

CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP

ATTORNEYS AT LAW
SUITE 2000
1001 SW FIFTH AVENUE
PORTLAND, OREGON 97204-1136

TELEPHONE (503) 224-3092
FACSIMILE (503) 224-3176

EDWARD A. FINKLEA

efinklea@chbh.com
www.cablehuston.com

April 28, 2005

VIA ELECTRONIC MAIL & FIRST CLASS MAIL

Oregon Public Utility Commission
550 Capitol St. NE, #215
PO Box 2148
Salem, OR 97308-2148
Attn: Filing Center

Re: In the Matter of the Request of Pacific Power and Light
Klamath Basin Irrigation Rates -- OPUC Docket No. UE-171

Dear Sir/Madam:

Enclosed please find an original and one copy of Klamath Water User Association's Response To PacifiCorp's Motion for Summary Disposition relating to the above-referenced docket.

Should you have any questions regarding this matter, please call.

Very truly yours,



Edward A. Finklea

EAF/tr

Enclosure

cc: UE-171 Service List (via email & first class mail)

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 171

In the Matter of PACIFIC POWER & LIGHT
(d/b/a PacifiCorp) Klamath Basin Irrigation
Rates

KLAMATH WATER USERS
ASSOCIATION'S RESPONSE TO
PACIFICORP'S MOTION FOR
SUMMARY DISPOSITION

I. INTRODUCTION

The Klamath Water Users Association (“KWUA”) respectfully submits this Response to the Oregon Public Utilities Commission (“Commission”) in opposition to PacifiCorp’s Motion for Summary Disposition. KWUA represents irrigators located within the boundaries of the United States Bureau of Reclamation’s (“Reclamation”) Klamath Irrigation Project. Most of KWUA’s members are retail customers of PacifiCorp within the State of Oregon who purchase power pursuant to a contract executed by PacifiCorp and Reclamation in 1956 (“1956 Contract”).¹ PacifiCorp executed the 1956 Contract to satisfy a condition on its federal license to develop the Klamath Hydroelectric Project.² The condition was placed on PacifiCorp’s original license to implement a compromise between PacifiCorp and Reclamation without which PacifiCorp would not have received its *original* license.³ The original license will expire in April of 2006, and the terms of any *new* license are not yet known. The question now before the Commission is, broadly stated, what power rate should the Klamath Irrigation Project pay after April of 2006? The answer is that the power rate should remain unchanged so long as PacifiCorp operates the Klamath Hydroelectric Project under an interim, *annual* license.

¹ For simplicity, KWUA uses PacifiCorp interchangeably with its predecessor Copco. KWUA also uses Federal Energy Regulatory Commission interchangeably with its predecessor the Federal Power Commission.

² The Klamath Hydroelectric Project currently consists of seven mainstream hydroelectric developments on the Upper Klamath River and one tributary hydroelectric development. PacifiCorp owns and operates the Klamath Hydroelectric Project under a single license issued in 1956 by the Federal Energy Regulatory Commission. The 50-year license for FERC Project No. 2082 expires as of April 2006. The Klamath Hydroelectric Project currently has a nameplate capacity of approximately 150 MW. *See generally* EXECUTIVE SUMMARY: APPLICATION FOR NEW LICENSE FOR MAJOR PROJECT, PacifiCorp, 2004.

³ In the context of the Federal Power Act, the term “original license” refers to the license that initially allowed the development of the hydroelectric project. The term “new license” refers to the permanent, long-term license issued to replace the original license. An “annual license” continues the original license until a new license is issued.

II. SUMMARY OF ARGUMENTS

- Reclamation filed a Protest against PacifiCorp's original license application for the Klamath Hydroelectric Project. In order to obtain its original license, PacifiCorp agreed to provide low-cost power to the Klamath Irrigation Project.
- The original license for the Klamath Hydroelectric Project includes an express condition requiring PacifiCorp to negotiate with Reclamation a contract to provide power to the Klamath Irrigation Project at a rate acceptable to Reclamation—which is the current rate.
- PacifiCorp's original license expires in April of 2006. It is expected that PacifiCorp will thereafter operate the Klamath Hydroelectric Project under one or more annual licenses issued under Section 15(a) of the Federal Power Act until a new license is issued.
- Under Section 15(a) of the Federal Power Act, an annual license must include all of the conditions on the original license. Thus, PacifiCorp's continued operation of the Klamath Hydroelectric Project after April of 2006 is contingent upon PacifiCorp continuing to provide power to the Klamath Irrigation Project at the current rate.
- This Commission is not preempted from reviewing or adjusting the rate charged by PacifiCorp to the Klamath Irrigation Project during any annual license term. The Commission must understand, however, that if PacifiCorp cannot continue to provide power to the Klamath Irrigations Project at the current rate, then PacifiCorp would be in violation of an express condition of its annual license.
- Nothing in Oregon law forbids PacifiCorp from continuing to charge the current rate during any annual license period. ORS 542.620 specifically identifies the Klamath Irrigators (as defined herein) as a distinct customer class. ORS 542.620 grants the Klamath Irrigators a statutory entitlement to "the lowest power rate which may be reasonable," as opposed to the default "just and reasonable" and "non-discriminatory" standards found in ORS Chapter 757.
- Continuing to provide service to the Klamath Irrigators under the current rates during any annual license period would not violate the Commission rules implementing SB 1149 because the current arrangement does not fit the definition of a "special contract" as that term is defined and used in the Commission's SB 1149 rules.
- The Commission's existing approval for the current rate is sufficient to enable PacifiCorp to continue charging that rate during any annual license period—no further approval is required.
- To the extent that further Commission approval is required, continuing to provide service to the Klamath Irrigation Project at the current rate during any annual license period would not be "unfair" to PacifiCorp's other ratepayers because it is necessary in order for PacifiCorp to continue operating the Klamath Hydroelectric Project—which confers a substantial benefit on PacifiCorp's other ratepayers.
- The Commission need not decide in this proceeding what will be the "lowest power rate which may be reasonable" at the time that PacifiCorp is issued a new license for the Klamath Hydroelectric Project.

III. ARGUMENT

A. PacifiCorp Executed The 1956 Contract To Satisfy An Express Condition On PacifiCorp's Original License For The Klamath Hydroelectric Project.

KWUA does not dispute the fact that the 1956 Contract contains a nominal expiration date of April 16, 2006. What KWUA does dispute is PacifiCorp's simplistic explanation that this expiration date is the end of the story. The expiration date is merely the beginning of the analysis of what happens after that date. In order to complete that analysis, this Commission must understand that the current power rate was negotiated between PacifiCorp and Reclamation to satisfy an express condition on PacifiCorp's original license for the Klamath Hydroelectric Project. Because it is a condition on the original license, the current power rate automatically will become, by operation of federal law, a condition on any annual license issued to PacifiCorp after the expiration of the original license but before the issuance of a new license.

By way of background, the Klamath Irrigation Project was authorized by the Secretary of the Interior in 1905 pursuant to the Reclamation Act of 1902, 32 Stat. § 388, long before PacifiCorp developed any hydroelectric facilities on the Klamath River. The Klamath Irrigation Project uses waters of the interrelated Lost River and Klamath River Basins, including water controlled at Upper Klamath Lake through Link River Dam. Water diverted into Irrigation Project canals serves family farms and ranches within the Irrigation Project service area. Noted for its extremely high efficiency of water use, the Irrigation Project reuses a substantial percentage of the water diverted, and water not consumed is ultimately returned to the Klamath River. In order to circulate the same water supply, move water to the Klamath national wildlife refuges and return water to the River, a substantial amount of water must be lifted and pumped.

By its very design, this process requires considerable electricity. The United States has made a substantial investment in the infrastructure and operation of the Irrigation Project over the last century. KWUA members also have invested heavily in construction costs of the Irrigation Project and continue to pay for its operation and maintenance as well as their own pumping costs. This investment has been predicated upon certainty of access to low-cost power. Historically, such power has been provided by Reclamation permitting PacifiCorp to develop the

hydroelectric potential of the River. PacifiCorp and Reclamation first reached a 50-year agreement in 1917, whereby PacifiCorp agreed to provide low-cost power to the Klamath Irrigation Project in exchange for the right to operate the Link River Dam for the benefit of PacifiCorp's downstream hydroelectric facilities. This arrangement benefited PacifiCorp's ratepayers and shareholders as well as the Irrigation Project.

Reclamation was studying the prospects of developing its own power resources on the Klamath River for the benefit of the Irrigation Project upon the expiration of the 1917 agreement when, in 1951, PacifiCorp applied for a federal license for a new hydroelectric facility on the Klamath River. Reclamation has developed the hydroelectric potential of most of its irrigation projects, and is one of the largest hydroelectric operators in the nation. If Reclamation had been able to complete a hydroelectric facility for the Klamath Irrigation Project, the benefit to KWUA members would have included a permanent supply of electricity at *or below* the cost of production. *See Reply Brief of the Secretary of the Interior*, October 17, 1952, p. 10 ("If power were developed by the Interior Department, it would be available for pumping, for financial aid to irrigation, and for sales to customers having preference rights under the reclamation laws.").

Knowing that it would not be possible for both it and PacifiCorp to develop and operate new hydroelectric facilities on the Klamath River, Reclamation filed a protest against PacifiCorp's 1951 license application ("Protest"). *See Protest of the United States to the Application For License of the California-Oregon Power Company, Project No. 180, June 1, 1951*. A copy of the Protest is attached hereto as Exhibit A. Reclamation made the following arguments to FERC:

However important future agricultural development of the Klamath Basin may be, vastly more important is the preservation of the existing agricultural economy of the region. This economy is largely dependent upon low cost power for pumping. Without low cost power, many thousands of acres in the project would be forced out of production. Low cost power has been available for over 25 years by virtue of a contract between the United States and the California-Oregon Power Company. However, this contract terminates in 1967 and, if the water is not available at that time for the development of power either by the United States or the water users, the success or failure of a majority of the farmers with the

project will depend entirely upon what rate the California-Oregon Power Company shall charge.

See id. In short, Reclamation believed that PacifiCorp should not be entitled to develop the Klamath River if it meant subjecting the Klamath Irrigation Project to PacifiCorp's normal tariff rates. Because Reclamation is a Bureau of the United States Department of Interior, which enjoys mandatory conditioning authority under the Federal Power Act, the Protest represented a virtually insurmountable barrier between PacifiCorp and the license it was seeking.

As a compromise urged by FERC, Reclamation agreed to withdraw its Protest and allow PacifiCorp to receive the original license for the Klamath Hydroelectric Project on the condition that PacifiCorp continue supplying the Klamath Irrigation Project with power at a price similar to what would have been offered by Reclamation had it been able to develop its own hydroelectric resource. *See In The Matter of the California Oregon Power Company Upon Application for License*, 13 F.P.C. 1, 1954 WL 47779 (January 28, 1954). A copy of FERC's original licensing Order is attached hereto as Exhibit B. FERC explained:

In reporting under Section 4(e) of the Federal Power Act on Copco's application for license, the Secretary of the Interior recommended that the license be denied. However, in the oral argument before us, counsel for the Secretary stated that the Presiding Examiner's Initial Decision in the project proceeding was generally satisfactory—*primarily because it contains a condition which would require Copco to enter into a contract with the Department of the Interior prior to issuance of a license. That requirement will be included in the license.*

Id. at 4 (Emphasis added). Thus, Reclamation withdrew the Protest under Section 4(e) of the Federal Power Act in exchange for the original license condition requiring PacifiCorp to execute a contract to continue providing power to the Klamath Irrigation Project at terms acceptable to Reclamation.

FERC memorialized this compromise as a condition of the original license. The condition reads:

Provided, further, That with and as a part of the acceptance of this license, the Licensee hereunder shall file conformed copies (in quadruplicate) of the existing agreement between the Licensee and the United States (by the Secretary of the Interior), dated February 24, 1917, as amended, which has been further amended or renewed

to cover a time period at least equivalent to the time period of this license, or a new agreement, *covering a time period at least equivalent to the time period of this license* between the Licensee and the United States, which provides for the storage in and release of water from Upper Klamath Lake in Oregon, and the use thereof by the Licensee for the generation of electric energy under terms and conditions substantially similar to those terms and conditions contained in the existing February 24, 1917 agreement, as amended.

See id. at 8 (Emphasis added). Although PacifiCorp has tried to be coy on this point, the Commission should not be fooled.⁴ The 1956 Contract is an express and binding condition of PacifiCorp's original license for the Klamath Hydroelectric Project. FERC later reaffirmed this condition after PacifiCorp challenged certain license condition. *See generally Order Further Amending Order Issuing License (Major)*, 18 FPC 364, 1957 WL 3945 (FPC).

As required by the condition on its original license, PacifiCorp spent approximately two years negotiating the 1956 Contract and the current rate with Reclamation. A copy of the 1956 Contract is attached hereto as Exhibit C. The 1956 Contract addresses not just the power rate for the Klamath Irrigation Project, but contains detailed provisions regarding PacifiCorp's operation of the Link River Dam. The expiration date of the 1956 Contract was to be 50 years from the effective date of the original license—the same as the license itself. In short, the 1956 Contract reflects PacifiCorp's compliance with an express condition on its original license that requires PacifiCorp to, among many other things, make low-cost power available to the Klamath Irrigation Project. *See In The Matter of the California Oregon Power Company Project No. 2082*, 15 F.P.C 14, 1956 WL 54507 (February 28, 1956) (the "Supplemental License Order"). A copy of the Supplemental License Order is attached hereto as Exhibit D.

B. The Original License Condition Remains Binding After The Expiration Of The Original License Until The Issuance Of A New License.

The original license was issued to PacifiCorp in 1956 for a term of 50 years and expires in April of 2006. Although PacifiCorp has completed its final application for a new license, FERC is unlikely to issue a final license prior to next April. Thus, there is a very high likelihood

⁴ On page 2 of its Motion, PacifiCorp represents that it "entered into the USBR Contract pursuant to a *provision* in the original license issued by the Federal Power Commission for Project 2082 * * *." (Emphasis added). The Commission should pay careful attention to PacifiCorp's misleading choice of words. The 1956 Contract is required by an express *condition* of PacifiCorp's license.

that FERC will not be prepared to issue PacifiCorp a new license prior to the expiration of the original license. This is a relatively common occurrence given the complexity of hydroelectric license applications, and one that is expressly addressed by federal law. *See generally California Trout, Inc. v. Federal Energy Regulatory Commission*, 313 F.3d 1131 (9th Cir. 2002) (Explaining that annual licenses must be granted by FERC upon the expiration of an original license.).

Under Section 15(a)(1) of the Federal Power Act, as well as FERC's corresponding administrative rules, beginning in April of 2006, one or more Annual Licenses will be issued to allow PacifiCorp to continue operating Project No. 2082 on an interim basis until a new, long-term license is issued. Section 15(a)(1) of the Federal Power Act states that "the commission shall issue from year to year an annual license to the then licensee *under the terms and conditions of the existing license* until the property is taken over or a new license is issued as aforesaid." (Emphasis added). In other words, Section 15(a)(1) freezes all of the existing conditions in place at the expiration of the original license to enable the licensee to continue operating the project until a new license can be prepared and issued.

The judicial construction given to these provisions confirms that the intent of Congress in enacting Section 15(a)(1) was to "preserve the status quo" through the issuance of annual licenses to allow the relevant stakeholders to prepare for a new license.

Congress fashioned Section 15 to prevent abrupt termination of a power project which should, in the public interest, be continued. *
* * Section 15(a) annual licenses are designed to prevent a possible hiatus in the operation of a project while either of these decisions [issuance of a new license or recapture of the Project by the government] is being made, *preserving the status quo at the expiration of a long-term license and thereby guaranteeing that industries created by Commission projects and dependent upon them may not suffer.*

LacCourte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Commission, 510 F.2d 198, 205-06 (D.C. Cir. 1975) (citing the legislative history of Section 15 of the Federal Power Act) (Emphasis added). In simple terms, an annual license is merely a placeholder and the intent is to avoid altering the environmental and economic affects of the project until a new license is issued.

As discussed above, one of the express conditions of the original license for the Klamath Hydroelectric Project is that PacifiCorp shall file the 1956 Contract “covering a time period at least equivalent to the time period of this license * * *.” *See In The Matter of the California Oregon Power Company Upon Application for License*, 13 F.P.C. 1, 1954 WL 47779 (January 28, 1954). Thus, under the plain meaning of Section 15(a) of the Federal Power Act, during any annual license period PacifiCorp will be required to continue performing its obligations under the 1956 Contract because it was executed to satisfy an express condition on the original license.

As the Commission might expect, there has been some disagreement between PacifiCorp on one hand, and Reclamation and KWUA on the other, concerning PacifiCorp’s continuing obligations under the 1956 Contract during an annual license period. The issue of whether the 1956 Contract will be extended during any annual extension ultimately will be determined by FERC. The Commission should not, and need not, opine on the issue. The purpose of this Response is not to ask this Commission to interpret the Federal Power Act or to attempt to guess what FERC may do. The purpose of this brief is simply to make the Commission aware of the very high likelihood that PacifiCorp will have a continuing obligation under any annual license to provide power to the Klamath Irrigation Project at the current rate, notwithstanding the nominal expiration of the 1956 Contract.

C. If PacifiCorp Fails To Deliver Power To The Klamath Irrigation Project At The Current Rate During Any Annual License Period, It Will Violate Its Annual License.

1. Changing The Power Rate During An Annual License Period Would Violate An Express Condition Of PacifiCorp’s Annual License.

As described above, PacifiCorp’s contractual obligation to provide power to the Klamath Irrigation Project according to the current terms satisfies an express condition of PacifiCorp’s original license for the Klamath Hydroelectric Project. That original license condition will be extended on an annual basis until such time as a new license is issued. The annual license will include all of the conditions on the original license. Therefore, PacifiCorp will still be required by a condition on its annual license[s] for the Klamath Hydroelectric Project to provide power to the Klamath Irrigation Project at the current contract rate. If, during any annual license period,

PacifiCorp were to charge a rate other than the current rate, then PacifiCorp would be in violation of an express condition of its annual license.

If PacifiCorp were to intentionally violate an express condition of its annual license, then it would gravely jeopardize its authorization to operate the Klamath Hydroelectric Project during that annual license period. Section 31 of the Federal Power Act directs FERC to “monitor and investigate compliance with each license and permit issued under this subchapter * * *.” 16 U.S.C. § 823b(a). *FERC is expressly authorized to revoke PacifiCorp’s operating license if PacifiCorp were to knowingly violate a condition of its license. See 16 U.S.C. § 823b(b).* Furthermore, a knowing violation of PacifiCorp’s annual license is likely to have an adverse affect on PacifiCorp’s pending application for a new license. If FERC were to revoke PacifiCorp’s annual license to operate the Klamath Hydroelectric Project, then PacifiCorp’s ratepayers would lose the benefit of the approximately 150 megawatts of clean, low-cost power generated by Project No. 2082 Facilities.

2. This Commission Is Not Preempted, And Has A De Facto Veto Of The License.

Contrary to PacifiCorp’s egregious misrepresentation, KWUA has *never* argued to FERC or otherwise that this Commission is “preempted” from reviewing the rates charged to KWUA members or other Klamath Basin Irrigators. *See* Motion, p.14. The 1956 Contract itself was expressly subject to Commission approval. *The fact is that this Commission in 1956 was free not to approve the Contract, in which case PacifiCorp would not have been able to comply with an express term of its license and it would not have been granted authority to construct and operate the Klamath Hydroelectric Project.* KWUA has never suggested that the Commission is bound by FERC’s determination. Therefore, the Commission’s reasoning in this case should not be influenced by PacifiCorp’s school-yard attempt to goad the Commission into defending its jurisdictional turf.

This Commission continues to have the final authority over the retail rates charged to the Klamath Irrigation Project. If the Commission were to exercise that authority to prohibit PacifiCorp from continuing the current rate during an annual license period, however, the

Commission would preclude PacifiCorp from complying with an express condition of such annual license. In this sense, the Commission retains a *de facto* veto over PacifiCorp's eligibility to hold an annual license for the Klamath Hydroelectric Project. If presented by such a conflict, the Commission would then have to evaluate what is in the best interest of PacifiCorp's ratepayers during the annual license period: a relatively minor increase in revenue associated with adjusting the rates charged to the Klamath Irrigation Project, or allowing PacifiCorp's ratepayers to continue to enjoy the benefits of the approximately 150 megawatts of low-cost and clean electricity generated by the Klamath Hydroelectric Project?

D. Nothing Under Oregon Law Prohibits PacifiCorp From Continuing To Supply The Klamath Irrigation Project At The Current Power Rate.

1. *The Klamath Irrigators Are A Unique Customer Class Under Oregon Law.*

PacifiCorp's basic proposition is that, notwithstanding the express condition on any annual license[s], it would be discriminatory to offer the Klamath Irrigators a rate that is different from the rate offered other irrigators after the nominal expiration date of the 1956 Contract. But PacifiCorp's argument fails to account for the fact that Oregon law treats the Klamath Irrigators as a separate customer class subject to its own distinct, preferential rate standard.

