

TOWN SITES AND POWER DEVELOPMENT

An act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June 17, 1902, and for other purposes. (Act of April 16, 1906, ch. 1631, 34 Stat. 116)

[**Sec. 1. Withdrawal of lands for reclamation town sites—Survey of town sites—Reservations for public purposes.**]—The Secretary of the Interior may withdraw from public entry any lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June 17, 1902, not exceeding one hundred and sixty acres in each case, and survey and subdivide the same into town lots, with appropriate reservations for public purposes. (34 Stat. 116; 43 U.S.C. § 561)

EXPLANATORY NOTES

Codification. The section is codified as 43 U.S.C. § 561 with a proviso added that expresses the later authority to modify the 160-acre limit.

Supplementary Provision: 160-Acre Limit Modified. Section 4 of the Act of June 27, 1906, 34 Stat. 520, authorizes the Secretary of the Interior to exceed the 160-acre limit on reclamation town-sites when advisable in his opinion for the public interest. The Act appears herein in chronological order.

Cross References, General. The Act of

October 5, 1914, 38 Stat. 727, authorizes the reservation of public lands in reclamation projects for parks, playgrounds, and community centers. The Act appears herein in chronological order. Provisions relating to the reservation and sale of town sites on public lands generally are codified in 43 U.S.C. §§ 711–31.

Cross Reference, Special Act. The Act of July 3, 1926, 44 Stat. 890, 43 U.S.C. § 569a, extends this act to a lot in the Black Canyon unit, Boise project, Idaho.

NOTE OF OPINION

1. Park in town site

A park within a town site established under this act is not a country park, public playground, or community center contem-

plated by the Act of October 5, 1914, 38 Stat. 727, and water cannot be delivered thereon free of charge. Departmental decision, June 18, 1915.

Sec. 2. [Appraisal of lots—Sale at auction—Subsequent sale—Expenses and proceeds.]—The lots so surveyed shall be appraised under the direction of the Secretary of the Interior and sold under his direction at not less than their appraised value at public auction to the highest bidders, from time to time, for cash, and the lots offered for sale and not disposed of may afterwards be sold at not less than the appraised value under such regulations as the Secretary of the Interior may prescribe. Reclamation funds may be used to defray the necessary expenses of appraisement and sale, and the proceeds of such sales shall be covered into the reclamation fund. (34 Stat. 116; 43 U.S.C. § 562)

EXPLANATORY NOTES

Supplementary Provision: Reappraisals; Installment Payments. The Act of June 11, 1910, 36 Stat. 465, authorizes reappraisal of unsold lots and installment payments for the sale of any town lot. The Act appears herein in chronological order.

Supplementary Provision: School Pur-

poses. The Act of October 31, 1919, 41 Stat. 326, authorizes the conveyance of not to exceed six acres within a reclamation town site for school purposes. The Act appears herein in chronological order.

Supplementary Provision: Disposition of Unplatted Portion. The Act of March 2,

1929, 45 Stat. 1522, as amended by the Act of February 14, 1931, 46 Stat. 1107, authorizes the disposition of unplatted portions of reclamation town sites. The 1929 and 1931 Acts appear herein in chronological order.

Cross Reference, Prior Town Sites. Section 3 of the Act of June 27, 1906, 34 Stat. 519, extends the appraisal and dis-

posal provisions of the above act to town sites previously established in or near reclamation projects under R.S. §§ 2380-81 (43 U.S.C. §§ 711-12). The 1906 Act appears herein in chronological order.

Cross References, Special Acts. See index for references to special acts dealing with individual townsites.

NOTES OF OPINIONS

1. Receipts, application of

The gross receipts from the sale of town-site lots should be considered as revenues, and not as a repayment in part and revenues in part. Comp. Dec., December 6, 1906.

It is not permissible to deduct the receipts from the sale of town lots from construction or operation and maintenance cost. Neither is it permissible to class such receipts as repayments under the comptroller's decision of December 6, 1906. They are accretions to the reclamation fund directly resulting from the operations

of the Reclamation Service. C.L. 639, March 22, 1917.

