



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

1925
M
MAR 24 1965

Dear Mr. Swidler:

Reference is made to your letter of October 9, 1964, transmitting for our views the Idaho Power Company's comments on this Department's recommendations on the company's application for license for constructed Project No. 2258, located on the Snake River, Idaho.

BUREAU OF RECLAMATION
FEDERAL POWER COMMISSION

1923 Contract Subordinate to FPC Licensing Authority

TO: INTR. 700-124
7380
At the outset, we note that Article 36 of the 1923 contract between the United States and the company expressly preserves the full licensing authority of the Federal Power Commission over the company's American Falls project and makes the provisions of the contract subordinate to that authority. The company did not, accordingly, acquire any vested rights inconsistent with the paramount power of the United States over its navigable waters, as exercised through the licensing procedures of the Federal Power Commission.

95

Public Ownership of Project Lands

The Department has heretofore corrected certain erroneous information which was furnished with respect to Dolman Island (occupied by the Upper Salmon plant) by letter to the Federal Power Commission dated March 25, 1964. We cannot, however, agree with the company's contentions with the Shoshone Falls and American Falls plants. Since patents have never been issued for those islands, title continues in the United States. / Scott v. Lattig, 227 U. S. 229, 57 L. Ed. 490 (1913); Pac. Co. v. Hirzel, 29 Idaho 438, 161 p. 854 (1916); Miller v. Lewiston-Clarkston Canning Co., 35 Idaho 669, 209 Pac. 194 (1922).

Accordingly, all of the company's projects except Upper Salmon involve lands of the United States and can be operated only by using such lands, together with the waters released by the United States from its American Falls project. Similarly, the operation of a Federal powerplant at American Falls will require the use of the company's water entitlement. We believe that under the auspices of the Commission, the company and the United States are capable of a voluntary accommodation of their joint needs and interests in this area. Such an accommodation should not be left to chance, however, but should be made a condition of granting the license, by imposing the following requirement on the company:

100 COPY TO
CODE 100

→ BR

18
3.26

* The company shall within one year from issuance of this order enter into an agreement with the Bureau of Reclamation, United States Department of the Interior, to effect the maximum justifiable development of the power resources of the American Falls site. Such agreement shall include provision for:

- (a) The use of the company's water entitlements, together with other water releases at American Falls Dam for operation of any Federal powerplant at the site, and
- (b) The use of Federal lands and of Federal water releases, together with the company's water entitlements, for operation of the company's plant at American Falls Dam,

in such a way as to maximize the production of electricity at the site. The agreement shall also include appropriate provisions that until the construction and operation of a Federal powerplant at American Falls, the company, upon the request of the Secretary of the Interior, shall generate for the United States electrical energy using the water entitlements of the United States provided for in the contract between the Government and the company, dated June 15, 1923. The company shall be reimbursed for the production of such energy at a rate per kilowatt-hour which will cover a ratable portion of the company's hydroelectric production expenses prescribed and recorded under the Federal Power Commission Uniform System of Accounts; provided, however, that such reimbursement to the company be made in electric energy if so desired by the Secretary of the Interior.

The above-suggested requirement would, of course, replace stipulation No. 3 recommended for inclusion in the license by the Department in its letter of August 30, 1962, to the Federal Power Commission, beginning on page 2.

As pointed out in the Department's letter of March 25, 1964, to the Commission, reporting the correction of the landownership description for Dolman Island, the Bureau of Reclamation is now engaged in studying the possibility of enlarging American Falls Reservoir. The possibility of this enlargement, of course, makes it even more

imperative that appropriate stipulations and conditions be incorporated in any license which may be issued to the company.

The substitution of the provision outlined above for the third stipulation, appearing in the Department's August 30, 1962, letter to the Commission, appears to be consistent with the action that was taken by the Commission in issuing a license to the Portland General Electric Company for its Round Butte project, Project No. 2259. You will recall in that instance the Round Butte project for which the company was seeking a license involved the inundation of the Bureau's Cove powerplant. The Commission incorporated as a condition of the license a requirement that the licensee, prior to commencement of construction on the development, should enter into an agreement with the Bureau and the Pacific Power and Light Company relating to the settlement of rights and interests involved in inundation of the Cove powerplant. Such an agreement was consummated promptly and did not delay construction of the Round Butte project by the Portland General Electric Company.

