



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

IN REPLY REFER TO:
NC
Navajo Plant
Dup.

December 10, 1969

Memorandum

To: Secretary of the Interior

From: Solicitor

Subject: Navajo Steam Generating Project -- use of Colorado River water

The Bureau of Reclamation and five electric utilities, three investor owned and two public agencies, have completed negotiations and final contract drafts for construction and operation of the Navajo Project for the thermal generation of electric power. The Project will be built on the Navajo Indian Reservation near Page, Arizona, using coal mined on the Reservation and Colorado River water from Lake Powell.

The Bureau of Reclamation's participation will entitle it to approximately one-fourth of the plant generating capability. This source of electric power has been determined to be the best alternative for supplying pumping power to the Central Arizona Project. The remainder of the plant capability will be used, and is urgently needed, by the other parties to supply immediately projected loads.

All parties except the United States have signed the basic contracts for the project, and it is now in order for the United States to execute the documents. However, at a meeting with the Congressional delegations of Wyoming and other Upper Basin states on October 29, 1969, objection was raised to the water service contract entered into by Interior with the Salt River Project on January 17, 1969. The Salt River Project is one of the participants in the Navajo Project.

The water service contract, which runs for a maximum of 40 years, allows the Navajo Project to use up to 34,100 acre-feet a year of Colorado River water. Under Article III of the Upper Colorado River Basin Compact, water used for the Navajo Project must be charged to the 50,000 acre-feet a year of Upper Basin water that has been apportioned to Arizona under the Compact. Lest there be any doubt as to this, Section 303(d) of the Colorado River Basin Project Act and Section 6(a) of the water service contract also specifically provide that water used by the Navajo Project shall be charged to the 50,000 acre-feet a year apportioned to Arizona.

The objection of the Upper Basin states to the water service contract is based on their assertion that when Indian and other miscellaneous uses of Upper Basin water in Arizona are added to the 34,100 acre-feet a year committed to the Navajo Project, the total demand in Arizona on Upper Basin water will exceed 50,000 acre-feet. They express concern that because of the reserved water rights the Indians are claimed to have, the Navajo Tribe may be able to insist that the Secretary of the Interior deliver water in excess of the 50,000 acre-feet a year apportioned to Arizona under the Compact.

There is, in my opinion, no legal basis for this concern. The Upper Colorado River Basin Compact is binding on the Secretary of the Interior, the Indians, and all others, and it flatly precludes total use of Upper Basin water in Arizona in excess of 50,000 acre-feet a year. It does not matter whether the use by the Indians of their reserved water rights is considered a use by the United States for the benefit of the Indians or whether it is considered a direct use by the Indians themselves; such use must be counted as part of Arizona's total use of Upper Basin water and charged against the 50,000 acre-feet. Article VII of the Compact states specifically:

"The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the State in which the use is made"

Section 601(c) of the Colorado River Basin Project Act (Public Law 90-537) binds the Secretary of the Interior and all other Federal officers and agencies to comply with the Upper Colorado River Basin Compact "in the storage and release of water from all reservoirs and in the operation and maintenance of all facilities in the Colorado River system under the jurisdiction and supervision of the Secretary, and in the operation and maintenance of all works which may be authorized hereafter for the augmentation of the water supply of the Colorado River systems." No one, therefore, should entertain any doubt about the inviolability of the 50,000 acre-feet limitation.

However, the representatives of the Upper Basin states point to the Supreme Court decisions in Winters v. United States, 207 U.S. 564 (1903), and Arizona v. California, 373 U.S. 546 (1962), as justifying their concern. As explained in Arizona v. California, the United States at the time of creating the Indian Reservation reserved water rights for the Indians sufficient to irrigate all practicably irrigable acreage on the Reservations. Therefore -- it is contended -- the United States is under an obligation to make available for Indian use the amount of Colorado River water necessary to satisfy their reserved water rights. If such an obligation exists, it has been preserved by Article XIX of the Compact, which provides that nothing in the Compact shall be construed as affecting "the obligations of the United States of America to Indian tribes."

Even if the foregoing exposition of Indian reserved water rights is correct, it is not inconsistent with the Compact's absolute limitation on combined uses of Upper Basin water in Arizona. In fact, Article III(b)(4) of the Compact declares that the apportionment to each state includes "all water necessary for the supply of any rights which now exist." It is clear, therefore, that to the extent the Navajo Tribe has reserved water rights in the Upper Basin portion of Arizona, those rights must be satisfied out of the 50,000 acre-foot a year apportioned to Arizona.

As a practical matter, the water-use experts of the Bureau of Reclamation assure us that the amount of water available -- after the 34,100 acre-foot contracted for by the Navajo Project is deducted from 50,000 acre-foot apportioned to Arizona -- will be adequate to meet the Indians' reasonably foreseeable needs. If this estimate is wrong, the deficiency could be made up, under Article XVII of the Compact, by augmentation through importation of water from another river basin or desalination, for example. But under no circumstances can the Navajo Tribe have any complaint against the United States for having entered into the water service contract. Section 15 of the plant-site lease, approved by the Tribe on September 29, 1969, states:

"In consideration of the execution of this Lease and the benefits to the Tribe which shall accrue hereunder, the benefits to the Tribe from the construction and operation of Navajo Units #1, #2 and #3 and the benefits to the Tribe from Peabody's mining operations to provide coal fuel for said units, the Tribe agrees that during the term of this Lease or the operating life of the Navajo Generation Station, whichever is the shorter, of the 50,000 acre-feet of water allocated to the State of Arizona pursuant to Article III(a)(1) of the Upper Colorado River Basin Compact (63 Stat. 31), 34,100 acre-feet of water per year shall at all times be available for consumptive use by Lessees in the operation of the Navajo Generation Station and all other purposes related to such operation including coal transportation and ash disposal. The Tribe agrees the use of water on Reservation Lands within the Upper Basin of Arizona (as said Upper Basin is defined in the Upper Colorado River Basin Compact) shall not reduce or diminish the availability of said 34,100 acre-feet to the Lessees. This agreement shall not be construed in any manner as a waiver by the Tribe of any present or prospective water rights of the Tribe, other than as set forth above."

In this and other ways, the Navajo Tribe has encouraged the Navajo Project to go forward and the United States to cooperate. As a result of the Project's construction and operation on Navajo lands, including the lease of Navajo coal deposits for use in the Project, the Navajo Tribe will realize substantial profits. The water service contract was an indispensable element in the mosaic

of events making this possible, and I do not believe that the Tribe could thus encourage the United States to enter into the contract for water service to the Navajo Project and later be heard to complain because the contract has reduced the availability of Upper Basin water for Indian use in Arizona.

In sum, the Upper Basin states are protected under the Upper Colorado River Basin Compact and the Navajo Project documents against any infraction of the 50,000 acre-feet a year limit on Arizona use of Upper Basin water. The Project -- in addition to supplying the pumping-power needs of the Central Arizona Project and meeting imminent loads of the participating utilities -- will provide substantial economic benefits to the Navajo Tribe. It will also serve as a prototype for similar projects to be built at Kaiparowits in Utah and elsewhere. It is our recommendation that you complete execution of the Navajo Project documents.

/s/ Mitchell Melich

Solicitor