



United States Department of the Interior



BUREAU OF RECLAMATION
Pacific Northwest Region
1150 North Curtis Road, Suite 100
Boise, Idaho 83706-1234

JUN 07 2006

IN REPLY REFER TO:

PN-3100
WTR-4.10

Clive Strong
Chief, Natural Resource Division
Office of the Attorney General
P. O. Box 83720
Boise, Idaho 83720-0098

Subject: Documents Relating to Water Right Claim No. 01-02064 (American Falls)

Dear Mr. Strong:

I understand your office is continuing its review of Water Right Claim No. 01-02064, which was recently amended by the Bureau of Reclamation to include power as a purpose of use. To facilitate review of the amended claim by your office, you have requested a copy of the Solicitor's Opinion M24116 dated February 20, 1928. Enclosed is a copy of that opinion.

If you have any questions regarding this letter, please feel free to contact me at 208-378-5306.

Sincerely,

E. Gail McGarry
Program Manager
Water Rights and Acquisition

Enclosure

M. 24116.

Solicitor's Opinion

Concerning certain provisions
of contract between the United
States and the Idaho Power Com-
pany.

FEB 20 1928

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M. Hall

United States
Department of the Interior
Office of the Solicitor
Washington

February 20, 1928.

The Honorable

The Secretary of the Interior.

Dear Mr. Secretary:

I have, by reference from the First Assistant Secretary, for consideration and opinion upon the questions therein presented, a letter from the Commissioner of Reclamation, with its accompanying papers, relating to a contract dated June 15, 1923, between the United States and the Idaho Power Company. It is stated in the submission that an authoritative construction of certain provisions of the contract is needful in order that the Bureau of Reclamation, which is considering the construction of a power unit at American Falls, in pursuance of the appropriation of \$700,000 for that purpose in the Interior Department appropriation act of January 12, 1923 (41 Stat. 934), may adjust its plans to the requirements of the contract.

The contract in question covers the purchase by the United States of a part of the company's power property and water rights at American Falls, needed in connec-

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tion with the construction of a large storage reservoir at that point designed to save the flood and winter flow for irrigation in southern Idaho. Prior to the execution of the contract, the power rights claimed by the company at American Falls prevented absolutely the development of further storage resources on Snake River. It was planned in connection with the storage dam to construct a large power plant at American Falls to create the necessary power during the irrigation season for pumping water on the proposed North Side Extension of the Minidoka project. The purpose and plan of the Reclamation Service regarding this project, and the situation now confronting it, are summarized in the Commissioner's letter as follows:

At the time the contract was negotiated and during the time the dam across the Snake River at American Falls was being constructed, the Bureau planned to use the water, stored in the reservoir and belonging to the United States, largely for the irrigation of a tract of land containing about 120,000 acres, lying near the town of Minidoka, Idaho, and known as the North Side Pumping Division of the Minidoka project. It was the plan to utilize the water released from the reservoir to develop power which was to be used in part to pump water for use on the lands of the North Side extension of the Minidoka project and in part to supplement the output of the present power plant at Minidoka dam.

Congress, in the latest appropriation act for the Bureau postponed or altered the plans for the construction

of the North Side Pumping Division by making appropriations for the Gravity Extension (or Gooding) Unit of the Minidoka project which had not theretofore been considered a part of the Minidoka project. In the same act, however, Congress appropriated \$700,000 for the construction of the power plant at American Falls. The taking for the Gooding Division of a part of the water intended for the Pumping Division will decrease the area to be irrigated under the Pumping Division, and will correspondingly increase the amount of summer power which the United States will have for sale, (if the contract does not prohibit such sale) and provided the four units of the proposed power plant with total capacity of 30,000 k.w.'s. are constructed at American Falls as originally planned.

The restrictions, if any, which the contract with the Idaho Power Company places upon the generation and sale by the United States of summer power are, under the circumstances, of great importance, since it appears that it may be a number of years before the electric power may be needed for pumping water onto the North Side Pumping Division, and if in the meantime the Government is debarred by contract with the Idaho Power Company from selling the summer power, the wisdom from the practical business standpoint of building the power plant at the present time may be doubted or it may be advisable to construct only one unit of the plant now, and such additional units as may be necessary from time to time as the North Side Division develops. On the other hand, if the contract with the Idaho Power Company does not interfere, it appears that there is a considerable market for the sale of summer power for irrigation pumping.

The question presented is this: What, if any, restrictions does the contract place upon the generation and sale by the United States of power (a) during the summer months and (b) during the winter months?