In its Motion, PacifiCorp mysteriously failed to mention the Oregon statute that directly and expressly governs the provision of electricity to irrigation loads in the Klamath River Basin ("Klamath Irrigators"). ORS 542.620 adopts the provisions Klamath River Basin Compact ("Compact"). A copy of the Compact as codified into Oregon law is attached hereto as Exhibit E. ORS 542.620 provides, in pertinent part, that the water of the Klamath River Basin, the same water that PacifiCorp uses to operate its Klamath Hydroelectric Project, shall be used to secure the "*lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells.*" (Emphasis added). In other words, Oregon law *requires* that electricity be provided to the Klamath Irrigators not under the typical "just and reasonable" standard, but under the preferential "lowest power rates which may be reasonable" standard. The significance of ORS 542.620 is clear: the Klamath Irrigators are a separate and distinct class of

electricity customers that are subject to a completely different rate standard than PacifiCorp's other customers—even other irrigators.⁵

The Commission should be wary of PacifiCorp's inevitable attempt to argue that ORS 542.620 is not really the *law* of Oregon. Specifically, PacifiCorp has argued that the relevant provision of the Compact is merely an "objective" of the State of Oregon. *See* Motion, p. 16. But PacifiCorp's position is thoroughly refuted by a second statute, ORS 542.610(1), which provides: "The Legislative Assembly of the State of Oregon hereby ratifies the Klamath River Basin Compact set forth in ORS 542.620, and *the provisions of such compact hereby are declared to be the law of this state* upon such compact becoming effective as provided in subsection (2) of this section." (Emphasis added). In short, the Klamath Irrigators have a *statutory entitlement* to "the lowest power rates which may be reasonable," for the specific end-use of "irrigation and drainage pumping, including pumping from wells." PacifiCorp may not like it, but it is the law.⁶

Nor should the Commission accept PacifiCorp's invitation to equate the "lowest power rate which may be reasonable" standard with the default "just and reasonable" standard. *See* Motion, p. 16 (Arguing that the "lowest power rates which may be reasonable" standard is "the same reasonableness standard that the Commission is asked to apply in this proceeding.") PacifiCorp's suggestion is contrary to Oregon law, which presumes that statutes having different words also have different meanings. *See, e.g., Premier West Bank v. GSA Wholesale, LLC*, 196 Or.App 640, 103 P.3d 1169 (Or. Ct. Ap. 2004) ("Ordinarily, when the legislature has used different terms in related statutes, we infer that it intended different meanings."). In this case, the

⁵ The standard articulated in ORS 542.620 applies equally to all Klamath Basin Irrigators and makes no distinction between the so-called "On-Project" and "Off-Project" consumption of electricity in the Klamath Basin. On its face, the statute applies to all irrigation loads in the Klamath River Basin, whether On-Project or Off-Project.

⁶ In addition to being a State law, the Klamath Irrigators' rate requirement also is a federal law. Article IV of the Compact confirms that the water of the Klamath River Basin shall be used to secure the "lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells." The Compact—which was ratified by the United States Congress—is federal law. The United States Supreme Court has unambiguously declared that an interstate compact that has been approved by Congress has the same legal status as a federal statute. *See Virginia v. Maryland*, 540 U.S. 56, 66, 124 S. Ct. 598, 605 (2003) ("We interpret a congressionally approved interstate compact just as if we were addressing a federal statute.") (Internal citations omitted.); *Cuyler v. Adams*, 449 U.S. 433, 438 (1981) (Holding that "congressional consent transforms an interstate compact * * * into a law of the United States.").

Oregon Legislative Assembly specifically chose to adopt the phrase “lowest power rate which may be reasonable” to describe pricing of power service to the Klamath Irrigators. The Oregon Legislative Assembly could have, but did not, choose to use the words “just and reasonable.” Because the Oregon Legislative Assembly chose different words, it is presumed that it meant to create a different standard.

Furthermore, because “just and reasonable” is the default standard, it is the standard that the Klamath Irrigators would have enjoyed if the Oregon Legislative Assembly had not enacted ORS 542.620. Oregon law does not permit PacifiCorp to interpret ORS 542.620 to arrive at the same default standard that would have applied if the statute had never been enacted. ORS 174.010 provides that statutes must be interpreted so as to give effect to all of the provisions. ORS 174.010 further commands that in interpreting a statute one shall not “omit what has been inserted.” *See also Keller v. SAIF Corp.*, 175 Or.App 78, 82, 27 P.3d 1064, 1066 (Or Ct. App. 2001) (“We will not construe a statute in a way that renders its provisions superfluous.”); *Federation of Parole and Probation Officers v. Washington County*, 142 Or.App. 252, 259, 920 P.2d 1141, 1144 (Or. Ct. Ap. 1996) (“In construing those statutes, we are to presume that the legislature did not intend to enact a meaningless statute.”). In short, subjecting the Klamath Irrigators to the default rate standard would render ORS 542.620 superfluous and meaningless, which is an impermissible interpretation of Oregon law.

Finally, in addition to the text of the statute, the Commission should consider the context in which ORS 542.620 was enacted. *See, e.g., Portland General Electric v. Bureau of Labor and Industry*, 317 Or 606, 859 P.2d 1143 (1993). The note to ORS 542.610 indicates that ORS 542.620 became effective when the Compact became effective on September 11, 1957. The Commission will notice that ORS 542.620 became effective only *after* the 1956 Contract already had been negotiated and executed by PacifiCorp and Reclamation. By enacting ORS 542.620 *after* the 1956 Contract was already in place, the Oregon Legislative Assembly could have been concerned only with the rate standard to be applied by this Commission *after* the expiration of

the 1956 Contract and PacifiCorp's original license. It was a pointless exercise otherwise to codify a distinct standard if it was only intended to ratify what had already been legally required.

That ORS 542.620 was enacted to address what happens after the 1956 Contract confirms the intent of the Oregon Legislative Assembly that the Klamath Irrigators are a separate class of customers subject to their own rate standard even beyond the 1956 Contract. Uses of electricity for irrigation in the Klamath River Basin are to be served with the lowest power rate that can reasonably be justified using the generating resources on the Klamath River. Through ORS 542.620, Reclamation and the farmers of the Klamath Irrigation Project have a statutory entitlement to the advantages of the hydroelectric potential of the Klamath River for irrigation and drainage pumping. The express provision of ORS 542.620 can not be ignored.

Because the Klamath Irrigators are a distinct customer class under Oregon law, PacifiCorp's basic proposition that the law requires it to treat the Klamath Irrigators identical to other irrigation ratepayers as of April, 2006, is *fundamentally false*. Oregon law expressly allows, and in fact mandates, PacifiCorp to charge a different rate to the Klamath Irrigators. ORS 757.310(b) provides that "[a] difference in rates or charges based upon a difference in classification pursuant to ORS 757.230 shall not constitute a violation of this paragraph."⁷ In short, PacifiCorp's basic premise that it *cannot* charge a different rate to Klamath Irrigators than it charges to its other irrigation customers cannot be squared with two key provisions of Oregon law: ORS 542.620 and ORS 757.310(b). The former requires that the Klamath Irrigators be treated as an independent customer class, and the latter affirms that different rates may be charged to different customers classes.

⁷ ORS 757.230(1) provides:

The Public Utility Commission shall provide for a comprehensive classification of service for each public utility, and such classification may take into account the quantity used, the time when used, the purpose for which used, the existence of price competition or a service alternative, the services being provided, the conditions of service and any other reasonable consideration. Based on such considerations the commission may authorize classifications or schedules of rates applicable to individual customers or groups of customers.

2. The 1956 Contract Is Not A “Special Contract” Under This Commission’s Administrative Rules.

In its Motion, PacifiCorp repeatedly refers to the 1956 Contract as a “special contract.” *See, e.g.,* Motion, p. 1, 7. PacifiCorp then asserts that the 1956 Contract rate must be terminated because it is a “special contract” rate that is no longer lawful. PacifiCorp relies on OAR 860-038-0260(3), which was promulgated by this Commission to implement SB 1149 and provides that “[a]fter March 1, 2002, subject to Commission approval, an electric company may enter into special contracts for distribution service but may not enter into *special contracts* for power supply.” (Emphasis added). Conspicuously absent from PacifiCorp’s Motion, however, is even a superficial analysis of whether the 1956 Contract is, in fact, a “special contract.” More to the point, PacifiCorp offers no analysis of whether continuing the current rate during any annual license period would amount to a “special contract.”

PacifiCorp clearly omitted this analysis because it was aware that the 1956 Contract does not even come close to fitting the Commission’s definition of a “special contract.” OAR 860-038-0005(60) defines the term “special contract” as a “rate agreement that is *justified primarily by price competition or service alternatives* available to a retail electricity consumer, *as authorized by the Commission under ORS 757.230.*” (Emphasis added). ORS 757.230 was amended in 1987 by HB 2144 to confirm the Commission’s existing authority to approve incentive rate agreements that are based on “price competition” or “a service alternative.” The legislative history to HB 2144 confirms that where the Oregon Legislative Assembly and the Commission use the term “special contract,” they are referring specifically and exclusively to a contract entered into to prevent a retail customer from taking service from a competitive energy supplier or from self-generating. In fact, *PacifiCorp’s own witness* testified that HB 2144 “pertain[s] to the Commission’s authority to set *competitive* rates, also referred to as ‘incentive’ or ‘*special contract*’ rates.” (Emphasis added). A copy of the testimony of Robert V. Sirvaitis on behalf of PacifiCorp is attached hereto as Exhibit F.

As described above, the 1956 Contract was executed to satisfy a condition on PacifiCorp’s original license for the Klamath Hydroelectric Project. The 1956 Contract was not

executed to prevent the Klamath Irrigators from self-generating or from taking service from a competitor of PacifiCorp. The 1956 Contract was not an “incentive rate” intended to prevent the Klamath Irrigation Project from dropping PacifiCorp’s service in favor of some alternative. In short, there is no evidence that the 1956 Contract is a “special contract” as that term has been specifically defined by the Commission, and as that term has been used by PacifiCorp, the Commission and the Oregon Legislative Assembly. Thus, the 1956 Contract is not prohibited by OAR 860-038-0260(3).

E. The Rate Required By The Original License Should Automatically Continue During Any Annual License Period Without Additional Commission Approval.

Although the Commission has jurisdiction over retail rates charged to the Klamath Irrigation Project, the Commission already has approved the current rate and need not do so again prior to an annual license period. *See* Motion, p. 3 (Conceding that the Commission has already approved the current rate.) PacifiCorp has agreed that this UE 171 involves a legal determination, and not a factual inquiry. *See* Motion, p. 1-2. Because the Commission has not held a factual inquiry into the 1956 Contract, the facts before the Commission when it previously approved the 1956 Contract rate have not changed. Since the facts before the Commission have not changed, there is no reason for the Commission to revisit the issue.

PacifiCorp devotes much of its Motion to a factual analysis of whether the current rate meets the “just and reasonable” standard. *See, e.g.*, Motion, p. 13. PacifiCorp’s argument is beyond the scope of this proceeding. This docket was opened to determine, as a legal matter, what rate should apply after April of 2006--not to test the factual adequacy of any particular rate. Even if it were within the scope of this proceeding, PacifiCorp has applied the wrong rate standard. As discussed above, the Klamath Irrigators have a statutory entitlement to “the lowest power rate which may be reasonable,” which is presumed by law to have a meaning distinct from the default “just and reasonable” standard. Finally, PacifiCorp’s “just and reasonable” argument completely fails to address PacifiCorp’s continuing obligations during any annual license period.

F. If Additional Approval Is Required To Continue The Current Rate During The Annual License Period, The Commission Should Grant It.

1. Continuing The Current Rate During Any Annual License Period Would Not Be “Unfair” To PacifiCorp’s Other Ratepayers.

PacifiCorp argues that continuing the current rate after April of 2006, would be “unfair” to its other ratepayers. *See* Motion, p. 9. KWUA rejects this argument as it totally ignores the benefits PacifiCorp’s other ratepayers received in light of PacifiCorp’s license to operate the Klamath Hydroelectric Project. PacifiCorp was only issued its original license based on the condition that it provide low-cost power to the Klamath Irrigation Project. If PacifiCorp had not complied with this condition, it would not have been permitted to develop the Klamath Hydroelectric Project. PacifiCorp’s other retail ratepayers have benefited from the 1956 Contract by having access to approximately 150 megawatts of low-cost power provided by the Klamath Hydroelectric Project. Thus, continuing the current rate during any annual license period would not be an unfair drain on PacifiCorp’s other ratepayers—but a fair and reasonable compromise through which PacifiCorp’s other ratepayers would continue to have access to a very valuable generating resource while PacifiCorp’s application for a new license is pending.

Second, KWUA does not seek to implement a new reduced rate, but simply to continue the same power rate that has long been accounted for in PacifiCorp’s cost structure. Consistent with the legislative intent behind the annual license provisions of the Federal Power Act, KWUA seeks only to preserve the *status quo* until a new license can be issued. *See generally LacCourte Oreilles Band of Lake Superior Chippewa Indians*, 510 F.2d at 205-06 (Legislative history reveals that the purpose of the annual license provision of the Federal Power Act is to preserve the status quo until a new license can be issued.) Thus, continuing the 1956 Contract rate during the annual license period would not require PacifiCorp’s other ratepayers to shoulder any new or increased burden.

Third, the preferential rate called for in ORS 542.620, and reflected in the 1956 Contract rate, is no different from numerous other power preferences created by law. Under the Pacific Northwest Power Planning And Conservation Act of 1981, 16 USC § 839c(c), for example,

PacifiCorp's residential customer class benefits from a *statutory entitlement* to a "power exchange" with the Bonneville Power Administration. The power exchange helps PacifiCorp to provide lower cost power to its residential customers than it can provide to other customer classes. PacifiCorp's residential customers have never been denied the benefits of their statutory entitlement simply because it could be viewed as "unfair" to PacifiCorp's other customers.

2. Continuing The Current Rate During Any Annual License Period Is Most Equitable To The Klamath Irrigators.

The Commission should not underestimate the stakes. The termination of low-cost power for irrigation and drainage pumping would be detrimental to both the economy and the environment of the entire Klamath River Basin. This would not be a 25% rate increase, this would be a 2500% rate increase.⁸ Even in the case that PacifiCorp cites in support of its Motion, *American Can Co. et. al. v. Davis*, 28 Or.App 207, 559 P.2d 898 (Or. Ct. Ap. 1977), the largest rate increase any customer faced was "only" a 100% rate increase. This case involves a potential rate increase that would be *25 times larger* than the next highest rate increase that PacifiCorp can cite to the Commission. The Commission must recognize that this 2500% rate increase would fall on many individual farmers that employ thousands of workers and that contribute heavily to the property tax base within Klamath County. Additionally, the 2500% rate increase would also fall on Reclamation and numerous drainage and irrigation districts that are indispensable to returning diverted water to the Klamath River and supplying water to the several Klamath Wildlife Refuges.

G. The Commission Need Not Decide In This Proceeding What Will Happen Upon The Issuance of a New License.

The focus of this brief has been on explaining that the current power rate will remain a condition on PacifiCorp's hydroelectric license during any annual license period. The 1956 Contract rate satisfies an express condition of PacifiCorp's license to develop and operate the Klamath Hydroelectric Project. The condition reflects a compromise between PacifiCorp and Reclamation without which PacifiCorp would not have been permitted to develop the Project in

⁸ This is based on KWUA's best estimate of what its members would pay for both power and demand charges under PacifiCorp's current Oregon irrigation tariff.

the first place. When the original license expires, it will be replaced by annual licenses until a new license can be issued. Under federal law, each annual license must contain all of the conditions on the original license. In this case, that includes the condition requiring PacifiCorp to provide low-cost power to the Klamath Irrigation Project. If PacifiCorp fails to, or cannot, satisfy that license condition during any annual license period, it will jeopardize its right to operate the Klamath Hydroelectric Project during that annual license period.

The obvious next question is: What is the appropriate power rate for the Klamath Irrigators once a new license is issued? The answer may be resolved through the FERC licensing process. KWUA has intervened in the FERC relicensing process and has taken the position that continuing the current rate on any *new* license is consistent with the Congressional intent reflected in the Compact. This argument requires an interpretation of FERC's authority and obligations under the Federal Power Act. KWUA expects that FERC will address this contention in due course. KWUA does not submit that question to this Commission for resolution in this proceeding.

If FERC ultimately issues PacifiCorp a new license without a condition requiring PacifiCorp to continue providing low-cost power to the Klamath Irrigation Project, only then will this Commission be required to set a rate consistent with the standard set forth in ORS 542.620. As discussed above, the law of the State of Oregon provides that the waters of the Klamath River shall be used to provide the Klamath Irrigators the "lowest power rate which may be reasonable." Under Oregon law, PacifiCorp would then have the legal burden of initiating a proceeding and proving to this Commission that the current rate should be adjusted to meet that standard. In short, the Commission simply need not resolve at this time the question of what rate is appropriate when PacifiCorp is issued a new license for its Klamath Hydroelectric Project.

IV. CONCLUSION

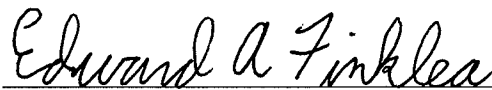
The answer to what power rate shall apply to the Klamath Irrigation Project after April of 2006 is surprisingly straightforward: *PacifiCorp must continue to provide power to the Klamath Irrigation Project at the current, contract rate in order to satisfy an express condition on its*

annual license. It is unlikely that FERC will issue a new license for the Klamath Hydroelectric Project until well after the expiration of the original license. Under federal law, therefore, one or more interim, annual licenses will be issued while FERC completes the process of granting a new license. These annual licenses will allow PacifiCorp to continue to operate the Klamath Hydroelectric Project in the interim—*but subject to all of the conditions on the original license.* PacifiCorp provides power to the Klamath Irrigation Project according to the terms of the 1956 Contract in order to satisfy an express conditions of the original license. Thus, in order to continue operating the Klamath Hydroelectric Project during an annual license period, PacifiCorp must continue to provide power to the Klamath Irrigation Project at the current rate. This would be consistent with the Klamath Irrigators' statutory entitlement in ORS 542.620 and would violate no other provision of Oregon law.

Pursuant to the foregoing, KWUA requests that the Commission deny PacifiCorp's Motion to terminate the rate provision of the 1956 Contract as of April 16, 2006.

DATED Thursday, April 28, 2005.

CABLE HUSTON BENEDICT HAAGENSEN
& LLOYD LLP



EDWARD A. FINKLEA, OSB No. 84216
J. LAURENCE CABLE, OSB No. 71035
RICHARD G. LORENZ, OSB No. 00308
Of Attorneys for
Klamath Water Users Association

EXHIBIT A

PROTEST



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
REGIONAL OFFICE, REGION 2
P. O. BOX 2511
SACRAMENTO, CALIFORNIA

ADDRESS ALL
COMMUNICATIONS TO:
THE REGIONAL DIRECTOR

IN REPLY REFER TO:

BEFORE THE HYDROELECTRIC COMMISSION OF THE STATE OF OREGON

PROTEST OF THE UNITED STATES

TO

THE APPLICATION FOR LICENSE OF THE CALIFORNIA-OREGON POWER

COMPANY

PROJECT NO. 180

The United States protests against the issuance of a license to the California-Oregon Power Company to appropriate water of the Klamath River for the development of a power project designated on the records of this Commission as Project No. 180 and by the applicant as Big Bend No. 2 Development.

This protest is filed for the United States and on behalf of the water users, present and potential, of the Klamath River Basin. This protest to the granting of

KB10001728

Exhibit A Page 1 Of 19

the said license and rights to appropriate certain water of the Klamath River is filed for the reason that such license and rights of appropriation would destroy, damage, or impair the use or utility of the Klamath River and its tributaries, for the present and future irrigation of lands within the Klamath Project, and would prevent the future development of other irrigable areas in the vicinity of the Klamath Project.

The United States does not wish to prevent or hinder any development of the resources of the Klamath Basin which the State of Oregon and its citizens most immediately affected, determine to be for their best ~~interests. The principle purpose of this protest, therefore,~~ is to present, in brief form, the factual and legal material which it is believed is necessary to a determination of the most beneficial future course of development of the Klamath Basin's greatest resource.

In 1905, the State of Oregon entrusted the development of this resource to the United States and, in 45 years, the Klamath Project, from a beginning of some 20,000 acres, has expanded to an irrigated area of

approximately 191,000 acres. This growth has been a gradual but continuing process which resulted largely from a growing need for more agricultural land. If this demand for agricultural land should continue in the future, and if it is desired to continue this course of development, there are other lands in the Klamath Basin which can be developed. Approximately 19,000 acres remains open for development within the present Klamath Project, and approximately 25,000 acres in the Swan Lake and Pine Flat valleys, substantial acreages in the Sprague River valley and Klamath Marsh areas, in addition to an area of approximately 80,000 acres in Butte and Red Rock valleys, in California, are areas with irrigation potentialities. The Swan Lake and Butte Valley areas have been investigated by the Bureau of Reclamation with a view to future development, but authorization of Congress has not yet been requested. Preliminary investigations indicate that high pump lifts would be required to furnish water to these areas. Consequently, the economic feasibility of the development

of these areas is questionable unless low cost pumping power can be associated with the development and unless substantial irrigation subsidies from power are also secured. Thus, future development of these areas would be dependent upon public power development with water of the Klamath River.

