Davison Van Cleve PC
Attorneys at Law
TEL (503) 241-7242 • FAX (503) 241-8160 • mail@dvclaw.com
Suite 400
333 SW Taylor
Portland, OR 97204

April 28, 2005

Via Hand Delivery

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

Re: In the Matter of PACIFIC POWER & LIGHT Klamath Basin Irrigation Rates
Docket No. UE 171

Dear Filing Center:

Enclosed please find an original and six copies of the Response to PacifiCorp's Motion for Summary Disposition on behalf of the Klamath Off-Project Water Users'.

Please return one file-stamped copy of the document in the self-addressed, stamped envelope provided. Thank you for your assistance.

Sincerely,

/s/ Ruth A. Miller
Ruth A. Miller

Enclosures
cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Response to PacifiCorp's Motion for Summary Disposition on behalf of the Klamath Off-Project Water Users', upon the parties on the service list, shown below, by causing the same to sent by electronic mail to all parties who have an email address, as well as mailed, postage-prepaid, through the U.S. Mail.

Dated at Portland, Oregon, this 28th day of April, 2005.

/s/ Ruth A. Miller
Ruth A. Miller

EDWARD BARTELL KLAMATH OFF-PROJECT WATER USERS INC 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
EDWARD A FINKLEA CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP 1001 SW 5TH, SUITE 2000 PORTLAND OR 97204 efinklea@chbh.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	THOMAS P SCHLOSSER MORISSET, SCHLOSSER, JOZWIAK & MCGAW t.schlosser@msaj.com
GLEN H SPAIN PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOC PO BOX 11170 EUGENE OR 97440-3370 fish1ifr@aol.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	

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 171

In the Matter of	)
	)
PACIFIC POWER & LIGHT	)
(dba PACIFICORP)	)
	)
Klamath Basin Irrigation Rates.	)
	)

KLAMATH OFF-PROJECT WATER USERS' RESPONSE TO PACIFICORP'S MOTION FOR SUMMARY DISPOSITION

April 28, 2005

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DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

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DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

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DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

TABLE OF ACRONYMS

Copco	California Oregon Power Company
CPUC	California Public Utilities Commission
FERC	Federal Energy Regulatory Commission
FPC	Federal Power Commission
The Water Users Association	Klamath Basin Water Users' Protective Association
KOPWU	Klamath Off-Project Water Users
OPUC	Oregon Public Utility Commission

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

The Klamath Off-Project Water Users ("KOPWU") submits this Response in Opposition to PacifiCorp's (or the "Company") Motion for Summary Disposition ("Motion") in Public Utility Commission of Oregon ("OPUC" or the "Commission") Docket No. UE 171. KOPWU requests that the Commission deny PacifiCorp's request to terminate the April 30, 1956 Agreement ("Off-Project Agreement" or the "Agreement") between the Klamath Basin Water Users' Protective Association (the "Water Users Association") and PacifiCorp's predecessor, the California Oregon Power Company ("Copco").

INTRODUCTION

The Off-Project Agreement has been in effect for approximately 50 years. The Agreement represents the culmination of a complex series of events that defined the rights of PacifiCorp's Off-Project Customers, yet PacifiCorp's Motion excludes virtually any meaningful discussion of the background of the Off-Project Agreement. Moreover, PacifiCorp fails to recognize that the Agreement creates distinct legal rights, and the Company raises issues in its Motion that are inconsistent with the legal standards for summary disposition and contract interpretation.

Termination or modification of a valid and effective contract is a matter that the courts and this Commission do not take lightly. Implicit in PacifiCorp's Motion is the misguided suggestion that the Commission may disrupt the obligations in the Off-Project Agreement without thoughtful consideration of legal principles that discourage termination of the parties' valid contractual rights. Furthermore, PacifiCorp fails to describe the reasons for the Off-Project Agreement or the mutual exchange of consideration that forms the basis of the Agreement.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

PacifiCorp's Motion must be decided based on the laws governing summary disposition, legal standards for contractual interpretation and enforcement, and economic considerations that have justified the Off-Project Agreement for the last fifty years. KOPWU requests that the Commission deny PacifiCorp's Motion for Summary Disposition for the following reasons:

1. The Off-Project Agreement is unambiguous in that it does not terminate in 2006. PacifiCorp's attempt to impose the expiration date in the January 31, 1956 agreement between the United States ("U.S.") and Copco ("On-Project Agreement") on the Off-Project Agreement is without legal or factual support. The Commission has recognized in the past that it is not the proper body to adjudicate parties' contractual rights. Accordingly, the Agreement should remain in effect until a court determines otherwise.

2. The plain language of the Off-Project Agreement provides that it continues in effect as long as PacifiCorp continues to operate its Hydroelectric Project No. 2082 and water continues to flow from Off-Project land to the Klamath River above Keno. Under no circumstances should the Off-Project Agreement terminate while PacifiCorp operates under its current Federal Energy Regulatory Commission ("FERC") hydro license, or an annual license renewal, for Project No. 2082.

3. PacifiCorp has raised the issue of the parties' intent with respect to termination of the Off-Project Agreement, and determination of the parties' intent is a genuine issue of material fact that the Commission cannot resolve on summary disposition.

4. PacifiCorp seeks to impose special contract standards on the Off-Project Agreement that, by definition, apply in an entirely different context. The Commission has never subjected the Agreement to these standards in the past. PacifiCorp has not demonstrated as a matter of law that conventional special contract standards should be applied to the Off-Project Agreement or that these standards dictate that the Commission must terminate the Agreement.

5. PacifiCorp has disregarded OPUC standards and policies that promote upholding negotiated agreements that have been approved by the Commission. Application of these standards to the Off-Project Agreement involves genuine issues of material fact that cannot be resolved on summary disposition.

6. The Klamath River Basin Compact (the "Compact"), which is codified at ORS § 542.610 et seq., provides that Klamath irrigation customers should receive

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

the "lowest power rates which may be reasonable" for irrigation and drainage pumping. PacifiCorp's claim that the Compact merely restates the OPUC's just and reasonable standard ignores the significance of the Compact and conflicts with established principles of statutory construction.

7. PacifiCorp's request to impose a one-time 1176% rate increase on Klamath irrigator customers is unprecedented.[1/] The Off-Project Agreement was designed to avoid the imposition of such unjustified rate increases on Off-Project Customers.

KOPWU requests that the Commission deny PacifiCorp's Motion for Summary Disposition. KOPWU also requests that the Commission find the Off-Project Agreement to be unambiguous as it does not contain a termination date. If the Commission does not find that the Off-Project Agreement is unambiguous, then the Commission should allow the courts to resolve the parties' contractual issues. Discussed below are the reasons why both summary disposition and alteration of the Off-Project rate are improper. KOPWU has a valid and enforceable contract that should remain in place.

HISTORICAL CONTEXT OF THE OFF-PROJECT AGREEMENT

To place PacifiCorp's request to terminate the Off-Project Agreement in full perspective, it is important to look back over the past 100 years at the development of the Klamath Reclamation Project ("Klamath Project" or the "Project") and the events that led to the contract rates in the Off-Project Agreement. PacifiCorp provides electric service to KOPWU's members in accordance with the Off-Project Agreement, which specifies power rates for

[1/] Despite the unprecedented rate increase proposed by PacifiCorp in Docket No. UE 170 for Klamath Basin irrigation customers, in its direct testimony the Company did not identify the proposed rate or revenue changes that would result from moving the Klamath Basin irrigation customers from Schedule 33 to Schedule 41. OAR § 860-022-0030 (requiring statements of proposed changes "for each separate schedule"). KOPWU obtained this information only after requesting a comparison in discovery and conferring with the Company to resolve its objection that it was not required to provide a study for any other party.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

irrigation and pumping in the Upper Klamath River Basin for "Off-Project" Customers. Off-Project Customers are those who are not located on "Project Land" of the Klamath Project.[2/] The hallmarks of the historical foundations of the Agreement are: 1) the commencement of the Klamath Project by the U.S. Department of the Interior's Reclamation Service ("Reclamation") in the early 1900s; 2) the 1917 Link River Dam Contract between Reclamation and Copco; and 3) the Federal Power Commission ("FPC") issuance of a license to Copco in 1956 for FERC Project No. 2082, which consists of certain dams and hydroelectric facilities on the Klamath River below Keno. All of these events led to the execution of the Off-Project Agreement by Copco and the Water Users Association in 1956. The bargain reflected in the Off-Project Agreement is straightforward: in exchange for the power rate contained in the Agreement, Off-Project irrigators agreed to support Copco's application to construct Project No. 2082 and to provide water for Copco's downstream hydroelectric facilities.

A. 1880 – 1916: Early Irrigation and Power Development in the Klamath Basin

Farmers introduced irrigation to the Klamath Basin in the 1880s with the construction of ditches and canals to irrigate farmland, provide power for mills, and transport

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[2/] A Copco tariff that bears an effective date of May 1, 1956, and is titled "Upper Klamath River Basin Irrigation and Agricultural Drainage Pumping Service Tariff (For Users Not on Project Land)" defines "Project Land" as "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." Re PacifiCorp, OPUC Docket No. UE 171, Affidavit of Matthew W. Perkins Exhibit No. 1 (Apr. 28, 2005) ("Affidavit"). Project Land is defined in the same manner in the On-Project Agreement. References to page numbers in Exhibits to the Affidavit refer to the page numbers in the original documents.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

logs.[3/] By 1903, Reclamation began investigating the development of additional irrigation in the Klamath Basin.[4/] Reclamation's Chief Engineer suggested after his first visit to the Upper Klamath River Basin that a "dam could be built at the lower end of the Upper Klamath Lake in order to hold back an amount of water" sufficient to irrigate over 100,000 acres as well as generate power for pumping.[5/] Shortly thereafter, Reclamation set aside over one million acres of public lands in the Klamath Basin for power purposes.[6/]

Recognizing that development of a federal reclamation project would benefit the Klamath Basin, Oregon and California assisted Reclamation's efforts. In early 1905, the Oregon and California Legislatures passed laws authorizing Reclamation to lower the water levels of certain lakes in the Klamath River Basin, and ceding to the U.S. title to all land uncovered by lowering the lake levels.[7/] By May 1905, the Secretary of the Department of the Interior ("Interior") had authorized development of the Klamath Project, which was to consist of a series of dams and distribution canals to facilitate agricultural irrigation and development in the Klamath River Basin. Reclamation began constructing the Project's main canals and distribution system in 1906, and irrigation using water from the Project began in May 1907.[8/]

Reclamation noted early on that the farmers "who reside in the Klamath Basin were practically unanimous for the construction of the government project, and had organized a

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[3/] Eric A. Stene, The Klamath Project (Seventh Draft) 2–3 (Bureau of Reclamation History Program 1994) ("Stene History").

[4/] I. S. Voorhees, History of the Klamath Project, Oregon-California, From May 1, 1903 to Dec. 31, 1912 4 (Dept. of the Interior, U.S. Reclamation Service, 1913) ("1913 History").

[5/] Id.

[6/] Id. at 8.

[7/] Water Rights on Lower Klamath Lake, 331 Decisions of the Dept. of the Interior 693, 695-96 (June 9, 1932).

[8/] 1913 History at 173–74.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Water Users' Association ready to meet the requirements of the Government."[9/] The water users assisted Reclamation in obtaining land and water rights, and the Association agreed to repay the government for the costs of the Project.[10/]

B. 1917: Copco Convinces Interior to Allow Private Construction of the Link River Dam

As Reclamation continued constructing the Klamath Project in the early 1900s,[11/] Copco began developing its own hydropower resources on the Klamath River in California. By 1915, Copco realized that upstream development of the Klamath Project would eventually result in insufficient water during the summer to generate power at Copco's downstream projects in California.[12/] Copco needed some ability to regulate streamflow in the Klamath River.[13/]

Knowing that Reclamation had contemplated building a dam to regulate the flow from Upper Klamath Lake, Copco inquired as to the timing of the project.[14/] The government responded that although it planned to construct a dam on Upper Klamath Lake in the future, it lacked the funds to do so right away. Copco approached the government with a unique proposal: if the government would grant Copco the right to operate the dam in the future, Copco would finance and construct the dam right away.[15/] Although this proposal deviated significantly from its plans for a federally developed Klamath Project, the government agreed to Copco's plan.

9/ Id. at 20–21.
10/ Exh. No. 2 at 33.
11/ The Clear Lake Dam was completed in 1910, the Lost River Diversion Dam in 1912, and the Lower Lost River Diversion Dam (now Anderson-Rose Diversion Dam) in 1921.
12/ Affidavit, Exh. No. 2 at 13-14; Affidavit, Exh. No. 3 at 22 (Statement of Herman Phleger, Counsel for Copco).
13/ Affidavit, Exh. No. 2 at 34.
14/ Affidavit, Exh. No. 3 at 22.
15/ Id.

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333 SW Taylor, Suite 400
Portland, OR 97204
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Copco and Interior immediately began negotiations to construct what is now the Link River Dam. These negotiations culminated in a 1917 contract (the "Link River Dam Contract") "whereby [Copco] would build the dam, take care of damages about the lake, supply water to the Government project, and regulate the flow of the stream so that the normal flow would go down the river through California and through [Copco's] power house in California."[16/] In addition, in return for the right to operate the dam, Copco agreed to supply power for pumping to irrigators on the Klamath Project at a rate of seven mills per kilowatt hour ("mills").[17/] The government requested a special rate for pumping on the Project because, until that time, the plan had called for federal development of the dam, and the government would have sold the power generated by the Project and used for Project purposes at a special rate. It was unusual for a power company to build and operate a dam on a Reclamation project.[18/] The Link River Dam Contract may in fact have been "the first joint venture between the Department of Interior and a private industry."[19/] As described below, the government's change in plans was not well received in the Upper Klamath River Basin.

C. 1920s – 1930s: Opposition to the Link River Dam Contract

Upper Klamath River Basin water users and Oregon politicians strongly opposed the Link River Dam Contract. The Klamath Irrigation District sent a telegram to the Secretary of the Interior stating that negotiation of the Link River Dam Contract "without consulting wishes of people has aroused much hostility and suspicion."[20/] The Klamath Falls Business Mens'

16/ Id.
17/ Affidavit, Exh. No. 4 at 5.
18/ Stene History at 19.
19/ Affidavit, Exh. No. 2 at 34.
20/ Affidavit, Exh. No. 5.

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Association passed a resolution "that our Senators and representatives in Congress be urgently requested to appropriate the necessary funds to complete the Klamath project as originally planned."[21/]

While the objections to Link River Dam Contract persisted, on July 20, 1920, Copco began constructing the Link River Dam. Oregon Senator George Chamberlain, who had been governor when Oregon passed the legislation ceding its lands to the U.S. for the Project, quickly asked the Secretary of the Interior to halt construction to reconsider the Link River Dam Contract:

> I think I can speak authoritatively when I say to you that when the cession was made . . . by the State of Oregon to the United States it was the purpose solely of the State to make the same to aid in the operations of irrigation and reclamation under the act of Congress approved June 17, 1902.
>
> If the suggestion [had] been made that the waters of the lake were to be used for power purposes or that the Government would ever enter into a contract with any private company or corporation authorizing the construction of a dam and the utilization of the waters of the lake for power purposes or the irrigation lands not coming within the provisions of the reclamation act, the legislature would not have made the cession, and I am sure that I never would have approved the act.[22/]

The Secretary responded by stating that he agreed with Senator Chamberlain in policy:

> With your position on the question of policy involved I am in entire agreement. The United States should have built this dam on its own account, and with its own funds. If the question of entering into this contract were before me as a new matter, I should take that position and, of course, decline to enter into agreement along the lines here involved.[23/]

[21/] Affidavit, Exh. No. 6 at 1.
[22/] Affidavit, Exh. No. 3 at 46.
[23/] Affidavit, Exh. No. 7.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Ultimately, however, the Link River Dam Contract was allowed to stand.

The State of Oregon subsequently petitioned Congress to pass legislation granting the U.S. District Court in Oregon jurisdiction to hear an action to set aside the Link River Dam Contract. Oregon's Attorney General argued that Oregon had ceded its land and water rights to the U.S. in trust for the purpose of developing federal reclamation and hydro projects, and that the U.S. had violated the trust by making "a contract under which it has turned over [the] power privileges . . . to [Copco] for 50 years."[24/] Copco opposed the legislation, arguing that "no beneficial or useful result could ever flow from it," and the State of Oregon's efforts ultimately were unsuccessful.[25/]

D. 1951: Copco's Big Bend License Applications Lead to the Off-Project Agreement

The On-Project and Off-Project Agreements at issue in this proceeding have their genesis in Copco's 1951 applications to construct Project No. 2082, including the Big Bend facility (now called J. C. Boyle), on the Klamath River below Keno.[26/] The State of Oregon, Interior, Reclamation, and nearly every Klamath Basin irrigation district opposed Copco's applications.[27/]

Interior and Reclamation protested on the basis that granting Copco the license would be detrimental not only to "the present and future irrigation of lands within the Klamath Project," but also to "the future development of other irrigable areas in the vicinity of the

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[24/] Affidavit, Exh. No. 3 at 11 (statement of Lawrence A. Liljeqvist).
[25/] Affidavit, Exh. No. 3 at 20.
[26/] Affidavit, Exh. No. 2 at 53.
[27/] Affidavit, Exh. No. 8 at 1.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Klamath Project."[28/] The U.S. was concerned that if Copco were permitted to develop power at this site, the company would not provide low-cost power to Klamath Basin irrigators, and the region's agricultural economy would suffer.[29/] In contrast, if Interior itself developed the dam, the power "would be available for pumping, for financial aid to irrigation, and for sales to customers having preference rights under the reclamation laws."[30/]

Heeding the concerns expressed by the U.S. and other parties, the FPC issued the Project No. 2082 license, but it conditioned its issuance upon Copco securing a renewal of its Link River Dam Contract with Reclamation "so as to make adequate water supplies available for its operation."[31/] The FPC specified that the renewed contract had to cover a time period equivalent to the duration of the license for Project No. 2082 (until 2006) and include "terms and conditions substantially similar to those terms and conditions contained in [the Link River Dam Contract]."[32/] Thus, the FPC specifically required as a condition of the Project No. 2082 license that Copco extend the contract rates for irrigation and pumping power included in the Link River Dam Contract.

Negotiations to renew the Link River Dam Contract commenced. The most active participants in these negotiations were the U.S. (through Interior and Reclamation), the Oregon-California Klamath River Compact Commission, and the Water Users Association.[33/] The Water Users Association insisted that Copco provide contract rates for irrigation and pumping to both Upper Klamath River Basin customers located on Klamath Project land and

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28/ Affidavit, Exh. No. 9 at 1-2.
29/ Id. at 4; see Affidavit, Exh. No. 10 at 50.
30/ Affidavit, Exh. No. 10 at 10.
31/ Affidavit, Exh. No. 12 at 2.
32/ Affidavit, Exh. No. 11 at 5-6.
33/ The Water Users Association presently does business as the Klamath Water Users' Association.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

those off Project land (i.e., "Off-Project Customers").[34/] The Water Users Association argued that the "power rates allowed Districts and persons having contracts with the Bureau should also be allowed those having State water rights as long as the return flow from their lands, if any, would return to the Klamath River above Keno."[35/] The water users had not been given a voice in the original Link River Dam Contract, and subsequent attempts to rescind that agreement had failed. Now, however, the water users had enough leverage to hold up Reclamation's approval of the renewed agreement until the water users reached agreement with Copco on the issue of On- and Off-Project rates.[36/]

E. 1956: Negotiation, Execution, and OPUC Approval of the Off-Project Agreement

The following facts regarding the Off-Project Agreement are uncontroverted: 1) on April 30, 1956, Copco and the Water Users Association executed an Agreement that provides the contract rate for Off-Project Customers; 2) the April 30, 1956 Agreement was approved by the OPUC; 3) Copco or PacifiCorp has provided service to Off-Project Customers pursuant to the April 30, 1956 Agreement since its approval; and 4) the Agreement does not contain an expiration date.[37/] In addition, the Off-Project users pay slightly higher rates for power than the On-Project users. On May 11, 1956, Copco's Vice President and General Manager, J. C. Boyle, testified before the California Public Utilities Commission ("CPUC") that Copco and the Water Users Association had executed the Off-Project Agreement on April 30, 1956, and the Oregon Public Utility Commissioner approved the Agreement on May 2, 1956:

[34/] Affidavit, Exh. No. 12 at 8; Affidavit, Exh. No. 8 at 4, 7.
[35/] Affidavit, Exh. No. 13.
[36/] See Affidavit, Exh. No. 14 at 2.
[37/] Motion at 2, 5; Affidavit of Laura Beane, Exh. No. 2 (identifying the April 30, 1956 Agreement as the "Off-Project Contract" that PacifiCorp seeks to terminate).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
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Telephone: (503) 241-7242

Q. Has the company entered into a similar contract with respect to off-project users located in that part of the Upper Klamath River Basin which is in Oregon?

A. Yes, we have. By an agreement dated April 30, 1956, we entered into a contract with the Klamath Basin Water Users' Protective Association providing for a rate of 7½ mills per kilowatt hour for pumping installations of 10 horsepower or more, subject to a seasonal minimum charge of $111.60 for the first 10 horsepower, and $10.80 per horsepower for all horsepower in excess of 10 horsepower. After the fifth year of continuous use, the minimum charge shall be reduced to one-half of that effective during the first five-year period.

Q. Has the contract relating to off-project users in the Upper Klamath basin in Oregon been approved by the Public Utilities Commissioner of Oregon?

A. Yes, it has, by a letter dated May 4, 1956.[38/]

KOPWU has been unable to locate a copy of the OPUC's letter of approval. Nevertheless, Mr. Boyle's statement and the Commission's subsequent recognition of the Off-Project Agreement in PacifiCorp's rates reflect that the Agreement was approved.[39/]

As described above, the Water Users Association asked Copco to provide a contract rate for both Off-Project Customers and On-Project Customers. The Water Users Association's demand resulted in a standoff: Copco refused to include a contract rate for Off-Project Customers in the renewal of the Link River Dam Contract, and as a result, the Water Users Association objected to the renewal of the contract in the FPC proceeding.[40/] Eventually, Copco and the Water Users Association reached a compromise. Copco agreed to negotiate with

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38/ Affidavit, Exh. No. 15 at 44-45.

39/ See, e.g., Re PacifiCorp, OPUC Docket No. UE 94, Order No. 96-175 at 16-17 (July 10, 1996) (discussing allocation of contract rates that the Klamath customers receive "in exchange for water rights for hydroelectric projects on the Klamath River").

40/ See Affidavit, Exh. No. 8 at 7.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

the Water Users Association a separate "Off-Project" agreement providing power rates for customers not located on project land. In exchange, the Water Users Association agreed to withdraw its protest to the renewal of the Link River Dam Contract, which would allow Copco to secure its license for Big Bend.[41/]

Negotiations for the Off-Project Agreement involved a number of exchanged proposals between Copco and the Water Users Association.[42/] The Water Users Association sent two different letter proposals to Copco during this period, one dated October 28, 1955, and another dated November 3, 1955 (the "November 3, 1955 Letter"). In the November 3, 1955 Letter, the Water Users Association proposed rates and terms of service for Off-Project Customers in exchange for withdrawing its protest to the amendments to the Link River Dam Contract. Copco signed the November 3, 1955 Letter on November 22, 1955, indicating the company's acceptance; nevertheless, the parties subsequently executed the Off-Project Agreement on April 30, 1956, agreeing to new terms.

PacifiCorp claims that the parties intended the Off-Project Agreement to terminate in 2006 based on the proposal in the November 3, 1955 Letter that "after power rates have been established for off-project pumpers and applications have been approved by the Public Utilities Commissions of Oregon and California, no change in power rates for the term of the contract between the Bureau of Reclamation and Copco shall be submitted to the Commission

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41/ See Affidavit, Exh. No. 14 at 2.

42/ Affidavit, Exh. No. 8 at 8. The meaning of the letter proposals sent by the Water Users Association to Copco is discussed in more detail in Section A.2.c of this Response.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

unless filed jointly by Copco and this Association."[43/] The November 3, 1955 Letter is not an "agreement" and does not reflect the intent that PacifiCorp claims. First, the November 3, 1955 Letter reflects that the parties purposefully excluded a definitive termination or expiration provision from the Off-Project Agreement despite previously considering such a provision. Second, the November 3, 1955 Letter proposal was never a valid agreement regarding Off-Project Rates, because the terms of the proposal never took effect. The November 3, 1955 Letter was specifically rejected by the CPUC on August 29, 1956, and there is no evidence that the OPUC ever approved the letter. The terms proposed in the November 3, 1955 Letter have been superceded by the Off-Project Agreement.

PacifiCorp also appears to attach significance to the fact that the November 3, 1955 Letter was presented to the CPUC, and that the CPUC rejected the proposed rate as too low and lasting for too long a period of time.[44/] PacifiCorp's argument only highlights the OPUC's different conclusion regarding the Off-Project Agreement. The OPUC reviewed the Off-Project Agreement and determined that the contract rates and lack of definitive expiration date were appropriate.

PacifiCorp also describes the Off-Project Agreement as a "me too" contract that is "secondary" to the On-Project Agreement.[45/] Given the important role that the Off-Project Agreement played in allowing Copco to secure a license to construct what is now one of PacifiCorp's more important hydroelectric projects, it is hardly appropriate to dismiss the

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[43/] Affidavit, Exh. No. 16 at 2. The October 28, 1955 letter proposed that Off-Project rates would apply "for the duration of the contract between the Department of Interior and The California Oregon Power Company."

[44/] Motion at 19.

[45/] Id. at 18.

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333 SW Taylor, Suite 400
Portland, OR 97204
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Agreement as being "secondary" in nature.[46/] The Off-Project Agreement is an entirely separate contract from the On-Project Agreement. It was negotiated separately from the On-Project Agreement and it creates distinct legal rights. The plain language of the Off-Project Agreement states that the contract rate was provided:

> In consideration for an increased flow of water caused by the development of lands for agricultural purposes within the Upper Klamath River Basin, which increased flow will be used for the generation of electric power in Copco's proposed dam improvements on the Klamath River below Keno.[47/]

In addition, the CPUC transcript that PacifiCorp attached to its Motion contradicts its claim that the Off-Project rate is higher than the On-Project rate because it was merely a "me too" agreement. The Water Users Association's President testified that the slightly higher Off-Project rates were justified because, unlike the On-Project irrigators, the Off-Project irrigators did not have to pay costs to Reclamation in relation to the Klamath Project.[48/]

The history also shows that aside from obtaining its FPC license, Copco had other reasons to support the Off-Project Agreement. Copco was willing to provide contract rates in the entire Klamath Basin because "[i]t is a different type of territory than any other served by [Copco] in Northern California and also in Oregon."[49/] Copco acknowledged that the Upper Klamath Basin was uniquely suited to the exchange of benefits embodied in the Off-Project Agreement because of the "increased drainage pumping of water flow into the Klamath River which is of beneficial use to the company in its hydroelectric plant on that river."[50/] The Off-

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46/ See id.
47/ Affidavit, Exh. No. 1.
48/ Affidavit, Exh. No. 15 at 70 (testimony of Frank Z. Howard).
49/ Affidavit, Exh. No. 15 at 28 (testimony of J. C. Boyle).
50/ Affidavit, Exh. No. 15 at 135 (statement of Robert N. Lowry).

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333 SW Taylor, Suite 400
Portland, OR 97204
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Project Agreement also was good for Copco's bottom line. J. C. Boyle stated to the Water Users Association's Executive Committee that "it would without a doubt be a good thing financially for Copco if a favorable power rate could be granted" to Off-Project lands and that the additional irrigation would "make it better for Copco from a power use standpoint."[51/]

F. 2005: PacifiCorp's Request to Terminate the Off-Project Agreement

In 1976, J. C. Boyle wrote that irrigation and power in the Klamath Basin had "developed parallel to and complimented each other."[52/] Now, however, PacifiCorp requests that the Commission authorize the Company to retain the benefits of the hydropower development in the Upper Klamath River Basin, but eliminate the irrigation and pumping contract rates in the region. PacifiCorp has declared that it will no longer honor its obligations in the Off-Project Agreement after 2006, and that the Company will move Off-Project Customers to the Company's standard irrigation tariffs.[53/] According to PacifiCorp's calculation, moving Off-Project Customers to standard irrigation tariffs will raise Off-Project Customers' rates by 1176%.[54/] This unprecedented rate increase would devastate Off-Project irrigation, and PacifiCorp has not proposed any measure to mitigate the impact of the proposed rate increase on customers or the economy of the Upper Klamath River Basin.[55/] PacifiCorp's plans to move

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51/ Affidavit, Exh. No. 18.

52/ Affidavit, Exh. No. 2 at 57.

53/ Re PacifiCorp, OPUC Docket No. UE 170, PPL/100, Furman/13 (Nov. 12, 2004).

54/ Affidavit, Exh. No. 19.

55/ In UE 116, PacifiCorp proposed a rate mitigation adjustment to ensure that no customer class would experience a rate increase of more than fifteen percent. Despite the Commission's conclusion in that docket that it did "not find that it is in the public interest to impose greater than 15 percent price increases," PacifiCorp now requests a rate increase of more than one thousand percent for Off-Project Customers. Re PacifiCorp, OPUC Docket No. UE 116, Order No. 01-787 at 50, 52 (Sept. 7, 2001).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Off-Project Customers to standard tariffs and its request to terminate the Off-Project Agreement also constitutes breach of contract.

The Upper Klamath Basin is a unique agricultural region because it "remains one of the few regions in the United States where families rather than agribusiness corporations run the farms."[56/] But as PacifiCorp's consultants have pointed out, if the Company is successful in this litigation, it will be "in a position to wield great power over the lives of these Upper Klamath Basin irrigators as it sets the power rate for the region."[57/] If the OPUC permits PacifiCorp to terminate the Off-Project Agreement and place Off-Project Customers on standard irrigation tariffs, a way of life that has been enjoyed for over 100 years will dramatically change, an economy will be devastated, and PacifiCorp will be allowed to claim the full benefits of the water in the Klamath Basin while depriving Off-Project Customers of any reciprocal benefit. Such a result should not occur, and it cannot legally occur in the context of a motion for summary disposition.

LEGAL STANDARD FOR SUMMARY DISPOSITION

Summary judgment, or summary disposition as it sometimes is called in OPUC proceedings, is designed to determine whether there is any genuine issue of material fact to be resolved in a trial or hearing.[58/] In resolving requests for summary disposition, the Commission has applied the summary judgment standard in ORCP 47, which provides:

> The court shall enter judgment for the moving party if the pleadings, depositions, affidavits, declarations and admissions on

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[56/] Stephen Most, Nature and History in the Klamath Basin, Putting Nature to Work: Reclaiming the Upper Basin (Oregon History Project 2003).

[57/] Affidavit, Exh. No. 20 at 34.

[58/] Klimek v. Continental Ins., 57 Or. App. 435, 441 (1982); Re PacifiCorp, OPUC Docket No. UE 111, Order No. 00-090 at 5 (Feb. 14, 2000).

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

> file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.[59/]

Under this standard, the moving party has the burden to demonstrate the absence of a genuine issue as to any material fact when the record is viewed in the light most favorable to the opposing party.[60/] It is insufficient for the moving party to assert that the opposing party lacks evidence to support its allegations—the moving party must affirmatively disprove those allegations.[61/] If a moving party's own motion creates a genuine issue of material fact, the non-moving party has no burden to provide opposing evidence.[62/]

A "material" fact, for the purposes of summary disposition, is a fact that is relevant to the legal right of the party moving for summary judgment.[63/] A "genuine" issue is one that is "triable," which means an issue about which there is sufficient evidence to allow the finder of fact to decide the matter.[64/]

The Commission must evaluate PacifiCorp's request to terminate the Off-Project Agreement according to these standards. Both PacifiCorp and the Commission have recognized in previous proceedings that "the standards for summary judgment are not easily met."[65/] The

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[59/] ORCP 47C; Rio Communications, Inc. v. U.S. West Communications, Inc., OPUC Docket No. UC 410, Order No. 99-611 at 4-5 (Oct. 5, 1999) (quoting previous version of ORCP 47C). ORCP 47 was amended effective January 1, 2004, and the language quoted above reflects the most recent version of the rule.

[60/] Beachcraft Marine Corp. v. Koster, 116 Or. App. 133, 136 (1992).

[61/] Tozer v. City of Eugene, 115 Or. App. 464, 466 (1992).

[62/] Henderson v. Hercules, Inc., 57 Or. App. 791, 795 (1982).

[63/] See, e.g., Garrison v. Pac. Northwest Bell, 45 Or. App. 523, 533-34 (1980).

[64/] Jones v. Gen. Motors Corp., 325 Or. 404, 413 (1997).

[65/] Re PacifiCorp, OPUC Docket No. UE 111, Order No. 00-090 at 5 (Feb. 14, 2000).

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Commission may grant summary disposition terminating the Off-Project Agreement only if: 1) PacifiCorp has demonstrated that no genuine issue of material fact exists; 2) PacifiCorp has affirmatively disproven KOPWU's allegations; and 3) the Commission is certain that no objectively reasonable factfinder could find that termination is unwarranted. In considering PacifiCorp's claims "the Commission must view the evidence and the record, including all reasonable inferences that can be drawn from the record and the evidence, in the light most favorable to [KOPWU]."[66/]

ARGUMENT

PacifiCorp has not demonstrated that it is entitled to summary disposition. Although the Company recognizes in its Motion that summary disposition is appropriate only when no genuine issue of material fact exists, the Motion is self-defeating because it simultaneously raises a genuine issue of material fact. Specifically, PacifiCorp alleges that the Water Users Association and Copco "intended the [Off-Project] Contract to expire at the same time as the [On-Project] Contract[,]" despite the fact that the Agreement bears no such limitation on it face.[67/] The "intent" of the parties regarding the terms of a contract is an issue of fact that cannot be resolved on summary judgment.[68/] This is both a "genuine" issue and a "material" fact in this case. It is a genuine issue because the Off-Project Agreement itself, along with the facts and circumstances surrounding execution of the Agreement, provide sufficient evidence to allow the finder of fact to decide the issue. It is a material fact because the intent of the parties with

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[66/] PGE v. Oregon Energy Co. and St. Helens Co-Gen, OPUC Docket No. UC 315, Order No. 98-238 at 1-2 (June 12, 1998).

