



United States Department of the Interior

OFFICE OF THE SOLICITOR

Phoenix Field Office
One Renaissance Square
Two North Central
Suite 1130
Phoenix, Arizona 85004-2383

October 8, 1996

Memorandum

To: Area Director, Phoenix Area Office, Bureau of Indian Affairs

From: Field Solicitor, Phoenix

Subject: Inspector General's Audit Concerning Repayment of Federal Investment in the Headgate Rock Dam Powerplant

I. INTRODUCTION

The Inspector General's Memorandum Audit Report No. 93-I-1546 (September 14, 1993) (Audit) questions, *inter alia*, the Bureau of Indian Affairs' (BIA) handling of repayment of the construction cost of the hydroelectric powerplant (powerplant) added to the Headgate Rock dam located on the Colorado River. The Audit suggested, *inter alia*, that the BIA: (1) establish a plan for the recovery of the reimbursable Federal investment in the powerplant; (2) request the Solicitor to determine whether Congress intended the power investment of the powerplant to be repaid with interest, or seek Congressional clarification of congressional intent if the Solicitor does not make the determination; and (3) adjust the repayment plan based on the determination made by the Solicitor or Congress on the interest issue. See Audit at p. 8. Your office asked us for an opinion on whether Congress intended the power component (distinguished from the irrigation component) of the powerplant be repaid with interest. This constitutes our response¹ to that request.

II. ISSUE

Does the law require the addition of an interest component to the amount expended in the construction of the Headgate Rock Dam Hydroelectric Project in calculating the construction cost of the powerplant?

¹ This memorandum corrects typographical errors contained in our September 6, 1996 memorandum. The analyses and conclusions are the same in both opinions.

III. FACTS

Headgate Rock Dam was authorized under the River and Harbors Act of 1935. The act of August 30, 1935, 49 Stat. 1028 ("River and Harbors Act of 1935"), provides in pertinent part:

SEC. 2. That for the purpose of controlling floods, improving navigation, regulating the flow of the streams of the United States, providing for storage and for the delivery of the stored waters thereof, for the reclamation of public lands and Indian reservations, and other beneficial purposes, and for the generation of electric energy as a means of financially aiding and assisting such undertakings,
* * * The construction by the Secretary of the Interior of a dam in and across the Colorado River at or near Head Gate Rock, Arizona, and structures, canals, and incidental works necessary in connection therewith is hereby authorized, * * * .

(emphasis supplied).

Construction of the dam was initiated by the BIA in 1938 and was completed in 1941. The dam was designed to provide permanent diversion facilities for irrigation of up to 100,000 acres of land in Arizona on the Colorado River Indian Tribe's (CRIT) reservation; it was authorized to generate electric power necessary to irrigate Indian lands. The United States owns the dam, which is operated by the BIA.

In its January 31, 1977, resolution, the CRIT tribal council requested Federal assistance in the construction of facilities to generate hydroelectric power on the Colorado River Reservation so that CRIT would be able to expand its irrigated agricultural reservation land, engage in water-oriented recreation, and engage in residential development, all of which was directed at the heightened economic development of the Tribe and its members. See *id.*

In 1980, the BIA requested the Water and Power Resource Service² (herein Reclamation) to update a 1967 feasibility report for the construction of a low head power generation plant at Headgate Rock Dam, Arizona, to supply additional power to the CRIT

² Formerly known, and subsequently redesignated, as the Bureau of Reclamation. The Water and Power Resource Service is referred to herein as the Bureau of Reclamation or Reclamation.

reservation.³ In response, Reclamation updated a 1967 feasibility study concerning the proposed powerplant and prepared the June 1980 Advance Planning Report for the BIA.⁴ The 1980 Planning Report concluded that a Headgate Rock hydroelectric powerplant was economically justified and financially feasible, stating that all of the costs could be repaid within 50 years. *Id.* at p. 4. According to the study, the powerplant would provide for a total of 19,500 kilowatt of capacity and an annual average production of 86.5 million kilowatt-hours of energy. *Id.* The 1980 cost estimate for the powerplant was \$35.5 million, of which \$26.2 million was allocated to commercial power and \$9.3 million was allocated to irrigation.⁵

Reclamation's 1980 Planning Report anticipated that all the power that could be produced by the powerplant would be used on the CRIT Reservation to operate the irrigation and drainage facilities and to supply a portion of the residential and commercial power requirements of the Reservation land. *Id.* at p. 3. 26.3% of the power expected to be generated was anticipated to be used to irrigate CRIT's agricultural lands; 73.7% of the power was anticipated to be used to meet on reservation commercial and domestic needs. See *id.* at p. 30.