Here, because the project is already constructed, it is appropriate that the accommodation be ordered to be worked out before the license is issued.

Protection for Present and Future Irrigation Development

The Idaho Power Company in its letter of January 24, 1963, has agreed to the inclusion in a license of a provision which it states is substantially the same as the Department's stipulation No. 1 appearing on page 2 of the Department's letter of August 30, 1962. The stipulation which the company recommends reads as follows:

The Licensee shall operate its facilities at American Falls in such a manner as not to interfere with the release of water by the Government at American Falls Dam for irrigation requirements, and when required by the United States, acting through the Department of the Interior, the Licensee shall draw down the elevation of water in its forebay pool sufficiently to permit the waters to flow from the Government's American Falls Dam into the forebay of the Licensee's installation at rates of flow required for irrigation uses as determined by the Department of the Interior. The company, it should be noted, uses 5-foot flashboards to increase the forebay level.

The significant difference between the provision which the company is willing to accept and our recommended stipulation is the inclusion by the company of the words "for irrigation requirements." The company's wording limits the application of the stipulation to interference with irrigation releases rather than to interference with all types of releases. We do not consider that the company should have the

right to interfere with releases from American Falls at low reservoir elevations by raising the company's forebay elevation and thereby decreasing the flow available to the Government for all downstream uses.

The Government, and not the company, should have control of river regulation at American Falls Dam.

With respect to the second numbered stipulation recommended by the Department, also appearing on page 2 of the August 30, 1962, letter, the company takes issue with the wording of this stipulation and has offered instead to accept a stipulation similar to the one included in article 41 of the license for Project No. 1971 (Brownlee, Oxbow, and Hells Canyon). The provision which the company is willing to accept reads as follows:

"Article _____. The project shall be operated in such manner as will not conflict with the future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the backwater created by the project for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed."

The Department has previously indicated that it does not consider that the article recommended by the company meets the Department's requirements. For one thing, it is completely silent as to whether the company will expect compensation for future alleged interferences with its projects by reason of continuing reclamation developments in the Upper Snake River Basin. The company's position under the Brownlee license with respect to the requirements of that license for coordination would certainly indicate that compensation would be expected. Similarly, past experience with the company with respect to the release for irrigation purposes of its alleged water entitlements at American Falls indicates that the company expects a very substantial compensation for any water entitlements which it might make available to irrigation interests.

License Term

*
The Commission has ruled that licenses granted for projects constructed prior to 1935 shall terminate on December 31, 1993, which is 50 years from the 1943 Commission ruling which adopted the concept of navigable waters as being waters required for transporting of logs. A license issued to the Idaho Power Company, therefore, would not expire 50 years from the date of the company's application in 1957, but 50 years from the 1943 navigability ruling of the Commission.

Power Wheeling Arrangement

With respect to the possible transmission of Government power over the company lines, we note that the Commission had already imposed such a condition on the company in Project No. 1971. Moreover, both the Departments of Interior and Agriculture have issued regulations with respect to utilization of excess capacity of private transmission lines where rights-of-way are required over public lands. We see no reason why a similar requirement should not be imposed on the company in this case.

Fish and Wildlife Provisions

We believe that conditions (1), (2) and (3) recommended in the Departmental letter of August 30, 1962, can be omitted provided that the standard conditions for fish and wildlife and recreational resources contained in FPC Form L-3 (revised August 1, 1964) are included in the license issued for this project.

Our recommended conditions (4), (5) and (6) are supported on pages 6 and 7 of the Departmental letter. These conditions are necessary for the conservation and development of fish and wildlife resources. These recommendations are based on studies conducted by the Fish and Wildlife Service in cooperation with the Idaho Fish and Game Department. We request, therefore, that special conditions (4), (5) and (6) be included in any license issued for this project.

Sincerely yours,

(sgd) Stewart L. Udall

Secretary of the Interior

Hon. Joseph C. Swidler
Chairman
Federal Power Commission
Washington, D. C. 20426

cc:
Secretary's Reading File

NxBR

FWS

P. Van Deraa - Room 6627

PVanDeraa:fp - 2/26/65