However important future agricultural development of the Klamath Basin may be, vastly more important is the preservation of the existing agricultural economy of the region. This economy is largely dependent upon low cost power for pumping. Without low cost power, many thousands of acres in the project would be forced ~~out of production. Low cost power has been available~~ for over 25 years by virtue of a contract between the United States and the California-Oregon Power Company. However, this contract terminates in 1967 and, if the water is not available at that time for the development of power either by the United States or the water users, the success or failure of a majority of the farmers within the project will depend entirely upon what rate the California-Oregon Power Company shall charge.

The contract between the United States and the California-Oregon Power Company provided for the construction of the Link River Dam by the latter, acting for and on behalf of the United States. Pursuant to the terms of this contract, the dam was constructed and subsequently conveyed to the United States. The contract further provided, by supplement executed December 10, 1920, that:

"Nothing in this agreement shall curtail or be in anywise construed as curtailing the rights of the United States to the waters of Upper Klamath Lake and its tributaries or the lands under or along the margin of the lake. None of the waters of said lake or its tributaries or the Klamath River shall be used by the company for any other purpose when the same may be needed or required by the United States or any irrigation or drainage district, person, or association obtaining water from the United States under the blanket filings of May 17, 1905, and May 17, 1909, for irrigation of lands lying within the boundary of the Klamath reclamation project as shown by the plans of the United States Government filed with the State Engineer of Oregon, May 6, 1908 * * *"

As heretofore stated this contract is still in force and does not terminate until 1967. In this connection it should be noted that in the absence of the increased storage created as a result of this contract, there

would have been a shortage of water for the presently irrigated area of the project during several periods of low runoff. Therefore, it is evident that the only excess water available for power production is that resulting from storage created by virtue of a contract in which the California-Oregon Power Company expressly acknowledges full priority of water rights in the United States and the project water users. In this circumstance, it does not seem that the California-Oregon Power Company is in a favorable position to appropriate a portion of this stored water for its own use. Obviously, the acquisition of any unrestricted right to the release of water for power production below Keno, forever removes such water from the reach of the water users in the Klamath Basin for either irrigation usage or low cost power production.

The legal and factual bases of the protest are as follows:

The water rights of the United States in the Klamath Basin are vested under State law, particularly Chapter 229, Oregon General Law, 1905. Section 2 thereof provides that whenever the United States shall notify the State Engineer that the United States intends to utilize certain water, the water so described and unappropriated shall not be subject to further appropriation, but shall be deemed to have been appropriated by the United States pending the filing of final plans within three years, and authorization of construction within four years of the filing date of such notice. Pursuant to this legislation, the United States Reclamation Service, in 1905, filed its Notice of Intention to Utilize all of the water of the Klamath Basin. Plans and specifications and proof of authorization, in accordance with the mandates of the legislation, were subsequently filed.

It should be noted that the 1905 Notice of Intention to Utilize stated that all water of the Klamath Basin

were thereby withdrawn and the United States maintains the position that the notice resulted in a withdrawal of all such water. In fact, this very position has been previously accepted by the Attorney General of Oregon (Opinions of the Attorney General of Oregon, 1930-1932, p. 43, dated November 24, 1930), and by the Supreme Court of Oregon In re Waters of Klamilla River (1927-28), 88 Or. 376, 168 Pac. 922, 172 Pac. 977, and the United States for 45 years has acted upon this assumption.

However, for the purposes of illustration, it will be assumed that the 1905 Notice of Intention withdrew from appropriation only all water reasonably required for the project areas as delineated by the original plans and specifications. Upon the basis of this assumption, our first consideration will be the water demands required to irrigate these project lands.

The present annual water requirements of the Klamath Project are as follows:

<u>Canal</u>	<u>Acres-Foot</u>
Lost River Diversion Canal	288,900
Lost River below Wilson Bridge	51,500
Coppeck Bay and pump lands	60,000
Klamath Drainage District	30,000
Misc. Klamath Diversions	13,000
Clear Lake Reservoir	25,000
Garber Reservoir	24,000
Romania Springs	18,000
Total	447,800

Actual diversions from Klamath and Lost Rivers and the acreage of land irrigated in the period 1924-1950 are set forth in Table 2, attached to this Protest and made a part hereof by reference. An examination of Table 2 shows that the total acreage of lands under irrigation has increased steadily from 1925 to 1950 until the earlier figure has been multiplied approximately 2½ times. There can be no question that the United States has a vested right to the water required to irrigate

these lands, and from Table 2 and the water requirements chart set forth above, it is clear that at least 447,200 acre-feet per annum is required for this purpose.

In the event of the future development of the areas heretofore described, an additional 320,000 acre-feet of water would be required for Butte, Red Rock, Swan Lake, and Pine Flat valleys alone. The United States claims water rights sufficient to develop these lands and the legal bases for such claim will be developed at this point.

Because of the Oregon Attorney General's Opinion of November 10, 1950, some doubt has been cast upon the exact status of the water rights of the United States in the Klamath Basin. To alleviate any possible confusion, and to assure a water supply sufficient for the future irrigation and reclamation developments in Butte, Red Rock, Pine Flat, and Swan Lake valleys, the Proponent filed a new Notice of Intention to Utilize on January 25, 1951, pursuant to Chapter 228, Oregon General Laws, 1945. This procedure was chosen, rather than the usual procedure for appropriation under the Oregon Water Code,

primarily because the basic water rights of the United States in the Klamath Basin were originally acquired under the 1905 act and it appeared that the 1905 act was still in full force and effect. On January 30, 1951, the State Engineer of Oregon in a letter addressed to the Regional Director, Region 2, Bureau of Reclamation, indicated that he believed that the 1905 act was no longer in effect and apparently that the January 1951 Notice was null and void. (To the protestants' knowledge the State Engineer has not caused the publication of the January 25 Notice of Intention, as required by Section 2, Chapter 228, General Laws of Oregon 1905.) However, it is respectfully submitted that the 1905 act has in no way been repealed, that such act is still in effect, and that if the United States did not have a priority for water use in Hutto, Pine Flat, Swan Lake, and Red Rock valleys dating from the original Notice in 1905, it gained such priority by its Notice of Intention to Utilize of January 28, 1951. Briefly, the legal reasons for this conclusion are as follows:

1. Chapter 228, General Laws of Oregon, 1905, is legislation of a special nature in the form of a privilege or grant of power, extended by the State of Oregon to the United States. The waters withdrawn pursuant thereto are "to be held in trust for the general public." See Statement of Lawrence A. Liljeqvist, Assistant Attorney General of Oregon. Joint Hearing before the Committee on Irrigation and Reclamation on S. 1189 and HR 9692, 69th Cong., 1st Sess. (1926), p. 11.

2. There has been no express indication by the Oregon legislature of the repeal of the 1905 act. The only possible basis for finding a repeal would be through indirection, e.g., that Section 73 of Chapter 216, General Laws of Oregon ("all laws or parts of laws so far as in conflict or inconsistent with the provisions of this act are hereby repealed,") brought about a repeal. However, it should be apparent that the 1905 act was not "inconsistent with" the 1909 act, since the 1909 act was intended to cover the general appropriation of water by private interests, whereas the 1905 act was special

legislation confined in its application to one public
appropriator--the United States. In determining whether
a repeal was effected, the intent of the 1909 Oregon
legislature is controlling. In discovering this intent,
a generally accepted rule of construction is that the
enactment of a general law broad enough in its scope
and application to cover the field of operations of a
special statute will usually not repeal a statute which
limits its operation to a particular phase of the sub-
ject covered by the general law. utherland, Statutory
Construction, 3rd Ed., Vol. 1, Ch. 20, Sec. 2021, p. 486.
See also: Weber v. Bailey (1936), 151 Or. 432, 51 P. 2d.
422. It is also the accepted rule that a general repeal
clause within a general act is indicative of an intent to
limit the repealing effect of the statute to conflicting
acts. It strengthens the presumption against the repeal
of special statutes by general statutes. State ex. Rel.
Shawnte v. District Court (1939), 107 Mont. 429, 86 P.
2d. 750.7

Also, it can be said that the 1909 Oregon
legislature indicated an intent not to interfere with

meet the 447,200 acre-foot demand of the present Klamath Project in 10 years of the 28 years of record. In the other 18 years of record, in which the demands of the Reservation and present Klamath Project could have been met, there would have been a surplus of water for other uses, such as power, in but 13 years.

If the ultimate Klamath Project's requirements of 767,200 acre-foot were used in this computation, the ultimate Project's demands could have been met in only eight of the 28 years of record.

SUMMARY

There is not a sufficient supply of appropriated water in the Klamath River below Upper Klamath Lake to satisfy the California-Oregon Power Company's application for diversion of 2500 cubic feet per second of water.

Such water as may be available in the Klamath River for the production of power results from storage

by the United States in Upper Klamath Lake, which storage was provided and has been used for the sole purpose of furnishing a low cost power supply for project purposes.

Granting of the applicant's license in the amount of 2500 cubic feet of water per second will cloud the water rights of the United States in the Klamath Basin and jeopardize the water supply of the water users within the present Klamath Project. Furthermore, the granting of the license will forever place beyond the reach of the people in the Klamath Basin area water necessary to the future development of that area.

If the license is granted upon a general condition to the effect that the license and rights of appropriation are "subject to existing or prior rights", the result will be uncertainty, confusion, and probable litigation.

A copy of this protest has been served upon the applicant by registered mail addressed to its address as shown in the application.

Phil Dickinson

Acting Regional Director
United States Bureau of Reclamation
Region 2

June 1, 1951

I have compared the foregoing carbon copy with the original Protest in the above entitled proceedings and certify that the carbon copy is a full, true, and correct copy of the original Protest.

E. K. Davis

Acting Regional Counsel
United States Bureau of Reclamation
Region 2

June 1, 1951

KB10001749

Exhibit A Page 16 of 19

TABLE 1
Historical yield--Klamath Basin
1904-05 through 1942-43

Water year	Upper Klamath Lake (a)	Wilson Bridge (b)	Total yield Upper Klamath Basin above Keno (c)	Index of average	Historical runoff Klamath River at Keno (d)
	Thousands of acre-feet			%	1000 A.f.
1904-05	1,546.0	185.4	1,725.4	113	1,588.8
1905-06	1,610.0	340.1	1,950.1	127	1,659.7
1906-07	2,100.0	494.3	2,594.3	169	1,955.4
1907-08	1,470.0	161.3	1,631.3	107	1,350.5
1908-09	1,680.0	373.8	2,053.8	134	1,445.5
1909-10	1,780.0	278.7	2,058.7	136	1,612.6
1910-11	2,035.7	433.8	2,469.5	162	1,515.5
1911-12	1,601.7	259.7	1,861.4	122	1,351.5
1912-13	1,655.7	251.3	1,907.0	125	1,513.3
1913-14	1,775.7	404.6	2,180.3	143	1,901.0
1914-15	1,320.3	190.0	1,510.3	98	1,325.2
1915-16	1,444.3	229.1	1,673.4	109	1,433.4
1916-17	1,343.7	411.7	1,755.4	115	1,430.3
1917-18	1,118.7	149.8	1,268.5	83	1,117.7
1918-19	1,188.7	254.9	1,443.6	94	1,146.6
1919-20	1,002.0	130.8	1,132.8	74	863.5
1920-21	1,603.1	394.2	1,997.3	131	1,620.1
1921-22	1,349.0	-	-	-	1,381.2
1922-23	1,103.0	-	-	-	1,124.6
1923-24	984.0	-	-	-	848.0
1924-25	1,139.0	-	-	-	1,098.0
1925-26	944.0	122.0	1,066.0	70	820.5
1926-27	1,297.0	361.8	1,658.8	106	1,255.4
1927-28	1,238.0	282.0	1,520.0	99	1,198.0
1928-29	893.0	138.5	1,031.5	67	783.5
1929-30	794.0	178.9	972.9	64	633.4
1930-31	639.0	87.3	726.3	48	395.0
1931-32	664.0	234.0	898.0	59	513.5
1932-33	721.0	134.5	855.5	56	514.9
1933-34	802.6	93.2	895.8	59	547.4
1934-35	819.9	243.4	1,063.3	69	650.2
1935-36	986.3	290.9	1,277.2	83	884.6
1936-37	854.6	209.9	1,064.5	69	686.2
1937-38	1,464.6	585.6	2,050.2	134	1,491.7
1938-39	991.6	148.8	1,140.4	75	744.1
1939-40	1,083.6	392.7	1,476.3	96	986.6
1940-41	887.0	247.6	1,134.6	74	782.1
1941-42	1,123.5	366.4	1,489.9	97	1,038.4
1942-43	1,685.3	509.1	2,194.4	143	1,746.5
Average	1,250.0	270.0	1,520.0		1,150.0

- (a) From USGS published records. Includes diversions to "A" Canal and Keno Canal.
(b) Summation of USGS and Bureau of Reclamation records.
(c) Total outflow Upper Klamath Lake and Lost River above Wilson Bridge.
(d) From USGS published records.

TABLE 2

**Lands irrigated and water diverted
Klamath Project--California and Oregon**

Year	Lands irrigated			Water diverted		
	Klamath Projects			Klamath River(a) Lost River(b): Total		
	Lands	Lease lands	Total	Klamath River(a)	Lost River(b)	Total
	Acres			Acres-feet		
1928	80,121	268	80,389	141,460	66,603	208,063
1929	79,576	8,300	87,876	161,770	66,860	228,630
1930	83,513	30,300	113,813	166,280	65,180	231,460
1931	91,461	25,476	116,937	223,890	46,080	269,970
1932	81,577	26,159	107,736	203,000	55,000	258,000
1933	85,115	36,311	121,426	222,930	57,530	280,460
1934	85,623	40,207	125,830	263,910	46,880	310,790
1935	87,460	44,729	132,189	225,890	54,200	280,090
1936	83,551	43,559	127,110	211,120	73,710	284,830
1937	91,777	45,882	137,659	237,120	67,640	304,760
1938	96,784	33,769	130,553	223,790	73,180	296,970
1939	102,444	35,195	137,639	291,560	75,040	366,600
1940	98,879	33,877	132,756	234,940	74,460	309,400
1941	100,651	33,401	134,052	210,980	70,660	281,640
1942	105,629	34,926	140,555	236,700	76,400	313,100
1943	113,883	44,106	157,989	218,170	81,225	299,395
1944	117,063	46,894	163,957	285,025	81,100	366,125
1945	119,320	46,431	165,751	241,250	82,980	324,230
1946	126,315	30,888	157,203	282,960	94,230	377,190
1947	131,721	45,540	177,261	312,990	80,280	393,270
1948	144,488	43,831	188,319	256,320	70,130	326,450
1949	148,534	35,506	184,040	325,180	87,920	413,100
1950	154,542	37,386	191,928	346,160	91,300	437,460

(a) Includes "A" Canal diversion from Upper Klamath Lake, diversion from Klamath River to Lost River, and diversions from Klamath River at Ady to Klamath Drainage District.

(b) Includes irrigation diversions to West and North Canals, Langell Valley from Clear Lake and Gerber Reservoirs, and Bonanza Springs (5 months at 75 c.f.s. continuous flow).

KB10001751

TABLE 3

Water available for Klamath Project after
Klamath Indian Reservation lands are developed

Water year	Inflow	Yield	Total water available for Klamath Project (c)
	Upper Klamath Lake (a)	Lost River Basin above Wilson Bridge (b)	
	Acres-feet		
1911-12	559,600	259,700	819,300
1912-13	588,200	251,300	839,500
1913-14	712,000	404,600	1,116,600
1914-15	561,900	190,000	753,900
1915-16	436,900	229,100	666,000
1916-17	532,800	411,700	944,500
1917-18	386,900	149,800	536,700
1918-19	366,200	254,900	621,100
1919-20	236,800	130,800	367,600
1920-21	445,100	394,200	839,300
1921-22	366,500	-	-
1922-23	425,400	-	-
1923-24	209,900	-	-
1924-25	353,600	-	-
1925-26	202,300	122,000	324,300
1926-27	456,100	361,800	817,900
1927-28	343,900	282,000	625,900
1928-29	221,000	138,500	359,500
1929-30	204,300	178,900	383,200
1930-31	153,500	87,300	240,800
1931-32	241,700	234,000	475,700
1932-33	196,600	134,500	331,100
1933-34	137,500	93,200	230,700
1934-35	199,000	243,400	442,400
1935-36	262,800	290,900	553,700
1936-37	174,300	209,900	384,200
1937-38	413,600	585,600	999,200
1938-39	189,300	148,800	338,100
1939-40	292,900	392,700	685,600
1940-41	230,500	247,600	478,100
1941-42	215,200	366,400	581,600
1942-43	647,700	509,100	1,156,800
Average	309,400	270,000	779,400

(a) Surplus runoff from Williamson and Sprague Rivers in excess of Indian land irrigation requirement plus return flows intercepted by Upper Klamath Lake. Data from report by Bureau of Indian Affairs, "Irrigable Area Report, Klamath Reservation, Oregon," December 1948.

(b) Summation of flows recorded by U.S.G.S. and Bureau of Reclamation.

(c) Total Upper Klamath Lake plus Lost River Basin.

EXHIBIT B

ORIGINAL
LICENSING
ORDER

Westlaw

13 F.P.C. 1

Page 1

13 F.P.C. 1, 1954 WL 47779 (F.P.C.)

(Publication page references are not available for this document.)

In The Matters of THE CALIFORNIA OREGON POWER COMPANY

Upon Application for License

Project No. 2082 and Docket No. E-6390

January 28, 1954 [FN1]

Doty, Commissioner, concurring in the result only.

Gregory A. Harrison, Malcolm T. Dungan, Herman Phleger, and Brobeck, Phleger & Harrison for the California Oregon Power Co.

Joseph B. Hobbs and Joseph E. Hayden for the staff of the.

These are proceedings under the Federal Power Act (1) on an application filed April 19, 1951 by the California Oregon Power Company (hereinafter called Copco or Applicant) for a license for the proposed Big Bend No. 2 hydroelectric development, designated as the Project No. 2082, at mile 223 on the Klamath River, a point about 13e miles upstream from the California-Oregon boundary line, and (2) on 3e an order to show cause (Docket No. E-6390) issued by this Commission on November 28, 1951 as to whether any or all of Copco's five existing on hydroelectric developments on the Klamath River in Oregon and in California are subject to the licensing requirements of the Federal Power Act.

The Klamath River system has its headwaters in the Williamson River, the source of which is a spring located on the Klamath Indian Reservation. Upper Klamath Lake is a shallow body of water about 20 miles long and 6 miles wide which discharges at the City of Klamath Falls into a one-mile-long connection known as Link River, which in turn discharges into Lake Ewauana, a body of water about 2 miles long and a half-mile wide, which gradually narrows at its lower end and becomes the Klamath River. The Klamath flows thence in a general southwesterly direction into California and on to the Pacific Ocean.

In view of the widespread interest in the two matters, we ordered a public hearing which was held in Klamath Falls, Oregon. On July 7, 1953 the Presiding Examiner issued his Initial Decision in Docket No. E-6390 proceeding, and on October 2, 1953, issued his Initial Decision in the Project No. 2082 proceeding. The Examiner found that proposed Project 2082 would occupy navigable waters and lands of the United States; would affect the interests of interstate commerce (1) by causing noticeable fluctuations in downstream navigable capacity of the Klamath River and (2) by utilizing waters for the generation of electric energy for transmission in interstate commerce; and would utilize

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit B Page 1 of 12

13 F.P.C. 1

Page 2

13 F.P.C. 1, 1954 WL 47779 (F.P.C.)

(Publication page references are not available for this document.)

surplus water from a Government dam. And, he concluded that the proposed Project No. 2082 is subject to the Commission's licensing authority.

In addition, the Examiner found that all of the existing projects occupy navigable waters of the United States; (that two of the projects, Copco No. 1 and Copco No. 2, produce noticeable fluctuations in the navigable capacity of the Klamath River, and in such way affect the interests of interstate commerce) that they utilize waters for the generation of electric energy for transmission in interstate commerce and in that way affect the interests of interstate commerce; that they utilize surplus water from a Government dam; and, he concluded that all of the existing projects are subject to the licensing authority of the Commission.

Exceptions to the Examiner's Initial Decision were filed by Copco and others and oral argument was held before the Commission, the Copco argument being limited to the jurisdictional issues raised by the Copco exceptions. In the exceptions none of the parties questioned the Copco finding with respect to navigability, nor that Project No. 2082 would occupy lands of the United States, but parties did object, as being unnecessary, to the assertion of jurisdiction on any other basis.

