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Opinion No. 64-3
R-29
December 19, 1963

REQUESTED BY: JOHN E. SMITH, Chairman
Arizona Power Authority

OPINION BY: ROBERT W. PICKRELL
The Attorney General

QUESTION: Is the Marble Canyon Dam which is subject to the jurisdiction and approval of the Federal Power Commission subject to the concurrent jurisdiction and approval of the State Engineer as provided in A.R.S. §§ 45-702 and 45-703 ?

ANSWER: No.

The Arizona Power Authority has applied for a license under Section 4(e) of the Federal Act for authority to construct, operate and maintain a hydroelectric project at a site on the Colorado River, a navigable water of the United States, known and referred to as Marble Canyon (United States of America before the Federal Power Commission - In The Matter Of The Arizona Power Authority - Project No. 2248).

A.R.S. § 45-702 provides as follows:

"A. All dams shall be under the jurisdiction of the state engineer. Dams of the state, the United States, or any of their political subdivisions, or dams of public utilities, and all dams without exception are included within the jurisdiction conferred by this section. It is unlawful to construct, reconstruct, repair, operate, maintain, enlarge, remove or alter any dam except upon approval of the state engineer.

"B. The state engineer shall employ clerical, engineering and other expert assistance necessary for dam supervision, and fix their compensation. The state engineer may employ consulting engineers, geologists and other expert consultants. The records pertaining to dam supervision shall be public documents.

The state engineer shall adopt and revise rules of procedure and regulations and issue general orders to effectuate this article."

A.R.S. § 45-703 provides as follows:

"A. Construction of a dam or enlargement of an existing dam shall not be commenced until a written approval of plans and specifications has been obtained from the state engineer.

"B. A separate application for each dam shall be filed with the state engineer upon forms provided by him reciting the name and address of the owner or his agent, the location, type, size and height of the proposed same and appurtenant works, the storage capacity of the reservoir, and such other information as the state engineer requests. The application shall also set forth the area of the drainage basin, rainfall and stream flow records, flood flow records and estimates and other similar information required by the state engineer. The state engineer may require information concerning subsoil and foundation conditions and may require that the site be drilled or otherwise prospected.

"C. When the physical conditions and the size of the dam do not require the information provided in subsection B, such information may be waived by the state engineer.

"D. The means, plans and specifications by which the stream or body of water is to be dammed, by-passed or controlled during construction shall be stated in the application or such means, plans and specifications shall be submitted to the state engineer for approval

prior to beginning construction. The state engineer shall have the same authority over the construction and maintenance of such means of damming, by-passing or controlling the stream or body of water during construction of the dam as he has over similar work on the dam itself.

"E. The application shall further state the proposed time of beginning and completing construction, the estimated cost thereof, the use to which the impounded or diverted water is to be put, and shall be accompanied by maps, plans and specifications and state such details and dimensions as the state engineer may require. The maps, plans and specifications shall be a part of the application.

"F. Prior to the approval of plans and specifications the state engineer may require a surety company bond in an amount sufficient to secure the costs to the state in assuring the safety of any dam left partially constructed. The bond may be required only when the state engineer questions the financial ability of the owner or contractor, or otherwise deems the bond advisable."

The question resolves itself into whether or not the construction of the Marble Canyon project is subject to the jurisdiction and approval of the state engineer (A.R.S. § 45-701 defines "state engineer" as the "state highway engineer") pursuant to the aforementioned sections.

While the precise situation has not been encountered in any judicial decisions to this date, certain analogous fact situations are deemed controlling.

A leading case on the subject appears to be First Iowa Hydroelectric Cooperative v. Federal Power Commission, 328 U.S. 152 (1945). This case involved the following fact situation:

First Iowa Hydroelectric Cooperative applied to the Federal Power Commission for a license for a power project in Iowa involving the construction of a dam on a navigable stream and the diversion of water from two navigable streams into another. Section 9(b) of the Federal Power Act requires an applicant to submit satisfactory evidence of compliance with the requirements of state laws "with respect to bed and banks and to the appropriation, diversion and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power and in any other business necessary to effect the purposes of a license under this act." The applicant showed no attempt to comply with Iowa Code 1939, Chapter 363, which forbids the construction of dams and diversion of water for industrial purposes without a permit from the State Executive Council and authorizes the issuance of such a permit upon a finding inter alia that any "water taken from the stream . . . is returned thereto at the nearest practicable place." The State of Iowa intervened and urged that the application be denied because the applicant did not submit evidence of its compliance with the requirements of the Iowa Code for a permit from the State Executive Council. The Federal Power Commission found that a Federal license for the project was required under the Federal Power Act and that the project called for a practical and reasonably adequate water power development with certain recreational advantages, all at a cost not appearing to be unreasonable; but it dismissed the application without prejudice on the ground of the applicant's failure to present satisfactory evidence pursuant to Section 9(b) of compliance with the requirements of the law of Iowa requiring a state permit. The Court of Appeals for the District of Columbia affirmed the decision of the Commission and the Supreme Court of the United States granted certiorari.

The United States Supreme Court held at pages 163, 170 and 182 that compliance with requirements for a state permit under Iowa Code 1939, Chapter 363, was not a condition precedent to or an administrative procedure that must be exhausted before securing a federal license. The Court further stated that to require the petitioner in that case to secure a state permit, as a condition precedent to securing a federal license, would vest in the

Opinion No. 64-3
R-29
December 19, 1963
Page 5

Iowa State Executive Council a veto power over the federal project which could easily destroy the effectiveness of the Federal Act and subordinate to state control the "comprehensive" planning which the Federal Power Act entrusts the judgment of the Commission or other representatives of the Federal Government.

Also the Court stated that where the Federal Government supersedes the state government, there is no suggestion that both agencies shall have final authority and that a contrary policy is indicated in Sections 4(e), 10(a), (b) and (c) and 23(b) of the Federal Power Act, which sections place responsibility squarely upon federal officials and usually upon the Federal Power Commission.

As a final closure of the problem, it was held at pages 160 to 163 that the Iowa project was clearly within the jurisdiction of the Federal Power Commission under the Federal Power Act and the Court deemed the Iowa law to be either inapplicable or to have been superseded by the Federal Power Act.

The basic precepts established in the First Iowa case, supra, as it would apply to the case at hand, it is to be noted that legislation relating the design and construction of dams falling into the category of the Marble Canyon project have been pre-empted by federal legislation on the subject. (See sections 9(A), 10(a), (b), Federal Power Act).

It is therefore the opinion of this office that the matters contained in A.R.S. §§ 45-702 and 45-703 have been superseded by federal legislation and that the Marble Canyon project is solely within the jurisdiction of the Federal Power Commission under the Federal Power Act. This being true, the two Arizona statutes, above cited, have no application to the Marble Canyon project and the Marble Canyon project is not subject to the jurisdiction and approval of the state engineer as provided in those sections.


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