The articles of agreement (paragraph 9) enumerate the properties and rights to be conveyed to the United

States by the Idaho Power Company, among them the Island and West Side Power Plants at American Falls, the title to certain land adjacent to the river, and other parcels necessary in connection with the inundation of lands in the reservoir basin; also a portion of the company's power and water rights at American Falls, as specified in subparagraph (d), which reads as follows:

All the company's water rights, appropriations, water filings and permits, at American Falls, or used or intended to be used in connection with the company's power plants and proposed plants at American Falls, except the rights, whether primary or tertiary, expressly reserved to the company, as hereinafter set out. The water rights of the company transferred to the United States for use for power purposes shall be considered as impressed with a right in the United States to change the use of such water from power to irrigation or to store the same for irrigation whenever the Secretary of Interior shall decide that such water is required for irrigation purposes. But it is expressly agreed and understood that the water rights and rights to the use of water which it is herein agreed that the Company shall have are reserved out of its existing appropriations and rights as independent rights under its own filings and appropriations and of the dates of priority to which the Company is entitled under such appropriations and are not to be considered as mere contract rights under contract with the United States.

Subparagraph (e) grants to the United States:

The right to limit all other rights of the company on Snake River at whatever points and in whatever counties the same may be located in so far as and no farther than the rights allowed and granted to the United States to store and use water as herein provided may inter-

fers with any rights of the company at any lower points on Snake River.

The primary right for power purposes reserved to the company is specified in paragraph 10 as follows:

100 second-feet beginning April 1st, increasing uniformly to 2500 second-feet on May 1st, and continuing at that amount to September 15th inclusive, then decreasing uniformly to 100 second-feet on October 31st and none except as hereinafter provided from November 1st to March 31st inclusive.

The above described power right so reserved to the company shall be considered as prior and superior to all other rights at American Falls. The company may also have a primary right to use at any time any water brought to American Falls by it from beyond the Snake River water shed, or any stored water acquired by the company from storage capacity hereafter constructed above American Falls provided that it is understood and agreed that the company's right to store water, except water brought by the company from beyond the Snake River watershed, in such capacity above American Falls shall be inferior and subordinate to the right of the United States to provide for building and to fill and use 3,000,000 acre-feet of storage capacity, including the capacity of the American Falls Reservoir anywhere on Snake River in addition to the storage capacity now available in Jackson Lake Reservoir and Lake Walcott.

Other rights reserved or granted to the company are enumerated in paragraphs 16, 18, 19, and 20, as follows:

16. Company's Primary Storage Capacity.

In part consideration for the rights and property to be conveyed to the United States by the company, and as a part of the cost of the proposed development at American Falls the United States grants to the company and

the company shall be entitled to the perpetual use of 45,000 acre-feet of storage capacity in the reservoir to be constructed by the United States, such capacity to be for storing the water reserved to the company, and the water referred to in the last sentence of Paragraph 10, the company's right to such storage capacity to be on an equal basis in all respects, except as otherwise provided herein, with other primary storage capacity rights in the reservoir, as defined in the contracts between the United States and the Irrigation Companies and Districts cooperating with the United States in the construction of said reservoir, a form of which contract is attached hereto and marked Exhibit "C".

18. Company's Secondary Storage Capacity.

Between October 1st of any year and June 10th of the following year, the company shall have and is hereby granted for the purpose of regulating and controlling the water reserved to the company under Paragraph 19 hereof, and the water which may be acquired under the last sentence of Paragraph 10, a secondary right to use not to exceed 255,000 acre-feet of storage capacity in the reservoir when such capacity is not then required and not being used by the owners of irrigation rights to the use of such capacity, but shall have no further right to use any part of said 255,000 acre-feet of capacity or any water stored therein after the reservoir is first filled each season, and the company shall in any event release on April 1st of each year all right and claim to such capacity and water stored therein, except 60,000 acre-feet, and shall release all right and claim to the remainder, if any, on June 10th of each year.

