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United States Department of the Interior

BUREAU OF RECLAMATION

Pacific Northwest Region
Snake River Area Office
230 Collins Road
Boise, ID 83702-4520

RECEIVED

JUL 17 2019

DEPARTMENT OF
WATER RESOURCES

Tony Olenichak
Water District 1
900 N. Skyline Dr., Suite A
Idaho Falls, ID 83402-1718

Rodney Dalling
Chairman
Committee of Nine
386 North 2400 East
St. Anthony, ID 83445

Subject: Lack of authorization for Reclamation's Palisades powerhead space to be used for flood control purposes

Dear Mr. Olenichak and Mr. Dalling,

This letter replaces my letter dated July 10, 2019, which was sent in error.

As you are aware, last year Reclamation had raised the question with Water District 1 as to whether there was congressional authorization to allow Reclamation's Palisades powerhead space to share in any shortage resulting from flood control operations. Reclamation recognizes that in two past instances — 2007 and 2012 — powerhead space was used to share in flood control shortages. In an October 17, 2018, email Reclamation agreed to allow powerhead space to again share in the shortage resulting from flood control operations in 2018, recognizing that the impact to powerhead would be relatively small (less than 1,000 acre-feet) and that we would work collaboratively to resolve the issue.

In November 2018, staff from my office, the Regional Office, and Solicitor's Office and I met with the Committee of Nine's tribal subcommittee and attorneys. We discussed whether Palisades powerhead space could share in shortages resulting from flood control operations. We appreciated the exchange with the Committee of Nine representatives and attorneys but none of the information provided shed light on a legal basis upon which powerhead space could share in shortages stemming from flood control releases.

The purpose of this correspondence is to advise you that Reclamation, in consultation with the Solicitor's Office, is unable to find authorization for powerhead space to share in flood control shortages. As a consequence, powerhead space will not be able to share in this year's shortage of 104,205 acre-feet resulting from flood control operations in the upper Snake River reservoir system. We recognize this decision represents a departure from past practice. As such, it was not made lightly and involved considerable dialogue with the Solicitor's Office.

Given the change in direction this letter represents, I want to provide you with a detailed explanation of Reclamation's determination. As explained in detail below, Palisades powerhead space can not share in flood control shortages because doing so would contradict the statute authorizing Palisades Dam and

Reservoir, the Palisades repayment contracts, and the Nez Perce Term Sheet, as codified in the Snake River Water Rights Act of 2004, P.L. 108-447.

Turning first to the project authorization. Congress authorized Reclamation to construct and operate Palisades Dam and Reservoir based on the Secretary of the Interior's feasibility findings presented in the original project feasibility report, House Document 457 (Dec. 12, 1941), and the supplemental feasibility report, House Document 720 (Nov. 27, 1950). Those feasibility reports describe a reservoir operation plan and accompanying cost allocation under which the bottom 200,000 acre-feet of reservoir storage space will be "dead storage and allocated exclusively to the production of hydroelectric power." Only the "remainder of the storage capacity in the amount of 1,200,000 acre-feet will be operated in the joint interests of irrigation and flood control." In other words, the feasibility reports do not contemplate utilizing powerhead storage for flood control or irrigation purposes. Congress directed Reclamation to operate Palisades "substantially in accordance" with these plans.

Consistent with Congress's direction and the feasibility reports, the Palisades repayment contracts recognize that Palisades Reservoir has an "active capacity of about 1,200,000 acre-feet." Those contracts provide that only the "the active capacity of Palisades Reservoir will be used jointly for irrigation and flood control storage in accordance with the operating plan set forth in House Document No. 720." The contracts further state:

In the event Palisades Reservoir fails to fill during any storage season by reason of such flood control operations, the amount of storage so attributable shall be prorated equally over all space allocated to storage of water for irrigation, municipal, or other miscellaneous purposes and shall be charged against all stored water including that, if any, carried over from prior irrigation seasons.

The storage space reserved for powerhead is not among those identified to share in the event of a failure to fill because of flood control operations.

The Nez Perce Term Sheet provides but one limited exception to the characterization of Palisades powerhead as dead storage; namely, that "Powerhead water in BOR storage facilities may be used only to increase the reliability of 427,000 acre-feet for flow augmentation." Consistent with this principle, the Term Sheet explains that "Palisades Reservoir powerhead water may be utilized by the United States to attain 427,000 acre-feet for flow augmentation," but if Reclamation so uses the powerhead space, it "shall be the last space to refill after all other space in reservoirs in that water district." The Term Sheet does not provide for the use of powerhead space for flood control purposes.

Requiring the Palisades powerhead space to share in the storage shortfall would contradict the foregoing authorities in three distinct ways. First, it would convert the powerhead storage space into active flood control space, contrary to the express representations in the feasibility reports that only the 1,200,000 acre-feet of active space would be used for flood control. Such a change to reservoir operations would not follow Congress's direction to Reclamation to operate "substantially in accordance" with the feasibility reports.

Second, it would violate terms of the Palisades repayment contracts. Those contracts provide that, in the event of a failure to fill due to flood control operations, the shortage "shall be prorated equally over all space allocated to storage of water for irrigation, municipal, or other miscellaneous purposes," none of which include space reserved for powerhead.

Third, prorating a share of the storage shortage to powerhead space would violate the Term Sheet provision that powerhead "may be used only to increase the reliability" of flow augmentation. Indeed, it

would have the opposite effect by decreasing the water available in powerhead space and thus the reliability of flow augmentation. Moreover, allowing powerhead space to share in flood control shortages would create an unintended windfall to spaceholders—i.e., it would provide more storage water to spaceholders than they historically received prior to the use of powerhead space for flow augmentation. Unfortunately, any windfall to spaceholders would necessarily come at the expense of ESA-listed anadromous fish and run counter to the Nez Perce Term Sheet.

I hope the above explanation for this decision is helpful and I welcome further dialogue with you on this issue.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Springer', written over a light blue horizontal line.

Roland K. Springer
Area Manager

Cc: Gary Spackman

Director, Idaho Department of Water Resources
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