We have reviewed the evidence of record respecting navigability and we affirm the Examiner's conclusion that the Klamath River system constitutes navigable waters of the United States, and consequently proposed Project No. 2082 and the five existing projects are subject to the licensing authority of the Commission under Part I of the Federal Power Act.

As stated above, the Examiner found that proposed Project No. 2082 will and the five existing projects are utilizing water for the generation of electric energy which in turn is transmitted in interstate commerce, and he concluded that in such way they affect the interests of interstate commerce, and are therefore subject to the licensing authority of the Commission. We reject that conclusion as unwarranted under the Federal Power Act.

The record shows that the existing projects are using, and the proposed project will use, surplus water from a Government dam, and jurisdiction on this ground must be asserted by the Commission, for under the provisions of Section 10(e) of the Federal Power Act this Commission has the responsibility of fixing reasonable annual charges for the use of a Government dam.

The Government dam involved here is the Link River dam located at the outlet of Upper Klamath Lake. It appears that on February 24, 1917, a contract was made between Copco's predecessor corporation, at California Oregon Power Company and the United States, for the purpose of adjusting the water rights in the Lake and Klamath River between power and irrigation use. Under the provisions of the contract, Copco constructed the Link River dam and conveyed the dam and the land upon which it is situated to the United States, in consideration for which Copco agrees to regulate the lake between certain specified elevations, to furnish water to the irrigators for irrigation purposes, and to ions, supply energy at low rates for pumping purposes in connection with ions, irrigation and drainage during the

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit B Page 2 of 12

13 F.P.C. 1

Page 3

13 F.P.C. 1, 1954 WL 47779 (F.P.C.)

(Publication page references are not available for this document.)

entire 50-year period of theithions, contract. The contract expires in 1967 and, unless its terms arehions, extended by contract or otherwise, upon its expiration the partiesions, including Copco, the United States, and the irrigators will be returned to the same positions with respect to power and water rights as theyned were prior to the execution of the contract.

Copco's contention that the Link River dam is a dual-purpose dam for irrigation and power uses and that there can be no "surplus dam water" until both purposes are satisfied, is not supported by theam facts. Under the provisions of the Link Dam Agreement, Copco's water rights are subordinated for the 50-year period of the agreement to the needs of the irrigators. The record shows that as far back as 1926the Copco considered that under the Agreement the United States had a prior water right for all the United States could use for irrigationd a prior purposes. Moreover, that interpretation was concurred in by Copco'sior Vice President and General manager during the course of the public'sior hearing in these proceedings.

In other words, Copco itself agrees that under the Agreement the Untied States has the "first use" to the that water and that, if there is any "surplus" afterwards, the Copco mayat use it.

While recognizing that the Federal Power Act relates to the utilization of surplus water from all types of Government dams, the Secretary of the Interior calls attention to the fact that underthe reclamation law since 1906, he has been empowered specifically to grant power privileges in connection with Government dams under hisy to grant jurisdiction and control for reclamation purposes. Cited in theo grant Secretary's brief are the Act of April 16, 1906 (32 Stat. 116) and thet Reclamation Project Act of 1939 (53 Stat. 1187). Under the Secretary's theory, Congress, by implication, repealed such parts of the Federaly's Power Act as were in conflict with the Reclamation Project Act ofraly's 1939.

Of course, repeals by implication are not favored in the law and close examination will reveal that there is no irreconcilable conflict between the Federal Power Act and the reclamation laws referred to byt the Secretary here as far as this case is concerned. The 1906 and 1939 Acts authorize the Secretary to lease "surplus power" or 'powernd 1939 privilege.' These Acts seemingly relate to the sale of electric power39 or the lease of water power including head and water, but not to ther39 sale or lease of water as such. Where there is available stored water9 not to be used in irrigation, which represents storage over and abover9 that needed for irrigation, and which would otherwise flow unused down9 the main channel of the stream, that water is "surplus water," and,n9 if used for power development, would require a license from this and,n9 Commission. Thus there is a distinction to be drawn between "surplus9 power" or "power privilege" in the reclamation laws, and "surpluss9 water" from a Government dam as used in the Federal Power Act; and we9 are here concerned with surplus water only.

Another point urged by the Secretary is that the 1917 contract constitutes a prior permit within the meaning of Section 23(b) of the Federal Power Act and consequently no further Federal authority isthe necessary until such time as the contract expires or is terminated. We are unable to find that the contract is or

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit B Page 3 of 12

13 F.P.C. 1

Page 4

13 F.P.C. 1, 1954 WL 47779 (F.P.C.)

(Publication page references are not available for this document.)

may be deemed to be Federale authority for the development of water power from a stream over whichle Congress has jurisdiction.

The Commission has had occasion to pass upon the questions of need for license under the Act even where departmental permits have beeneed issued. For example, in the Montana Power Company case, IT-5840, thed company had certain Forest Service and Interior Department permits thed covering some of its Missouri River developments which had been issued on the basis of occupancy of forest and other Government lands. Evend though these permits were valid for the purposes for which issued (and they were by their terms permits--not contracts), it was determinedand that they were insufficient authority for the continued occupancy ofnd navigable waters of the United States and that licenses under the ofnd Federal Power Act were required. This determination was upheld by the United States Court of Appeals for the District of Columbia Circuit,he and the Supreme Court denied certiorari. [FN2] So even if the 1917it,he contract could be considered as the equivalent of a permit of somet, he sort, it is very doubtful that Copco could rely upon it as complete,he authorization for its continued occupancy of a navigable water of thee United States without license authority from this Commission or Act of Congress.

There are a number of legal questions which have arisen with respect to the validity and scope of the Oregon water rights claimed by the Bureau of Reclamation on behalf of the United States and on behalfy of the irrigators. This Commission's role in water-resource on behalfy development is not that of arbiter or adjudicator of water rights under the laws of the various States. The evidence of record shows thatunder Copco has made application to the State of Oregon for a power permitder covering proposed Project No. 2082. Under the interpretation ofrmitder Section 9(b) of the Federal Power Act as rendered by the Supreme Courtr in the First Iowa case (328 U.S. 152) such an application to thertr State authorities may be deemed satisfactory compliance with Statehertr requirements. In view of the conditions of the license to be issuedrtr in this matter, we find that Copco has shown satisfactory compliancertr with requirements of State laws.

In reporting under Section 4(e) of the Federal Power Act on Copco's application for license, the Secretary of the Interiorn recommended that the license be denied. However, in the oral argument before us, counsel for the Secretary stated that the Presidingargument Examiner's Initial Decision in the project proceeding was generallyent satisfactory-primarily because it contains a condition which wouldyent require Copco to enter into a contract with the Department of thedyent Interior prior to issuance of a license. That requirement will beyent included in the license.

Appropriate orders will issue in these proceedings in conformity with this Opinion.

Commissioner Doty concurring in the result only.

Application was filed April 19, 1951 by The California Oregon Power Company of

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit **B** Page **4** of **12**

13 F.P.C. 1

Page 5

13 F.P.C. 1, 1954 WL 47779 (F.P.C.)

(Publication page references are not available for this document.)

Yreca, California, for a license under the Federal Power Act for a proposed hydroelectric development, designated asal Project No. 2082, to be located on the Klamath River in Klamathasal County, Oregon, and affecting public lands of the United States.

A public hearing was held on the application in Klamath Falls, Oregon, commencing on June 30, 1951 and ending on July 3, 1952, before an Examiner of the Commission.

For hearing purposed the, 1952, before above-designated matter was consolidated with the proceeding in Docket No. E-6390. In the hearing all parties, including the Applicant andet the Staff of the Commission, as well as the Secretary of the Interior, the States of California and Oregon, and a group of other Interveners, comprising Tulelake American Legion Post No. 164, et at., Interveners, participated, and presented testimony and documented exhibits.

Upon consideration of the record in the above-entitleds.

(1) Proposed Project No. 2082 would consist of:

(a)All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held bythe the Applicant or by the Untied States; such project area and projectthe boundary being tentatively shown and described by certain exhibitstcthe which formed a part of the application for license and which aretsctthe designated and described as follows:

Exhibit J: Maps in two sheets, signed The California Oregon Power Company by J.C. Boyle, Vice President & General Manager, April 16, 1951, comprising: Sheet No. 1 (FPC No. 2082-1) entitled "Hydro Development Klamath River in Oregon and California General Map." Sheet No. 2 (FPC No. 2082-2) entitled "Hydro Development-Klamath River ineet Oregon and California Profile and Topographic Map."

Exhibit K: Maps in two sheets, signed The California Oregon Power Company by J.C. Boyle, Vice President & General Manager, April 16, 1951, comprising: Sheet No. 1 (FPC N o. 2082-3) entitled "Hydro Development Klamath River in Oregon and California Topographic Mapdro -Big Bend No. 2." Sheet No. 2 (FPC No. 2082-4) entitled "Hydroapdro Development Klamath River in Oregon and California Project Boundary and Land Ownership Big Bend No. 2."

(b) Principal structures, comprising a concrete gravity-type diversion dam approximately 52 feet high and 310 feet long, with a fixed crest at elevation 3,628 feet (U.S.G.S datum) in SW a NE a a section 12, T. 40 S., R. 6 E., Willamette meridian; a temporarya a regulating dam in SE a section 31, T. 39 S., R. 7 E., Willamette a meridian to provide a reservoir with approximately 1,150 acre-feet of pondage at normal high-water elevation 3,793 feet (U.S.G.S. datum), a conduit, partly pipe and partly tunnel, about 4,440 feet long; a surge chamber; a penstock about 600 feet long; a powerhouse with two a surge 25,000-kilowatt generators each connected to a 37,000-horsepower surge turbine; a substation; a

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit B Page 5 of 12

13 F.P.C. 1

Page 6

13 F.P.C. 1, 1954 WL 47779 (F.P.C.)

(Publication page references are not available for this document.)

transmission line about one-quarter mile long from the substation to Applicant's 66,000-volt Fall Creek-Klamath long Falls line which is under license for Project No. 704; the location, nature and character of which are more specifically shown by the exhibits hereinbefore cited and by certain other exhibits which also formed part of the application for license and which are designated and described as follows:

Exhibit L: Drawings in four sheets, signed The California Oregon Power Company by J.C. Boyle, Vice President and General Manager or Vice President & General Manager, April 16, 1951, comprising: anager Sheet No. 1 (FPC No. 2082-5) entitled "Hydro Development-Klamath River in Oregon and California Diversion Dam-Big Bend No. 2."

Sheet No. 2 (FPC No. 2082-6) entitled "Hydro Development Klamath River in Oregon and California Conduit Profile and Sections Big Bendh No. 2."

Sheet No. 3 (FPC No. 2082-7) entitled "Hydro Development-Klamath River in Oregon and California Power House Plan and Sections Big Bendh No. 2."

Sheet No. 4 (FPC No. 2082-8) entitled "Hydro Development-Klamath River Regulating Dam Big Bend No. 2."

Exhibit M: A statement in two sheets entitled "General Description and Specifications of Equipment," with proposed circuit diagram, signed The California Oregon Power Company by J.C. Boyle, it Vice President & General Manager, April 16, 1951.

(c) All other structures, fixtures, equipment, or facilities used or useful in the maintenance and operation of the project and to beed located in the project area, including such portable property as mayd be used or useful in connection with the project or any part ofs mayd thereof, whether located on or off the project area, if and to theyd extent that the inclusion of such property as a part of the project is approved or acquiesced in by the Commission; also the part or parts of he stream within the project boundary and riparian or other rights, the use or possession of which is necessary or appropriate in theights, the maintenance and operation of the project.

(2) The California Oregon Power Company is a corporation organized under the laws of the State of California; is duly authorized to do business in the States of California and Oregon; and has authorized submitted satisfactory evidence of compliance with the requirements ofd all applicable State laws insofar as necessary to effect the purposesfd of a license for the project.

(3) No conflicting application is before the Commission.

(4) The proposed Big Bend No. 2 project would be located in and along a navigable water of the United States.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit B Page 6 of 12

13 F.P.C. 1

Page 7

13 F.P.C. 1, 1954 WL 47779 (F.P.C.)

(Publication page references are not available for this document.)

(5) The proposed Big Bend No. 2 project would occupy lands of the United States.

(6) Link River Dam is owned by the United States and is, therefore, a "Government dam" within the definition of Section 3(10) of the Act.

(7) The proposed Big Bend No. 2 project would utilize surplus water from a Government dam within the meaning of Section 4(e) of the Act.

(8) The issuance of a license, as hereinafter provided, will not affect the development of any water resources for public purposes which should be undertaken by the United States itself.

(9) The issuance of a license for the project as hereinafter provided will not interfere or be inconsistent with the purposes of any reservation or withdrawal of public lands.

(10) The Applicant has submitted satisfactory evidence of its financial ability to construct and operate the proposed project.

(11) Under present circumstances and conditions, and upon the terms and conditions hereinafter imposed, the project is best adapted to a comprehensive plan for improving or developing the waterways suited involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development and for the improvement and utilization of water power development and for other beneficial public uses including recreational purposes.

(12) No license should be issued for the proposed project without such conditions as will require proof of extension of the present contract between the United States and the Licensee before construction of the project is undertaken, thereby implementing the provisions of Section 27; of the Federal Power Act insofar as they apply to the appropriation under State law of water used in irrigation.

(13) The installed capacity of the proposed project would be 67,000 horsepower, and the energy generated would be used on the system of the Applicant.

(14) The amount of annual charges to be paid under the license for the purpose of reimbursing the United States for the costs of expense for administration of Part I of the Act, and for recompensing it for their use, occupancy, and enjoyment of its lands is reasonable, as for their hereinafter fixed and specified.

(15) The benefits received by the United States under the Link Dam Agreement, dated February 24, 1917, as amended, constitute reasonable compensation for the use of surplus water from that Government dam, and no additional charge therefore should be made under the license during the term of that agreement or extension thereof.

(17) In accordance with Section 10(d) of the Act, the rate of return upon the net

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit B Page 7 of 12

13 F.P.C. 1

Page 8

13 F.P.C. 1, 1954 WL 47779 (F.P.C.)

(Publication page references are not available for this document.)

investment in the project, and the proportion of surplus earnings to be paid into and held in amortization reserves, are reasonable as hereinafter specified.

(18) The exhibits, designated and described in paragraphs (a) and (b) above as part of the application, conform to the Commission's and rules and regulations and should be approved as part of the license for the project.

The Commission orders:

(A) This license is issued to The California Oregon Power Company, of Yreka, California, under Section 4(e) of the Federal Power Act for a period of fifty (50) years, effective as of the first day of the month in which the acceptance hereof is filed with the Commission, for the construction, operation, and maintenance of project No. 2082, subject to the terms and conditions of the Act which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act, Provided, however, That the acceptance of this license shall be filed within one year from the date of issuance of this order or within such further period of time as may be granted by the Commission and Provided, further, That with and as a part of the acceptance of this license, the Licensee hereunder shall file four (4) copies (in quadruplicate) of the existing agreement between the Licensee and the United States (by the Secretary of the Interior), dated February 24, 1917, as amended, which has been further amended or renewed to cover a time period at least equivalent to the time period of this license, or a new agreement, covering a time period at least equivalent to the time period of this license between the Licensee and the United States, which provides for the storage in and release of water from Upper Klamath Lake in Oregon, and the use thereof by the Licensee for the generation of electric energy under terms and conditions substantially similar to those terms and conditions contained in the existing February 24, 1917 agreement, as amended.

This license is also subject to the terms and conditions setd.

Article 28. - The Licensee shall not commence construction of the project until its acceptance of the license as outlined in paragraph (A) hereof has been filed; and within one year from the effective date of the license, the Licensee shall commence construction and thereafter in good faith and with due diligence prosecute such construction and shall complete the project works within two years from beginning of construction.

Article 29. - The Licensee shall, prior to flooding, clear all lands in the bottoms and margins of reservoirs up to high-water level, clear and keep clear to an adequate width lands of the United States, along open conduits, and shall dispose of all temporary structures, unused timber, brush, refuse, or inflammable material resulting from the clearing of the lands or from the construction and maintenance of, the project works. In addition, all trees along margins of reservoirs which may die during operation of the project shall be

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit B Page 8 of 12

13 F.P.C. 1

Page 9

13 F.P.C. 1, 1954 WL 47779 (F.P.C.)

(Publication page references are not available for this document.)

removed. Thers clearing of the lands and the disposal of the material shall be doners with due diligence and to the satisfaction of the authorized be doners representative of the Commission.

Article 30. - The Commission reserves the right to determine at a later date the following matters:

(a) Which additional transmission lines and facilities, if any shall be included in the license as part of the project works;

(b) Whether or not Project 2082 and other constructed developments operated and maintained by the Licensee on the Klamath River and the Link River shall be encompassed by a single license as being parts of a complete unit of improvement or development;

(c) Whether or not such single license, if required, should contain a provision reserving the Commission's authority in the interests of protection of life, health, and property, to require the installation of re-regulating facilities at or near the Iron Gate site on the lower Klamath River, in California, after notice and opportunity for hearing.

Article 31. - Upon completion of the project, the Licensee shall file Exhibits F and K for the project including transmission facilities revised in accordance with the Commission's rules and regulations.

Article 32. - The Licensee shall construct, operate, and maintain fishways at the diversion dam and the temporary regulating dam, and screens at the intake for the Big Bend No. 2 conduit. Plans for fishways and screens shall be submitted in advance of construction of these facilities for approval by the Commission with advice of the Secretary of the Interior and the Oregon State Game Commission.

Article 33. - The Licensee shall replace the egg-taking station on the Klamath River at the mouth of Spencer Creek as may be prescribed hereafter by the Commission upon the recommendation of the Oregon State Game Commission.

Article 34. - The Licensee shall for the protection of fishlife maintain in the natural channel of the Klamath River immediately below the diversion dam a reasonable minimum flow consistent with the primary purpose of the project to be fixed hereafter by the Commission after notice to interested parties and opportunity for hearing.

Article 35. - The Licensee shall pay to the United States the following annual charges:

(a) For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, one (1) cent per horsepower on the authorized installed generating capacity (67,000 horsepower), plus two and one-half (2) cents per 1,000 kilowatt-hours of gross energy generated by the

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit B Page 9 of 12

13 F.P.C. 1

Page 10

13 F.P.C. 1, 1954 WL 47779 (F.P.C.)

(Publication page references are not available for this document.)

project during the calendar year for which the charge is made;

(b) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands exclusive of those used for the, transmission line right-of-way, \$2,530.00;

(c) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands used for transmission line rights-of-way only, an amount to be hereinafter determined, if any;

(d) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of Link Dam, the consideration and benefitse, set forth in the Link Dam Agreement, as amended, are reasonable andse, adequate during the term of the agreement. Upon termination of these, Link Dam Agreement other reasonable annual charges may be fixed withthe, the approval of the Secretary of the Interior for the use of Link Dam, under this license and the charges may be further readjusted from time to time, as provided in the first provison of Section 10(e) of thetime Act.

Article 36. - The authorization herein for the temporary regulating dam and reservoir shall terminate without expense to the United States or its licensee for Big Bend No. 1 development when and in the event the development of Big Bend No. 2 site is subsequently authorized.

Article 37. - The Licensee shall guarantee continuing access to and across lands of the United States within the project area for legitimate business and shall allow the use by any agency of the United States or its permittees of any access road or roads, constructed into connection with the project for the purpose of removing forest products with the understanding that the user of such road or roads for such purpose shall make appropriate arrangements with the Licensee to provide for any extraordinary road maintenance, that would be required as a result of that use.

(C) The exhibits, designated and described in paragraphs (a) and (b) of finding (1) above, are approved as part of this license.

(D) The order shall become final thirty (30) days from the date of its issuance unless application for rehearing shall be filed as provided by Section 313 (a) of the Act.

Commissioner Doty concurring in the result only.

Upon consideration of the record in the above-entitled proceeding, the briefs, Examiner's Initial Decision and exceptions thereto, and the arguments adduced, and having this day issued its Opinion No. 266, which is incorporated by reference and made a part hereof, the Commission further finds:

(1) The Klamath River, in Oregon and California is a navigable water of the United States.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit B Page 10 of 12

13 F.P.C. 1

Page 11

13 F.P.C. 1, 1954 WL 47779 (F.P.C.)

(Publication page references are not available for this document.)

(2) Upper Klamath Lake, Lake Ewauna, and Link River, in Oregon, constitute navigable waters of the United States.

(3) The five existing hydroelectric developments involved in this proceeding, their location, capacities, and their dates of construction are as follows:

(4) The California Oregon Power Company, owner and operator of Eastside, Westside, Keno, Copco No. 1 and Copco No. 2 hydroelectric developments, has operated and maintained, and presently operates and maintains, the five-named hydroelectric developments in navigable and waters of the United States without license or licenses issued by the Federal Power Commission under the provisions of the Federal Power Act, or without any permit or valid existing right-of-way granted prior to, June 10, 1920.

(5) The five hydroelectric developments of The California Oregon Power Company on the Klamath or Link River utilize surplus water from a government dam, to wit, the Link River Dam at the outlet of Upper from a Klamath Lake in Oregon.

