

**Ute Reservoir
Private Uses of Interstate Stream Commission Fee Land,
Flowage Easements, And Encroachment Policy
Adopted by Interstate Stream Commission
February 16, 2005**

GENERAL POLICY

1. Water quality protection, public use of Interstate Stream Commission (“Commission”) public property, and protection of Ute Reservoir for drinking water supply and public recreation uses are superior to and will not be compromised by private improvements located on Commission property.
2. The Commission reserves the perpetual right to intermittently flood, flow, seep, silt, erode, submerge or otherwise affect with water from any source at any time lands below 3,806 feet elevation.
3. In order to protect public safety, and based upon well-established safety criteria, the Commission will acquire and maintain fee or easement interests on all land at Ute Reservoir below 3,806 feet elevation, as set forth in the Flowage Easement Resurvey and Purchase Policy, below.
4. The Commission shall not allow the construction of any habitable structures¹ on its fee simple land or flowage easements regardless of the elevation of such lands.²
5. The Commission shall consider the construction of non-habitable structures³ on its fee simple land or flowage easements above 3,787 feet elevation, as set forth in the Encroachment Policy, below, and in the ISC’s separate Boat Dock Policy for Commission fee simple land below 3,787 feet elevation.

1 Habitable structure is any residential, commercial or industrial building or residence for human habitation including but not limited to such structures as homes, commercial centers, office parks, and manufacturing facilities.

2 All topographic elevations referred to herein are based upon NAVD-29 Datum. Lands built-up beyond 3,806’ will be exempt.

3 Non-habitable structures include but not limited to sidewalks, ramps, staircases; retaining walls; patios, decks, parks structures (picnic shelters), parking lots and other paved surfaces (bike & walking paths), field recreation facilities (backstops, goalposts), golf courses, riding stables, roadways and arroyo crossings.

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6. The Commission will act aggressively to cause removal of trespass and unpermitted encroachments by structures, improvements, or materials on Commission property as provided by law.
7. The Commission will apply fee revenue for retirement of Ute Dam debt as required by law, administration and enforcement of this policy, preparation of a Ute Reservoir Master Plan, maintenance and repair of the dam, and other reservoir operations.
8. The Commission is interested in orderly development around Ute Reservoir and intends to pursue a comprehensive master plan for the reservoir.

FLOWAGE EASEMENT RESURVEY AND REPURCHASE POLICY

1. In instances where the original flowage easement survey did not include a flowage easement on lands between elevations 3,787 and 3,806 feet, the Commission may purchase flowage easements across such lands from the landowners at current fair market value. Where the Commission would need to purchase such easements, the costs will be borne by the Commission. The Commission will approve each transaction individually.
2. In instances where the original survey did not include required lands below 3,787 feet elevation, the Commission may purchase those lands from the landowners at current fair market value. Where the Commission desires to purchase land below 3,787 feet elevation, the costs would be borne by the Commission. The Commission will approve each transaction individually.
3. Regarding those portions of flowage easements at Ute Reservoir above 3,806 feet elevation, the easements above 3,806 feet elevation may be resurveyed and sold back to landowners at the original price paid by the Commission adjusted for inflation using the U.S. Consumer Price Index and on the condition that the landowners bear any and all costs associated with the process, including surveying, monumenting, legal fees, filing fees, or any other. Such sales shall be approved by the Commission no later than June 1, 2008, except for any sales of property subject to fill and build permits as provided in Section 3, below.
4. In instances where the original survey resulted in the purchase of fee property above 3,787 feet elevation, the landowner may purchase those lands from the Commission at current fair market value, with the Commission reserving the flowage easement. Where the landowner desires to purchase land above 3,787 feet elevation, any and all costs associated with the process would be borne by the landowner. The Commission will approve each transaction individually. Such sales shall be approved by the Commission no later than June 1, 2008.
5. With respect to transactions pursuant to paragraphs 1 and 2 above, the Commission and the landowner may agree to exchange lands of equal value in lieu of monetary payment.

