

INTERNATIONAL JOINT COMMISSION

IN THE MATTER OF THE APPLICATION OF THE CRESTON RECLAMATION COMPANY, LIMITED, AND /OR CRESTON DYKING DISTRICT FOR THE ISSUE OF CERTAIN ORDERS FOR THE ADJUSTMENT OF CERTAIN DIFFERENCES NOW EXISTING BETWEEN THE DRAINAGE DISTRICTS OF THE KOOTENAY FLATS IN BRITISH COLUMBIA, CANADA, AND ARISING OUT OF CERTAIN ORDERS OF APPROVAL TO CONSTRUCT CERTAIN WORKS GRANTED BY THE INTERNATIONAL JOINT COMMISSION TO THE SAID DISTRICTS.

O R D E R

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

WHEREAS the Creston Reclamation Company, Limited, presented and filed with the Commission on October 27th, 1927, plans and specifications for the construction of permanent works for the reclamation of certain lands adjacent to the channel of the said Kootenay River near Creston in the Province of British Columbia; and

WHEREAS the said plans and specifications were approved by the Commission on April 3, 1928; and

WHEREAS the Commission's approval was made subject among other things to the following conditions: "That this Commission doth hereby reserve to the Applicant and to all parties having claims for injuries in respect of said works the right to apply for such further order, direction or action with reference to such claims as may seem proper"; and

WHEREAS Creston Reclamation Company, Limited and /or Creston Dyking District has presented to and filed with the Commission an Application (hereto attached) for the issue of certain Orders for the adjustment of certain differences now existing between the Drainage Districts of the Kootenay Flats in British Columbia, Canada, and arising out of certain Orders of Approval to construct certain works granted by the International Joint Commission to the said Districts; and

WHEREAS the said Application came on for hearing at the Town of Creston, in the Province of British Columbia, on June 28, 1940, 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 among the parties interested who appeared and were represented by counsel at the hearing were George Leonard Salter, Trustee in Bankruptcy of the Kootenay Valley Power and Development Company, Limited, and Peter Charles Bruner, both of which parties had made application to the Commission, the former in September, 1932, and the latter in December, 1935, for the approval of certain works for the reclamation of lands adjacent to the channel of the Kootenay River in British Columbia, which applications were approved by Orders of the Commission dated respectively October 3, 1933, and May 15, 1936; and

WHEREAS in the course of the said hearing Counsel for the Creston Reclamation Company, Limited and /or Creston Dyking District, and for George Leonard Salter respectively represented to the Commission that they had come to an agreement, which agreement was subsequently put into formal shape, signed and executed, and filed with the Commission, to the following effect:

THIS AGREEMENT made the 28th day of June in the year of our Lord  
One thousand nine hundred and forty.

BETWEEN:

GEORGE LEONARD SALTER, of the City of Vancouver, in the Province  
of British Columbia, Chartered Accountant,

(HEREINAFTER CALLED "THE SAID SALTER")

OF THE FIRST PART.

AND

CRESTON RECLAMATION COMPANY LIMITED, a Company incorporated  
under the laws of the Province of British Columbia, and having  
its head office at Creston, British Columbia,

(HEREINAFTER CALLED "THE RECLAMATION COMPANY")

OF THE SECOND PART.

AND

CRESTON DYKING DISTRICT, an Improvement District, incorporated  
in 1937 under the provisions of the Water Act,

(HEREINAFTER CALLED "THE DYKING DISTRICT")

OF THE THIRD PART.

WHEREAS by an Order made on the 3rd day of April 1928 by the  
International Joint Commission appointed pursuant to the Treaty between the  
United States and Great Britain dated the 11th day of January 1909, the  
Reclamation Company was authorized to construct certain permanent works in  
and adjacent to the channel of the Kootenay River in the Province of British  
Columbia at Creston:

AND WHEREAS pursuant to the said Order the Reclamation Company constructed  
and the Dyking District has maintained such permanent works and has reclaimed  
certain lands known as Creston Reclamation Project, which said works involved  
the diversion of Goat River into the Kootenay River through an open cut  
between the Goat River and the Kootenay River at a point some four miles  
upstream from the natural junction of the said Rivers:

AND WHEREAS by an Order made by the said Joint Commission on the 3rd  
day of October 1933 the said Salter was authorized to construct certain  
permanent works for the reclamation of Lot 774, Kootenay District, and  
pursuant thereto the said Salter did certain permanent works for the  
rehabilitation of works previously constructed and thereby has reclaimed  
the said Lot 774 now known as Kootenay Reclamation Farm:

