

**Forest Service Handbook
National Headquarters - Washington Office
Washington, DC**

**Forest Service Handbook 2709.15 – Hydroelectric Handbook
Chapter 40 - Project Agreements**

Amendment: 2709.15-Amendment 1

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41 - Memorandums of Agreement

A memorandum of agreement (MOA) as sometimes used in the past was defined as a form of memorandum of understanding that was a binding contract that could be enforced through the courts. However, as a result of Supreme Court clarification, the Forest Service has authority, through section 4(e) of the Federal Power Act, to require necessary binding conditions in a license issued by FERC. For this reason, a memorandum of agreement should not be used. Regional Foresters shall not enter into memorandums of agreement without prior approval for the specific case from the Chief. If an MOA is used, it must be supported by appropriate environmental analysis and documentation.

42 - Memorandums of Understanding

A memorandum of understanding (MOU) documents an agreement that either party can cancel with notice, is not binding, and normally is not enforceable in court. Do not include terms that require enforcement in an MOU. Memorandums of understanding are optional and may be useful in coordinating project development and construction (FSM 1580). However, do not use MOU's to authorize any entry on National Forest land where ground or resource disturbance might occur (roads, equipment, survey clearing, staking, or painting). Only authorize these activities in a special-use authorization.

42.1 - Investigation Memorandums of Understanding (Preliminary Permit Stage)

A memorandum of understanding (MOU) at the preliminary stage provides direction and defines coordination needed during the license preparation phase. Include, as appropriate, the following items in an investigation MOU.

1. The circumstances under which the developer needs an investigation special-use permit.
2. The office where the developer is to obtain the special-use permit.
3. Types of resource studies necessary.
4. Liaison establishment.
5. Collection agreement information.

42.2 - Project Memorandums of Understanding

Do not use this type of agreement in place of license conditions submitted to FERC under Section 4(e) of the Federal Power Act or in place of appropriate conditions in the special-use authorization. A project MOU may document other agreements or

procedures for the implementation of conditions of the license or special-use authorization and establish criteria, standards, and methods.

Appropriate items for inclusion in the project memorandum of understanding might include:

1. Clarification of items that are in the application for license or exemption.
2. Identification of responsibilities for funding and for operation of recreation facilities, particularly those which are both partially project-induced and partially National Forest responsibilities.
3. Liaison designation and funding.
4. Items of coordination necessary before, during, and after construction.

42.3 - Example Investigation Memorandum of Understanding

See the following exhibit 1 for an example investigation stage memorandum of understanding (MOU).

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EXAMPLE MOU FOR INVESTIGATION STAGE

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE
AND
<name of developer>

This Memorandum of Understanding is entered into by and between the Forest Service, United States Department of Agriculture, hereinafter known as "Forest Service," and [], hereinafter known as the "Applicant." <name, number, and location of proposed project> to be known as the "Project."

RECITALS:

1. The Applicant is a private agent that proposes to study, investigate, develop plans, and propose agreements for the construction and operation of hydroelectric power generation facilities.
2. The Applicant has filed with the Federal Energy Regulatory Commission (FERC) for a preliminary permit under the Federal Power Act to occupy lands of the United States within the [] National Forest.
3. The Forest Service is responsible for the administration and protection of National Forest System lands within the boundaries of the [] National Forest. The withdrawal and licensing does not relieve the Forest Service of responsibility for multiple-use management of the resource thereon.
4. The parties hereto, through mutual agreement and cooperation expressed in this Memorandum of Understanding, seek to: inform the project Applicant of Forest Service requirements; define the needs, methods, and standards of the studies to be conducted; enable the Applicant to plan resource damage mitigation at an early stage; incorporate the project into the Forest Service multiple use concept; enhance forest resources where possible; alleviate impacts to the Forest Service during the course of this study; and encourage consultation with the Forest Service during the study period.

NOW, THEREFORE, it is mutually agreed by both parties hereto as follows:

1. The Applicant agrees to study the feasibility, locations, topography, streamflow, and requirements for hydroelectric development. Any tests requiring a change of land surface, vegetation removal, construction, sampling, or marking (paint, flagging, staking) must be authorized by a special-use permit from the [] National Forest.

