



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

JUN 27 2016

CECW-CO

MEMORANDUM FOR Commander, Southwestern Division

SUBJECT: Implementation Guidance Section 2011 of the Water Resources Reform and Development Act of 2014 (WRRDA 2014) Corps of Engineers Lock and Dam Energy Development

1. Section 2011 of WRRDA 2014 amends Section 1117 of WRDA 86, W. D. Mayo Lock and Dam, herein referred to as Section 1117. Section 1117 provides authority for the Cherokee Nation to design and construct one or more hydroelectric power generating facilities at the W.D. Mayo Lock and Dams on the Arkansas River, Oklahoma, at its own expense, with sole responsibility for operation, maintenance, repair, rehabilitation, and replacement (OMRR&R), and marketing of the electricity generated from any such facility. In addition, the Cherokee Nation shall hold all title to a hydroelectric generating facility constructed under this authority and, subject to approval by the Secretary, may assign such title to a third party and shall release the United States from any claims, causes of actions or liabilities that may arise out of any activity undertaken pursuant to this authority. The Secretary must review and approve the plans and specifications prior to initiation of any construction and may accept funds offered by the Cherokee Nation and use such funds to carry out the design and construction of a hydroelectric generating facility under this authority or to provide technical and construction assistance requested by the Cherokee Nation relating to the design and construction of a hydroelectric generating facility under this authority. Furthermore, the Cherokee Nation will be responsible for obtaining any permit required under Federal and State law except that they will be exempt from the licensing requirements that might otherwise apply under the Federal Power Act. A copy of Section 2011 of WRDDA 2014 is enclosed.

2. Any proposed hydroelectric power generating facilities under section 1117 will be evaluated in accordance with the 33 U.S.C. § 408 policy and procedural guidance provided in EC 1165-2-216, dated 31 July 2014, last updated 30 September 2015, or its successor. Although section 1117 provides authority for the Cherokee Nation of Oklahoma to design and construct one or more hydroelectric facilities at W. D. Mayo Lock and Dam, a determination must be made that the particular manner in which the Cherokee Nation proposes to add hydroelectric facilities to the project is not injurious to the public interest and will not impair the usefulness of the project. Additionally, as provided in EC 1165-2-216, a determination must be made that the proposed alterations or modifications meet USACE engineering and safety standards.

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3. While ensuring that compliance with the National Environmental Policy Act (NEPA) and other environmental compliance requirements is the responsibility of the USACE, the Cherokee Nation will be responsible for providing all information that is necessary to satisfy all applicable federal laws, executive orders, regulations, policies and ordinances. The Cherokee Nation will also be responsible for obtaining any other permits required under Federal and State law except the licensing requirements that might otherwise apply under the Federal Power Act. A Department of Army (DA) authorization pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act may also be required. The Cherokee Nation will be responsible for submitting an application to the USACE Tulsa District's Regulatory office and complying with all regulatory requirements.

4. If a proposal receives approval through the section 408 evaluation process, the section 408 approval document must include any special technical conditions or specifications that the District Engineer deems necessary, oversight procedures for USACE monitoring of construction activities, operation and maintenance requirements/restrictions for the completed hydroelectric facilities, and an express statement that the operation of the hydropower facilities shall be subject to the operational requirements of the W.D. Mayo Lock and Dam for authorized project purposes. The approval document must also expressly provide that the Cherokee Nation shall:

- a. Obtain USACE approval of 100% of plans and specifications prior to construction;
- b. Bear all costs associated with the design and construction of the proposed hydroelectric facilities;
- c. Certify in writing, prior to construction, that the entire amount of funding to complete the proposed hydroelectric facilities is available and provide any supporting documentation that USACE deems necessary;
- d. Provide the full amount of funding in advance for any work that the Cherokee Nation requests USACE to perform;
- e. Notify USACE of any third party agreements related to the financing, construction, operation, or management of the hydroelectric facilities;

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f. Obtain USACE approval of any proposed agreements with third parties that affect property interests in the hydroelectric facilities;

g. Be solely responsible for the operation, maintenance, repair, replacement and rehabilitation of the hydroelectric facilities;

h. Be solely responsible for the marketing of the electricity generated by the hydroelectric facilities;

i. Agree in writing, prior to construction, to release and indemnify the United States from any claims, causes of action, or liabilities that may arise out of any activity related to the hydroelectric facilities.

5. If deemed necessary, the requirements and conditions described in paragraph 4 of this guidance may be incorporated into a Memorandum of Agreement (MOA) between the parties.