AND WHEREAS in an action in the Supreme Court of British Columbia  
numbered S459/1940 wherein the said Salter is plaintiff, and the said  
Reclamation Company and the said Dyking District are defendants, the said  
Salter claimed damages against the defendants therein for wrongfully diverting  
the waters of the Goat River in such manner as to constitute a nuisance to  
and to damage the lands of the said Salter, and for wrongfully maintaining  
the said diversion, and for a declaration that the defendants therein are  
not entitled to maintain the said diversion so as to constitute a nuisance,  
and for an Injunction restraining the defendants therein from maintaining  
the said diversion:

AND WHEREAS in the said action the Dyking District by Counterclaim alleged that the said Salter has wrongfully interfered with the natural flow of the waters of Boundary Creek by the construction of a dyke along the Southerly boundary of Lot 774, Kootenay District, and that the same constitutes a nuisance and endangers the works of the said Dyking District, and claimed therein damages against the said Salter and a declaration and an Injunction:

AND WHEREAS by an application dated the 26th day of February 1940 the said Reclamation Company and the said Dyking District did apply to the International Joint Commission to hear and adjudicate upon the subject matter of the disputes between the said Salter on the one hand and the said Reclamation Company and the Dyking District on the other hand:

AND WHEREAS the said International Joint Commission pursuant to notice convened at the City of Creston on this day to hear the said application in the presence of Counsel for the said Salter who objected to the jurisdiction of the Commission in the premises, and the said Reclamation Company and Dyking District respectively:

AND WHEREAS the said parties have agreed to a settlement of their said disputes, the terms of which were read into the proceedings of the said International Joint Commission:

WITNESSETH that in consideration of the premises and of the mutual agreements herein contained the parties hereto agree each with the other as follows:

1. The said Reclamation Company and the said Dyking District do hereby withdraw and discontinue their application dated February 26th, 1940 to the International Joint Commission insofar as the same affects the said Salter and said Lot 774.
2. The action in the Supreme Court of British Columbia hereinbefore in part recited, and the Counterclaim therein of Creston Dyking District, shall be forthwith discontinued and the parties thereto shall consent to an Order whereby leave shall be given to discontinue the said action and the said Counterclaim. Each party shall pay their own costs of the said action.
3. The Reclamation Company and the Dyking District have remised, released and forever discharged, and for themselves and for their respective successors and assigns remise, release and forever discharge the said George Leonard Salter, his heirs, executors, administrators, successors and assigns, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims and demands whatsoever at law and in equity which they ever had or now have or which they or their successors or assigns respectively hereafter can, shall or may have by reason of any matter, cause or thing whatsoever existing up to the present time, and in particular but without restricting the generality of the foregoing, arising out of the alleged interference by the said Salter with the natural flow of the waters of Boundary Creek by the construction of a dyke along the Southerly boundary of Lot 774, Kootenay District, and by cutting off of the by-passes through which a large volume of Kootenay River and Boundary Creek water flowed through French's Slough along the West side of Lot 774 during flood periods.
4. The said George Leonard Salter has remised, released and forever discharged, and does for himself, his heirs, executors administrators and assigns, remise, release and forever discharge the Reclamation Company and the Dyking District and each of them and their successors and assigns respectively of and from all and all manner of action and actions, cause and

causes of action, suits, debts, dues, sums of money, claims and demands whatsoever at law and in equity, which he ever had or now has, or which he or his heirs, executors, administrators or assigns hereafter can, shall or may have by reason of any matter, cause or thing whatsoever existing up to the present time; and in particular but without restricting the generality of the foregoing arising out of or in connection with the diversion of the waters of the Goat River into the Kootenay River through an open cut made by the said Reclamation Company and maintained by the said Dyking District between the Goat River and the Kootenay River at a point some four miles upstream from the natural junction of the said rivers.