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2. The Applicant agrees to apply for a hydroelectric investigation permit for all phases of resource measurement testing, surveying, and topography work performed on National Forest System land prior to commencing work.

3. The Applicant agrees to apply for a cultural resource permit for investigation of archaeological, historical, and ethnographic studies research and testing on National Forest System land. Prior to commencing work, the contractors shall submit a written proposal with the special-use permit application.

4. The Applicant agrees to require its botanist responsible for plant surveys to be approved by and obtain a botanical collectors permit from the Forest Service before beginning surveys.

5. The Applicant agrees to fully repair all damage, other than ordinary wear and tear to National Forest roads and trails, caused by the Applicant in pursuit of this study.

6. The Applicant shall designate a liaison to the Supervisors Office to represent the Applicant's interests with the Forest Service. This liaison shall serve as contact person for communications and requests between the Forest Service and Applicant. The Applicant shall report immediately any change in status of the liaison.

7. The Applicant agrees to consult with the Forest Service in preparing mitigation measures for all resource damage caused by the proposed project for both construction and operation stages.

8. The Applicant agrees to submit any requirements from other agencies to the Forest Service for consideration and information.

9. The Applicant agrees to perform all studies and environmental reviews to fulfill the National Environmental Policy Act process pursuant to issuing the special-use permits required by the construction and operation phases of the project.

10. The Forest Service may request the Applicant to enter into a collection agreement to pay for costs above normal administrative duties for performance of work required by law or policy but not funded by the agency on a time schedule beneficial to the applicant.

11. This Memorandum of Understanding does not preclude any other rights and privileges of others that have been issued by an authorized agency of the United States. It is the Applicant's responsibility to research and understand these previously issued rights and privileges in the project area.

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12. This Memorandum of Understanding becomes effective upon execution by both parties hereto.

13. Either party may terminate this Memorandum of Understanding by providing 60 days written notice. Unless terminated by written notice, this Memorandum will remain in force for as long as the preliminary permit issued by FERC remains in force.

_____/s/_____

<name>

Forest Supervisor
[] National Forest

<date>
Date

_____/s/_____

APPLICANT

<name>

Project

<date>
Date

43 - Collection Agreements

(FSM 1584 and FSH 1509.11, chapter 70).

43.1 - Purpose

Collection agreements are optional and may be used in both prelicense study and project development stages of a project to cover some of the costs of construction monitoring, detailed planning, studies, reviews, environmental analysis, and liaison. Collection Agreements may be useful to the developer to allow the Forest Service to keep up with their rapidly developing project. Their use allows the Forest Service to facilitate the needs of developers for quick turn-around of information.

43.2 - Procedures

If the Forest Service cannot meet the developer's schedule with current funding and priorities, and when mutually agreed, use a collection agreement to expedite planning and project development for the developer. There is no basis for forcing a developer to enter into a collection agreement.

If a collection agreement appears necessary, discuss the advantages to the developer of such an agreement. These benefits include allowing timely, early review of the designs, proposals, and construction which could (1) save the developer money by not having to redesign; (2) save the developer money by obtaining ground verification by local experts; and (3) prevent future lengthy and costly time delays for shut-downs if the developer's designs are unacceptable on-the-ground. Our experience has shown that some site plans and environmental mitigation plans are over-designed or mislocated, on numerous occasions and that the Forest Service has saved the developer considerably more money in potential construction costs than the collection agreement cost.

Generally, do not use collection agreements to pay the Forest Service to do the developer's work; however, for the sake of overall efficiency, there may be specific instances where it also would be in the Government's interest to perform some studies at the developer's expense. The developer should hire the appropriate consultants. A collection agreement appropriately could cover Forest Service review of surveys and associated administrative activities.

Collection Agreements commit us to providing the services we agree to, which may mean adjusting workloads, detailing personnel from other units, or using contracting to meet other targets.

Keep complete records of collection agreement expenditures and periodically report those expenses to the other party to the agreement as specified in the agreement.

Since the developer is paying for special processing to meet its time schedule and not just financing the Forest Service, the Forest Supervisor should be able to show that the people doing the work would be surplus (the work they were doing before is no longer financed) or that the work they would otherwise be doing is being accomplished by other means (contracting, temporaries, new hires, overtime, and so forth).

