

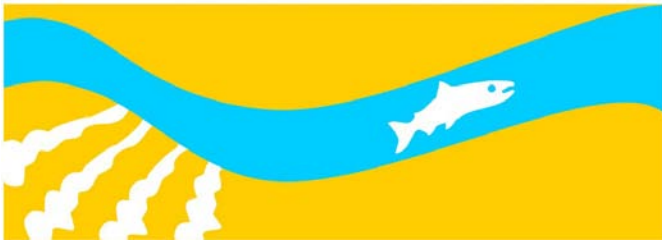
RECLAMATION

Managing Water in the West

Part III Guidelines

**Guidelines for the Application of Criteria for
Financial Assistance for Local Projects
under Part III of Title X, Subtitle A of Public Law 111-11**

**SAN JOAQUIN RIVER
RESTORATION PROGRAM**



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Appendix A: Public Law 111-11, Title X, Subtitle A, Part III, Section 10202, Omnibus Public Land Management Act of 2009, Water Settlements, San Joaquin River Restoration Settlement, Friant Division Improvements, Financial Assistance for Local Projects

Appendix B: Reclamation Manual, Directives and Standards (ACM 01-01)

Appendix C: Government Accountability Office (GAO) Redbook, Chapter 10, “Federal Assistance: Grants and Cooperative Agreements,” Section 2, “Pre-Award Costs (Retroactive Funding)”

Appendix D: OMB Circular A-87, 2-CFR Part 225 (Page 51920 of Federal Register Vol. 70, No. 168)

List of Abbreviations and Acronyms

CCR	Central Contractor Registration
CEQ	Council on Environmental Quality
CEQA	California Environmental Quality Act
CFR	Code of Federal Regulations
CPA	Certified Public Accountant
CVP	Central Valley Project
CWA	Clean Water Act
DFG	California Department of Fish and Game
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FOA	Funding Opportunity Announcement
FONSI	Finding of No Significant Impact
FWCA	Fish and Wildlife Coordination Act
GAO	Government Accountability Office
NHPA	National Historic Preservation Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NPDES	National Pollution Discharge Elimination System
O&M	Operations and Maintenance
OMB	Office of Management and Budget
P&G	Economic and Environmental Principles and Guidelines for Water and Related Land Resource Implementation Studies
Part III	Part III of Title X, Subtitle A of Public Law 111-11
Reclamation	U.S. Department of the Interior, Bureau of Reclamation
ROD	Record of Decision
RWA	Recovered Water Account
Secretary	Secretary of the Interior
Settlement	Stipulation of Settlement in <i>NRDC, et al., v. Kirk Rodgers, et al.</i>
SJRRP	San Joaquin River Restoration Program
USFWS	U.S. Fish and Wildlife Service

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1.0 Introduction

The San Joaquin River Restoration Settlement Act (Public Law 111-11) directs the Secretary of the Interior (Secretary), acting pursuant to the Reclamation Act of 1902, as amended, to implement the Stipulation of Settlement (Settlement), dated September 13, 2006, in the litigation entitled *Natural Resources Defense Council, et al. v. Kirk Rodgers, et al.*, U.S. District Court, Eastern District of California, No. CIV.S-88-1658-LKK/GGH. The Settlement identifies a Water Management Goal “to reduce or avoid adverse water supply impacts to all of the Friant Division long-term contractors that may result from the Interim Flows and Restoration Flows.” Part III of Title X, Subtitle A of Public Law 111-11 (Part III, refer to **Appendix A**) authorizes the U.S. Department of the Interior, Bureau of Reclamation (Reclamation), to provide financial assistance to local agencies within the Central Valley Project (CVP) of California for the planning, design, environmental compliance, and construction of local facilities to bank water underground or to recharge groundwater to reduce, avoid, or offset the quantity of expected water supply impacts to Friant Division long-term contractors caused by the Interim and Restoration flows authorized by Public Law 111-11.

This document provides guidelines for obtaining Federal financial assistance for Friant Division groundwater recharge and/or banking projects as authorized by Part III. Consistent with statutory requirements of Part III, Office of Management and Budget (OMB) Cost Principles, Administrative and Audit Requirements and Cost Principles for Assistance Programs (43 Code of Federal Regulations (CFR) Part 12), and Reclamation policy, the Guidelines address the contents of a complete Project Report and cost-share agreement. The process for obtaining funding under Part III will generally follow the path outlined below.

Reclamation will make a Funding Opportunity Announcement (FOA) available on www.grants.gov in preparation for the availability of funds to implement Part III. Registration in the Central Contractor Registration (CCR) database will be required to apply for the Part III financial assistance.

Part III funding will be allocated in accordance with the Reclamation Manual, Directives and Standards (ACM 01-01) (refer to **Appendix B**), which states:

Reclamation awards financial assistance agreements based on merit and in accordance with the law. Consistent with 31 U.S.C. 6301, and 505 DM 2.13, Reclamation strongly encourages competition in the award of financial assistance. Per the requirements of 505 DM 2.14, the determination to “single-source without engaging in competition must be able to withstand scrutiny, should protect the public interest, and should comport with management priorities, objectives and statutory requirements.”

1.0 Introduction

The Reclamation Manual, Directives and Standards require that competition in the selection and award of financial assistance include a full and open announcement, impartial review and evaluation, and selection following the review. This full and open, competitive application process that results in the highest ranking projects being funded is imperative to ensure Part III funding results in the greatest public benefit. Proposals will be ranked in part based on their demonstrated ability to provide for broad benefits in the affected area and equitability among Friant Division long-term contractors experiencing water supply impacts.

Project sponsors will submit applications in response to the FOA, including Project Reports and cost breakdowns as described herein, requesting financial cost-share assistance for construction activities and eligible planning, design, and environmental compliance activities. Reclamation will conduct an impartial review and evaluation of each proposal, and rank the applications based on eligibility standards and evaluation criteria in the FOA. Each FOA will define the actual criteria used for these purposes. Reclamation will work to negotiate cost-share agreements with project sponsors of applications receiving the highest rankings. Reclamation anticipates making awards to successful sponsors following the availability of funds to implement Part III.

Part III funding is authorized for the planning, design, environmental compliance, and construction of local facilities to bank water underground or recharge groundwater and recover such water. Costs incurred prior to the execution of a cost-share agreement by Reclamation will be eligible as part of the non-Federal cost share provided they meet requirements in Public-Law 111-11, OMB Cost Principles, and Reclamation policy. The Government Accountability Office (GAO) Redbook, Chapter 10, “Federal Assistance: Grants and Cooperative Agreements,” Section 2, “Pre-Award Costs (Retroactive Funding)” (refer to **Appendix C**) identifies allowable pre-award costs based on date of incurrence. Eligible pre-award planning, design, and environmental compliance costs must have been incurred after Public Law 111-11 was enacted on March 30, 2009. Proposal costs incurred while putting together the application and associated documentation are eligible under OMB Circular A-87, 2-CFR Part 225 (refer to **Appendix D**). For any pre-award costs, project sponsors must demonstrate that costs would not have been incurred otherwise, and that costs are reasonable such that they do not diminish the public benefit from Federal funds and further the statutory purpose of Public Law 111-11. Pre-award costs should be identified in the detailed budget estimate that is part of the initial application. During pre-award clarifications with project sponsors, Reclamation will determine whether pre-award costs listed in the initial application meet these criteria.

2.0 Project Report

2.1 Requirements

Part III of Public Law 111-11 requires appropriate planning, design, and environmental compliance activities associated with a proposed project in order to be eligible for Federal financial assistance. To satisfy this requirement, the project sponsor will prepare a Project Report in accordance with the FOA. Reclamation will evaluate proposed projects based on the information provided in the Project Report.

The Project Report must include: a statement of the problem and need, groundwater recharge and/or banking opportunities, a description of project alternative(s), consistency with selection considerations, an economic analysis, cost-share/Recovered Water Account (RWA) reduction determination, an environmental analysis, legal and institutional requirements, and financial capability to implement the project. The Project Report should emphasize the public benefit resulting from Federal financial assistance to the project sponsor(s).

If a Project Report has already been completed by a project sponsor in another format, or if the information is available in other reports such as regional studies or growth management plans, the sponsor can prepare an Executive Summary document following the suggested outline and provide references indicating where the supporting information may be found. The supporting information should be provided to Reclamation with the Executive Summary.

2.2 Recommended Project Report Outline

2.2.1 Executive Summary

This can draw on existing reports and studies as described above.

2.2.2 Introduction

Identify the purpose of the study, report preparers, and the non-Federal sponsor(s) of the project.

Describe the study area and provide an area/project map. Define the study area in terms of the service area of the project sponsor(s), the site-specific project area where the water will be recharged and/or banked (if different than the service area of the project sponsor(s)), and in the larger regional, watershed or river basin context.

2.2.3 Problem and Need

Describe the water supply objective of the project sponsor(s) and all key water management problem(s) for which the groundwater recharge and/or banking project may provide a solution. Provide a description of the near- and long-term water demand and

2.0 Project Report

supplies in the study area, including the expected shortages resulting from the implementation of the San Joaquin River Restoration Program (SJRRP). Identify quantities in acre-feet and when such quantities will be needed. Identify the cost to acquire those supplies, if known, and assess the level of certainty associated with those estimates.

2.2.4 Groundwater Recharge/Banking Opportunities

Address the opportunities for groundwater recharge and/or banking in the study area and identify the sources of water available for these purposes. In acre-feet, include quantities that could be recharged and/or recovered.

2.2.5 Description of Project Alternatives

Describe project alternatives, including the proposed project alternative, that were considered to accomplish the water supply objective identified above. The descriptions must contain sufficient information for Reclamation to assess the potential measures and costs that may be necessary to comply with the National Environmental Policy Act (NEPA) and other applicable federal law. The descriptions should make clear how the alternatives were analyzed and on what basis the proposed project alternative was selected. These measures may include structural and/or nonstructural measures such as water conservation. These alternatives may have already been addressed in other reports.

Describe the no action alternative as well as the action that the sponsor would take if Federal funding was not provided for the project. Describe the project sponsor(s)' ability to recharge and recover groundwater without the project.

Provide a map or drawing for each alternative.

Provide a description of each alternative including the physical, institutional, or operational features needed for a fully functioning alternative, and how each alternative would operate. The description must include how each alternative would benefit the public.