[67/] Motion at 17.

[68/] See Oregon Sch. Employees Ass'n v. Rainier Sch. Dist. No. 13, 311 Or. 188, 194 (1991) (the trier of fact must ascertain the intent of the parties if a contract is ambiguous).

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

respect to termination of the Off-Project Agreement is relevant to PacifiCorp's legal right to terminate the Agreement.

In addition, PacifiCorp requests that the Commission terminate the Agreement based on application of special contract principles that are intended to apply in a different context and to which Off-Project Customers have never been subject in the past. Termination or alteration of the Off-Project Agreement is unwarranted; but even if the Commission believes that PacifiCorp's request has merit, the Company has not addressed the Commission's standard for altering contract rates or the Commission's policy of upholding negotiated agreements. Finally, PacifiCorp urges the Commission to adopt an interpretation of the Klamath River Basin Compact that essentially would render the language in the Compact meaningless. PacifiCorp's interpretation is unreasonable and conflicts with the rules of statutory construction. All of these arguments raise genuine issues of material fact that cannot be resolved on summary disposition. Furthermore, the Company has not demonstrated that it is entitled to summary disposition as a matter of law on these issues. The Motion should be denied.

A. PacifiCorp Has Not Demonstrated as a Matter of Law that the Agreement Terminates in 2006

In its Motion for Summary Disposition, PacifiCorp asks the Commission to terminate the Off-Project Agreement, claiming that the "law and circumstances have changed."[69/] The Commission cannot, however, unilaterally terminate the Off-Project Agreement. Regardless of whether circumstances have changed since the Agreement was entered into, the Agreement remains in effect unless and until a court of law declares that the parties are discharged from

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69/ PacifiCorp Motion at 1, 17.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

their obligations to perform under the contract.[70/] Indeed, the Commission has stated in previous proceedings that "[t]he Commission's policy has been to uphold agreements negotiated by parties at arm's length."[71/] PacifiCorp asks the Commission to terminate the Agreement by supplying a "reasonable" termination date, but established principles of Oregon law do not allow terms to be added to a valid and binding contract. Instead, if the Commission is to consider the contract issues in this case, its task is to interpret the contract to determine whether it is ambiguous as to duration.[72/] The plain language of the Off-Project Agreement unambiguously provides that the Agreement continues in duration as long as water from Off-Project land flows to the Klamath River above Keno and PacifiCorp generates power at its hydro project below Keno.

In addition, PacifiCorp's request to terminate the Off-Project Agreement, along with the Company's statement that it plans to move Klamath irrigation customers to standard tariffs in 2006, constitutes a breach of contract.

1. A Court Should Determine PacifiCorp's and KOPWU's Contractual Rights

As an initial matter, the authority to determine KOPWU's and PacifiCorp's rights under the Off-Project Agreement lies with the courts. The Commission has previously stated that the question of whether a utility can change a contract rate is a question for the courts, not

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[70/] See Portland Section of Council of Jewish Women v. Sisters of Charity, 266 Or. 448, 457 (1973) ("[F]acts existing when a bargain is made or occurring thereafter making performance of a promise more difficult or expensive than the parties anticipate, do not prevent a duty from arising or discharge a duty that has arisen.").

[71/] Wah Chang v. PacifiCorp, OPUC Docket No. UM 1002, Order No. 01-873 at 6 (Oct. 15, 2001).

[72/] Yogman v. Parrott, 325 Or. 358, 361 (1997).

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

the Commission.[73/] Moreover, the Commission has previously concluded that it has no particular expertise or authority to resolve a contract-related dispute simply because a regulated utility is involved.[74/] These principles are particularly applicable here because the Off-Project Agreement is based on the historical series of trade-offs described above.

Described below is the three-step analysis that the Oregon courts follow to interpret a contract. If the Commission is inclined to interpret the Off-Project Agreement rather than leaving the entire analysis of the Agreement to a court, the Commission's analysis should start and end at the first step—determining whether the Agreement is unambiguous. Anything beyond that first level of analysis: 1) cannot be resolved on summary disposition; and 2) involves determining the parties' intent and contractual rights, which goes beyond the Commission's expertise and authority. As a result, unless the Commission finds the Off-Project Agreement to be unambiguous in that it does not terminate in 2006, the Commission should abstain from resolving the issues related to the Agreement pending an interpretation and determination of the parties' rights by the Oregon courts.

2. The Off-Project Agreement Is Unambiguous and Must Be Enforced According to its Terms

The only way the Commission can resolve issues regarding the interpretation of the Off-Project Agreement is if the Commission finds the contract to be unambiguous. PacifiCorp's interpretation of the Off-Project Agreement fails under the three-step analysis that Oregon courts apply to interpret contracts. First, the Off-Project Agreement is unambiguous.

73/ Re Pacific Power & Light Co., OPUC Docket No. UF 3074, Order No. 74-658 at 30 (Sept. 30, 1974) ("Order No. 74-658") ("First, whether or not PacifiCorp can change contract rates … is a question for the courts to decide.").

74/ Intelli-Com, Inc. v. GTE Northwest, Inc., OPUC Docket No. UC 255, Order No. 95-288 (Mar. 17, 1995).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

The Agreement lacks a definitive termination date and continues in effect as long as water from Off-Project land flows to the Klamath River above Keno and PacifiCorp uses its hydroelectric facilities below Keno to generate power. It would be patently unreasonable for the Commission to conclude at the first level of contractual analysis that the Off-Project Agreement unambiguously provides for termination on April 16, 2006. The plain language contradicts that conclusion. Furthermore, the Commission is required on summary disposition to view the record in the light most favorable to KOPWU.

Second, if the Commission finds that the Agreement is ambiguous, PacifiCorp's interpretation fails at the second level as well because the Company's evidence that the parties "intended" the Agreement to terminate in 2006 is inconclusive and does not overcome the plain language of the Agreement. In any event, even if the Commission decides to review the Off-Project Agreement and finds it ambiguous, it still must deny PacifiCorp's Motion because the meaning of an ambiguous contract is a genuine issue of material fact that cannot be decided at the summary judgment level.[75/] There is no need to consider the third step of the analysis because PacifiCorp's arguments fail at the first two steps. In addition, the third step of the analysis goes well beyond Summary Disposition.

a. Oregon Law Requires a Three-Step Analysis to Interpret the Off-Project Agreement

To interpret the language of a contract, Oregon courts engage in the three-step

[75/] W. Sur. Co. v. FDS Diving Constr. and Salvage Co., 193 Or. App. 1, 7 (2004).

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

analysis described in Yogman v. Parrott.[76/] First, the court considers whether the contract language is unambiguous. To do so, "the court examines the text of the disputed provision, in the context of the document as a whole."[77/] If the court finds that an ambiguity exists, it then examines extrinsic evidence of the contracting parties' intent.[78/] If this still does not resolve the ambiguity, the court must turn to "appropriate maxims of construction."[79/]

While the question of whether a contract is ambiguous is one of law, the meaning of an ambiguous contract is a question of fact.[80/] Therefore, a court can only resolve an issue of contractual interpretation at the summary judgment level if it finds that the contract is unambiguous—that is, if it resolves the issue at the first level of the Yogman analysis.[81/] If the contract is ambiguous, summary judgment is inappropriate.[82/]

Under these circumstances, to resolve the issues regarding the Off-Project Agreement at the summary disposition stage, the only reasonable conclusion is that the Agreement unambiguously provides that it does not terminate on April 16, 2006. It would be unreasonable to conclude that the Agreement unambiguously provides that the Agreement terminates on April 16, 2006, especially viewing the record in the light most favorable to KOPWU.

[76/] Yogman, 325 Or. at 361. Although the Yogman analysis is widely accepted as the framework to apply in interpreting contracts in Oregon, it typically has been applied to interpret a disputed contract provision. KOPWU believes that this analysis also applies in the context of a dispute over the meaning of a contract as a whole.

[77/] Id.

[78/] Id. at 363.

[79/] Id. at 364.

[80/] Biomass One v. S-P Constr., 120 Or. App. 194, 200 (1993).

[81/] W. Sur., 193 Or. App. at 6.

[82/] Biomass One, 120 Or. App. at 200.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

b. The Off-Project Agreement Unambiguously Provides that It Continues as Long as the Contingencies in the Agreement Are Met

The Commission's first step in interpreting the Off-Project Agreement is to determine whether the Agreement is ambiguous as to its duration.[83/] To do this, the Commission must examine the four corners of the contract.[84/] An ambiguous contract is one that "can reasonably be given more than one plausible interpretation."[85/] On the other hand, if the meaning of the contract "is so clear as to preclude doubt by a reasonable person," the contract is unambiguous.[86/] The mere fact that the parties disagree about a contract's interpretation does not make the contract ambiguous.[87/] If the court finds that the contract is unambiguous, it must enforce the contract according to its terms.[88/]

The Off-Project Agreement is unambiguous in that it contains no termination date. The Agreement states the date upon which it became effective, and it recites the parties' promises and the consideration. It provides that in exchange for an increased flow of water caused by development of lands for agricultural purposes within the Upper Klamath Basin, PacifiCorp is to provide Off-Project users with the power rates for agricultural pumping specified in the Agreement.[89/] This provision provides for the duration of the Agreement rather than the external termination date that PacifiCorp unlawfully seeks to impose.

83/ Yogman, 325 Or. at 361.

84/ The Yogman court instructed that courts are limited to examining the four corners of the contract when determining whether a contract is ambiguous. Id. However, there remains some uncertainty as to whether courts may go beyond the four corners of the contract at this stage. See Portland Fire Fighters Ass'n v. City of Portland, 181 Or. App. 85, 94 n.6 (2002).

85/ Coats v. State, 188 Or. App. 147, 150 (2003).

86/ W. Sur., 193 Or. App. at 6.

87/ Biomass One, 120 Or. App. at 200.

88/ Coats, 188 Or. App. at 150–51.

89/ Affidavit, Exh. No. 1.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

i. PacifiCorp Inaccurately Describes the Law Regarding Interpretation of Agreements Without Termination Provisions

In its Motion, PacifiCorp misstates the applicable law in two important respects. First, PacifiCorp cites Lund v. Arbonne Int'l, Inc., 132 Or. App. 87 (1997) for the proposition that "[u]nder Oregon law, a contract that is indefinite as to its duration expires after a reasonable term."[90/] This is both an inaccurate characterization of the holding in Lund and an incorrect description of Oregon law relating to contracts that lack termination dates. The law in Oregon is not that contracts of indefinite duration expire after a reasonable term.

When presented with contracts that lack a definitive expiration date, Oregon courts have made a distinction between two types of contracts: contracts for indefinite periods of time and perpetual contracts. Contracts of indefinite duration are "at will" contracts and tend to involve employment contracts or situations in which contracts of specific duration have expired, but the parties have continued to perform under the terms of the contract.[91/] This type of contract is, as the court in Lund held, terminable at will by either party when reasonable notice is given.[92/] Perpetual contracts, on the other hand, are enforced according to their terms.[93/] While perpetual contracts do not necessarily continue "in perpetuity," they can be terminated only according to their terms or for cause under standard contract law analysis.[94/]

90/ Motion at 17.

91/ E.g., Lund v. Arbonne Int'l, Inc., 132 Or. App. 87, 90 (1994); Anderson v. Waco Scaffold & Equip. Co., 259 Or. 100, 105 (1971).

92/ Lund, 132 Or. App. at 90.

93/ Gabrilis, Inc. v. Dahl, 154 Or. App. 388, 394 (1997).

94/ See id. at 394-95.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

PacifiCorp also misstates the applicable law by applying Section 204 of the Restatement (Second) of Contracts to the facts of this case.[95/] Section 204 applies when the parties "have not agreed" to an essential term of a contract.[96/] The rule anticipates situations in which the parties "entirely fail to foresee the situation which later arises and gives rise to a dispute," or in which they "have expectations but fail to manifest them, either because the expectation rests on an assumption which is unconscious or only partly conscious, or because the situation seems to be unimportant or unlikely, or because discussion of it might be unpleasant or might produce delay or impasse."[97/] Under such circumstances, a court may supply a reasonable term by considering "the meaning of the words used and the probability that a particular term would have been used *if the question had been raised*."[98/] Indeed, Oregon courts have applied the doctrine of supplying a reasonable term exclusively in cases in which the text of a contract fails to address a particular factual circumstance that the parties did not anticipate would arise.[99/]

The parties to the Off-Project Agreement did not fail to agree upon the Agreement's duration. Even PacifiCorp does not seem to seriously argue that the parties failed to agree on this matter—its argument that the parties intended the Agreement to terminate concurrent with the On-Project Agreement implies that the parties had come to an agreement on the issue.[100/] At the very least, PacifiCorp concedes that the parties raised the question of

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95/ Motion at 17.

96/ Restatement (Second) of Contracts § 204 (1981).

97/ Id. at comment b.

98/ Id. at comment d (emphasis added).

99/ Without citing the Restatement, Oregon courts have adopted a similar approach "of supplying a reasonable term to fill a contractual gap when the equitable remedy of specific performance is sought." Harrisburg Educ. Ass'n v. Harrisburg Sch. Dist. No. 7, 186 Or. App. 335, 346 (2003). This approach also would not apply in the context of this case.

100/ See Motion at 17-18.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

duration.[101/] The parties to the Off-Project Agreement were well aware that Copco's FPC license and its contract with the On-Project users would expire in 2006. This is not a situation in which the parties failed to agree on a term because they did not anticipate subsequent factual circumstances, and it would be inappropriate to apply Section 204 of the Restatement to the facts of this case.

ii. Under Oregon Law Relating to Contracts that Lack Termination Dates, the Off-Project Agreement Is a "Perpetual" Contract

The Off-Project Agreement is similar to the agreements at issue in Gabrilis v. Dahl.[102/] That case involved country club membership agreements that contained no express language indicating when the agreements were to terminate. The country club owner had unilaterally terminated certain members' membership agreements, and when the members continued to use the country club facilities, the owner brought an action in trespass against them. The central issue in the case was whether the agreements were of indefinite duration and therefore terminable at will or perpetual and therefore enforceable only according to their terms.

In Gabrilis, the country club owner argued, citing the Lund case relied on by PacifiCorp, that "because the membership agreements are silent as to duration, they are terminable at will."[103/] The Court of Appeals disagreed:

> Plaintiff's reliance on that general rule is misplaced. It is true that if there is nothing in the nature or language of a contract to indicate that the contract is perpetual, courts will interpret the contract to be

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[101/] See id.

[102/] While Gabrilis does not explicitly state that it follows the Yogman analysis, it was decided after Yogman and appears to resolve the issue of contract duration at the first level of the Yogman analysis. The court examined only the four corners of the agreements at issue to determine that the agreements continued as long as contingencies contained in the agreements were satisfied.

[103/] Gabrilis, 154 Or. App. at 394.

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333 SW Taylor, Suite 400
Portland, OR 97204
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> terminable at will on reasonable notice. Nevertheless, where provided for, perpetual agreements will be enforced according to their terms.[104/]

The court found that the agreements contained "a number of express provisions that, taken together, lead us to conclude that the memberships in the country club were intended to be perpetual, in force so long as the members continued to pay their dues and to abide by the club's rules."[105/] One such provision required defendants to pay a substantial nonrefundable initiation fee. Because the fee was nonrefundable, the court concluded that it was meant to "secure more than a mere license that is revocable at any time."[106/]

Similarly, the Off-Project Agreement has the attributes of a "perpetual" contract rather than one that is terminable at will. First, the Off-Project Agreement resulted from extensive negotiations that revealed how crucial the terms of the Agreement were to each party. It is unreasonable to conclude that such negotiations would result in a contract that could be unilaterally terminated at any time. Second, the Agreement contemplated that Off-Project Customers would use Off-Project lands for agricultural purposes, which would create an increased flow of water in the Klamath River that benefited the power generation of Copco on the Klamath River. The Off-Project Agreement therefore contemplated that Off-Project Customers and Copco would make significant investments based on the Agreement, investments that are much more significant than the nonrefundable membership fee that the court found to be significant in Gabrilis.[107/]

[104/] Id.
[105/] Id.
[106/] Id. at 394-95.
[107/] Id.

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Just as the agreements in Gabrilis continued as long as the members fulfilled certain duties, the Off-Project Agreement continues as long as the Off-Project Customers use Off-Project land for agricultural purposes, providing water the PacifiCorp's hydro facilities, and the Company uses its "dam improvements on the Klamath River below Keno" (i.e., Project No. 2082, including the J. C. Boyle facility) to generate hydroelectric power. Under no circumstances should the Commission terminate the Agreement or alter the contract rates as long as PacifiCorp holds its current FERC license (or an annual license pending license renewal) for Project No. 2082.

c. If the Commission Finds that the Agreement Is Ambiguous, It Must Deny PacifiCorp's Motion

If the Commission decides to review the Off-Project Agreement and finds that it is ambiguous as to duration, it must deny PacifiCorp's Motion. The interpretation of an ambiguous contract presents a question of fact, and it is therefore improper to address that issue at the summary judgment stage.[108/] In this proceeding, PacifiCorp raised the issue of the parties' intent with respect to termination of the Agreement in its Motion and claims that the evidence "shows that the parties intended" the Off-Project Agreement to terminate at the same time as the On-Project Agreement.[109/] The parties' intent as to the duration of the Off-Project Agreement is a genuine issue of material fact in this case that cannot be resolved on summary judgment.[110/] If the Commission intends to resolve the issue of the parties' intent in executing the Off-Project Agreement, additional proceedings will be necessary. Although it is improper to decide issues of

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[108/] W. Sur., 193 Or. App. at 6.
[109/] Motion at 17.
[110/] See Biomass One, 120 Or. App. at 200.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

contractual intent at the summary disposition stage and a state court is the more appropriate forum in which to resolve this issue, it is necessary for KOPWU to address the arguments in PacifiCorp's Motion to correct certain statements made by the Company.[111/]

The evidence—including the evidence that PacifiCorp points to—does not demonstrate what PacifiCorp claims it does. The evidence reveals a series of negotiations that began with a proposal that the length of the Off-Project Agreement would mirror that of the On-Project Agreement, and concluded with an Agreement that dos not link the duration to the On-Project Agreement. In an October 28, 1955 letter, it was proposed that the contract rate would apply "for the duration of the contract between the Department of Interior and the California Oregon Power Company."[112/] After further negotiations, the Water Users Association submitted the November 3, 1955 Letter, proposing that "after power rates have been established for off-project pumpers and applications have been approved by the Public Utilities Commissions of Oregon and California, *no change in power rates for the term of the contract between the Bureau of Reclamation and Copco shall be submitted* to the Commission unless filed jointly by Copco and this Association."[113/]

First, while PacifiCorp relies on these letters as evidence that the Off-Project Agreement was intended to terminate, PacifiCorp ignores the fact that the two proposals are not consistent with each other. Second, the November 3, 1955 Letter did not, as PacifiCorp claims, state that the term of the Off-Project Agreement would be equivalent to the On-Project

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111/ W. Sur., 193 Or. App. at 6.
112/ Affidavit, Exh. No. 17 at 2.
113/ Affidavit, Exh. No. 16 at 2 (emphasis added).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Agreement.[114/] Nothing in the proposal provided that the Off-Project Agreement would automatically terminate when the On-Project Agreement expired. Instead, it provided that the term of the Off-Project Agreement would be indefinite in nature, but that the parties could jointly seek to change the Off-Project rates during the term of the On-Project Agreement. The November 3, 1955 Letter is silent as to whether the rates may be altered after the On-Project Agreement expires.

The Off-Project Agreement approved by the OPUC undermines PacifiCorp's arguments in a number of ways. No mention was made of the On-Project Agreement in the Off-Project Agreement, and no termination date was provided. This is the best evidence that the parties purposefully excluded from the Off-Project Agreement the proposed term for the Off-Project rate in the November 3, 1955 Letter.[115/] Indeed, the progression of the negotiations seen through the October 28, 1955 letter, the November 3, 1955 Letter, and execution of the Off-Project Agreement is that the parties moved away from a definitive termination provision and from tying the Agreement to the On-Project Contract.

In addition, the terms of the November 3, 1995 Letter never took effect because they were never approved by the OPUC or CPUC. To the extent that the terms in the November 3, 1955 Letter ever had any legal significance, the Off-Project Agreement supercedes those terms. Finally, the Off-Project Agreement could be construed as a "jointly filed" proposal to alter the contract rate, which is entirely consistent with the terms proposed in the November 3, 1955 Letter. Under these circumstances, that "jointly filed" proposal would replace the terms

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[114/] See Motion at 17.

[115/] See Royal Indem. Co. v. John F. Cause Lumber Co., 245 F. Supp. 707, 711 (D. Or. 1965) ("Words deleted from a contract may be the strongest evidence of the intentions of the parties.").

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

proposed in the November 3, 1955 Letter with a contract rate that continues as long as the Off-Project Agreement remains in effect.

It is not surprising that the Off-Project Agreement excluded express terms relating it to the On-Project Agreement, given Copco's position on the relation of the two agreements. Throughout the negotiations, Copco made clear that it wanted to keep the two agreements entirely separate.[116/] Now, 50 years later, it appears as if it would be more convenient for PacifiCorp if its predecessor had in fact linked the On- and Off-Project Agreements. The Commission's task, however, is not to determine what is convenient for PacifiCorp or even what it believes is reasonable under the circumstances today. If the Commission decides to interpret the Off-Project Agreement, it must do so in accordance with established principles of Oregon contract law.[117/]

This examination of the four corners of the Off-Project Agreement and of the negotiations leading up to the Agreement demonstrates that the Agreement is a contract that is perpetual, remaining in force so long as water flows from Off-Project land to the Klamath River above Keno and PacifiCorp is using its FERC Project No. 2082 facilities to generate power. Therefore, the Commission should deny PacifiCorp's Motion and refuse the Company's request to terminate the Agreement.

116/ Affidavit, Exh. No. 8 at 7 (describing the contract with Off-Project users as "a matter entirely beyond the scope of the Link River dam contract.").

117/ KOPWU believes, as stated earlier, that the Commission should defer to the courts regarding interpretation of the Off-Project Agreement, if the Commission finds the Off-Project Agreement ambiguous. See Reedsport v. Hubbard, 202 Or. 370, 385–86 (1954) ("The contracts of parties sui juris are solemn undertakings, and in the absence of any recognized ground for denying enforcement, they must be enforced strictly according to their terms. It is not the province of the court to rewrite a contract for the purpose of accomplishing that which, in the court's opinion, might appear proper.").

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

3. PacifiCorp Has Breached its Agreement With the Off-Project Customers By Requesting that the Agreement Be Terminated

The Off-Project Agreement is a valid and binding contract, and the plain language of that Agreement does not provide that it terminates in 2006. PacifiCorp cannot unilaterally terminate the Off-Project Agreement and impose different terms upon Off-Project Customers. By requesting to do so, PacifiCorp has breached its obligation to provide service to its Off-Project Customers pursuant to the terms of the Off-Project Agreement. Depending on whether the outcome of this proceeding and the proceedings in Docket No. UE 170 results in an unprecedented rate increase for Off-Project Customers, it may be necessary for KOPWU to pursue all available remedies for PacifiCorp's breach of contract in state court.

A breach of contract is the nonperformance of a duty under the contract.[118/] In testimony in OPUC Docket No. UE 170, PacifiCorp's Senior Vice President of Regulation and External Affairs stated that the Company will move the Off-Project Customers to standard tariff rates concurrent with the expiration of the On-Project Agreement in 2006.[119/] In addition, PacifiCorp has filed revised tariff sheets in Docket No. UE 170 that bear an effective date of December 12, 2004, including a revised Schedule 41 (Agricultural Pumping Service) that includes prices reflecting service to Off-Project Customers under that schedule.[120/] The only reason that PacifiCorp's revised Schedule 41 and the prices that reflect moving Off-Project

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[118/] Kantor v. Boise Cascade Corp., 75 Or. App. 698, 703 (1985).
[119/] Docket No. UE 170, PPL/100, Furman/13.
[120/] Docket No. UE 170, PPL/1202, Griffith/1.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Customers to that Schedule did not take effect as of December 12, 2004, is because the Commission suspended the tariff sheets for investigation.[121/]

In this Docket, PacifiCorp requests "a Commission order terminating the Off-Project Contract . . . on April 16, 2006."[122/] PacifiCorp's request in this Docket, along with the filing of revised tariff sheets that provide for service to Off-Project Customers under Schedule 41, is a breach of the Company's obligation to provide electric service to Off-Project Customers in accordance with the terms of the Off-Project Agreement while the Agreement is in effect. At the very least, PacifiCorp has repudiated its obligations under the Off-Project Agreement by requesting that the Commission terminate the Agreement and filing revised tariffs to move Off-Project Customers to Schedule 41.[123/]

PacifiCorp is obligated to provide electric power to Off-Project Customers at the rates specified in the Off-Project Agreement: 1) after the December 12, 2004 effective date in the Company's revised tariffs; 2) after September 12, 2005, the date on which the suspension period will end; and 3) after April 16, 2006, the expiration date of the On-Project Agreement. The Company's proposal to change the terms of service to Off-Project Customers is a breach of the Off-Project Agreement and the Commission should not alter the Off-Project rate until the parties' rights have been determined.

121/ Re PacifiCorp, OPUC Docket No. UE 170, Order No. 04-703 (Dec. 8, 2004). Under ORS §§ 757.210-.215, tariff filings take effect by operation of law unless suspended by the Commission.

122/ Motion at 2.

123/ See Mohr v. Lear, 239 Or. 41, 49 (1964).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

B. Summary Disposition Is Improper Because Alteration of the Off-Project Rate Requires Resolution of Genuine Issues of Material Fact

PacifiCorp has two primary arguments as to why the rates in the Off-Project Agreement should be terminated: 1) the Off-Project Agreement is a traditional special contract that does not meet the Commission's standards for new special contracts; and 2) the rates in the Off-Project Agreement are not just and reasonable. Both PacifiCorp's tariffs and the Commission's rules reflect the fact that the Off-Project Agreement is not a conventional special contract, and the Agreement certainly is not new. It is inappropriate to judge the Off-Project Agreement by standards that are intended to apply in a different context and that have never been applied to the Agreement in the past. The approved contract rate in the Off-Project Agreement should remain in effect until the Agreement terminates by itself or a court terminates the Agreement. If the Commission intends to terminate or modify the contract rate in the Off-Project Agreement, application of the Commission's policies and standards for such action involves genuine issues of material fact that cannot be resolved on summary disposition.

1. PacifiCorp Has Not Demonstrated ss a Matter of Law that the Off-Project Agreement Should be Evaluated According to the Standards for New Special Contracts

PacifiCorp argues that the Commission should terminate the Off-Project Agreement because the Agreement does not meet the Commission's standards for new special contracts executed due to price competition or service alternatives.[124/] PacifiCorp's argument ignores two major points. First, the Off-Project Agreement is not a new special contract. The Agreement was approved by the Commission in 1956 and has been in effect since that time.

[124/] Motion at 9.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Second, both the OPUC rules and PacifiCorp's tariffs reflect that the Off-Project Agreement has never been considered a conventional special contract. Although the Off-Project Agreement includes a contract rate under which PacifiCorp provides service to Off-Project Customers, it was not executed due to price competition or service alternatives, which is the assumption upon which the conventional special contract standards and OPUC rules are based. In contrast, the Off-Project Agreement was justified based on the benefit that the water users provide to PacifiCorp's hydroelectric facilities.

a. The Off-Project Agreement Is Not Based on Price Competition or Service Alternatives

PacifiCorp's discussion of the Off-Project Agreement relies on a characterization of the Agreement as a "special contract" as defined in the OPUC's rules and discussed by the Commission in Order No. 87-402.[125/] Application of conventional special contract standards to the Off-Project Agreement ignores both the historic significance of the Agreement and the fact that the Commission has never judged the Agreement by those standards in the past. The Commission has described the typical special contract as follows: "[s]pecial contracts can be used to offer a discount to a large customer that has energy alternatives and might reduce or discontinue service from the utility company if it must continue to pay rates established in the applicable tariff schedule."[126/] OAR § 860-038-0005(60) defines a "special contract" as "a rate agreement that is justified primarily by price competition or service alternatives available to a

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125/ Re Investigation into Incentive Rates for Electric Service, OPUC Docket Nos. UG 23, UE 50, Order No. 87-402 (Mar. 31, 1987).

126/ OPUC Docket No. UM 1002, Order No. 01-873 at 2.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

retail electricity consumer, as authorized by the Commission under ORS 757.230." Neither of these descriptions fits the Off-Project Agreement.

As discussed in detail above, the genesis of the Off-Project Agreement was the concern of the Federal government, the State of Oregon, and Klamath Basin irrigators that Copco and its successors would reap the benefits of hydroelectric development in the Klamath Basin at the expense of customers in the region. The Water Users Association and Copco executed the Off-Project Agreement to ensure that Copco and Klamath Basin irrigators shared in the benefits of hydroelectric development that the federal government otherwise would have completed. Price competition and service alternatives had nothing to do with the reasons for executing the Off-Project Agreement. Thus, it is legally flawed to evaluate the Off-Project Agreement on the basis of criteria that apply to entirely different circumstances.

PacifiCorp's argument that the direct access provisions of Senate Bill 1149 circumscribe the Commission's authority regarding the Off-Project Agreement only highlights the flaw in the Company's application of conventional special contract standards to the Agreement.[127/] OAR § 860-038-0260 prohibits new special contracts for power supply after March 1, 2002, and provides that existing special contracts shall continue to be in effect after March 1, 2002, according to their terms.[128/] The rule prohibiting new special contracts was intended to prevent monopoly utilities such as PacifiCorp from hindering the development of a competitive market by offering rate concessions to large customers who intended to leave the utility's system. Again, this prohibition is based on the existence of service alternatives, which is

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127/ See Motion at 10.

128/ OAR § 860-038-0260(3)-(4).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

wholly unrelated to the exchange of benefits in the Off-Project Agreement. In addition, even if it were appropriate to evaluate the Off-Project Agreement according to the Commission's direct access rules, the Off-Project Agreement was approved prior to March 1, 2002, and continues in effect according to its terms. PacifiCorp's argument assumes that the Agreement terminates at the same time as the On-Project Agreement, but the plain language of the Off-Project Agreement contradicts PacifiCorp's interpretation.

b. PacifiCorp's Tariffs Do Not Classify the Off-Project Agreement as a Special Contract

PacifiCorp's rate schedules also reflect the unique nature of the Off-Project Agreement and the inappropriateness of applying conventional special contract standards to that Agreement. PacifiCorp has a specific tariff that incorporates the Company's special contracts, Schedule 400.[129/] Schedule 400, which is titled "Special Contracts," includes eligibility criteria that reflect the standards that PacifiCorp argues apply to special contracts and lists the special contracts actually approved under those criteria.[130/] Schedule 400 does not, however, list either the On-Project Agreement or the Off-Project Agreement as a special contract approved according to the OPUC rules and criteria.

The Off-Project Agreement is incorporated into a Klamath-specific tariff, Schedule 33, "Klamath Basin Irrigation Contracts – Irrigation and Drainage Pumping."[131/] Schedule 33 is available only in the "Klamath Basin" and its eligibility criteria provide that "irrigation and drainage Customers whose retail rates are specified by Contract" can take service

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[129/] Affidavit, Exh. No. 21.

[130/] The only special contracts listed under PacifiCorp's Schedule 400 are agreements with Wah Chang – Millersburg and James River – Camas. Id.

[131/] Id.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

under the schedule.[132/] Unlike Schedule 400, Schedule 33 does not specify that customers meet the OPUC criteria applied to conventional special contracts. The Off-Project Agreement has not been subject to the criteria for conventional special contracts in the past, and it is inappropriate to arbitrarily subject the customers receiving service under those schedules to those standards now.

PacifiCorp notes that the CPUC rejected the Off-Project rate as discriminatory and burdensome in 1956 and that, "[f]ifty years later, the 7½ mill rate under the [Off-Project] Contract cannot be sustained as just and reasonable."[133/] If the Commission's special contract criteria are the appropriate standards by which to evaluate whether the Off-Project rates are just and reasonable, then it is unclear after 50 years why this would be a new issue. The Commission has acknowledged in at least two separate orders that the Off-Project Agreement provides a contract rate "in exchange for water rights for hydroelectric projects on the Klamath River."[134/] Thus, PacifiCorp's argument is fundamentally flawed. As PacifiCorp acknowledges, the Commission approved the Off-Project Agreement in 1956, and the Company has provided service under that Agreement for the past 50 years.[135/] The Commission should not accept PacifiCorp's request to terminate the Off-Project Agreement based on inapplicable special contract standards to which that Agreement has never been subject in the past.

132/ Id.

133/ Motion at 19.

134/ OPUC Docket No. UE 94, Order No. 96-175 at 16; Re PacifiCorp, OPUC Docket No. UE 94, Order No. 98-191 at 20 (May 5, 1998).

