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May 12, 2005

VIA ELECTRONIC MAIL & FIRST CLASS MAIL

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

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

Dear Filing Center:

Enclosed please find an original and one copy of Klamath Water Users Association's Reply Brief relating to the above-referenced docket

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

Very truly yours,

Richard Lorenz

Richard G. Lorenz

RGL/tr
Enclosure
cc: UE-171 Service List (via email & first class mail)

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 171

In the Matter of PACIFIC POWER & LIGHT (dba PacifiCorp) Klamath Basin Irrigation Rates	KLAMATH WATER USERS ASSOCIATION'S REPLY TO RESPONSIVE MEMORANDUM

I. INTRODUCTION

The Klamath Water Users Association ("KWUA") respectfully submits this Reply to the Responsive Memoranda filed by Staff and others in the above-captioned proceeding. In light of the facts and law that have been presented to the Commission, it is clear that the prudent course for this Commission is to deny PacifiCorp's Motion for Summary Disposition or, alternatively, to hold this proceeding in abeyance until the Federal Energy Regulatory Commission ("FERC") takes action regarding the annual license that PacifiCorp will need in order to continue operating Klamath Hydroelectric Project.

II. ARGUMENT

1. What Happens To The 1956 Contract In April of 2006 Is Tied To The Terms Of PacifiCorp's Interim, Annual License For The Klamath Hydroelectric Project.

A. Staff failed to acknowledge that the rate term of the 1956 Contract will be a condition on any annual license.

For PacifiCorp to have the authority to continue operating the Klamath Hydroelectric Project after April of 2006 under an annual license, the 1956 Contract between PacifiCorp and the Bureau of Reclamation ("Reclamation"), which is an express condition on PacifiCorp's FERC license, will have to be either extended or renewed. Both KWUA and Reclamation explained this in detail in their respective responsive memoranda. Nevertheless, Staff and others urge the Commission to terminate the 1956 Contract effective April 16, 2006, without ever

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addressing the implications on PacifiCorp's ability to continue operating the Klamath Hydroelectric Project. By cavalierly ignoring PacifiCorp's legal obligation to honor the terms of the 1956 Contract as long as PacifiCorp operates the Klamath Hydroelectric Project under an annual license, Staff and certain intervenors urge a course of action that will harm PacifiCorp's ratepayers and cause needless controversies.

Both Reclamation and the United States Fish and Wildlife Service explain that the power rate provided in the 1956 Contract is part of the "annual benefits to the United States" that *must be* provided as a condition of PacifiCorp's FERC license. In short, the power rate reflected in the 1956 Contract is a condition on PacifiCorp's existing FERC license. The Commission must understand that PacifiCorp will not have a *new* license to operate Project No. 2082 by the time the original license expires. Starting in April 2006, therefore, PacifiCorp will be operating the Klamath Hydroelectric Project under an *annual* license. 18 C.F.R. § 16.18 (b) provides that FERC "will issue an annual license to an existing licensee *under the terms and conditions of the existing license* upon expiration of its existing license." (Emphasis added). The Commission also must understand that the annual license is issued automatically with the existing license conditions and FERC generally does not have discretion to either withhold the annual license or alter its terms and conditions. *See generally California Trout, Inc. v. Federal Energy Regulatory Commission,* 313 F.3d 1131 (9th Cir. 2002). The intent of the annual license process is to "preserve the status quo" until a *new* license can be studied and prepared. *See, e.g.,* Reclamation Response, p 2. *Notwithstanding the expiration date, therefore, PacifiCorp must continue to honor the terms of the 1956 Contract as an express condition on any annual license issued by FERC for the Klamath Hydroelectric Project.*

If PacifiCorp's Motion were granted, and the Klamath Irrigation Project is served under a rate other than that specified in the 1956 Contract, PacifiCorp would intentionally violate an express condition on its annual license. By intentionally violating an express term of its annual license, PacifiCorp would risk losing its FERC license to operate the Klamath Hydroelectric

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Project. Section 31 of the Federal Power Act directs FERC to "monitor and investigate compliance with each license and permit issued under this subchapter * * *." 16 U.S.C. § 823b(a). *FERC is expressly authorized to revoke PacifiCorp's operating license if PacifiCorp were to knowingly violate a condition of its license. See* 16 U.S.C. § 823b(b). In short, there is a high probability that all PacifiCorp ratepayers would lose the benefit of the low-cost electricity generated by Klamath Hydroelectric Project if this Commission were to follow the recommendations of Staff and other Intervenors and direct PacifiCorp to violate an express condition on its annual FERC license.