Provide an engineering cost estimate and an estimate of the project yield over the life of the project as described in the "Economic Analysis" section of these guidelines.

The following apply to the proposed project alternative only:

- Discuss the dedicated use of, or market for, the groundwater that would be recovered, including the entity recovering the water and/or any contractual commitments for using the groundwater.
- Describe any barriers to the recovery and use of groundwater in the study area and how these barriers would be overcome.
- Discuss how the proposed project alternative would promote or apply a regional or watershed perspective to water resource management or cross-boundary issues. Describe how the Friant Division and/or other Friant Division long-term

contractors may be able to participate and/or share in the benefits from the proposed project. Identify known opportunities to expand, combine, or otherwise link projects of other Friant Division long-term contractors to provide synergistic benefits to the region.

- Describe the nature and magnitude of Federal participation in the proposed project alternative. Quantify the anticipated level of Federal benefit (e.g., quantity of annual project yield available for purchase to address unexpected seepage losses in accordance with the Settlement) and any costs associated with Federal participation.

2.2.6 Consistency with Selection Considerations

The “Selection Considerations” section of these guidelines identifies eligibility criteria that will be used to determine the eligibility of a project sponsor’s application for funding and identifies selection considerations for purposes of evaluating and ranking the project sponsor’s application. Describe how the proposed project meets the eligibility criteria, and provide information on the proposed project to enable an evaluation to be made in accordance with the selection considerations.

2.2.7 Economic Analysis of Alternatives

Present an analysis of the economic feasibility of the project alternatives as described in the “Economic Analysis” section of these guidelines. This analysis will evaluate the cost-effectiveness of the project alternatives.

2.2.8 Recovered Water Account Reduction Determination

Sponsors must propose a method to calculate RWA reduction consistent with the “Project Benefit Methodology” section. The only portion of projects eligible for Federal cost-sharing is that which is designed to provide RWA reduction. This information will support the cost-share agreement, defined in the “Cost-Share Agreement” section.

2.2.9 Environmental Analysis of Alternatives

Provide the environmental information on the project alternatives that Reclamation will need to fulfill its obligations under NEPA. This includes information on the existing environment including social and cultural resources and endangered species; an assessment of the environmental impacts of the proposed project; identification of applicable Federal and State environmental requirements; and mitigation measures where appropriate. Refer to the “National Environmental Policy Act and Other Applicable Federal Environmental Statutes” section of these guidelines for further discussion on this subject.

2.2.10 Legal, Institutional, and Regulatory Requirements

Describe the results of any consultation activities under the Endangered Species Act (ESA), Fish and Wildlife Consultation Act (FWCA), and other applicable Federal and State laws, that have occurred between the non-Federal sponsor and appropriate Federal, State, regional, and local authorities during the study (refer to the “National Environmental Policy Act and Other Applicable Federal Environmental Statutes” section of these guidelines).

2.0 Project Report

Identify the public health and environmental quality issues associated with the proposed project. Include Federal, State, and local public health and environmental regulatory requirements associated with the proposed project and the ability of the project to meet those requirements.

Provide an analysis of the effects of the change of the source water from its current use to the proposed groundwater recharge and/or banking use, including economic and environmental effects, and effects on downstream water rights. Discuss any water right issues and how they would be resolved.

Discuss how the project meets other legal and institutional requirements, if any, such as contractual water supply obligations, Indian trust responsibilities, water rights settlements, regional water quality control boards, county groundwater ordinances, or other requirements not previously addressed.

Discuss known legal and institutional constraints associated with the project that may affect the ability of the project sponsor to implement the project, how the issue(s) would be resolved, and how the project would be affected if the issue(s) is not resolved.

2.2.11 Management and Financial Capability of the Sponsor

Present the proposed schedule and approach for project implementation and the plan for funding the proposed project's construction, operations and maintenance (O&M), and replacement costs, including the non-Federal and other Federal sources of funding.

Document the sponsor's financial capability to fund the non-Federal share of the project costs following the "Management and Financial Capability" section of these guidelines.

2.3 Selection Considerations

2.3.1 Introduction

A project sponsor's application must meet the minimum criteria identified in Part III of Public Law 111-11 to be eligible for Federal financial assistance. Those applications deemed eligible will be evaluated, prioritized, and ranked in accordance with the performance criteria established in the FOA.

2.3.2 Eligibility Criteria

Eligibility for Federal financial assistance will be based on meeting all of the following criteria identified in Part III:

1. Sponsors are local agencies within the CVP.
2. All or a portion of the project benefits must be dedicated to reducing, avoiding or offsetting water supply impacts to Friant Division long-term contractors resulting from the release of Interim Flows or Restoration Flows.

3. Planning, design, and environmental compliance activities have been completed in accordance with the “Project Report” section of these guidelines, or the application requests to cost-share these activities.
4. The proposed Federal cost-share does not exceed 50 percent of the planning, design, and environmental compliance costs and 50 percent of the construction costs.
5. The application provides and/or assists in providing new opportunities for recharge or banking of water underground and/or the recovery of such water, but does not include the purchase of capacity or ownership in existing facilities.
6. The application must be a complete and fully functional unit; capable of providing the stated benefits without the completion of future phases and additional new facilities.

2.3.3 Evaluating, Prioritizing, and Ranking of Applications

Reclamation will evaluate, prioritize, and rank all eligible applications based on the performance criteria established in the FOA. The evaluation process may include pre-award clarifications with project sponsors. The performance criteria established in the FOA could include, but may not be limited to, the criteria listed below.

- **Broadest Benefit:** Applications will be evaluated based on their ability to provide the broadest benefit to the Friant Division service area and the public. Applications that provide water supply benefits for multiple Friant Division long-term contractors will be given higher priority than those applications that benefit only one Friant Division long-term contractor. Priority will be given to applications that provide water in Millerton Lake for the benefit of all Friant Division long-term contractors. The prioritization process will emphasize the equitable distribution of water supply benefits to all Friant Division long-term contractors based on anticipated water supply impacts resulting from the implementation of the SJRRP.
- **RWA Reduction:** Applications will be evaluated based on their effectiveness at reducing the RWA of the project sponsor(s) in relation to the anticipated water supply impacts of each sponsor(s) resulting from the implementation of the SJRRP. Applications that demonstrate a higher RWA reduction potential relative to the anticipated impacts of each sponsor will be given higher priority. The RWA reduction potential of a project will be determined in accordance with the “Project Benefit Methodology” section of these guidelines. It should be noted that this methodology will be incorporated into the cost-share agreement and will be an enforceable component of the funding agreement.
- **Cost Effectiveness:** Applications will be evaluated based on the Federal cost per unit of new yield produced to provide RWA reduction. Applications with the lowest Federal cost per unit of new yield produced to provide RWA reductions will generally be given highest priority. It should be noted that while the

2.0 Project Report

“Economic Analysis” section determines the cost effectiveness of all project alternatives based on total project costs, this section will evaluate the cost effectiveness of the proposed project based on the Federal cost-share portion only. This includes any Federal cost-share funding for planning and environmental compliance and mitigation activities requested by the project sponsor. Therefore, project sponsors requesting less Federal funding per unit of new yield to provide RWA reduction will receive higher priority.

- **Environmental Impacts:** Applications will be evaluated based on the number and extent of identified environmental impacts, as well as the complexity and cost of any mitigation strategies. Applications with fewer and less significant negative environmental impacts will be given higher priority than applications with significant impacts.
- **Legal, Institutional, and Regulatory Constraints:** Examples constraints include: (1) results of consultation activities under applicable Federal and State laws between the non-Federal sponsor and appropriate Federal, State, regional, and local authorities; (2) compatibility with Federal, State, regional, and local environmental and public health regulatory requirements; (3) economic, environmental, and water rights effects of changing the source water from its current use; and (4) other applicable legal, institutional, and regulatory requirements (e.g., contractual water supply obligations, Indian trust responsibilities, water rights settlements, county groundwater ordinances). Applications will be evaluated based on:
 - comprehensive consideration of potential constraints;
 - the number and severity of identified legal, institutional, and regulatory constraints; and,
 - complexity and cost of mitigation strategies.
- **Federal Participation:** To remain eligible for funding, a project sponsor must offer to the Secretary any project capacity in excess of that required to reduce, avoid, and offset water supply impacts resulting from the release of Interim and Restoration flows at a price no higher than the project sponsor’s costs; or offer to the Secretary an expansion of project capacity if feasible. Applications having available capacity for Federal participation, or the ability to expand capacity for Federal participation, will be given higher priority. Projects funded under Part III of Public Law 111-11 will be owned and operated by one or more non-Federal project sponsors. Therefore, Federal participation in a project is expected to be limited to operational agreements with the project sponsor(s), including, but not limited to, agreements to bank water purchased by the Federal government in a project sponsor’s facility or agreements to purchase yield from a project sponsor’s facility.

- **Management and Financial Capability:** Applications will be evaluated on the management and financial capabilities of the project sponsor(s) as determined in accordance with the “Management and Financial Capabilities” section of these guidelines. Applications that provide a complete and robust description of the project sponsor(s)’ past performance with Federal financial assistance and comprehensive and rigorous Implementation and Financial Plans will be given higher priority over applications that demonstrate a poor history of performance and provide vague Implementation and Financial Plans with little detail.

2.4 Economic Analysis

2.4.1 Introduction

Reclamation must demonstrate prudent use of Federal financial resources. A Project Report for a Part III groundwater recharge and/or banking project must include an assessment of the economic feasibility of the proposed project and its alternatives. This assessment must demonstrate the degree to which the groundwater recharge and/or banking project is cost effective.

2.4.2 The Economic Analysis

The basic guidelines for evaluating water development projects at the Federal level are embodied in the Economic and Environmental Principles and Guidelines for Water and Related Land Resource Implementation Studies (P&Gs). However, Part III groundwater recharge and banking projects are locally sponsored projects with Reclamation participation. The local sponsor owns the project and is responsible for O&M; therefore, the projects are not to be construed as Federal projects. Because these projects are not federally built and owned, the P&Gs and the National Economic Development test will not be applied. Rather, the economic analysis described in this section will be used by Reclamation to evaluate the project in comparison to other proposed projects.