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6. All appraisals must be performed by an appraiser licensed in New Mexico and must meet all applicable professional standards. The Commission reserves the right to reject any appraisal that does not conform to the standards of the profession. All options available to adjoining landowners with respect to fee and easement property between 3,787 and 3,806 feet elevation, as set forth in paragraph 2 below, equally apply to easement lands above 3,806 feet elevation.

ENCROACHMENT POLICY

1. General Provisions

- a. All privately owned permitted improvements located on Commission fee or easement real property shall meet applicable building codes, engineering standards, shall be constructed to prevent erosion and sedimentation, and shall be maintained in good and safe condition.
- b. Public pedestrian and handicap access improvements located on Commission fee or flowage easements may be allowed without additional fees.
- c. The owner will remove all encroachments that do not comply with this Policy. In the event the owner fails to remove encroachments after demand by the Commission, the Commission will initiate necessary criminal and civil legal procedures as are available under law.

2. Private Landowner Options for Permitting Improvements on Fee or Easement Real Property Between 3,787 and 3,806 Feet Elevation

- a. Permanent Use Permit for Non-habitable Structures. Such Permanent Use Permit shall be negotiated with the Commission, based upon the Present Value method, applying a 2.5% discount rate, of an Annual Use Permit (subparagraph b below) over fifteen (15) years. Present value is used to calculate what a cash flow to be received in the future is worth in today's dollars by the equation and example shown in Exhibit 1. For improvements more extensive than improvements such as private walkways and boat docks, the commission may negotiate alternate lesser fees with special consideration given to public facilities. All Permanent Use Permits are subject to the following conditions:
 - i) The Permanent Use Permit shall designate a specific use or uses by the landowner and their successors and assigns. The Commission may require an engineering report, plans, and specifications from a licensed New Mexico Professional Engineer.
 - ii) The landowner bears any and all costs associated with obtaining the Permanent Use Permit, including surveying, appraising, monumenting, legal fees, filing fees, or any other costs.

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- b. Annual Use Permit. In lieu of a Permanent Use Permit, the Commission requires annual rental for non-habitable structures within defined portions of the Commission's fee property and or flowage easement.
- i) The Commission may issue an Annual Use Permit only after the landowner submits the application titled "Boat Dock and/or Encroachment License" for Commission approval. Such application is available from the Commission staff's Ute Programs Manager.
 - ii) The Annual Use Permit shall designate a specific use or uses by the landowner. The Commission may require an engineering report, plans, and specifications from a licensed New Mexico Professional Engineer.
 - iii) Applications for Annual Use Permits for privately owned improvements located on Commission flowage easements or fee land must be submitted with the following fees:
 - 1. One-Time Application fee: \$500;
 - 2. Surety bond totaling \$3,000 or \$5.00/ft², whichever amount is greater; and
 - 3. Annual rental fee: \$0.50/ft² Occupied
 - iv) The annual rent shall be paid prior to September 1 of each year. Permits will terminate on September 1 of each year but will be extended for a subsequent year if the annual rent is paid to the Commission and the privately owned improvements located on public property are in satisfactory physical condition and in compliance with all conditions of the permit. One 30-day grace period following permit termination will be allowed for compliance with applicable standards before the Commission initiates removal proceedings. Annual rent shall be prorated for initial Annual Use Permit Applications submitted and approved prior to September 1 of that year.
 - v) Applications for previously non-permitted encroachments that exist as of the date of the application shall be accompanied by additional annual rent for one full year preceding the application.

3. Fill and Build Construction Permit

- a. By written permission of the Commission and upon approval of the Office of the State Engineer Dam Safety Bureau, the Commission may allow "fill-and-build" to 3,806 feet elevation on Commission fee or easement real property for the purposes of subsequently purchasing and building habitable structures on those elevated lands. The Commission may grant such permits without charging a fee

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apart from any costs, requirements, or conditions that may be associated with paragraphs 2(a) or 2(b) above, and subject to the conditions in this section.