19. Company's Reserved Water Right of 300,000 Acre-feet.

It is agreed that in addition to the primary right reserved in Paragraph 10, the company reserves and shall have the right (for power development at American Falls and to such extent as provided in Paragraph 21 hereof for power development at points below Milner) to 300,000 acre-feet of water flowing into the reservoir

after October 1st of any year which shall be the first 500,000 acre-feet flowing into the reservoir after October 1st and actually storable therein, except that precedence shall be given for the release through the American Falls Reservoir dam to the amount of water, if any, required to supply the amount of power not exceeding 10,000 kilowatts, half-hour peak, needed to supply the power demands and uses on the Minidoka Project and its proposed extensions, and including the town of Minidoka and the territory now supplied by the United States, and the camps, buildings, construction work, dam and adjacent grounds of the United States at American Falls but not elsewhere in the old or new town of American Falls, except that if the company should refuse to extend its lines into the new or government townsite at American Falls and furnish service in such townsite, then the United States may do so. The extension of power lines into the new townsite and furnishing of power to customers therein shall not be construed as waiving any of the rights of either party as to the amount of damage which may be allowed the company in condemnation or otherwise for the removal of the old town or otherwise. Nothing in this paragraph contained shall be construed to deny the United States the right to store and use for irrigation purposes the water herein authorized to be used for the generation of said winter power of not exceeding 10,000 kilowatts, half-hour peak, whenever the Secretary of the Interior shall decide that such water is required for irrigation purposes. The expression "10,000 kilowatts, half-hour peak," wherever it occurs in this contract shall be interpreted as meaning that the average for any half-hour interval must not exceed 10,000 kilowatts.

20. Company Right to Primary Storage Water.

The water required to fill the 45,000 acre feet of primary storage capacity allowed the company under Paragraph 16 hereof shall be a part of the 300,000 acre-feet of water reserved to the company under Paragraph 19 hereof, and the company shall have no right to require the turning out for the company of more than 300,000 acre-feet in any one year beginning October 1st in addition to the primary rights set forth in Paragraph 10 and the

holdover authorized in this paragraph. The company shall have the privilege of holding after October 1st and until November 15th any water which it may have remaining in its own storage capacity of 45,000 acre-feet, but the company's right shall expire on November 15th to any amount so held over beyond that date.

The requirements of the United States for power are set forth in paragraph 7, which recites that:

AND WHEREAS, the said proposed North Side Pumping Division of the Minidoka Project of the United States is a pumping project and the United States will require in connection with the said project a large power plant for the development of a large amount of electric power for pumping water upon the lands of the said project.

The amount of summer power that the United States is entitled to generate at American Falls, that is, between April 1 and October 31, is clearly set forth in paragraph 11 of the contract, which reads in part as follows:

The United States shall have and the company hereby grants to the United States as against the company a secondary power right at American Falls to that amount of water which will generate continuously for delivery from the generator bus bars in the Government power station at American Falls 6,700 kilowatts beginning on April 1st, increasing uniformly to 25,000 kilowatts on May 1st and to 30,000 kilowatts on June 1st, continuing at that amount to August 15th, inclusive, then decreasing uniformly to 25,000 kilowatts on September 15th, and to 5,500 kilowatts on October 31st, and none from November 1st to March 31st inclusive, except in connection with the 10,000 kilowatts as authorized in Paragraphs 24 and 19 hereof. In no case, however, except as authorized by Paragraph 13, shall the water utilized under this power

right exceed 1,500 second-feet on April 1st, increasing uniformly to 5,000 second-feet on May 1st, and to 6,000 second-feet on June 1st, continuing at that amount to September 15th inclusive, and decreasing uniformly to 1,500 second-feet on October 31st.

If language has any meaning, this provision of the contract operates as an express limitation upon the amount of power that may be developed in the Government's plant at American Falls during the irrigation season, or during the period from April 1 to October 31, inclusive. Clearly it was assumed that the maximum demands in connection with the project undertaken would not exceed 30,000 kilowatts, and in my view the parties have contracted in a way to definitely restrict the output to that amount. This view is fortified, and the limitation further explained by paragraph 12 of the contract, which reads as follows:

The company reserves and shall have as against the United States a tertiary power right at American Falls to all additional water released or wasted from the reservoir as released or wasted by the United States from April 1st to October 31st inclusive over and above the amounts required to furnish the primary rights reserved to the company in paragraph 10 hereof, and the secondary right granted to the United States under Paragraph 11 hereof.

Should the company fail for five years after a storage capacity of 1,500,000 acre-feet or more has been provided at American Falls, to make provision to utilize all the tertiary power provided in Paragraph 12, then the United States shall become entitled as against the company to develop and use any unused portion thereof, but should the United States fail, for a period of three years after becoming vested with the right to develop and use such undeveloped portion of said tertiary power, to make provision to utilize the same then thereafter either party may by making such provision become entitled to utilize such undeveloped portion of said tertiary power right.