Proposed projects and their alternatives will be compared on the cost effectiveness of producing a water supply or reducing water demand such that water supply impacts associated with the SJRRP are reduced, avoided, or offset. While there is a conceptual difference between economic benefit evaluation and cost effectiveness, cost effectiveness is a viable means of evaluating proposed projects, as long as the Part III legislative requirements are addressed. Economic benefits are concerned with additions to the Nation’s output of goods and services and/or improvements in the efficiency of production of those goods and services, whereas cost effectiveness is more typically associated with the comparison of alternatives for producing the intermediate product, in this case the water supply, and is expressed as the cost per unit of water produced (Project Cost/Project Yield).

The project sponsor(s) will provide the primary inputs to the cost effectiveness analysis, including detailed information on project costs and benefits as measured by the yield from the project. These are described in more detail in the sections below.

Project Cost

Provide a construction cost estimate for each project alternative in sufficient detail to permit evaluation and comparison of the alternatives. Construction cost estimates will generally include costs for major structures, facilities, or other types of construction as appropriate for the project. Direct construction costs should be based on quantities and unit prices. Lump-sum estimates should be used only for items of relatively small cost and where developing the estimates are impractical or unnecessarily costly. If the project sponsor is requesting Federal cost sharing for planning, environmental compliance, and design activities, these costs should also be included in the project cost of the alternatives.

Contingency costs are expressly unallowable unless the recipient can demonstrate that costs will be incurred. Allowable contingency costs must have a verifiable basis for a calculated amount. Determination of contingency costs may be supported by analysis of past similar projects.

Indirect costs may be based on agreed upon rates with other government agencies or a federally negotiated agreement. If these are not available, the recipient may use an audit by a qualified Certified Public Accountant (CPA) or other qualified entity who has developed indirect rates. If an audit is used the recipient should provide a letter and other supporting documentation from the CPA which shows the pool cost composition, the composition of the base, and calculations.

Project Yield

Determine the yield, or amount of recoverable supply, of each project alternative over the expected life of the project for the purpose of reducing the RWA. The engineering analysis will use a project life cycle of 30 years and a corresponding period of the hydrologic record. Note: If a proposed project's life-cycle yield exceeds the water supply impacts due to Interim and Restoration flows over the life of the project, the portion of a project's yield above the water supply impacts cannot be included in the cost effectiveness calculation.

2.5 Project Benefit Methodology

2.5.1 Introduction

Part III of Public Law 111-11 requires the development of a method, acceptable to the Secretary, for quantifying the benefit that will result from the proposed project in terms of reducing, avoiding, or offsetting the water supply impacts caused by the release of Interim and Restoration flows. The project benefits quantified under this methodology will justify the portion of a project that a local agency designates as eligible for Federal financial assistance through a cost-share agreement. The project benefits quantified under this methodology will also serve as the basis for the magnitude of reductions to a local agency's RWA resulting from the implementation of projects made possible through Federal financial assistance.

2.5.2 Federal Cost-Share Eligibility

To determine the portion of a proposed project eligible for Federal financial assistance, a project sponsor must demonstrate the project's ability to reduce, avoid, or offset the water supply impacts resulting from the release of Interim and Restoration flows. This can be accomplished by documenting the total expected water supply impacts to the project sponsor(s) and the expected capability of the project to reduce, avoid, or offset these impacts over the life of the project.

The project sponsor(s) must perform a technical analysis to demonstrate the total yield of the project over the life of the project as described in the "Economic Analysis" section of these guidelines. The total project life-cycle yield will be compared with the total expected water supply impacts incurred over the life of the project as determined by the Settlement Model of Deliveries and Releases from Friant Dam. Any portion of a project that provides yield in excess of the total water supply impacts is not eligible for Federal financial assistance.

2.5.3 Recovered Water Account Reductions

Reductions to RWAs resulting from the implementation of projects receiving Federal financial assistance for construction under Part III will be quantified in accordance with a method proposed by the project sponsor(s) in the Project Report and agreed to by Reclamation. The method should be based on actual deliveries of water to any portion of a project that has received Federal cost-share funding and should be initiated upon signing of the cost-share agreement.

2.6 National Environmental Policy Act and Other Applicable Federal Environmental Statutes

2.6.1 Introduction

A Reclamation agreement to provide construction funds for a locally sponsored groundwater recharge and/or banking project is a Federal action to which NEPA applies. NEPA and accompanying Council on Environmental Quality (CEQ) regulations require Reclamation to determine the environmental impacts of its proposed actions before implementing the proposed actions.

The ESA, the FWCA, the National Historic Preservation Act (NHPA), and other environmental statutes, as well as cultural resources, Native American, and environmental justice requirements also apply to such funding agreements. Reclamation must determine, in consultation with the appropriate agencies, whether certain species or other resources will be affected by a specific project.

2.6.2 Policies

Reclamation may execute a cost-share agreement for construction of a groundwater recharge and/or banking project prior to completion of NEPA and other environmental and cultural resource requirements, however, environmental and other associated compliance shall be completed prior to the start of ground disturbing actions related to the project. As such, notwithstanding any other provision of the cost-share agreement,

2.0 Project Report

Reclamation shall not provide any construction funds to the recipient for the project, and the recipient shall not begin implementation of the assisted activity described in the cost-share agreement, unless and until Reclamation provides written notice to the recipient that all applicable environmental and regulatory compliance analyses and clearances have been completed, and the recipient may begin implementation of the assisted activity.

NEPA and other environmental and cultural resource requirements must be complete prior to providing funding for any ground-disturbing activities. If locally funded, ground-disturbing activities of a groundwater recharge and/or banking project are begun by the local project sponsor before these requirements are met, the project sponsor assumes the risk that their action may result in no Federal funding for the project.

2.6.3 NEPA Responsibilities

As the lead Federal agency, Reclamation will review and approve NEPA documents prepared by the project sponsor to ensure all essential information is obtained, and the analysis is adequate to meet NEPA standards. In addition to providing information on other requirements specified in this section, the project sponsor should answer the following questions about the project alternatives, which focus on the requirements of NEPA, the ESA, and the NHPA:

- Will the project alternatives impact the surrounding environment (i.e., soil (dust), air, water (quality and quantity), habitat)? Explain the impacts and any steps that can be taken to minimize the impacts.
- Are there any endangered or threatened species in the project area?
- Are there wetlands inside the project boundaries? Estimate how many acres of wetlands exist, and describe any impact the project alternatives will have on the wetlands.
- If the project alternatives will affect individual features of an irrigation or other conveyance system (e.g., head gates, canals, or flumes), state when those features were constructed and describe the nature and timing of any extensive alterations or modifications to those features.
- Are buildings, structures, or features in the project area listed or eligible for listing on the National Register of Historic Places?
- Are there known archeological sites in the project area?

2.6.4 NEPA Compliance Process

Once it has been established that there is a proposed Federal action, in this case a proposed cost-share agreement for construction, Reclamation's next step is to determine relevant issues and the potential magnitude of environmental impacts. To do this, Reclamation uses one of several tools, depending on the action and the issues involved. These tools range from an Environmental Assessment (EA) leading to a Finding of No Significant Impact (FONSI); an EA leading to a determination of potential significant effects and preparation of an Environmental Impact Statement (EIS); and an EIS with a Record of Decision (ROD). Each involves a different level of effort, time, and resources.

Not all groundwater recharge and/or banking projects will require a full EIS process or substantial public involvement. But at a minimum, an EA should be available to the public for review. Federal funding of groundwater recharge and/or banking project construction does not fit under one of Reclamation's categorical exclusions from the EA/EIS process. Reclamation's NEPA Handbook provides details on this process.

2.6.5 Scope of Alternatives

Reclamation will look at the entire groundwater recharge and/or banking project as proposed, and its alternatives, including no Federal action, rather than just the impact of the Federal funds on the project.

2.6.6 Coordination of NEPA Activities with the Project Report

NEPA activities will be completed after the project sponsor's Project Report is submitted and Reclamation executes cost-share agreements with the highest ranking sponsors. The NEPA process may uncover information on alternatives, potential environmental impacts, or mitigation not identified in the Project Report that could significantly affect project design or construction, operational decisions, or even Federal funding decisions. In such a case, the project sponsor will modify the project to be compliant with NEPA and other environmental statutes.

2.6.7 Other Environmental Statutes

For all other environmental requirements not discussed in this section, Reclamation and the project sponsor will work closely together to identify and comply with the requirements for a proposed project, and to determine who is responsible for each requirement (Reclamation or the project sponsor). Typically, these are all considered as a package within the NEPA process at the planning stage. For some requirements, such as Section 7 ESA consultation, Reclamation is responsible and must take the lead. In some cases, such as obtaining Clean Water Act (CWA), State, or local permits, the project sponsor is responsible.

In a project, these actions may include, but are not limited to:

- Consult under ESA with the U.S. Fish and Wildlife Service (USFWS) or the National Marine Fisheries Service (NMFS) if endangered or threatened species may be affected.
- Consult under the FWCA regarding modifications to a water body that would affect fish and wildlife.
- Identify National Pollution Discharge Elimination System (NPDES) (402), 404, or other permits required under the CWA.
- Identify affected historic sites or cultural resources under the NHPA or other cultural resource statutes, and consult with the State Historic Preservation Officer and Advisory Council for Historic Preservation.
- Identify Native American or other trust resources affected.
- Consider the environmental justice implications of the proposed project.
- Consider the air quality implications of the proposed project.

2.0 Project Report

- Coordinate with the California Environmental Quality Act (CEQA).
- Obtain a permit with the California Department of Fish and Game (DFG) if take of State-listed threatened or endangered plant or animal species may occur.
- Obtain an agreement with DFG if alteration to stream features may occur.
- Identify and coordinate with State or Federal public health requirements regarding recharge and recovery of groundwater supplies.
- Identify and coordinate with State water right petition requirements.
- Identify and coordinate with local agency regarding local plans and policies.

2.6.8 Coordination with California Environmental Quality Act

Part III projects will also need to comply with CEQA. The information from this process will be useful in assisting Reclamation to meet its NEPA obligations, but there are differences in compliance with the two laws and CEQA compliance cannot automatically substitute for Reclamation's NEPA compliance obligations. If timing permits, these differing requirements may be addressed in a single document. The project sponsor will be responsible for CEQA compliance.

2.6.9 The Endangered Species Act

A funding agreement for construction of a groundwater recharge and/or banking project is an action that requires ESA compliance. Under Section 7 of the ESA, Federal agencies are required to ensure that actions they fund, permit, or carry out are not likely to jeopardize the continued existence of a species federally listed as threatened or endangered, or adversely affect or destroy critical habitat designated for those species.

