



DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 8

[Docket No. DOI-2024-0017]

[256D0102DM, DS6CS00000, DLSN00000.000000, DX6CS25]

RIN 1093-AA29

Joint Policies of the Departments of the Interior and of the Army Relative to Reservoir Project Lands

AGENCY: Office of the Secretary, Interior.

ACTION: Direct final rule.

SUMMARY: We, the Department of the Interior (DOI), are revising regulations that govern DOI's internal real property acquisition policies for reservoir lands. This direct final rule adds a section to allow deviations for the acquisition of less than fee title realty interests in and around reservoirs owned by DOI and typically only those constructed before 1962, a relatively infrequent occurrence.

DATES: This direct final rule is effective [INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] without further action, unless significant adverse comment is received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If significant adverse comment is received, we will publish a timely withdrawal of the rule in the *Federal Register*.

ADDRESSES: You may submit comments by one of the following methods:

- Electronically: Go to the Federal eRulemaking Portal: <https://www.regulations.gov> and search for Docket Number DOI-2024-0017. Follow the instructions for submitting comments.

- By hard copy: Submit by U.S. mail to U.S. Department of the Interior, Office of the Solicitor, 960 South Broadway, Suite 400, Boise, ID 83706, Attention: Jeremiah Williamson.

See Public Comments under **SUPPLEMENTARY INFORMATION** for more information about submitting comments.

FOR FURTHER INFORMATION CONTACT: Jeremiah Williamson, Senior Attorney, jeremiah.williamson@sol.doi.gov, (208) 334-1915. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Purpose of Direct Final Rule and Next Steps

The purpose of this direct final rule is to revise 43 CFR part 8 by adding section 8.7, Interior Deviations, which solely establishes internal DOI policy for acquisition of certain reservoir realty interests. This revision is only a change in internal policy for a particular and relatively infrequent circumstance; namely, the acquisition of interests in realty in and around reservoirs owned by Interior and typically only those constructed before February 21, 1962, when the policies in 43 CFR part 8 first took effect. It allows future DOI acquisitions to be consistent with historical acquisition practices on existing reservoirs that differed from the policies in 43 CFR part 8.

We are publishing this rule without a prior proposal because this is a noncontroversial action relating to agency management that, in the best interest of the public, should be undertaken as quickly as possible. This rule will be effective, as published in this document, on the effective date specified above in the **DATES** section of this document, unless we receive significant adverse comments on or before the comment due date specified above in **DATES**. Significant adverse comments are comments that provide strong justification as to

why our rule should not be adopted or why it should be changed.

If we receive significant adverse comments, we will publish a document in the *Federal Register* withdrawing this rule before the effective date, and we will determine whether to engage in the normal rulemaking process to promulgate changes to 43 CFR part 8.

Public Comments

You may submit your comments regarding this direct final rule by one of the methods listed in **ADDRESSES**. Please include sufficient information with your comments that allows us to verify information you include. We will not consider comments sent by email or fax, or to an address not listed in **ADDRESSES**. We will not consider hand-delivered comments, or mailed comments that are not postmarked by the date specified in **DATES**.

We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us. Before including your address, phone number, email address, or other personal information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comments we receive will be available for public inspection on the internet at <http://www.regulations.gov>. Please note that comments posted to <https://www.regulations.gov> are not immediately viewable. When you submit a comment, the system receives it immediately. However, the comment will not be publicly viewable until we post it, which might not occur until several days after submission.

Background

In 1962, DOI and the Department of the Army (Army) published in the *Federal Register* a joint policy requiring each Department to obtain fee simple title to lands acquired for reservoir inundation, specifically those lands “below the maximum

flowage line of the reservoir.” The policy did not permit exceptions for lands lying within the “storage pool” of the reservoir. Four years later, DOI and Army promulgated a direct final rule (31 FR 9108, July 2, 1966) to codify this policy at 43 CFR part 8, *Joint Policies of the Departments of the Interior and of the Army Relative to Reservoir Project Lands*. Not long thereafter, in 1969, the Government Accounting Office, now known as the Government Accountability Office, published a report criticizing the policy, finding it had resulted in excessive Federal expenditures on unnecessary realty acquisitions; specifically acquisitions of fee simple title when “less costly flowage easements would have sufficed.” Elmer B. Staats, *Report to the Congress: Review of Policies and Practices for Acquiring Land for Reservoir Projects*, Government Accounting Office (Feb. 3, 1969), <https://www.gao.gov/assets/b-118634-087811.pdf>.

On January 15, 1979, the U.S. Army Corps of Engineers (Army Corps) promulgated a direct final rule at 32 CFR 644.4(b) (44 FR 3168) to revise Army’s policy and treat the 43 CFR part 8 rule only as “guidelines.” In 2018, Congress directed the Army Corps to “first consider the minimum interest in real property necessary to support the water resources development project for which such interest is acquired,” including “a temporary easement or other interest designed to reduce the overall cost of the water resources development project for which such interest is acquired, reduce the time to complete such project, and minimize conflict with property owners related to such project.” 33 U.S.C. 598a. The Army Corps’ Real Estate Handbook also treats the 43 CFR part 8 rule as guidelines and not mandatory. U.S. Army Corps of Engineers, Real Estate Handbook Ch. 12, sections 12-5, 12-9, and 12-12.

