



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

SACW

20 December 2023

MEMORANDUM FOR COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS

SUBJECT: Prado Dam, Majestic-Chino Warehouse Development

1. References:

- a. Section 14 of the Rivers and Harbors Act of 1899, as amended (33 USC § 408).
- b. Engineering Circular (EC) 1165-2-220.
- c. Policy Guidance Letter No. 32, Use of Corps Reservoir Flowage Easement Lands, dated April 1993.
- d. Project Cooperation Agreement (PCA) Between the Department of the Army and Orange County Flood Control District for Construction of the Prado Dam, dated 11 February 2003.
- e. Real Estate Planning Report, Prado Dam Expansion as Separable Element, dated February 2000.

2. Background.

a. Prado Dam in Riverside County, California, is approximately two miles west of the city of Corona on the Santa Ana River and approximately 30 miles upstream from the river's termination in the Pacific Ocean. The dam was initially constructed pursuant to the Flood Control Act of 1936 (Pub. L. 74-738), as amended. The Corps acquired the right to flood, either by ownership in fee or by easement, all reservoir lands up to elevation 556-ft NGVD, the original real estate take line for the reservoir. Congress subsequently authorized the raise of Prado Dam and the non-Federal sponsor, Orange County Flood Control District (OCFCD), purchased the required lands as part of its obligation to acquire the right to flood this new area. The real estate take line for the raised dam project moved from elevation 556-ft to 563-ft NGVD, plus an additional three feet of reasonable freeboard allowance in accordance with 32 CFR § 644.4(b)(1)(ii), the maximum water surface of the updated standard project flood (SPF). The USACE Real Estate Planning Report (Reference 1.e.), pursuant to which this property was acquired, determined that the "existing Government owned flowage easements will remain in effect." The plan further states that "Los Angeles District, Corps of Engineers would

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continue to be responsible for compliance with the deed restrictions of these flowage easements, as they apply, to ensure that the project is operated and maintained consistent with the authorized project purposes.”

b. Third-party permittee Majestic seeks to construct two commercial warehouses totaling approximately 2.1 million square feet (~48 acres) on the OCFCD property, which is subject to flooding for project purposes. Majestic proposes to build its warehouse pads above elevation 566-ft by importing approximately 340 acre-feet of fill from five separate borrow sites lower in the reservoir, owned in fee by OCFCD. The current development proposal includes parking lots that are at-grade and loading docks surrounding the two warehouses that are up to six feet below the real estate take line of elevation 566-ft NGVD. Generally, under current regulation and practice, surface parking lots, susceptible to inundation, are considered an acceptable land-use in reservoirs.

c. In accordance with Reference 1.b., OCFCD and Majestic applied for a Section 408 Permission, pursuant to 33 USC. § 408. Notwithstanding the submission of a Section 408 application, Majestic proposed the request be processed as a real estate action consisting of consents to construction, consent to borrow, and a release of the flowage easements. In 2022, the District Commander declined to release the flowage easements. After that decision, OCFCD and Majestic requested that the District continue to process its Section 408 application. After several years of review and consideration, the engineering analyses concluded that the proposed improvements would not impair the function and usefulness of the project, provided that certain evacuation and safety measures were imposed on the warehouses’ construction and operation as conditions of the Section 408 Permission. The District Engineer was therefore able to conclude that the proposal was compatible with the authorized purposes of the project in accordance with the PCA. The Corps issued a Section 408 permission for the warehouse development that would approve the development, if accepted by the applicants. Majestic then requested that the ASA(CW) reconsider the applicability of Section 408 in favor of proceeding as a real estate action.

3. Section 14 of the Rivers and Harbors Act of 1899 (33 USC § 408) makes it unlawful to take possession of, make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct, or in any manner whatever impair the usefulness of any work built by the United States. Section 14 further provides that the Corps may grant permission for the alteration of such public works when, in the judgment of the Secretary, such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work. Finally, Section 14 was amended in WRDA 2018 to specifically provide that “the term ‘work’ shall not include unimproved real estate owned or operated by the Secretary as part of a water resources development project, if the Secretary determines that modification of such real estate would not affect the function and usefulness of the project.” (33 U.S.C. § 408(d)).

Attachment A

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4. Section 408(d) does not exempt unimproved lands from Section 408. However, it does specifically provide that if the Secretary determines the proposed alteration does not affect the function and usefulness of the project, then Section 408 does not apply to that area of the project for the purposes of that specific alteration. Accordingly, if the modification of the unimproved real estate would not affect the function and usefulness of the project, then a Section 408 permit is not legally required. For example, farmers using unimproved project lands for grazing would not need a Section 408 permission if the livestock's presence would not affect the project's operation or function. My determination, which applies to unimproved real estate owned *or* operated by the Army, is specific to the particular activity. Any other activity proposed for that parcel would require a separate determination from me of whether the activity would affect the function and usefulness of the project or whether it could otherwise be authorized under Section 408.