The ESA compliance process begins with a request to either the USFWS and/or NMFS for a report of listed species or listed critical habitat in or near a proposed project area. If the USFWS and/or NMFS determine that there are no listed species or listed critical habitat in or near the proposed project area, then compliance has been completed. If there are listed species or critical habitat in or near the proposed project area, then Reclamation prepares a biological assessment to determine if the project may affect listed species in the area. Reclamation may designate the project sponsor or its contractor to prepare this assessment, but Reclamation, as the responsible Federal agency, must conduct formal consultation if that becomes necessary. If Reclamation determines there is no effect to listed species or critical habitat then compliance is completed. If, however, Reclamation determines that the proposed action may affect, but is not likely to adversely affect the listed species, it must obtain the concurrence of either the USFWS and/or NMFS.

If the biological assessment shows that a species or its habitat may be adversely affected, formal consultation is required. Formal consultation is concluded when the USFWS and/or NMFS publish a final biological opinion as to whether or not the project is likely to jeopardize the continued existence of a species (referred to as "jeopardy" or "no jeopardy"). Reclamation has an opportunity to review and comment on this opinion before it is final. A jeopardy opinion usually identifies reasonable and prudent alternatives to the project that would avoid placing the species in jeopardy or affecting

critical habitat, and reasonable and prudent measures to reduce incidental taking of the species.

Reclamation must notify the USFWS and/or NMFS if it accepts the alternative, and must agree to implement the measures, before the proposed project may proceed. Reclamation will include these measures in any funding agreement for project construction as commitments of the project sponsor.

2.6.10 The Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act of 1934, as amended, requires Federal agencies proposing to construct or to issue permits for construction of projects affecting streams, lakes, or other watercourses to consult with the USFWS and State wildlife agencies before final approval of the project. Reclamation is required to consider recommendations made by wildlife agencies concerning the project's wildlife aspects, and if not implementing them, identify why. Reclamation may adopt changes in project plans to mitigate damage to wildlife resources and, where possible, to enhance such resources. Reclamation, however, retains the authority to decide which mitigation measures recommended by the USFWS, if any, to incorporate into the project plan. The mitigation recommendations made by the USFWS are incorporated into the NEPA process in preparing an EIS or EA.

Reclamation will involve the sponsor in the process of developing mitigation measures with the USFWS. Once agreed upon, these measures will become part of the project design, and will be so identified in the ROD or the FONSI. Implementation or inclusion of these measures in the project will be required.

2.7 Management and Financial Capability

2.7.1 Introduction

Pursuant to Part III, the non-Federal sponsor of a project must demonstrate the financial capability and willingness to fund the non-Federal share of the construction costs and all annual O&M costs. This demonstration must be included in the Project Report according to the FOA and submitted to Reclamation along with supporting documents.

A self-certification alone is not deemed adequate because Reclamation has a responsibility to ensure that Federal funds are prudently invested. The project sponsor(s) must demonstrate the capability to manage and finance the project.

2.7.2 Implementation and Financial Plans

The project sponsor must include an implementation plan for the project that outlines the plan of action and details how the proposed work will be accomplished, including the acquisition of required permits and approvals. The plan should cite factors that might accelerate or decelerate the work and reasons for taking this approach as opposed to others. The plan should also describe unusual features of the project, such as design or technological innovations, innovative cost- and time-saving measures, or extraordinary social and community involvements required to implement the project. The implementation activities should be shown in chronological order to depict the schedule

2.0 Project Report

of accomplishments and expected target completion dates, and the criteria to be used to evaluate the results and success of the project should be discussed.

The project sponsor must also include a financial plan in the Project Report that includes plans for funding the construction costs identified in the “Economic Analysis” section of these guidelines, as well as the proposed method for funding the project O&M. The plan should include project life-cycle funding, i.e., it should quantify and show how repairs and replacements will be funded, as well as continuing O&M and environmental compliance costs. If applicable, demonstration of financial capability can be drawn from documents that have been prepared by an entity providing the non-Federal cost-share funding and/or were required to obtain the non-Federal cost-share funding.

2.7.3 Non-Federal Funding

The non-Federal project sponsor may obtain the requisite funding by a variety of methods. If bonding authority is used, i.e., municipal bonds, a copy of the underwriter’s report or prospectus should be included with the project submittal. This report will describe the inherent risk in the bond issue. A form of certification from the underwriter is necessary to demonstrate the bonds have been sold and the money made available to the sponsor. In those instances where non-Federal funding is dependent on the availability of Federal funds, an indication of bond rating and impending sale will suffice as preliminary documentation. If a bond election and/or formal approval of a governing body (Board of Directors or City Council) is required to provide taxing authority to refund the bonds, a certification of election results and/or a copy of the approved resolution should be included.

In instances where a State Revolving Fund will provide some or all of the non-Federal cost-share, a certification of loan availability should be provided. Federal sources of funding involved in the project must also be identified, as all Federal sources of funding together cannot exceed 50 percent.

If another financing method is used by the non-Federal sponsor, Reclamation will seek appropriate supporting documentation during review of the application and Project Report.

2.7.4 Additional Supporting Information

The non-Federal sponsor should include documentation of its past project performance, including but not limited to, experience with projects of similar size and complexity, results of any OMB Circular A-133 Single Audits, and details of any debarment or suspension from Federal assistance programs.

Registration in the CCR database will be required to apply for the Part III financial assistance.

3.0 Cost-Share Agreement

3.1 Requirements

In accordance with Part III of Public Law 111-11, a project will only be eligible for Federal financial assistance if all or a portion of the project is designed to reduce, avoid, or offset the quantity of expected water supply impacts to Friant Division long-term contractors caused by the Interim or Restoration Flows, and such quantities have not already been reduced, avoided, or offset by other programs or projects.

In accordance with Part III, Federal financial assistance will only be provided for construction of a project if the Secretary:

1. Determines that appropriate planning, design, and environmental compliance activities associated with such a project have been completed.
2. Has been offered the opportunity to participate in the project at a price that is no higher than the local agency's own costs.
3. Determines that the local agency has the financial capability and willingness to fund its share of the project's construction and all annual operation and maintenance costs.
4. Determines that an acceptable method has been developed for quantifying the benefit of the project, in terms of reducing, avoiding, or offsetting the water supply impacts expected to be caused by the Interim or Restoration Flows, and for ensuring appropriate adjustment in the RWA.
5. Has entered into a cost-share agreement with the local agency, which commits the local agency to funding its share of the project's construction costs.

3.2 Procedures and Content of Agreements

Part III of Public Law 111-11 requires the execution of a cost-share agreement with the project sponsor(s) before awarding Federal financial assistance. In preparing cost-share agreements, Reclamation will follow procedures in the Reclamation Manual and Reclamation's Financial Assistance Handbook, as well as procedures and guidance in the CFR and the OMB Circulars listed below:

- 2 CFR Part 225, "Cost Principles for State, Local, and Indian Tribal Governments"
- 43 CFR Part 12, "Administrative and Audit Requirements and Cost Principles for Assistance Programs"

3.0 Cost-Share Agreement

- OMB Circular A-102, “Grants and Cooperative Agreements with State and Local Governments”
- OMB Circular A-133, “Audits of States, Local Governments, and Non-Profit Organizations.”
- GAO Redbook, Chapter 10, “Federal Assistance: Grants and Cooperative Agreements.”

Reclamation will abide by the standard definitions of cooperative agreement and grant agreement in choosing the funding vehicle for any one action. The degree of Federal participation in the action(s) covered by the agreement is the key factor. A grant agreement is used when Federal participation in the activity is minimal. Cooperative agreements are used when there is a greater degree of Federal involvement in the activities.

Reclamation will not award assistance to applicants that are debarred or suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs.

The cost-share agreement will commit the project sponsor to annually funding its share of the project’s planning and construction costs identified in the financial plan in the “Management and Financial Capability” section of these guidelines. A cost-share agreement must also include a certification that O&M expenses are not included in the agreement, and are not in the bills and accounting records provided to Reclamation for auditing purposes.

The cost-share agreement will include a detailed plan for reducing the RWA of the project sponsor(s) resulting from Part III projects as described in the Project Report.

Reclamation will review each cost-share agreement annually.

3.3 Cost Sharing

Cost-share agreements will fund those portions of a project identified as reducing, avoiding, and offsetting water supply impacts resulting from the release of Interim and Restoration flows as defined by the project sponsor(s) in the Project Report.

Construction work performed under Section 10202 of Part III is eligible for a Federal cost-share up to 50 percent of total eligible construction costs. Planning work performed under Section 10202 of Part III is eligible for a Federal cost-share up to 50 percent of the total eligible planning costs.

3.4 Allocation Schedule and Rules

Reclamation will issue an FOA on www.grants.gov in preparation for the first appropriation of Part III funding. In response to the FOA, project sponsors will submit applications, including the Project Report, to Reclamation. These applications will be allocated funding based on Reclamation review and prioritization. The initial allocation

will be limited to the amount of funding initially appropriated and will be followed by subsequent rounds of FOAs and allocations as additional funding is appropriated. If available, unallocated funds from the initial FOAs would be made available in subsequent FOAs until all funds have been allocated.

For each FOA, applications will be evaluated against eligibility criteria and prioritized and ranked in accordance with performance criteria established in the FOA, as described in the “Selection Considerations” section of these guidelines. Sponsors of projects which achieve sufficient rank may proceed to cost-share agreement discussions with Reclamation. The project sponsors of those applications deemed ineligible for allocation in any FOA may resubmit their applications during subsequent FOAs.

3.5 Timing of Cost-Share Agreements

Reclamation will develop cost-share agreements for those applications that become eligible for reimbursement through the allocation process outlined above. As provided in Section 2.6.2 above, Reclamation may execute a cost-share agreement prior to completion of NEPA and other environmental compliance activities, however, all such activities must be completed prior to starting ground disturbing actions related to the project or funding being provided. Recipients will incur costs at their own risk prior to entering into a cost-share agreement with Reclamation.

3.6 Eligible Cost-Share Contributions

The Reclamation Manual, Directives and Standards (**Appendix B**) provides guidance on the types of local costs, in addition to construction, which may be included for cost-sharing purposes.