It is not the intent of Congress by this act to take away the right of the State of Idaho to the 5 per cent of the net proceeds of sales of public lands lying within said State for the support of the common schools of the State. If, however, the whole proceeds of said sales have been covered into the reclamation fund and the 5 per cent paid to the State out of the permanent indefinite appropriation therefor, the reclamation fund should be charged therewith. 20 Comp. Dec. 365 (1913).

Sec. 3. [Public reservations to be maintained by town authorities—Conveyances of same to municipal corporations.]—The public reservations in such town sites shall be improved and maintained by the town authorities at the expense of the town; and upon the organization thereof as municipal corporations the said reservations shall be conveyed to such corporations by the Secretary of the Interior, subject to the condition that they shall be used forever for public purposes. (34 Stat. 116; 43 U.S.C. § 566)

NOTE OF OPINION

1. Public purposes

Reservations for fire house, town hall,

and armory approved. Departmental decision, July 15, 1916, Shoshone.

Sec. 4. [Water rights for towns—Contracts therefor.]—The Secretary of the Interior shall, in accordance with the provisions of the reclamation act, provide for water rights in amount he may deem necessary for the towns established as herein provided, and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken. (34 Stat. 116; 43 U.S.C. § 567)

EXPLANATORY NOTE

Cross References, Water Supply. The Act of February 25, 1920, 41 Stat. 451, and section 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1187, 1194, author-

ize the Secretary to furnish water from reclamation projects for purposes other than irrigation under stated conditions. Both Acts appear herein in chronological order.

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1. Individual contracts

Application for water rights under the reclamation act by individual lot owners for lands which have been subdivided into town lots will not be allowed hereafter; but water may be supplied to towns from reclamation projects by delivery to some convenient point, to be handled and distributed to the inhabitants of the town by the municipal authorities in accordance with the provisions of this act. Instructions, 39 L.D. 591 (1911).

It is within the discretion of the Secretary of the Interior to contract with towns in the manner provided by this section, or contract directly with water users upon town lots or tracts within the corporate limits of town sites regardless of the size of such lots

Sec. 5. [Development and lease of surplus power—Proceeds—Impairment of projects prohibited—Longer lease permitted on Rio Grande project.]—Whenever a development of power is necessary for the irrigation of lands, under any project undertaken under the said reclamation act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the money derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided*, That no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project: *Provided further*, That the Secretary of the Interior is authorized, in his discretion, to make such a lease in connection with Rio Grande project in Texas and New Mexico for a longer period not exceeding fifty years, with the approval of the water users' association or associations under any such project, organized in conformity with the rules and regulations prescribed by the Secretary of the Interior in pursuance of section six of the reclamation act approved June seventeenth, nineteen hundred and two. (34 Stat. 117; Act of February 24, 1911, 36 Stat. 930; 43 U.S.C. § 522)

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1911 Amendment. The Act of February 24, 1911, added the second proviso authorizing a 50-year lease in connection with the Rio Grande project. The Act appears herein in chronological order.

Cross Reference, General. Section 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1194, authorizes the sale of electric power or lease of power privileges for periods not to exceed 40 years. The Act appears herein in chronological order.

Cross References, Application of Power Revenues, General. General provisions re-

or tracts. Opinion Chief Counsel, Reclamation Service, February 22, 1916, Commission Minutes 147, Docket 658.

2. Effect of later acts

Section 4 of the Act of April 16, 1906, authorizes the furnishing of project water to a town in the immediate vicinity of the project which has a pre-existing water right in the same source of water as the project source. The authority to furnish water in such a case under the 1906 Act is neither repealed by, nor subject to the conditions of, the Act of February 25, 1920, 41 Stat. 451, or section 9(c) of the Reclamation Project Act of 1939. Memorandum of Acting Commissioner Lineweaver to Regional Director, Boise, September 26, 1950, in re contracts with cities of Culver and Metolius, Deschutes Project, Oregon.

lating to the application of power revenues for the benefit of water users are found in subsection I, section 4, of the Act of December 5, 1924, 43 Stat. 703, and in the Act of July 1, 1946, 60 Stat. 366. The so-called Hayden-O'Mahoney amendment in the Act of May 9, 1938, 52 Stat. 322, provides generally that power revenues from reclamation projects shall be covered into the reclamation fund until power costs are repaid. The relevant provisions from the 1924, 1946 and 1938 Acts appear herein in chronological order.