As to winter power, paragraph 11 of the contract stipulates that during the period from November 1 to March 31, inclusive, the Government shall have no power right or right to stream flow at American Falls as against the company "except in connection with the 10,000 kilowatts as authorized in paragraphs 24 and 19 hereof."

Article 19 of the contract, hereinbefore quoted, reserves to the company the first 500,000 acre-feet of water flowing into the reservoir after October 1st of any year, and actually storable therein with the exception therein specifically stated. The excepting clause leaves little room for doubt as to the intention and agreement of the parties respecting the winter power demands and rights of the Government.

Article 23 also relates to the Government's

winter-power rights and specifies the amount which can be generated from November 1 to March 31, inclusive.

That article reads as follows:

In securing the winter power not exceeding a half-hour peak of 10,000 kilowatts provided for the United States under paragraph 19 hereof, the United States shall secure at the Minidoka Power plant so much of said power as it is reasonably practicable to secure from the installed machinery at said plant without releasing water which otherwise might be held for irrigation, generating at American Falls the balance, if any, of the amount required. Nothing herein contained shall be construed to prevent the United States from obtaining the ten thousand kilowatts at its American Falls plants when the Minidoka plant, is closed or out of operation on account of enlargement, improvement or repairs.

There is little room for doubt as to what was meant by the parties to this agreement. It effectually restricts the United States to the generation, during the winter months, of not to exceed 10,000 kilowatts. The Government was to secure as much of this amount at the Minidoka plant as it was reasonable or practicable to obtain from that plant, generating at American Falls the balance, if any, of the amount required.

A reading of paragraph 24 confirms this view. That paragraph provides in part as follows:

The United States shall have and the company hereby grants to the United States as against the company the right to store in the American Falls Reservoir for use

for irrigation and domestic purposes and for the power use set forth in Paragraph 11 and for the development of an amount of power not exceeding 10,000 kilowatts, half-hour peak, as defined in Paragraph 19, all of the storable water at American Falls not specifically reserved to the company or granted to the company as against the United States. The company reserves and as against the United States shall have the right to use for power purposes all American Falls water released or wasted between November 1st and March 31st, inclusive, in excess of the amount herein specified to be allowed to the United States for power under the foregoing provisions of this contract.

Considering the various provisions of the agreement, there is, in my opinion, no escape from the view that in entering into the contract both parties intended that the Government should be restricted at American Falls to the generation of not to exceed 10,000 kilowatts during the nonirrigation season, and of not to exceed 30,000 kilowatts during the irrigation season.

If the contract places any limitation or restriction upon the field or territory within which the Government may use or sell the summer output of the American Falls plant, it must be found in the excepting clause of paragraph 19, hereinbefore set out.

This article, it will be observed, reserves to the company the first 300,000 acre feet of water flowing into the reservoir after October 1st of any year and

actually storable therein, and then states the exception which, to my mind, means, and was intended to mean, no more nor less than what it plainly says, namely, that the first right to the water coming into the reservoir after October 1st of any year is in the United States, to the extent that it is required to develop 10,000 kilowatts winter power for use on the Minidoka project and its proposed extensions, as set out in paragraphs 23 and 24. Clearly, the excepting clause should be construed in connection with the paragraph of which it forms a part, that is, to save or carve something from the preceding right reserved or granted to the company, or to qualify and restrain its generality. Its grammatical and logical scope is confined to the subject matter of the principal clause.

In the circumstances, I think it would be giving the contract a strained and unreasonable construction to assume that the Government intended to disable itself to distribute, sell, and use its surplus summer power to the best advantage or in any field within the limits of commercial feasibility.

The situation is different with respect to winter

power. It apparently was the intent of the contract to limit the field within which such power may be sold. The limitation with respect to the amount, 10,000 kilowatts, is unequivocally stated in various provisions of the agreement, hereinbefore set out. Paragraph 19 reiterates the limitation as to amount, and fixes a limitation on the field of sale or place of use, namely "the Minidoka project and its proposed extensions, and including the town of Minidoka and the territory now supplied by the United States, and the camps, buildings, construction work, dam and adjacent grounds of the United States at American Falls, but not elsewhere in the old or new town of American Falls."

The terms of the agreement, the situation of the parties when the contract was made and the circumstances surrounding them, converge to the view that it was the intention the Government's winter output should be used or marketed within the territory defined.

Respectfully,

(Signed) E. G. Patterson

Solicitor.

Approved: Feb. 20, 1928;

(Signed) E. G. Finney

First Assistant Secretary.

Copy to Bureau of Reclamation.