Reclamation will adhere to the GAO Redbook, which allows pre-award costs that are incurred after program legislation has been enacted, but before an appropriation becomes available. Public Law 111-11 was enacted on March 30, 2009; planning, design, and environmental compliance costs incurred by project sponsors after that date may be eligible to count as part of the non-Federal cost share. Project sponsors must also demonstrate that costs would not have been incurred otherwise, and are reasonable, such that they do not diminish the public benefit from Federal funds and further the statutory purpose of Public Law 111-11. Pre-award costs should be identified in the detailed budget estimate that is part of the initial application. During pre-award clarifications with project sponsors, Reclamation will determine whether pre-award costs listed in the initial application meet these criteria.

2-CFR Part 225 states, “Costs for preparing proposals for potential Federal awards are allowable. Proposal costs should normally be treated as indirect costs and should be allocated to all activities of the governmental unit utilizing the cost allocation plan and indirect cost rate proposal. However, proposal costs may be charged directly to Federal awards with the prior approval of the Federal awarding agency.” Proposal costs should be

identified in the detailed budget estimate along with the other pre-award costs described above.

3.7 Project Ownership

Title to projects funded under Part III will remain in one or more non-Federal local agencies, which will also operate and maintain these projects.

3.8 Project Reporting Requirements

3.8.1 Introduction

In accordance with Part III, the Secretary is authorized to require any local agency receiving Federal financial assistance under Part III to submit progress reports and accountings to the Secretary, as the Secretary deems appropriate. All reports submitted under this section will be publicly accessible.

3.8.2 Performance Reports

Performance reports will be submitted quarterly for all planning studies and construction projects until expiration or termination of the Part III financial assistance. The performance reports should include, at a minimum, a comparison of actual accomplishments to the objectives established for the period, the reasons for slippage if established objectives were not met, analysis and explanation of cost overruns, percent-complete estimates, negative developments that will materially impair the ability to meet the project objectives and mitigation actions that have or will be taken to resolve the issues, and favorable developments that enable meeting objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

3.8.3 Financial Status Reports

Financial Status Reports will be submitted quarterly for all planning studies and construction projects until expiration or termination of the Part III financial assistance. The Financial Status Reports will report project outlays and project income on a cash or accrual basis, as prescribed by Reclamation.

3.8.4 RWA Reports

Projects receiving Federal financial assistance under Part III of Public Law 111-11 will be required to submit RWA reports to the Secretary providing a detailed accounting of project operations to document RWA reductions in accordance with the method proposed in the “Project Benefit Methodology” section of these guidelines and agreed to by Reclamation. These RWA reports will be provided to Reclamation annually, or more frequently as required to maintain consistency with the RWA accounting process established in the Restoration Flow Guidelines, for the life of the project.

Appendix A
Public Law 111-11,
Title X, Subtitle A, Part III, Section 10202
San Joaquin River Restoration Settlement Act
Friant Division Improvements
Financial Assistance for Local Projects

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Fresno, Madera, Merced, Stanislaus, and San Joaquin counties in California.

(b) USE OF PLAN.—The Integrated Regional Water Management Plan developed for the 2 hydrologic basins under subsection (a) shall serve as a guide for the counties in the study area described in subsection (a)(2) to use as a mechanism to address and solve long-term water needs in a sustainable and equitable manner.

(c) REPORT.—The Secretary shall ensure that a report containing the results of the Integrated Regional Water Management Plan for the hydrologic regions is submitted to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives not later than 24 months after financial assistance is made available to the California Water Institute under subsection (a)(1).

(d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section \$1,000,000 to remain available until expended.

PART III—FRIANT DIVISION IMPROVEMENTS

SEC. 10201. FEDERAL FACILITY IMPROVEMENTS.

(a) The Secretary of the Interior (hereafter referred to as the “Secretary”) is authorized and directed to conduct feasibility studies in coordination with appropriate Federal, State, regional, and local authorities on the following improvements and facilities in the Friant Division, Central Valley Project, California:

(1) Restoration of the capacity of the Friant-Kern Canal and Madera Canal to such capacity as previously designed and constructed by the Bureau of Reclamation.

(2) Reverse flow pump-back facilities on the Friant-Kern Canal, with reverse-flow capacity of approximately 500 cubic feet per second at the Poso and Shafter Check Structures and approximately 300 cubic feet per second at the Woollomes Check Structure.

(b) Upon completion of and consistent with the applicable feasibility studies, the Secretary is authorized to construct the improvements and facilities identified in subsection (a) in accordance with all applicable Federal and State laws.

(c) The costs of implementing this section shall be in accordance with section 10203, and shall be a nonreimbursable Federal expenditure.

SEC. 10202. FINANCIAL ASSISTANCE FOR LOCAL PROJECTS.

(a) AUTHORIZATION.—The Secretary is authorized to provide financial assistance to local agencies within the Central Valley Project, California, for the planning, design, environmental compliance, and construction of local facilities to bank water underground or to recharge groundwater, and that recover such water, provided that the project meets the criteria in subsection (b). The Secretary is further authorized to require that any such local agency receiving financial assistance under the terms of this section submit progress reports and accountings to the Secretary, as the Secretary deems appropriate, which such reports shall be publicly available.

(b) CRITERIA.—

(1) A project shall be eligible for Federal financial assistance under subsection (a) only if all or a portion of the project is designed to reduce, avoid, or offset the quantity of the

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expected water supply impacts to Friant Division long-term contractors caused by the Interim or Restoration Flows authorized in part I of this subtitle, and such quantities have not already been reduced, avoided, or offset by other programs or projects.

Applicability.

(2) Federal financial assistance shall only apply to the portion of a project that the local agency designates as reducing, avoiding, or offsetting the expected water supply impacts caused by the Interim or Restoration Flows authorized in part I of this subtitle, consistent with the methodology developed pursuant to paragraph (3)(C).

Determinations.

(3) No Federal financial assistance shall be provided by the Secretary under this part for construction of a project under subsection (a) unless the Secretary—

(A) determines that appropriate planning, design, and environmental compliance activities associated with such a project have been completed, and that the Secretary has been offered the opportunity to participate in the project at a price that is no higher than the local agency's own costs, in order to secure necessary storage, extraction, and conveyance rights for water that may be needed to meet the Restoration Goal as described in part I of this subtitle, where such project has capacity beyond that designated for the purposes in paragraph (2) or where it is feasible to expand such project to allow participation by the Secretary;

(B) determines, based on information available at the time, that the local agency has the financial capability and willingness to fund its share of the project's construction and all operation and maintenance costs on an annual basis;

(C) determines that a method acceptable to the Secretary has been developed for quantifying the benefit, in terms of reduction, avoidance, or offset of the water supply impacts expected to be caused by the Interim or Restoration Flows authorized in part I of this subtitle, that will result from the project, and for ensuring appropriate adjustment in the recovered water account pursuant to section 10004(a)(5); and

Contracts.

(D) has entered into a cost-sharing agreement with the local agency which commits the local agency to funding its share of the project's construction costs on an annual basis.

Deadline.
Public comment.

(c) GUIDELINES.—Within 1 year from the date of enactment of this part, the Secretary shall develop, in consultation with the Friant Division long-term contractors, proposed guidelines for the application of the criteria defined in subsection (b), and will make the proposed guidelines available for public comment. Such guidelines may consider prioritizing the distribution of available funds to projects that provide the broadest benefit within the affected area and the equitable allocation of funds. Upon adoption of such guidelines, the Secretary shall implement such assistance program, subject to the availability of funds appropriated for such purpose.

(d) COST SHARING.—The Federal financial assistance provided to local agencies under subsection (a) shall not exceed—

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(1) 50 percent of the costs associated with planning, design, and environmental compliance activities associated with such a project; and

(2) 50 percent of the costs associated with construction of any such project.

(e) PROJECT OWNERSHIP.—

(1) Title to, control over, and operation of, projects funded under subsection (a) shall remain in one or more non-Federal local agencies. Nothing in this part authorizes the Secretary to operate a groundwater bank along or adjacent to the San Joaquin River upstream of the confluence with the Merced River, and any such groundwater bank shall be operated by a non-Federal entity. All projects funded pursuant to this subsection shall comply with all applicable Federal and State laws, including provisions of California water law.

(2) All operation, maintenance, and replacement and rehabilitation costs of such projects shall be the responsibility of the local agency. The Secretary shall not provide funding for any operation, maintenance, or replacement and rehabilitation costs of projects funded under subsection (a).

SEC. 10203. AUTHORIZATION OF APPROPRIATIONS.

(a) The Secretary is authorized and directed to use monies from the fund established under section 10009 to carry out the provisions of section 10201(a)(1), in an amount not to exceed \$35,000,000.

(b) In addition to the funds made available pursuant to subsection (a), the Secretary is also authorized to expend such additional funds from the fund established under section 10009 to carry out the purposes of section 10201(a)(2), if such facilities have not already been authorized and funded under the plan provided for pursuant to section 10004(a)(4), in an amount not to exceed \$17,000,000, provided that the Secretary first determines that such expenditure will not conflict with or delay his implementation of actions required by part I of this subtitle. Notice of the Secretary's determination shall be published not later than his submission of the report to Congress required by section 10009(f)(2).

(c) In addition to funds made available in subsections (a) and (b), there are authorized to be appropriated \$50,000,000 (October 2008 price levels) to carry out the purposes of this part which shall be non-reimbursable.

Determination.

Notice.
Publication.

**Subtitle B—Northwestern New Mexico
Rural Water Projects**

Northwestern
New Mexico
Rural Water
Projects Act.
Native
Americans.
43 USC 371 note.

SEC. 10301. SHORT TITLE.

This subtitle may be cited as the "Northwestern New Mexico Rural Water Projects Act".

SEC. 10302. DEFINITIONS.