(6) By reason of the occupancy of navigable waters of the United States and use of surplus waters from a government dam, each and all of the five hydroelectric developments of The California Oregon Power Company, on the Klamath or Link River, are subject to the licensing authority of the Commission, as set forth in Section 4(e) of the Federal Power Act.

(7) The California Oregon Power Company has not shown any cause why it is not appropriate, expedient, and in the public interest for the Commission to issue an order requiring that a license or licenses be applied for and accepted by The California Oregon Power Company, which would authorize the continued operation and maintenance of its developments on the Klamath River and Link River in California and Oregon, or such other order or orders as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

The Commission orders:

The California Oregon Power Company shall file an application or applications for licenses under the Federal Power Act for the continued operation and maintenance of its Eastside, Westside, Keno, Copco No. 1 and Copco No. 2 hydroelectric developments.

Such application or applications shall be filed in accordance with the Commission's General Rules and Regulations within six months after this order becomes effective.

Commission Order concurring in the result only. FNA1. Designated Commission Opinion No. 266. Rehearing denied by order issued March 29, 1954. See supplemental Opinion No. 266-A, 15 FPC 14.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit B Page 11 of 12

13 F.P.C. 1

Page 12

13 F.P.C. 1, 1954 WL 47779 (F.P.C.)

(Publication page references are not available for this document.)

FNEditor's Note: Affirmed 239 F.2d 426 (CADC, 1956).

FEDERAL POWER COMMISSION

13 F.P.C. 1, 1954 WL 47779 (F.P.C.)

END OF DOCUMENT

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit B Page 12 of 12

EXHIBIT C

1956 CONTRACT

Contract No.
14-06-200-5075

UNITED STATES
DEPARTMENT OF THE INTERIOR

CONTRACT WITH THE CALIFORNIA OREGON POWER COMPANY

THIS CONTRACT, made this 31st day of January, 1956,
in pursuance of the Act of Congress of June 17, 1902 (32 Stat. 388),
and acts amendatory thereof or supplementary thereto, hereinafter
referred to as "the Federal reclamation laws", and acts of Congress re-
lating to the preservation and development of fish and wildlife resources,
between THE UNITED STATES OF AMERICA, hereinafter called "the United
States", represented by the officer executing this contract, his duly
appointed successor, or his duly authorized representative, hereinafter
called "the Contracting Officer", and THE CALIFORNIA OREGON POWER COMPANY,
a California corporation, its successors or assigns, hereinafter called
"Copco";

WITNESSETH:

WHEREAS, the United States, pursuant to the Federal reclamation
laws, is now engaged in the reclamation and irrigation of lands lying in
the State of Oregon and in the State of California in the vicinity of
Klamath Falls, Oregon, known as the Klamath Project; and

WHEREAS, the United States has investigated and is further
investigating and preparing plans for the development of water and related
resources of the Upper Klamath River Basin, including the area in
California known as Butte Valley; and

WHEREAS, on February 24, 1917, an agreement was made for the term of fifty (50) years between the United States and a predecessor of Copco, which agreement was thereafter assigned to Copco, providing, among other things, for the construction of Link River Dam, Klamath County, Oregon, for the purpose of regulating the level of Upper Klamath Lake, and said agreement has been amended and supplemented from time to time; and

WHEREAS, the parties deem it to their advantage and to the best interest of the users of the water in the Upper Klamath River Basin that a new agreement be entered into for a period of fifty (50) years, upon the terms and conditions hereinafter expressed;

NOW, THEREFORE, in consideration of the premises and the mutual covenants hereinafter contained, the parties hereto agree as follows:

1. Whenever used in this contract, the following terms shall have the respective meanings set opposite thereto:

(a) Upper Klamath River Basin -- The area so designated and delineated on the map annexed hereto and made a part hereof, marked Exhibit "A".

(b) Klamath Water -- The water lying or flowing in or which has been diverted from Upper Klamath Lake, Link River, Lake Ewauna, Lost River, Klamath River, or their tributaries, or water that is pumped from underground sources for use on Project Land as part of a plan for maximum water resource development.

(c) Project Land -- All land of the United States lying in the Upper Klamath River Basin, and all land in the Upper Klamath River Basin lying within any public district or within the service area of any association which has contracted or may hereafter contract and any land of individuals or corporations in the Upper Klamath River Basin which have contracted or may hereafter contract with the United States, pursuant to the Federal reclamation laws, for water service or for the construction of irrigation, drainage, or other reclamation works.

2. Copco shall operate and maintain for a period of fifty (50) years from the effective date hereof, subject to the conditions hereinafter provided, Link River Dam, located in Klamath County, Oregon, heretofore constructed by Copco and transferred to the United States pursuant to the agreement of February 24, 1917. Copco may regulate the water level of Upper Klamath Lake between the elevations 4143.3 and 4137, (Reclamation Service Datum), but the water level shall not be raised above elevation 4143.3 and shall not be lowered below elevation 4137, except at such times, and on such conditions, as may be satisfactory to the Contracting Officer: Provided, That the Contracting Officer from time to time may specify a higher minimum elevation than 4137 if in his opinion such must be maintained in order to protect the irrigation and reclamation requirements of Project Land. Whenever the elevation of the

lake drops to a point two-tenths of a foot above the applicable minimum elevation, the Contracting Officer may assume control of the Link River Dam and its outlets and continue in control so long as the lake level remains at or below that elevation.

All elevations stated in this article, or specified by the Contracting Officer pursuant to this article, shall mean elevations in a state of calm.

3. Copco shall at its own expense maintain the approach channel to the "A" Canal of the Klamath Project to the satisfaction of the Contracting Officer so far as may be necessary to carry a flow of not less than 1200 c.f.s. into the "A" Canal with the water of Upper Klamath Lake at an elevation of 4137.

4. Copco assumes any and all liability for damages resulting from operation of the Link River Dam by Copco or resulting from its regulation and control of the water levels of Upper Klamath Lake. Copco hereby undertakes to hold the United States harmless from any and all liability for damage arising out of the operation by Copco of Link River Dam and the regulation and control by Copco of Upper Klamath Lake herein provided for.

5. For the period of this contract Copco agrees to furnish electric power for the purposes and for the rates set forth in Exhibit "B", attached hereto and hereby made a part of this contract.

6. Nothing in this agreement shall curtail or in anywise be construed

as curtailing the rights of the United States to Klamath Water or to the lands along or under the margin of Upper Klamath Lake. No Klamath Water shall be used by Copco when it may be needed or required by the United States or any irrigation or drainage district, person, or association obtaining water from the United States for use for domestic, municipal, and irrigation purposes on Project Land: Provided, That nothing in this agreement shall curtail or interfere with the water rights of Copco having a priority earlier than May 19, 1905, and: Provided further, That no water originating in the Upper Klamath River Basin shall be transported beyond the Upper Klamath River Basin except under the provisions of Article 7 of this contract and except for that water which originates within the drainage area of Fourmile Lake.

7. If there shall be authorized for construction pursuant to the Federal reclamation laws projects or units of projects including lands lying within Butte Valley, all drainage water shall be returned to the Klamath River at a point above the town of Keno, Oregon, unless the Secretary of the Interior shall determine that this would render the irrigation and reclamation of lands within Butte Valley economically less feasible than under an alternate plan of development, in which event, upon construction of such projects or units of projects, the drainage water from Project Land lying within Butte Valley shall be returned to the Klamath River at such point upstream from Copco Lake as shall be determined by the Secretary of the Interior: Provided, That

if Copco makes economic benefits available to such projects or units of projects by means of power rates lower than those specified in Exhibit "B", or otherwise, that will make it equally feasible, to the satisfaction of the Secretary of the Interior, to return the drainage water to a point in the Klamath River above Keno, then the drainage water shall be returned to the Klamath River above Keno. Copco shall have the first right to develop, for power purposes, drainage water removed by the United States from Project Land lying within Butte Valley, subject to establishment by Copco of its rights under the applicable state law.

8. Nothing in this agreement shall be deemed to confer on the United States or upon any of its successors any right to the use of Klamath Water for the purpose of generating electric power.

9. Except for the water rights of Copco having a priority earlier than May 19, 1905, no Klamath Water shall be used by Copco when it may be needed or required by the United States for waterfowl conservation in the Upper Klamath River Basin in the quantities in which it is being used for that purpose as of the effective date of this contract.

10. The failure of Copco to comply in the true intent and meaning with any of the provisions of this agreement in regard to the operation and use of Link River Dam during the fifty (50) year period shall render this contract in regard to said dam subject to cancellation by the Secretary of the Interior upon sixty (60) days' written notice to Copco stating the cause for such proposed cancellation and in case of failure

or refusal of Copco to comply with the provisions of this contract within the period allowed by the Secretary of the Interior he may cancel this contract. After such cancellation, or at the expiration of the fifty (50) year period of this contract, Copco shall have no further rights in regard to the use of Link River Dam and its appurtenances, the operation and control of which shall immediately pass to the United States, but such cancellation shall in nowise curtail or affect the rights which Copco now has in the waters of Link River and Klamath River.

11. This contract shall become effective on the date of its approval by the Public Utility Commissioner of the State of Oregon or the Public Utilities Commission of the State of California, whichever shall occur later, and shall not be effective in any way until approved by both regulatory authorities. Within thirty (30) days after the execution of this contract Copco shall file applications with both regulatory authorities for orders authorizing Copco to carry out the terms thereof and shall prosecute the applications and any proceedings on them diligently. If such orders are not issued and effective within nine (9) months after execution of this contract, the United States may, within sixty (60) days, terminate this contract on thirty (30) days' notice to Copco.

12. This contract shall supersede and cancel the contract, including all amendments thereto, entered into under date of February 24, 1917, by Copco and its predecessor company, California-Oregon Power Company, and the United States, upon the effective date hereof.

13. In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause. The contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

14. No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

15. This contract binds and inures to the benefit of the parties hereto, their successors and assigns, including without limitation any water users' organization or similar group which may succeed either by assignment or by operation of law to the rights of the United States hereunder.

16. Copco warrants that it has not employed any person to solicit or

secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the United States the right to annul the contract or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fee. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by Copco for the purpose of securing business.

17. This contract shall be in effect for a period of fifty (50) years from the effective date determined pursuant to article 11.

IN WITNESS WHEREOF, the parties hereto set their hands and the seal of Copco is hereto affixed.

APPROVED AS TO LEGAL
FORM AND SUFFICIENCY
Kurt Schuthane
ACTING REGIONAL SOLICITOR
DEPARTMENT OF THE INTERIOR

THE UNITED STATES OF AMERICA

By *A. K. Spencer*

Title Regional Director, Region 2

Bureau of Reclamation,

U. S. Department of the Interior

Address P. O. Box 2511

Sacramento 11, California

THE CALIFORNIA OREGON POWER COMPANY

By *A. S. Cummins*

A. S. CUMMINS

Title President

Address 216 West Main Street

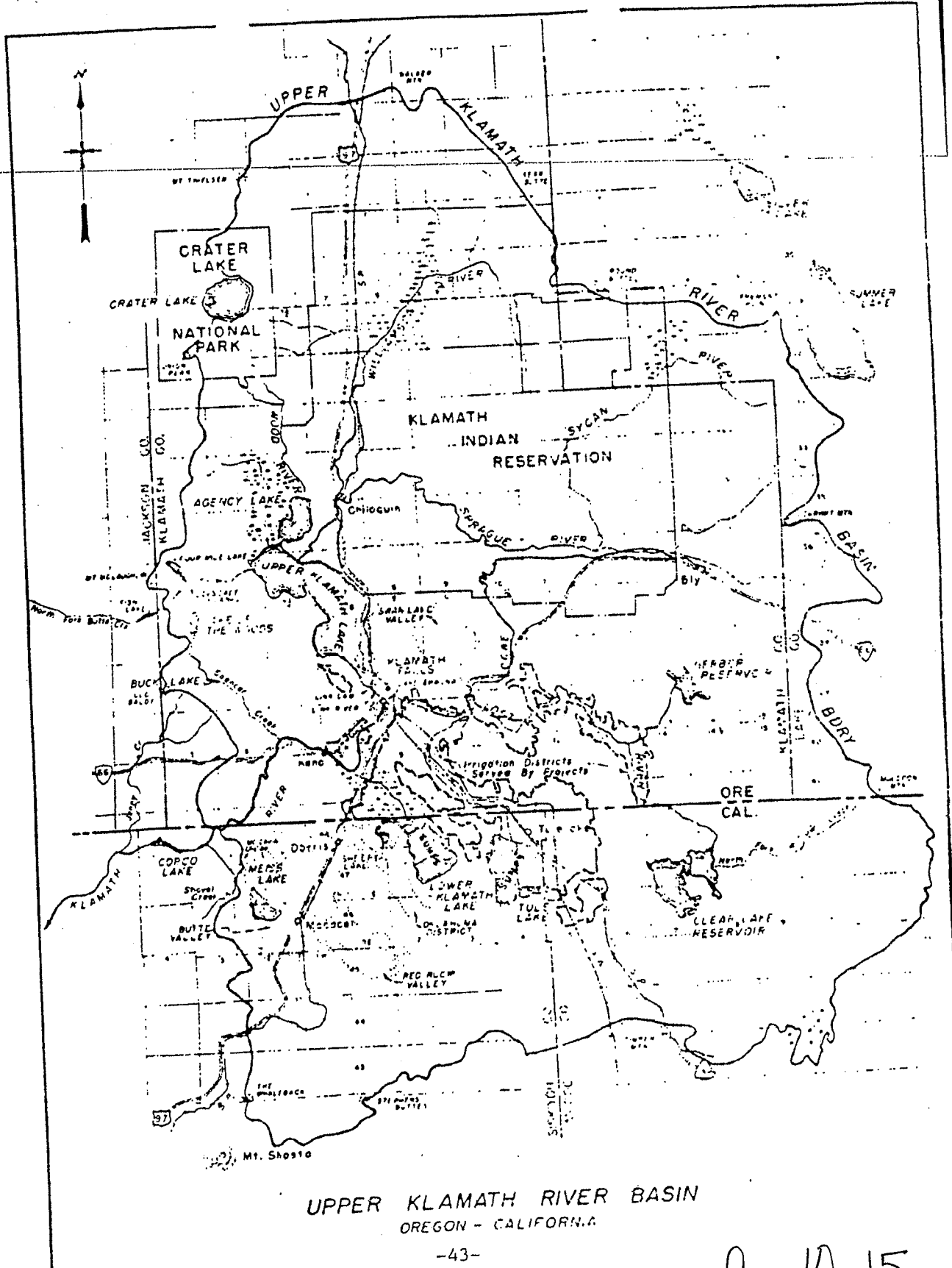
Medford, Oregon

Attest:

E. L. Lenox

E. L. LENOX

Title Secretary



UPPER KLAMATH RIVER BASIN
OREGON - CALIFORNIA

REPORTED URE. 214 40
9. 214. 125 40
SEE "OREGON" FORM CONTRACTS
Exhibit "B"

STATES OF CALIFORNIA AND OREGON

SPECIAL GOVERNMENT POWER RATE UNDER CONTRACT DATED January 31, 1956

BETWEEN UNITED STATES OF AMERICA AND THE CALIFORNIA OREGON POWER COMPANY

AGRICULTURAL POWER SERVICE: --RATE SCHEDULE "A"

This rate schedule shall be applicable only to pumping Klamath Water for use on Project Land and for drainage of Project Land.

Territory:

Applicable to the Upper Klamath River Basin.

Rate:

0.6¢ per kwh

Annual Minimum Charge:

The annual minimum charge is based on the name plate rating in horsepower of the maximum connected motor load at each installation during a calendar year.

100 H.P. or over:

for first two years of service	\$10.45 per H.P. per calendar year
after two years of service	No Charge

99 H.P. or less:

for first five years of service

first 25 H.P.	\$6.00 per H.P. per calendar year
next 74 H.P.	\$5.25 " " " " "

after five years of service

first 25 H.P.	\$3.00 per H.P. per calendar year
next 74 H.P.	\$2.625 " " " " "

Special Conditions:

- (1) Where 3-phase service is required for installation under 7-1/2 H.P., the annual minimum charge will be based on 7-1/2 H.P.
- (2) Installations in service prior to the effective date of this contract shall receive credit for the time service has been rendered under special power contracts entered into pursuant to the contract between the United States and Copco dated February 24, 1917, in meeting the time requirements used in determining annual minimum charges.
- (3) Energy will be supplied either single-phase or 3-phase at nominal voltages consistent with those in effect elsewhere in the territory served by Copco.
- (4) Special contracts shall be executed for all installations under this rate and all contracts shall have attached thereto a letter from the Contracting Officer stating the proposed consumer is entitled to this rate.
- (5) For installations of more than 7-1/2 H.P., Copco shall make all necessary line extensions at its own expense.
- (6) For installations of 7-1/2 H.P., or less, Copco shall make necessary line extensions in accordance with its established line extension policies as filed with the State regulatory authorities having jurisdiction.
- (7) The annual minimum charge is payable in consecutive monthly installments of 1/6 (one-sixth) of the annual minimum charge, beginning the first month of operation until such time as the accumulated energy charges equal the annual minimum charge.

REPORTED SCH 46 (ON PEAK)
AND SCH 47 (OFF PEAK)

DRAINAGE PUMPING: --RATE SCHEDULE "B"

This rate schedule shall be applicable only to the pumps operated by the United States, or its successors in interest, for the removal of water from Tule Lake Sumps and Lower Klamath Lake Sumps and any drains leading thereto or therefrom and for power used to pump such drainage water for the irrigation of the areas lying within the beds of Tule Lake and Lower Klamath Lake, all as shown on the map marked Exhibit "A".

Rate:

On-peak pumping--eight (8:00) A.M. to eight (8:00) P.M. of each day except Saturdays, Sundays and legal holidays--five (5) mills per kwh

Off-peak pumping--eight (8:00) P.M. to eight (8:00) A.M. of each day and during the 24-hour period of Saturdays, Sundays and legal holidays--three (3) mills per kwh

If at any time Copco's commercial rates for like service are lower than the rates specified in Schedules "A" and "B" herein, the commercial rates shall prevail during such time.

THE CALIFORNIA OREGON POWER COMPANY

WHEREAS, the officers of this Company have negotiated a contract with the United States of America, Department of the Interior, acting by and through the Bureau of Reclamation, for the regulation of the waters of Upper Klamath Lake through the operation of Link River Dam and related irrigation and reclamation matters in the Upper Klamath River Basin; and

WHEREAS, said contract is for a period of 50 years from its effective date and is to supersede a contract dated February 24, 1917, as amended, between California-Oregon Power Company (a predecessor company) and the United States; and

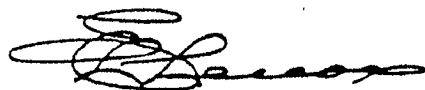
WHEREAS, the Officers and Counsel for the Company have negotiated a new contract with representatives of the United States identified as "Draft of October 10, 1955 (Revision of Draft dated August 5, 1955)," which draft was approved by the Assistant Secretary of the Interior Fred G. Aandahl on December 27, 1955; and

WHEREAS, the Board of Directors have reviewed said draft of contract and believe that its execution is in the best interest of the Company;

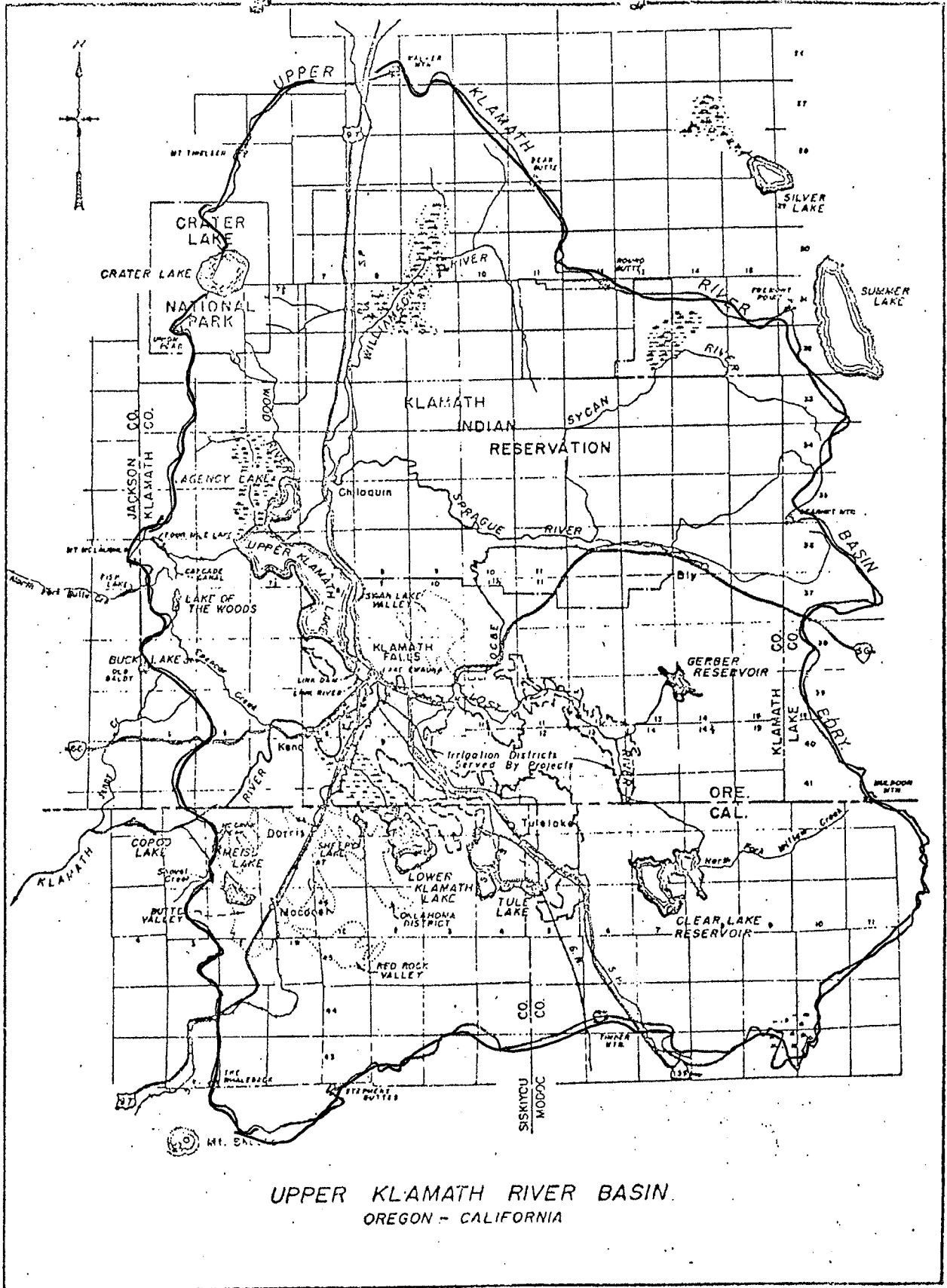
NOW, THEREFORE, BE IT RESOLVED, that the President of The California Oregon Power Company, Mr. A. S. Cummins, is hereby authorized to execute said contract, to make and file with such regulatory bodies as may have jurisdiction, any applications, including amendments, for the purpose of obtaining any necessary authorization or approval of such regulatory bodies of the aforesaid contract and to do all other acts and to execute and deliver such other documents as may be necessary or desirable to effectuate the purpose of these resolutions.