135/ Motion at 5.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

2. Alteration of the Contract Rates in the Off-Project Agreement Involves Genuine Issues of Material Fact that the Commission Cannot Resolve on Summary Disposition

PacifiCorp also argues in its Motion that the Commission should terminate the Off-Project Agreement because the rates in that Agreement are no longer just and reasonable.[136/] According to PacifiCorp, the Commission has an obligation to continually evaluate all of the Company's tariffs, including those with contracts rates, to ensure that the rates and fair, just, and nondiscriminatory.[137/] PacifiCorp cites American Can Co. v. Davis for the proposition that the Commission can alter or terminate contract rates at any time those rates are determined not to be just and reasonable.[138/] PacifiCorp's reliance on American Can fails to acknowledge that the Commission did not evaluate the contract rates described in American Can solely according to whether they were just and reasonable. The Commission has adopted a more stringent standard for revisions of fixed rate contracts. In addition, the Commission has more recently stated a policy that discourages modification of negotiated agreements in general.

a. PacifiCorp Does Not Address the Commission's Standards and Policies that Discourage Alteration of Contract Rates

In American Can, the Court of Appeals reviewed the Commission's decisions in Order No. 74-658, the final order from a 1974 Pacific Power rate case.[139/] PacifiCorp's arguments focus on one aspect of Order No. 74-658: the Commission's authorization of Pacific Power to alter the contract rate charged to Crown Zellerbach, one of PacifiCorp's industrial

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136/ Motion at 18-19.
137/ Id. at 7.
138/ Id. (citing 28 Or. App. 207 (1977)).
139/ American Can, 28 Or. App. at 209; Order No. 74-658 at 31-32.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

customers.[140/] PacifiCorp relies, in part, on the statement in American Can that "'[t]he Commissioner had not only the right, but indeed the duty, in exercising his authority to set just and reasonable rates, to consider and, *upon a proper showing*, to change the [contract at issue] with respect to the rate to be charged thereunder.'"[141/] Despite PacifiCorp's reliance on this statement to argue that the Commission has an obligation to terminate the Off-Project Agreement, the Company altogether ignores the "proper showing" language in the quote above. This "showing" is a reference to the standard that the Commission applied to determine whether to alter the Crown Zellerbach contract rate, which generally provides that the Commission will not alter contract rates absent an adverse impact of rates on the public interest. Indeed, since its decision in Order No. 74-658, the Commission has specifically stated that its policy discourages alteration of contract rates.[142/] Despite the fact that PacifiCorp requests that the Commission terminate the Off-Project Agreement on summary disposition, the Company has not even addressed the OPUC standard for the relief it seeks.

i. The OPUC Adopted a Four-Part Test for Alteration of Contract Rates in Order No. 74-658

Although the Commission found in Order No. 74-658 that it had the authority to alter the contract rate at issue, it did not find that it would do so as readily as PacifiCorp represents in its Motion. In fact, the Commission specifically recognized a U.S. Supreme Court decision regarding alteration of a contract rate in which the Court concluded that the authority to alter such a contract should be exercised only under extraordinary circumstances. The

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140/ Order No. 74-658 at 32.
141/ Motion at 7 (emphasis added) (quoting 28 Or. App. at 224).
142/ OPUC Docket No. UM 1002, Order No. 01-873 at 7-8.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Commission quoted from Fed. Power Comm'n v. Sierra Pac. Power Co. to describe its position on alteration of contract rates:

> In short, the Commission holds that the contract rate is unreasonable solely because it yields less than a fair return on the net invested capital. But, while it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate approaching less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. In such circumstances, the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other customers an excessive burden, or be unduly discriminatory. . . . [i]t is clear that a contract may not be said to be either "unjust" or "unreasonable" simply because it is unprofitable to the public utility.[143/]

The four-part test adopted by the Commission based on this passage examined alteration of a contract rate according to whether the rate: 1) impairs the ability of the utility to continue its service; 2) casts upon other customers an excessive burden; 3) is unduly discriminatory; and 4) adversely affects the public interest.[144/]

ii. The Commission Articulated a Policy of Upholding Negotiated Agreements in Docket No. UM 1002

Since Order No. 74-658 was issued, the Commission has further elaborated on the strong showing that must be made to alter a valid agreement that has been approved by the Commission.[145/] In Docket No. UM 1002, the Commission refused to alter Wah Chang's

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[143/] Order No. 74-658 at 31-32 (citing Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 354-55 (1956) (internal citations omitted).

[144/] Order No. 74-658 at 32.

[145/] OPUC Docket No. UM 1002, Order No. 01-873 at 7-8.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

contract with PacifiCorp, despite the fact that the contract required Wah Chang to pay market-based rates at the height of the Western energy crisis.[146/] The Commission stated:

> The Commission's policy has been to uphold agreements negotiated by parties at arm's length. In Order No. 95-857 the Commission stated that when
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> > '. . . the Commission adopts a Memorandum of Understanding or other settlement agreement, it does so because it finds the agreement to be reasonable and consistent with Commission policy and law . . . . [I]t is our general policy that only the most compelling circumstances justify retroactive modification of a Commission order adopting a fully negotiated settlement agreement. Such circumstances might include facts constituting mistake, fraud, impossibility, or some other extraordinary basis for modifying an executed agreement. We do not agree that new information alone is a sufficiently compelling circumstance to retroactively modify the terms of a fully negotiated agreement.'
>
> The Commission was addressing a memorandum of understanding in that order, but the language states the Commission's serious reluctance to modify agreements executed between parties and approved by the Commission.[147/]

In this case, the Commission approved the Off-Project Agreement in 1956, and has recognized and approved it as part of PacifiCorp's rates since that time.[148/] PacifiCorp is not entitled to summary disposition because the Company has not demonstrated as a matter of law that it has made the necessary "showing" to justify termination or alteration of the Off-Project Agreement. Indeed, the Company has not even mentioned in its Motion the Commission's standards for

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146/ Id.

147/ Id. at 6.

148/ See, e.g., OPUC Docket No. UE 94, Order No. 96-175 at 16-17.

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

alteration of a contract rate or the policy of upholding agreements negotiated at arm's length. Genuine issues of material fact exist with respect to the application of the OPUC's standards and policies to the Off-Project Agreement. Summary disposition must be denied.

b. Termination of the Off-Project Agreement Is Distinguishable from Alteration of the Contract at Issue in American Can

PacifiCorp describes the facts surrounding the contract at issue in American Can as "virtually indistinguishable" from those at hand; however, the facts and circumstances presently before the Commission are unlike those in any previous proceeding.[149/] First, as described below, the Klamath River Basin Compact, which is codified in Oregon statute at ORS §§ 542.610 et seq., provides that irrigation and pumping customers in the Klamath Basin should receive the "lowest power rates" which may be reasonable for irrigation and pumping. The Crown Zellerbach contract rate was not subject to such a mandate and it was unnecessary to evaluate the contract according to that standard.

Second, the Crown Zellerbach contract contained a provision specifically providing that the contract rate was subject to changes as ordered by the Commission.[150/] Thus, while the plain language of Crown Zellerbach contract contemplated changes to the contract rates, the Off-Project Agreement contains no such provision. Under these circumstances, the plain language of the Off-Project Agreement does not reflect that the parties expected that the Off-Project rate would be altered or eliminated as proposed by PacifiCorp.

Third, the Off-Project Customers provide a benefit to PacifiCorp under the Agreement based on increased water flows in the Klamath River for use in PacifiCorp's

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149/ Motion at 8 n.4.

150/ Order No. 74-658 at 31.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

hydroelectric facilities. Order No. 74-658 and American Can do not indicate that Crown Zellerbach provided any similar reciprocal benefit to PacifiCorp. Thus, the Commission's decision upsetting the Crown Zellerbach agreement was made under much different circumstances.

Finally, Order No. 74-658 states that Crown Zellerbach had been receiving service from PacifiCorp under a series of contract revisions dating back to 1911, but that the current contract renewal had been executed in 1971.[151/] Thus, the contract renewal at issue in Order No. 74-658 had only been in effect for three years at the time of the Commission's order. Crown Zellerbach was accustomed to changes in its contract due to the repeated renewals over the years. In contrast, the Off-Project Agreement has been in effect since 1956. All of these circumstances dictate a different result for the Off-Project Users than for Crown Zellerbach.

C. Summary Disposition Is Improper Because a Genuine Issue of Material Fact Exists with Respect to Determining the "Lowest Power Rates Which May Be Reasonable" under the Klamath River Basin Compact

Klamath Basin irrigation customers are unique in that the Klamath River Basin Compact, ORS § 542.610 et seq., specifies that those customers are to receive the "lowest power rates which may be reasonable" for irrigation and pumping uses. The Compact was codified in Oregon and California statutes in 1957, and was consented to by the U.S. Congress and signed by the President that same year.[152/] Since 1956, the "lowest power rate which may be reasonable" for Off-Project Customers has been the contract rate in the Off-Project Agreement.

151/ Id. at 29.

152/ ORS § 542.610 et seq.; Cal. Water Code § 5900 et seq.; Pub. Law No. 85-222, 71 Stat 497 (1957). Article I, Section 10 of the U.S. Constitution requires Congressional consent for states to enter into a compact. Virginia v. Maryland, 540 U.S. 56, 66 (2003).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Summary disposition is inappropriate because PacifiCorp has not demonstrated as a matter of law that terminating the Off-Project Agreement is consistent with the Compact.

1. The Commission Is Bound to Abide by the Terms of the Compact

The Compact is an agreement among Oregon, California, and the U.S., the purpose of which is:

> 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.[153/]

Section IV of the Compact describes the rates to be charged to Klamath irrigation customers:

> 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 water 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.[154/]

The Compact has the force and effect of federal law and Oregon statute, and the Commission is bound by its terms.[155/] The Commission must consider the Compact's meaning in the context of PacifiCorp's request to terminate both the Off-Project and the On-Project Agreement.

153/ ORS § 542.610.
154/ ORS § 542.620.
155/ Virginia, 540 U.S. at 66.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

2. PacifiCorp's Interpretation of the Compact Ignores the Plain Language of ORS § 542.620 and the Rules of Statutory Construction

PacifiCorp would have the Commission believe that the language in the Compact is essentially meaningless. According to PacifiCorp, the provision calling for the "lowest power rates which may be reasonable" merely incorporates the OPUC's "just and reasonable" or "fair and reasonable" standard—"the same reasonableness standard that the Commission is asked to apply in this proceeding."[156/] Examination of the language in ORS § 542.620 according to rules of statutory construction reveals that PacifiCorp's interpretation is incorrect.

a. The Plain Language of the Compact Contradicts PacifiCorp's Interpretation

The plain language of ORS § 542.620 indicates that the "lowest rate which may be reasonable" is a different statutory standard than the "fair and reasonable" standard in ORS § 756.040.[157/] For example, the fair and reasonable standard requires that the Commission balance the interests of the Company and customers and that reasonable rates "provide adequate revenue for both operating expenses of the public utility . . . and for capital costs of the utility."[158/] There is no indication that determining the "lowest power rates which may be reasonable" for irrigation and pumping purposes in the Klamath River Basin requires the same balance called for in ORS § 756.040. Indeed, PacifiCorp's Motion indicates without factual support that the Off-Project rates may have not covered these costs for some time, yet the Off-

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[156/] ORS §§ 756.040, 757.210; Motion at 16.

[157/] The phrases "fair and reasonable" and "just and reasonable" appear in different sections of the statutes governing the OPUC's general powers and ratemaking authority. Repeated use of the term "reasonable" within the context of the statutory scheme governing the OPUC indicates that term has the same meaning in each provision. PGE v. Bureau of Labor and Indus., 317 Or. 606, 611 (1993). It does not follow that the term has the same meaning in the context of the Compact.

[158/] ORS § 756.040.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Project Agreement was approved by the OPUC in 1956 and has been included in rates since that time. PacifiCorp has "agree[d] by contract to a rate affording less than a fair return" and that action is entirely consistent with the legislative objective stated in ORS § 542.620.[159/]

b. Basic Rules of Statutory Construction Contradict PacifiCorp's Interpretation

Longstanding principles of statutory construction support the distinction between the plain meaning of "lowest power rates which may be reasonable" and "just and reasonable." When multiple statutes are to be construed together, the provisions should be interpreted as to give meaning to all and the court should not "insert what has been omitted, or . . . omit what has been inserted."[160/] PacifiCorp's interpretation conflicts with both of these principles. Interpreting the phrase the "lowest power rates which may be reasonable" as merely a reference to the OPUC's reasonableness standard results in a meaning that: 1) inserts "just and reasonable" into ORS § 542.620 when that language does not appear on the face of the statute; and 2) gives no effect to the specific language in the statute. Such an interpretation is unreasonable.

In addition, ORS § 174.020(2) provides that "[w]hen a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent." In this case, the particular intent is that power rates for irrigation and pumping in the Klamath Basin be set at the "lowest power rates which may be reasonable." The general intent is found in the OPUC's mandate to obtain adequate service at fair and reasonable rates for all customers.[161/] ORS § 542.620 specifically

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159/ Sierra Pacific, 350 U.S. at 35.
160/ ORS § 174.010.
161/ ORS § 756.040.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

distinguishes irrigation and pumping rates in the Klamath Basin within the context of the overall OPUC ratemaking scheme. In such circumstances, the particular statute is considered an exception to the general statute.[162/] Here, it appears that the purpose of this provision was to ensure that the hydroelectric power generated by dams on the Project would be provided at a lower rate for irrigation and pumping uses in the Klamath River Basin.

The Oregon Attorney General applied this rule of construction to reach a similar conclusion with respect to the interpretation of the Compact in connection with more generally applicable water policy statutes.[163/] In 1979, the Oregon Water Resources Department asked the Attorney General whether the Board had authority under ORS §§ 536.300 and .310 to formulate an integrated program for water in the Upper Klamath River Basin and adopt minimum streamflows contrary to the preferences in Article III of the Compact.[164/] The Attorney General concluded that "ORS 536.310 is a general statute dealing with statewide water use considerations and policies. The compact, however, is an act dealing specifically with the Klamath River Basin."[165/] The Attorney General concluded that the Compact's specific provisions controlled over the general authority of the Water Resources Board: "although the board has general authority to establish a state wide, integrated and coordinated program for water use, that authority is subject to the requirements of the Klamath River Basin Compact."[166/] The Attorney

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[162/] In re Allen, 326 Or. 107, 119 (1997).
[163/] 39 Op. Atty. Gen. Or. 748 (1979).
[164/] Id. at 748-49.
[165/] Id. at 751.
[166/] Id.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

General noted that this conclusion was strengthened by the fact that "the specific provision (the compact) was adopted after the more general statute."[167/]

The circumstances are the same with respect to the OPUC's general ratemaking authority. The "just and reasonable" standard was codified in statute in 1912, while the Compact took effect in 1957.[168/] Under these circumstances, it is contrary to Oregon law to find that the OPUC's general ratemaking objectives trump the more specific intent in the Compact. Drainage and pumping rates in the Klamath Basin enjoy a unique position within the overall structure of PacifiCorp's rates.

c. A 1176% Rate Increase Does Not Result in the Lowest Rate Which May Be Reasonable

Ever since ORS § 542.620 took effect in 1957, the "lowest power rates which may be reasonable" for Off-Project Customers has been the 7½ mill rate specified in the Off-Project Agreement. After such an extended period of rate certainty for these customers, it is unreasonable to conclude all of a sudden that the lowest rate which may be reasonable is 1176% higher. Even assuming for the sake of argument that the Commission concludes that alteration of the Off-Project rate is justified, the Commission must articulate a rational basis for why a rate that is 1176% higher than the one that has been in effect since 1956 is now the lowest reasonable rate. No such basis exists.

[167/] In a subsequent letter of advice clarifying the 1979 decision, the Attorney General noted that "it is . . . a general principle of statutory construction that compacts, like treaties, are to be given a liberal interpretation to carry out the intended objectives of the contracting parties." Or. Atty Gen. Letter of Advice No. OP-5559 at 2 (Mar. 12, 1984).

[168/] Woodburn v. Pub. Serv. Comm'n, 82 Or. 114, 117 (1916); ORS § 542.610.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

D. All PacifiCorp Customers Benefit from the Company's Hydroelectric Resources

PacifiCorp's arguments regarding rate discrimination and cost of service ignore the fundamental basis of the Off-Project Agreement, which is that Off-Project Customers would receive the benefit of a contract rate in exchange for the increased flow of water that would be made available to PacifiCorp for hydro generation. PacifiCorp recognized in its direct testimony in Docket No. UE 170 that the rates in both the Off-Project Agreement and the On-Project Agreement are "premised on the value provided by the Klamath irrigation project to Klamath hydroelectric generation, and hence to the utility's other customers."[169/] The Commission has previously acknowledged that the irrigation and pumping rates for Klamath customers were provided "in exchange for water rights for hydroelectric projects on the Klamath River."[170/] The Commission should evaluate the contract rate in light of this benefit.

The value of the benefit that PacifiCorp and customers receive by virtue of the Company's right to develop and operate hydroelectric projects such as Project No. 2082 on the Klamath River far outweighs any revenue disparity between irrigation customers in the Klamath River Basin and the rest of Oregon customers. Although PacifiCorp claims that this benefit has "nearly disappeared," the Company has provided no evidence to demonstrate that claim.[171/] Irrigation customers in the Klamath River Basin enjoy a special status that is recognized by state statute and PacifiCorp's rate schedules. The Commission should not upset the balance between PacifiCorp and the Off-Project Users while both entities still enjoy the benefits of the

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169/ OPUC Docket No. UE 170, PPL/100, Furman/13.
170/ OPUC Docket No. UE 94, Order No. 96-175 at 16.
171/ OPUC Docket No. UE 170, PPL/100, Furman/13.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Agreement. PacifiCorp has failed to provide any legal or factual basis for disrupting this carefully negotiated balance. Mere assertions cannot be accepted as fact.

CONCLUSION

PacifiCorp's Motion raises genuine issues of material fact and the Company has not otherwise demonstrated that it is entitled to summary judgment as a matter of law. If the Commission is inclined to interpret the Off-Project Agreement in this context, then based on the plain language of the contract it must find that it does not terminate in 2006. To find otherwise would require a court to resolve the significant legal and factual issues regarding PacifiCorp's and KOPWU's contractual rights, and the Commission should not alter the Off-Project rates until a court has interpreted the language in the Agreement. The unprecedented rate increase that PacifiCorp proposes for Off-Project Customers demands that the parties be permitted full and complete process to determine their rights prior to the Commission implementing any change to the contract rate. KOPWU requests that the Commission deny PacifiCorp's Motion and find that the Off-Project Agreement does not terminate based on the plain language of the Agreement. In the alternative, the Commission should deny the Motion and refrain from altering the existing rate for Off-Project Customers until a court has been permitted to determine the party's contractual rights.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Dated this 28th day of April, 2005.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Matthew Perkins

Melinda J. Davison
Matthew Perkins
Sarah Yasutake
Davison Van Cleve, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
(503) 241-7242 phone
(503) 241-8160 fax
mail@dvclaw.com
Of Attorneys for the Klamath Off-Project Water Users

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 171

In the Matter of	)	
PACIFIC POWER & LIGHT (dba PACIFICORP)	)	AFFIDAVIT OF MATTHEW W. PERKINS
Klamath Basin Irrigation Rates.	)	

State of Oregon)
) ss.
County of Multnomah)

I, Matthew W. Perkins, being first sworn, hereby declare that I have personal knowledge of the matters set forth in this Affidavit and am competent to testify to them:

1. My full name is Matthew William Perkins. I am an attorney in the law firm of Davison Van Cleve, P.C. in Portland, Oregon. My business address is: 333 SW Taylor, Suite 400, Portland, Oregon 97204. I represent the Klamath Off-Project Water Users, Inc. ("KOPWU") in Oregon Public Utility Commission Docket No. UE 171.

2. Attached to this Declaration are the following documents, which were obtained in discovery in this proceeding, provided to KOPWU by the Klamath Water Users Association, Inc., or retrieved from PacifiCorp's website:

1. Agreement Between the Klamath Basin Water Users Protective Association and the California Oregon Power Company ("Copco") (Apr. 30, 1956); California Oregon Power Company, Upper Klamath River Basin Irrigation and Agricultural Pumping Service (For Users Not on Project Land) (effective May 1, 1956).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

2. J. C. Boyle, 50 Years on the Klamath (1976) (Excerpts).

3. Klamath Irrigation District Suit Bill, Joint Hearing before the Committees on Irrigation and Reclamation on S. 3189 and H.R. 9493, U.S. Congress, 69th Congress, 1st session (Apr. 30, 1926) (Excerpts).

4. Contract Between the Secretary of the Interior & California-Oregon Power Co. Raising the Level of Upper Klamath Lake (Feb. 24, 1917).

5. Telegram from Geo. W. Offield and R. E. Bradbury, Klamath Irrigation District, to Franklin K. Lane, Dept. of the Interior (April 14, 1919).

6. Memorandum from Herbert D. Norwell, U.S. Reclamation Service, to the Project Manager, Director, and Chief Engineer (Mar. 18, 1920).

7. Letter from John Barton Payne, Secretary of the Interior, to George E. Chamberlain, United States Senate (Dec. 6, 1920).

8. J. C. Boyle, Memorandum: Negotiations Leading up to Contract Between the Bureau of Reclamation and Copco (Nov. 17, 1955).

9. Protest of the United States to the Application for License of the California-Oregon Power Co. (Oregon Hydroelectric Commission, June 1, 1951) (Excerpt).

10. Re The California Oregon Power Co., FPC Project No. 2082, Reply Brief of the Secretary of the Interior (Oct. 17, 1952) (Excerpts).

11. Re The California Oregon Power Co., FPC Project No. 2082, Order Issuing License (Jan. 28, 1954).

12. Russell R. Kletzing, Review of items involved in negotiations between Department of the Interior and California Oregon Power Co. (Oct. 13, 1954).

13. Letter from Klamath Basin Water Users Protective Association to Chas E. Stricklen, Hydroelectric Commission of Oregon (June 18, 1954) (reprinted in Minutes of Klamath Basin Water Users Protective Association (June 25, 1954)).

14. Letter from R. S. Calland, Bureau of Reclamation, to Regional Director of the Bureau of Reclamation (Nov. 10, 1955).

15. Re Copco, CPUC Application Nos. 37724 and 37918, Transcript of May 8, 1956 Hearing (Excerpts).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

16. Letter from Frank Z. Howard, Klamath Basin Water Users Protective Association, to J. C. Boyle, Copco (Nov. 3, 1955).

17. Letter from Frank Z. Howard, Klamath Basin Water Users Protective Association, to J. C. Boyle, Copco (Oct. 28, 1955).

18. Minutes of the Executive Committee of Klamath Basin Water Users Protective Association, Special Session Meeting with J. C. Boyle (Aug. 11, 1955) (Excerpt).

19. Re PacifiCorp, OPUC Docket No. UE 170, PacifiCorp Response to KOPWU Data Request 1.4 Supplemental (Mar. 22, [2005]).

20. Momentum Market Intelligence, Klamath Basin Irrigation Study—Final Report (May 2004).

21. Pacific Power & Light Co., Oregon Schedule 33, Klamath Basin Irrigation Contracts, Irrigation and Drainage Pumping (effective Apr. 2, 2002); Pacific Power & Light Co., Oregon Schedule 400, Special Contracts (effective Sept. 10, 2001).

SIGNED THIS 28th day of April, 2005, at Portland, Oregon.

MATTHEW W. PERKINS

SUBSCRIBED and sworn to before me this 28th day of April, 2005, by Matthew W. Perkins.

OFFICIAL SEAL
RUTH A MILLER
NOTARY PUBLIC-OREGON
COMMISSION NO. 362751
MY COMMISSION EXPIRES NOV. 6, 2006

NOTARY PUBLIC
State of Oregon
County of Multnomah

DAVISON VAN CLEVE, P.C.
333 SW Taylor. Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Exhibit 1

A G R E E M E N T

AGREEMENT, dated April 30, 1956, between The California Oregon Power Company, hereinafter called Copco, and the Klamath Basin Water Users Protective Association, regarding proposed agricultural pumping power rates for off-project users in the Upper Klamath River Basin boundary which is shown on Exhibit "A" attached.

In consideration for an increased flow of water caused by the development of lands for agricultural purposes within the Upper Klamath River Basin, which increased flow will be used for the generation of electric power in Copco's proposed dam improvements on the Klamath River below Keno, Copco agrees to provide power rates for agricultural pumping for all off-project users in the Upper Klamath River Basin, as follows:

10 Horsepower motors or over. . . . . 7½.mills per KWH

First five year seasonal minimum charge shall be $111.60 for the first 10 horsepower and $10.80 per horsepower for all excess horsepower based upon rated horsepower connected but not less than $111.60 per season.

The minumum charges are payable in consecutive monthly installments of one-sixth of the seasonal minimum charges beginning the first month of seasonal operation, until such time as the accumulated charges equal the seasonal minumum charge.

After the fifth year of continuous use of the same installation, the minimum charge shall be one-half of the first five-year period.

It is agreed that the above proposed rates will take effect on May 1, 1956.

THE CALIFORNIA OREGON POWER COMPANY

J. C. Boyle

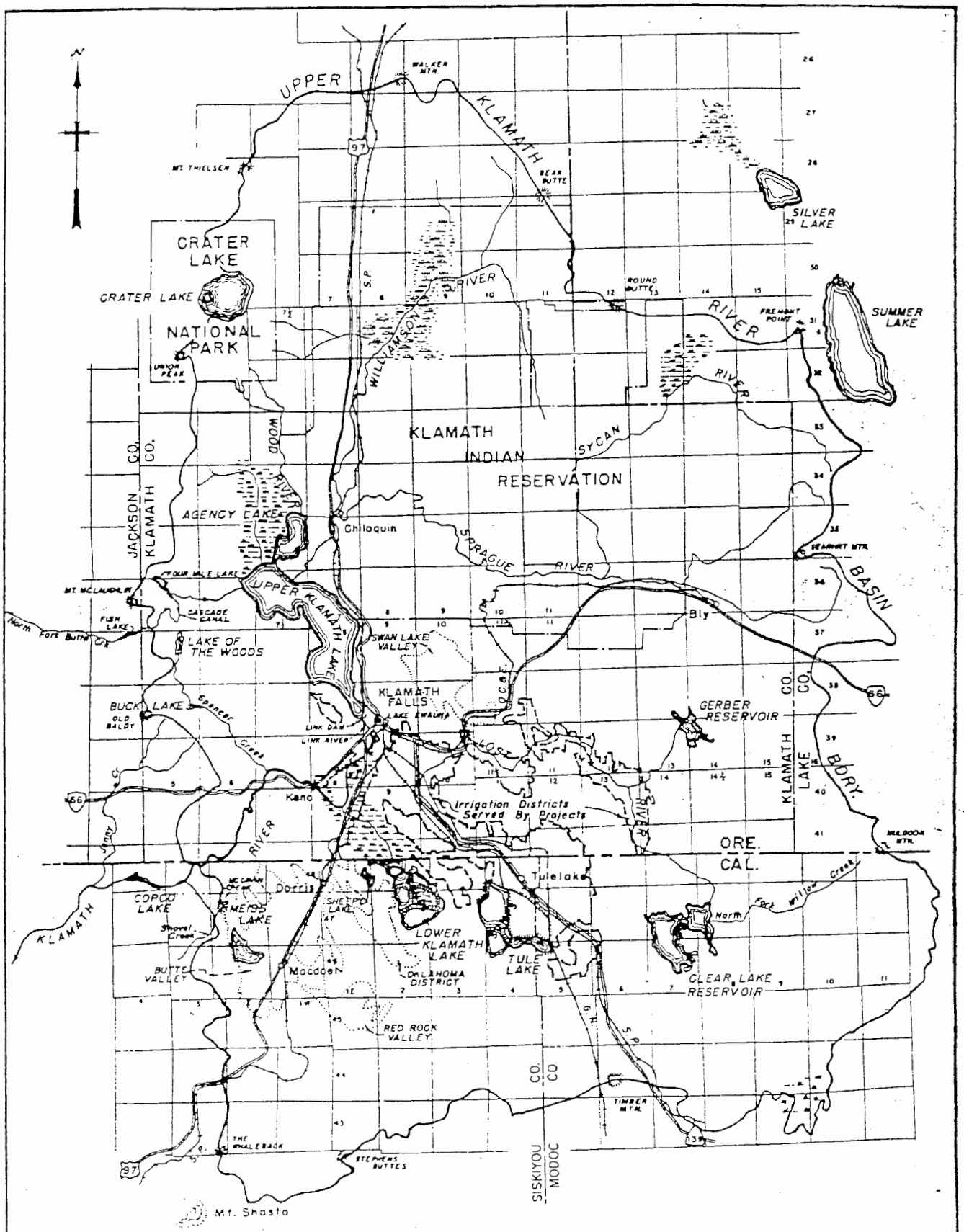
J. C. Boyle, Vice-President and General Manager

KLAMATH BASIN WATER USERS PROTECTIVE ASSOCIATION

Frank Z. Howard

Frank Z. Howard, President

EXHIBIT - A



UPPER KLAMATH RIVER BASIN

OREGON – CALIFORNIA

THE CALIFORNIA OREGON POWER COMPANY
MEDFORD, OREGON

NO 35

RECEIVED
APR 19 1972
KLAMATH FALLS, OREGON

OREGON DIVISION

UPPER KLAMATH RIVER BASIN
IRRIGATION AND AGRICULTURAL DRAINAGE PUMPING SERVICE
(For Users Not on Project Land*)

APPLICABILITY

Applicable to single phase or three phase alternating current electric service, at such voltage as the Company may have available at the Customer's premises, for the operation of off-Klamath Project pumping installations using 10 H.P. motors or over for general irrigation purposes and the drainage of agricultural lands.

TERRITORY

Within the territory served in Oregon by the Company in the Upper Klamath River Basin, as shown on Exhibit A, attached.

RATES

10 horsepower motors or over.

	Per Meter Per Month
Energy Charge:	
All kwhr, per kwhr	0.75¢

Minimum Charge:

First five year seasonal minimum charge shall be $111.60 for the first 10 horsepower and $10.80 per horsepower for all excess horsepower based upon rated horsepower connected but not less than $111.60 per season.

After the fifth year of continuous use of the same installation, the minimum charge shall be one-half of the first five-year period.

The minimum charges are payable in consecutive monthly installments of one-sixth of the seasonal minimum charges beginning the first month of seasonal operation, until such time as the accumulated charges equal the seasonal minimum charge.

* 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.

From USBR - Copco Contract)

Issued by
J. C. Boyle

Effective May 1, 1956

Exhibit 2

50 YEARS ON THE KLAMATH

By JOHN C. BOYLE

FIRST PRINTING 1976
SECOND PRINTING 1982

PRINTED IN THE UNITED STATES OF AMERICA
BY KLOCKER PRINTERY, MEDFORD, OREGON

Yreka *(Siskiyou News)*, September 13, 1911. "Lack of material causes shutdown on power company dam. The Siskiyou Electric Power and Light Company has laid off about one-third of the force of men which has been working on the big dam in Ward's Canyon on account of lack of material. No progress can be made on the dam until more material arrives.

"The project is a big undertaking and it is difficult to get enough concrete and other material needed in continuous quantities and is also difficult to transport the needed article to the scene of the work.

"Representatives of the company deny the report there is any defect in the formation which would make the dam unsafe. They say as soon as material arrives work on the dam will be rushed."

On March 1, 1913 the crew was reduced to 10 men and work was confined to maintenance of property, unloading powerhouse machinery and excavation on the dam foundations.

The California-Oregon Power Company was incorporated December 15, 1911 to acquire and consolidate with other properties of the Siskiyou Electric Power and Light Company which was then doing the construction work on the Klamath River Dam No. 1.

However, a contract provided that the S.E.P.L. Co. should continue to completion the work in progress. Bonds and preferred and common stocks were sold by Copco to provide construction money.

On February 2, 1916 the Yreka *Journal* said: "In order to secure funds for needed construction work, the completion of the great power project at Copco, on the Klamath River, . . . the stockholders of the California-Oregon Power Company have assessed themselves $3.30 a share on the outstanding stock, while the bondholders have cooperated by waiving interest on bonds outstanding for five years. This method of financing construction work was deemed preferable to a new bond issue, which would increase interest charges on the company.

"A committee of bondholders has the power to make a settlement with the company, either for cash or stock covering interest in default. In addition to bonds deposited to secure borrowed money, there are $3,200,000.00 first and refunding bonds outstanding.

"The company is paying interest on $1,200,000.00 underlying bonds and on its floating debt and is earning enough to pay upon the first and refunding bonds, but necessary construction is underway for which the money is needed.

"These financial arrangements have been accompanied by a reorganization of the company, with some of the strongest financiers in California as executives. J. D. Grant of San Francisco, the new president; John D. McKee, vice-president, J. P. Churchill of Yreka, former president, is now a vice-president and Alex Rosborough, former secretary, is also a vice-president in charge of operations."

This marked the passing of control from Churchill to the McKee interests. The Churchills, Siskiyou County people, had pioneered and consolidated into an integrated company practically all of the power generating and distribution agencies in Northern California and Southern Oregon and therein invested much of their money.

In May 1910, river gauging was begun at the Ward's bridge and records of river discharges were kept daily. A study of the records over a period of five years indicated a change from a uniform flowing stream to one with lower water in summer and higher water in early spring.

Answer to the change was readily found in the development of the reclamation and irrigation project being constructed by the U. S. Reclamation Service in the Upper Klamath basin.

While the change in river flows were not too serious at the time, they were destined to get worse as the Reclamation Service projects progressed.

The Company had already invested large sums of money on Klamath River Dam No. 1 and No. 2, so it was faced with either bringing suit involving interstate water rights or making some arrangement wherein it could get some measure of control of water in the Upper Klamath Basin.

During the Fall of 1915, a delegation of financial men and engineers from San Francisco made an inspection trip to appraise the work which had been completed, and to see what work remained to be done.

The appraisal showed about $1,000,000 had been spent and about $2,000,000 would be needed to complete the project. However, by leaving about 13 feet off the top of the dam and installing only one unit in the powerhouse the remaining cost might be reduced to about $1,000,000.