43 USC 407 note.

In this subtitle:

(1) AAMODT ADJUDICATION.—The term "Aamodt adjudication" means the general stream adjudication that is the subject of the civil action entitled "State of New Mexico, ex rel. State Engineer and United States of America, Pueblo de Nambe, Pueblo de Pojoaque, Pueblo de San Ildefonso, and Pueblo de

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Appendix B
Reclamation Manual, Directives and Standards
(ACM 01-01)

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Reclamation Manual

Directives and Standards

Subject:	Requirements for Award and Administration of Financial Assistance Agreements (Grants and Cooperative Agreements)
Purpose:	This release establishes Bureau of Reclamation requirements for the award and administration of financial assistance agreements (grants and cooperative agreements). The benefits of this Directive and Standard (D&S) are to promote uniformity and accountability in the award and administration of financial assistance agreements by Reclamation.
Authority:	43 CFR 12, Administrative and Audit Requirements and Cost Principles for Assistance Programs; 505 DM 1-5, which provide departmental requirements for implementing Federal financial assistance statutory and regulatory requirements; 505 DM 1.3B, which provides Reclamation with the responsibility to develop and issue policies, procedures, and regulations which will implement departmental policies for financial assistance
Approving Official:	Director, Management Services Office (MSO)
Contact:	Acquisition and Assistance Management Division, Policy (AAMD), 84-27820

1. **Scope.** The requirements within this D&S apply to all financial assistance awards issued and administered by Reclamation.
2. **Definitions.** The following definitions apply to this D&S:
 - A. **Financial Assistance Agreement.** A financial assistance agreement is defined as an award which provides support in order to accomplish a public purpose authorized by a law or regulation of the United States. Financial assistance awards include grants, cooperative agreements, and other agreements in the form of money or property in lieu of money, by the Federal government to an eligible recipient. The term does not include: technical assistance which provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; or contracts which are required to be entered into and administered under procurement laws and regulations.
 - B. **Delegation of Signature Authority.** Signature authority for financial assistance agreements is delegated from the Commissioner to each regional director and the Director, MSO. This authority may be re-delegated, in writing, to individuals (not positions) to function as Grants Officers (GOs) with the full authority to sign and administer financial assistance agreements on behalf of Reclamation, subject to the requirements within this D&S; Reclamation, departmental, and government-wide policies and procedures applicable to financial assistance; and any monetary limitations that a regional director or the Director, MSO, may impose.

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Directives and Standards

- C. **Grants Officer (GO).** The GO, also known as the “Grant and Cooperative Agreement Officer,” is a Reclamation employee who has been delegated signature authority to award and administer financial assistance agreements on behalf of Reclamation.
 - D. **Grants Officer Technical Representative (GOTR).** The GOTR, also known as a “Grants and Cooperative Agreement Officer’s Representative,” is a Reclamation employee with an award or program-specific designation, in writing, from a GO with the responsibility to provide technical assistance and monitor the project performance of a recipient on behalf of Reclamation.
 - E. **Reclamation Financial Assistance Handbook (RFAH).** The RFAH, issued and maintained by AAMD-Policy, provides guidance for the implementation of the requirements within this D&S, departmental policies and regulations, and government-wide policy requirements as well as in-depth guidance on a variety of topics, both general and specific to Reclamation programs, associated with the award and administration of federal financial assistance.
3. **Procedures.** The following procedures are required for all financial assistance agreements awarded and administered by Reclamation.
- A. **Pre-Award Requirements.** The following procedures are required prior to the award of financial assistance agreements by Reclamation.
 - (1) **Training.** All GOs and GOTRs must satisfy the following training requirements. Regions are responsible for tracking compliance with these requirements as well as providing an update on current GO delegations and GOTR designations to AAMD on a semi-annual basis. An annual AAMD release provides additional implementation guidance for these training requirements. The regional acquisition and assistance management office is responsible for review and approval of training plans submitted by GOTRs that do not obtain the required training prior to designation.
 - (a) A GO must, at a minimum, obtain 40 hours of training applicable to the award and administration of financial assistance prior to delegation of authority. Further, a minimum of 32 hours of training is required for each 2-year period subsequent to the initial delegation, in order to maintain proficiency and knowledge of current financial assistance management laws, regulations, requirements, and best practices. If the GO has completed a formalized grants management certificate program, required maintenance training is limited to a refresher course every 2 years.
 - (b) A GOTR must attend a standardized internal training workshop conducted by Reclamation staff applicable to the award and administration of financial assistance either prior to designation or within 6 months of designation subject to regional office approval of their training attendance plan.

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Directives and Standards

Subsequent to the initial training workshop, the GOTR must complete a Reclamation-administered “refresher” workshop for each 2-year period in order to maintain proficiency and knowledge in current financial assistance management laws, regulations, requirements, and best practices.

- (2) **Competition and Single Source Requirements.** Reclamation awards financial assistance agreements based on merit and in accordance with the law. Consistent with 31 U.S.C. 6301, and 505 DM 2.13, Reclamation strongly encourages competition in the award of financial assistance. Per the requirements of 505 DM 2.14, the determination to “single-source without engaging in competition must be able to withstand scrutiny, should protect the public interest, and should comport with management priorities, objectives and statutory requirements.”
- (a) **Competition.** Competition in the selection and award of financial assistance requires the following:
- (i) **Full and Open Announcement.** A Funding Opportunity Announcement (FOA) must be posted on Grants.gov in compliance with the prescribed Office of Management and Budget (OMB) announcement format. The FOA must provide for sufficient time for all eligible applicants to develop and submit applications. Additional announcement methods may be utilized in addition to posting on Grants.gov, but applicants should be encouraged to apply electronically via the Grants.gov submission portal.
 - (ii) **Impartial Review and Evaluation.** As per 505 DM 2, and consistent with legislative authority, an impartial review and evaluation of applications received in response to the FOA must be conducted and documented.
 - (iii) **Selection.** Award decisions that deviate from recommendations made by the application reviewers during the impartial review and evaluation process must be documented with a written justification.
- (b) **Single-Source.** A single-source agreement is a financial assistance award issued without competition to an organization or individual determined to be an appropriate partner, either through Congressional designation or based on demonstrable criteria such as unique expertise or capacity. The following requirements must be met prior to the award of a single-source agreement:
- (i) For all single-source awards for \$25,000 and above:

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- (aa) A "Notice of Intent to Award," utilizing the Reclamation prescribed format, must be posted on Grants.gov for a minimum of 14 calendar days; and
- (bb) The single source justification included within the "Notice of Intent to Award" and documented within the agreement file must specifically address the criterion or criteria in 505 DM 2.14 as well as provide enough detail to clearly explain why Reclamation chose not to award the agreement competitively.
- (ii) For all single-source awards for less than \$25,000, a single-source justification must be documented within the agreement file and must specifically address the criterion or criteria in 505 DM 2.14 as well as provide enough detail to clearly explain why Reclamation chose not to award the agreement competitively.
- (3) **Notification of Unsuccessful Applicants.** Unsuccessful applicants shall be promptly notified, in writing, by the GO. Upon applicant request, the GO must provide the reason(s) why their application was not funded.
- (4) **Responsibility Determination.** Prior to the issuance of a new award, a responsibility determination, which reviews a potential recipient's organizational responsibility, shall be conducted. The GO is responsible for review and approval of this determination.
 - (a) **Financial and Business Management Systems Review.** In accordance with 43 CFR 12 and as part of the responsibility determination, a review of the recipient's financial and business management systems must be conducted on potential recipients that have not received awards from Reclamation in the past or for which sufficient past performance under other Federal awards cannot be substantiated. This review is conducted to verify that the potential recipient has the systems and process in place to manage and account for performance and expenses for Federal awards.
- (5) **Independent Review.** An independent review must be performed and documented prior to the award of a new agreement or a modification to an existing agreement that exceeds the threshold set by the region. The independent review serves to ensure that all required pre-award steps have been conducted and documented and that the new agreement or modification has been constructed appropriately and effectively. The independent review should be conducted by personnel with good, working knowledge of financial assistance regulations and requirements, preferably by another GO. Regions are responsible for determining the appropriate personnel and dollar thresholds for this review.

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- (6) **Award Instrument Determination (AID).** Prior to the award of a new agreement or a modification to an existing agreement that exceeds the original estimated amount or significantly modifies the original scope, an AID must be conducted and documented. The AID ensures that a financial assistance agreement is the appropriate instrument to be utilized for the action and that Reclamation possesses the delegated legislative authority to fund the proposed activities. The determination must address the requirements of the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. 6301 et seq.) as well as cite and document the legislative authority for the proposed action. The AID must be approved by both a GO and the regional Chief of the Contracting Office (CCO) (or the CCO's acting in cases where the CCO is out of the office). As stated below, review may be sought, regardless of award amount, from a solicitor or the AAMD, to assist in this determination.
- (7) **Legal Review.** Legal review shall be obtained within 7 working days for all proposed financial assistance awards or modifications when review is advisable due to such issues as the complexity, novelty, intellectual property issues, potential conflicts of interest, questions on the applicability of a statutory authority, or other matters that may benefit from a solicitor's review. As the GO has legal responsibility for the agreement, a legal review may be required prior to award at the GO's discretion.
- (8) **AAMD Review and Approval.** Reclamation has established a review and approval control process that requires all financial assistance agreements that meet any of the conditions below to be reviewed and approved by AAMD prior to the award or modification. The primary purpose of this review and approval is to ensure compliance with Reclamation's guidelines for implementing an internal control program as required by the OMB's Circular A-123. GOs must submit for review, as applicable, the original award, all modifications, performance progress and financial status reports, the responsibility determination, the AID, and any other supporting documentation. The AAMD must provide a review response within 7 working days of receipt of a request, provided that all documentation required for the review is submitted. Agreements that meet one of the following criteria must be sent to the AAMD for review and approval:
- (a) The total estimated amount of the agreement, including all anticipated options, exceeds the threshold established by the annual AAMD release on review thresholds; or
 - (b) Regardless of award amount, when review is advisable, due to concerns related to the selection process, proposed budget, proposed option years, past performance, or other such matters related to the award and administration of the proposed action that would benefit from an AAMD review.

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- B. **Award Requirements.** The following procedures are required prior to the award of financial assistance agreements by Reclamation.
- (1) **Award and Modification Identification and Format.** All awards and modifications must be executed with the approved Reclamation cover sheet, budget, statement of work, reporting requirements, and terms and conditions. The required agreement identification protocol, modeled on the numbering system utilized to identify procurement agreements, is prescribed within the Reclamation Acquisition Regulations.
 - (2) **GOTR Designation.** GOs must designate, in writing, a GOTR for all assistance awards issued by Reclamation.
 - (3) **Reporting Requirements:** All new awards and modifications that change the total amount of the obligation must be reported in the required reporting system within 5 working days of award.
- C. **Post-Award Administration.** The following procedures are required for post-award monitoring of financial assistance agreements by Reclamation personnel.
- (1) **Post-Award Roles and Responsibilities.** GOs and GOTRs are required to monitor financial assistance agreements to ensure proper and effective recipient performance. Effective monitoring is achieved by means of thorough review of recipient financial status and program performance reports and clear, timely communication with the recipient conducted by GOs and GOTRs working together. GOs have primary responsibility for monitoring the financial and administrative aspects of financial assistance agreements. GOTRs have primary responsibility for monitoring the programmatic progress of projects funded under financial assistance agreements as well as providing the recipient technical assistance, when required.
 - (2) **Review and Acceptance of Interim Reports.** With regard to the review and acceptance of interim financial status and program performance reports received by the recipient:
 - (a) GOs must review and accept all Financial Status Reports and Requests for Advance/Reimbursement (SF-270s). Review of financial status reports shall be documented and include, at a minimum, a comparison of recipient draw-downs to date against the approved budget and terms and conditions of the agreement.
 - (b) GOTRs must review and accept all program performance reports and submit them to the GO for file integrity. Review of program performance reports

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shall be documented and include, at a minimum, a comparison of reported recipient progress against the approved statement of work and terms and conditions of the agreement.