43.3 - Collection Agreement Content and Examples

(FSH 1509.11 sec. 71.2). The mandatory items which must be part of the collection agreement are:

1. Reference to the law that allows the collection agreement (see opening paragraph of exhibit 1). Note that to use the Granger-Thye Act of April 24, 1950 (16 USC 572) as the authority (FSM 1584.13) for the collection agreement, that the other party must be a permittee of the Forest Service. Also note that if there is no permit, the Department gift authority under 7 USC 2269 may be appropriate.
2. Reference to the project involved (see RECITALS of exhibit 1).
3. The reason for the developer paying for Forest Service involvement rather than the Forest Service using appropriated funds (see clauses D and E of exhibit 1). Ensure that there is a clear statement that the work is in the public interest and that the developer's needs are the driving force behind the collection agreement (FSH 1509.11, sec. 71.21).
4. Method for transferring funds (see clauses 1 and 2 of exhibit 1).
5. Disposition of excess funds (see clause 5 of exhibit 1).
6. Government nonliability clause (see clause 7 of exhibit 1).
7. A time and escape clause (use clause 8 of exhibit 1) .
8. Legal protection clauses (use clauses 9 and 10 of exhibit 1).
9. Signatures and dates.

If improvements to National Forest System lands will be made under the collection agreement, see FSH 1509.11, section 71.23. If amendments are necessary, see FSH 1509.11, section 71.27.

Exhibits 1 and 2 show example collection agreements for investigation and construction, respectively.

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EXAMPLE COLLECTION AGREEMENT FOR STUDY

COLLECTION AGREEMENT
BETWEEN
[]
AND
[] NATIONAL FOREST, USDA-FOREST SERVICE

THIS AGREEMENT, in accordance with the provisions of the Act of April 24, 1950, (16 USC 572), is made and entered into this <day> day of <month>, <year>, by and between the [] <a corporation, etc.> and permittee on National Forest land, hereinafter referred to as [] , and the FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, hereinafter referred to as the "Forest Service."

RECITALS:

- A. [] proposes to study the [] hydroelectric project.
- B. [] feasibility studies on National Forest land are authorized by Forest Service special-use permit designated: Hydroelectric Investigation - <date>.
- C. The proposed project known as [] would be located on National Forest lands in [township, and range, meridian].
- D. [] has requested the Forest Service to provide input to the project studies by attending various meetings, participating in field reconnaissance, and providing certain information relating to various routing alternatives as required by 36 CFR 251.54(a).
- E. Forest Service indicates that current staffing and budget are not adequate to provide input and support as described in Recital D within the time frames allotted in the [] project schedule.

NOW THEREFORE, the parties hereto agree as follows:

1. [] shall make advance payments to the Forest Service, USDA, [address], as requested by the Forest Service, in amounts sufficient to cover the total cost, including administrative costs, of providing the requested information, which total is not to exceed \$[]. The first advance payment shall be in the amount of \$[].
2. Forest Service shall deposit payments received from [] into the Forest Service work fund.

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3. This agreement will have no effect on the provisions and clauses of ☐ special-use permits or easement; specifically, this agreement shall in no way be deemed an admission or agreement on the part of ☐ that it is required to reimburse the Forest Service for any costs incurred by it in processing ☐ permit application.

4. Forest Service shall provide to ☐, accompanying each subsequent request for advance payment, an itemized statement of actual expenditures since the previous deposit.

5. Forest Service will, upon termination of this agreement, refund to ☐ any unexpended funds previously deposited.

6. Forest Service will provide the work and information, as described herein, as soon as possible following receipt of deposit.

7. The United States of America shall not be liable for any damage incident to the performance of work under this agreement to ☐ and ☐ hereby expressly waives any and all claims against the United States of America for compensation for any loss, damage, personal injury or death occurring in consequence of the performance of this agreement.

8. This agreement shall become effective when signed by the parties hereto and will continue for one (1) year from the date of execution of this agreement unless terminated earlier by thirty (30) calendar days' written notice by either party to the other: Provided that any funds on deposit will be available for expenses incident to closing out the work beyond the written notice.

9. No member of, or delegate to, Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this agreement if made with a corporation for its general benefit.