5. The parties hereto agree that the only dispute existing between the said Salter on the one hand, and the Reclamation Company and the Dyking District on the other hand, is a question of:

"what work, if any, should be done by the Creston Dyking District at the diversion of Goat River to afford protection to Lot 774 under all circumstances which may be reasonably anticipated?"

and the parties hereto agree that the said dispute shall be referred to arbitration in the following manner:

The Board of Arbitrators shall consist of an Engineer to be appointed by the Reclamation Company and the Dyking District jointly; an Engineer to be appointed by the said Salter; and a third Engineer to be appointed by the International Joint Commission; PROVIDED HOWEVER, that if the said Commission intimates to the parties hereto that it does not wish to appoint the third member of the Board or fails to do so, then the two Engineers appointed by the parties shall endeavour to agree on such third member, and failing an agreement the Dominion Water Board shall be asked by the said Engineers to appoint such third member. The Board of Arbitration when appointed shall enter upon their duties as soon as possible in order that a decision may be reached and an award given by December First 1940; provided, however, that if a majority of the said Board is of the opinion that a decision cannot be reached by the said First December 1940 the Board shall have another year in which to reach a decision and make an award. If the Board decides that any work should be done, such work shall be done before the High Water of 1941; but if the Board decides that they cannot reach a decision and make an award until 1941, then the work, if any, shall be done before High Water of 1942.

6. In the event of dispute it shall be referred to the said Board of Arbitration to decide whether or not any work directed by them to be done has been satisfactorily performed.

7. The "Arbitration Act" shall apply to any arbitration pursuant to this agreement.

8. The costs of the said Board of Arbitration shall be born equally by the said Salter on the one hand, and the Reclamation Company and the Dyking District on the other hand.

9. The parties hereto agree that any award made by the Board of Arbitrators and any work thereby ordered to be done shall in no way affect the right of the Reclamation Company and the Dyking District to do such other or additional works as may be necessary for the protection of their South Dyke.

IN WITNESS WHEREOF the said Salter has hereunto set his hand and seal and the corporate seals of the Reclamation Company and the Dyking District have been hereunto affixed in the presence of their proper officers in that behalf.

SIGNED SEALED AND DELIVERED by :  
the said Salter in the presence :  
of :  
(Signed) Geraldine Alexander :  
Name :  
850 West Hastings Street :  
Address :  
Stenographer :  
Occupation :

G.L.Salter Seal

THE CORPORATE SEAL OF THE :  
RECLAMATION COMPANY was hereto :  
affixed in the presence of :  
(Signed) Frank Putnam (Pres.) :  
(Signed) Fr.Staples, Director :  
:  
:  
:

Seal of Creston Reclamation Company

THE CORPORATE SEAL OF THE :  
DYKING DISTRICT was hereto :  
affixed in the presence of :  
(Signed) Guy Constable, Chairman :  
(Signed) A.H.Doyle, Secretary :

Seal of Creston Dyking District

WHEREAS the representative of the Creston Reclamation Company, Limited and /or Creston Dyking District, did not press the request contained in subparagraph 3 of paragraph 37 of their Application, namely, for an Order directing the removal of obstructions in Nick's (Big) Slough; and

WHEREAS Counsel for the Creston Reclamation Company and /or Creston Dyking District and Peter Charles Bruner stated in the course of the hearing that the interests they represented were in agreement that each should at their own expense make such corrections or readjustments in their works as might from time to time become necessary;

NOW THEREFORE THIS COMMISSION DOETH ORDER AND DIRECT:

1. That a Board of Engineers be created consisting of three members, one to be appointed by the Creston Reclamation Company and /or Creston Dyking District, one by George Leonard Salter and the third by this Commission. It shall be the duty of this Board to recommend to the Commission what work if any should be carried out by the Creston Dyking District at the point where Goat River is diverted into the Kootenay River to afford protection to that portion of the property of George Leonard Salter known as Lot 774 under all circumstances which may be reasonably anticipated.
2. That in so far as the interests of the Creston Reclamation Company and /or Creston Dyking District and Peter Charles Bruner are concerned, each is at his or their own expense to make such corrections or readjustments in their reclamation works as may from time to time become necessary; provided that such corrections or readjustments are not inconsistent with the terms of the Commission's Orders of April 3, 1928, and May 15, 1936, to the Creston Reclamation Company and Peter Charles Bruner respectively.
3. That this Commission doth hereby reserve to the Applicant and to all parties having claims for injury in respect of its works the right to apply for such further order, direction or action with respect to such claims as may seem proper.

Dated at Ottawa, this first day of October, 1940.

(Signed) Chas. Stewart

A.O. Stanley

Geo.W. Kyte

Roger B. McWhorter

J.E. Perrault

R. Walton Moore