The underpinnings of the economics and repayment statements contained in Reclamation's 1980 Planning Report, see *id.* at p. 30, were assumptions and methodology Reclamation uses for the development of Reclamation (as distinguished from BIA) projects. The 1980 Planning Report, at p. 30 stated in pertinent part:

[t]he repayment analysis included in the study follows standard Service [Reclamation] procedures. Since all the benefits are attributed to electrical power production, all project costs are considered reimbursable.

When the proposal for the construction and financing of the powerplant was considered by Congress, Reclamation assumptions [upon which the standard Reclamation procedures applicable to Reclamation projects, *inter alia*, the repayment principles contained in Reclamation's 1980 Planning Report] were not employed by Congress because Congress did not treat the powerplant as a Reclamation project but rather identified it as an Indian project.

³ Water and Power Resource Service, U.S. Department of the Interior, *Headgate Rock Hydroelectric Project, Advance Planning Report Prepared for the Bureau of Indian Affairs*, p. 1 (June 1980) (hereinafter the 1980 Planning Report).

⁴ *Id.*

⁵ *Id.* at p. 30. These figures do not include interest.

In the Supplemental Appropriations Act for Fiscal Year 1985,⁶
Pub.L. 99-88; 99 Stat. 293, 319 - 20, (August 15, 1985), Congress
provided in pertinent part:

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Construction Program

For an additional amount for the Department of the
Interior, Bureau of Reclamation, "Construction
program", for the design and construction of * * * the
Headgate Rock Project, Arizona,

* * *

Provided further, * * * \$8,300,000 is appropriated pursuant
to the Snyder Act (25 U.S.C. 13), to be expended by the
Bureau of Reclamation for the purpose of designing and
initiating construction of the Headgate Rock Hydroelectric
Project, Arizona.

Shortly following the passage of the Supplemental Appropriations
Act for Fiscal Year 1985, *supra*, Reclamation's Commissioner and
the Secretary concurred, see the October 16, 1985, Secretarial
decision memorandum, at p. 1, that Reclamation's standard
repayment regime was not applicable to the construction and
funding of the powerplant by stating,

at the explicit direction of P.L. 99-88, the powerplant will
be constructed under the authority of the Snyder Act (Act of
November 2, 1921, 42 Stat. 208). The Snyder Act gives the
Secretary of the Interior broad authority to under take
programs and projects for the benefit, care and assistance
of Indians.

* * *

It should be noted that the Senate Report explains that P.L.
99-88 is not intended to change current financing
requirements of Federal water projects with respect to
Indian Tribes. The application of BIA's current policy of
~~establishing power rates sufficient to amortize (without~~
~~interest) the construction costs of the powerplant, would be~~
consistent with congressional intent.

The Supplemental Appropriations Act for Fiscal Year 1985, *supra*,
~~demonstrates that all of the powerplant features were authorized~~

⁶ Approved August 15, 1985.

under the Snyder Act. The Secretary similarly viewed all of the powerplant features as authorized under the Snyder Act. See the October 16, 1985, Secretarial decision memorandum, at pp. 1 - 2. Accordingly, as to repayment of interest on the construction costs, there is no statutory distinction between irrigation and commercial uses of the electricity generated by the powerplant; neither use bears an interest component.

The Audit, at p. 6, recognizes the decision on the interest issue contained in the Secretary's October 16, 1985, decision memorandum. However, the Audit appears to question the propriety of the Secretary's decision on this point. See the Audit at pp. 6 - 7. Apparently, the Audit assumes that existing law requires that the portion of the powerplant construction cost which will generate energy to be used by CRIT for domestic and commercial purposes (as distinguished from power necessary to irrigate the CRIT farmlands) be repaid with interest. See *id.* at p. 7. The Audit appears to assume that the Permanent Appropriations Repeal Act of August 7, 1946, is applicable to the instant case, and appears to believe that statute requires the application of power revenues to the amortized portion of the reimbursable portion of the construction costs of the powerplant. See Audit at p. 6. Finally, the Audit appears to assume that Reclamation's 1980 Planning Report and Reclamation's annual budget justifications establish that all of the construction costs are reimbursable and that the commercial power component (as distinguished from the power necessary to make water deliveries necessary for irrigation) are reimbursable with interest. See *id.* at p. 6.

As of September 30, 1992, Reclamation determined the estimated total construction costs (without interest) to be \$55.1 million and \$70.6 million (with interest).⁷ The United States owns and operates, through the Bureau of Indian Affairs, the powerplant, which is a part of Headgate Rock Dam, just as it owns and operates the dam.