B. Summary disposition is not proper if the Commission determines that the terms of any annual license are uncertain.

In determining whether to grant a motion for summary disposition, the Commission must view the evidence in the light most favorable to the non-moving party. *See* ORCP 47. Summary disposition is proper only when there is no genuine issue of material fact, and it is certain that no reasonably objective fact finder could find in favor of the non-moving party on the issues that are subject to the motion. *See generally PGE v. Oregon Energy Co.,* Order No. 98-238.

KWUA and Reclamation both point out that the terms of the 1956 Contract will, unequivocally, be a condition on any annual license. PacifiCorp, however, asserts that it can terminate the 1956 Contract without any repercussions, *i.e.* without violating any condition on its FERC license. Although PacifiCorp's position is groundless, the dispute raises a genuine issue of material fact as to whether the rate prescribed in the 1956 Contract will continue to be a condition on an annual license. Accordingly, the Motion for Summary Disposition should be denied.

To the extent that the Commission views this as a legal dispute rather than a factual dispute, the prudent action for the Commission is to hold this proceeding in abeyance until the FERC resolves the matter. FERC has exclusive jurisdiction under the Federal Power Act to

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interpret the conditions that are automatically included on PacifiCorp's annual license. FERC has not yet made a determination on annual license conditions because it is simply presumed that existing license conditions carry forward. In light of the present controversy, however, Reclamation has stated its intent to put this question before FERC.[1] As Reclamation has suggested, if the Commission has any doubts that the power rate reflected in the 1956 Contract will be a continuing condition of PacifiCorp's annual license, the Commission should simply look to FERC for guidance.

2. The Commission Must, As A Matter Of Law, Give Effect To ORS 542.620 And The Compact

A. The provisions of the Compact are Oregon law.

In its brief, Staff not only fails to address the interconnection between the 1956 Contract and the relicensing of the Klamath Hydroelectric Project, but Staff also fails to even acknowledge the existence of the Oregon law specifically at issue in this case. ORS 542.620 codifies the provisions of the Klamath River Basin Compact ("Compact"). ORS 542.620 provides, in pertinent part, that *the water of the Klamath River Basin, the same water that PacifiCorp uses to operate its Klamath Hydroelectric Project, shall be used to secure the "lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells."* (Emphasis added). In other words, even if the current contract rate is not extended as a condition on PacifiCorp's FERC license, then *Oregon law requires* that electricity be provided to the Klamath Irrigators under the specific "lowest power rates which may be reasonable" standard, and not the general "just and reasonable" standard.

The Compact is a valid, binding and enforceable legal obligation of the State of Oregon that the Commission may not ignore. As the Oregon Attorney General has explained:

[1] PacifiCorp's suggestion that FERC has already decided not to continue the 1956 Contract condition on a new license is both incorrect and misleading. *See* PacifiCorp's Motion, p. 16. First, FERC's decision on additional study requests is in no way a final order regarding conditions on any new license. More important, the study requests have nothing to do with the conditions automatically carried forward to an annual license.

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> Oregon, California and the federal government have entered into the Klamath River Basin Compact, codified in ORS 542.610 and 542.620. The United States Constitution, art 1, sec 10, par 3, requires the consent of Congress for states to enter into compacts. The Klamath River Basin Compact was ratified by Congress in 1957 (Pub L 222, Aug. 30, 1957) and became effective September 11, 1957. ***The compact is a contract between the states involved and the federal government; the parties are bound by the compact's terms.***

Or Op Atty Gen 748 (1979). A copy of this Opinion is attached hereto as Exhibit A. If there is any remaining doubt that the provisions of the Compact are Oregon law, ORS 542.610(1) provides: "The Legislative Assembly of the State of Oregon hereby ratifies the Klamath River Basin Compact set forth in ORS 542.620, and *the provisions of such compact hereby are declared to be the law of this state* upon such compact becoming effective as provided in subsection (2) of this section." (Emphasis added).

