INTERNATIONAL JOINT COMMISSION

IN THE MATTER OF THE APPLICATION OF THE CRESTON RECLAMATION COMPANY, LIMITED, FOR PERMISSION TO CONSTRUCT CERTAIN PERMANENT WORKS ADJACENT TO THE KOOTENAY RIVER AND ITS EAST BRANCH, FOR THE RECLAMATION OF CERTAIN FLOOD LANDS BETWEEN THE INTERNATIONAL BOUNDARY AND KOOTENAY LAKE, NEAR SIRDAR, IN THE PROVINCE OF BRITISH COLUMBIA.

ORDER OF APPROVAL

OTTAWA, CANADA
August 6, 1949
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ORDER OF APPROVAL

WHEREAS the Kootenay River is a river flowing across the boundary between the United States and Canada within the meaning of Article IV of the Boundary Waters Treaty of January 11th, 1909; and

WHEREAS the Creston Reclamation Company, Limited, has made an application dated May 12th, 1942, transmitted to the Commission by the Canadian Government on May 26th, 1942, for permission to construct certain permanent works adjacent to the Kootenay River and its East Branch for the reclamation of certain flood lands known as the Duck Lake area between the international boundary and Kootenay Lake, near Sirdar, in the Province of British Columbia, together with plans showing the delta of the Kootenay River in British Columbia and the reclaimed area therein, and also the land proposed to be reclaimed, as well as the location of levees, ditches and other works deemed necessary; and

WHEREAS the total area involved in this proposal amounts to some 8,100 acres of which approximately 700 acres were included in the Application approved by the Commission under its Order of April 3rd, 1928, and the remaining 7,400 acres constitute lands not dealt with previously by the Commission; and
WHEREAS said Application came on for hearing in the Town of Creston, in the Province of British Columbia, on August 15th, 1942, after due notice to all parties interested in both countries of the filing of the Application and of the time and place of hearing, when evidence was adduced and all parties so desiring were heard; and

WHEREAS the Applicant filed with its Application, Order-in-Council Number 141 of the Province of British Columbia, dated February 5th, 1942, granting the Applicant the right under authority of Section 68 of the Land Act, being Chapter 144, Revised Statutes of British Columbia, 1936, to acquire partly by purchase and partly by free grant certain agricultural lands subject to submergence in greater or lesser degree at frequent intervals from the back-waters of Kootenay Lake situate and being in the North East angle of the delta of the Kootenay River, and contained in the Townships and Sections enumerated below:

Township 8  Sections 29,32,33;
Township 10  Sections 12,15,23,24,25,26,35,36;
Township 11  Sections 4,5,6,7,8,17,18,19,30;

on the following conditions:
1. That the land contained in the said area be dyked, reclaimed and fully protected from flooding during an entire period between April 1st and August 1st in the same year.

2. That the Applicant first obtain the approval of the International Joint Commission to construct and operate the necessary permanent works to fully secure and satisfy the aforementioned condition.

3. That concurrently therewith the Applicant obtain approval of the construction and operation of the said works by the Governor General in Council under the provisions of Chapter 140, Revised Statutes of Canada, 1927, being the Navigable Waters Protection Act, so that the provisions of Section IV thereof may be fully complied with.

4. That concurrently therewith the Applicant make such further arrangements as may be necessary with the Indian Affairs Branch, Department of Mines and Resources (Canada) in regard to any Indian Reserve lands within the said area; and

WHEREAS the Applicant filed with its Application a consent of the Indian Affairs Branch of the Department of Mines and Resources of Canada,
as represented by a lease dated October 1st, 1934, and a provisional consent as represented by a letter of the Indian Commissioner for British Columbia, dated April 13th, 1942; and

WHEREAS, on September 11th, 1942, Messrs. Burnett and McGugan, on behalf of the Kootenay Reclamation Company, Limited, protested against the granting of the Application on account of the insufficient engineering data provided by the Applicant, to which the Applicant replied on September 28th, 1942; and

WHEREAS the Commission at a meeting held in New York on October 22nd 1942, considered the evidence given at the public hearing in August, as well as the material filed since that hearing, and decided that in view of the opposition to the Application, and particularly the lack of engineering data to enable the Commission to reach a conclusion, the International Kootenay Lake Board of Control should be asked to report on the various features of the Application; which Report, dated March 17th, 1943, was duly presented and considered at Washington in April, 1943; and