Approximate costs charged to the work by January 1, 1916	
Real Estate (Reservoir, etc.)	$ 114,000.00
Powerhouse Equipment – 2 units complete	217,000.00
Interest on Construction	101,000.00
Bond Discount	35,000.00
Railroad	66,000.00
	$ 533,000.00
All other charges over a period of about 5½ years – actual construction expenditure	475,000.00
	$1,008,000.00

- The river had been diverted through the tunnel.
- The excavation completed on the abutment cuts of the dam.
- All explorations for foundations were finished.
- The layout for Copco No. 2 had been completed.
- The excavation for powerhouse No. 1 was completed to water level.
- The construction plant, crushers, sand machines, mixers and conveying equipment for concrete were ready.
- The two units for the powerhouse with transformers and associated equipment were delivered.
- The upstream cut-off wall for the dam foundation was finished to 30 feet above water level, and work was progressing on the downstream cut-off wall.
- The railroad had been made operational, and a one-mile spur had been built to camp and on down the canyon to the powerhouse.

All the difficult foundation work was done. What was needed now was cement, forms, reinforcing steel, labor, supplies and money.

To carry out such regulation, it would be necessary to construct a dam at the head of Link River and recognize that changes from the natural state might adversely affect interests of any and all riparian landowners, or vested rights, whether private or governmental. It meant that natural conditions would be largely reversed, that normal spring flows to the lake would be impounded and released later in the season. Also that maximum flows in the Klamath River might often occur in the summer rather than in the spring adversely affecting riparian rights below the dam.

The Klamath Water Users Association was organized March 4, 1905 and incorporated with capital stock of $2,000,000. The association contracted with the Secretary of Interior to assume responsibilities for paying to the government the cost of the irrigation works. The association helped in signing up land, and in other land and water right matters, and worked in friendly relations with the Reclamation Service until 1908 when the original estimated $20.00 per acre charge was modified to actual costs. The association denied liability for any extra costs.

When the Secretary of Interior ordered all construction on the Klamath Project suspended, the association agreed to pay the charges of $20 or more if fixed by the Secretary of Interior, and the association fearing that funds for the Klamath Project would be diverted, assured the Secretary of full cooperation.

The Klamath Water Users Association served a useful purpose during the development of the early irrigation system. It was headed by farmers, livestock men, businessmen, bankers, attorneys and many well-known citizens who were interested in seeing that the Klamath Reclamation Project was constructed at the least cost and for the lasting benefit of the entire community.

Of the $2,250,000 allocated by 1908 about $1,350,000 had been spent on purchase of canals, property, water rights and the construction of Clear Lake Dam, Keno Canal and Lost River diversion. Items which were expected to be utilized on development of future units of the project were considered as "control purchases." These expenditures were not charged to the project, and title was held exclusively by the United States.

The Reclamation Service with its know-how was building an excellent project in engineering, construction and operation. By 1909 the landowners believed that the costs per acre for water were going to far exceed the original estimates and asked that a special board be appointed to investigate and review the general features of the project.

The board report indicated that:

(1) The original construction estimates would be materially exceeded.
(2) Contingencies in the original estimates were inadequate due to added engineering and administrative charges, purchase of lands, etc.
(3) The total acreage in the upper part of the project could be cut from 48,000 acres to 36,000 acres.
(4) The Keno Canal from Klamath Falls to Keno and west side of Lower Klamath Lake could be eliminated.
(5) Some pumping projects and the Modoc subproject could be postponed.

(6) The reclamation of Lower Klamath Lake was questionable, due to soil conditions. The lands surrounding it were largely in private hands and could be released to private owners.

(7) The Keno cut for draining Lower Klamath Lake and helping the Lost River diversion could be eliminated and by use of head gates and pumps at the railroad crossing at Ady, Lower Klamath Lake could be dried up.

(8) Unforeseen drainage problems needed attention.

At no time up to 1910 was mention made of a need for regulation of the Upper Klamath Lake. Clear Lake was considered to be a better reservoir than Upper Klamath Lake. Since only 30,000 acres were then served under the Upper Klamath Lake it was believed that lake regulations would not be necessary for some time to come.

By December 31, 1912, the Government had made allotments of about $3,000,000.00 to the Klamath Project, had spent over $2,250,000.00 and had only been able to serve about 30,000 acres, 10,000 of which had formerly been irrigated. As the Government had already undertaken 20 or 30 reclamation projects and had spent over $50,000,000.00 in efforts to develop the arid west, the feeling prevailed that it was time to take a good look at future expenditures on the Klamath Project.

The predecessors of the California-Oregon Power Company (Copco) in 1902 had owned riparian property that constituted a power site on the Klamath River in California. In 1909, the Company made water appropriations and in 1910 started construction work on its No. 1 Copco power plant. Careful stream gaugings were taken of the river. By 1915 it was realized that unless the United States carried out its plan of regulating the Upper Klamath Lake, the river would often, if not regularly, be extremely low during the summer months, but if this regulation was carried out by the U. S. Government, a uniform flow of about 1500 second feet could be maintained in the Klamath River at Keno.

The U. S. Government was approached and the company was told that although the Government contemplated the regulation and control of Upper Klamath Lake where needed, it was not in a position to get appropriations for that purpose and could not indicate when Congress might make an appropriation. Negotiations were started whereby the power company would build Link River Dam, take care of claims for damages and regulate the lake subject to Government supervision and subject to supplying all water needed for irrigation purposes first. The dam and dam site would be conveyed to the United States, and power would be furnished to the irrigation project at estimated cost.

The outcome was a contract between the power company and the Department of Interior dated February 24, 1917. This was one of the first if not the first joint venture between the Department of Interior and a private industry.

The California-Oregon Power Company had already entered into the distribution of power in the Klamath Falls area.

The predecessors of Copco had purchased the Klamath Light and Power Company from the Moore Bros. on December 31, 1910. The Moores had built transmission lines to Merrill and Bonanza. This purchase included all the electric generating and distribution facilities then located on Link River and the water system serving the City of Klamath Falls.

Toketee – 8 plants on the North Umpqua River (2 under construction)		200,000 KW
	Total	241,685 KW

Upon completion of the last of the Toketee plants by 1956 other plants needed to be constructed shortly thereafter. In the early '20s Copco system load increased at about 4,000 to 5,000 KW per year. By 1957 this increase jumped to about 10,000 and 15,000 KW per year.

So filings were made on the McCloud River on January 9, 1952 with the Federal Power Commission for development of about 250,000 KW there.

However, Klamath Canyon was most attractive, being near the Copco load center where construction cost and transmission lines would be minimum. It was therefore decided to make another attempt to secure necessary water rights in Oregon sufficient to justify construction.

The creation of the Hydroelectric Commission of Oregon in 1931 with amendments of the Legislative Act made it possible for a power company to obtain a license similar to a Federal Power Commission license for use of water in Oregon, for power purposes. Such a license could be obtained for use of water in the Klamath River without conflicting with the water rights of the U. S. Government and other irrigationists.

In 1951, the Klamath community was advised that a power plant would be built on the Klamath River below Keno if it was unanimously approved by all interested parties of the Klamath basin.

On February 15, 1951, Copco authorized applications to the Federal Power Commission and the Hydroelectric Commission of Oregon to construct the Big Bend Plant on Klamath River 6 miles below Keno.

Because of the need to construct larger power developments adequate to meet the system demands, the plans were changed to combine two of the original projects with one of 88,000 KW capacity.

The purpose of applications at this time, perhaps four or five years in advance of need, was to determine what if any legal complications would arise which would delay the development or make it impossible to construct the plant. Based upon the experiences during 1925 to 1930 in Klamath regarding water rights, the outlook was not optimistic.

A plan was submitted covering development of the remaining undeveloped projects between Keno and Iron Gate and it incorporated additional storage at Aspen Lake. Applications to the Federal and State Commissions were mailed on April 16, 1951.

Practically all the irrigation districts in the Klamath Reclamation Project joined in filing protests. The Secretary of Interior filed a protest as did the Bureau of Reclamation and many individuals.

During the following months some resolutions favoring the project were filed. The Oregon State Federation of Labor at convention in Klamath Falls June 29, 1951 was an important one.

The deadline date for filing protest with the Federal Power Commission was July 19, 1951. Some extension of time was given by the Hydroelectric Commission of Oregon.

On Friday, September 7, 1951, the State Hydroelectric Commission stated that no further hearings would be held and it was satisfied that if Copco could work out an agreement with the Bureau of Reclamation for an extension of the contract to regulate the Upper Klam-

It had iron eyebolts drilled securely in the bedrock to hold log booms which impounded and released logs from upstream as needed for the sawmill at Klamathon below.

It controlled the one-way county road cut in a bedrock shelf frequently subject to overflow.

It controlled the Klamath Lake Railroad at its five-mile post where a mile of 4% grade had to be built adverse to upstream freight hauling.

It marked the control of water surface fluctuations caused by load changes at Copco No. 2 powerhouse which had affected the river below.

It marked the end of fish migration from the Pacific Ocean and the construction of facilities for artificial propagation.

It marked the time when the States of California and Oregon solved the intricate problem of interstate water rights by creating a compact commission ratified by Congress to "promote the orderly, integrated and comprehensive development use, conservation and control of water in the Upper Klamath Basin in Oregon and California."

SUMMARY

The Bureau of Reclamation and Copco continued to make studies relative to the value of additional storage of water at Steel Swamp. Clear Lake, Boundary and elsewhere. Also the downstream benefits which might accrue from power to warrant further irrigation developments. were calculated. As in the beginning there were so many diverse opinions on the further use of Klamath Water that time passed with very little progress being made.

Fifty years had passed during this application of water to about one-half of the 600,000 acres of agricultural land which could be eventually irrigated in the Upper Klamath Basin. It was reliably estimated that it would take another 75 years to complete the irrigation program.

It also had taken 50 years for the development of about one-half of the potential hydroelectric power (320,000 KW) in the Upper Klamath Basin below Keno.

The two, irrigation and power, developed parallel to and complimented each other.

Twenty years have now passed since the joint venture between the Department of Interior and Copco which started February 24, 1917, was extended to the year 2006.

Those interested in retaining and developing Klamath's greatest natural resource, "Water," should not be complacent. Who knows when somebody with plenty of money and plenty of votes may appropriate part of it and put it to beneficial use outside the basin of its origin. It is still the envy of much of the arid West.

On June 21, 1961 Copco was merged with Pacific Power & Light Company.

At the dedication of Iron Gate on February 3, 1962 Pacific Power surprisingly announced that its directors had decided to rename the Big Bend Plant on the Klamath River below Keno.

Rededication was held on June 25, 1962 at the Big Bend Powerhouse and a luncheon was served at the Winema Hotel in Klamath Falls. At that time a pamphlet distributed to the public contained the following announcement:

Exhibit 3

Ore. Report
Klamath irrigation & reclamation

947

KLAMATH IRRIGATION DISTRICT SUIT BILL

JOINT HEARING

BEFORE THE

COMMITTEES ON IRRIGATION AND RECLAMATION CONGRESS OF THE UNITED STATES

SIXTY-NINTH CONGRESS

FIRST SESSION

ON

S. 3189 and H. R. 9493

BILLS CONFERRING JURISDICTION UPON THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, OR THE COURT OF CLAIMS, TO HEAR AND DETERMINE ANY SUIT OR SUITS, ACTIONS, OR PROCEEDINGS WHICH MAY BE INSTITUTED OR BROUGHT BY THE KLAMATH IRRIGATION DISTRICT, A PUBLIC CORPORATION OF THE STATE OF OREGON, OR THE STATE OF OREGON BY INTERVENTION OR DIRECT SUIT OR SUITS, TO SET ASIDE THAT CERTAIN CONTRACT BETWEEN THE UNITED STATES AND THE CALIFORNIA OREGON POWER CO., DATED FEBRUARY 24, 1917, TOGETHER WITH ALL CONTRACTS OR MODIFICATIONS THEREOF, AND TO SET ASIDE OR CANCEL THE SALE MADE BY THE UNITED STATES GOVERNMENT, THROUGH THE SECRETARY OF THE INTERIOR, OF THE SO-CALLED ANKENY AND KENO CANALS, AND THE LANDS EMBRACED IN THE RIGHTS OF WAY THEREOF, TO THE SAID CALIFORNIA OREGON POWER CO., SAID SALE HAVING BEEN MADE IN THE YEAR 1923

APRIL 30, 1926

Printed for the use of the Committee on Irrigation and Reclamation

WASHINGTON
GOVERNMENT PRINTING OFFICE
1926

09263

between the Government of the United States and the California Oregon Power Co.?

Mr. LILJEQVIST. This contract reads:

> This agreement made this 24th day of February, 1917, pursuant to an act of Congress, between the United States of America, hereinafter styled the United States, by Franklin Lane, Secretary of the Interior, and the California Oregon Power Co., a California corporation, hereinafter styled the company.

And after some whereases it says this:

> Now, therefore, the parties hereto agree that the company, acting for and on behalf of the United States, may at its option construct a dam on Link River, etc.

So that you will see the contract is between the United States of America on the one hand and the California Oregon Power Co. on the other, but a company acting for and on behalf of the United States.

Representative LEATHERWOOD. In the construction of that work do you mean?

Mr. LILJEQVIST. In the construction of the work provided for in the contract and in the operation and maintenance of the project. So far as this contract is concerned there can not be any question that in the entire operation and maintenance of this dam and all the powers that the California Oregon Power Co. have they are acting for and on behalf of the United States of America, because at certain times and under certain circumstances and contingencies the Interior Department may take possession temporarily of that dam, otherwise it is allowed to be operated by this company, and——

Representative HILL (interposing). It makes the California Oregon Power Co. the agent of the Government of the United States.

Mr. LILJEQVIST. Yes, sir; the contract specifically does that. And the point we make, after a very full examination of the authorities, is that it is our judgment the State of Oregon is unable to maintain an action against the California Oregon Power Co. because they would set up that they are the agents of the United States Government and that the State was in fact instituting an action against the Government, and under repeated decisions of the courts a State can not sue the Government without its consent.

The CHAIRMAN. As I understand it is the opinion of the Attorney General, whom you represent before this joint committee, that no suit in this matter can lie against the United States?

Mr. LILJEQVIST. Yes, sir.

The CHAIRMAN. Can you briefly sketch the reasons why you wish to bring suit in the name of the State of Oregon?

Mr. LILJEQVIST. In 1905 the State of Oregon, after giving to the Federal Government the power to appropriate all these waters, also passed another act in reference to Klamath Lake. Governor Chamberlain, afterwards Senator Chamberlain, was then Governor of the State of Oregon, and under these new negotiations California and Oregon both enacted legislation in which they ceded to the Federal Government all the lands uncovered by the lowering of the waters of upper Klamath Lake, of this lake and other lakes in Klamath County, and Tule Lake and Goose Lake in eastern Oregon, and gave the Government the right to use the beds of the lakes for the storage of water. That legislation was passed in aid of the Government in

its reclamation projects. It gave the Government the right to appropriate the water, and this concession was made distinctly to the Government to aid it in carrying out its reclamation projects.

The Federal Government, as I say, started to carry out those reclamation projects, and then it turned around and made this contract, and the complaint of the State of Oregon with reference to this matter is this: That the Government of the United States, through the Interior Department, instead of maintaining control and operating all the works in this project, have turned over to the California Oregon Power Co. the building of this dam and the control of this dam for 50 years, and the use of the water for power for 50 years.

First of all, we claim that those waters under those two acts were given to the Government in trust and the land was given to the Government in trust, for one purpose and one purpose only, and that was to carry out the reclamation project; that the waters were given to the Government in order to reclaim those lands, and the lands were given to the Government for settlement, and the waters must be applied by the Government pursuant to the trust under which the Government received those lands. But the Government, instead of carrying out the trust itself, has made a contract under which it has turned over power privileges of immense value, and the rental value alone would build this dam many times over; that it has turned the power privileges over to the California Oregon Power Co. for 50 years, without the payment of a cent to the State of Oregon and in violation of its trust.

Not only that, but we claim—and Representative Sinnott, I think, is entitled to the credit of this proposition—that this contract itself is in violation of the statutes of the United States.

I want to call the attention of this joint committee to the act of February 14, 1911, amending an act of 1906, and this is the only Federal legislation I have been able to find upon the subject, and it says this:

> That whenever a development of power is necessary for the irrigation of lands, under any project undertaken under the said reclamation act, or an opportunity is afforded for the development of power under such project, the Secretary of the Interior is authorized to lease for a period not exceeding 10 years, giving preference to municipal purposes, any surplus power or power privilege, and the money derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived.

There is the only legislation I know of, and I can not see but what that legislation specifically limits the Interior Department in making leases to a period of 10 years. As I say, when you read this agreement, upon its face it apparently does not give them a lease of power for 50 years, but as the Supreme Court of the United States has said time and time again, the courts will look through form into the substance of things, and you can not look through the history of this project, in my opinion, and conclude otherwise than that any court will consider that it is a lease by the Interior Department of power privileges to the California Oregon Power Co. for 50 years, even though under the law they were specifically limited to making a lease for 10 years.

STATEMENT OF HERMAN PHLEGER, COUNSEL FOR THE CALIFORNIA OREGON POWER CO., SAN FRANCISCO, CALIF.

The CHAIRMAN. You will give your name, address, and whom you represent.

Mr. PHLEGER. My name is Herman Phleger, and I am counsel for the California Oregon Power Co.

The CHAIRMAN. Where do you live?

Mr. PHLEGER. San Francisco.

The CHAIRMAN. What is your particular address?

Mr. PHLEGER. Crocker Building, San Francisco.

The CHAIRMAN. You represent the California Oregon Power Co.?

Mr. PHLEGER. I do.

The CHAIRMAN. Very well, you may proceed.

Mr. PHLEGER. I should like, if the joint committee pleases, to present a map. May I put it on the bookcase here?

The CHAIRMAN. Suppose you see if you can not raise it a little higher, so all of us may see.

Mr. PHLEGER. I believe this is about the best I can do.

The CHAIRMAN. You may proceed.

Mr. PHLEGER. If the committee pleases, I have listened with a great deal of interest to the statements of fact by the assistant attorney general of Oregon; and while I do not, of course, impugn the motives at all of the Representative, I will state this: If the facts were as he represented them to be, I would agree absolutely with the conclusions of the assistant attorney general. He would be quite right.

But I wish to say to you gentlemen: I have been connected with this matter since 1915; I have been familiar with this situation since before the contract itself was made; and I think I am familiar as anyone with its subsequent history.

I take it that this joint committee is interested principally in the reasons why this bill should either be adopted or rejected. And in a consideration of that matter I think the facts are what you desire to hear and not argument. So I will confine myself principally to the facts.

As we all know, the sovereign can not be sued without its consent, even though a cause of action may exist against it. I understand it is the contention of the assistant attorney general that he has a cause of action, but that he can not secure the desired relief because the sovereign can not be sued.

We respectfully submit that that is not the fact in this case, and our two reasons for objecting to this bill are these:

(1) It is not necessary to enact this bill in order to permit the relief which the assistant attorney general thinks he is entitled to; and

(2) The passage of this bill would introduce litigation which would be extremely injurious not only to the very people sought to be protected but generally to the State of Oregon and also to the State of California.

Now, just one moment as to the case that was referred to, a case involving a suit against the Emergency Fleet Corporation. While I have not read that case recently, I think I am familiar enough

with it to state that it holds that the Emergency Fleet Corporation is subject to suit, and that the Emergency Fleet Corporation does not have the immunity of the sovereign. But I will point out this fact, which I think conclusively disposes of the argument that it is necessary to have this bill enacted into law in order to institute suit. It is claimed by the assistant attorney general that the California Oregon Power Co. is dealing with property of the State of Oregon under a void contract. It is hornbook law that the owner of property may proceed against individuals who have wrongful possession of that property without joining the United States, even though those individuals claim to be holding it for the benefit of the United States; and if it is a fact that the California Oregon Power Co. is acting under a void contract, it is no agent of the United States or the agency itself is void. And if in fact and law this contract is void all that the State of Oregon has to do is to sue those persons who are wrongfully in possession of its property. I think that is an absolutely accurate statement of the law.

We have no fear of the outcome of the proposed suit; that is, as to the validity of the contract in question, of February 24, 1917. You gentlemen may ask, if this is so, then why does the California Oregon Power Co. object to the passage of this bill? We object for these reasons:

First. It is an implied benediction, if I may use that word, on the institution of litigation of this character.

Second. It would be simply the introduction of years of litigation which would so injure the Klamath project, the State of Oregon, and the California Oregon Power Co., that no beneficial or useful result could ever flow from it.

Now, to proceed for a moment to the facts: This map on the wall is what I term a lawyer's map—it contains only the principal features, rather accurately, however, I think, as to scale [pointing on map]. This is the State of Oregon, north of this horizontal line, and the State of California lies below. Upper Klamath Lake is shown in blue. The project lands are shown in various colors, the distinction in colors being between land which is served by gravity flow from the lake and lands being served by pumping. To irrigate these latter lands requires the pumping or lifting of water.

Out of Upper Klamath Lake flows the Klamath River, for 45 miles through the State of Oregon and for 210 miles through the State of California.

As has been stated, upper Klamath Lake is one of the greatest natural reservoirs in the world. It is fed by a large drainage area lying principally to the north and east, as illustrated by the Sprague River. The sole outlet of the lake is the Klamath River. Lying about Klamath Falls, principally in the area shown on the map as project lands, are irrigable lands, lands that are arid without the application of water. All of these lands lie outside the watershed of upper Klamath Lake and Klamath River.

The course of the river is through almost a flat country until some distance below the outlet of the lake. As it nears the California line and down through California there is quite a fall. The elevation of the lake itself is 4,140 feet, so that in the 255-mile course of the river there is a fall of 4,140 feet. It has been estimated by

Government engineers that there is upon that river in California, and to a small extent in Oregon, 700,000 potential horsepower.

The lake itself is 60,000 acres in area. It was held at the elevation of 4,140 feet in a state of nature by a rock rim. As the waters in spring and winter flow into the lake the level of the lake rises under natural conditions to as high as 4,147 feet; in other words, 6 or 7 feet above this rock rim. Its lowering in the summer time, of course, was always stopped by this rock rim.

The Government, after the passage of the reclamation act in 1902, investigated the feasibility of irrigating these lands. In 1904 the Department of the Interior determined upon this reclamation project. Its investigations convinced it that in order to irrigate the 200,000-odd acres, which were intended to be included in the district, from the lake, it would be necessary to appropriate every drop of unappropriated water in the Klamath drainage area, and that is what it did. It filed in Salem, Oregon, an application for all the waters of the Klamath drainage area, including the lake and all its tributaries.

There flows into the lake and out of the lake in a state of nature, in the course of a year, approximately 1,500,000 acre-feet of water. By the regulation of that flow through the year, it is possible to maintain a constant flow from the lake and down through the river to the ocean, of a little over 2,000 second-feet. The demands of the project for irrigation are 1,500 second-feet during the irrigation season. The summer flow out of the lake is as low as 800 second-feet in a state of nature.

It was therefore obvious that it was impossible to irrigate the project lands, which required 1,500 second-feet, with a summer flow out of the lake as low as 800 second-feet, even if the Government took every drop of water in that river and in that watershed. So in its original plans for the project the Government included two things:

(1) The use of the lake for storage purposes in order to supply necessary water for the lands; and

(2) The generation of electric power to lift water to the higher levels.

Now, those are rather inconsistent uses, because in the one case the water would be taken out of the lake and placed upon the land, and in the other case it would be permitted to flow down the river to generate power and would thus be lost for irrigation purposes.

That was the situation which brought about the enactment in 1905 of the statutes which have been referred to, giving to the United States the right to use Upper Klamath Lake for storage purposes, and permitting the United States to make blanket filings upon all the waters.

Now, I will direct your attention to another point: The California Oregon Power Co., while a California corporation, operates in northern California and in southern Oregon. Its principal office is in Oregon. It has hundreds of stockholders and bondholders in Oregon, and at least half of its power is consumed in Oregon. The California Oregon Power Co. and its predecessors as early as 1902 possessed riparian property upon the Klamath River in California, below the Oregon line, constituting a power site.

In 1909 various appropriations were made, and shortly thereafter construction work started on the power plant. By 1915 more than $1,000,000 had been expended in the construction of the power plant.

In 1915 it was realized that if the Government carried out the Klamath project in the State of Oregon the river would be dry in California; California would have no water, and there would be no water flowing through our power site. And so what did we do? We approached the United States. We said to the United States: "Your plans contemplate the use of that lake for storage purposes and the generation of power. If you will do that and store this water, so as to keep a normal summer flow down the river, that is all we want. All we want is water to flow down through California so that we can utilize this natural resource in the generation of power in California."

So we asked the Government: "When are you going to build that dam and regulate the flow?" They said: "Some time, but we have not the money now."

And so the negotiations started, whereby the California Oregon Power Co. would build the dam, take care of damages about the lake, supply water to the Government project, and regulate the flow of the stream so that the normal flow would go down the river through California and through its power house in California.

The Government proceeded with its usual care. The matter was first submitted to a board consisting of representatives of the State water board of Oregon, of the United States itself, and of the water users upon the project. The water users' representative on that board was Mr. Bradbury—who I now understand will appear in support of this bill. He was on that committee. They went very carefully into the subject, and recommended that this contract be made; in fact the terms of their report are incorporated in the contract almost verbatim.

Following that recommendation a contract was entered into dated February 24, 1917. This is the contract now under discussion. It is between the United States of America and the California Oregon Power Co. It provides that the California Oregon Power Co., acting for and in behalf of the United States, would construct a dam at the outlet; that that dam would become the property of the United States; that the plans of the dam would be approved by the United States; that the regulation of the lake would be subject to the control of the United States and that whenever the level of the water in the lake reached within two-tenths of a foot of the point where it would affect the Government reclamation that the Government would take actual physical charge.

It provided further that the California Oregon Power Co. would take care of navigation upon the lake; that it would take care of the claims of all the surrounding property owners for damages due to the regulation. It provided for the prior right of the United States to the waters.

It provided one further thing; that the California Oregon Power Co., at its own expense, would generate and sell all the power necessary for the project pumping at 7 mills. I direct the attention of the committee to the fact, and they are doubtless familiar with such matters, that this rate represents a saving of something like 40 per

cent over normal rates and in addition it is a rate that can not be changed for 50 years.

And so the contract was entered into. The contract provided that construction of the dam would commence within two years; and at the end of about two years—in 1919 or early in 1920—the construction of the dam was commenced.

Thereupon a protest was made to John Barton Payne, the then Secretary of the Interior. A hearing was had here in Washington, in which I participated. The matter was again referred to a local committee consisting of a representative of the State Chamber of Commerce of Oregon, a representative of the American Legion of Oregon, and a representative of the Klamath Chamber of Commerce. After an exhaustive investigation the committee recommended that the contract be carried out with certain amendments.

Senator Chamberlain appeared at the hearing before the Secretary of the Interior, as did Mr. Sinnott, and made some valuable suggestions, which resulted in the adoption of a supplemental contract, the important point of which is this: There was inserted a provision which, in terms, said that the United States should have an absolutely prior right to all the waters, and that the rights of the California Oregon Power Co. in the waters were subject to all demands the United States might desire to make.

In December, 1920, at the time of the hearing before Secretary Payne, the California Oregon Power Co. had spent $75,000 in the performance of that contract. Since that time the dam has been built. I wish it had only cost $150,000, as stated by Mr. Liljeqvist. The fact is it cost $450,000. And the fact is to-day, with the sole purpose of performing our duty under that contract, we have already spent $1,500,000 on the construction of the dam, taking care of damages and other requirements under the contract. And I may have the pleasure of defending a damage suit for $500,000 additional brought by the landowners owning lands bordering on the lake, which is now pending. So that to carry out the contract has already cost the power company $1,500,000 and may cost the company as much as $2,000,000.

Not only that, but we have built our power plants down the river in California, where they are dependent upon the maintenance of the normal summer flow of the river provided by lake regulation under the contract. We have $8,000,000 invested in these power plants, almost all made since the contract was entered into.

What has the Government gotten out of the contract? What is the fact with respect to the water supply? The official records of the department show this: That without this dam and the regulation of the supply of water to the Government, 32,000 acres of the project would have been without water during a critical portion of the irrigation season in 1920; 16,000 acres would have been similarly without water in 1921; 20,000 acres would have been similarly without water in 1922; 16,000 acres would have been similarly without water in 1923; 48,000 acres would have been similarly without water in 1924; and 24,000 acres would have been similarly without water in 1925. And I am sorry to say that this is a worse water year than 1924 was. That is what would have happened without the dam being put in.

I take it you are interested in what would be accomplished if this contract were set aside. Certainly the Government would have to to compensate us for the money we have spent in good faith. It works out about $15 an acre as a minimum for the 100,000 acres in the project which receives water stored under this contract. What would these farmers get for the $15? They would not get any more water than they get now, because they get first crack at the water supply, even if it dries up the river. And just as much power will be generated, for the water that is not used for irrigation will continue to run down the river. I will make this statement now, that if the Government of the United States will regulate that lake and agree to generate power, we will cancel our contract, because our company in California will get the benefit of the water in California to which it is equitably entitled. The United States can have the water in Oregon to generate power and when it is through with it, it will roll down the Klamath, and must necessarily roll through our power plants in California.

This is the important fact, as I see it; there is enough water flowing through the Klamath Basin for every single acre that can physically be irrigated from that basin, and there is enough water left over to maintain the normal flow of water in Klamath River in California, if the lake is regulated. Is the lake to be regulated and the normal flow in California maintained, or is regulation to cease and the river dried up in summer?

That is the question. I take it that it is the policy of the United States and the States to economically and beneficially use water. That is what this contract provides. When it was made the company was faced with this election:

Shall we institute a suit against the United States on its appropriation and against these water users and litigate the matter; shall we ask the State of California to demand of the State of Oregon an equitable distribution of those waters? Or shall we as business men talk this thing over and attempt to accomplish the proper result without litigation?

Now, we may have been foolish, but we thought it the fit and proper thing to make that arrangement and not to litigate. The contract has cost us $1,500,000; we have relied upon it for nine years, and we have spent almost $8,000,000 additional upon the faith of it. I do not think any reasonable body, and certainly not our Government, will say we have done the wrong thing.

If the suit is instituted, what must happen? Why, naturally, we must defend our water rights. Much as we would dislike to do it, we will maintain that there is no authority, public or private, or any sovereign State, that can dry up the flow of this stream against the State of California. You gentlemen know the law with respect to the waters of interstate streams. The water of interstate streams must be equitably divided between the States concerned, and in making the equitable division, the ability of a State to store waters economically within its own borders is taken into consideration, in order that the greatest possible beneficial use of the waters may be made. Assume, if you will, that the contract would be set aside, still the only result of litigation would be to force the State of Oregon to make an equitable division of the waters with California,

and this would require the regulation of Upper Klamath Lake in exactly the same way in which it is now regulated.

But what would happen in the event of litigation? The Government would instantly be called upon to pay $1,500,000, and this, in turn, would be charged to the project settlers. The water rights of the project settlers would be in dispute. I do not think that the project settlers would receive a very cordial reception from bankers if they try to borrow money on their holdings, with their water rights in dispute. I do not think many new settlers would invest in the project while the litigation was pending. The power company would be injured, although the outcome would be in its favor, for it would be difficult for it to borrow money to make improvements while the litigation was in progress, to say nothing of the cost of the litigation. Surely it is not in the public interest to invite litigation of this character, which can finally have no beneficial result to anyone.

The State of Oregon, it is said, wants to get this water back for its own use. The use that the power company makes of the water is a public use, one of the highest of public uses. We think its use is just as high a use as irrigation, but perhaps it is not. But certainly, if all of the water necessary for irrigation purposes is first provided, and the power company only uses the balance to generate power for public use, I do not see how it can be validly claimed that the use of the surplus for power is not a public use.

What do we use the water for? We use it, under the public regulation of California and Oregon, to supply the wants and necessities of the people of Oregon and California. We are subject to regulation. Our rate of return is strictly limited, and I must say that our return has been very meager. There has never been a dividend declared on our common stock. We think we are a public servant. That is our attitude, and that is our slogan. Much of the power we generate from the waters of the Klamath Basin goes back to the State of Oregon. The State of Oregon has special laws governing the use and appropriation of water. Those laws recognize and permit the use of water for the generation of power for public sale. That is what the California Oregon Power Co. does with water of the Klamath River in California. Certainly Oregon can not justly claim that these waters are not being put to a public use.

I want to correct one or two statements that were made. I know they were made unintentionally. Large areas of land on the Klamath project could not be irrigated without electric power for pumping. We generate that power and deliver it at the motor for 7 mills. We own the lines. The Government does not own those lines. The Government has not spent a sou marque to provide this storage for these lands; it has not spent a sou marque to provide for the building of the dam, although it is to be the property of the Government; it has not spent a cent to provide power for these farms. Now, if the farmers and the Government want to spend all of the money we have spent to do just what we are now doing without cost to them, perhaps we would be wise to permit them to do it. We might profit by such an arrangement. However, we think we should live up to our contract, and we think the Government should

do the same. We feel that we have lived up to our contract, and we feel that the benediction of the United States on litigation of this character, which is not only unnecessary but is very definitely against the public benefit, should not be given. And we think the reasons are overwhelming that the bill should not be enacted.

Just one further point: I do not want the committee to think that the people in this area are unanimously in favor of setting this contract aside or the passage of this bill. Not at all. The resolutions, I think, of several pumping districts asking that this bill be not enacted, have been sent here, and I think I may properly say that there are a large number of people upon the project who are very much against the institution of litigation of this kind and have so wired your committee. Frankly, I do not see what they could gain. They have a prior water right now for all they can ever use, which does not cost them anything. I think litigation would not only bring them less than they have now, but would cause much confusion and loss in the interim.

I have not referred to the sovereign rights of the State of California, but it has very distinct rights. We thought we were protecting those rights when we made this contract. We were protecting the rights of ourselves, and of the State of California by contract and at great cost in those things to which, after all, the State of California is entitled to as a matter of right and without contract.

I would be glad to answer any questions.

The CHAIRMAN. Are there any questions to ask Mr. Phleger?

Representative LEATHERWOOD. Does the State of California still rely upon the riparian rights doctrine?