5. Here, OCFCD and Majestic have requested permission to build two warehouses on unimproved lands used in the operation of the project for flood storage. Considering the potential application of Section 408(d), I requested additional information from the Corps. On August 14, 2023, the Corps advised that the impact of the proposed warehouse development would be local and *de minimis*, based upon the Corps' engineering expertise, experiences, and understanding of current conditions; the information Majestic has provided to date; and the assumption that appropriate safety measures will be implemented. In other words, there will be essentially no impact on the operation of this specific project. I understand that the proposed modification will import 600K cubic yards of fill from borrow areas within the Prado Basin to construct the building pads and to make the finished floor elevation at 567-ft NGVD. The Corps District has estimated the potential borrow sites contain a total of 835K cubic yards of potential contributed fill material, so there may be no net change to overall flood storage volume resulting from the planned borrow and fill. Further, in response to my questions, the Corps acknowledged that the proposed grading could even potentially provide a slight increase in flood storage volume below 566-ft NGVD if the borrow sites were fully used for the fill. Thus, I find that the proposed modification on unimproved real estate operated as part of the Prado Dam does not affect the function and usefulness of the project. My finding is based on the facts and history specific to this request and does not establish a precedent for the application of Section 408(d) or for other development at this project or any other project.

6. With respect to Majestic's request to reconsider the applicability of Section 408 in favor of proceeding as a real estate action, I am directing the Corps to dispose of flowage easement rights over Parcels 510 and 511 to the underlying fee owner, OCFCD, for no consideration, and subject to certain conditions intended to ensure that OCFCD exercises its responsibilities as the non-federal sponsor to retain interests in public ownership and satisfy all of its Operation, Maintenance, Repair, Replacement and Rehabilitation (OMRR&R) requirements, including, but not limited to prohibiting human habitation and any other safety measures required by the Corps. Such conditions and measures will be set forth in an agreement between the Army and

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OCFCD and in all documentation between OCFCD and Majestic. After the United States' acquisition of a flowage easement, when the real estate take line for the raised dam project changed, OCFCD acquired a fee interest in the subject property for the project pursuant to the PCA executed between OCFCD and the Army. Specifically, Article III.A. of Reference 1.d. obligates OCFCD to "ensure that lands that the Government determines to be required for the operation and maintenance of the Project and that were provided by OCFCD are retained in public ownership for uses compatible with the authorized purposes of the Project." In accordance with Section 221 of the Flood Control Act of 1970, as amended, and Section 103 of the Water Resources Development Act of 1986, as amended, PCAs are legally binding agreements enforceable in District Court. When OCFCD acquired the fee interest, the Government's easement became superfluous to the project since OCFCD acquired all ownership and the right to use and possess the property. As detailed above, OCFCD is also obligated to ensure that this property remains in public ownership for uses compatible with the project. Accordingly, the flowage easement rights are no longer needed for use, occupancy, and control for project needs.

7. Under Article VIII.A of Reference 1.d., OCFCD is obligated to "manage and maintain all lands, easements, and rights-of-way provided by the Non-Federal Sponsor in accordance with Article III.A of this Agreement, in a manner compatible with the project's authorized purposes and in accordance with . . . specific directions prescribed by the Government in the OMRR&R Manual and any subsequent amendments thereto." Consistent with the paragraph six above, I am specifically directing the Corps to ensure the OMRR&R manual is clear that any non-project alterations occurring on the project lands must be secondary to, and compatible with, the project purposes. I am providing a copy of this memo to OCFCD to ensure they are aware of my determination regarding the release of the easement, that the lands remain project lands subject to inundation pursuant to project operation, and my direction with respect to the OMRR&R manual prohibiting any activities on this property incompatible with the project, including human habitation, which is prohibited because of the potential for flooding.

8. I understand that the remaining requests for a storm drain easement and construction license for proposed grading on Corps land are noncontroversial and can be addressed through local processes.

9. As a general matter, I recognize that there may be many potential modifications of projects that may affect a project's function and usefulness, yet do not rise to the level of impairing the usefulness of the project. Clearly there are categories of modifications that would not affect the project function and usefulness and others that would require specific review of the proposed modification's potential affects. The Corps is directed to develop options for implementing Section 408(d), recognizing that even small effects can have substantive impacts to the function or manner of a project's operation and thus may require a permission pursuant to Section 408(a). Further, I am directing the Corps to develop and propose an approach for elevating future Section 408 decisions above District level when the real estate acquisition requirements for flood risk reduction

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reservoir projects are at issue, like Prado. The Corps' proposal will be reviewed by my staff and subject to my final approval.

10. I appreciate that local interests might perceive Corps project lands as available space for development, that sponsors may wish to offset project construction costs by allowing development, and that the Corps may have permitted similar development previously. Nonetheless, the Corps is reminded that if a modification would impair the function and usefulness of a project, including its operation, or if the modification is injurious to the public interest, then the Section 408 request must be denied. As indicated in paragraph five above, my determinations pertaining to the application of Section 408(d) and the disposal of flowage easements in this specific scenario may *not* be relied upon to support the development of any other project on real estate owned or operated by the Army or its non-federal project partners.

11. The Corps will expeditiously complete the actions in paragraphs six through eight above and provide my staff with biweekly status updates until the conclusion of such actions. The Corps is also directed to provide a briefing on the actions in paragraph nine above within six months of the date of this memorandum. The Corps Headquarters is responsible for ensuring execution of the directives in this memorandum and any associated actions.

12. Questions regarding this matter may be directed to Stacey Jensen, Acting Director of Policy and Legislation, Office of the Assistant Secretary of the Army (Civil Works), at (703) 459-6026 or stacey.m.jensen.civ@army.mil.



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