WHEREAS the Commission having been informed that consideration was being given to a Reference to the Commission concerning the Columbia River system, it was decided at a meeting in January, 1944, that no decision should be made on the Application of the Creston Reclamation Company, Limited.
pending consideration of the larger problem of the Columbia Valley investigation; and

WHEREAS the said Reference was filed with the Commission on March 9th, 1944, by the Governments of the United States and Canada; and

WHEREAS the Applicant on February 2nd, 1945, wrote the Commission stating that during the war they had not pressed for this reclamation owing to the urgent need for power, but with the completion of the Brilliant Dam on the Kootenay River, and power being available in quantity, they felt their Application should now be granted; and

WHEREAS the Commission at its April meeting, 1945, directed that the Applicant be informed that the Commission had agreed that until the Columbia Investigation was completed, this Application would not be dealt with. As the engineering data previously requested from the Applicant had not been furnished, the Commission had asked the International Columbia River Engineering Board to make a survey of conditions on the Kootenay River above Kootenay Lake. As soon as the Commission found itself in a position to take action, the Applicant would be advised; and

WHEREAS the Commission at its October meeting, 1945, reviewed the Application and agreed that no action could be taken until the
International Columbia River Engineering Board had made its Report; and

WHEREAS during the year 1946 the Solicitors for the Applicant pressed that the Application be granted, but the Commission was unable to act in the matter as the Report of the International Columbia River Engineering Board was not available; and

WHEREAS the International Columbia River Engineering Board filed an Interim Report dated April 1st, 1947, re the Hydraulic Effect of the Proposed Duck Lake Reclamation, Kootenay Flats, in which the pertinent conclusions and recommendations are as follows:

"The Board has considered the purpose of the Application of the Creston Reclamation Company, Limited, from the point of view of its hydraulic effect, in the light of available data, the previous submissions of the United States Geological Survey and the Dominion Water and Power Bureau, the possible effect of the revised data on those submissions and additional back-water computations. As a result of its deliberations, it has concluded:

(a) That the diversion of Duck Creek to the Kootenay River at the south end of the project will not raise the level of Kootenay River upstream a measurable amount. However, it is recommended that should the Application
be approved, the Order should direct that the diversion entrance shall be so designed as to cause a minimum of hydraulic disturbance in the main River.

(b) That the highest possible floods on the river, such as that of 1894, may be expected to overflow and to destroy or damage seriously all reclamation projects on the Flats whether or not the present proposal is adopted.

(c) That the proposal will result in restriction to the free flow of flood waters in the river channel only during floods which would be higher than the natural bank elevations adjacent to the proposed project area (approximately 1761 at the south end) but not as high as floods which would overtop the proposed dikes (elevation approximately 1765). Floods in this range may be expected to occur only at long intervals of time. During the past 50 years probably not more than two floods (1903 and 1916) would have fallen within this range under the present lake outlet conditions.

(d) That the maximum effect of the proposal on the river levels at the International Boundary can be expected at the higher of the rare floods referred to in (c) and will probably not be in excess of 4 or 6 inches. This effect will become progressively less upstream from the boundary and at Bonners Ferry may be approximately one-half that at the boundary.
(e) That for floods of a magnitude less than those described in (e) above, the proposal would affect the water levels at the boundary only to the extent caused by the reduction of storage capacity in Kootenay Lake. This effect would be negligible - probably less than an inch.

(f) That the proposal will reduce the authorized storage program of the West Kootenay Power and Light Company, Limited, by an amount of 20,000 acre feet. This reduction in storage would result, in most years, in a loss of approximately 15,000 kilowatt-hours of energy for each foot of head at existing and potential downstream hydro power plants through which the flow resulting from the storage could be utilized effectively. There are approximately 800 feet of head already developed downstream and nearly an equal amount of head at sites that are considered feasible for future development. The flow from the storage in question might be utilized effectively through an appreciable portion of the aggregate head.