6. Section 1117 provides authority for the Secretary to accept and use funds provided by the Cherokee Nation to carry out the design and construction of a hydroelectric generating facility at W.D Mayo Lock and Dam and to provide technical and construction management assistance at the request of the Cherokee Nation. Prior to USACE accepting any funds or performing work on behalf of the Cherokee Nation, the parties must execute a support for others MOA and accompanying support agreement(s) that comply with Department of Defense Instruction 4000. 19, dated 25 April 2013, and ER 1140-1-211, dated 15 August 2011. The Cherokee Nation must provide all funding in advance and agree to pay all costs associated with USACE's provision of goods and/or services, to include liabilities arising from USACE's execution of the work. The MOA may be a standalone agreement or the necessary support for others provisions may be incorporated into the MOA described in paragraph 5 of this guidance.

7. Approval Authorities:

a. The USACE Director of Civil Works (DCW) is the final decision authority for this section 408 authorization. Following DCW approval, the Southwestern Division Commander must approve the section 408 approval document prepared by the District Engineer prior to issuance of the document to the Cherokee Nation. All other approval

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authorities for the section 408 evaluation process will be determined in accordance with EC 1165-2-216.

b. The SWD Division Commander is the approval authority for the MOA(s) described in paragraphs 5 and 6 of this guidance and is further authorized to accept funds from the Cherokee Nation and use such funds to carry out the design and construction of hydroelectric facilities on behalf of the Cherokee Nation as provided in subparagraphs (b)(2) and (e) of Section 1117.

c. The DCW is the approval authority for any third party agreements that affect property interests in installed hydroelectric facilities as described in subparagraph 4.f. of this guidance and subparagraph (d)(1) of section 1117.



Encl

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Directorate of Civil Works

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Section 2011 CORPS OF ENGINEERS LOCK AND DAM ENERGY DEVELOPMENT

Section 1117 of the Water Resources Development Act of 1986 (100 Stat. 4236) is amended to read as follows:

“SEC. 1117. W.D. MAYO LOCK AND DAM.

“(a) IN GENERAL.—The Cherokee Nation of Oklahoma may—

“ (1) design and construct one or more hydroelectric generating facilities at the W.D. Mayo Lock and Dam on the Arkansas River, Oklahoma; and

“ (2) market the electricity generated from any such facility.

“(b) PRECONSTRUCTION REQUIREMENTS.—

“ (1) PERMITS.—Before the date on which construction of a hydroelectric generating facility begins under subsection (a), the Cherokee Nation shall obtain any permit required under Federal or State law, except that the Cherokee Nation shall be exempt from licensing requirements that may otherwise apply to construction, operation, or maintenance of the facility under the Federal Power Act (16 U.S.C. 791a et seq.).

‘ (2) REVIEW OF PLANS AND SPECIFICATIONS.—The Cherokee Nation may initiate the design or construction of a hydroelectric generating facility under subsection (a) only after the Secretary reviews and approves the plans and specifications for the design and construction.

“(c) PAYMENT OF DESIGN AND CONSTRUCTION COSTS.—

“ (1) IN GENERAL.—The Secretary may accept funds offered by the Cherokee Nation and use such funds to carry out the design and construction of a hydroelectric generating facility under subsection (a).

“ (2) ALLOCATION OF COSTS.—The Cherokee Nation shall—

“ (A) bear all costs associated with the design and construction of a hydroelectric generating facility under subsection (a); and

“ (B) provide any funds necessary for the design and construction to the Secretary prior to the Secretary initiating any activities related to the design and construction.

“(d) ASSUMPTION OF LIABILITY.—The Cherokee Nation shall—

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“ (1) hold all title to a hydroelectric generating facility constructed under subsection (a) and may, subject to the approval of the Secretary, assign such title to a third party;

“ (2) be solely responsible for—

“ (A) the operation, maintenance, repair, replacement, and rehabilitation of the facility; and

“ (B) the marketing of the electricity generated by the facility; and

“ (3) release and indemnify the United States from any claims, causes of action, or liabilities that may arise out of any activity undertaken to carry out this section.

“(e) ASSISTANCE AVAILABLE.—The Secretary may provide technical and construction management assistance requested by the Cherokee Nation relating to the design and construction of a hydroelectric generating facility under subsection (a).

“(f) THIRD PARTY AGREEMENTS.—The Cherokee Nation may enter into agreements with the Secretary or a third party that the Cherokee Nation or the Secretary determines are necessary to carry out this section.”