- b. Such “fill-and-build” may only occur after the landowner submits an engineering report, plans, and specifications from a Professional Engineer licensed in New Mexico and the Commission’s staff approves such report, plans, and specifications.
- c. The Commission reserves the right to reject any engineering report, plans, or specifications that do not conform to the standards of the profession.
- d. The engineering report, plans, and specifications must demonstrate that any proposed improvement provides protection of water quality, prevents erosion and ensures stability of said improvement during periods of flooding and inundation at Ute Reservoir. Such protection must include the period of construction and thereafter.
- e. Any materials used for fill and build permits shall meet all applicable requirements of Section 404 of the Federal Water Pollution Control Act or any other applicable federal or state laws or regulations and construction shall be in accordance with best management practices, and not contribute to sedimentation, chemical, or biological contamination or pollution including aesthetic degradation of Ute Reservoir.
- f. The Commission must be satisfied any “fill-and-build” does not impair the safety, operations, or beneficial uses of Ute Reservoir.
- g. The landowner shall bear any and all costs associated with obtaining the “fill and build” Construction Permit, including surveying, appraising, monumenting, legal fees, filing fees, or any other costs.
- h. The expiration period of any “fill and build” Construction Permit shall be for three years. In the event that construction is not completed during this period, renewal of the permit is at the option of the Commission’s staff.
- i. The Commission may sell any interest in land or easement that pertains to land raised to an elevation above 3,806 feet as a result of a “fill and build” Construction Permit pursuant to paragraph 3 of the Flowage Easement Resurvey and Purchase Policy, above.
- j. The total displacement of reservoir surcharge capacity or acreage covered by any “fill and build” construction may be restricted by the Commission in accordance with any Ute Reservoir master plan, for reservoir operational or safety reasons, for aesthetic considerations, to comply with applicable laws or regulations, or for other reason or reasons determined by the Commission to be sufficient or necessary. The Commission encourages no change in flood storage capacity

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through “fill and build” improvements. The Commission may require the excavation of soils between 3,787 feet and 3,806 feet for “fill and build”.

4. Indemnity and Insurance

- a. With respect to the Permanent Use and Annual Use permits, paragraphs 2a, and 2b above, the Commission shall require landowners, their successors and assigns, to:
 - i. Indemnify the Commission for any damages or injury arising from any landowner activity associated with such options; and
 - ii. Maintain a general liability insurance policy in the amount of \$1,000,000 with the Commission listed as an additional named insured and provides for affirmative notice of cancellation or non-renewal by the insurer to the Commission. The landowner, and their successors and assigns, shall provide a certificate of insurance issued by the insurer to the Commission that reflects such insurance coverage.
 - iii. The term of the general liability insurance policy period shall cover the duration of any activities licensed in paragraphs 2 and 3, i.e., during the duration of a permit in paragraph 2, and during the duration of construction activities in paragraph 3.

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EXHIBIT 1: Present Value Calculation Example

Present Value (PV) Formula:

$$PV = CF_t / (1+r)^t$$

Where

PV = Present Value

CF_t = Future Cash Flow which occurs t years from now

r = the discount rate

t = the number of years

Example:

A homeowner at Ute Reservoir has a 20' by 20' deck on ISC flowage easement. The homeowner may apply under the Permanent Use Permit for Non-habitable Structures:

$$\text{Square foot occupied: } 20' \times 20' = 400 \text{ ft}^2$$

$$\text{Annual Fee: } 400 \text{ ft}^2 \times \$0.50 \text{ per ft}^2 = \$200.00 \text{ per year}$$

$$\text{Cash Flow} = \$200.00 \text{ per year} \times 15 \text{ year} = \$3,000.00$$

$$r = 2.5\%$$

$$t = 15 \text{ years}$$

$$PV = \$3,000 / (1+0.025)^{15}$$

$$PV = \$2,071.40$$