(g) That the possibilities of the investigation being conducted by the Board with a view to the over-all development of the water resources of the Columbia River basin do not warrant delaying a decision on this Application pending receipt of the Board's final report; and
WHEREAS in order that interested parties should be fully informed of the terms of the Report, copies were sent by the Commission to such parties in Canada and the United States; and

WHEREAS at the October meeting of the Commission, 1947, it was decided that a further public hearing should be held at Creston, British Columbia, on November 13th, 1947; and

WHEREAS the Department of Mines and Resources of Canada, on behalf of the National Parks Bureau of that Department, filed a brief on October 28th, 1947, opposing the granting of the Application because of the effect the reclamation of Duck Lake would have on wildlife interests; and

WHEREAS a further hearing on the said Application took place in the Town of Creston in the Province of British Columbia on November 13th and 14th, 1947, after due notice to all parties interested in both countries of the filing of the Application and of the time and place of hearing, when evidence was adduced and all parties so desiring were heard; and

WHEREAS the Solicitor for the Applicant having objected to the evidence of the wildlife interests being heard, as in his opinion the Commission's only concern was the effect, if any, of the granting of the Application on the level of the water at the international boundary,
under Article IV of the Treaty of 1908. The Chairman ruled that
the objection on behalf of the Applicant be noted; and

WHEREAS briefs were filed on behalf of wildlife interests in
British Columbia and Idaho, both at the hearing and later with the
Commission; and

WHEREAS since the Creston hearing of 1947 the Commission has
received and considered (a) a Memorandum Relative to the Proposed
Reclamation of the Duck Lake Area of the Kootenay Flats and the
Relation of Migratory Wildfowl, by Mr Guy Constable; (b) a Memorandum
by the Deputy Minister of Mines and Resources of Canada of September
14th, 1948, in reply thereto; and (c) a Compilation of Facts Pertinent
to the Duck Lake Reclamation Project, compiled by the Creston Board of
Trade, of January 6th, 1949; and

WHEREAS the Department of Public Works of Canada transmitted the
approval of the plan and site of the proposed reclamation works, Order-
in-Council P.C. 410, of February 3rd, 1948, under the Navigable Waters
Protection Act, Chapter 140, Revised Statutes of Canada, 1927; and

WHEREAS in view of the objections of the wildlife interests, the
Solicitor for the Applicant gave an undertaking dated June 21st, 1948,
to reserve for wildlife purposes an area of approximately 2,000 acres
of Duck Lake from the area contained within the Application; and
WHEREAS the Applicant has urged the Commission to approve its Application subject to such conditions as the Commission considers necessary for the protection of other interests.

NOW THEREFORE THE COMMISSION DO THUS ORDER AND DIRECT:

That the said Application be and is hereby approved, subject to the following conditions:

1. The said Creston Reclamation Company, Limited, shall indemnify, to the satisfaction of the Commission, any persons or interests on the United States side of the international boundary who may suffer damage or injury attributable to said Company's dykes;

2. Pending determination by the Province of British Columbia regarding the purpose or purposes for which the said lands shall be utilized in order best to serve the public interests, the said Company shall not extend its main river dyke north of the ridge of high ground which cuts diagonally across the area of the Application from the river bank, near the junction of the east and main channels, northeasterly to the vicinity of the foothills and is intersected by north latitude 49° 12'; nor shall said dyke be extended north of that limit until flood control storage has been provided in the Kootenay River watershed upstream from Bonners Ferry, Idaho, sufficient
in amount to more than compensate for the effects
of said dykes constructed under this Order on the levels
of the Kootenay River at and above the international
boundary; but said Company is hereby authorized to
construct a cross dyke along or near the crest of said
high ridge to make possible as soon as practicable the
utilization of approximately 3,200 acres of land in the
south end of said Duck Lake area for agricultural
purposes, without disturbing the outlet of Duck Creek
to Kootenay Lake.

3. Nothing in this Order shall be construed as freeing and
relieving the Applicant of any claims for injuries,
damage or loss sustained by reason of its works to any
person or persons or corporation or any other interest
in Canada or the United States which may be affected by
such works, and which are not otherwise provided for
herein.

4. Any questions arising with respect to the enforcement
of this Order shall be referred to the International
Kootenay Lake Board of Control, previously established
by this Commission. Any questions which the Board is
unable to settle to the satisfaction of the interested
parties or on which the Board is unable to agree shall be referred by the Board to the Commission for decision. The Board shall take such steps as may be necessary to ensure that the provisions of this Order are carried out properly and shall make appropriate reports to the Commission as required.

Approved in the City of Ottawa, this the sixth day of August, 1949.

[Signatures]