I, E. L. LENOX, Secretary of The California Oregon Power Company, hereby certify the above and foregoing to be a full, true and correct copy of a resolution adopted by the Board of Directors of said Corporation at a meeting thereof held on January 26, 1956; that there was then and there present and voted thereon a quorum of said Board; and that said resolution is in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Corporation this 26th day of January, 1956.



Secretary



UPPER KLAMATH RIVER BASIN.
OREGON - CALIFORNIA

EXHIBIT D

SUPPLEMENTAL LICENSE ORDER

Westlaw.

15 FPC 14

Page 1

15 F.P.C. 14, 1956 WL 54507 (F.P.C.)

(Cite as: 15 F.P.C. 14)

H

IN THE MATTERS OF THE CALIFORNIA OREGON POWER COMPANY

Project No. 2082 and Docket No. E-6390

Supplemental Opinion and Order Amending Order Issuing License

February 28, 1956*

*14 Syllabus

1. Authority of the Commission to readjust annual charges for Government dams under section 10(e) of the Federal Power Act is not limited to readjustment where agreements for the release of surplus water have been terminated but includes also the right to readjust with the approval of the Secretary of the Interior 'at the end of 20 years after the project is available for service and at periods of not less than 10 years thereafter upon notice and opportunity for hearing.' P. 17.

2. Commission's licensing authority under the 'surplus water' clause in section 4(e) of the Federal Power Act includes hydroelectric developments utilizing the surplus water from a Government dam constructed several miles downstream from the Government dam. P. 19.

3. Commission amends Copco's license and changes the expiration date of the license to coincide with an agreement between Copco and the Department of the Interior. P. 21.

BY THE COMMISSION:

OPINION

These matters are before the Commission on application to amend an order issuing license pursuant to section 4(e) of the Federal Power Act and on remand from the United States Court of Appeals for the District of Columbia Circuit.

The California Oregon Power Co. (hereinafter called applicant, Copco, or licensee) filed on December 7, 1955 an application for amendment of the Commission's order issued January 28, 1954 issuing a license to Copco for its proposed Big Bend No. 2 hydroelectric development (project No. 2082) on the Klamath River in Oregon approximately 13 miles upstream from the California-Oregon State line. Applicant has requested that the order be amended to include an additional special condition to read substantially as follows:

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit D Page 1 of 9

15 FPC 14

Page 2

15 F.P.C. 14, 1956 WL 54507 (F.P.C.)

(Cite as: 15 F.P.C. 14)

Article 38. For the term of the contract dated January 31, 1956 between the licensee and the United States of America, and filed herein pursuant to the *15 second proviso of paragraph (A) of this license, no Klamath water as defined in said contract shall be used by the licensee when needed or required for use for domestic, municipal or irrigation purposes on lands other than 'project land,' as defined in said contract, within the Upper Klamath River Basin as that basin is defined in said contract; provided, that nothing herein shall curtail or interfere with the water rights of the licensee having a priority earlier than May 19, 1905; provided further, that all drainage and return flows from lands in the Upper Klamath River Basin, other than those lands defined as 'project land' in said contract, shall be returned to the Klamath River above Keno.

The aforesaid application for amendment is requested by Copco pursuant to a stipulation dated October 31, 1955 between Copco and the Klamath River Commissions of the State of California and Oregon. The application for amendment was served on all parties to these proceedings and no protest or objection to the proposed amendment has been received.

As one of the conditions to the issuance of the license for project No. 2082, the second proviso of paragraph (A) of the Commission's order requires:

That with and as a part of the acceptance of this license the licensee hereunder shall file conformed copies (in quadruplicate) of the existing agreement between the licensee and the United States (by the Secretary of the Interior), dated February 24, 1917, as amended, which has been further amended or renewed to cover a time period at least equivalent to the time period of this license, or a new agreement, covering a time period at least equivalent to the time period of this license between the licensee and the United States, which provides for the storage in and release of water from Upper Klamath Lake in Oregon, and the use thereof by the licensee for the generation of electric energy under terms and conditions substantially similar to those terms and conditions contained in the existing February 24, 1917 agreement, as amended.

The license has not been accepted by Copco but the aforesaid agreement, dated January 31, 1956 (the new Link Dam agreement), has now been executed and filed with the Commission. Upon its becoming effective, the new Link Dam agreement will satisfy the requirements of the second proviso of paragraph (A) of the order respecting project No. 2082 (the Big Bend No. 2 project), subject to acceptance by the applicant of the license as amended herein. However, in view of the terms of the new Link Dam agreement with respect to its effective date, paragraph (A) of the project No. 2082 order should be amended to bring the expiration date of the license within the period of the new Link Dam agreement, as hereinafter provided.

Concurrently with its order issuing license for project No. 2082, the Commission issued its order in docket No. E-6390 requiring Copco to file an application or applications for license under the Federal Power Act for its existing three hydroelectric developments on the Klamath River and its existing two hydroelectric developments on *16 Link River below Link Dam. The proceeding respecting Copco's

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit D Page 2 of 9

15 FPC 14

Page 3

15 F.P.C. 14, 1956 WL 54507 (F.P.C.)

(Cite as: 15 F.P.C. 14)

application for project No. 2082 and the proceeding on the Commission's order to show cause in docket No. E-6390 were consolidated for hearing.

In the consolidated proceedings the Commission found and concluded, among other things, that Copco's proposed Big Bend No. 2 (project No. 2082) would utilize and that its aforesaid five existing hydroelectric developments now utilize surplus water from a Government dam known as Link Dam located at the outlet of Upper Klamath Lake. The Commission also found and concluded that the annual benefits received by the United States under the Link Dam agreement dated February 24, 1917, as amended (the 1917 agreement), are reasonable charges for the use of Link Dam by Copco's proposed Big Bend No. 2 project, and accordingly fixed such charges in article 35 (d) of the license, [FN1] pursuant to section 10(e) of the act.

In petitions for review filed May 19, 1954, in the United States Court of Appeals for the District of Columbia Circuit, Copco has requested that the Commission's orders in these consolidated proceedings be modified or set aside, in part, by deleting therefrom the aforesaid findings and conclusions and the requirement for payment of annual charges by reason of the alleged use of a Government dam. By its order dated April 14, 1955, the court remanded the matters to the Commission for further proceedings.

With specific reference to the first question asked by the court in its remand order, [FN2] the first sentence of article 35(d) of the license fixed annual charges under section 10(e) of the act [FN3] to recompense the United States for the use by Copco of Link Dam in accordance with *17 the annual benefits received by the United States under the 1917 agreement. The second sentence of article 35(d) reserved in the Commission authority to fix 'other reasonable annual charges' in the event the 1947 agreement was superseded by a new agreement involving the use of Link Dam by Copco for the benefit of Copco's proposed Big Bend No. 2 hydroelectric development. The second sentence merely directs attention to the Commission's authority under section 10(e) to fix other reasonable annual charges in the event the benefits under the 1917 agreement are altered through amendment or supersedure as contemplated by the second proviso of paragraph (A) of the Commission's order.

An examination of the new Link Dam agreement reveals that the annual benefits to the United States under that agreement will be substantially the same as under the 1917 agreement. However, we will amend article 35(d) to fix the charges for the use of Link Dam in accordance with the annual benefits received by the United States under the new Link Dam agreement since that agreement upon its effective date will supersede the 1917 agreement.

The second question asked by the court, with respect to article 35 (d) of the license, [FN4] may be attributable, in part, to the language of the Commission's finding No. 15 (J. A. 131). Finding No. 15 is not in accord with the provisions of section 10(e) of the act to the extent the finding indicates that no additional charge could be made if the 1917 agreement had been extended to cover the full period of the license. The authority reserved to the Commission in the second

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit D Page 301 9

15 FPC 14

Page 4

15 F.P.C. 14, 1956 WL 54507 (F.P.C.)

(Cite as: 15 F.P.C. 14)

sentence of article 35(d) to readjust the charges fixed in the first sentence of that article is not limited to the fixing of 'other reasonable annual charges' mentioned in the second sentence of that article in the event of the termination of the 1917 agreement while the license is still outstanding. Such authority to readjust may be exercised by the Commission with the approval of the Secretary of the Interior 'at the end of 20 years after the project is available for service and at periods of not less than 10 years thereafter upon notice and opportunity for hearing' without regard to whether the term of the 1917 agreement is extended to accord with the terms of the license or whether the new Link Dam agreement becomes effective and supersedes the 1917 agreement. One of the stated purposes for the 1935 amendment to section 10(e) of the act was to make 'explicit' the *18 authority of the Commission to readjust charges fixed in licenses including licenses involving the use of Government dams (Senate report No. 621 at p. 45, 74th Cong., 1st Sess.). The reference to Government dams 'in reclamation projects' was included in section 10(e) by the 1935 amendment, and makes explicit the authority of the Commission to readjust charges, with the approval of the Secretary of the Interior, for the use by licensees of such Government dams.

Since project No. 2082 will have an installed capacity of 67,000 horsepower (J. A. 130) and does not constitute a minor part of a project, the Commission may not under section 10(i) waive any of the provisions of the act. Consequently in further answer to the second question the Commission could not bind itself not to readjust the charges at the end of the 20-year period and at periods of not less than 10 years thereafter as specified in section 10(e) of the act.

In the third question in its order on remand, [FN5] the court has asked that we set forth the basis and principles for assuming jurisdiction under the 'surplus water' clause in section 4(e) of the act over a hydroelectric power project not located at or in the immediate vicinity of a Government dam, and state why the 'surplus water' basis for the Commission's jurisdiction should be asserted in these proceedings since no additional charge is imposed on Copco pursuant to the assumption of jurisdiction under the surplus water clause.

In the 20-mile section between Link Dam and Keno, the fall in the river is small which accounts for the small size of the power installations in the east side, west side and Keno plants located in that section. There is a steep drop in the Klamath River in the 40-mile section between Keno and the tailwater of Copco No. 2. The development of the head at the Big Bend No. 2 site, in addition to the existing Copco No. 1 and Copco No. 2 developments, will enable applicant to operate these three plants as peaking plants and coordinate their operations to carry the peak loads of applicant's system, provided water is available for their operation.

Link Dam was constructed by Copco and conveyed to the United States pursuant to the terms of the 1917 agreement. It is presently operated to provide the storage of water in Upper Klamath Lake to meet specified requirements of the area covered by the Klamath reclamation *19 project and any water not needed for the Klamath reclamation project is available for use by Copco for the operation of its

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit D Page 4 of 9

15 FPC 14

Page 5

15 F.P.C. 14, 1956 WL 54507 (F.P.C.)

(Cite as: 15 F.P.C. 14)

hydroelectric projects located downstream from Link Dam. The geographic area is enlarged by the new Link Dam agreement and by the proposed amendment to the license to include all lands within the Upper Klamath River basin, and water to meet specified requirements of the enlarged area may also be obtained at specified points downstream from Link Dam.

There are no substantial tributaries entering the river between Link Dam and applicant's Copco Co. 2 plant which is its lower plant on the Klamath River. Consequently, Copco's five existing plants are now and will continue to be dependent on water releases from Upper Klamath Lake for their operation. The record shows that the proposed construction and operation of the proposed Big Bend No. 2 development would not be economically feasible without the use of Link Dam for the storage of water in Upper Klamath Lake. These facts are undisputed. In its opening brief filed with the Commission on September 15, 1952, with respect to project No. 2082, Copco stated (p. 20) that:

The Big Bend No. 2 project will use the same water supply as that now used at the applicant's Copco plants in California, namely, the water released by the applicant from Upper Klamath Lake in the exercise of its contractual right to operate Link River dam (R. 710). The continuance of this historical method of regulation at Link River dam is necessary in order to make possible the operation of the Big Bend No. 2 development (R. 190) as well as to assure a continued supply of water for the present operations of the Copco 1 and 2 plants. It would be idle for this Commission to issue a license for the Big Bend project without at the same time making provision for the continuance of that regulation for the period of the license.

The evidence of record shows that Copco's five existing developments now utilize, and that its proposed Big Bend No. 2 development would utilize, 'surplus water' from Link Dam as found by the Commission. This evidence is analyzed in the Commission's brief filed with the Court in September of 1954 and need not be repeated here. Subsequent to the Court's remand order, Copco has declined an opportunity to present additional evidence.

Applicant's proposed Big Bend No. 2 development and its existing Copco No. 1 and Copco No. 2 developments are 32, 57, and 59 miles, respectively, downstream from Link Dam. It thus appears immaterial to the Commission's licensing authority under the 'surplus water' clause of section 4(e), whether hydroelectric developments utilizing the surplus water from a Government dam are constructed at, or in the immediate vicinity, or several miles downstream from the Government *20 dam. [FN6] On the other hand, the Commission's licensing authority with respect to hydroelectric development utilizing 'water power' from Government dams is limited by natural laws to those developments at or in the vicinity of such dams. The natural laws relating to the use of 'water power' are such that its utilization may only be at the dam when the power house is integral therewith, or at the downstream end of a pressure conduit leading from the intake to the turbines in the power house. Thus, the 'water power' utilized at or in the vicinity of a dam is the result of the head and flow there available.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit D Page 5 of 9

15 FPC 14

Page 6

15 F.P.C. 14, 1956 WL 54507 (F.P.C.)

(Cite as: 15 F.P.C. 14)

The Commission concluded that these developments are subject to its licensing authority under the 'surplus water' clause of section 4 (e) and found that, subject to the condition that applicant enter into an agreement with the Secretary of the Interior for the period of the license as described above, the license will not interfere or be inconsistent with the purpose for which any reservation, including the Klamath reclamation project, was created or acquired. Upon reconsideration on remand, we have found nothing in the language of the act, or in its legislative history, which leads us to believe that the Commission's licensing authority under the 'surplus water' clause of section 4(e) is limited to hydroelectric power projects located at or in the immediate vicinity of a Government dam. Moreover, as indicated above, there would seem to be no purpose for such limitation.

In further answer to the third question of the court, it appears that the Commission may not fix 'additional' charges at this time since the annual benefits to the United States under the 1917 agreement and under the new Link Dam agreement constitute reasonable annual charges under present conditions. However, in the event such charges become unreasonable they may be readjusted from time to time as provided by section 10(e) of the Act.

A further reason why the Commission's jurisdiction under the 'surplus water' clause should be asserted in these proceedings, is that section 23(b) of the act apparently makes it unlawful for Copco to operate its developments without a license authorizing their utilization *21 of surplus water from Link Dam. [FN7] A comparable situation was presented to this Court in *The Montana Power Co. v. Federal Power Commission*, 185 F. 2d 491, 496, wherein the court agreed with the Commission's conclusion that, although *The Montana Power Co.* had obtained appropriate authorization for its Holter development with respect to its occupancy of public lands of the United States, it was necessary to obtain additional authorization for the occupancy of navigable waters. See also, *United States v. Arizona*, 295 U. S. 174.

The Commission found that Copco's proposed project No. 2082 would occupy lands of the United States (J. A. 129) and fixed reasonable annual charges for the use thereof as provided in section 10(e) of the act (J. A. 134-135). Such charges may be readjusted as provided by that section. We do not know of any reason why the Commission's practice in respect to the use of a Government dam should be any different from its practice with respect to the use of Government lands when such uses are supported by the evidence of record. The record with respect to project No. 2082 supports both uses.

The Commission further finds:

(1) The annual benefits to be received by the United States under the new Link Dam agreement dated January 31, 1956, constitute reasonable compensation for the use of Link Dam.

(2) It is appropriate in carrying out the provisions of the Federal Power Act to

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit D Page 6 of 9

15 FPC 14

Page 7

15 F.P.C. 14, 1956 WL 54507 (F.P.C.)

(Cite as: 15 F.P.C. 14)

amend the Commission's order issued January 28, 1954 in project No. 2082, as hereinafter provided.

The Commission orders:

(A) The effective date of the license for project No. 2082 specified in paragraph (A) of the Commission's order issued January 28, 1954, namely 'as of the first day of the month in which the acceptance hereof is filed with the Commission,' is hereby amended and changed to 'as of the first day of March 1956.'

(B) Paragraph (d) of article 35 of the Commission's order issued January 28, 1954 in project No. 2082, is hereby amended to read as follows:

(d) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of Link Dam, (1) the annual benefits set forth in the 1917 Link Dam agreement, as amended, are reasonable and adequate during the term of that agreement; and (2) the annual benefits set forth in the new Link Dam agreement dated January 31, 1956, are reasonable and adequate commencing with the date on which the new Link Dam agreement supersedes the 1917 agreement.

*22 (C) The Commission's order issued January 28, 1954 in project No. 2082, is hereby amended to include an additional article immediately following article 37 thereof, reading as follows:

Article 38. No Klamath water as defined in the contract dated January 31, 1956 between the licensee and the United States of America, and filed herein pursuant to the second proviso of paragraph (A) of this license, shall be used by the licensee when needed or required for use for domestic, municipal or irrigation purposes on lands other than 'project land,' as defined in said contract, within the Upper Klamath River basin as that basin is defined in said contract; provided, that nothing herein shall curtail or interfere with the water rights of the licensee having a priority earlier than May 19, 1905; provided further, that all drainage and return flows from lands in the Upper Klamath River basin, other than those lands defined as 'project land' in said contract shall be returned to the Klamath River above Keno.

(D) This order amending the Commission's order issued January 28, 1954 in project 2082, shall be accepted by The California Oregon Power Co. on or before January 28, 1957, or within such further period of time as may be granted by the Commission, and said order issued January 28, 1954 shall not become effective without acceptance of the provisions of that order as amended by the provisions of this order.

FN* Designated Commission opinion No. 266-A.

FN1 Article 35. The licensee shall pay to the United States the following annual charges:

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit D Page 7 of 9

15 FPC 14

Page 8

15 F.P.C. 14, 1956 WL 54507 (F.P.C.)

(Cite as: 15 F.P.C. 14)

* * * * *

(d) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of Link Dam, the consideration and benefits set forth in the Link Dam agreement, as amended, are reasonable and adequate during the term of the agreement. Upon termination of the Link Dam agreement other reasonable annual charges may be fixed with the approval of the Secretary of the Interior for the use of Link Dam under this license and the charges may be further readjusted from time to time, as provided in the first proviso of section 10(e) of the Act.

FN2 That the Commission state specifically, with regard to the second sentence of article 35 (d) of the special conditions set forth in paragraph 17(B) of its order issuing license (major) on project No. 2082, adopted January 27, 1954, and issued January 28, 1954, whether the power or authority reserved therein to fix other reasonable annual charges in accordance therewith is exercisable upon termination of the Link Dam agreement, as extended in accordance with the Commission's order, or upon termination of the agreement on the original termination date, or is otherwise exercisable.