IV. ADDITIONAL APPLICABLE STATUTES

The Permanent Appropriations Act of 1934, 48 Stat. 1224, repealed prior acts making permanent or continuing appropriations from the general fund for authorized governmental activities and substituted therefore the necessity for Congress to make annual appropriations to fund those activities. See *id.* at p. 1225, sec. 2. At that time, there were unobligated balances previously appropriated to certain appropriations accounts as well as receipts from sales, fees, etc., credited to appropriations

⁷ See Reclamation's Headgate Rock Hydroelectric Statement of Project Costs and Repayment - Summary, approved by the Bureau's Regional Financial Management Officer, Lower Colorado Region (March 24, 1993).

accounts for particular projects and activities. Apparently, the prior practice was to deposit proceeds from leases, sales, charges, etc., into individual project accounts and to permit an agency to spend those monies to continue to operate the particular projects. Section 4 of the Permanent Appropriations Act of 1934, 48 Stat. 1227 - 1228, provided that receipts credited to certain appropriations accounts would be deposited in the Treasury as miscellaneous receipts and that equal amounts would be appropriated annually for the same purposes for which such receipts were then appropriated. Section 20 of the Permanent Appropriations Act of 1934, 48 Stat. 1233 - 1235, had a similar effect. Portions of both sections 4 and 20 involved Indian monies generally, but neither involved the Headgate Rock Dam or the subsequently constructed powerplant. See *id.*

The act of August 7, 1946, 60 Stat. 895, modified sections 4 and 20 of the Permanent Appropriations Act of 1934 by providing, *inter alia*, that collections made from water users on each Indian irrigation project on account of assessments levied to meet the costs of operating and maintaining such projects would be deposited into the Treasury and would be available for expenditure to carry out the purposes for which they were collected. See *id.*

Section 3 of the act of August 7, 1946, 60 Stat. 895 - 896, provided that revenues thereafter collected from power operations on each Indian irrigation project, and deposited into the Treasury for credit to miscellaneous receipts pursuant to section 4 of the Permanent Appropriations Act of 1934, were authorized to be appropriated annually in specific or indefinite amounts, equal to collections so credited, for: (1) payment of operation and maintenance (O&M) of the power system; (2) creation and maintenance of reserve funds to be available for making repairs and replacements to, defraying emergency expenses for, and ensuring continuous operation of the power system; (3) amortization, in accordance with the repayment provisions of applicable statutes or contracts, of construction costs allocated to be returned with power revenues; and (4) payments of other expenses and obligations chargeable to power revenues to the extent required or permitted by law. The act of August 7, 1946 is codified at 25 U.S.C. sec. 385a - 385c. The implementing regulations are found at 25 Code of Federal Regulations Part 175 (1995 ed.).

The Snyder Act, 25 U.S.C. sec. 13, the authority under which the powerplant was constructed, provides in pertinent part:

[t]he Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following

purposes:

General support and civilization, including education.

* * *

For industrial assistance and advancement and general administration of Indian property.

For extension, improvement, operation, and maintenance of existing Indian irrigation systems and for development of water supplies.

V. DISCUSSION

A. The statements contained in Reclamation's 1980 Planning Report concerning anticipated repayment, interest, etc., are irrelevant in determining whether the law requires the inclusion of an interest component in the determination of the construction costs of the powerplant. Reclamation's methodology, as reflected in its 1980 Planning Report, on repayment and interest issues is derived from Reclamation's general governing statutes which require repayment contracts, payment of construction charges, interest components, etc. See e.g., 43 U.S.C. sec. 485 et seq. Apparently, when it submitted that report, Reclamation believed that the construction would be performed under its authority, not under BIA's Snyder Act authority as Congress subsequently directed.

As noted above, the Snyder Act, 25 U.S.C. sec. 13, the Secretary's authority under which the powerplant was constructed, is quite different from his authority to construct Reclamation projects under Reclamation statutes, as the former states in pertinent part:

[t]he Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:

General support and civilization, including education.

* * *

For industrial assistance and advancement and general administration of Indian property.

For extension, improvement, operation, and maintenance of existing Indian irrigation systems and for development of

water supplies.

(emphasis supplied); see also generally, *Morton v. Ruiz*, 415 U.S. 199, 205 - 209 (1974) (describing the Snyder Act). Unlike the general statutes governing Reclamation's activities, the Snyder Act does not contain specific requirements on repayment, interest, etc. See 25 U.S.C. sec. 13. Rather, the Snyder Act gives the Secretary wide discretion to determine how, and on what terms, money appropriated under the Snyder Act will be expended. See *id.* Since Congress chose to authorize the powerplant under the Snyder Act rather than under Reclamation's statutory authority, Reclamation's 1980 Planning Report offers no support for an assertion that Congressional intent on repayment and interest matters was other than that expressed by the Secretary in his October 16, 1985, decision memorandum.