B. The specific provisions of the Compact are to be liberally construed.

When placed in its historical context, it is clear that the intent of Article IV of the Compact is to provide the Klamath Irrigators a preference right to low cost power generated using the waters of the Klamath River. The Compact was negotiated in 1956 and 1957 by representatives of the States of Oregon, California and the federal government acting in the interest of the Department of Interior. At that time, the Department of Interior was (and still is) authorized by the Flood Control Act to dispose of excess federal power "in such manner as to encourage the most widespread use thereof *at the lowest possible rates* to consumers consistent with sound business principles* * *." 16 U.S.C. § 825s (emphasis added). This Commission will notice that this language is remarkably similar to the "lowest power rates which may be reasonable" language included by the federal government in Article IV of the Compact. In short, the drafters of the Compact—including the Department of Interior—clearly chose language that they understood and intended to grant Klamath Irrigators a preference to power generated on the Klamath River.

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This Commission must give effect to this key provision of the Compact—not ignore or undermine it. In its analysis of the Compact, the Oregon Attorney General has commanded that the provisions of the Compact are to be interpreted liberally so as to give effect to the purpose of the Compact. "***It is, however, 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 Op Atty Gen OP-5559 (1984) (*citing* 3 Sutherland Statutory Construction, § 64.04 (Sands, 4th ed 1974)). A copy of this Opinion is attached hereto as Exhibit B.

In a separate Opinion, the Attorney General again rejected a literal reading of the Compact that would undermine the purpose of the relevant term under consideration:

> *As noted above, Oregon is now subject to all the terms and conditions of the Klamath River Basin Compact.* Article III of the Compact establishes priorities for the use of waters in that basin. It may be argued that, since the priorities established in Article III are priorities for 'granting permits to appropriate waters,' and since establishment of minimum stream flows by rule is not, strictly speaking, the granting of a permit for the appropriation of waters, the Article III priorities do not apply to such action.
>
> *We do not take such a literal view of the compact's provisions.* Establishment of minimum stream flows is merely an entitlement, but in a very real sense represents an 'appropriation' of water by the state which affects water available for other uses. We believe such action is subject to the priority requirements of Article III.
>
> Under ORS 536.310(7), minimum perennial stream flows are to be established by the board for the purpose of supporting aquatic life and minimizing pollution on 'if existing rights and priorities under existing laws will permit.' This provision was adopted in 1955; the compact was adopted two years later, in 1957. *Again, under a literal interpretation of this statute, it could be argued that since the compact was not an 'existing law' when ORS 536.310(7) was adopted, the board need not consider the compact when it sets minimum stream flows.*
>
> *We reject such an interpretation.*

Or Op Atty Gen 748 (1979) (Exhibit A hereto) (emphasis added). Under this method of analysis, *which is required for interstate compacts*, the Commission must read Article IV of the

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Compact liberally so as to give effect to the underlying purpose of granting a power preference to Klamath Irrigators.

C. The specific provisions of the Compact control over general rate statutes.

To a large degree, this case boils down to a conflict between two competing Oregon statutes. Despite the unique facts and law applicable to this case, Staff's analysis goes no further than ORS 756.040(1), which generally requires the Commission to ensure that retail electric rates are "fair and reasonable." *See* Staff, pp. 3-4. This general statutory provisions stands in stark contrast to ORS 542.620, which specifically provides the Klamath Irrigators with a statutory entitlement to "the lowest power rates which may be reasonable," for the specific end-use of "irrigation and drainage pumping, including pumping from wells." In this case, *the law requires* that the general provisions of ORS 756.040(1) give way to the specific statutory scheme enacted in ORS 542.620.