Mr. PHLEGER. The State of California relies upon the riparian rights doctrine, modified to this extent: It follows the law of appropriation, as between appropriators, but protects riparian owners as against appropriators. From the old case of Lux *v.* Haggin it has followed the riparian doctrine. But the policy, in California, as in every Western State, is that water should be put to the maximum use and if there is enough water for everybody, everybody should get it.

Senator GOODING. Have you the figures showing the pumping lift and the percentage of the land that is covered?

Mr. PHLEGER. I think I can give you that in a concrete way. The area of land which is now receiving water by pumping is 24,000 acres, out of a total of approximately 60,000 acres, which are now being irrigated. The ultimate percentage will be somewhat different. The uttermost limits of the project have not yet been finally fixed, but they may include as much as 200,000 acres. Out of that 200,000 acres the lands which will require pumping either for irrigation or for drainage will include about 58,000 acres. I think that we may very conservatively say that at least one-third of the land now requires pumping for irrigation purposes. The ultimate percentage will be somewhat smaller.

Just one point: The limits of this project are very great, and I think comprehend in the ultimate analysis about 250,000 acres. Of this about 60,000 acres have presently been put under water. The supplemental contract made on December 10, 1920, after those points were called to the attention of the Department of the Interior, provides in terms that all of the lands comprehended within the original

project—that is, the entire 250,000 acres—shall have prior rights to the power company, so that this priority of rights is not confined to the lands presently irrigated, but include all the lands in the project which may ultimately be irrigated. And I will say that includes every acre which can physically be irrigated from this source.

Representative LEAVITT. Do you dispose of power now on the unit basis to the water users?

Mr. PHLEGER. Yes, sir.

Representative LEAVITT. At the 7-mill rate?

Mr. PHLEGER. No; that is the rate to official users, as they may be called, for pumping. In fact, there is a still lower rate of 5 mills for pumping for drainage purposes. All of the people in this district, down in the Shasta View district, down into the State of California, all of them in that area, are served by this company with light and power for all domestic purposes generated by the waters of the Klamath.

Representative LEAVITT. Their rate, except for the pumping, is at the regular rate?

Mr. PHLEGER. It is the standard rate; yes, sir. The theory was that power which the Government itself contemplated generating for project purposes, for pumping and drainage, should be sold at the 7-mill and 5-mill rate. The ordinary domestic use is charged at the regular rates.

Representative SINNOTT. Mr. Phleger, what is your view of the 10-year limitation of the statute on a lease of a power privilege in connection with this matter?

Mr. PHLEGER. I am very glad you brought that up, Congressman. You remember that was the subject of some discussion in 1920. The contract is not a lease of a power privilege. It is a contract settling a dispute between owners on the subject of water rights. It is a working arrangement between the United States of America, which owns certain rights in the State of Oregon, with a power company which owns conflicting rights in the State of California whereby those rights are adjusted and settled. The sovereign State of Oregon conveyed to the United States, another sovereign, certain property, consisting of a lake to be used for storage purposes and also all the waters of the Klamath Basin in the State of Oregon. Now we in California do not think the State of Oregon had a perfect title to all those waters. We do not think the State of Oregon can dry up the waters of the Klamath River at the State line.

Senator SHORTRIDGE. Of course, she can not. Pardon me, Mr. Phleger.

Mr. PHLEGER. In other words, the United States had a grant of property, but did not have a perfect title. We all know that a trustee can deal with property in order to perfect its title. That is an inherent power of a trustee. Now, what did it do? It made the best bargain that I think the United States has ever made. It entered into this contract and got all it wanted. What did it get? It got a waiver by the California Oregon Power Co., whose rights were of equal dignity with the Government—it got a waiver by contract of all claim to prior rights to the water. How did it get that? It got it because our engineers made an investigation and reported that if

such notice the proper officer of the United States shall file final plans of the proposed works in the office of the State engineer for his information: *And provided further*, That within four years from the date of such notice the United States shall authorize the construction of such proposed work. No adverse claims to the use of the water required in connection with such plans shall be acquired under the laws of this State except as for such amount of said waters described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized, which release shall also be filed in the office of the State engineer. In case of failure of the United States to file such plans or authorized or authorized construction of such works within the respective periods herein provided, the waters specified in such notices, filed by the United States, shall become subject to appropriation by other parties. Notice of the withdrawal herein mentioned shall be published by the State engineer in a newspaper published and of general circulation in the stream system affected thereby, and a like notice upon the release of any lands so withdrawn, such notices to be published for a period not exceeding 30 days.

Filed in the office of the secretary of state February 22, 1905.

EXHIBIT C

PORTLAND, OREG., *October 4, 1920.*

HON. JOHN BARTON PAYNE,
Secretary of the Interior, Washington, D. C.

MY DEAR SIR: Upon my return from a trip through the central and western portions of the State, I found your favor of the 8th ultimo on the subject of the Klamath reclamation contract. In that letter you advised me that you were in receipt of a long letter from the California Oregon Power Co., the burden of which was that the company had expended some $75,000 and insisted that the contract between it and the Government is in the public interest and can not be disturbed. You asked me for my views on the subject.

In reply, permit me to say that I do not believe I can more succinctly or more clearly express my views to you than was done in a recent telegram sent to you signed by Congressman N. J. Sinnott and myself, covering the whole of this subject. I can therefore only repeat the substance of what we then submitted to you.

You are familiar with the situation and will agree with me that Klamath Lake is the greatest natural reservoir in the world, completely surrounded by high lands and mountains and perpetually supplied with water by mountain streams and surplus snow waters. The waters in the lake do not vary very much and the lake is situated above many thousands of acres of land either under irrigation now from waters taken therefrom or susceptible or irrigation later by the construction of other ditches and laterals.

For many years prior to the time when the Government entered upon the Klamath irrigation project waters were taken from the lake through privately owned ditches, and were utilized for the irrigation of privately owned lands. In 1905, while I was governor of the State, the then Secretary of the Interior, through the Director of the Reclamation Service, entered into negotiations with the State of Oregon and with the State of California with reference to said waters and rights belonging to the two States which were necessary, it was thought, to enable the Government to proceed with the Klamath irrigation project. The legislature of the State of Oregon, pursuant to these negotiations, passed an act, which was approved January 20, 1905, and which is as follows:

AN ACT To authorize the utilization of Upper Klamath Lake, Lower or Little Klamath Lake, and Tule or Rhett Lake, situate in Klamath County, Oregon, and Goose Lake, situate in Lake County, Oregon, in connection with the irrigation and reclamation operations of the Reclamation Service of the United States, and to cede to the United States all right, title, interest, and claim of the State of Oregon to any and all lands recovered by the lowering of the water levels or by the drainage of any or all of said lakes

Be it enacted by the Legislative Assembly of the State of Oregon; be it enacted by the people of the State of Oregon:

SECTION 1. That for the purpose of aiding in the operations of irrigation and reclamation, conducted by the Reclamation Service of the United States, established by the act of Congress approved June 17, 1902 (32 Stat. 388),

known as the reclamation act, the United States is hereby authorized to lower the water level of Upper Klamath Lake, situate in Klamath County, Oregon, and to lower the water level of, or to drain any or all of the following lakes: Lower or Little Klamath Lake, and the Tule or Rhett Lake, situate in Klamath County, Oregon, and Goose Lake, situate in Lake County, Oregon; and to use any part or all of the beds of said lakes for the storage of water in connection with such operations.

SEC. 2. That there be and hereby is ceded to the United States all the right, title, interest, or claim of this State to any land uncovered by the lowering of the water levels or by the drainage of any or all of said lakes not already disposed of by the State; and the lands hereby ceded may be disposed of by the State; and the lands hereby ceded may be disposed of by the United States, free of any claim on the part of this State in any manner that may be deemed advisable by its authorized agencies, in pursuance of the provisions of said reclamation act.

Approved January 20th, 1905.

Filed in the office of the Secretary of the State January 20, 1905.

I think I can speak authoritatively when I say to you that when the cession was made, under the terms of this act, by the State of Oregon to the United States it was the purpose solely of the State to make the same to aid in the operations of irrigation and reclamation under the act of Congress approved June 17, 1902.

If the suggestion has been made that the waters of the lake were to be used for power purposes or that the Government would ever enter into a contract with any private company or corporation authorizing the construction of a dam and the utilization of the waters of the lake for power purposes or the irrigation lands not coming within the provisions of the reclamation act, the legislature would not have made the cession, and I am sure that I never would have approved the act.

Taking it by the four corners and reading it as a whole, I am sure you will conclude with me that the terms of the act bear out the contention which is here made.

Contrary to the terms thereof, your predecessor has entered into a contract with the California Oregon Power Co. authorizing the construction of a dam that will raise the waters of the lake, for the purpose of controlling and regulating them for the period of 50 years.

I will not undertake to call attention in detail to the provisions of the contract, because you have it before you, but, taking it altogether, the main purpose of it is to authorize the utilization of the waters for power purposes, and irrigation is a mere incident to the contract. In my opinion, it is violative of the act of the Oregon Legislature, and the Secretary of the Interior had no power or authority to enter into it.

In the second place, the United States ought not to transfer the control of any part of the waters of Klamath or any other lake situated as it is to the jurisdiction and control of any private company or corporation. If a dam is to be constructed where the power company now proposes to construct one, it ought to be constructed by the Federal Government and the waters of the lake controlled entirely in the public interest.

It is claimed by the reclamation officials that the construction of this dam by the power company will be an aid to irrigation of lands

in Klamath County. If that be true, how much greater would be the benefits derived from irrigation of other lands than those now under irrigation from the waters of Klamath Lake if the Government will construct such dam to whatever height may be necessary, raising the waters of the lake so as to utilize all of the waters thereof for the irrigation of lands not now under irrigation?

The contract entered into between the Secretary and the power company is contrary to public policy, and, furthermore, is contrary to the general policy of the Government, under which limitations and restrictions are placed upon the disposition of waters under the jurisdiction of the Federal Government. Vigorous protests were made to the Secretary against the execution of this contract by individuals in Klamath County and by some, if not all, of the Representatives from Oregon in Congress. I felt when negotiations were being had that the contract ought not to be entered into, and I feel now that an effort ought to be made to cancel it. The company will resist cancellation, of course; but if the contention which I am attempting to make is correct the courts will not sustain it.

The raising of the waters of the lake under this contract will flood quite a large body of the Government lands at the upper end thereof and interfere with acquired rights of individuals along the edge of the lake; and while these are matters of great importance they do not, in my opinion, compare in magnitude with the principle involved and with the possibility of interfering with later irrigation projects in Klamath County which the Federal Government itself ought to put under way as soon as moneys are made available by Congress for that purpose.

May I say, Mr. Secretary, without meaning to impugn the integrity of the reclamation officials at Klamath Falls, that they seem prejudiced in favor of this contract. In my discussion with the project engineer, Mr. Newell, he strenuously insisted that the performance of this contract by the power company would aid in the irrigation of lands in Klamath County, and he did not think the contract ought to be disturbed. But, again, I repeat, if that be true, the Government itself ought to construct the dam; and upon your recommendation I am sure Congress would appropriate the moneys necessary to do this; if not now, a little later.

Before acting upon the recommendation of these gentlemen, an independent and impartial investigation and hearing ought to be had, so as to develop to you the whole situation. In this connection permit me to say that at a number of hearings had before Secretary Lane in reference to this contract with the power company Mr. O. Hamele, chief counsel of the Reclamation Service, appeared and was of the opinion that the contract with the power company ought to be kept in force; at least, that is my recollection of his attitude. He recently visited Klamath Falls, and it was generally supposed that he was there to examine the situation and make report to the Interior Department. In view of his well-known attitude upon the subject, it would be better, it seems to me, to have some one without preconceived opinions to look into the situation, particularly if it is your purpose to act without any hearings upon the subject. A great deal of feeling has been engendered over this matter, and when it is finally settled it ought to be settled right. Otherwise it is impossible to tell what serious results may follow.

I am submitting these observations to you, Mr. Secretary, first, because of my familiarity with the act of the Oregon Legislature of 1905; second, my knowledge of the whole irrigation situation in Klamath County; third, my acquaintance with the present situation in regard to lands under irrigation and those that may later be irrigated; and, fourth, my feeling that this contract, if permitted to stand, violates the act of cession and is contrary to the national policy, as well as the public policy generally. I beg that you will give the matter your usual painstaking consideration, to the end that a proper solution of a complicated situation may be arrived at.

I have the honor to remain,

Yours very sincerely,

GEO. E. CHAMBERLAIN.

Exhibit 4

No. 3

--- C O N T R A C T ---

Between the SECRETARY OF THE INTERIOR
&
CALIFORNIA-OREGON POWER CO.

Raising the Level of Upper Klamath Lake.

February 24, 1917.

Klamath - Oregon
Contract Storage
Cal-Ore Power Co. re
raising level of Upper Klamath Lake

(COPY)

THIS AGREEMENT made this Twenty-fourth day of February, 1917, in pursuance of the Act of June 17, 1902 (32 Stat., 388) and acts amendatory thereof and supplementary thereto, between the United States of America, hereinafter styled the United States by Franklin K. Lane, Secretary of the Interior, and the California-Oregon Power Company, a California corporation, hereinafter styled the Company.

Witnesseth:

Whereas, the United States pursuant to the said acts 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, an Act of the Legislature of the State of Oregon approved January 20, 1905 (Chap. 5 General Laws of Oregon, 1905, P. 63) authorized and empowered the United States to lower the water level of Upper Klamath Lake, Klamath County, Oregon, and to use any part or all of the bed of said lake for the storage of water in connection with the operations of irrigation and reclamation conducted by the Reclamation Service of the United States, and

Whereas, the Company has offered to construct a dam at or near the outlet of the Lake for the purpose of regulating the level of th lake in such manner as may be deemed advisable by the United States for purposes authorized by the laws of the United States and of the State of Oregon,

Now therefore, The parties hereto agree-

1. The Company acting for and on behalf of the United States, may at its option construct a dam on Link River at or near the outlet of Upper Klamath Lake for the purpose of controlling and regulating the waters of the Lake and the flow in Link River and may operate and maintain said dam for a period of 50 years from the date hereof subject to the conditions hereinafter provided. The said dam and the appurtenances thereof, including the land upon which it is situated, shall be the property of the United States, and the Company hereby undertakes and agrees to acquire and convey to the United States such land, the title to which is not now in the United States, as will be occupied by said dam and as may be necessary for its construction, maintenance and operation.

If said Company elects to build said dam as herein provided, said Company must, within two years from date hereof, notify the Secretary of the Interior in writing of its election so to do, and the Company shall thereupon become bound by all of the conditions and obligations of this contract with reference to said dam and the regulation of the water levels of Upper Klamath Lake. If such written notice is not so served within said period, then all rights and obligations of the Company under this contract, other than with regard to the lease of the Keno Canal and the provisions regarding the sale of power, shall immediately cease and terminate. The promise

of the Company to supply power and to lease the Keno Canal, as herein provided, shall be deemed sufficient consideration for the option to erect and maintain said dam.

2. Said dam shall be constructed according to plans and specifications approved by the Director of the Reclamation Service and under the supervision of that Service. The top of said dam shall ultimately have an elevation of 4143.3 above sea level according to the datum of the Reclamation Service, to which all elevations hereinafter stated are referred and shall be so located as to protect the intake of Keno Canal of the Reclamation Service and permit a flow of water therein to its full capacity. The dam shall be so constructed that at its various stages it will permit at all times a maximum outflow not less than 6,000 cubic feet per second.

3. The Company, after constructing said dam, may regulate the water level of Upper Klamath Lake between elevations 4143.3 and 4137, but the water level shall not be raised above elevation 4143.3 and shall not be lowered below elevation 4137. Within two years from the date of this contract the Company must elect whether or not to construct said dam, and within one year after such election the dam shall be so constructed as to permit of the raising of the elevation of the lake to a height of 4141.5, and within 10 years shall be constructed to its ultimate elevation for providing a lake level of 4143.3 The Company may be permitted to lower the level of the lake to below 4137 at such times and upon such conditions as may be satis-

factory to the Secretary of the Interior.

4. If the Company elects to build the dam, the Company shall at its own expense deepen the approach channels to the Main and Keno Canals of the Reclamation Service, to the satisfaction of the Secretary of the Interior so far as necessary to insure a flow of not less than 1200 cubic feet per second during June, July and August, and 1000 cubic feet per second at all other times into Klamath Project main canal and not less than 1020 cubic feet per second into Keno Canal with water of the lake at an elevation of 4137.

5. The lowering and raising of the waters of the lake below or above the normal fluctuations while in a state of nature shall be undertaken by the Company only after making satisfactory adjustments at its own expense in regard to all interests which may be affected thereby, whether of the State for navigation or other purposes, or of any private individuals, or Indians.

6. The Director of the Reclamation Service through the authorized representative of said Service on the project shall specify from time to time the lowest permissible limit for the lake level to protect the requirements of the project, and whenever the lake level drops to a point two-tenths of a foot above such level, such representative shall assume control of the dam and its outlets and continue in control so long as the lake level remains at or below that elevation.

7. The Company assumes any and all liability for damage to the property or rights of any person or corporation or the property or rights of the State of Oregon or of the Indians due to the operation of said dam by said Company or to the regulation and control of the levels of said lake by said Company and hereby undertakes to hold the United States harmless from any and all liability for damage due to such regulation and control.

8. At the end of the 50-year period of the Company's control and operation of the dam all rights hereunder shall terminate.

9. In consideration of the rights and benefits accruing to the Company by reason of the control and operation of the dam, the Company hereby agrees to furnish electric power during the 50-year period of its control of the dam for all pumping requirements for the irrigation or drainage of lands deriving their water supply from or in connection with the works of the Klamath Project, or otherwise made part of the Project by the Secretary of the Interior, within 25 miles from the town of Merrill, Oregon, at a rate of 7 mills per kilowatt hour. In the case of the power for the drainage of Tule Lake the charge for the power shall be 7 mills per kilowatt hour between the hours of 6 p. m. and 11 p. m. and at the rate of 5 mills per kilowatt hour during other times of the day. All such power shall be delivered by the Company at its own expense wherever there is an installation for such pumping purposes of 100 horse-power or more, for at least 2 years business at an average load factor of at

least 50%. The electric current supplied shall be in such form as to be available for the pumping requirements of the project. In case the commercial rates for power at any time are lower than the said rates for a like service, the commercial rates during such time shall supersede those herein stated. This rate does not extend generally to pumping by private individuals, but only to pumping by the United States or by the Water Users' Association, or other successor in interest of the United States, or to organizations or individuals pumping water to any lands of the project as described in this section.

10. Nothing in this agreement shall curtail or be in any wise construed as curtailing the present 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.

11. The failure of the Company to comply in their true intent and meaning with any of the provisions of this contract in regard to the construction, operation, and use of the dam at the outlet of Klamath Lake during the 50-year period shall render this contract in regard to said dam subject to cancellation by the Secretary of the Interior upon 60 days' written notice to the Company stating the cause for such proposed cancellation and in case of failure or refusal of the Company to comply with the provisions of this contract within the period allowed by the Secretary of the Interior he may cancel this contract as to such dam. After such cancellation the Company shall have no further rights in regard to the

use of the said dam and its appurtenances, the operation and control of which shall immediately pass to the United States.

12. The United States hereby leases to the Company for a period of 10 years from the date of this contract at an annual rental of $1,000 per year the Keno Canal of the Klamath Project together with its appurtenances, and so far as may be authorized under the laws of the State of Oregon the right to the use of 815 cubic feet of water per second therein, in addition to the 205 second-feet which the Company now claims as successor to the Moore Bros. and is using; Provided, That such additional right to the use of 815 second-feet shall be subordinate to the water rights deemed necessary for the Klamath Project as determined by the Director of the Reclamation Service. The aforesaid rental shall be payable annually in advance, the first of which payments shall be due at the date of the signing of this contract, and said lease shall be subject to the conditions hereinafter stated. The Secretary of the Interior shall have the right in his discretion to renew this lease of the Keno Canal after the expiration of said ten-year period for a further period of ten years, on the same terms.

13. The Company may use the said canal for power purposes subject to the obligation heretofore assumed by the United States in connection with the delivery of 205 second-feet of water through said canal, and shall maintain it at all times in good condition satisfactory to the Secretary of the Interior.

14. The Company shall be permitted to make such improvements in the Keno Canal at its own expense as may be approved by the Secretary of the Interior, and all plans and specifications for such work shall be subject to the approval of the Director of the Reclamation Service, and the work performed shall be under his supervision. Any further improvements made by the Company as to which the Secretary of the Interior expressly declares that the Reclamation Service shall bear one-half the reasonable cost, shall be a credit on account of the rental charge paid and payable hereunder up to the limit of such charges, and any additional amount of such one-half share shall be paid to the Company by the Reclamation Service. At the termination of the said 10-year lease period all rights secured hereunder for the use of said canal and of 815 cubic feet of water per second and all appurtenances together with all improvements made by the Company as a result of this lease shall revert to the United States and the Company shall not be authorized to exercise any further control thereof. Nothing in this contract shall abridge or be construed to abridge, or affect in any way the rights which the Company now has in said canal and in and to the waters flowing therein and in Link River.

15. The Company assumes any and all liability for damage to property or rights of any persons or corporation due to the construction, operation or maintenance of the said Keno Canal while under lease to the Company or to any work which it may cause to be done thereon

and hereby undertakes to hold the United States harmless from any and all liability for damage due to its occupation and use of the said canal or to any work which it may cause to be done thereon.

16. All payments herein provided for shall be made to such officer of the Reclamation Service as may be designated by the Director and in case of failure to make any payment when due the Company will pay interest thereon at the rate of 10 per cent per annum up to the date of payment.

17. The failure of the Company to comply with any of the provisions of this contract as to the 10-year lease of Keno Canal in their true intent and meaning, shall render the lease of the Keno Canal as herein provided subject to cancellation by the Secretary of the Interior upon 60 days' written notice to the Company, stating the cause for such proposed cancellation and in case of failure or refusal of the Company to comply with the provisions of this contract within the period allowed by the Secretary of the Interior, he may cancel this contract as to said canal. After such cancellation the Company shall have no further rights in regard to the use of the Keno Canal as herein provided, but such cancellation shall in no wise curtail or affect the rights which the Company now has in said canal and in its waters and in the waters of Link River.

18. The provisions of this and the following paragraph refer to the work on both the dam and the canal. In all construction work eight hours shall constitute a day's work. It is expressly stipu-

lated and agreed, in accordance with the provisions of the Act of June 19, 1912 (37 Stat., 137), that no laborer or mechanic doing any part of the work contemplated under this contract, in the employ of the contractor or any subcontractor contracting for any part of the work contemplated to be performed hereunder, shall be required or permitted to work more than eight hours in any one calendar day upon such work. No Mongolian labor shall be employed under this contract. The importation of foreigners and laborers under contract to perform labor in the United States or the District of Columbia is prohibited. (Sec. 3738 Rev. Stat. U.S.; Acts, Aug. 1, 1892, 27 Stat., 340; June 17, 1902, sec. 4, 32 Stat., 388; Feb. 26, 1885, 23 Stat.,532; Feb. 23, 1887, 24 Stat., 414). In the performance of this contract no persons shall be employed who are undergoing sentences of imprisonment of hard labor imposed by courts of the several States or municipalities having criminal jurisdiction. (Executive order, May 18, 1905).

19. No member of or delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified and during his continuance in office, and no officer, agent, or employee of the Government, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation

or company, as provided in section 116 of the Act of Congress approved March 4, 1900 (35 Stat. L., 1109).

In witness whereof the parties have hereto set their hands and the seal of the Company is hereto affixed.

W.R.K
E.C.F. A.P.D.
H.B.

United States of America
By Franklin K. Lane.

California-Oregon Power Company
By Alex. J. Rosborough,
Vice-President

(Corporate Seal)

Exhibit 5

TELEGRAM.

April 14, 1919.

Hon. Franklin K. Lane,
Secretary of the Interior.
Washington, D. C.

People on Klamath Project desire to know the policy of the Reclamation Service relative to final disposition of power features of Project. Recent act of service negotiating a lease of ten years with California-Oregon Power Company of Keno Canal with privilege of building dam across Link River with control of same for fifty years without consulting wishes of people has aroused much hostility and suspicion. People willin to cooperate with Reclamation Service in all matters pertaining to prope development of project but high handed acts render such course difficult Would be pleased to receive from you explanation of your course which shows same to be compatible with best interests of people on project and to that end would kindly ask for immediate telegraphic reply to the following questions:

Is the power account if any charged to the klamath Project?

Is the Klamath Irrigation District liable for expenditures made by Reclamation Service in connection with power canals, sites and other power features incident to Klamath Project?

If power features have been segregated from Klamath Project have individual water users been given credits for amount charged to power features under their annual installments on the cost of the Klamath Project

Have the recommendations of the Board of Review been adopted as a matter of policy wherein one-half of the cost of the power features have been charged to Units one and two and one-fourth to Tule Lake and one-fourth to Lower Klamath Lake marshes Klamath Project, and if not why recommendations were not followed?

If the power features of the Klamath Project have been segregated and are no longer charged to said project by what authority was it done and who is to repay the money expended in that connection?

If a portion of the power account is chargeable to canals will the title to and management of said canals be turned over to water users?

If it is contemplated to sell the Ankeny power canal, site for powe house and water right will Klamath Project get credit for the amount realized on said proposed sale and will the liability mentioned in contract between United States and the Klamath Irrigation District be reduced to that extent?

Will the Klamath Irrigation District at any time in the future acquire absolute ownership of the canals and lateral system supplying wate to the district with sufficient water to irrigate the district lands?

Does the sum of money specified in the contract between the United States and the Klamath Irrigation District represent the total liability to the United States and will that be all that said district will be hel liable for on account of the developement and cost of project?

Is the Klamath Irrigation District now liable for any deficit that may exist in connection with the Klamath Project as a whole, and may it become liable therefor in the future?

Does the contract now existing between the Klamath Irrigation Dist. and the United States abrogate or supercede the contract of guaranty between the Klamath Water Users Association and the United States for the whole amount expended in connection with the Klamath Project?

Inasmuch as the following clause with reference to the Ankeny Canal in the contract between the United States and the Klamath Irrigation District was not in said contract when voted on by the water users do you consider Klamath Irrigation District to be bound thereby:

"provided that said maximum sum does not include any proposed cost for additional drainage, replacement of perishable structures, or any rights to the Ankeny Canal, but covers

amounts expended or authorized to be expended prior to date hereof."

13 By what authority do you add $6.00 penalty on lands brought into Klamath Irrigation District not peviously under Stock Subscription and contract, or Water Right Application, and if this penalty is waived, will the United States give Klamath Irrigation District a corresponding reduction of the amount of the indebtedness assumed in contract between United States and Klamath Irrigation District?

14 Do you consider that the Klamath Irrigation District would be liable either directly or indirectly for possible damages resulting from the construction of the proposed dam and dykes pursuant to authority given California and Oregon Power Company?

15 Will the Klamath Irrigation District or Klamath Project at large have first privilege of purchasing power possibilities incident to Klamath Project for the amount actually expended by the Government in connection therewith.

KLAMATH IRRIGATION DISTRICT

Geo.W.Offield.

R.E.Bradbury.

Directors.

Exhibit 6

Klamath Falls, Ore., March 18, 1920.

Project Manager

Director and Chief Engineer

Regulation of Upper Klamath Lake - Klamath project.

1. At a meeting of the Business Mens' Association of Klamath Falls, Oregon, held Friday evening March 12, 1920, the following resolution was adopted:

"Whereas the original plans of the United States Reclamation Service contemplated a project embracing 256,000 acres of land, and the present size of the Klamath project is but 50,000 acres or thereabouts,

And whereas if the waters of the Upper Klamath Lake were controlled by the Government of the United States there would be an ample supply of water to irrigate the remaining 206,000 acres originally contemplated by the United States Government plans for the Klamath project,

Therefore be it resolved by the Klamath Business Men's Association that our Senators and representatives in Congress be urgently requested to appropriate the necessary funds to complete the Klamath project as originally planned,

And be it further resolved, that the Government itself build the dam at the head of Link River without delay and itself control the waters of Klamath River and Upper Klamath Lake; that all of the said waters be first utilized for irrigation until every acre of land in the Klamath Basin capable of being irrigated, is irrigated; that all public lands be opened to entry with a preference right in ex-soldiers, sailors and marines and army nurses."

2. Copy of the resolution will be sent to Oregon's representatives in Congress and doubtless also a copy will be sent to you. I am enclosing clipping from the Evening Herald of March 15th giving a partial account of the meeting. For the information of your office, I am enclosing also a copy of the legal opinion, referred to in the clipping, and written by Mr. J. F. Stone in the spring of 1917.

3. It occurs to me that the resolution of the Business Men's association affords the opportunity for a reply which will tend to clarify the situation and make for a sane public sentiment. The questions involved in the contract between the United States and the California-Oregon Power Company have been so persistently misrepresented that very few in the community have clear ideas what will be the effect of the contract and whether or not the Company is being given valuable privileges without paying therefor anything like an adequate compensation.

4. The meeting of March 12th was the first one following the meeting in January at which my paper was read. I believe those opposing the present plan of lake regulation requested an opportunity to be heard; therefore, Messrs. Bradbury and Carnahan were invited to appear. Mr. Bradbury's remarks are indicated in part in the clipping. What the clipping omits mentioning is that Mr. Bradbury claimed that the contract did not follow the Board's recommendation of October 6, 1916, of which Board he was a member. After Mr. Bradbury had finished, Mr. Walton, local manager for the Power Company, compared the contract with the recommendations of the Board, paragraph by paragraph, and showed that so far as lake regulation is concerned the contract and the Board Report are in substantial agreement.

5. Mr. Carnahan then made an address and proposed, what he called, a compromise resolution. Mr. Walton feeling sure that some resolution would pass anyhow, promptly moved the adoption of the resolution suggested by Mr. Carnahan. However, in writing the resolution, Mr. Carnahan attempted to introduce various matters not originally suggested. Mr. Walton, as the one moving the adoption of the original resolution, was in a position to show that the draft, as written, was not in harmony with the one first proposed; therefore, the objectionable phases were struck out and the resolution passed, as quoted.

6. I believe a reply to the resolution can be made which will show that project development, as contemplated

by the Reclamation Service, is in general harmony with the resolution of the Business Men's Association, and, in so far as they differ, the plans of the Service are better for the community and more severe for the Power Company than those implied in the resolution. The reply should be framed with the idea that copies will be sent to the Secretaries of the various Irrigation Districts in this vicinity which will derive their water supply from Upper Klamath Lake. As an aid in formulating a reply, I wish to indicate some of the objections commonly raised and suggest the general nature of the answer which, it seems to me, should be made to the Business Men's Association.

7. It is alleged:

(a) That by the contract between the United States and California-Oregon Power Company the Company has been given the prior right to all water in Upper Klamath Lake after the United States has diverted 1200 second feet;

(b) That the United States at present runs the main canal full, and uses the quantity of water above indicated; therefore, the contract prevents any additions to the project thus excluding both the proposed pumping districts and Tule Lake Lands;

(c) That the dam belongs to the California-Oregon Power Company which, in effect, is given practically complete control of Upper Klamath Lake and that the United States can only use such water as the Company does not wish;

(d) That the only consideration paid by the Company is $1,000.00 a year, annual rental for the Keno Canal, and making a rate of seven mills per kilowatt hour for pumping. Further, that the pumping rate is largely a subterfuge as the area benefited by this rate at present is small and may never be large.

8. While an examination of the contract will show the falsity of these assertions, nevertheless they are made. Their frequent reiteration tends to befog public sentiment because there has been no authoritative denial supplemented by a statement of the reasons for the contract and the benefits to the public conferred thereby.

9. The reply should emphasize:

(a) That under the contract the United State has ceded no water rights. Water rights for the Klamath project, up to its maximum feasible limits, are fully protected by virtue of appropriations made by the United States, supplemented by water rights acquired by purchase and perfected by systematic and extensive construction;

(b) That the contract does not adversely affect the water rights of the marginal marsh lands on Upper Lake;

(c) That the water rights for land within the Klamath Indian Reservation are not affected one way or another by the contract; further, that such rights are sufficiently safeguarded;

(d) That if the marsh lands around Lower Klamath Lake are shown to be good agriculturally, and a feasible plan for their irrigation can be developed, it will be legally possible for them to secure a water right through the United States with early priority., However, if the marsh landowners elect to rely on their own filings they must take their chances under State laws;

(e) That the dam at the head of Link River is to be built at the expense of the Power Company according to plans approved by the United States, under its supervision, and, when built, will belong to the United States. Control by the Power Company is only delegated control to an agent and the United States will assume direct control whenever the water surface reaches an elevation where the project supply may be adversely affected;

(f) That the Power Company gives a substantial and adequate consideration for whatever benefits it may receive. Without lake regulation during July and August of years of low run-off the available supply for irrigation has been less than 525 second feet, corresponding to an adequate supply for less than 40,000 acres. The United States is now obligated to supply about 50,000 acres. Water is also needed for proposed pumping districts, totaling about 20,000 acres; likewise for a similar area of Tule Lake land.

In the not distant future water may be needed for other Tule Lake lands; also for lands around Lower Klamath Lake, so ultimately water may be required for from 150,000 to 200,000 acres - substantially all to come from Upper Klamath Lake. By virtue of the contract with the Power Company, the project will get the necessary storage free of cost.

10. No accurate estimate of the probable cost to the Power Company of Lake regulation can be given at this time. The dam and the channels to be excavated through the reefs leading to the diversion points of the Keno Canal and the project Main Canal may easily cost $250,000. If the marginal marsh lands are fully dyked, then in the neighborhood of 100 miles of exterior dykes will be called for. A maximum section of the dykes is likely to run in the neighborhood of 10 yards per lineal foot or 50,000 cubic yards to the mile, corresponding to a cost of $10,000.00 per mile. While some of the dyking may be much cheaper, one can easily see that the cost of the exterior dykes may approximate $1,000,000.00. In addition, there will be the cost of interior dykes, drains, pumping plants, power lines and channel diversions for control of natural drainage. Moreover, the Company must satisfy existing rights on the Upper Lake, so it may be subject to costly litigation, damage claims and the necessity of extensive purchases of land. While to the extent to which it is feasible, the cost of the work, indicated above, can be charged against the land benefited thereby, yet where such a charge cannot be made, the Power Company must shoulder the burden.