Cross References, Special Acts. See index for references to special acts dealing with the development of power and disposition of power revenues.

Legislative History. S. 87, Public Law 103 in the 59th Congress. S. Rept. No. 648. H.R. Rept. No. 2113.

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1. Generally

The development and sale of surplus power not required for pumping or other uses of irrigation is authorized by this section only as an incidental phase of reclamation, not as a primary or independent end in itself. Consequently, those who benefit from the net profits of the commercial power operation of a project are not entitled as a matter of right to have water released for power production rather than held for irrigation use, nor are they entitled to receive credit for the profits attributable to the sale of replacement power acquired from another source. *Burley Irr. Dist. v. Ickes*, 116 F. 2d 529 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 687 (1941).

The limitations in the power leasing act do not apply to the lease of a power privilege to a Warren Act contractor for the purpose of generating power for irrigation pumping. Solicitor Margold Opinion, M-28725 (October 6, 1936), in re use of power site at C canal drop, Klamath project.

2. Utility companies, contracts with

By the terms of a contract between the United States and the Pacific Gas & Electric Co. in connection with the construction, operation, and maintenance of the Salt River Project, the company surrendered and conveyed all of its rights within the physical limits of the project, and in lieu thereof the United States agreed to furnish the company in the city of Phoenix, Ariz., a specified amount of electrical energy generated at its works at the Roosevelt Reservoir at a stipulated sum of money and for a term not exceeding 10 years, and the United States further agreed that while serving power to the company under the terms of the contract, it would refrain from entering into a general retailing of power to customers in the city of Phoenix and from furnishing power to anyone in said city to be again sold or retailed. This contract neither violates the provisions of the anti-trust law of July 2, 1890, 26 Stat. 209, nor the provision of the Act of April 16, 1906 (34 Stat. 116), which, in authorizing the

Secretary of the Interior to lease surplus power derived from reclamation projects, provides that preference be given to municipal usage. 30 Op. Atty. Gen. 197 (1913).

3. Revenues, application of

The receipts arising from the sale or leasing of water rights to towns or others, and from the leases of power to towns or others, should be classed as repayments. Comp. Dec., December 6, 1906. (Reclamation B58.)

Returns from the sale of power and power privileges are to be credited as a refund on account of the construction cost of the project. Departmental decision, December 28, 1916.

The Hayden-O'Mahoney amendment of 1938 amends section 5 of the Act of April 16, 1906, by providing that after net power revenues have repaid project construction costs allocated to be repaid by such revenues, they shall then be covered into the General Treasury as miscellaneous receipts. Solicitor Harper Opinion, M-33504 (September 26, 1944), in re disposition of power revenues from Grand Valley project.

The practice of using power revenues to assist in the payment of irrigation costs and in determining whether a project will probably return its cost to the United States originated with section 5 of the Act of April 16, 1906, 34 Stat. 116, 117, 43 U.S.C. § 522; was followed in a number of subsequent enactments, including section 9 of the Reclamation Project Act of 1939, 53 Stat. 1187, 1193, 43 U.S.C. § 485h; and has repeatedly been recognized and accepted by Congress. Letter from Acting Commissioner Markwell to Rep. Leroy Johnson, April 2, 1948.

The availability of power revenues to aid irrigation has, in one form or another, been a part of general reclamation law almost since its beginning. This is evident from section 5 of the Act of April 16, 1906, 34 Stat. 116, 117, 43 U.S.C. § 522; the Act of February 24, 1911, 36 Stat. 930, 43 U.S.C. § 522; and subsection I, section 4, of the Act of December 5, 1924, 43 Stat. 703, 43 U.S.C. § 501. This general trend has been reinforced by the Hayden-O'Mahoney amendment to the Interior Department Appropriation Act, 1939, 52 Stat. 322, 43 U.S.C. § 392a, and a provision in

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the Interior Department Appropriation Act, 1947, 60 Stat. 366, as well as section 9 of the Reclamation Project Act of 1939, 53 Stat. 1193, 43 U.S.C. § 485h. Memo-

randum of Chief Counsel Fisher, September 12, 1952, in re procedure on use of surplus power revenues for assistance in financing irrigation distribution systems.