The Oregon Supreme Court has held that where two statutes conflict, the specific statute controls the general statute. In *Thompson v. IDS Life Insurance Co.*, 247 Or 649, 549 P2d 510 (1976), the Court determined that the general provisions of the Public Accommodations Act did not apply to the sale of insurance, which is specifically regulated by the Insurance Commissioner under ORS 746.015 and ORS 737.310. The Court explained that "[a]bsent a plain indication of intent to repeal the special act the special act will continue to have effect and the general act will be modified by construction so the two can stand together; one as the general law of the state and the other as the law of the particular case or as an exception to the general rule." *Id.* at 656; *See also Davis v. Wasco Intermediate Education District*, 286 Or 261, 593 P2d 1152 (1979) (holding that the specific statutory provisions relating to teachers are controlling over the general statutory provisions relating to public employees.)

This rule of statutory interpretation already has been applied to limit the Commission's general ratemaking authority of ORS 756.040(1) in at least two instances. In *Pacific Northwest Bell Telephone Co. v. Eachus*, 135 Or App 41, 48-9, 898 P2d 774, 779 (Or Ct Ap 1995), the

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court concluded that the Commission did not have the authority to declare an existing rate an "interim" rate subject to refund even though this power was included in the Commission's general ratemaking authority. The court found that the more specific statute governing interim rates was controlling and did not apply to existing rates. *See Id.* In short, the court concluded that the Commission's general ratemaking statutes, specifically including ORS 756.040, were "circumscribed" by other more specific provisions. *See Id.*

More recently, the court applied this same analysis in *Citizens Utility Board of Oregon v. Public Utility Commission of Oregon*, 154 Or App 702, 962 P2d 744 (Or Ct Ap 1998). In that case, the Commission relied in part on ORS 756.040 to allow Portland General Electric to collect a rate of return on capital assets not presently used for providing electric service. The problem with the Commission's order was that two more specific statutes, ORS 757.355 and ORS 757.140(2), expressly disallowed such rate of return. *See Id.* at 716. The court concluded that the specific statutes control over the general authority conferred by ORS 756.040. "The general grants of authority in ORS 756.040 and other general statutes do not empower PGE to charge or PUC to approve rates of a kind that are specifically contrary to the limitations in ORS 757.355 and ORS 757.140(2)." *Id.* at 716-17.

Furthermore, the Oregon Attorney General has confirmed that the Compact is a specific statute that supersedes and limits other general statutes. With respect to minimum stream flows established by the State, the Oregon Attorney General explained 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." Or Op Atty Gen 748 (1979) (Exhibit A). "Accordingly, we conclude that 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." *Id.* The Attorney General then reiterated that "*it is clear that in those areas covered by the compact's regulation the compact represents the controlling law, and therefore any action taken by the board in conflict with provision of the*

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compact would have no legal effect." *Id.* (emphasis added)*; see also* Or Op Atty Gen OP-6268-A (1989) ("Additionally, in some circumstances the Compact may circumscribe agency discretion or limit the effect of an agency action."). A copy of Or Op Atty Gen OP-6268-A (1989) is attached hereto as Exhibit C.

In this case, there is no question that the general "fair and reasonable" standard of ORS 756.040(1) conflicts with the specific "lowest power rate which may be reasonable" standard of ORS 542.620. As explained in greater detail in KWUA's Response Memorandum, the Commission is required by law *not* to conflate the two standards. First, the words of the two statutes are different and there is a legal presumption that where related statutes use different words the Oregon Legislative Assembly intended different meanings. *See, e.g., Premier West Bank v. GSA Wholesale, LLC*, 196 Or App 640, 103 P.3d 1169 (Or Ct App 2004) ("Ordinarily, when the legislature has used different terms in related statutes, we infer that it intended different meanings.") Second, interpreting ORS 542.620 as merely adopting the existing, default rate standard would render the above-quoted language superfluous. *See Keller v. SAIF Corp.*, 175 Or App 78, 82, 27 P.3d 1064, 1066 (Or Ct App. 2001) ("We will not construe a statute in a way that renders its provisions superfluous."). Finally, as a practical matter this Commission must recognize that the States of Oregon and California would not go to the trouble of negotiating, drafting and ratifying the Compact to include Article IV if they intended Article IV to have absolutely no legal effect. *See Federation of Parole and Probation Officers v. Washington County*, 142 Or App 252, 259, 920 P.2d 1141, 1144 (Or Ct App 1996) ("In construing those statutes, we are to presume that the legislature did not intend to enact a meaningless statute.").