11. If the Power Company does not do the work and the United States regulates the lake by virtue of direct appropriation and expenditure of funds, then either lake regulation must be limited to that needed for irrigation only or else the United States must face a problem involving the probable expenditure of $1,000,000.00, or more. A large part of the expenditures indicated above would have to be charged to lands yet to be irrigated, which includes proposed pumping districts and Tule Lake lands. Meanwhile the Power Company, and such other ~~interests~~ buyers as may hereafter develop along Klamath River, would get the benefit of lake regulation with ~~cost~~ out. The foregoing indicates why the resolution of the Business Men's Association does not protect the public interests as well as does the existing contract with the Power Company.

12. It can be pointed out that the Reclamation Service appreciates the efforts of the Business Men's Association to secure funds for the early completion of the project to the fullest feasible limit. The contract with the Power Company furthers that very end. By it lake regulation will be obtained in the near future without the delays and uncertainties which are inseparable from dependence on Congressional appropriations. The project will obtain storage to whatever extent is necessary without cost to the water users and at the expense of the Power Company, which will be compelled to pay a fair price for the benefits it will receive.

13. The statement should be made that existing laws give the preference right to ex-service men which the Association requests in its resolution. I believe it would also be well to point out that it is clearly for the public interests to further electric power development to the fullest extent economically feasible. Where development is by private interests, the public has or can have protection against extortionate rates by virtue of the powers of the Public Utilities Commissions of Oregon and California. Before closing, I should make clear that while every year the Main Canal is checked up so it appears to be full, actually the maximum quantity thus far run is only 460 second feet or one-third the designed capacity of the Canal.

Herbert D. Newell

cc Director
C of C
D C

Exhibit 7

K

DEPARTMENT OF THE INTERIOR

WASHINGTON DEC -6 1929

California-Oregon Power Co
8-C
Klamath Lease Power

Hon. George E. Chamberlain,

United States Senate.

My dear Senator:

I have given careful and extended consideration to the matter of the California-Oregon Power Company contract, executed by my predecessor on February 24, 1917, and to the suggestions you and Congressman Sinnott have been kind enough to make in connection with it.

With your position on the question of policy involved I am in entire agreement. The United States should have built this dam on its own account, and with its own funds. If the question of entering into this contract were before me as a new matter, I should take that position and, of course, decline to enter into an agreement along the lines here involved. But the matter is not a new one. The contract has been in effect well over three years. The company, as well as many citizens of Klamath County, have changed their positions very materially in dependence on it. The company has expended a large sum of money in operations under the contract. Farmers of Klamath County have made expenditures and incurred obligations in reliance on its terms. These considerations, as well as the question of public policy originally involved, must be taken into consideration.

The committee of the Klamath Falls Chamber of Commerce in its report, as a result of its investigation of this matter, has made some suggestions which seem to me well taken. I think the contract may well be modified in some regards. I have concluded, however, that I would not be justified in cancelling it.

I appreciate highly your interest and help in bringing out the facts concerning the matter. A copy of the supplementary contract which it is proposed to execute is inclosed herewith.

Cordially yours,

(Sgd.) JOHN BARTON PAYNE

Any suggestion ?

Inc. 7205

Exhibit 8

LP208253.9

11/17/55

MEMORANDUM

Negotiations Leading up to
Contract Between the Bureau of Reclamation and Copco
dated October 10, 1955,
With Particular Reference to the Matter of Power Rates

Five years ago, on November 10, 1950, the Attorney General of Oregon rendered an opinion, contrary to the former Attorney General's opinion, that the waters in the Klamath basin were subject to appropriation. The opinion was submitted to attorneys Roberts, Rives and Kuykendall for review. The result was authorization by the board of directors on February 15, 1951 to make application to the Federal Power Commission and the Hydroelectric Commission of Oregon for the construction of a project on the Klamath River designated as Big Bend. These applications were prepared and filed with both commissions under date of April 16, 1951.

Protests were filed with both commissions by practically all of the irrigation districts in the Klamath basin, the State of California, the State of Oregon, the state legislative representatives, the Secretary of the Interior, the Bureau of Reclamation, County of Klamath, City of Klamath Falls and many individuals. In fact the company had very little support other than certain business interests.

A hearing was held in Klamath Falls before the Hydroelectric Commission on June 11, 1951, at which time the company stated that no development could be made on the Klamath River without an extension of the Klamath Lake contract. So the commission stated that "No further hearings will be held at the present time, and we are satisfied that if the company could work out an agreement with the Bureau of Reclamation for an extension of the contract on the Upper Klamath Lake there would be no further question about the issuance of a license."

The Federal Power Commission asked for additional information relative to water supply, economic studies of various plant capacities, and information on the past, present and future uses of Klamath River for navigation. The data was prepared and sent to the FPC, with the result that the FPC held a hearing on June 30 at Klamath Falls at which time statements were made by all parties opposing issuance of a license. Exhibits were introduced and stenographic records were made of all the proceedings.

After the FPC hearing, time was granted for those intervening to file briefs and supplemental data. This consumed a period of about a year, or until October 2, 1953, when the FPC issued a license for Project #2082, Big Bend #2.

The FPC license for construction of Project #2082 provided:

1. That the license should be accepted within a year, and that with acceptance of the license there should be copies of the agreement between the Licensee and the Bureau of Reclamation for extension of the Upper Klamath Lake regulation for the term of the license.

2. That the company should file applications for licenses on all of its power plants on the Klamath River, namely, East Side, West Side, Keno and the two Copco plants. Extensions of time have been granted by the FPC as requested.

During the spring of 1953, certain individuals representing the irrigation districts and the business interests believed that the opposition to the company's development of Big Bend #2 could be removed if the company was willing to discuss with organized groups provisions which they believed should be put in the contract between the Bureau and the company. The first meeting was held with a limited group in April 1953 at which meeting Attorney Ganong, supposedly representing all water users, stated that the most important item for consideration in the contract was the matter of power rates. The company had indicated that the power rates in the original contract were established on a cost basis and that they fairly represented the cost of power throughout the term of the contract to date. In response to the request of this group, the company prepared a statement of its power cost and a statement of its estimated cost for the proposed Big Bend #2 plant. These costs were quoted in a letter to Mr. Ganong of April 20, 1953, as follows:

Production cost at powerhouse switchboard (present plants)	4.54 mills
Transmission cost from powerhouse to distribution substation	1.65 mills
Total	6.19 mills
Estimated cost of power at switchboard (Big Bend #2 plant)	4.37 mills
Transmission cost from power plant to distribution substation	1.60 mills
Total	5.97 mills

After several meetings, this group organized the Klamath Basin Water Users Protective Association (incorporated July 8, 1953), and agreed with us that we could make no progress in obtaining a contract without starting negotiations with the

Bureau of Reclamation. Communication with the Bureau in May 1953 resulted in a statement from the Bureau that they would meet with the company to discuss the terms and conditions of the contract. So the company was asked for a statement of the conditions and stipulations under which the company would extend the Link River dam contract. These were contained in memorandum of July 10, 1953 which contained seven conditions:

1. 50-year term.
2. Same priorities for irrigation as contract of February 24, 1917.
3. Eliminate 25-mile radius from Merrill.
4. Subject to water rights conferred by treaty on Indians.
5. Operate upper lake same as contract of 1917.
6. Surplus and return waters above Keno. No diversion outside the Klamath basin watershed.
7. Company furnish electric power for all pumping plants on project:
    a. At same rates for the Bureau.
    b. 6 mills per kilowatt hour eliminating 7-1/2 HP or less.

This memorandum was submitted to both the Bureau and the water users association.

Under date of September 1, 1953, Mr. Ganong directed a letter to the Klamath Basin Water Users Protective Association stating that:

1. The proposed 6-mill rate of Copco was not quite low enough.
2. The boundaries of the area should be more adequately described.
3. That it was his understanding that Copco would be willing to enter into an agreement giving priority for beneficial use of water to all lands above the Keno shelf as the return flow would be above Keno.
4. The company was willing to furnish power at cost.

Late in 1953, advance copies of the Upper Klamath River Basin report, being prepared by the Bureau of Reclamation, was made available. Butte Valley came actively into the picture because of the Bureau's proposal to divert Upper Klamath Lake water through

Butte Valley to a proposed power plant above Copco. Considerable time was taken in studying this report by all concerned. It was indicated by the Butte Valley water users that if they could get a favorable pumping rate that they would not be interested in the Bureau's proposed irrigation and power scheme.

On April 20, 1954, at a meeting with the Oregon Klamath River Commission there was considerable discussion about Butte Valley, supplemental storage, water rights and pumping rates to be applied not only to on-project users but off-project users. The Oregon Klamath River Commission felt that some off-project pumping rates would be necessary to satisfy all users of power for pumping in the area.

On April 22, 1954, at a meeting with the Klamath Basin Water Users Protective Association, the proposed extension of the contract between the company and the Bureau was discussed. No members of Copco were present. Certain districts favored opposing extension of the proposed contract for regulation of the lake indefinitely. Others favored extension of the contract providing off-project pumping rates were obtained, and other items. It was concluded that the association would draft a form of contract which they thought should be negotiated between the Bureau and the company.

Later the water users association passed a resolution in favor of an extension of the contract provided it incorporated the ideas of the farmers.

On April 29, 1954, a tentative form of contract drawn up by the water users association was sent to the company. This contract included:

1. 50-year term.
2. Control of water levels by the Bureau.
3. The company to create at its own expense 450,000 acres of additional reservoir capacity and give it to the government at the end of the contract period.
4. No water should be used for power purposes on the project or off the project when needed for irrigation of any lands within the Klamath drainage basin in Oregon, and all lands in California within 40 miles of Merrill.
5. The company assumes all liability for damage in the regulation of the lake.
6. The company maintains a dam.
7. All rights and easements of the company relating to dikes, levees and flowage around Upper Klamath Lake to become the property of the government at the end of the contract.

8. The company supply power:

   a. For the Bureau at 4 mills and 2 mills.

   b. For on-project pumping at 5 mills and 3 mills.

9. That the company pay the United States $300,000 a year to be applied by the Secretary to operation and maintenance of the districts and all of the irrigable land within the project.

10. 60-day cancellation provision.

11. Successors and assigns.

12. No members of Congress, etc.

A meeting was held in Klamath Falls on May 18, 1954 at which were present Butte Valley Protective Association, Bureau of Reclamation, California Water Resources Board, and representatives of several of the irrigation districts. The form of contract submitted by the Association was reviewed, and my memorandum stated as follows:

1. California people opposed to any contract or Big Bend construction until they had opportunity to study the Bureau's report and make final report,

2. Bureau of Reclamation had not received any instructions to talk contract with Copco

3. Semons received assurance from McKay that Interior would not agree to extension of contract until after all parties had opportunity to be heard, and the Bureau's report reviewed.

4. I stated that the contract submitted was not satisfactory:

   a. Copco could not construct the storage reservoir and give it to the government.

   b. Proposal on boundaries of Upper Klamath basin not accurate enough.

   c. Company could not give upper lake releases to government at end of contract period.

   d. Matter of power rates should be pended until main provisions of contract were agreed upon.

   e. Copco would not pay $300,000 a year for use of the upper lake.

5. Company stated that it would be willing to cooperate in investigating Boundary dam.

6. All agreed that any water used for irrigation should be returned to Klamath River above Keno.

7. It was the general feeling of the group that pumping rates would have to be established for all irrigation uses in the Klamath basin, including Butte Valley, through separate negotiations, or through filings with the state agencies, which would be beneficial to all users whether districts or individuals.

8. It was concluded that Copco would prepare a tentative draft of contract which it would consider satisfactory, and to present it to the directors of the organizations present prior to the meeting to be held on June 9.

On May 26, 1954 Copco's redraft of the proposed contract was submitted to the water users association. It contained essentially the same provisions as the contract of 1917 without Exhibit B covering pumping rates.

This redraft of contract was prepared by Brobeck, Phleger & Harrison, and submitted to the Bureau and the water users association setting forth a 6-mill rate for on-project pumping.

Another proposed contract drafted by the water users association on June 25, 1954 still contained some of the provisions of the original draft: the irrigation pumping rates to be applied on all lands in the Klamath drainage basin, including pumping from wells. Copies were forwarded to the Bureau of Reclamation.

During the first of July 1954, negotiations with the Bureau of Reclamation on the proposed contract were actively started, and involved a satisfactory solution of the Butte Valley plans and the elimination of power development by the Bureau. Copies of the Bureau's report were then given to the company.

Until May 23, 1955, the time was taken with discussions with the Bureau of Reclamation arriving at the terms of the contract to be submitted for general circulation by the Bureau. The rate included in this draft was the 6-mill rate for on-project pumping, and some other minor changes. Draft of contract was forwarded by the Bureau to all concerned, including the Klamath Basin Water Users Protective Association, and finally resulted in the draft of October 10, 1955 which has now been submitted for final approval of the Secretary. The Bureau, however, proposed a special rate for the Butte Valley area which was refused by the company. There was considerable support from local interests, including the labor unions, City of Klamath Falls, businessmen, and some of the individual farmers to have this contract executed.

On September 16, 1955 the water users association directed a resolution to the Hon. James E. Murray, Chairman of the Committee on Interior and Insular Affairs, stating that they did not want any interference by Wayne Morse, Neuberger or anyone else in the matter of negotiating a contract between the Bureau and Copco, and stated in part, "We are not asking for a hearing before any committee . . . We feel that this is not necessary, and also it would be too expensive a proposition for some of us to have to appear in Washington. However, if some of our wishes are not granted, we think there should be a hearing before the Secretary, such hearing to be held here in Klamath Falls on our own home ground. The minor changes in the contract as drafted on August 5, 1955, which we are suggesting are:

1. To broaden the definition of 'Project Land' to include all irrigable land in the Klamath Basin.

2. To extend the reduced pumping rates to all water users in the Klamath Basin.

3. To reject a paragraph in the proposed contract which limits the generation of power to Copco.

4. To include the transfer of all easements to levees, dikes, flowage, etc., to the United States at the end of the fifty year period."

Numbers 1, 3 and 4 have subsequently been eliminated by negotiation.

At the hearing in Klamath Falls on September 16, 1955 before the joint river commissions, the question of off-project pumping rates was again brought up. As the company had prepared a statement in advance, it read into the records of this hearing the following:

> The company has said that it would consider off-peak pumping rates and discuss with the properly organized districts or individual pumpers pumping rates outside of the jurisdiction of the Bureau which would be equal to the pumping rates in the contract plus the equivalent of what is paid the government for water. The matter could only be determined by the Public Utilities Commissions of Oregon and California in a regular proceeding in which the Public Utilities Commissions would determine whether or not any special rates are proper and legal. The company cannot make a commitment at this time which would bind either the company or the commission. This is a matter entirely beyond the scope of the Link River dam contract.

On October 7, 1955, the Klamath Basin Water Users Protective Association met with members of the Oregon Klamath River Commission and wrote a letter stating that there were some matters of rates which had not been settled, and they would like a statement from the company before they took final action on the contract. These were:

"Do you agree to a lower pumping rate on-project from 5 mills to 4 mills? And from 3 mills to 2 mills?

"Will the company submit a letter that it will not oppose the application of non-project users applying a pumping rate of 8 mills, and if necessary will Copco make application?

"Will Copco make a proposal for off-peak pumping rate for all irrigation and drainage uses? Will this rate apply over a 24-hour load, or off-peak use only?"

On October 10, the company in a letter restated the above quotation read into the public record on September 16.

An estimate was made of the reduction in revenue under the above proposed 8-mill rate, assuming that the answer was "No" to #1 above, which made the average kilowatt hour cost for the off-project 231 customers in the Butte Valley-Klamath basin 9.6 mills, or a reduction in revenue on 1954 billing of $72,700.

On October 17, the water users arranged for a meeting to discuss these off-project rates, at which time the company made a proposal which was confirmed in a letter of October 24, 1955:

1. The company would make application to the PUC for a 15% reduction in Schedule 20.

2. The company would make application for 5-mill off-peak pumping rate.

The reduction in revenue under this rate, for the same 231 customers, would be approximately $47,000. The water users association advised that the 5-mill off-peak rate was satisfactory, but the 15% reduction in Schedule 20 was not enough.

After a further meeting on November 2, the association was advised that the company would like to receive a proposal from them stating just exactly what they would approve in the way of a satisfactory off-project pumping rate. This was incorporated in the association's letter of November 3, 1955, and was in effect a reduction on the 231 customers in the Klamath basin on the basis of 1954 billing of about $28,000.

The minutes of the meeting of the association on November 3 stated:

"Mr. Howard stated that if Copco approves and returns a copy of the acceptance that he will immediately call a meeting of the Board of Directors of the Association and endeavor to get their approval and also action on submitting a letter to Mr. C. H. Spencer withdrawing all opposition to the contract between Copco and the Bureau of

of Reclamation and requesting that signing of contract not be delayed."

Copy of the Klamath Basin Water Users Protective Association's letter of November 3, 1955 is hereto attached.

J. C. Boyle

JCB:EA

Encl.

Exhibit 9

C O P Y

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

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

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 10,000 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.

Exhibit 10

Before the

FEDERAL POWER COMMISSION

In the Matter of)
) Project No. 2082
THE CALIFORNIA OREGON POWER COMPANY)

REPLY BRIEF OF THE SECRETARY OF THE INTERIOR, AS INTERVENOR

Mastin G. White
Solicitor of the Department
of the Interior

Leland O. Graham
Regional Counsel

E. K. Davis
Assistant Regional Counsel

Helen T. Moss
Attorney

Kent Silverthorne
Attorney

Porter A. Towner
Attorney

Sacramento, California

October 17, 1952

The irrigation developments indicated would require large amounts of power for pumping purposes. The total requirements, exclusive of the present Klamath Project, are estimated at from 100 million to 125 million kilowatt-hours annually. Witness Dickinson stated that, in connection with the power phase of Interior's investigation, preliminary studies pointed toward a proposal for two plants on the Klamath River, one below Keno and a second at the upper end of Copco Lake, both to be fed through long tunnels diverting water from the Klamath River. It is estimated that these two plants would have an installed capacity of from 200,000 to 250,000 kilowatts. 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.

Mr. Woodward, Regional Supervisor of River Basin Studies, from the Portland office of the Fish and Wildlife Service, testified that although the Service presently carries on extensive activities in the Klamath region, additional development will be required in order adequately to care for wild fowl. Also, any new developments will have to give adequate protection to the fish population (Tr. 489, et seq.).

The Interior Department is convinced that the preservation and expansion of the agricultural economy of the Upper Klamath Basin are of primary importance to the region, and that the proposed Project No. 2082 could be operated successfully only at the expense of present and future agricultural developments. Under the laws of the United States and of the State of Oregon, and on behalf of present and future irrigators of the Basin, the Interior Department asserts the prior rights of the United States to water of the Upper Klamath Basin.

It is the position of the Interior Department that it holds legal rights of sufficient priority to ensure the water requirements of present and future irrigation in the Basin. Irrigation use, present and potential, under these rights will not leave a sufficient amount of water in the Klamath River for the operation of Project No. 2082 as proposed by the California Oregon Power Company. Accordingly, the application for Project No. 2082 should be denied.

II

THE COMMISSION SHOULD DENY THE LICENSE UNDER SECTIONS 7(b) AND 10(a) OF THE FEDERAL POWER ACT

Section 7(b) of the Federal Power Act provides:

"Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States

Exhibit 11

IN THE MATTERS OF

THE CALIFORNIA OREGON POWER COMPANY

Upon Application for License

Project No. 2082 and Docket No. E–6390

January 28, 1954*

Syllabus

1. Commission concludes that the Klamath River constitutes navigable waters of the United States, and consequently the proposed project and the five existing projects are subject to the licensing authority of the Commission under Part I of the Federal Power Act. P. 3.
2. Commission also asserts jurisdiction under Section 4 (e) of the Federal Power Act on the ground that the existing projects are using, and the proposed project will use surplus water from a Government dam. P. 3.
3. The 1917 contract between Copco's predecessor and the United States does not constitute authority for the continued occupancy of navigable waters of the United States, and licenses under the Federal Power Act are required. P. 4.
4. Application by Copco to State for power permit for proposed project constitutes satisfactory compliance with State requirements under Section 9 (b) of the Federal Power Act, in view of conditions of license to be issued in this matter. P. 5.
5. Commission *issues* license to Copco under Section 4 (e) of the Federal Power Act for Project No. 2082, and *orders* Copco to file application for licenses under the Federal Power Act for its five existing projects. P. 13.

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 Federal Power Commission.

BY THE COMMISSION:

OPINION

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

*Designated Commission Opinion No. 266. Rehearing denied by order issued March 29, 1954. See supplemental Opinion No. 266–A, 15 FPC 14.
EDITOR'S NOTE: Affirmed 239 F. 2d 426 (CADC, 1956).

as Project No. 2082, at mile 223 on the Klamath River, a point about 13 miles upstream from the California-Oregon boundary line, and (2) on 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 hydroelectric developments on the Klamath River in Oregon and 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 Ewauna, a body of water about 2 miles long and a half-mide 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 the 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 No. 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 surplus water from a Government dam. And, he concluded that 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 Decisions were filed by Copco and others and oral argument was held before the Commission, the argument being limited to the jurisdictional issues raised by the exceptions. In the exceptions none of the parties questioned the 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.

The record shows that Copco No. 1 and Copco No. 2 plants are operated in such manner as to produce appreciable fluctuations in the Klamath River. However, in view of the navigable status of the entire river, we do not consider it necessary to assert our jurisdiction separately on this ground.

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, 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 supply energy at low rates for pumping purposes in connection with irrigation and drainage during the entire 50-year period of the contract. The contract expires in 1967 and, unless its terms are extended by contract or otherwise, upon its expiration the parties including Copco, the United States, and the irrigators will be returned to the same positions with respect to power and water rights as they 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 water" until both purposes are satisfied, is not supported by the 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 1926 Copco considered that under the Agreement the United States had a prior water right for all the United States could use for irrigation purposes. Moreover, that interpretation was concurred in by Copco's Vice President and General Manager during the course of the public hearing in these proceedings. In other words, Copco itself agrees that under the Agreement the United States has the "first use" to the water and that, if there is any "surplus" afterwards, then Copco may 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 under reclamation law since 1906, he has been empowered specifically to grant power privileges in connection with Government dams under his jurisdiction and control for reclamation purposes. Cited in the Secretary's brief are the Act of April 16, 1906 (32 Stat. 116) and the Reclamation Project Act of 1939 (53 Stat. 1187). Under the Secretary's theory, Congress, by implication, repealed such parts of the Federal Power Act as were in conflict with the Reclamation Project Act of 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 by the Secretary here as far as this case is concerned. The 1906 and 1939 Acts authorize the Secretary to lease "surplus power" or "power privilege." These Acts seemingly relate to the sale of electric power or the lease of water power including head and water, but not to the sale or lease of water as such. Where there is available stored water not to be used in irrigation, which represents storage over and above that needed for irrigation, and which would otherwise flow unused down the main channel of the stream, that water is "surplus water," and, if used for power development, would require a license from this Commission. Thus there is a distinction to be drawn between "surplus power" or "power privilege" in the reclamation laws, and "surplus water" from a Government dam as used in the Federal Power Act; and we 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 is necessary until such time as the contract expires or is terminated. We are unable to find that the contract is or may be deemed to be Federal

authority for the development of water power from a stream over which 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 been issued. For example, in the Montana Power Company case, IT-5840, the company had certain Forest Service and Interior Department permits covering some of its Missouri River developments which had been issued on the basis of occupancy of forest and other Government lands. Even though these permits were valid for the purposes for which issued (and they were by their terms permits—not contracts), it was determined that they were insufficient authority for the continued occupancy of navigable waters of the United States and that licenses under the Federal Power Act were required. This determination was upheld by the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court denied certiorari.* So even if the 1917 contract could be considered as the equivalent of a permit of some sort, it is very doubtful that Copco could rely upon it as complete authorization for its continued occupancy of a navigable water of the 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 behalf of the irrigators. This Commission's role in water-resource development is not that of arbiter or adjudicator of water rights under the laws of the various States. The evidence of record shows that Copco has made application to the State of Oregon for a power permit covering proposed Project No. 2082. Under the interpretation of Section 9 (b) of the Federal Power Act as rendered by the Supreme Court in the *First Iowa* case (328 U.S. 152) such an application to the State authorities may be deemed satisfactory compliance with State requirements. In view of the conditions of the license to be issued in this matter, we find that Copco has shown satisfactory compliance with the 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 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.

*Montana Power Co. v. Federal Power Commission, 185 F. 2d 491, cert. den., 340 U. S. 947.

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

Commissioner Doty concurring in the result only.

ORDER ISSUING LICENSE (MAJOR)

Application was filed April 19, 1951 by The California Oregon Power Company, of Yreca, California, for a license under the Federal Power Act for a proposed hydroelectric development, designated as Project No. 2082, to be located on the Klamath River in Klamath 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, 1952 and ending on July 3, 1952, before an Examiner of the Commission. For hearing purposes the above-designated matter was consolidated with the proceeding in Docket No. E–6390. In the hearing all parties, including the Applicant and 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 al., participated, and presented testimony and documented exhibits. After the close of the hearing briefs were filed by the various parties and by the Staff, and an Initial Decision was rendered by the Presiding Examiner containing findings, conclusions, and an order. On December 1, 1953, the Commission heard oral argument on exceptions to the Examiner's Initial Decisions in the consolidated proceedings.

Upon consideration of the record in the above-entitled proceeding, the briefs of the parties filed in connection therewith, the Examiner's Initial Decision and the exceptions thereto, the oral argument upon such exceptions, and having this day issued our Opinion No. 266, which is hereby incorporated herein by reference and made a part hereof, the Commission further *finds*:

(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 by the Applicant or by the United States; such project area and project boundary being tentatively shown and described by certain exhibits which formed a part of the application for license and which are 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 in 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 No. 2082–3) entitled "Hydro Development Klamath River in Oregon and California Topographic Map—Big Bend No. 2."

Sheet No. 2 (FPC No. 2082–4) entitled "Hydro 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 fixed crest at elevation 3,628 feet (U.S.G.S. datum) in SW¼NE¼ section 12, T. 40 S., R. 6 E., Willamette meridian; a temporary regulating dam in SE¼ section 31, T. 39 S., R. 7 E., Willamette 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 25,000-kilowatt generators each connected to a 37,000-horsepower turbine; a substation; a transmission line about one-quarter mile long from the substation to Applicant's 66,000-volt Fall Creek-Klamath 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: 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 Bend No. 2."

Sheet No. 3 (FPC No. 2082–7) entitled "Hydro Development—Klamath River in Oregon and California Power House Plan and Sections Big Bend 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, 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 be located in the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the 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 the stream within the project boundary and riparian or other rights, the use or possession of which is necessary or appropriate in 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 submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes 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.

(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 involved for the use or benefit of interstate or foreign commerce, 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 administration of Part I of the Act, and for recompensing it for the use, occupancy, and enjoyment of its lands is reasonable, as 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 therefor should be made under the license during the term of that agreement or extension thereof.

(16) In accordance with Section 10 (d) of the Act, the rate of return upon the net investment in the project, and the proportion of surplus earnings to be paid into and held in amortization reserves, are reasonable as hereinafter specified.

(17) The exhibits, designated and described in paragraphs (a) and (b) above as part of the application, conform to the Commission's 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 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.

(B) This license is also subject to the terms and conditions set forth in Form L-6, December 15, 1953, entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States," which terms and conditions described as Articles 1 through 27 are attached hereto and made a part hereof; and subject to the following special conditions set forth herein as additional articles:

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 removed. The clearing of the lands and the disposal of the material shall be done with due diligence and to the satisfaction of the authorized 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 a 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 (2½) cents per 1,000 killowatt-hours of gross energy generated by the 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 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 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.

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. 1 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 in 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) This 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.

ORDER REQUIRING FILING OF APPLICATION OR APPLICATIONS FOR LICENSES FOR MAJOR PROJECTS

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.

(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:

Name	Date	Capacity	Location
		kilowatts	
Eastside	1924	3,200 (Oregon)	Mile 254.
Westside	1908	600 (Oregon)	Mile 264.
Keno	1914	760 (Oregon)	Mile 234.
Copco No. 1	1918	20,000 (California)	Mile 198.
Copco No. 2	1925	27,000 (California)	Mile 196.

(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 waters of the United States without a 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 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*:

(A) 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.

(B) 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.

Commissioner Doty concurring in the result only.

Exhibit 12

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
SACRAMENTO REGION
P. O. Box 291
Sacramento 21, California

B/Rec. 7 71

October 13, 1954

Memorandum

To: Files

From: Russell R. Kletzing

Subject: Review of items involved in negotiations between Department of the Interior and California Oregon Power Company

I. A summary of the legal proceedings involving Copco's Big Bend No. 2 Project serves also as a summary of most of the recent history leading up to the present contract negotiations

In the Spring of 1951, Copco filed a petition with the Oregon Hydroelectric Commission for the appropriation of sufficient unappropriated water for its proposed Big Bend No. 2 Project. About the same time it filed a similar petition with the Federal Power Commission seeking a license for that project. The Secretary of the Interior appeared in both proceedings in opposition to the Company's petitions. Although a number of other contentions have been involved, the significant item in both proceedings had to do with the allocation of water supplies as between future power development and future irrigation development in the Klamath River Basin. The Department contended that insufficient water would be available for the Big Bend No. 2 Project if the irrigation needs in California and Oregon were met. It also asserted that the United States holds water rights that could be utilized for irrigation development and that they are superior to any held by Copco. The latter contentions are based primarily on the 1905 Act providing for the appropriation of water by the United States and the Notice of Intention to Utilize Water made under it, and on the provisions of the contract of February 24, 1917, between the United States and Copco, as amended.

Copco contended, on the other hand, that the water rights held by the United States were limited to water supplies needed for the present Klamath Project; further, that sufficient water was available to meet its requirements for Big Bend No. 2 and to meet irrigation needs for the existing project. It advanced a number of legal arguments to the effect that the United States does not hold water rights

that are available for future irrigation development.

The proceeding before the Oregon Hydroelectric Commission has as yet not been decided. The proceedings before the Federal Power Commission have included hearings before a trial examiner and before the Commission, a request for rehearing, and finally an appeal to the courts as to one of the grounds of jurisdiction asserted by the Federal Power Commission. The appeal is still pending. So far as the Department is concerned, the issues have, however, remained essentially the same.

On January 28, 1954, the Federal Power Commission adopted Opinion No. 266, with appropriate Orders attached. This decision granted a license to Copco for its Big Bend No. 2 development, but only on the condition that Copco should first obtain a renewal or extension of the Link River Dam contract so as to make adequate water supplies available for its operation. It is the negotiations for such a contract that are now about to commence.

Also involved in the proceedings before the Federal Power Commission is the matter of licenses for Copco's existing plants. The Commission ruled that Copco must apply for licenses for them.

II. Contract of February 24, 1917

In the last six or eight months various interested groups and agencies have been gradually crystallizing their positions on the question of what type of contract Interior and Copco should execute. This process was assisted by the somewhat anomalous procedure of the exchange of drafts of such a contract between Klamath Water Users Protective Association and Copco. In order to assess the positions that have been taken, a brief summary is given of the contract of February 24, 1917, between Copco and the United States.

That contract contains the following principal provisions:

1. Copco was to build Link River Dam and transfer it to the United States.

2. With certain limitations, Copco was allowed to operate Link River Dam and maintain the lake level at between 4143.3 and 4137 feet above sea level.

3. All irrigation uses on the Klamath Project were to take precedence over Copco's use of water for power.

4. The United States, in operating the project, and the

project water users, were allowed preferential rates for power obtained from Copco.

5. Copco was to make appropriate compensation for any rights that would be adversely affected by the construction and operation of Link River Dam.

III. The position of the Klamath Water Users Protective Association

The Klamath Water Users Protective Association represents most of the owners of land in the present Klamath Reclamation Project. These landowners are, of course, the ones who are benefiting from the present operation of the project and the provisions of the 1917 contract. At the conclusion of its discussions with Copco, the Association embodied its views in a draft of proposed contract between Copco and the Secretary which was submitted to Secretary McKay under date of June 25, 1954.

The draft of contract contains the following principal items:

1. Copco is to be allowed to operate Link River Dam between the same limits specified in the 1917 contract, for a period of fifty years. (This would preclude utilizing the device of lowering the outlet of Upper Klamath Lake by the Company to increase storage.)

2. The Company is to provide at its own expense 450,000 acre feet of additional storage, in accordance with plans approved by the Secretary; the Company is to transfer the dams and reservoirs involved to the United States. The water made available from the additional storage is to be governed by the terms of the contract extension; all rights of the Company shall cease after fifty years.

3. The Company's right to use water for power is to be subject to rights for irrigation for the present Klamath Project or extensions of it, and for future irrigation development of land in the Basin, the return flow of which is tributary to the Klamath River above Keno. A further limitation on future irrigation development is that the land in California must lie within forty miles of Merrill, Oregon (the requirement of return flow being tributary above Keno would greatly increase the cost of irrigation for Butte Valley and probably make it infeasible. It would also preclude the use of the Ikes Mountain Powerplant.)

4. On the termination of the contract, all of Copco's rights are to terminate and all flowage easements which it holds will be transferred to the United States.

5. The Company is to furnish power to those within the Klamath Reclamation Project, including any additions to the project, at rates even more favorable than those in the 1917 contract.

6. The California Oregon Power Company is to pay $300,000 a year to the United States, which amount is to be credited against operation and maintenance charges for the Klamath Project.