B. The Permanent Appropriations Repeal Act of August 7, 1946, *supra*, does not require the application of power revenues to repay the amortized portion, or interest on, of the reimbursable portion of the construction costs of the powerplant. See *id.* As noted above, the pertinent portion of that statute, codified at 25 U.S.C. sec. 385c, merely identifies the "purposes," see *id.*, for which revenues collected from power operations on Indian irrigation projects and deposited in the Treasury are authorized to be appropriated. That statute does not "provide criteria for the application of power revenues to the amortization of reimbursable Federal construction costs," see Audit at p. 6, as the Audit suggests. Thus the Permanent Appropriations Repeal Act of August 7, 1946, *supra*, is not inconsistent with the decision articulated in the Secretary's October 16, 1985, memorandum of decision.

Further, to the extent it is applicable, the Permanent Appropriations Repeal Act of August 7, 1946, see 25 U.S.C. sec. 385c, permits the expenditure of funds for the "(3) amortization, in accordance with the repayment provisions of the applicable statutes or contracts." See *id.* Our research has not identified any statutory provision requiring "repayment provisions," see 25 U.S.C. 385c *supra*, for the powerplant. 25 U.S.C. 385c *supra*, does not require repayment of the construction cost of the powerplant. See *id.* Similarly, our research has not disclosed any "contracts," see 25 U.S.C. 385c, *supra*, mandating the Secretary require repayment of the construction cost of the powerplant. Finally, we are unaware of any applicable statutes or contracts which have determined the "construction costs" "allocated to be returned from power revenues." See 25 U.S.C. 385c.

C. Reclamation's 1980 Planning Report and its annual budget justifications are not evidence that Congress intended all, or any, of the construction costs to be reimbursable or that Congress intended that the commercial power component (as

distinguished from the power necessary to make water deliveries necessary for irrigation) be reimbursable with interest. A few months after the authorization of the powerplant in the Supplemental Appropriations Act for Fiscal Year 1985, *supra*, the Commissioner of the Bureau of Reclamation stated his understanding of the applicable statute was that no interest would be charged on any of the construction costs. See the Secretary's October 16, 1985, decision memorandum. The Secretary concurred that no interest would be added to any of the construction costs. See *id.*

Reclamation's 1980 Planning Report is irrelevant because Reclamation's statutory authorities were not utilized in the authorization of the Hydroelectric Project. Reclamation's budget submissions, tendered to the enactment of the authorizing statute and subsequent to the Commissioner's and the Secretary's interpretation of the authorizing statute that no interest would be charged on the construction costs for the powerplant Project, are not evidence of what Congress intended when it passed the authorizing statute.

VI. CONCLUSION

Based on the foregoing, it is our opinion that the law does not require the addition of an interest component to the amount expended in the construction of the powerplant to determine the construction cost of the powerplant.

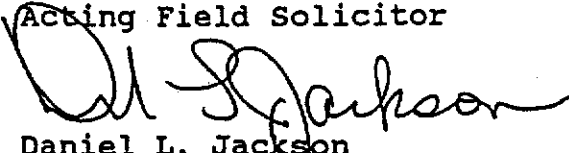
The other issues concerning the powerplant, noted in the Introduction section of this memorandum and identified in the Audit, involve programmatic decisions or require factual development by the BIA before we can address the legal issues raised by those facts. For example, establishing a plan for the recovery of the reimbursable Federal investment in the powerplant is a programmatic matter. Prior to the development of such a plan, we suggest the BIA determine what, if any, costs are reimbursable. We also suggest that the plan consider the CRIT's and its members' ability to pay power rates for the power generated by the powerplant.

The purpose of the statute authorizing and funding the powerplant was to displace energy now purchased from Arizona Public Service. See the Secretary's October 16, 1985, decision memorandum at p. 1. It would seem that the rates for power generated by the powerplant must be competitive with Arizona Public Service rates in order to accomplish the purpose of the authorizing statute. The 100% overrun in projected construction expenditures is also a factor that should be considered.

Finally, as noted above, the Secretary has wide discretion in determining repayment issues on projects authorized and funded under the Snyder Act in order to fulfill the purposes of that

Act. In our view, the Secretary is empowered to grant such additional relief in this case as he determines appropriate under the circumstances.

Robert Moeller
Acting Field Solicitor



Daniel L. Jackson
For the Field Solicitor