In this case, the only legally permissible outcome is that the Klamath specific language of the Compact found in ORS 542.620 conflicts with and controls over the general ratemaking principles of ORS 756.040. Furthermore, because ORS 542.620 sets forth a specific rate standard it is neither unfair nor discriminatory to serve the Klamath Irrigators at a different rate than other irrigators. *See* ORS 757.310(b).

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D. The Compact is not merely a policy statement.

Article IV if the Compact is no less a law of the State of Oregon simply because it speaks in terms of an "objective" of the State. Specifically, PacifiCorp has argued that the rate provision of the Compact is merely an "objective" of the State of Oregon. *See* Motion, p. 16. This hyper-literal interpretation is not sound and must be rejected. First, this view ignores ORS 542.610 and 620, which make the rate standard in the Compact a *law* of the State. Second, as discussed in greater detail above, the Oregon Attorney General has advised that the Compact is to be read liberally to give effect to its provisions. *See* Or Op Atty Gen OP-5559 ("It is, however, 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.").

Even if this Commission were to adopt a hyper-literal interpretation, however, PacifiCorp misreads the statute. The State's "objective," referred to in Article IV, is to maximize the hydroelectric potential of the Klamath River consistent with other water uses. In other words, the State is not legally required to allow further hydroelectric development of the Klamath River,[2] and the State has no legal duty to ensure that there is ongoing hydroelectric development on the Klamath River.[3] But presuming that there is *any* hydroelectric development using the waters of the Klamath River at any given time, as there is now, the Klamath Irrigators have a statutory right to power rates that reflect the cost of generating power using the waters of Klamath River. That is the purpose of Article IV, and the law of this State, and the Commission is required to effectuate that purpose and law.

[2] This is how the Oregon Attorney General interpreted Article IV. "Article IV states a goal of the Compact, but creates neither a state nor a federal obligation to grant a hydroelectric permit, or a water right for hydroelectric generation." Or Ap Atty Gen OP-6268 (1988). A copy of this Opinion is attached hereto as Exhibit D.

[3] For example, if Article IV provided that is the "law" of the State to maximize hydroelectric develop on the river, then this could be construed as requiring hydroelectric development.

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III. CONCLUSION

In response to a data request by KWUA, PacifiCorp admitted that it staged multiple *private* meetings with the Commissioners and the Staff in order to lobby to terminate the 1956 Contract.[4] A copy of PacifiCorp's data response is attached hereto as Exhibit E. In reviewing the analysis provided by Staff in this proceeding, it is immediately apparent to KWUA that PacifiCorp did not inform the Staff that the 1956 Contract is a condition on its hydroelectric license and that this condition will be automatically included on any annual license extension. Nor, apparently, did PacifiCorp bother to disclose the existence and application of ORS 542.620. Instead, PacifiCorp apparently tried to convince the Staff that the 1956 Contract is nothing more than a garden-variety "special contract," which is absolutely indefensible.[5] KWUA recognizes that PacifiCorp has the right to meet with Staff and the Commissioners in advance of filing a contested case, and KWUA presumes that PacifiCorp was careful not to violate an *ex parte* rules. But along with this right of access comes a duty of candor and full disclosure. The Commissioners and the Staff have a difficult and important job, and that job should not be made more difficult by PacifiCorp apparently withholding applicable law and relevant facts. Staff's job in this proceeding has been made more difficult in this proceeding due to PacifiCorp's lack of candor.

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[4] The data response provides, in pertinent part:

> On April 14, 2004 Robin Furness and Paul Wrigley met with Lee Sparling to discuss Klamath related issues. The 1956 Agreement was discussed at these meetings.
>
> In the fall of 2004, Christy Omohundro and Judi Johansen met individually with Ray Baum, Lee Beyer, and John Savage to discuss Klamath related issues. The 1956 Agreement was discussed at these meetings. OPUC Staff may have been present at one or more of the meetings with the Commissioners, but the names of these individuals were not recorded.