FN3 It appears that section 10(c) of the act, in pertinent part, provides:

* * * when licenses are issued involving the use of government dams * * * the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams * * * in reclamation projects * * *, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: * * * [Emphasis added].

FN4 That the Commission state specifically whether the power or authority reserved in the second sentence of said article 35(d) to readjust the charges laid upon California Oregon Power Co. by article 35(d) is limited to readjustment of these charges in the event of termination of the Link Dam agreement, while the license granted California Oregon Power Co. is outstanding, or may be exercised prior to termination of such agreement upon its original or extended termination date; and whether a reservation limited to readjustment of charges upon termination of the agreement but while the license is outstanding would be valid under section 10(e) of the Federal Power Act.

FN5 That the Commission, with regard to its orders issuing license (major) on project No. 2082 and order requiring filing of application for licenses for major projects, docket No. E-6390, both adopted January 27, 1954, and issued January 28, 1954, set forth (a) the basis for assuming (or the principles governing assumption of) jurisdiction under the 'Surplus Water' clause of section 4(e) of the Federal Power Act over a hydroelectric power project not located at or in the immediate vicinity of a Government dam; and (b) why this basis for its jurisdiction should be asserted, since its orders issuing license (major) on project No. 2082 and requiring filing of application for licenses for major projects, docket No. E-6390, appear to be supported by other provisions of section 4(e) of the Federal

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit D Page 8 of 9

15 FPC 14

Page 9

15 F.P.C. 14, 1956 WL 54507 (F.P.C.)

(Cite as: 15 F.P.C. 14)

Power Act and since no additional charge is imposed on California Oregon Power Co. pursuant to assumption of jurisdiction under the surplus water clause.

FN6 It appears that section 4(e) of the Federal Power Act, in pertinent part, authorizes and empowers the Commission:

(e) To issue licenses * * * to any corporation organized under the laws of the United States or any State thereof * * * for the purpose of utilizing the surplus water or water power from any government dam * * * Provided, the licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: * * * [Emphasis added].

FN7 It appears that section 23(b) of the act, in pertinent part, provides:

It shall be unlawful for any person * * *, for the purpose of developing electric power, to * * * utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of * * * a license granted pursuant to this act. * * * [Emphasis added.]

FEDERAL POWER COMMISSION

15 F.P.C. 14, 1956 WL 54507 (F.P.C.)

END OF DOCUMENT

EXHIBIT E

KLAMATH RIVER BASIN COMPACT

KLAMATH RIVER BASIN COMPACT

BETWEEN THE STATES OF

OREGON AND CALIFORNIA

Ratified by

STATE OF OREGON, APRIL 17, 1957

(Chapter 142, Oregon State Laws, 1957)

and

STATE OF CALIFORNIA, APRIL 17, 1957

(Chapter 113, California Statutes, 1957)

Consented to by

THE UNITED STATES CONGRESS

ACT OF AUGUST 30, 1957 (71 STAT. 497)

Effective September 11, 1957

KLAMATH RIVER BASIN COMPACT

After negotiations participated in by the following duly appointed Compact Commissioners of the States of California and Oregon, acting pursuant to authorizations of their respective legislatures and the Act of Congress of August 9, 1955 (69 Stat. 613):

FOR OREGON

NELSON REED, *Chairman*
Klamath Falls, Klamath County
JAMES KERNS, Jr., *Vice Chairman*
Klamath Falls, Klamath County
RALPH E. KOOSER, *Commissioner*
Ashland, Jackson County
HARRY PEARSON, *Commissioner*
Chiloquin, Klamath County
GEORGE E. STEVENSON, *Commissioner*
Olene, Klamath County



FOR CALIFORNIA

BERT A. PHILLIPS, *Chairman*
Douglas City, Trinity County
JAMES G. STEARNS, *Vice Chairman*
Tulelake, Modoc County
NELSON C. BOWLES, *Secretary*
Eureka, Humboldt County
HARVEY O. BANKS, *Director of*
Water Resources, Sacramento
ERLIS J. LOUPE, *Commissioner*
Gazelle, Siskiyou County



and by Frank A. Banks, representative of the United States of America, the States of California and Oregon have agreed on the compact articles hereinafter set out which were approved by the Klamath River Commissions of Oregon and California on November 17, 1956, and ratified by the Legislatures of Oregon (Chap. 142, Oregon State Laws 1957) and California (Chap. 113, Calif. Statutes 1957) on April 17, 1957. This compact was consented to by Act of Congress (71 Stat. 497) on August 30, 1957, and became effective on September 11, 1957.

TABLE OF CONTENTS

Article I.	Purposes	7
Article II.	Definition of Terms	7
Article III.	Distribution and Use of Water	8
Article IV.	Hydroelectric Power	10
Article V.	Interstate Diversion and Storage Rights; Measuring Devices	10
Article VI.	Acquisition of Property for Storage and Diversion; in Lieu Taxes	11
Article VII.	Pollution Control	12
Article VIII.	Miscellaneous	13
Article IX.	Administration	13
Article X.	Status of Indian Rights	16
Article XI.	Federal Rights	17
Article XII.	General Provisions	18
Article XIII.	Ratification	18
Article XIV.	Termination	19

ARTICLE I
PURPOSES

The major purposes of this compact are, with respect to the water resources of the Klamath River Basin:

A. To facilitate and promote the orderly, integrated and comprehensive development, use, conservation and control thereof for various purposes, including, among others: the use of water for domestic purposes; the development of lands by irrigation and other means; the protection and enhancement of fish, wildlife and recreational resources; the use of water for industrial purposes and hydroelectric power production; and the use and control of water for navigation and flood prevention.

B. To further intergovernmental cooperation and comity with respect to these resources and programs for their use and development and to remove causes of present and future controversies by providing (1) for equitable distribution and use of water among the two states and the Federal Government, (2) for preferential rights to the use of water after the effective date of this compact for the anticipated ultimate requirements for domestic and irrigation purposes in the Upper Klamath River Basin in Oregon and California, and (3) for prescribed relationships between beneficial uses of water as a practicable means of accomplishing such distribution and use.

ARTICLE II

DEFINITION OF TERMS

As used in this compact:

A. "Klamath River Basin" shall mean the drainage area of the Klamath River and all its tributaries within the States of California and Oregon and all closed basins included in the Upper Klamath River Basin.

B. "Upper Klamath River Basin" shall mean the drainage area of the Klamath River and all its tributaries upstream from the boundary between the States of California and Oregon and the closed basins of Butte Valley, Red Rock Valley, Los River Valley, Swan Lake Valley and Crater Lake, as delineated on the official map of the Upper Klamath River Basin approved on September 6, 1956, by the commissions negotiating this compact and filed with the Secretaries of State of the two states and the General Services Administration of the United States, which map is incorporated by reference and made a part hereof.

C. "Commission" shall mean the Klamath River Compact Commission as created by Article IX of this compact.

D. "Klamath Project" of the Bureau of Reclamation of the Department of the Interior of the United States shall mean that area as delineated by appropriate legend on the official map incorporated by reference under subdivision B of this article.

E. "Person" shall mean any individual or any other entity, public or private, including either state, but excluding the United States.

F. "Keno" shall mean a point on the Klamath River at the present needle dam, or any substitute control dam constructed in Section 36, Township 39 South, Range 7 East, Willamette Base and Meridian.

G. "Water" or "waters" shall mean waters appearing on the surface of the ground in streams, lakes or otherwise, regardless of whether such waters at any time were or will become ground water, but shall not include water extracted from underground sources until after such water is used and becomes surface return flow or waste water.

H. "Domestic use" shall mean the use of water for human sustenance, sanitation and comfort; for municipal purposes; for livestock watering; for irrigation of family gardens; and for other like purposes.

I. "Industrial use" shall mean the use of water in manufacturing operations.

J. "Irrigation use" shall mean the use of water for production of agricultural crops, including grain grown for feeding wildfowl.

ARTICLE III

DISTRIBUTION AND USE OF WATER

A. There are hereby recognized vested rights to the use of waters originating in the Upper Klamath River Basin validly established and subsisting as of the effective date of this compact under the laws of the state in which the use or diversion is made, including rights to the use of waters for domestic and irrigation uses within the Klamath Project. There are also hereby recognized rights to the use of all waters reasonably required for domestic and irrigation uses which may hereafter be made within the Klamath Project.

B. Subject to the rights described in subdivision A of this article and excepting the uses of water set forth in subdivision E of Article XI, rights to the use of unappropriated waters originating within the Upper Klamath River Basin for any beneficial use in the Upper Klamath River Basin, by direct diversion or by storage for later use, may be acquired by any person after the effective date of this compact by appropriation under the laws of the state where the use is to be made, as modified by the following provisions of this subdivision B and subdivision C of this article, and may not be acquired in any other way: 1. In granting permits to appropriate waters under this subdivision B, as among conflicting applications to appropriate when there is insufficient water to satisfy all such applications, each state shall give preference to applications for a higher use over applications for a lower use in accordance with the following order of uses:

- (a) Domestic use,
- (b) Irrigation use,
- (c) Recreational use, including use for fish and wildlife,
- (d) Industrial use,
- (e) Generation of hydroelectric power,
- (f) Such other uses as are recognized under the laws of the state involved.

These uses are referred to in this compact as uses (a), (b), (c), (d), (e) and (f), respectively. Except as to the superiority of rights to the use of water for use (a) or (b) over the rights to the use of water for use (c), (d), (e) or (f), as governed by subdivision C of this article, upon a permit being granted and a right becoming vested and perfected by use, priority in right to the use of water shall be governed by priority in time within the entire Upper Klamath River Basin regardless of state boundaries. The date of priority of any right to the use of water appropriated for the purposes above enumerated shall be the date of the filing of the application and completion of construction of the necessary works and application of the water to beneficial use with due diligence and within the times specified under the laws of the state where the use is to be made. Each state shall promptly provide the commission and the appropriate official of the other state with complete information as to such applications and as to all actions taken thereon.

2. Conditions on the use of water under this subdivision B in Oregon shall be:

(a) That there shall be no diversion of waters from the Upper Klamath River Basin, but this limitation shall not apply to out-of-basin diversions of waters originating within the drainage area of Fourmile Lake.

(b) That water diverted from Upper Klamath Lake and the Klamath River and its tributaries upstream from Keno, Oregon, for use in Oregon and not consumed therein and appearing as surface return flow and waste water within the Upper Klamath River Basin shall be returned to the Klamath River or its tributaries above Keno, Oregon.

3. Conditions on the use of water under this subdivision B in California shall be:

(a) That the waters diverted from the Klamath River within the Upper Klamath River Basin for use in California shall not be taken outside the Upper Klamath River Basin.

(b) That substantially all of the return flows and waste water finally resulting from such diversions and use appearing as surface waters in the Upper Klamath River Basin shall be made to drain so as to be eventually returned to the Klamath River upstream from Keno, Oregon.

C. 1. All rights, acquired by appropriation after the effective date of this compact, to use waters originating within the Upper Klamath River Basin for use (a) or (b) in the Upper Klamath River Basin in

either state shall be superior to any rights, acquired after the effective date of this compact, to use such waters (i) for any purpose outside the Klamath River Basin by diversion in California or (ii) for use (c), (d), (e) or (f) anywhere in the Klamath River Basin. Such superior rights shall exist regardless of their priority in time and may be exercised with respect to inferior rights without the payment of compensation. But such superior rights to use water for use (b) in California shall be limited to the quantity of water necessary to irrigate 100,000 acres of land, and in Oregon shall be limited to the quantity of water necessary to irrigate 200,000 acres of land.

2. The provisions of paragraph 1 of this subdivision C shall not prohibit the acquisition and exercise after the effective date of this compact of rights to store waters originating within the Upper Klamath River Basin and to make later use of such stored water for any purpose, as long as the storing of waters for such later use, while being effected, does not interfere with the direct diversion or storage of such waters for use (a) or (b) in the Upper Klamath River Basin.

ARTICLE IV

HYDROELECTRIC POWER

It shall be the objective of each state, in the formulation and the execution and the granting of authority for the formulation and execution of plans for the distribution and use of the waters of the Klamath River Basin, to provide for the most efficient use of available power head and its economic integration with the distribution of water for other beneficial uses in order to secure the most economical distribution and use of water and lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells.

ARTICLE V

INTERSTATE DIVERSION AND STORAGE RIGHTS;
MEASURING DEVICES

A. Each state hereby grants for the benefit of the other and its designees the right to construct and operate facilities for the measurement, diversion, storage and conveyance of water from the Upper Klamath River Basin in one state for use in the other insofar as the exercise of such right may be necessary to effectuate and comply with the terms of this compact. The location of such facilities shall be subject to approval by the commission.

B. Each state or its designee, exercising within the jurisdiction of the other a right granted under subdivision A of this article, shall make provision for the establishment, operation and maintenance of permanent gaging stations at such points on streams or reservoir or convey-

ance facilities as may be required by the commission for the purpose of ascertaining and recording the volume of diversions by the streams or facilities involved. Said stations shall be equipped with suitable devices for determining the flow of water at all times. All information obtained from such stations shall be compiled in accordance with the standards of the United States Geological Survey, shall be filed with the commission, and shall be available to the public.

ARTICLE VI

ACQUISITION OF PROPERTY FOR STORAGE AND
DIVERSION; IN LIEU TAXES

A. Subject to approval of the commission, either state shall have the right (1) to acquire such property rights in the other state as are necessary for the diversion, storage, conveyance, measurement and use of water in conformity with this compact, by donation or purchase, or (2) to elect to have the other state acquire such property rights for it by purchase or through the exercise of the power of eminent domain. A state making the latter election shall make a written request therefor and the other state shall expeditiously acquire said property rights either by purchase at a price satisfactory to the requesting state, or, if such purchase cannot be made, then through the exercise of its power of eminent domain, and shall convey said property rights to the requesting state or its designee. All costs of such acquisition shall be paid by the requesting state. Neither state shall have any greater power to acquire property rights for the other state through the exercise of the power of eminent domain than it would have under its laws to acquire the same property rights for itself.

B. Should any diversion, storage or conveyance facilities be constructed or acquired in either state for the benefit of the other state, as herein provided, the construction, repair, replacement, maintenance and operation of such facilities shall be subject to the laws of the state in which the facilities are located, except that the proper officials of that state shall permit the storage, release and conveyance of any water to which the other state is entitled under this compact.

C. Either state having property rights other than water rights in the other state acquired as provided in this article shall pay to each political subdivision of the state in which such property rights are located, each and every year during which such rights are held, a sum of money equivalent to the average annual amount of taxes assessed against those rights during the 10 years preceding the acquisition of such rights in reimbursement for the loss of taxes to such political subdivisions of the state. Payments so made to a political subdivision shall be in lieu of any and all taxes by that subdivision on the property rights for which the payments are made.

ARTICLE VII

POLLUTION CONTROL

A. The states recognize that the growth of population and the economy of the Upper Klamath River Basin can result in pollution of the waters of the Upper Klamath River Basin constituting a menace to the health and welfare of, and occasioning economic loss to, people living or having interests in the Klamath River Basin. The states recognize further that protection of the beneficial uses of the waters of the Klamath River Basin requires cooperative action of the two states in pollution abatement and control.

B. To aid in such pollution abatement and control, the commission shall have the duty and power:

1. To cooperate with the states or agencies thereof or other entities and with the United States for the purpose of promoting effective laws and the adoption of effective regulations for abatement and control of pollution of the waters of the Klamath River Basin, and from time to time to recommend to the governments reasonable minimum standards for the quality of such waters.

2. To disseminate to the public by any and all appropriate means information respecting pollution abatement and control in the waters of the Klamath River Basin and on the harmful and uneconomic results of such pollution.

C. Each state shall have the primary obligation to take appropriate action under its own laws to abate and control interstate pollution, which is defined as the deterioration of the quality of the waters of the Upper Klamath River Basin within the boundaries of such state which materially and adversely affects beneficial uses of waters of the Klamath River Basin in the other state. Upon complaint to the commission by the state water pollution control agency of one state that interstate pollution originating in the other state is not being prevented or abated, the procedure shall be as follows:

1. The commission shall make an investigation and hold a conference on the alleged interstate pollution with the water pollution control agencies of the two states, after which the commission shall recommend appropriate corrective action.

2. If appropriate corrective action is not taken within a reasonable time, the commission shall call a hearing, giving reasonable notice in writing thereof to the water pollution control agencies of the two states and to the person or persons which it is believed are causing the alleged interstate pollution. Such hearing shall be held in accordance with rules and regulations of the commission, which shall conform as nearly as practicable with the laws of the two states governing administrative hearings. At the conclusion of such hearing, the commission shall make a finding as to whether interstate pollution exists, and if so, shall issue to any person or persons which the commission finds are causing such interstate pollution an order or orders for correction thereof.

3. It shall be the duty of the person against whom any such order is issued to comply therewith. Any court of general jurisdiction of the state where such discharge is occurring or the United States District Court for the district where the discharge is occurring shall have jurisdiction, on petition of the commission for enforcement of such order, to compel action by mandamus, injunction, specific performance, or any other appropriate remedy, or on petition of the person against whom the order is issued to review any order. At the conclusion of such enforcement or review proceedings, the court may enter such decree or judgment affirming, reversing, modifying, or remanding such order as in its judgment is proper in the circumstances on the basis of the rules customarily applicable in proceedings for court enforcement or review of administrative actions.

D. The water pollution control agencies of the two states shall, from time to time, make available to the commission all data relating to the quality of the waters of the Upper Klamath River Basin which they possess as the result of studies, surveys and investigations thereof which they may have made.

ARTICLE VIII

MISCELLANEOUS

A. Subject to vested rights as of the effective date of this compact, there shall be no diversion of waters from the basin of Jenny Creek to the extent that such waters are required, as determined by the commission, for use on land within the basin of Jenny Creek.

B. Each state shall exercise whatever administrative, judicial, legislative or police powers it has that are required to provide any necessary re-regulation or other control over the flow of the Klamath River downstream from any hydroelectric power plant for protection of fish, human life or property from damage caused by fluctuations resulting from the operation of such plant.

ARTICLE IX

ADMINISTRATION

A. 1. There is hereby created a commission to administer this compact. The commission shall consist of three members. The representative of the State of California shall be the Department of Water Resources. The representative of the State of Oregon shall be the State Engineer of Oregon who shall serve as ex officio representative of the State Water Resources Board of Oregon. The President is requested to appoint a federal representative who shall be designated and shall serve as provided by the laws of the United States.

2. The representative of each state shall be entitled to one vote in the commission. The representative of the United States shall serve as

chairman of the commission without vote. The compensation and expenses of each representative shall be fixed and paid by the government which he represents. Any action by the commission shall be effective only if it be agreed to by both voting members.

3. The commission shall meet to establish its formal organization within 60 days after the effective date of this compact, such meeting to be at the call of the governors of the two states. The commission shall then adopt its initial set of rules and regulations governing the management of its internal affairs providing for, among other things, the calling and holding of meetings, the adoption of a seal, and the authority and duties of the chairman and executive director. The commission shall establish its office within the Upper Klamath River Basin.

4. The commission shall appoint an executive director, who shall also act as secretary, to serve at the pleasure of the commission and at such compensation, under such terms and conditions and performing such duties as it may fix. The executive director shall be the custodian of the records of the commission with authority to affix the commission's official seal, and to attest to and certify such records or copies thereof. The commission, without regard to the provisions of the civil service laws of either state, may appoint and discharge such consulting, clerical and other personnel as may be necessary for the performance of the commission's functions, may define their duties, and may fix and pay their compensation. The commission may require the executive director and any of its employees to post official bonds, and the cost thereof shall be paid by the commission.

5. All records, files and documents of the commission shall be open for public inspection at its office during established office hours.

6. No member, officer or employee of the commission shall be liable for injury or damage resulting from (a) action taken by such member, officer or employee in good faith and without malice under the apparent authority of this compact, even though such action is later judicially determined to be unauthorized, or (b) the negligent or wrongful act or omission of any other person, employed by the commission and serving under such officer, member or employee, unless such member, officer or employee either failed to exercise due care in the selection, appointment or supervision of such other person, or failed to take all available action to suspend or discharge such other person after knowledge or notice that such other person was inefficient or incompetent to perform the work for which he was employed. No suit may be instituted against a member, officer or employee of the commission for damages alleged to have resulted from the negligent or wrongful act or omission of such member, officer or employee or a subordinate thereof occurring during the performance of his official duties unless, within 90 days after occurrence of the incident, a verified claim for damages is presented in writing and filed with such member, officer or employee and with the commission. In the event of a suit for damages against any member, officer or employee of the commission on account of any

act or omission in the performance of his or his subordinate's official duties, the commission shall arrange for the defense of such suit and may pay all expenses therefor on behalf of such member, officer or employee. The commission may at its expense insure its members, officers and employees against liability resulting from their acts or omissions in the performance of their official duties. Nothing in this paragraph shall be construed as imposing any liability upon any member, officer or employee of the commission that he would otherwise not have.

