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The Honorable George Miller Chairman, Subcommittee on Water and Power Resources Committee on Interior and Insular Affairs House ofRepresentatives

Dear Mr. Chairman:

In your letter of December 10, 1985, you request our opinion of the views expressed by the Associate Solicitor, Division of Energy and Resources of the Department of the Interior, in a memorandum dated December 5, 1985, addressed to the Commissioner of the Bureau of Reclamation. The memorandum deals with the application of reclamation safety of dams funds to the construction of Cliff Dam, Plan 6, Central Arizona Project.

The specific issue considered in the memorandum is whether the Reclamation Safety of Dams (SOD) Act, or the 1984 amendments to the Act, prohibits the use of SOD funds for dam safety strategies other than the simple repair of existing facilities. The Associate Solicitor concludes that, "the Secretary's interpretation of the SOD Act in utilizing the construction of Cliff Dam partially as an SOD remedy is reasonable, and consistent with congressional intent, and that he has complied with the requirements of the Act.

For the reasons stated below, we disagree. It is our opinion that reclamation safety of dams funds may not be used in the construction of the proposed Cliff Dam, a part of the Central Arizona Project.

We have provided a summary of the pertinent legislative background relating to your request as an appendix to this letter.

Discussion

The Associate Solicitor states in his memorandum that the question to be answered about Cliff Dam is whether the Secretary of the Interior may allocate SOD funds to its construction as part of a strategy to address dam safety problems at the structure Cliff Dam is to replace, Horseshoe Dam, and a downstream dam, Bartlett Dam. In addressing this question he expresses the opinion that the SOD Act provides the Secretary with broad authority not only to modify an existing dam, but also to use SOD funds for the construction of a new dam as a modification to Bartlett and Horseshoe Dams. He finds that this "creative" approach is a reasonable exercise of the Secretary's powers under the Act. Our view is to the contrary.

First, the statutory design of the SOD Act is not consistent with this approach.

The provisions of the SOD Act show that a modification authorized by section 2 of the Act is one that is necessary to preserve the structural safety of the existing dam which requires that modification. The Act specifically refers to "structural modification" in section 4. Also, under the Act costs for modification are allocated depending on the reason for the changes needed in the existing dam (section 4). Reimbursable costs are to be allocated to the purposes for which the structure was initially authorized and are not to be paid out of SOD Act funds (section 3). Further, under section 5 of the Act, no funds are to be obligated for actual construction to modify an existing dam until after the Secretary has transmitted a report on that dam to the Congress. If the Congress had intended to permit Interior's plan for a new dam using SOD Act funds, it would certainly have imposed a similar reporting requirement.

Second, the legislative history of the SOD Act is against Interior's interpretation. The Secretary, in requesting the SOD legislation in 1978, noted that dam modification under the bill he proposed would be compared to other measures, including the replacement of a project facility. This shows his understanding that modification and replacement were two entirely different matters and that only modification of an existing defective dam was encompassed by the legislation he was proposing. The reports of both cognizant committees of the Congress referred to the prior structural modification of several dams and the need to continue this work on other dams found to be hazardous. Additionally, the House of Representatives was told by a principal supporter of the legislation that all the bill did was to give the Secretary of the Interior the authority to repair or modify any Bureau of Reclamation dam that is found to be unsafe.

Based on the above, it is clear that the SOD Act is limited to repairs of existing Bureau of Reclamation dams. This apparently was the view of the Department of the Interior in 1982 [1] and 1983 when it supported legislation to amend the SOD Act to include the construction of a new dam as an authorized use for SOD funds. Statements by supporters of the 1984 legislation in both houses of the Congress also indicate their understanding that neither the SOD Act nor the 1984 amendments, which principally authorized an additional $650 million, provides the authority to build a new dam rather than to repair an existing defective dam. In neither Act can we find authority for the Secretary to use SOD funds towards the erection of a new dam instead of repairing an existing inadequate dam.

In his memorandum the Associate Solicitor suggests a rationale for the use of SOD funds towards the construction of a new dam. First, he indicates that Cliff Dam would be constructed under Central Arizona Project authority. Thus, in his view, concerns expressed during the congressional consideration of the 1984 SOD Act amendments are satisfied since the SOD Act would not provide the "authorization" for the new dam. However, congressional opposition was to the use of SOD funds to build a new dam. For example, Congressman Edgar's question, "can we be assured that none of the funds now being authorized in this bill will be committed to construction of new dams.

The Associate Solicitor tried to further argue that the use of SOD funds for construction of a new dam is proper under the SOD Act as a "modification" of the system, specifically, Horseshoe Dam (which will be breached) and Bartlett Dam, which itself, will not be modified. We are told that this is permissible under the SOD Act because we are dealing with an integrated system so that construction of Cliff Dam may be considered a "modification" of the system,

which includes Horseshoe and Bartlett Dams, so that these dams may be considered to be "modified." As previously indicated, the legislative history of the SOD Act demonstrates that the only modifications contemplated under it are to be made to a defective dam, itself. Repairs and new dam construction are entirely different matters under the SOD Act. Congress in funding the SOD program made it clear that these funds were not intended to pay for new dam construction and we are unable to see any reasonable argument to support the view that this restriction does not apply to paying for a portion of a new dam.

Conclusion

While the Associate Solicitor views the SOD Act authority for modification of a dam needing additional safeguards as extending to the remodification of the unsafe dam and another dam by means of constructing a new dam, the results of our review do not support this approach to the lack of secretarial authority to use SOD funds for building a new dam. Accordingly, it is our opinion that funds authorized under the Reclamation Safety of Dams Act, as amended, may not be used in the construction of the proposed Cliff Dam, Central Arizona Project.

Unless you notify us otherwise, this opinion will be available for distribution after 10 days.

Sincerely yours,

Milton J. Socolar Acting Comptroller General of the United States

1. H.R. Rep. No. 478, 97th Cong., 2d Sess. 8 (1982). The Interior communication referred to possible construction of a new dam a quarter mile downstream from the Roosevelt Dam, Salt River Project, Arizona, in lieu of making modifications to Roosevelt Dam.