the termination of the use agreement prior to the end of the term of years.

(g) Upon non-renewal or termination of a use authorization for an existing private exclusive recreational or residential use of Reclamation land, facilities, and waterbodies, the grantee will remove any improvements from the site within 90 days from the date of termination or non-renewal of the use authorization. The grantee will return the property as near as possible to its original undisturbed condition. Any property not removed within 90 days may be removed by Reclamation at the expense of the prior grantee.

(h) Renewal decisions of use authorizations for existing private exclusive recreational or residential uses located on Reclamation land, facilities, and waterbodies will be made by the Regional Director. If the Regional Director determines that deficiencies identified under paragraph (d) of this section cannot be corrected prior to the expiration date of the use authorization, the use authorization may be extended for a period not to exceed 6 months.

(i) Requests for the renewal, extension, or reissuance of use authorizations for private exclusive recreational or residential uses that expired and were not renewed prior to the effective date of this part and were not renewed or are subsequently not renewed or terminated under the procedures of this section will be considered requests for uses prohibited under § 429.31 and will not be approved. Conversely, requests for the renewal, extension, or reissuance of use authorizations for private exclusive recreational or residential uses that were in existence on the effective date of these regulations and that are in compliance with all requirements of the applicable use authorization at the time a request is made will not be considered requests for uses prohibited under § 429.31. Requests for renewal, extension, or reissuance of use authorizations for private exclusive recreational or residential uses must be made by submitting Form 7-2540 as stated under § 429.10(b) and in compliance with subpart D of this part.

(j) Unauthorized existing private exclusive recreational or residential uses will be administered under §§ 429.31 and 429.33 and part 423 of this chapter.

#### § 429.33 What are the consequences for using Reclamation land, facilities, and waterbodies without authorization?

(a) Reclamation may seek to collect the following:

(1) All administrative costs incurred by Reclamation in resolving the unauthorized use;

(2) All costs of removing structures, materials, improvements, or any other real or personal property;

(3) All costs of rehabilitation of the land, facilities, or waterbodies as required by Reclamation.

(4) The use fee that would have applied had your use been authorized from the date your unauthorized use began;

(5) Interest accrued on the use fee from the date your unauthorized use began as specified in paragraph (a)(4) of this section; and

(6) The interest charge rate shall be the greater of either the rate prescribed quarterly in the **Federal Register** by the Department of the Treasury for application to overdue payments or the interest rate of 0.5 percent per month. The interest charge rate will be determined as of the due date and remain fixed for the duration of the delinquent period.

(b) As an unauthorized user, you will receive a written notice in which Reclamation will outline the steps you need to perform to cease your unauthorized use.

(c) If appropriate, you will receive a final determination letter detailing the applicable costs and fees, as set forth under paragraph (a) of this section, which must be paid to Reclamation for your unauthorized use. Payment must be made within 30 days of receipt of this letter unless Reclamation extends this deadline in writing. Failure to make timely payment may result in administrative or legal action being taken against you.

(d) Reclamation may determine that issuing a use authorization to you for an existing unauthorized use is not appropriate; and may deny future use applications by you because of this behavior. As noted at § 429.15, use authorizations are always issued at Reclamation's discretion.

(e) If, however, your unauthorized use is deemed by Reclamation to be an unintentional mistake, consideration may be given to issuing a use authorization provided that you qualify and meet the criteria at § 429.14; and, in addition to the normal costs, you agree to pay the following:

(1) The use fee that would have been owed from the date your unauthorized use began; and

(2) Interest accrued on the use fee from the date your unauthorized use began as specified in paragraph (f)(1) of this section.

(f) Under no circumstances will your unauthorized use or payment of monies to the United States in association with an unauthorized use either:

(1) Create any legal interest or color of title against the United States; or

(2) Establish any right or preference to continue the unauthorized use.

(g) Under part 423 of this chapter, unauthorized use of Reclamation land, facilities, or waterbodies is a trespass against the United States. You may be subject to legal action including criminal prosecution as specified under § 423.71.

### Subpart I—Decisions and Appeals

#### § 429.34 Who is the decisionmaker for Reclamation's final determinations?

(a) The appropriate Regional Director, or the Regional Director's designee, makes any final determination associated with an action taken under this rule and will send that final determination in writing to you by mail.

(b) The Regional Director's final determination will take effect upon the date of the final determination letter.

#### § 429.35 May I appeal Reclamation's final determination?

(a) Yes, if you are directly affected by a final determination, you may appeal by writing to the Commissioner within 30 calendar days after the postmark date of the Regional Director's determination letter.

(b) You have an additional 30 calendar days after the postmark of your written appeal to the Commissioner within which to submit any additional supporting information.

(c) The Regional Director's final determination will remain in effect until the Commissioner has reviewed your appeal and provided you with that decision, unless you specifically request a stay and a stay is granted by the Commissioner.

#### § 429.36 May I appeal the Commissioner's decision?

(a) Yes, you may appeal the Commissioner's decision by writing to the Director, Office of Hearing and Appeals (OHA), U.S. Department of the

Interior, 801 North Quincy Street, Arlington, Virginia 22203.

(b) For an appeal to be timely, OHA must receive your appeal within 30 calendar days from the date of mailing of the Commissioner's decision. Rules that govern appeals to OHA are found at part 4, subparts B and G, of this title.

(c) Notwithstanding the provisions of § 4.21(a) of this title, the Commissioner's decision will take effect upon issuance and remain in effect unless you specifically request a stay and a stay is granted under § 4.21(b) of this title.

#### § 429.37 Does interest accrue on monies owed to the United States during my appeal process?

Except for any period in the appeal process during which a stay is then in effect, interest on any nonpayment or underpayment, as provided in § 429.33(a), continues to accrue during an appeal of a Regional Director's final determination, an appeal of the Commissioner's decision to OHA, or during judicial review of final agency action.

[FR Doc. E8-28740 Filed 12-4-08; 8:45 am]

BILLING CODE 4310-MN-P