7. The commission may incur obligations and pay expenses which are necessary for the performance of its functions. But it shall not pledge the credit of any government except by and with the authority of the legislative body thereof given pursuant to and in keeping with the constitution of such government, nor shall the commission incur any obligations prior to the availability of funds adequate to meet them.

8. The commission may:

(a) Borrow, accept or contract for the services of personnel from any government or agency thereof, from any intergovernmental agency, or from any other entity.

(b) Accept for any of its purposes and functions under this compact any and all donations, gifts, grants of money, equipment, supplies, materials and services from any government or agency thereof or intergovernmental agency or from any other entity.

(c) Acquire, hold and dispose of real and personal property as may be necessary in the performance of its functions.

(d) Make such studies, surveys and investigations as are necessary in carrying out the provisions of this compact.

9. All meetings of the commission for the consideration of and action on any matters coming before the commission, except matters involving the management of internal affairs of the commission and its staff, shall be open to the public. Matters coming within the exception of this paragraph may be considered and acted upon by the commission in executive sessions under such rules and regulations as may be established therefor.

10. In the case of the failure of the two voting members of the commission to agree on any matter relating to the administration of this compact as provided in paragraph 2 of this subdivision A, the representative from each state shall appoint one person and the two appointed persons shall appoint a third person. The three appointees shall sit as an arbitration forum. The terms of appointment and the compensation of the members of the arbitration forum shall be fixed by the commission. Matters on which the two voting members of the commission have failed to agree shall be decided by a majority vote of the members of the arbitration forum. Each state obligates itself to abide by the decision of the arbitration forum, subject, however, to the right of each state to have the decision reviewed by a court of competent jurisdiction.

11. The commission shall have the right of access, through its authorized representatives, to all properties in the Klamath River Basin when

ever necessary for the purpose of administration of this compact. The commission may obtain a court order to enforce its right of access.

R. 1. The commission shall submit to the governor or designated officer of each state a budget of its estimated expenditures for such period and at such times as may be required by the laws of that state for presentation to the legislature thereof. Each state pledges itself to appropriate and pay over to the commission one-half of the amount required to finance the commission's estimated expenditures as set forth in each of its budgets, and pledges further that concurrently with approval of this compact by its legislature the sum of not less than \$12,000 will be appropriated by it to be paid over to the commission at its first meeting for use in financing the commission's functions until the commission can prepare its first budget and receive its first appropriation thereunder from the states.

2. The commission shall keep accurate accounts of all receipts and disbursements, which shall be audited yearly by a certified public accountant, and the report of the audit shall be made a part of its annual report. The accounts of the commission shall be open for public inspection during established office hours.

3. The commission shall make and transmit to the legislature and governor of each state and to the President of the United States an annual report covering the finances and activities of the commission and embodying such plans, recommendations and findings as may have been adopted by the commission.

C. 1. The commission shall have the power to adopt, and to amend or repeal, such rules and regulations to effectuate the purposes of this compact as in its judgment may be appropriate.

2. Except as to matters involving exclusively the management of the internal affairs of the commission and its staff or involving emergency matters, prior to the adoption, amendment or repeal of any rule or regulation the commission shall hold a hearing at which any interested person shall have the opportunity to present his views on the proposed action in writing, with or without the opportunity to present the same orally. The commission shall give adequate advance notice in a reasonable manner of the time, place and subject of such hearings.

3. Emergency rules and regulations may be adopted without a prior hearing, but in such case they may be effective for not longer than 90 days.

4. The commission shall publish its rules and regulations in convenient form.

ARTICLE X

STATUS OF INDIAN RIGHTS

A. Nothing in this compact shall be deemed:

1. To affect adversely the present rights of any individual Indian, tribe, band or community of Indians to the use of the waters of the Klamath River Basin for irrigation.

2. To deprive any individual Indian, tribe, band or community of Indians of any rights, privileges, or immunities afforded under Federal treaty, agreement or statute.

3. To affect the obligations of the United States of America to the Indians, tribes, bands or communities of Indians, and their reservations.

4. To alter, amend or repeal any of the provisions of the Act of August 13, 1954, (68 Stat. 718) as it may be amended.

B. Lands within the Klamath Indian Reservation which are brought under irrigation after the effective date of this compact, whether before or after Section 14 of said Act of August 13, 1954, becomes fully operative, shall be taken into account in determining whether the 200,000 acre limitation provided in paragraph 1 of subdivision C of Article III has been reached.

ARTICLE XI

FEDERAL RIGHTS

Nothing in this compact shall be deemed:

A. To impair or affect any rights, powers or jurisdictions of the United States, its agencies or those acting by or under its authority, in, over and to the waters of the Klamath River Basin, nor to impair or affect the capacity of the United States, its agencies or those acting by or under its authority in any manner whatsoever, except as otherwise provided by the federal legislation enacted for the implementation of this compact as specified in Article XIII.

B. To subject any property of the United States, its agencies or instrumentalities, to taxation by either state or any subdivision thereof, unless otherwise provided by act of Congress.

C. To subject any works or property of the United States, its agencies, instrumentalities or those acting by or under its authority, used in connection with the control or use of waters which are the subject of this compact, to the laws of any state to an extent other than the extent to which those laws would apply without regard to this compact, except as otherwise provided by the federal legislation enacted for the implementation of this compact as specified in Article XIII.

D. To affect adversely the existing areas of Crater Lake National Park or Lava Beds National Monument, or to limit the operation of laws relating to the preservation thereof.

E. To apply to the use of water for the maintenance, on the scale at which such land and water areas are maintained as of the effective date of this compact, of officially designated waterfowl management areas, including water consumed by evaporation and transpiration on water surface areas and water used for irrigation or otherwise in the Upper Klamath River Basin; nor to affect the rights and obligations of the United States under any migratory bird treaty or the Migratory Bird Conservation Act (45 Stat. 1222), as amended to the effective date of this compact.

GENERAL PROVISIONS

A. Each state and all persons using, claiming or in any manner asserting any right to the use of the waters of the Klamath River Basin under the authority of either state shall be subject to the terms of this compact.

B. Nothing in this compact shall be construed to limit or prevent either state from instituting or maintaining any action or proceeding, legal or equitable, in any court of competent jurisdiction for the protection of any right under this compact or the enforcement of any of its provisions.

C. Should a court of competent jurisdiction hold any part of this compact to be contrary to the Constitution of either state or the United States, all other provisions shall continue in full force and effect, unless it is authoritatively and finally determined judicially that the remaining provisions cannot operate for the purposes, or substantially in the manner, intended by the states independently of the portions declared unconstitutional or invalid.

D. Except as to matters requiring the exercise of discretion by the commission, the provisions of this compact shall be self-executing and shall by operation of law be conditions of the various state permits, licenses or other authorizations relating to the waters of the Klamath River Basin issued after the effective date of this compact.

E. The physical and other conditions peculiar to the Klamath River Basin constitute the basis for this compact, and neither of the states hereby, nor the Congress of the United States by its consent, considers that this compact establishes any general principle or precedent with respect to any other interstate stream.

ARTICLE XIII

RATIFICATION

A. This compact shall become effective when ratified by the legislature of each signatory state, and when consented to by an act of Congress of the United States which will, in substance, meet the provisions hereinafter set forth in this article.

B. The act of Congress referred to in subdivision A of this article shall provide that the United States or any agency thereof, and any entity acting under any license or other authority granted under the laws of the United States (referred to in this article as "the United States"), in connection with developments undertaken after the effective date of this compact pursuant to laws of the United States, shall comply with the following requirements:

1. The United States shall recognize and be bound by the provisions of subdivision A of Article III.
2. The United States shall not, without payment of just compensation, impair any rights to the use of water for use (a) or (b) within

the Upper Klamath River Basin by the exercise of any powers or rights to use or control water (i) for any purpose whatsoever outside the Klamath River Basin by diversions in California or (ii) for any purpose whatsoever within the Klamath River Basin other than use (a) or (b). But the exercise of powers and rights by the United States shall be limited under this paragraph 2 only as against rights to the use of water for use (a) or (b) within the Upper Klamath River Basin which are acquired as provided in subdivision B of Article III after the effective date of this compact, but only to the extent that annual depletions in the flow of the Klamath River at Keno resulting from the exercise of such rights to use water for uses (a) and (b) do not exceed 340,000 acre-feet in any one calendar year.

3. The United States shall be subject to the limitation on diversions of waters from the basin of Jenny Creek as provided in subdivision A of Article VIII.

4. The United States shall be governed by all the limitations and provisions of paragraph 2 and subparagraph (a) of paragraph 3 of subdivision B of Article III.

5. The United States, with respect to any irrigation or reclamation development undertaken by the United States in the Upper Klamath River Basin in California, shall provide that substantially all of the return flows and waste water finally resulting from such diversions and use appearing as surface waters in the Upper Klamath River Basin shall be made to drain so as to be eventually returned to the Klamath River upstream from Keno, unless the Secretary of the Interior shall determine that compliance with this requirement would render it less feasible than under an alternate plan of development, in which event such return flows and waste waters shall be returned to the Klamath River at a point above Copco Lake.

C. Upon enactment of the act of Congress referred to in subdivision A of this article and so long as such act shall be in effect, the United States, when exercising rights to use water pursuant to state law, shall be entitled to all of the same privileges and benefits of this compact as any person exercising similar rights.

D. Such act of Congress shall not be construed as relieving the United States of any requirement of compliance with state law which may be provided by other federal statutes.

ARTICLE XIV

TERMINATION

This compact may be terminated at any time by legislative consent of both states, but despite such termination, all rights then established hereunder or recognized hereby shall continue to be recognized as valid by the states.

Exhibit 11 Page 10 of 11

THE BASIN

DOUGLAS

JACKSON

L A K E

This area not included
in Klamath River Basin

STUDY AREAS

- 1. WILLIAMSON RIVER
- 2. SPRAGUE RIVER
- 3. UPPER KLAMATH LAKE
 - a. Wood River
 - b. Upper Klamath Lake
- 4. LOST RIVER
 - a. Swan Lake

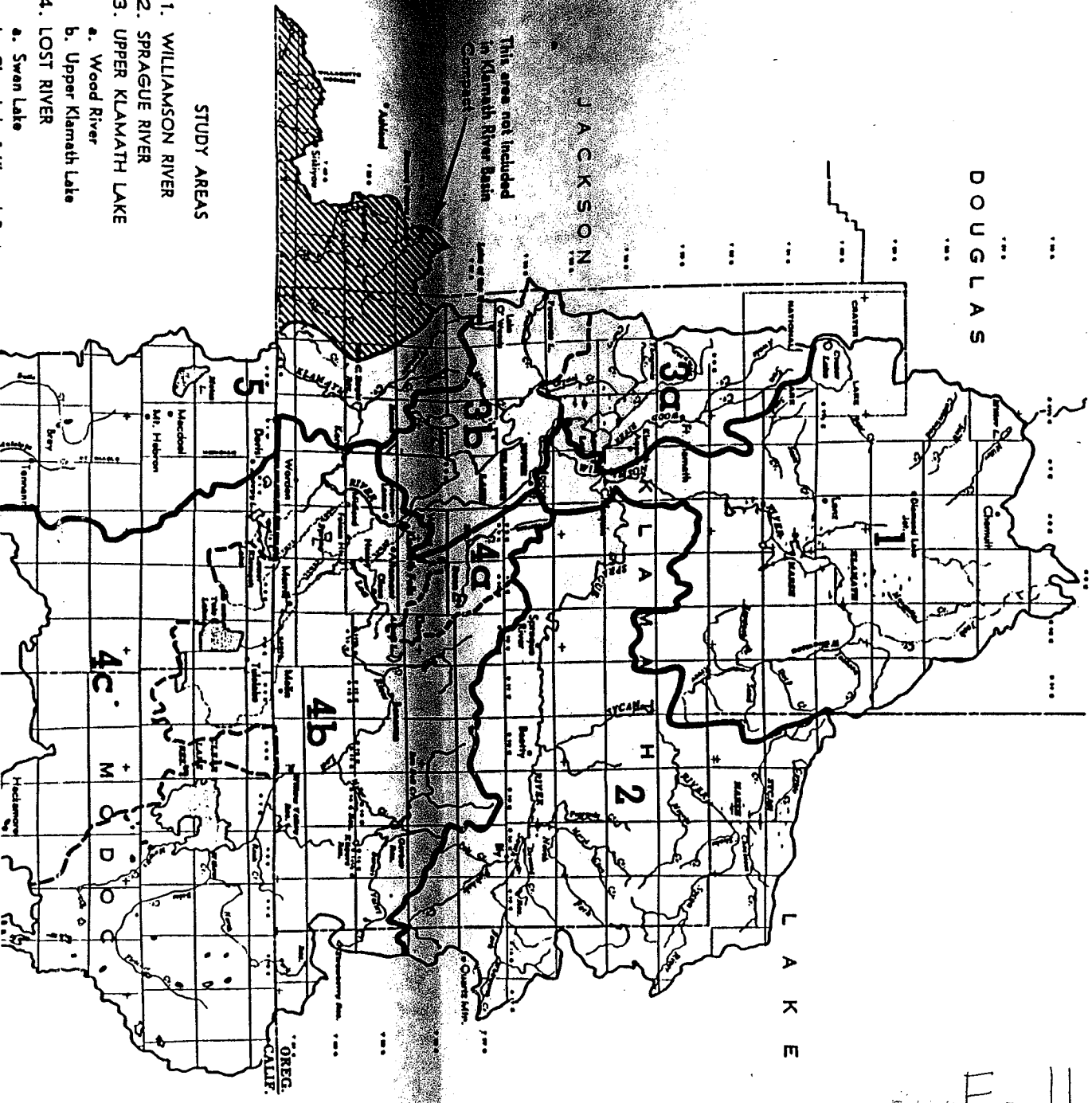


EXHIBIT F

PACIFICORP

TESTIMONY

ON HB 2144

Testimony Before the House Energy
and Environment Committee Regarding HB 2144

My name is Robert V. Sirvaitis. I am employed by Pacific Power & Light Company (Pacific), as Manager, Rates & Regulatory Administration. I am here today to offer testimony in support of the amended version of HB 2144, non-LC draft, which is attached and has been previously distributed. These revisions to Chapter 757 of the Oregon Revised Statutes pertain to the Commission's authority to set competitive rates, also referred to as "incentive" or "special contract" rates. Mr. Bill Warren, Assistant Commissioner to the Public Utility Commission of Oregon previously has presented testimony concerning the background and purpose of the amended version of HB 2144 as well as what the bill does and does not do. Pacific strongly endorses and agrees with the testimony provided by Bill Warren.

The purpose of my testimony is to explain why HB 2144 is important to Pacific and its customers and to provide an explanation of each of the revisions to existing statutes as proposed in the amended version of HB 2144.

Why HB 2144 is Important

Pacific believes that the amended version of HB 2144 clarifies existing statutes concerning the Commission's ratemaking authority and eliminates or reduces uncertainty. Existing statutes allow the Commission to approve special contracts and set rates to meet competitive conditions as long as certain standards are met by the utility offering the special contract. The standards are generally described as follows:

1. Classes of customers must be based on reasonable considerations so that customers receiving "like and contemporaneous service under substantially similar circumstances" are placed in the same class.
2. Classes of customers must be open ended so that any similarly situated customer has the ability to obtain a lower rate offered another.
3. Special rates must continue to provide for just and reasonable rates to remaining customers. A special rate must cover the relevant costs of providing service and should provide a benefit to other customers to the extent that remaining customers are better off with the special rate than without it.

HB 2144 adds specific considerations which may be used by the Commission to establish separate classes of service and allows separate rates or charges for the individual customer or groups of customers in the different classes. These considerations are currently encompassed in the authority to establish customer classes based upon "other reasonable considerations." Identifying considerations explicitly will eliminate any uncertainty over the Commission's authority in this area. By eliminating or reducing uncertainty, the risk of future litigation requiring court review and decisions about the Commission's ratemaking authority is substantially reduced. Where a special contract is

Competitive markets are developing for separate services and some customers do not want or need to purchase all services as a bundle. Because some of our competitors have the flexibility to offer lower prices for certain services, customers are demanding the right to select unbundled services from regulated utilities as well.

As customers or sales are lost to competitors, regulated utilities' ability to compete will depend on gaining the freedom to modify their obligation to serve customers who have the ability to choose among services from more than one supplier. To restore balance, the electric industry requires that the regulated utilities also be permitted to offer separate services. If a customer chooses to purchase only certain services, rather than all services as a bundle, the supplier should be permitted to provide those services at prices which reflect their unbundled value to the purchaser. Pricing flexibility is essential to the provision of customer-chosen services. Again, we believe this authority already exists through the Commission's ability to establish classes based on "other reasonable considerations." However, because this authority is becoming increasingly important, we are asking that the statute be made explicit.

Another provision of the amended version of HB 2144, shown on lines 12 through 14, authorizes the Commission to have classes of service or schedules of rates applicable to individual customers or group of customers. This explicitly recognizes there may be one or more customers whose circumstances are unique. Nevertheless, if it develops that other customers meet the qualifications for service under that particular special contract, those other customers may become eligible to receive similar services under similar terms, conditions, and rates.

Finally, the language shown on lines 5-7 of page 2 of the amended version of HB 2144 states that a difference in rates for the different classes of service authorized pursuant to ORS 757.230 will not violate existing statutes concerning price discrimination as set forth in ORS 757.310. As required under ORS 757.310(1)(b), all customers who are similarly situated will be able to transfer to the new class of service -- that is, the class will be open-ended. If a customer believes he is similarly situated, the customer has the option to change classes. There is, therefore, no price discrimination involved.

This concludes my prepared testimony. I will gladly respond to any questions you may have.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the **KLAMATH WATER USERS ASSOCIATION'S RESPONSE TO PACIFICORP'S MOTION FOR SUMMARY DISPOSITION** to be served upon each party to this proceeding as reflected on the official service list compiled by the Secretary of the Commission by mailing a full, true and correct copy thereof in a sealed, postage-paid envelope, addressed as shown above, and deposited with the U.S. Postal Service at Portland, Oregon, on the date set forth below:

EDWARD BARTELL
KLAMATH OFF-PROJECT WATER USERS
30474 SPRAGUE RIVER ROAD
SPRAGUE RIVER OR 97639

LISA BROWN
WATERWATCH OF OREGON
213 SW ASH ST STE 208
PORTLAND OR 97204
lisa@waterwatch.org

LOWREY R BROWN
CITIZENS' UTILITY BOARD OF OREGON
610 SW BROADWAY, SUITE 308
PORTLAND OR 97205
lowrey@oregoncub.org

JOHN CORBETT
YUROK TRIBE
PO BOX 1027
KLAMATH CA 95548
jcorbett@yuroktribe.nsn.us

JOHN DEVOE
WATERWATCH OF OREGON
213 SW ASH STREET, SUITE 208
PORTLAND OR 97204
john@waterwatch.org

JASON EISDORFER
CITIZENS' UTILITY BOARD OF OREGON
610 SW BROADWAY STE 308
PORTLAND OR 97205
jason@oregoncub.org

GLEN H SPAIN
PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOC
PO BOX 11170
EUGENE OR 97440-3370
fish1ifr@aol.com

DAN KEPPEN
KLAMATH WATER USERS ASSOCIATION
2455 PATTERSON STREET, SUITE 3
KLAMATH FALLS OR 97603

JIM MCCARTHY
OREGON NATURAL RESOURCES COUNCIL
PO BOX 151
ASHLAND OR 97520
jm@onrc.org

KATHERINE A MCDOWELL
STOEL RIVES LLP
900 SW FIFTH AVE STE 1600
PORTLAND OR 97204-1268
kamcdowell@stoel.com

BILL MCNAMEE
PUBLIC UTILITY COMMISSION
PO BOX 2148
SALEM OR 97308-2148
bill.mcnamee@state.or.us

MICHAEL W ORCUTT
HOOPA VALLEY TRIBE FISHERIES DEPT
PO BOX 417
HOOPA CA 95546

STEVE PEDERY
OREGON NATURAL RESOURCES COUNCIL
sp@onrc.org

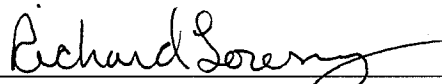
MATTHEW W PERKINS
DAVISON VAN CLEVE PC
333 SW TAYLOR, STE 400
PORTLAND OR 97204
mwp@dvclaw.com

THOMAS P SCHLOSSER
MORISSET, SCHLOSSER, JOZWIAK Et al.
t.schlosser@msaj.com

ROBERT VALDEZ
PO BOX 2148
SALEM OR 97308-2148
bob.valdez@state.or.us

PAUL M WRIGLEY
PACIFIC POWER & LIGHT
825 NE MULTNOMAH STE 800
PORTLAND OR 97232
paul.wrigley@pacificorp.com

DATED Thursday, April 28, 2005.



EDWARD A. FINKLEA, OSB No. 84216
J. LAURENCE CABLE, OSB No. 71035
RICHARD G. LORENZ, OSB No. 00308
Of Attorneys for
Klamath Water Users Association