This direct final rule formalizes similar policy for DOI. This rule will allow DOI greater flexibility in its acquisition of realty interests for reservoir lands to account for site-specific circumstances that can warrant utilization of flowage easements, rather than fee simple title, where DOI determines it is in the best interests of the United States. Such site-specific circumstances can include, for example, new acquisition of realty

interests in parcels on which DOI had previously acquired a less than fee title interest, such as a flowage easement. It will also allow for more consistency in Federal acquisition of reservoir lands. This flexibility is expected to accomplish similar goals that Congress sought for the Army Corps: namely, reductions in the cost and time to complete water resources development projects and minimization of conflicts with property owners.

Compliance with Other Laws, Executive Orders, and Department Policy

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866, as amended by Executive Order 14094, provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. Executive Order 13563 also directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act

This rule will not have a significant regulatory effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because it only governs internal DOI policy for acquisition of reservoir lands.

Congressional Review Act

The Congressional Review Act (CRA) defines a rule as major if it meets any of three criteria. The three criteria are:

(a) Does the rule have an annual effect on the economy of \$100 million or more?

(b) Will the rule cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions?

(c) Does the rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises?

This rule will not cause any of the aforementioned effects and thus is not a major rule under the CRA.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$200 million per year. This rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630)

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. This rule is not a government action capable of interfering with constitutionally protected property rights. A takings implication assessment is not required.

Federalism (Executive Order 13132)

Under the criteria in Section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. It does not have a substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the levels of government. A federalism summary impact statement is

not required.

Civil Justice Reform (Executive Order 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) 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

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

Consultation with Indian Tribes (Executive Order 13175)

The DOI strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under DOI's consultation policy and under the criteria in Executive Order 13175 and have concluded it will have no substantial direct effects on any federally recognized Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, and that consultation is not required. Because, however, the rule will have the indirect effect of allowing the Cle Elum pool raise project in central Washington to proceed as planned, the Department has consulted informally with the Yakama Nation, whose views DOI has fully considered in this rule. No other potential indirect effects to any federally recognized Indian Tribes have been identified.

Paperwork Reduction Act of 1995

This rule does not contain information collection requirements and does not require a submission to the Office of Management and Budget under the Paperwork Reduction Act.

National Environmental Policy Act

This rule is categorically excluded from National Environmental Policy Act of 1969 (NEPA) under the DOI categorical exclusion codified at 43 CFR 46.210(i), which applies to

“Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively, or case-by-case.” This rule establishes internal policy on DOI’s reservoir realty acquisitions. The policy is administrative (how DOI chooses to own real property), financial (how much DOI expends for real property), and legal (how different property interests serve legal needs on individual reservoir projects). The type of realty interest DOI owns for reservoir inundation will not alter the effects resulting from inundation, which are subject to project specific NEPA analysis. While this rule could theoretically have negligible causally removed socioeconomic effects related to different opportunities available to owners of inundated parcels subject to flowage easements versus landowners who have relinquished title in a fee simple acquisition, any such potential effects are so intertwined with site specific conditions as to be too broad, speculative, and conjectural to support meaningful analysis. Those effects, if any, would be considered in project specific NEPA analysis in situations where this rule could apply.

Effects on the Energy Supply (Executive Order 13211)

This rule is not a significant energy action under the definition in Executive Order 13211 and does not require a Statement of Energy Effects.

List of Subjects in 43 CFR Part 8

Reservoir project lands, Acquisition of easements.

Promulgation of Direct Final Rule

For the reasons stated in the preamble, DOI is amending part 8 of title 43 of the CFR as set forth below:

PART 8 – JOINT POLICIES OF THE DEPARTMENTS OF THE INTERIOR AND OF THE ARMY RELATIVE TO RESERVOIR PROJECT LANDS

1. The authority citation for part 8 continues to read as follows:

Authority: Sec. 7, 32 Stat. 389; sec. 14, 53 Stat. 1197; 43 U.S.C. 421, 389.

2. Add § 8.7 to read as follows:

§ 8.7 Interior deviations.

On Department of the Interior projects, a bureau director or secretarial officer may authorize acquisition of easements in lieu of fee title to property to allow reservoir inundation of lands if the acquisition meets a combined total of at least five conditions listed in § 8.3 and in this section:

(a) The reservoir was originally constructed before February 21, 1962.

(b) The current reservoir has utilized more than de minimis acquisition of easements for inundation.

(c) The acquisition of less than fee title is in the best interests of the United States.

Joan M. Mooney,
Principal Deputy Assistant Secretary
Exercising the Delegated Authority of the Assistant Secretary – Policy, Management, and Budget

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