- (3) **File Documentation and Monitoring Activities.** For file integrity and to promote consistency in post-award administration, GOs are the mandatory control point for all post-award correspondence between Reclamation and recipient that may affect the administration of the award including, but not limited to, receipt of required reports, changes in the budget, modifications to the statement of work, and extensions to the period of performance. All correspondence and activities that impact the post-award administration of the agreement must be documented within the GO's agreement file. If a separate file is maintained by the GOTR for the technical details of the project (such as site plans, drawings, etc.) the GO's agreement file must indicate this arrangement. Required monitoring activities include, but are not limited to:
- (a) tracking report and supporting documentation due dates;
 - (b) reviewing reports and supporting documentation for completeness and accuracy, and returning incomplete or inaccurate reports to the recipient in a timely manner with a description as to why the information provided appears to be incomplete or inaccurate;
 - (c) using reports and supporting documentation to determine whether the agreement terms and conditions are met;
 - (d) ensuring that all interim reports, as required by the terms and conditions of the agreement, have been received prior to a modification which increases project funding; and
 - (e) taking effective action to rectify any noncompliance, providing timely notice and obtaining overdue reports and supporting documentation, with due concern for recipient rights and program needs.
- (4) **Recipient Non-compliance.** Recipient non-compliance with the terms and conditions of the award, including the reporting requirements, may require eventual suspension and termination of the agreement by the GO as per 43 CFR 12 and the Department of the Interior's 2003 Policy Memorandum, "Policy Regarding Financial Status Reporting Requirements Related to Grants." The Department's 2003 policy on non-compliance and Reclamation's full implementation is Appendix A of this D&S.
- (5) **Site Visits.** Site visits are formal reviews conducted at the recipient's place of performance and administration to review project performance and expenditures. The determination to conduct site visits should be made on a case-by-case basis to

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address definitive findings of recipient non-compliance or as part of an overall risk-based approach to the region's or office's monitoring strategy. Site visits should be conducted by the GOTR and GO (or the GO's financial representative), as appropriate. Notification and arrangements must be made with the recipient prior to the site visit. Site visits, phone calls, findings, and their resolution must be documented and should address the following, as appropriate:

- (a) review of actual expenditures against reported expenditures;
 - (b) review of actual performance against reported performance;
 - (c) review of organizational, financial, and management capabilities;
 - (d) review sub-contract and sub-grant procedures of the organization to ensure compliance with Federal regulations;
 - (e) interviews of key personnel;
 - (f) review of organizational procedures to ensure that the recipient is in compliance with applicable Federal regulations and award-specific terms and conditions; and
 - (g) review of documentation of cost-sharing to ensure that all matching contributions are allowable, reasonable, and allocable to the project.
- (6) **Resolution of Site Visit Findings.** The GO has delegated signature authority to represent Reclamation to the recipient. As such, all findings and actions taken as a result of the site visit must be reviewed and approved by the GO. The GO must notify the recipient, in writing, within 45 days of a site visit, of any financial assistance management matters that require corrective action.
- D. **Close-Out Requirements.** The following procedures are required to close-out financial assistance agreements by Reclamation personnel.
- (1) **Review of Final Reports.** Receipt, review, and approval of final financial status and program performance reports must be conducted prior to close-out of all financial assistance agreements.
 - (a) The GO must review and approve the final financial status report. Review of the final financial status report shall include, at a minimum, a comparison of recipient expenditures against the approved budget for the financial assistance agreement and, when applicable, a determination that the cost-share provided by the recipient was in accordance with the terms and

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conditions of the agreement. Further documentation and detail of recipient expenditures shall be requested from the recipient when the GO deems such detail is necessary.

- (b) The GOTR must review and approve the final program performance report and submit it to the GO for file integrity. Review of the final program performance report shall, at a minimum, include a comparison of recipient project performance against the approved statement of work for the financial assistance agreement. Additional documentation and detail shall be requested from the recipient when the GOTR deems such detail is necessary.
 - (2) **Disposition of Property.** For property either acquired with Federal funds or furnished directly by Reclamation, the GO must issue disposition instructions to the recipient in accordance with Department and Reclamation requirements.
 - (3) **Formal Close-Out Modification.** A close-out modification must be completed upon conclusion of the above requirements. The modification should de-obligate any remaining funds as well as document any additional administrative items that the GO considers pertinent to the file.
 - (4) **Retention of Records.** The agreement file and all supporting records must be retained by Reclamation for the length of time prescribed by the records retention schedule applicable to the agreement.
- E. **Acquisition and Assistance Management Reviews (AAMRs).** The AAMRs are on-site reviews of Reclamation contracting offices and other offices that execute and administer financial assistance actions.
- (1) AAMRs of major and subordinate acquisition and financial assistance offices will be conducted as directed by the Department's Office of Acquisition and Property Management (PAM).
 - (2) **Responsibility.** The AAMD is responsible for conducting AAMRs of Reclamation's major acquisition and assistance offices. CCOs are responsible for conducting AAMRs of subordinate offices.
 - (3) **Subject areas to be reviewed.** The subject areas to be reviewed in AAMRs are delineated in the Department's AAMR Handbook
 - (4) **AAMR reports.** Reports shall be prepared and submitted in accordance with guidelines established by PAM.

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4. **Sources.** The requirements within this D&S originate from the following sources:
- A. United States. Cong. The Federal Grant and Cooperative Agreement Act of 1977. Public Law 95-244. 31 United States Code 6301 et. seq. 95th Cong., 1st sess. Washington: GPO 1977.
 - B. United States. Office of Management and Budget. Implementation of Federal Grant and Cooperative Agreement Act of 1977. Public Law 95-224. 43 Federal Register 36860. Washington: GPO 1977.
 - C. United States. Department of the Interior. Bureau of Reclamation. 505 DM 2, Procurement Contracts, Grant and Cooperative Agreements. January 2208.
 - D. United States. Department of the Interior. Office of Inspector General. Independent Auditor's Report on the BOR Financial Statements for Fiscal Years 2007 and 2006. January 2008.
 - E. United States. Department of the Interior. Office of Inspector General. Report No. W-IN-MOA-0052-2004 (2005) – Framework Needed to Promote Accountability in Interior's Grants and Management. August 2005.
 - F. United States. Government Accountability Office. Appropriations Law. Volume II. Chapter 10. Federal Assistance: Grants and Cooperative Agreements. February 2006.
 - G. United States. General Accountability Office. Opportunities to Improve Federal Discretionary Award Practices. September 1986.
 - H. United States. Department of the Interior. Office of Inspector General. Proper Use of Cooperative Agreements Could Improve Interior's Initiatives for Collaborative Partnerships. January 2007.
 - I. United States. Domestic Working Group. Grant Accountability Project. Guide to Opportunities for Improving Grant Accountability. October 2005.
 - J. United States. Cong. The Federal Funding Accountability and Transparency Act of 2006. Public Law 109-282. 109th Cong., 2nd sess. Washington: GPO 2006.
 - K. United States. Office of the President. Executive Order. Protecting American Taxpayers from Government Spending on Wasteful Earmarks. Washington: GPO 2008.
 - L. United States. Office of Management and Budget. Memorandum M-07-09, Collection of Information on Earmarks. January 2007.

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- M. United States. Office of Management and Budget. Memorandum M-07-10 - To Provide Guidance to Departments and Agencies about Obligating FY 2007 Funds Under a Full-Year Continuing Resolution (CR) with no Congressional Earmarks. February 2007.

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Appendix C
Government Accountability Office (GAO)
Redbook, Chapter 10, “Federal Assistance:
Grants and Cooperative Agreements,” Section 2,
“Pre-Award Costs (Retroactive Funding)”

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2. Pre-Award Costs
(Retroactive Funding)

“Retroactive funding” means the funding of costs incurred by a grantee before the grant was awarded. Three separate situations arise: (1) costs incurred prior to award but after the program authority has been enacted and the appropriation became available; (2) costs incurred prior to award and after program authority was enacted but before the appropriation became available; and (3) costs incurred prior to both program authority and appropriation availability.

Situation (1): In this situation, the grantee seeks to charge costs incurred before the grant was awarded (in some cases even before the grantee submitted its application) but after both the program legislation and the implementing appropriation were enacted.

There is no rule or policy that generally restricts allowable costs to those incurred after the award of a grant. However, agencies may adopt such a policy by regulation. B-197699, June 3, 1980. Thus, in a number of cases, grant-related costs incurred prior to award, but after the program was authorized and appropriated funds were available for obligation, have been allowed where (a) there was no contrary indication in the language or legislative history of the program statute or the appropriation, (b) allowance was not prohibited by the regulations of the grantor agency, and (c) the agency determined that allowance would be in the best interest of carrying out the statutory purpose. 32 Comp. Gen. 141 (1952); 31 Comp. Gen. 308 (1952); B-197699, June 3, 1980; B-133001, Mar. 9, 1979; B-75414, May 7, 1948. (The above criteria are not specified as such in any of the cases cited but are derived from viewing all of the cases as a whole.)

Situation (2): In this situation, pre-award costs are incurred after program legislation has been enacted, but before an appropriation becomes available.

Prior to the Comptroller General's decision in 56 Comp. Gen. 31 (1976), a “general rule” was commonly stated to the effect that absent some indication of contrary intent, an appropriation could not be used to pay grant costs where the grantee's obligation arose before the appropriation implementing the enabling legislation became available. 45 Comp. Gen. 515 (1966); 40 Comp. Gen. 615 (1961); 31 Comp. Gen. 308 (1952); A-71315, Feb. 28, 1936.