7. Subject to congressional authorization, the Bureau is to build a Boundary Dam, costs to be divided as follows: California Oregon Power Company one-fourth, Fish and Wildlife Service from duck stamps one-eight, Bureau from agricultural and grazing leases five-eighths. The dam is to be operated by the United States.

IV. The position of The California Oregon Power Company

The California Oregon Power Company has not taken a firm position on most of the items involved in the present negotiations. It has indicated, however, that it believes that Boundary Dam should be handled in a separate contract. It has also indicated that the draft of contract of the Water Users Protective Association is unacceptable. Without committing itself, it offered to the Association for discussion a draft of contract prepared by Brobeck, Phleger, and Harrison, its attorneys, and forwarded to the Company by means of a letter dated June 3. This draft includes the following principal items:

1. The California Oregon Power Company shall operate Link River Dam and regulate Upper Klamath Lake between the same levels as specified in the 1917 contract, and may exceed these limits only with the approval of the Secretary of the Interior.

2. All rights are to terminate after 50 years, and at that time the California Oregon Power Company will transfer to the United States or its successors any flowage rights or easements it owns "if any there be".

3. The Company proposes substantially the same power rate article as in the 1917 contract but with the rates left blank and therefore subject to negotiation.

4. No water will be used by the Company so as to interfere with irrigation of the Klamath Reclamation Project provided that the return flow from the land reaches the Klamath River above Keno. "The

Klamath reclamation project" for this purpose is defined by a description and map which shows substantially the presently irrigated Klamath Project. (This provision would exclude most of the expansion contemplated in the Bureau's basin report.)

V. The position of the Butte Valley Water Users

The Butte Valley water users are anxious to have irrigation water supplied by the Bureau. They are willing to participate financially in a cooperative investigation of feasibility, and oppose any limitation that would bar irrigation of Butte Valley.

VI. The position of the States of Oregon and California

The States of Oregon and California have expressed their views only through their respective Klamath River Commissions. These Commissions were created by the Legislatures of these states within the last few years to carry on negotiations looking toward an interstate compact for the apportionment of the water of the Klamath River.

Originally the Oregon Klamath River Commission adopted a statement similar to that of the California Oregon Power Company in their draft of contract; it required that priority for irrigation over power be limited to water for land which could contribute return flow above Keno. This position has, however, been abandoned and at a joint meeting on July 29 the Oregon and California Commissions agreed to subordinate power to all irrigation requirements of the Basin, whether in Oregon or California.

The press release of this meeting, forwarded to the Regional Director on August 2 with a letter from Mr. William G. Hagelstein, Chairman of the California Commission, contains the following:

> "The following policy was outlined in general terms by A. D. Edmonston, California State Engineer, and a member of the California Commission: That all needs, present and future, of the Klamath River Basin have preference to the waters of the Klamath River in the following order: Domestic and Municipal, Irrigation, Recreation, Industrial, Power. This was unanimously agreed upon. Both Commissions unanimously agreed that Butte Valley and the Oklahoma District in California be properly considered a part of the Upper Klamath Basin, and in the apportionment of waters, an adequate supply for the irrigation of these areas be reserved."

In addition to this statement, Mr. Lewis A. Stanley, engineer for the Oregon Commission, indicated its position on two other important items. In a letter to Secretary McKay, dated August 27 and forwarded to the Regional Director by the Commissioner with his memorandum of September 27, Mr. Stanley states that the Oregon Klamath River Commission opposes (1) the Ikes Mountain Lake by lowering the outlet. It may be surmised that the opposition to the Ikes Mountain plan is due to the fact that the power plant would be located in California while under the river route plan most of the plants would be located in Oregon as would the proposed Big Bend No. 2 plant.

VII. Items for negotiation

The following are the principal items with respect to which negotiations may be expected with the California Oregon Power Company in connection with the renewal of the Link River Dam contract:

A. Irrigation Depletions

The principal point at issue is the priority that should be given to irrigation and other consumptive uses over power uses. In the basin report the Regional Director took the position that all irrigation requirements in the basin should be met ahead of power requirements. The California Oregon Power Company has never made a firm commitment to allow irrigation depletions above its power plants for any land except the present Klamath Project and perhaps the "Klamath extensions". The Water Users Protective Association has in general followed the same line, since it adequately protects the vested interests of the landowners in it. The Bureau studies show that full irrigation development would not leave the quantity of water which the California Oregon Power Company states it requires to operate its Big Bend No. 2 plant. It would leave sufficient water for some kind of power production. Full irrigation development would also cut down the available water for and the output of existing California Oregon Power Company plants.

B. Irrigation of Butte Valley

The California Oregon Power Company has to date resisted the idea of according priority to irrigation for Butte Valley. It has done this primarily by insisting that return flows must reach the Klamath River above Keno. This will make the irrigation

of Butte Valley infeasible or very much more expensive to the water users.

From the Bureau's point of view it is very desirable that an accord be reached with the California Oregon Power Company that would allow the irrigation of Butte Valley without return flow restrictions. This would probably make it possible to get Departmental approval for the Butte Valley investigations. Now that the California and Oregon Klamath River Commissions have come out for irrigation of all basin land in both states ahead of power, it is possible that the California Oregon Power Company might concede this point.

C. Which Power Plants?

The Bureau has proposed a plan of developing the head betweem Keno and Copco via Butte Valley and Ikes Mountain power plant. The California Oregon Power Company proposes to develop the same head via the river route, the first stage of which is to be the Big Bend No. 2 plant. The Bureau's basin report demonstrates that the Bureau's development is more economically desirable on the assumptions made there. It would be desirable to explore the areas of difference and agreement with regard to the two plans for power development to see if it is possible to work toward a resolution; that is, to agree upon which is the best plan.

D. Who Will Build the Power Plant?

Once the best plan for developing the power potential for the Klamath River has been agreed upon, the question of who will build and operate the power plants will be reached. This, of course, is a matter that will require a Departmental policy decision. It is doubtful that there will be much advantage to pursuing this in the present stage of negotiations except possibly to indicate that consideration might be given to allowing the California Oregon Power Company to opsrate such plants, including the Ikes Mountain plant if that should be determined to be the best plan for development.

E. Consideration from the California Oregon Power Company to the Water Users

The foregoing items look toward negotiation of some kind of an agreement by which the California Oregon Power Company would benefit by the operation of Link River Dam through its existing power plants and, perhaps, through future plants to be built. The amount of this benefit will depend on the conditions imposed -- primarily the priority accorded to irrigation -- and on whether

the United States or the California Oregon Power Company operates the new plants. In exchange for whatever benefit is derived, the California Oregon Power Company should be required to furnish benefits to the water users of an equal value. This was done in the 1917 contract by having the California Oregon Power Company build Link River Dam and transfer it to the United States and by preferential power rates. The following items have so far been suggested as desirable for consideration:

1. Reduced Power Rates

The Klamath Project has benefited by reduced power rates under the 1917 contract. The water users in the present Project are anxious to continue such an arrangement. There is a certain amount of equity in this proposal, since in multiple purpose projects operated by the Bureau, power for irrigation pumping is supplied at a low rate. The questions are then (1) how much should the power rates be reduced below the prevailing rates, and (2) should the reduced rates be confined to the present Project or extended to all future irrigation developments? Fairness would indicate that the answer to the second question must be in favor of having uniform power rates for the entire Project, present and future, even if this means smaller reductions.

2. Final Settlement of Water Rights

The 1917 contract provided for priority to irrigation only during its term. It would be possible to frame a renewal to the contract in this same way. This would, however, leave the question open for further conflict at the time of expiration of the contract. It would be desirable to have a final settlement of the water rights as between the United States and the California Oregon Power Company so far as is possible. "Final" is used in the sense of extending beyond the term of the contract rather than as envisioning an end to all water rights problems for all time.

If final settlement is reached and by it the California Oregon Power Company gives up water rights that it has under the operation of the present contract, this might constitute a factor in the consideration. Likewise, if the balance should be in favor of the California Oregon Power Company in such a settlement, then this item would be another factor for which the California Oregon Power Company should furnish consideration to the water users.

3. Transfer of Flowage Easements

The California Oregon Power Company has never formally transferred the flowage easements that it was required to obtain

under the 1917 contract. Primarily to avoid future arguments, it would be desirable to have these transferred to the United States. It is probable that they are of little or no value but study might be given to the question of whether some value can be assigned to the transfer.

4. Annual Payment

The water users have proposed an annual payment from the California Oregon Power Company to the United States to be used for operation and maintenance of the Klamath Project. The amount of such a payment warranted and the use that should be made of it might eventually be the subject of negotiation with the California Oregon Power Company. Some consideration might be given to applying such annual payments to subsidizing of irrigation in the same way that power features of multiple purpose projects subsidize irrigation.

The items just discussed involve benefits to the water users, some or all of which the California Oregon Power Company should be required to furnish. A reasonable approach to determining how these items should be handled is first to assign a monetary value for the benefits which the California Oregon Power Company will receive under a proposed contract and, second, to assign comparable monetary values or value scales to the items of benefit to the water users. When the benefits to the California Oregon Power Company and the benefits to the water users have been equated, a fair contract will have been reached.

Russell Kletzing
Attorney

Exhibit 13

MINUTES OF KLAMATH BASIN WATER USERS PROTECTIVE ASSOCIATION, VETERANS MEMORIAL BUILDING, KLAMATH FALLS, OREGON, JUNE 25TH, 1954

The Board of Directors of the Klamath Basin Water Users Protective Association met in Special session in the Veterans Memorial Building, Klamath Falls, Oregon, June 25th, 1954.

The meeting was called to order by Dick Henzel, acting as chairman, in the absence of J. E. Craven, President and Ivan Rose, Vice President.

Present in answer to roll call were Directors: Dick Henzel, Frank Z. Howard, Lloyd Gift, E. M. Mitchell, W. H. Hooper, B. H. Pickett and Hubert Morelock.

Others present were: Paul Tschirky, Lewis A. Stanley, Engineer: Delos Mills, chairman Butte Valley Resources Committee: and Attorneys Wm. Ganong and M. W. Schaupp.

The minutes of the previous meeting were read by the Secretary and on motion made, seconded and duly passed, were approved as read and ordered signed.

To bring matters up to date as pertains to work done on draft of proposed contract, the Secretary read the minutes of the two committees' meetings of June 9th and 16th.

The following letter is self-explanatory and was written by the Secretary as requested by the two committees at their meeting on June 16th, 1954;

June 18, 1954

Mr. Chas E. Stricklin, Secretary
Hydroelectric Commission of Oregon
Salem, Oregon

Dear Mr. Stricklin:

We understand that you have been informed of the progress or lack of progress, being made in negotiations between The California Oregon Power Company and the Water Users, looking to extension of the contract between the United States and the Company covering regulation of Upper Klamath Lake.

The Water Users have taken the position that the lower power rates allowed Districts and persons having contracts with the Bureau should also be allowed those having State water rights as long as the return flow from their lands, if any, would return to the Klamath River above Keno. Copco has, as yet, not been willing to concede this point.

The question has arisen as to whether the Hydroelectric Commission legally could, as a condition to the license sought by Copco for the Big Bend #2 project, require that these water users be furnished power for irrigation purposes at rates not in excess of those charged users on the Federal Project. We understand that it is your position that under ORS 543.300, subsection (5) the Commission has the power to provide that the license shall be subject to prior rights for irrigation of lands which may be developed in the future and some of the water users take the position that if the Commission has this power it would also have the power to require the more equitable power rates.

You understand, of course, that we are not trying to put you on the spot as to what action the Commission might take but only wish to know whether you think that the Commission would have this power.

We would appreciate it very much if you would answer this for us before June 25th, which is the date set for the next meeting of our committee.

Very truly yours,

Klamath Basin Water Users Protective Association

/S/ JOHN L. STEWART, JR.
Secretary-Treasurer

The following letter was received in reply:

STATE OF OREGON
State Engineer
Salem

June 21, 1954

Mr. John L. Stewart, Jr., Secretary
Klamath Basin Water Users Protective Association
Third Floor, Court House
Klamath Falls, Oregon

Dear Mr. Stewart:

In Reply to your letter of June 18th please be advised that the Hydroelectric Commission in the issuance of a license can protect rights to the use of water for future irrigation.

With reference to your question as to whether the Commission can, in the issuance of a license, fix the rates for which the licensee can sell its energy, please be advised that the Attorney General has advised us, and in my opinion correctly, that the Hydroelectric Commission does not have any jurisdiction to fix the rates for the sale of Hydroelectric energy by the licensee.

Very truly yours,

/S/ CHAS. E. STRICKLIN
CHAS. E. STRICKLIN, State Engineer and
Secretary, Hydroelectric Commission of Oregon

The following memorandum was read by the Secretary and is hereby made a part of the record as it pertains to power rates and is on file in the Association office along with rate schedules received from BPA:

June 21, 1954

Memo randum

TO: John L. Stewart., Jr., Secretary
Klamath Project Water Users Protective Association

On June 9, Mr. Craven visited my office and asked for explantion of the "Demand Charge" provision in a Bonneville Power Administration rate schedule which had been furnished to the Water Users Protective Association.

I inadvertently "slipped a decimal point" in mental multiplication, while giving him a brief explanation, which resulted in a figure for average cost of power on continous use basis (24 hours a day throughout the month) that was too small.

Exhibit 14

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:

2-700

16521

NOV 10 1955

Air Mail

To: Commissioner
Attention: 160

From: Acting Regional Director

Subject: Contract governing the operation of Link River Dam

Attached are three copies of an October 10 draft of a contract between the United States and The California Oregon Power Company governing the operation of Link River Dam for the next 50 years. Except for a few minor changes, the draft is the same as the one that was submitted to you on July 6, and approved for public distribution by Assistant Secretary Aandahl on July 27. As you are aware, that draft was distributed to all interested persons and agencies on August 5.

The changes that have been made from the August 5 draft were agreed upon unanimously at a meeting on September 28 in which the California and Oregon Klamath River Commissions, the California and Oregon State Engineers, Copco, and the Department of the Interior were represented. This meeting was discussed in a memorandum to you dated October 7. I am attaching two copies of the August 5 draft that have been marked to show the changes.

In my opinion, execution of a contract with Copco in the form of the attached draft will be in the best interests of the United States and present and future water users on Reclamation projects in the area. The draft has been approved by the Acting Regional Solicitor.

In a memorandum dated August 22, the Portland Area Office of the Bureau of Indian Affairs proposed changes in the contract. Copies of the Acting Area Director's memorandum are attached. His proposal, that the scope of the power rates specified by the contract be extended to Indian irrigation projects, was discussed with Copco. The California Oregon Power Company was unequivocally opposed to any such change. Its approach throughout the negotiations has been that the consideration for the contract grew out of water rights for reclamation projects, which rights in turn derived from a special act of the Legislature of Oregon, and that the benefits from lower power rates under the contract should be limited to reclamation irrigators. It also was pointed out that the Indian project would benefit from any general lowering of rates such as that now being worked out with the water users' organizations. I have informed the Area Director at Portland as to the current status of his proposals, and have suggested to him that further

discussions be carried on in Washington between you and the Commissioner of Indian Affairs.

During the last month Copco and the two Klamath River Commissions have been negotiating concerning guarantees that the use of water for power would be subordinated to the use of water for irrigation. The Commissions have been endeavoring to obtain safeguards for all irrigable land in the Upper Klamath River Basin comparable to those contained in the contract draft. These negotiations have been based on acceptance of the position of this office that questions as to these priorities, in so far as they do not affect Project land, are local matters in which the United States should not interfere. On October 31, Copco and the two Commissions reached a written agreement on this subject, and on November 1, the Commissions addressed a letter to this office enclosing a copy of the agreement and withdrawing their objections to the Link River Dam contract. Copies of that letter and of its enclosure are attached.

In addition to objections from agencies of the States of California and Oregon, recommendations for changes in the contract were received from a number of water users' organizations. Principal among these was a letter from the Klamath Basin Water Users Protective Association, dated August 23. The water users' groups indicated that they would oppose the contract strongly if their major recommendations were not adopted. Their objections paralleled those of the two Klamath River Commissions, and Copco also has been negotiating with these groups. The tenor of the negotiations is that Copco will agree to propose a new, lower power rate to the California and Oregon Public Utilities Commissions to apply to irrigators in the Upper Klamath River Basin not covered by the Federal contract. In return, the Protective Association will withdraw its objections. Copco believes that agreement is imminent but no word has been received from the water users' groups concerning their present position. I believe that it would be desirable to actually have in hand a letter from the Association before the Secretary approves the contract. I will inform you as soon as I hear from the Protective Association.

Assuming that the Association does inform us of withdrawal of its August 23 objections, and that the Secretary does not wish to enlarge the scope of the contract to go beyond Reclamation projects, I believe he can approve the October 10 draft as to form and delegate authority for me to execute it. I recommend that he take such action if my assumptions prove valid. Copco is anxious to initiate construction on its Big Bend No. 2 development at once; therefore, I suggest that you hold preliminary discussions with the Commissioner of Indian Affairs and the Secretary to see whether the Secretary desires the Bureau and this office to take any steps in connection with the contract other than prompt transmittal of any communications we may receive from the Water Users Protective Association.

In view of the interest shown in these negotiations, the Secretary himself may wish to make the initial public announcement of approval of the

contract. If so, and if you and he wish, we will be glad to teletype our suggestions for a press release on the subject.

RSheffield

In duplicate

Attachments 9

B. Copy to: Acting Regional Solicitor (in trip.)
Project Manager, Klamath Falls (w/enc. of each)

Exhibit 15

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE

STATE OF CALIFORNIA

MANLEY W. EDWARDS, Examiner, presiding.

* * * * *

In the Matter of the Application of the CALIFORNIA OREGON POWER COMPANY, for authority to enter into contract with the United States of America for regulation of Link River Dam, etc.	Application No. 37724
In the Matter of the Application of the CALIFORNIA OREGON POWER COMPANY, for approval of agreement with Klamath Basin Water Users Protective Association.	Application No. 37918

APPEARANCES:

Brobeck, Phleger & Harrison by ROBERT N. LOWRY and MALCOLUM T. DUNGAN, 111 Sutter Street, San Francisco 4, California, appearing for the California Oregon Power Company, Applicant.

J. J. BEUEL, BERT BUZZINI and JOSEPH Q. JOYNT, 2223 Fulton Street, Berkeley, California, appearing for the California Farm Bureau Federation, Interested Party.

Bert A. Phillips, Chairman, by ROBERT B. BOND, Executive Assistant, P. O. Box 1079, Sacramento 5, California, appearing for the California Klamath River Commission, Interested Party.

RICHARD W. HUBBELL, c/o Herald & News, Klamath Falls, Oregon, appearing for the News Editor, Max Wauchope, Interested Party.

HAROLD T. SIPE, appearing for the Commission's staff.

* * * * *

with respect to Application No. 37724.

Mr. Boyle is available for cross-examination.

EXAMINER EDWARDS: Mr. Buzzini.

MR. BUZZINI: Yes, Mr. Examiner.

CROSS-EXAMINATION

MR. BUZZINI: Mr. Boyle, referring to your statement that you have just concluded, when you refer to California customers, are you referring to power users of Copco within the Reclamation land?

A. Within that portion of the Upper Klamath Basin in California.

Q. So, that you are referring also then, to power users outside of the Reclamation land?

A. That is correct.

Q. The benefits derived for the California Oregon Power Company with its contract for the operation of Link River Dam is mainly one-sided from your statement. Mainly, one of controlling the flow of water?

A. Yes, the regulation of the water.

Q. Regulating the flow?

A. Yes.

Q. And your references to the Pacific Gas and Electric Company, by comparison, is it my understanding from your statement that your production of power by your future development along this line is to replace power now purchased by you from the Pacific Gas and Electric Company?

A. It can replace it, yes.

Q. You have also testified, Mr. Boyle, to dealing at arms' length with the Bureau of Reclamation in arriving at your contract agreement.

Can you give us an idea, over how long a period of time, you negotiated this contract?

A. I recall we started negotiating with the Bureau of Reclamation in December of 1952.

Q. And you concluded when?

A. It was concluded in August or September, '55.

Q. During the period of time in which you were negotiating with the Bureau of Reclamation for the Link River project or operation, did you, at any time, give any consideration to an agreement with the water users in Butte Valley?

A. I don't understand your question.

"Agreement with the water users in Butte Valley?"

Q. Yes, were you looking forward to an agreement with the water users in Butte Valley?

A. We had discussed rates with the water users of Butte Valley and with the water users in building the project. It has also been my feeling that there should be an adjustment of rates here with the water users in all the Upper Klamath Basin to cut down the differences between the rates we obtained on the project and the rates we obtained off project.

So, there has been some discussion on all of these operations.

Q. Does the Bureau of Reclamation -- do you feel in your negotiation with them, they were the motivating parties, the insisting parties in this arrangement?

A. Well, I considered the whole Basin was vitally interested in the program. The farmers of the irrigation district as well as the Bureau and all the government agencies were interested and we considered it a vital project.

Q. And you feel now that this application which you have before the Commission toapprove this agreement is a mutual project?

A. I think it would.

MR. BUZZINI: No further questions.

EXAMINER EDWARDS: Do you have any questions, Mr.Sipe?

MR. SIPE: Yes.

The company has presented information which the staff had requested and I only have a few questions.

Referring to this, the January 31, 1956 contract, I understand that the United States does not take service for pumping under rate Schedule A but that it appears that customers entitled to the rates provided in that schedule are those who contracted with the United States, pursuant to the Federal Reclamation Laws for water service or for the construction of irrigation

drainage or other reclamation works, does that mean that the customers taking service under this schedule are all the customers who can take service under the schedule at the present time, or is it possible to extend the service to additional customers?

THE WITNESS: The application of the rates under the contract are to customers under the project, buy water or take water under the contract from the United States.

Q. Yes.

A. If the United States extends this project boundary to include additional areas or if other customers come into the project as part of the project then they would automatically get the rates of the government contract.

Q. I see.

Then, the use of the project then has been contracted for entirely by the project as it exists today?

A. Yes.

Q. I notice that the annual minimum charges provided in Rate Schedule A are reduced after two years of service for the 100 horsepower installation and after five years of service for installation of less than 100 horsepower, would this not result in an automatic reduction after two and five years?

A. If the minimum applied, yes. If the use was in excess of the minimum, the energy rate would control.

Are you speaking of the ultimate?

Q. The minimums.

A. If the minimum customers, yes.

Q. Could you explain the reason for this provision?

A. That was part of the original contract negotiated in 1917 contract with the load factor provision was provided in the original contract which nobody could understand, even ourselves, so as a result of negotiation with the Bureau, we reduced the load factor requirement to a minimum now shown in the schedule filed with the Commission in that minimum did change after a period of two to five years as I recall.

Q. As I understand the minimums will be reduced in the future, is that correct?

A. Are you speaking of customers taking service under the government contract?

Q. Under contract Schedule A?

A. Customers now receiving service after having continuous service for, over five years are now receiving a lower minimum.

New customers --

Q. The two and five year period refers to the time service was first taken then?

A. Yes, then if the new customers come on they will get the similar reduction at the end of the five and two years period.

Q. Now, the contract does not contain the usual

jurisdiction clause required by General Order 96 --

MR. LOWRY: Would you explain what the justification clause is. I think I know but he may not know.

EXAMINER EDWARDS: I have a hunch that Mr. Lowry knows that.

Can you answer, sir?

THE WITNESS: There is no jurisdictional clause in the original contract.

EXAMINER EDWARDS: That still doesn't exempt them from jurisdiction of this Commission.

THE WITNESS: A recital or stipulation paragraph in the new contract that did provide for Commission jurisdiction as to the rates.

MR. SIPE: Can you show me where that appears in the new contract?

THE WITNESS: No.

MR. LOWRY: I am calling Mr. Boyle's attention to paragraph 11 of the contract of January 31, 1956 which provides that the contract will become effective "on the dates of its approval by the Public Utilities Commissioner of the State of Oregon or the Public Utilities Commission of the State of California, whichever shall occur later."

MR. SIPE: The clause that I had in mind was the clause of paragraph 10-A of the General Order 96.

EXAMINER EDWARDS: Would you read that out so that all the parties here can hear it, Mr. Sipe?

MR. SIPE: Referring to the general requirements and procedures involving contracts and services at other than filed tariffs, schedules, "Each such contract shall contain a provision indicating to the parties that it shall not become effective until such authorization of the Commission is obtained. Such contract shall also contain substantially the following provisions: This contract shall at all times be subject to such changes or modifications by the Railroad Commission of California as said Commission may, from time to time, direct in the exercise of its jurisdiction."

Do you have any objection to modifying the contract to include that clause?

THE WITNESS: Oh, yes. I think the contract speaks for itself and I think the contract as modified by the contract is now effective.

MR. SIPE: That is all I have, Mr. Examiner.

EXAMINER EDWARDS: Any other questions now of Mr. Boyle?

MR. BUZZINI: I might impose some further questions.

Mr. Boyle, earlier in response to my questioning, with regard to your company's understanding and general policy in wishing to make rates within Bureau lands as equal to those outside of the Bureau lands within the Klamath Basin --

MR. LOWRY: May I interrupt?

I didn't think he proposed equal, they reduced

some of them.

MR. BUZZINI: That is correct.

MR. LOWRY: I am sorry for interrupting you.

MR. BUZZINI: That is all right.

Can you tell us what your company policy is with regard to reduced disparity between the power rates, applicable power users within the Klamath Basin, but outside the Bureau land and those power users between those people and those in your service area, generally, in California?

THE WITNESS: Well, I think there are two entirely different situations.

The Klamath area is one of the largest areas we have in our territory that is subject to irrigation -- that is, well, gravity and pumping.

It is a different type of territory than any other served by us in Northern California and also in Oregon.

But, the principal difference is that we have a common interest with the people pumping and using water for irrigation purposes in the Klamath Basin, in the conservation and use of water for irrigation and power purposes, we have no similar situation that I know of in our California territory.

The plan for development here, have been made many years ago. They have been progressing to a point where now development is becoming more rapid. We believe --

MR. LOWRY: May I suggest to Mr. Buzzini that I think any inquiry directed to possible off-project rates elsewhere in California is a question more appropriate to be raised after Mr. Boyle's testimony with respect to Application No. 37918 dealing with off-project rates.

MR. BUZZINI: That is my only purpose in raising it here to determine the relationship to this testimony that he has already made with regard to policies and such.

MR. LOWRY: Well, he will testify to off-project policy in regard to Application No. 37918.

You are certainly free to raise that question again, at that time.

EXAMINER EDWARDS: Anything else with regard to this testimony?

(No response)

EXAMINER EDWARDS: Mr. Boyle, I saw a couple of things as we went through the text here, what are you doing about reregulating the company's flow at Copco No. 2?

Have you got that in your planned development the 250,000 kilowatt hours?

THE WITNESS: Yes, that includes both developments at Irongate for regulating purposes but the amount of capacity at Irongate has not been definitely set.

There has been two possibles: one for 9,000 kilowatts and one for 30,000 kilowatts depending upon the highth of the dam and degree of regulation required for

downstream.

Q. Now, these other new plants, will they become Copco 1 and your Link River Dam?

A. All except the Irongate which is regulated.

Q. Yes.

A. Of the second I meant.

There is one plant -- two plants in our plan which arestorage plants having to do with the use of storage reservoirs wherein the water will be pumped at over the peak period into these reservoirs and the water returned through the turbines during the peak period to generate power.

Q. Yes.

Now, as I understand it, this water is diverted for irrigation, you have less and less water for generating power, isn't that a fact?

A. Not on our over-all program because the plan calls for a supplemental storage of 250,000 acre feet to 600,000 acre feet which is water now largely lost or wasted so that it is of no benefit for irrigation development or for power purposes.

Q. Where does that waste water go?

Does it go to the Klamath River?

A. It goes down the Klamath River.

Q. You have to spill that because you don't have the capacity to handle it?

A. No, the loss from evaporation is the largest there is.

There is plenty of water for extensive irrigation project and to develop the power from the water if properly utilized.

Q. Now, when this -- supposing this cheaper rate is given for pumping purposes, will that water, any of that water, be returned to the Klamath River so that it can be used to produce water?

A. Yes, that is one of the fundamental reasons for making the request of these lower rates.

Q. Do you know the ratio for that amount of water pumped to that which is returned?

A. No, sir, offhand, I do not. That is, I think that part of this other --

MR. DUNGAN: Well, some of it is pumped again?

THE WITNESS: I thought that comes in on this other part of our case.

EXAMINER EDWARDS: Very well, you indicated that the depreciation on the dam was amortization as opposed to depreciation.

THE WITNESS: No, I believe that is set up on our Accounting Department as amortization entirely.

MR. LOWRY: Is that related life term, is that why you amortized it in that fashion, the term of the plant rather than the term of life of the dam?

THE WITNESS: This property doesn't belong to us anymore. It is deeded to the Government and we amortize life of the plant or life of the contract.

EXAMINER EDWARDS: Now, this reduction of the annual charges of $8,690 a year to $1,887 a year, is that because you ordinarily base your write-off on the remaining 36 years comparatively a very low amount?

MR. LOWRY: I believe you said 36, Mr. Examiner, that period was 39.

EXAMINER EDWARDS: 39, yes, sir.

THE WITNESS: Yes, sir.

EXAMINER EDWARDS: Any other questions now of Mr. Boyle, at this time?

(No response)

EXAMINER EDWARDS: Does that complete your showing now of Application No. 37724?

MR. LOWRY: That is correct.

We will proceed with reference to Application No. 37918.

EXAMINER EDWARDS: Do you have any showing you wish to make?

MR. LOWRY: None in connection with Application 37724.

EXAMINER EDWARDS: Does the staff have anything, Mr. Sipe?

MR. SIPE: We don't have any questions.

EXAMINER EDWARDS: Does that complete the showing with

respect to Application No. 37724 relating to the contract and the rates therein of the Bureau of Reclamation?

(No response)

EXAMINER EDWARDS: Very well, we will take a 5 minute recess.

(Recess taken)

EXAMINER EDWARDS: The Commission will be in order.

Do you wish to offer these in evidence, these first two exhibits?

MR. LOWRY: Yes, I would like to offer them.

EXAMINER EDWARDS: Any objection?

MR. BUZZINI: No objection.

EXAMINER EDWARDS: None appearing, they will be received in evidence.

Are you ready to proceed to the next application, Mr. Lowry?

MR. LOWRY: Mr. Boyle will now testify with respect to Application No. 37918 which is the contract providing for certain rates for off-project pumping in Upper Klamath River Basin in California.

resumed - DIRECT EXAMINATION

MR. LOWRY: Will you describe what the company seeks in Application No. 37918?

THE WITNESS: In this application, the California Oregon Power Company seeks approval of a letter agreement between it and the Klamath Basin Water Users' Protective

Association respecting rates to be charged for off-project agricultural pumping in the Upper Klamath River Basin in California.

Q. Will you please describe this letter agreement?

A. This agreement is contained in a letter dated November 3, 1955, from Frank Z. Howard, President, Klamath Basin Water Users' Protective Association, to the company. This agreement was accepted with modifications by the company on November 22, 1955. A copy of the agreement is attached as Exhibit B to Application No. 37918. By letter, dated May 7, 1956, the President of the Water Users' Association agreed to the modifications contained in our acceptance of November 22, 1955.

MR. LOWRY: Mr. Examiner, I would like to have marked for identification an exhibit consisting of a letter dated May 7, 1956, addressed to Mr. Boyle, from Frank Z. Howard, in which Mr. Howard accepts certain changes described therein.

EXAMINER EDWARDS: Very well, I think we can identify this as Exhibit No. 1 as under Application 37918.

MR. LOWRY: Is this letter, Exhibit 1 for identification, a copy of a letter which you received from the President of the Association accepting the modifications contained in your acceptance of the proposal in the Association letter of November 3, 1955?

THE WITNESS: Yes, it is.

Q. Will you describe what this letter agreement provides?

A. This agreement provides for a new scale of agricultural pumping rates within that part of the Upper Klamath River Basin not covered by the Bureau of Reclamation contract with respect to which I have just testified. This contracts provides for an energy rate of 7-1/2 mills per kilowatt hours for pumps of 10 horsepower and over. Minimum char ges under this agreement for the first five years of continuous use shall be those presently applicable under the applicant's Rate Schedule 20. After the first five years of continuous service, the minimum charges shall be one-half of such presently effective charges.

Q. Whas is the relationship between the contract with the Water Users' Association and the contract with the Federal Bureau of Reclamation with respect to which you testified in Application No. 37724?

A. During the latter part of 1955, when the company was negotiating with the Bureau of Reclamation for a renewal or extension of its 1917 Link River Dam contract, the company was approached by representatives of water users in the Upper Klamath River Basin who would not be eligible for the rates under the existing or renewed Bureau contract, for the purpose of seeking a level of rates for such off-project users that would reduce the disparity in rates which the project users would receive under the

Bureau contract and those which the off-project users would have to pay under our Rate Schedule 20.

After considerable negotiation with representatives of the Klamath Basin Water Users' Protective Association, it was agreed that off-project users were entitled in fairness to a rate for agricultural pumping that was somewhat similar to that afforded the project users under the revised Bureau contract then under negotiation. It was recognized that the off-project users were not entitled to as low a rate as that under the Bureau contract because of the direct benefits received by the company under the Bureau contract.

As a consequence, it was agreed that an energy rate 1-1/2 mills higher than that provided for in the Bureau contract would contribute to some extent to a reduction inthe rate disparity which then existed between project users and off-project customers taking service under Rate Schedule 20.

Furthermore, the minimum charges under the Association contract, for the first five years remain unchanged from those now effective under Rate Schedule 20. After five years, the minimum charges under the Association contract will still be higher than those under Schedule A of the Bureau contract. Since the rate reduction from 7 mills to 6 mills under the new Bureau contract would not become effective until such contract had been approved

by both the California Commission and the Oregon Commissioner, it was agreed that applications seeking approval of the Association contract would be filed after the Bureau contract had been approved.