10. Nothing herein shall be construed as obligating the Forest Service to expend or involving the United States in any contract or other obligation for the future payment of money in excess of appropriations authorized by law and administratively allocated for this work.

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IN WITNESS WHEREOF, the parties hereto, by their respective duly authorized officials, have executed this agreement the day and year first written above.

[Developer identification]

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE, [] NATIONAL FOREST

By _____/s/_____
[Authorized representative]

By _____/s/_____
Forest Supervisor

Date

Date

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EXAMPLE COLLECTION AGREEMENT FOR PROJECT CONSTRUCTION

**COLLECTION AGREEMENT NUMBER 1
BETWEEN**

**THE EL DORADO COUNTY WATER AGENCY
AND
THE ELDORADO IRRIGATION DISTRICT
AND
EL DORADO NATIONAL FOREST, USDA-FOREST SERVICE**

THIS AGREEMENT, in accordance with the provisions of the Act of April 24, 1950, (16 USC 572), is made and entered into this 8th day of February 1986, by the FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, hereinafter referred to as the "Forest Service" and the EL DORADO COUNTY WATER AGENCY AND THE EL DORADO IRRIGATION DISTRICT, a permittee on National Forest land, hereinafter jointly referred to as "El Dorado."

RECITALS:

- A. El Dorado proposes to construct the SOFAR Hydroelectric project.
- B. El Dorado's construction involving National Forest land is authorized by FERC-License #2761 issued December 24, 1984, and Forest Service Special-Use Permit #_____ issued [] to El Dorado.
- C. The proposed project known as SOFAR will be located on National Forest lands.
- D. El Dorado desires the Forest Service to provide input to the project design studies, environmental mitigation plans, and construction monitoring by attending various meetings, participating in field reconnaissance, reviewing plans and actions, and providing certain information relating to various routing alternatives as required by 36 CFR 251.54(a).
- E. Forest Service indicates that current staffing and budget are not adequate to provide input and support as described in Recital D within the time frame allotted in the project schedule.

NOW THEREFORE, the parties hereto agree as follows:

- 1. El Dorado shall make advance payments of \$[] to the Forest Service to cover the liaison, support, and administrative costs of providing the requested information for the period [] through []. Should the amount of time necessary to respond to the project's needs increase, the amount of funding may be renegotiated. The payments shall consist of [] no later than [] and the payments per 3-month period as shown on the attached exhibit A. The Forest Service will provide a quarterly report of expenses relating to this agreement. Adjustments to the payment schedule of exhibit A may be made, based on the carry-over balance shown in such report. Additional advances may be requested by the Forest Service to cover periods where El Dorado's activity is more than planned, as long as the total collection agreement amount remains unchanged, except as provided herein.

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2. In the event where unacceptable resource damage is occurring or about to occur because of poor cooperation in resource protection by the construction contractors or others, the Forest Service reserves the right to request additional funds, since the total amount shown in item 1 above was negotiated on the basis of construction proceeding in a cooperative manner.

3. Forest Service shall deposit payments received from El Dorado into the Forest Service cooperative work fund.

4. Forest Service will, upon termination of this agreement, refund to or credit El Dorado any unexpended funds previously deposited.

5. The United States of America shall not be liable for any damage incident to the performance of work under this agreement to El Dorado and El Dorado hereby expressly waives any and all claims against the United States of America for compensation for any loss, damage, personal injury or death occurring in consequence of the performance of this agreement.

6. This agreement shall become effective when signed by the parties hereto and will continue until April 30, 1987, unless terminated earlier by thirty (30) calendar days' written notice by either party to the other: Provided that any funds on deposit will be available for expenses incident to closing out the work beyond the written notice.

7. No member of, or delegate to, Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this agreement if made with a corporation for its general benefit.

8. Nothing herein shall be construed as obligating the Forest Service to expend or involving the United States in any contract or other obligation for the future payment of money in excess of appropriations authorized by law and administratively allocated for this work.

IN WITNESS WHEREOF, the parties hereto, by their respective duly authorized officials, have executed this agreement the date and year first written below.

SOFAR MANAGEMENT AUTHORITY:

By _____ Date _____
Chairman

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE, ELDORADO NATIONAL FOREST:

By _____ Date _____
Forest Supervisor