In 56 Comp. Gen. 31, the Comptroller General reviewed the earlier decisions and concluded that there was no legal requirement for a general rule prohibiting the use of grant funds to pay for costs incurred prior to the

availability of the applicable appropriation. Rather, the determination should be made on a case-by-case basis. Thus, the decision announced:

“We would prefer to base each decision from now on on the statutory language, legislative history, and particular factors operative in the particular case in question, rather than on a general rule.”

Id. at 35.

In reviewing the earlier decisions, the Comptroller General found that each had been correctly decided on its own facts. Thus, retroactive funding was prohibited in [40 Comp. Gen. 615 \(1961\)](#), [31 Comp. Gen. 308 \(1952\)](#), and [A-71315, Feb. 28, 1936](#). However, in each of those cases, there was some manifestation of an affirmative intent that funds be used only for costs incurred subsequent to the appropriation. For example, [31 Comp. Gen. 308](#) concerned grants to states under the Federal Civil Defense Act.⁹⁶ The committee reports and debates on a supplemental appropriation to fund the program contained strong indications that Congress did not intend that the money be used to retroactively fund expenses incurred by states prior to the appropriation. By way of contrast, there were no such indications in the situation considered in [56 Comp. Gen. 31](#) (matching funds provided to states under the Land and Water Conservation Fund Act of 1965⁹⁷). Accordingly, [56 Comp. Gen. 31](#) did not overrule the earlier decisions, but merely modified them to the extent that GAO would no longer purport to apply a “general rule” in this area.

In determining whether retroactive funding is authorized, relevant factors are evidence and clarity of congressional intent, the degree of discretion given the grantor agency, and the proximity in time of the cost being incurred to the grant award. As in Situation (1), significant factors also include the agency’s own regulations and the agency’s determination that funding the particular costs in question will further the statutory purpose. Accordingly, the authority will be easier to find where an agency has broad discretion and favorable legislative history. With this approach, retroactive funding authority may be found to exist (as in [56 Comp. Gen. 31](#)), or not to exist (as in [40 Comp. Gen. 615](#)).

⁹⁶ Pub. L. No. 81-920, 64 Stat. 1245 (Jan. 12, 1951).

⁹⁷ Pub. L. No. 88-578, 78 Stat. 897 (Sept. 3, 1964).

If an agency wishes to recognize retroactive funding in limited situations in its regulations, it must, in order to avoid potential Antideficiency Act problems, make it clear that no obligation on the part of the government can arise prior to the availability of an appropriation. Of course, the grant itself cannot be made until the appropriation becomes available. 56 Comp. Gen. at 36.

Situation (3): In this situation, the grantee seeks to charge costs incurred not only before the appropriation became available, but also before the program authority was enacted.

Costs incurred prior to both the program authorization and the availability of the appropriation may generally not be funded retroactively. See 56 Comp. Gen. 31 (1976); 32 Comp. Gen. 141 (1952); B-11393, July 25, 1940. GAO recognizes that there may possibly be exceptions even to this rule (56 Comp. Gen. at 35), but thus far there are no decisions identifying any.

One final situation deserves mention. In each of the retroactive funding cases cited above, the grant was in fact subsequently awarded. In B-206244, June 8, 1982, a state had applied for an Interior Department grant under the Youth Conservation Corps Act, 16 U.S.C. §§ 1701–1706 (1976), and later withdrew its application due to funding uncertainties. The state then filed a claim for various expenses it had incurred in anticipation of the grant. GAO held that payment would violate both the program legislation and the purpose statute, 31 U.S.C. § 1301(a). Interior's appropriation was intended to accomplish grant purposes, but the state's expenses did not accomplish any grant purposes since the grant was never made.

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Appendix D
OMB Circular A-87, 2-CFR Part 225 (Page 51920 of
Federal Register Vol. 70, No. 168)

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30. *Plant and homeland security costs.* Necessary and reasonable expenses incurred for routine and homeland security to protect facilities, personnel, and work products are allowable. Such costs include, but are not limited to, wages and uniforms of personnel engaged in security activities; equipment; barriers; contractual security services; consultants; etc. Capital expenditures for homeland and plant security purposes are subject to section 15, Equipment and other capital expenditures, of this appendix.

31. *Pre-award costs.* Pre-award costs are those incurred prior to the effective date of the award directly pursuant to the negotiation and in anticipation of the award where such costs are necessary to comply with the proposed delivery schedule or period of performance. Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the award and only with the written approval of the awarding agency.

32. *Professional service costs.*
a. Costs of professional and consultant services rendered by persons who are members of a particular profession or possess a special skill, and who are not officers or employees of the governmental unit, are allowable, subject to subparagraphs b and c when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government. In addition, legal and related services are limited under section 10 of this appendix.

b. In determining the allowability of costs in a particular case, no single factor or any special combination of factors is necessarily determinative. However, the following factors are relevant:

- (1) The nature and scope of the service rendered in relation to the service required.
- (2) The necessity of contracting for the service, considering the governmental unit's capability in the particular area.
- (3) The past pattern of such costs, particularly in the years prior to Federal awards.
- (4) The impact of Federal awards on the governmental unit's business (*i.e.*, what new problems have arisen).
- (5) Whether the proportion of Federal work to the governmental unit's total business is such as to influence the governmental unit in favor of incurring the cost, particularly where the services rendered are not of a continuing nature and have little relationship to work under Federal grants and contracts.
- (6) Whether the services can be performed more economically by direct employment rather than contracting.
- (7) The qualifications of the individual or concern rendering the service and the customary fees charged, especially on non-Federal awards.
- (8) Adequacy of the contractual agreement for the service (*e.g.*, description of the service, estimate of time required, rate of compensation, and termination provisions).

c. In addition to the factors in subparagraph b, retainer fees to be allowable must be supported by available or rendered evidence of bona fide services available or rendered.

33. *Proposal costs.* Costs of preparing proposals for potential Federal awards are

allowable. Proposal costs should normally be treated as indirect costs and should be allocated to all activities of the governmental unit utilizing the cost allocation plan and indirect cost rate proposal. However, proposal costs may be charged directly to Federal awards with the prior approval of the Federal awarding agency.

34. *Publication and printing costs.*

a. Publication costs include the costs of printing (including the processes of composition, plate-making, press work, binding, and the end products produced by such processes), distribution, promotion, mailing, and general handling. Publication costs also include page charges in professional publications.

b. If these costs are not identifiable with a particular cost objective, they should be allocated as indirect costs to all benefiting activities of the governmental unit.

c. Page charges for professional journal publications are allowable as a necessary part of research costs where:

- (1) The research papers report work supported by the Federal Government; and
- (2) The charges are levied impartially on all research papers published by the journal, whether or not by federally-sponsored authors.

35. *Rearrangement and alteration costs.* Costs incurred for ordinary and normal rearrangement and alteration of facilities are allowable. Special arrangements and alterations costs incurred specifically for a Federal award are allowable with the prior approval of the Federal awarding agency.

36. *Reconversion costs.* Costs incurred in the restoration or rehabilitation of the governmental unit's facilities to approximately the same condition existing immediately prior to commencement of Federal awards, less costs related to normal wear and tear, are allowable.

37. *Rental costs of buildings and equipment.*

a. Subject to the limitations described in subsections b. through d. of this section, rental costs are allowable to the extent that the rates are reasonable in light of such factors as: rental costs of comparable property, if any; market conditions in the area; alternatives available; and the type, life expectancy, condition, and value of the property leased. Rental arrangements should be reviewed periodically to determine if circumstances have changed and other options are available.

b. Rental costs under "sale and lease back" arrangements are allowable only up to the amount that would be allowed had the governmental unit continued to own the property. This amount would include expenses such as depreciation or use allowance, maintenance, taxes, and insurance.

c. Rental costs under "less-than-arm's-length" leases are allowable only up to the amount (as explained in section 37.b of this appendix) that would be allowed had title to the property vested in the governmental unit. For this purpose, a less-than-arm's-length lease is one under which one party to the lease agreement is able to control or substantially influence the actions of the other. Such leases include, but are not

limited to those between divisions of a governmental unit; governmental units under common control through common officers, directors, or members; and a governmental unit and a director, trustee, officer, or key employee of the governmental unit or his immediate family, either directly or through corporations, trusts, or similar arrangements in which they hold a controlling interest. For example, a governmental unit may establish a separate corporation for the sole purpose of owning property and leasing it back to the governmental unit.

d. Rental costs under leases which are required to be treated as capital leases under GAAP are allowable only up to the amount (as explained in subsection 37.b of this appendix) that would be allowed had the governmental unit purchased the property on the date the lease agreement was executed. The provisions of Financial Accounting Standards Board Statement 13, Accounting for Leases, shall be used to determine whether a lease is a capital lease. Interest costs related to capital leases are allowable to the extent they meet the criteria in section 23 of this appendix. Unallowable costs include amounts paid for profit, management fees, and taxes that would not have been incurred had the governmental unit purchased the facility.

38. *Royalties and other costs for the use of patents.*

a. Royalties on a patent or copyright or amortization of the cost of acquiring by purchase a copyright, patent, or rights thereto, necessary for the proper performance of the award are allowable unless:

(1) The Federal Government has a license or the right to free use of the patent or copyright.

(2) The patent or copyright has been adjudicated to be invalid, or has been administratively determined to be invalid.

(3) The patent or copyright is considered to be unenforceable.

(4) The patent or copyright is expired.

b. Special care should be exercised in determining reasonableness where the royalties may have been arrived at as a result of less-than-arm's-length bargaining, *e.g.*:

(1) Royalties paid to persons, including corporations, affiliated with the governmental unit.

(2) Royalties paid to unaffiliated parties, including corporations, under an agreement entered into in contemplation that a Federal award would be made.

(3) Royalties paid under an agreement entered into after an award is made to a governmental unit.

c. In any case involving a patent or copyright formerly owned by the governmental unit, the amount of royalty allowed should not exceed the cost which would have been allowed had the governmental unit retained title thereto.

39. *Selling and marketing.* Costs of selling and marketing any products or services of the governmental unit are unallowable (unless allowed under section 1. of this appendix as allowable public relations costs or under section 33. of this appendix as allowable proposal costs).

40. *Taxes.*

a. Taxes that a governmental unit is legally required to pay are allowable, except for self-

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