In effect,the Association contract was contingent upon prior approval by the regulatory commissions of the Bureau contract. If the Bureau contract had not been approved, the application for approval of the Association contract would not have been filed.

Q. Application No. 37918 states that Klamath Basin Water Users' Protective Association entered strenuous objection to execution of the new Link River Dam contract, and withdrew such objection only upon provision being made for off-project pumping rates.

Will you state what its objections to the new contract were?

A. Yes. The Water Users' Association was principally concerned about relative priorities of right to the use of water for purposes of irrigation and power, and about rates for power for pumping irrigation water in the Upper Klamath Basin.

As to the priority question, the Water Users' Association voiced objection over a period of several years, from the time the Big Bend No. 2 licenses were applied for until late in 1955. However, it was satisfied with an agreement entered into between the applicant and

the Klamath River Commissions of Oregon and California, which provided that no Klamath water as defined in the Link River Dam contract would be used for power purposes, when needed for irrigation or domestic use on off-project lands, upon the condition that all drainage and return flows be returned to the Klamath River above Keno.

That agreement was made on October 31, 1955 and was approved by the Federal Power Commission on February 28, 1956 by its inclusion in the license for the Big Bend No. 2 project. On the question of pumping rates, the Water Users' Association desired a rate which would improve the economic feasibility of the irrigation of presently irrigated off-project lands and also make possible either the development of additional areas or the improvement of existing supply so as to enable different types of crops to be planted.

It was the position of the Association that project and project users were in essentially the same position both as users of water and as consumers of electricity, and that the non-project irrigators should be placed in a position comparable to that which the project users would have under the Link River Dam --

MR. LOWRY: When you referred to project users, I think you should have said off-project users.

Will you restate that?

THE WITNESS: I am sorry.

Q. Can you state it again?

A. It was the position of the Association that project and off-project users were in essentially the same position both as users of water and as consumers of electricity, and that the non-projectirrigators should be placed in a position comparable to that which the project users would have under the Link River Dam contract.

Moreover, by agreeing that return flows from off-project lands would be returned to the Klamath River above Keno, they were also agreeing to make available additional amount of water in the river at the points where it could be used for generation of electricity. Their usage of water, like that of reclamation project irrigators, takes place at times when annual system peak loads do not occur.

Q. Have you a tabulation of customers, sales and revenues at various rates in the area covered by the Water Users' Association contract?

A. Yes, I have.

MR. LOWRY: Mr. Examiner, I would like to have identified as exhibit next in order the document entitled "California customers, in Upper Klamath River Basin and not on Klamath project land, as billed on Rate Schedule 20 and as billing would be at rates provided in Application 37918 to California PUC - year 1955."

The document consists of three pages.

EXAMINER EDWARDS: Exhibit No. 2 under Application 37918.

MR. LOWRY: Will you describe the number of accounts in California which received service under Schedule 20 in 1955, who would have received service under the Association contract had that contract been in effect during that year?

THE WITNESS: Had the Association contract been in effect during 1955, one hundred accounts of the company would have been eligible to have received service under that contract.

Q. What were the 1955 recorded revenues under Schedule 20 from the one hundred accounts to which you have just referred?

A. In 1955, we received gross revenues of $78,029.66.

Q. What would have been the revenue effect if the Association contract had been in effect during the year 1955?

A. If the Association contract had been in effect during 1955, the company would have received revenues of $55,240.06, or a reduction in revenues of 29.21 percent.

Q. What is the position of the applicant regarding the revenue effect of the proposed rates upon the system as a whole?

A. It is believed that the over-all system cost of the

energy to be furnished will be approximately 4.54 mills for production plus 1.65 mills for transmission or a total of approximately 6 mills for these costs. The rate in the Link River Dam contract for pumping on project land has been reduced but will still recover the 6 mill direct costs I have mentioned. However, in the judgment of the applicant, the benefits received under the contract are substantial and essential to the continuance and necessary expansion of its Klamath River operations so that losses arising out of the other costs allocable to the service involved are clearly chargeable to the system as a whole through the development of cheap hydro power and the protection of the company's existing investment on the Klamath River. The rate applicable under the Klamath Basin Water Users' agreement would produce 25 percent more than the 6 mill direct costs above mentioned, and to that extent would contribute to other costs and other items allocable to that service. A lowered pumping rate is believed to be justified to promote development of the area. Lacking a period of experience within which that rate has been in effect, and knowing that the economic effects of such developments may be felt only indirectly and after a lapse of some time, the applicant is not prepared to say whether or to what extent revenue effects under that contract should be treated otherwise than by spreading them over system operations. The

establishment of this rate may prove to be a benefit to the system as a whole.

Q. How many accounts in California took service under Schedule 20 in 1955?

A. The total number of California accounts under Schedule 20 in 1955 was 268, and our revenues therefrom amounted to $171,790.84.

103 were located within the California portion of the Upper Klamath River Basin.

Q. If the Association contract becomes effective will there be any California customers in the Upper Klamath River Basin taking service under Schedule 20?

A. The Association contract applies only to those customers in the Klamath Basin area with motors of 10 horsepower or more. Our study of 1955 operations shows that there will be 3 customers in this area taking service under Schedule 20 if the Association contract becomes effective.

Q. Will you indicate the considerations that the company had in mind in entering into this contract?

A. The Upper Klamath River Basin is a clearly defined area in which the land is devoted to farming and in which the farmers utilize to a large extent the water resources found in the area for the purpose of irrigating their farm lands.

The Basin area is the largest single area in the

in the company's territory in California devoted to these uses. Within certain parts of the area farmers are able to use water from the Bureau of Reclamation Project under the special rates contained in our contract with the Bureau of Reclamation with respect to which I testified earlier. Those farmers who would receive the benefit of the Water Users' Association contract are in the same territory as those receiving service pursuant to the Bureau contract and in some instances own property adjacent to that of project users. We feel that the Upper Klamath Basin constitutes a definable service area in which it would be undesirable to maintain too sharply differing rate levels for similar service. The customers receiving service under the Water Users' Association contract, unlike the project customers, acquire their water for irrigation purposes from their own wells and water resources. Generally project users on the other hand purchase their water from the United States.

Both project customers and off-project customers utilize electrical energy for the same purpose, that is for agricultural pumping and irrigation purposes. By encouraging the use of Klamath Basin water resources for such irrigation uses, the company is able to insure that water in the Klamath Basin is returned to the Klamath River above Keno. This insures the return of all Klamath Basin water to the Klamath River at a point

where it may be utilized by our hydroelectric plants, the major water supply of which is controlled by Link River Dam.

We feel that this agricultural pumping load is desirable in that the peak season occurs in the summer time when our system load is at its lowest. Similarly the pumping load occurs during the off-peak hours of the day, usually late at night, when our system is otherwise operating at minimum capacity.

These special rates to water users in the Upper Klamath River Basin will further the development of the agricultural economy in that area and through that growth provide for increases in other types of electrical load at our prevailing rates.

Q. Has the company entered into a similar contract with respect to off-project users located in that part of the Upper Klamath River Basin which is in Oregon?

A. Yes, we have.

By an agreement dated April 30, 1956, we entered into a contract with the Klamath Basin Water Users' Protective Association providing for a rate of 7-1/2 mills per kilowatt hour for pumping installations of 10 horsepower or more, subject to a seasonal minimum charge of $111.60 for the first 10 horsepower, and $10.80 per horsepower for all horsepower in excess of 10 horsepower. After the fifth year of continuous use, the minimum charge shall be reduced to one-half of that effective during

the first five year period.

Q. Has the contract relating to off-project users in the Upper Klamath Basin in Oregon been approved by the Public Utilities Commissioner of Oregon?

A. Yes, it has, by a letter dated May 4, 1956.

MR. LOWRY: Mr. Examiner, the Commission staff asked us to supply certain information, most of which has been offered in the record.

There is one item which is not yet provided for. That was not provided in the record although we have previously provided to the staff and that is an estimate of the pumping requirements in -- that part of the Upper Klamath River Basin lying within California.

We would like to offer as an exhibit, through Mr. Boyle, a copy of a letter addressed to the Secretary of the Commission, dated May 2, 1956, containing the information requested.

EXAMINER EDWARDS: Very well, any objection to receipt of this?

MR. LOWRY: May I have it marked as an exhibit?

EXAMINER EDWARDS: Very well, it will be identified as Exhibit No. 3.

MR. LOWRY: Mr. Boyle, is this letter a true copy of a letter which you wrote to the Secretary of the Commission, dated May 2, 1956?

THE WITNESS: Yes, it is.

MR. LOWRY: I would like to call at this time, Mr. Frank Howard.

FRANK Z. HOWARD, a witness called on behalf of the Applicant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

EXAMINER EDWARDS: Be seated and state your name and address?

THE WITNESS: Frank Z. Howard, 1155 Lakeshore Drive, Klamath Falls.

MR. LOWRY: Will you state your principal occupation, Mr. Howard?

THE WITNESS: Civil Engineer.

Q. What is your position with the Klamath Basin Water Users' Protective Association?

A. I am President of that organization.

Q. Will you define or tell us what the Association is?

A. It is a organization of water users of the whole Klamath Basin and principally made up -- the present organizations are the Klamath Drainage District, Irrigation District, Improvement District in the large part.

Q. Does the activities of the Association include in its membership both on-project and off-project users of water?

A. Yes.

Q. Did you on behalf of the Association negotiate the contract providing for off-project rates by the

California Oregon Power Company which is the subject of Application No. 37918?

A. Yes.

Q. Would you state what the position of the Association is with respect to the rates proposed by the California Oregon Power Company in this proceeding?

A. Well, we think it is a very fair rate. In order to give the off-project pumpers more or less competition with the on-project pumpers and as I say, I think it is a very fair rate that we are requesting.

Q. You state that the rate is a fair rate, what advantage or what is the basis for your position in feeling that such a rate is desirable?

A. As I say, it puts the off-project pumper in competition -- able to compete with the on-project user on that particular rate. Of course, some mentioned the difference in the rate, but as I looked at it, we discussed it -- that difference was brought out probably by what we termed the difference in certain cost of water to on-project users and the man off-project who did not have to pay -- for instance, the on-project users has to pay the Government for certain water which the off-project does not have to pay.

Q. Do you, from the standpoint of the Association have a program of any sort respecting the development of water resources in the Klamath Basin?

decision in this matter. Our position with respect to Application 37918 is solely to see that a complete record is developed which enable the Commission to determine the reasonableness of the preferential rate.

EXAMINER EDWARDS: Very well, it occurred to me that it might be helpful to the Commission if we could refer to the annual reports of the applicant here, California Oregon Power Company and place them in the record by reference.

MR. LOWRY: No objection to that reference.

EXAMINER EDWARDS: So, they will be considered by reference in this record.

Do you wish to reply to Mr. Buzzini's statement, Mr. Lowry?

MR. LOWRY: In reference to the matter of rates in the Klamath Basin and in the areas in California outside of the Klamath Basin, the company in proposing the rates herein issue within the Klamath Basin did so because of the peculiar circumstances pertaining in the Basin, where you have a project user of electricity and off-project user, side by side in many cases, in asingle area which has many of the characteristics of a single rate area or rate territory.

There are conditions prevailing in the Klamath Basin which are peculiar to that area which do exist in Shasta Valley and Scott Valley, I make particular reference

to the effect of increased drainage pumping of water flow into the Klamath River which is of beneficial use to the company in its hydroelectric plant on that river.

I believe the evidence shows quite clearly that no similar condition, no similar benefits prevail with respect to the use of water in the Shasta Valley and Scott Valley. I believe that the economic development of the Klamath Basin is such that the users of energy there use it in substantial quantities which makes the rate reduction not a burden upon other users of the company.

The company, of course, is always willing to consider proposals for extension of rate which would produce benefits in the area for agricultural development and by our statement, we are not precluding any willingness to discuss those matters with users of electricity on the company's system in such areas.

We do not feel, however, that the time is right, at this time, in that the development has not progressed to the extent that such development of a lower pumping rate can be feasibly undertaken at this time.

The company, however, of course, is willing to discuss the matter further with interested parties in those parts of California outside the Klamath Basin.

EXAMINER EDWARDS: Very well, anything further now to come before the Commission?

(No response)

EXAMINER EDWARDS: Do you wish to submit on the record as made or file briefs?

MR. LOWRY: Submit on the record as made.

MR. BOLLINI: Submit on the record.

EXAMINER EDWARDS: The matter will be submitted and the Commission stands adjourned.

Thank you, gentlemen, for your kindness.

(Whereupon, at the hour of 5:20 p.m., the above matter was submitted, and the Commission then adjourned.)

* * * * *

Exhibit 16

Exhibit B

KLAMATH BASIN WATER USERS PROTECTIVE ASSOCIATION
POST OFFICE BOX 430
KLAMATH FALLS, OREGON

November 3, 1955

The California Oregon Power Company
Medford, Oregon

ATTENTION: Mr. J. C. Boyle
Vice-President and General Manager

Dear Mr. Boyle:

The following is in confirmation of the conversation of yesterday, between you, representing the California Oregon Power Company, and the Executive Committee of the Board of Directors of the Klamath Basin Water Users Protective Association, regarding proposed agricultural power pumping rates on off-project land in the Upper Klamath River Basin, in connection with the proposed contract, dated October 10, 1955, between the Department of the Interior and Copco, for the operation of Link River Dam.

This letter is, also, a withdrawal of the letter of the Association, dated October 28, 1955, which made proposals for reduced rates for both on-peak and off-peak periods and for on-project and off-project pumpers, and replaces it with a new proposal eliminating the matter of peak periods and dealing with off-project users, only. The new proposal is a plan for securing reduced off-project pumping rates by the united efforts of Copco and the Association, carried through along lines agreeable to both, and the procedure is as follows:

(1) That as soon as it is practicable after the contract has become effective, the applications for reduced agricultural off-project pumping rates in the Upper Klamath River Basin, will be presented by Copco to the Public Utilities Commission of California and to the Public Utilities Commissioner of Oregon.

(2) That any such petition for reduced pumping rates shall be by joint application of The California Oregon Power Company and the Klamath Basin Water Users Protective Association.

(3) That the application shall be for the approval of an "Area Rate" designed to apply only to that area defined in the proposed contract as the Upper Klamath River Basin.

(4) That it is necessary to have a paper or office survey made to determine the pumping potential of the Upper Klamath River Basin. In presenting the applications to the Public Utilities Commissions, the extent of the possible future pumping development should be known.

(5) That the rates granted by the Public Utilities Commissions, shall apply only to motors of 10 H. P. and over.

(6) That minimum charges applicable to pumps, shall be the same as minimums now set up by Copco under Schedule "20", for a period of five years, and after the fifth year shall be one-half the first-five-year rate. It is understood that this is to be considered a new rate and affects all off-project pumps in the Basin, whether already in use or newly installed.

(7) That after power rates have been established for off-project pumpers and applications have been approved by the Public Utilities Commissions of Oregon and California, no change in power rates for the term of the contract between the Bureau of Reclamation and Copco shall be submitted to the Commissions unless filed jointly by Copco and this Association.

(8) That the agricultural power pumping rate for all off-project users in the Upper Klamath River Basin, shall be:

50 H.P. and over - 7 mills.

49 H.P. and less - 8 mills.

If the above is acceptable to Copco, the Executive Committee, upon receipt of the "ACCEPTANCE", will immediately present the matter to the Board of Directors of the Klamath Basin Water Users Protective Association, and, when approved, will immediately withdraw all objections to the proposed contract, dated October 10, 1955.

Yours truly,

Frank Z. Howard

Frank Z. Howard, President,
Klamath Basin Water Users Protective Association

ACCEPTANCE with the following changes:

November 22, 1955
The California Oregon Power Company

J. C. Boyle, Vice-President and
General Manager.

Paragraph (6), insert in the third line after the words "fifth year" the words "of continuous use."

Change paragraph (8) to read as follows:

"That the agricultural power pumping rate for all off-project users in the Upper Klamath River Basin, shall be 7-1/2 mills."

Exhibit 17

KLAMATH BASIN WATER USERS PROTECTIVE ASSOCIATION
P. O. BOX 430
KLAMATH FALLS, OREGON

October 28, 1955

Orig. to Document File

The California Oregon Power Company
Medford, Oregon

Attention: Mr. J. C. Boyle
Vice-President and General Manager

Dear Mr. Boyle:

The Executive Committee of the Board of Directors of the Klamath Basin Water Users Protectivw Association, met last night and discussed your letter of October 24, 1955, regarding proposed agricultural power pumping rates for the Upper Klamath River Basin, in connection with the proposed contract between the Department of the Interior and The California Oregon Power Company, for the operation of Link River Dam.

The conclusions at which the Committee arrived, are based upon the thinking of its five individual members, and upon reflections about the proposed reduced rates that have been received from eleven different members of the Board of Directors and from many individual off-project pumpers from Butte Valley and various locations scattered about the Basin, who have been contacted. The off-project pumpers are not at all happy about the proposed small discount on Schedule 20. They feel that such a little reduction still does not recognize their right to a rate which is equal to or at least competitive with that of the project users. The proposals of your letter will never get by our Board.

The Executive Committee is just as anxious as anyone to make arrangements about the contract and rates that are agreeable to all. It wishes to see the contract signed soon, and Copco's plans of development proceed. However, in order to get the approval of the Board of Directors, and to get opposition to the contract withdrawn, there must be further reduction in the on-peak pumping rate, and the Committee is proposing the following:

> The California Oregon Power Company will make application to the Public Utility Commissions of Oregon and California for reductions of Agricultural power pumping rates in the Upper Klamath River Basin, and with the approval of the Commissions of the two states, will grant a five (5) mill off-peak rate for all agricultural drainage and irrigation pumpers in the Basin, and a ten (10) mill on-peak rate for all off-project agricultural pumpers in the Basin.
>
> The on-peak pumping rate will apply from eight (8) A. M. to eight (8) P. M. of each day except Saturdays and Sundays.

The off-peak pumping rate will apply from eight (8) P. M. to eight (8) A. M. of each day and during the 24-hour period Saturdays and Sundays.

The above rates shall apply for the duration of the contract between the Department of the Interior and The California Oregon Power Company.

Very truly yours,

Frank Z. Howard, President
Klamath Basin Water Users Protective Association

Exhibit 18

MINUTES OF THE EXECUTIVE COMMITTEE OF THE KLAMATH BASIN WATER USERS PROTECTIVE ASSOCIATION, HELD IN THE CALIFORNIA OREGON POWER BUILDING, MEDFORD, OREGON, AUGUST 11, 1955

The Executive Committee, complying with Article III, Section 2, of the By-Laws, met in Special session (by prearrangement) with Mr. John Boyle, General Manager and Vice President of The California Oregon Power Company, in his office in Medford, Oregon, at 1:30 P.M. Thursday, August 11, 1955.

Committee members present were Frank Z. Howard, chairman, E. M. Mitchell, Vice-Chairman and Frank L. King, Jr., and John L. Stewart, Jr., Secretary.

The Chairman opened the meeting by stating that this committee was present to discuss the draft of proposed Contract between the United States Department of the Interior and Copco (which incidently was received from C. H. Spencer, Bureau of Reclamation just prior to meeting date but after date had been set).

Mr. Boyle stated that he was very willing to discuss all or any part of the draft but that he could not commit himself on any of the committees questions.

General discussion was then had on questions and statements by committee and answers by Mr. Boyle, the highlights of which are as follows:

1. Why shouldn't the Indian Lands and all other lands outside the boundaries of the Project in the Upper Klamath River Basin be included in this Contract for a reasonable power rate and the Contract be signed by the Secretary of the Interior Mr. Douglas McKay (not C. H. Spencer) who has jurisdiction over the Indian Lands. Too, nearly all drainage water, including well water, in the upper reaches of the Klamath Drainage Basin, finds its way down for irrigation and power purposes, whether over Project lands or not.

Mr. Boyle stated that if signing the Contract by Secty. Douglas McKay instead of Mr. Spencer would make it legally OK to give Indian Lands and all other lands lying outside of the Project a low power rate without the Public Utilities Commission of the State of Oregon ruling that partiality was being shown, he believed that Copco would approve such a rate. Further, that it would without a doubt be a good thing financially for Copco if a favorable power rate could be granted.

The Committee countered by stating that the Public Utilities Commission certainly should weight the magnitude and importance of the other things involved at this time in this area of Oregon as pertains to water and power, and not try to compare with a problem with no similarity in another part of the State.

2. That a reasonable power rate would enable approximately 300,00 acres (including Butte Valley) to irrigate whether all land was levelled or not as sprinklers would be used on many thousands of hill land acres. That irrigating by sprinklers would also make it better for Copco from a power use standpoint.

Mr. Boyle stated that Copco can readily see this to be true.

3. That many homes and other useages for power at commercial rates would materilize on this 300,000 acres, creating business for merchants, dealers, etc., as well as for Copco.

Mr. Boyle stated that there was no doubt but what additional revenue from commercial use would warrant a reasonable power rate for pumping on these lands.

4. That it would be a general stimulation.

Mr. Boyle stated that Copco can readily see this to be true.

5. That a reasonable power rate for these lands is the only way in which water for beneficial use can be used quickly and assuredly. That it is a fallacy to infer that when these lands lying outise of the Project are taken into the Project they can then benefit by the 6 mill rate, when in fact only approximately 75,000 acres of the 300,000 acres could ever be taken into or served by the Project and benefit from the proposed 6 mill rate. This approximately 70,000 acres being Butte Valley and high land lying on the fringe of the Project.

Mr. Boyle answered the first part of this question by stating that it is true that the Bureau is usually many years in bringing their plans to completion. He would not commit himself that he knew the second part of the question to be true and was rather hesitant and evasive in an inconclusive answer.

6. There should be a Paragraph or Section in this draft of Contract stating that Copco will furnish at some given time additional storage in vicinity of Upper Klamath Lake and at the end of 50 year Contract will transfer title to the USA or its successors or assigns.

Mr. Boyle stated that Copco will not approve this request. That for Copco to say that they will give away to anyone an ultimate $13,000,000 investment (additional storage only) would be down right foolishness. Mr. Boyle did, however, explain in some detail the proposed storage plans that Copco has and gave each person present a copy of a layout drawing.

7. That paragraph 7 of Water Users draft of Contract should be included in draft of Bureau-Copco Contract.

Mr. Boyle stated that again Copco would be giving away a healthy, investment, that someday they expect to be reimbursed by somebody for any remaining interest they may have invested in these dykes, flowage and easement rights.

8. An explanation of paragraph 5 was requested.

Mr. Boyle stated that this paragraph implies that Copco has first right to the waters of the Upper Klamath Basin for power purposes.

9. An explanation of paragraph 9 was requested.

Mr. Boyle stated, among other things, that it was understood that the Fish and Wildlife is to decrease their acreage rather than increase it.

The Committee countered by stating that this was very hard to believe, indeed.

The discussion on power rate schedule was brief, however, Mr. Boyle did state that the 6 mill rate was at cost before delivery. 4.54 mills to generate, 1.43 mills pump storage; making 5.97 mills at the switchboard.

With general discussion at an end the meeting adjourned at 4:00 P.M.

Prior to the departure to Medford there being a quorum present, the members approved the signing of vouchers and checks as follows:

Exhibit 19

KOPWU Data Request 1.4

Regarding PPL/100, Furman/3, 13-14 and PPL/1200, Griffith/8-9, please provide the Company's proposed actual and the overall percentage price increase for the Klamath Basin irrigators that are currently on Schedule 33. Please provide the percentage price increase in "net" and "base" rates.

Supplemental Response to KOPWU Data Request 1.4

The Company objects to KOPWU Data Request 1.4 as vague and ambiguous. Nevertheless, insofar as KOPWU Data Request 1.4 is asking the Company to provide a comparison between Schedule 33 and Schedule 41 base and net rates, Attachment KOPWU 1.4 Supplemental contains the requested data.

PACIFIC POWER & LIGHT COMPANY

OREGON USBR/UKRB CUSTOMERS

FORECAST 12 MONTHS ENDED DECEMBER 31, 2006

Description	Pre Sch No.	Pro Sch No.	No. of Cust	MWh	Contract Rate Present Revenues ($000) Base Rates	Adders[1]	Net Rates	Schedule 41 Rate Present Revenues ($000) Base Rates	Adders[1]	Net Rates	Change Base Rates ($000)	Base Rates %	Net Rates ($000)	Net Rates %
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8) (6) + (7)	(9)	(10)	(11) (9) + (10)	(12) (9) - (6)	(13) (12)/(6)	(14) (11) - (8)	(15) (14)/(8)
USBR\UKRB	33	41	2,110	90,609	$604	$0	$604	$7,709	($1,542)	$6,167	$7,105	1176.3%	$5,563	921.0%

Description	Pre Sch No.	Pro Sch No.	No. of Cust	MWh	Schedule 41 Rate Present Revenues ($000) Base Rates	Adders[1]	Net Rates	Schedule 41 Rate Proposed Revenues ($000) Base Rates	Adders[1,2]	Net Rates	Change Base Rates ($000)	Base Rates %	Net Rates ($000)	Net Rates %
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8) (6) + (7)	(9)	(10)	(11) (9) + (10)	(12) (9) - (6)	(13) (12)/(6)	(14) (11) - (8)	(15) (14)/(8)
USBR\UKRB	33	41	2,110	90,609	$7,709	($1,542)	$6,167	$9,109	($2,352)	$6,757	$1,400	18.2%	$590	9.6%

[1] Excludes effects of the BPA Energy Discount (Schedule 98), Low Income Bill Payment Assistance Charge (Schedule 91) and Public Purpose Charge (Schedule 290).

[2] Removal of Sch 94 and includes new Sch 95 Miscellaneous Deferred Accounts Credit $1.8 million.

Exhibit 20

Klamath Basin Irrigation Focus Group Report

Presented to:

Pacific Power

May 2004

Momentum
Market Intelligence

PACIFIC POWER

Conclusions

- Findings from these six focus groups reveal a community of irrigators who are very aware of the issues impacting their way of life and they are very concerned about the continued viability of agriculture in the Klamath Basin.
- As would be expected, they believe the American farmer provides a very valuable resource for the nation and they do not want to have to give up their farming/ranching operations because of increased environmental pressures or higher power rates.
- They believe the KWUA is doing a good job of representing their interests and this organization is the preferred source for information and negotiation with external parties such as the Bureau of Reclamation or Pacific Power.
- Since 2001, they have faced on-going uncertainly about the availability of water to irrigate their crops or pastures for their cattle. This uncertainty has negatively impacted their ability to grow crops, their property values, and their way of life.
- In addition, they have had to make many costly changes to their operations to comply with the ESA, Clean Water Act, and other environmentally-driven regulations.
- The irrigators believe in conservation and have taken measures to conserve water and power. They will continue to do as much as they can, but have very limited resources to pay for all the new equipment.
  - Federal programs such as EQIP help, but are not sufficient.
  - The Water Banking program, another federal assistance program, is viewed less favorably because it benefits only a few land owners and actually decreases the number of jobs and the economic viability of the region.
  - The Water Banking program also depletes underground aquifers and requires significantly more water when brought back into production.

Conclusions *(continued)*

- The pending expiration of the '56 Contract represents one more uncertainty for them.
- They have always viewed the power company as a partner—they gave the power company their excess water, and the power company gives them favorable rates.
  - They hope this partnership will continue, but are worried that PacifiCorp is not concerned about the agricultural community and that decisions will be solely profit-driven.
- Currently, the cost of electricity represents 5% to 10% of operating costs for the irrigators.
  - If the cost of power increases significantly, it is easy to see that their profits will be dramatically cut.
  - PacifiCorp is in a position to wield great power over the lives of these Klamath Basin irrigators as it sets the power rate for the region.
  - The cost of pumping water, both to the individual property and through the Water District canals, will impact the future of the individual irrigators and of the entire Klamath Water Project.
- Regardless of the power rate outcome, the irrigators want more communication from Pacific Power. They need to reduce the uncertainty in their lives.
  - They would like information in their monthly bills and they would like to talk directly to representatives from the power company at meetings in their area.
  - The irrigators trust the KWUA and would like Pacific Power to negotiate with this organization that represents them all.
- To support the irrigators, Pacific Power could offer programs to assess the efficiency of their current pumps and provide assistance for updating equipment.
- More than anything else, the irrigators want Pacific Power to recognize and support the value that agriculture makes to the Klamath Falls economy and the nation by giving them a favorable rate for electricity.

Exhibit 21

PACIFIC POWER & LIGHT COMPANY
KLAMATH BASIN IRRIGATION CONTRACTS
IRRIGATION AND DRAINAGE PUMPING

OREGON
SCHEDULE 33

Available
In territory served by Company in Klamath Basin, Oregon.

Applicable
For irrigation and drainage Customers whose retail rates are specified by contract.

Net Monthly Rate and Conditions of Service
As specified by applicable contract. All Monthly Billings shall be adjusted in accordance with Schedule 90.

Purpose

The purpose of this schedule is to describe generally the terms and conditions of service provided by the Company pursuant to special contracts approved by the Oregon Public Utility Commission under OAR 860-22-035. In each case, the rights and obligations of the parties are as specified in detail in the respective special contracts. In the event of any ambiguity or conflict between the summaries in this schedule and the substantive provisions of the special contracts, the terms of the special contracts shall be controlling. A copy of each special contract is available for public inspection at each of the Company's district offices in Oregon.

Available

In all territory served by the Company in the State of Oregon.

Applicable

For those Customers demonstrating that they meet the eligibility criteria established under House Bill 2144, as is now contained under 1987 Session Laws Chapter 900, and Oregon Public Utility Commission Order 87-402. These eligibility criteria are summarized as follows:

Eligibility Criteria Questions Summarized from House Bill 2144

1. Does the special contract generate revenues at least sufficient to cover relevant short and long run costs of the Company during the term of the contract?
2. Does the special contract generate revenue sufficient to insure that just and reasonable rates are established for remaining customers of the Company?
3. Is it appropriate to incorporate interruption of service in the special contract?
4. Does the special contract require the Company to acquire new resources to serve the load?
5. For service to load not previously served, what is the effect of the special contract on the Company's average system cost through the residential exchange provisions of the Regional Power Act?

Eligibility Criteria Summarized from Order 87-402

1. The general legal standards for special contracts are:
   a. 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.
   b. Classes of customers must be open-ended, so that any customer meeting the criteria for the class qualifies for the special contract.
   c. Special contracts can be offered only for the purpose of providing just and reasonable rates for remaining customers.

2. The purpose of the special contract must be to benefit the Company's other customers by maximizing contribution to the Company's fixed costs from customers receiving the special contract. This implies that the special contracts should be offered only to customers with viable alternatives to the Company's service. Those "discretionary" customers are customers which:
   a. Use volumes large enough to justify the cost of administrating a special contract, and
   b. Can switch fuels, or

(continued)

Applicable *(continued)*

Eligibility Criteria Summarized from Order 87-402 *(continued)*

c. Can purchase their own supplies and install their own distribution system, or

d. Are otherwise so price sensitive that a special contract would increase consumption enough to increase the customer's contribution to the Company's fixed costs.

3. The special contract for discretionary customers must be designed to maximize contribution to fixed costs from customers receiving the special contract. In addition, the contract price must be greater than variable cost plus a minimum contribution to fixed costs. As the Company's system nears capacity, the minimum contract price must reflect the impact of system expansion on average costs.

4. Special contracts are permissible subject to the following conditions:
   a. Similar special contracts must be made available to any customer meeting the criteria for the class; and
   b. The Commission must be able to change any special contract.

5. The following are permissible classification criteria:
   a. Volume of use
   b. End use, at least to the extent difference in end use concisely describes difference in demands placed on the Company.
   c. Other factors affecting the contract price the customer will pay for the Company's service.

6. The following are not permissible criteria:
   a. Past usage
   b. Impacts on social policy goals unrelated to the Commission's mandate.

Special Contracts

Eligibility criteria listed below under each special contract generally indicate the unique characteristics of each Customer which are used in evaluating each special contract in accordance with the eligibility criteria set forth above in the **APPLICABLE** section of this Tariff Schedule. All Monthly Billings shall be adjusted in Accordance with Schedule 91 and Schedule 290.

Consumers who were served on special contracts with prices linked to the Company's Schedules 47T or 48T shall be served under the present Schedules 47 or 48 Delivery Service tariff and Schedule 200 Cost-Based Supply Service tariff.

(continued)

Special Contracts *(continued)*

1. Wah Chang - Millersburg

Effective Date:	September 12, 1997	
Term:	5 Years	
Price Adjustment:	Years 1-3	$27.98 per MWh for 8,000-14,000 MWh per month. $25.13 per MWh in excess of 14,000 MWh per month.
	Years 4-5	Prior monthly average of DJ-COB plus $11.00 per MWh per month adjusted by one-half the Portland CPI change since September 1997.

Special Conditions
- Minimum monthly bill of $223,840 for first three contract years.
- In any month that the Customer's load factor is 65% or below the Total bill for the month will be increased by 1.5 %.

Eligibility Criteria: Customers who:
- Qualify for service under Schedule 48, and
- Demonstrate ability to proceed with municipal acquisition of PacifiCorp's existing electrical system at costs comparable to Wah Chang, and
- Are willing to accept the risk of market-based pricing.

Other eligibility criteria are set forth above in the **APPLICABLE** section of this Tariff Schedule.

2. James River - Camas

Effective Date: Effective upon commencement of construction of the new generating unit at the site, but no earlier than October 1, 1993.

Term: Twenty years

Price Adjustment: All billings are calculated under Delivery Service Schedule 48 and Cost-Based Supply Service Schedule 200.

Special Conditions:
- Pacific will own a cogeneration facility under construction on Customer's site and has an option to participate in a gas turbine project on the Customer's Site.

Eligibility Criteria: Customers who have:
- on-site cogeneration facilities, and
- transferred to PacifiCorp rights to develop all currently identifiable cost-effective on-site generation potential, and
- committed to sole reliance on PacifiCorp as a source of electric service for a significant period of years.

Other eligibility criteria are set forth in the **APPLICABLE** section of this Tariff Schedule.