[5] OAR 860-038-0005(60) defines the term "special contract" as a "rate agreement that is *justified primarily by price competition or service alternatives* available to a retail electricity consumer, *as authorized by the Commission under ORS 757.230*." (Emphasis added). ORS 757.230 was amended in 1987 by HB 2144 to confirm the Commission's existing authority to approve incentive rate agreements that are based on "price competition" or "a service alternative." The 1956 Contract was executed to satisfy a condition on PacifiCorp's original license for the Klamath Hydroelectric Project. The 1956 Contract was not executed to prevent the Klamath Irrigators from self-generating or from taking service from a competitor of PacifiCorp. In short, there is no evidence that the 1956 Contract is a "special contract" as that term has been specifically defined by the Commission.

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In light of the forgoing, KWUA submits that PacifiCorp's Motion for Summary disposition be denied or, in the alternative, that the Commission hold this proceeding in abeyance until FERC conclusively orders that the 1956 Contract will continue to be a condition on PacifiCorp's annual license.

DATED Thursday, May 12, 2005.

CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP

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Found Document Rank 1 of 1 Database OR-AG

Office of the Attorney General
State of Oregon
***1** Opinion No. 7771
June 14, 1979

Mr. James E. Sexson
Director
Water Resources Department

FIRST QUESTION PRESENTED

Does the Water Policy Review Board have authority under ORS 536.300 to formulate an integrated, coordinated program for the water of the Upper Klamath River Basin?

ANSWER GIVEN

Yes, but the program is subject to all terms and conditions of the Klamath River Basin Compact set forth in ORS 542.620.

SECOND QUESTION PRESENTED

If the board has authority to adopt a program for the Upper Klamath River Basin, would the classification of water resources or establishment of minimum flows have legal effect if contrary to the preferences of use described in Article III of the Klamath River Basin Compact?

ANSWER GIVEN

No.

DISCUSSION

The Oregon Legislature in 1955 directed the Water Policy Review Board to formulate a program for the use and control of the water resources of this state. ORS 536.300 provides:

'(1) The board shall proceed as rapidly as possible to study: Existing water resources of the state; means and methods of conserving and augmenting such water resources; existing and contemplated needs and uses of water for domestic, municipal, irrigation, power development, industrial, mining, recreation, wildlife, and fish life uses and for pollution abatement, all of which are declared to be beneficial uses, and all other related subjects, including drainage, reclamation, flood plains and reservoir sites.

'(2) Based upon said studies and after an opportunity to be heard has been given to all other state agencies which may be concerned, the board shall progressively formulate an integrated, coordinated program for the use and control of all the water resources of this state and issue statements thereof.'

In formulating the water resources program the board is required to consider the policy declarations set forth in ORS 536.220 and the 12 enumerated declarations of policy in ORS 536.310. One of those policies is stated in ORS 536.310(7), which provides:

'(7) The maintenance of minimum perennial stream flows sufficient to support aquatic life and to minimize pollution shall be fostered and encouraged if existing rights and priorities under existing laws will permit;'

Oregon, California and the federal government have entered into the Klamath River Basin Compact, codified in ORS 542.610 and 542.620. The United States

Constitution, art 1, sec 10, par 3, requires the consent of Congress for states to enter into compacts. The Klamath River Basin Compact was ratified by Congress in 1957 (Pub L 222, Aug. 30, 1957) and became effective September 11, 1957. The compact is a contract between the states involved and the federal government; the parties are bound by the compact's terms. See e.g., Petty v. Tennessee-Missouri Bridge Com, 359 US 275 (1959).

Article II of the compact provides in part:

'As used in this compact:

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

***2** 'B. 'Upper Klamath River Basin' shall mean the drainage area of the Klamath River and all its tributaries upstream from the boundary between the State of California and Oregon and the closed basins of . . ..'

Article III, subdivision B, paragraph 1 of the compact sets forth the priority which must be given to the uses of water:

'In granting permits to appropriate waters . . . each state shall give preference to applications for higher use over applications for a lower use in accordance with the following order of uses:

'(a) Domestic use,

'(b) Irrigation use,

'(c) Recreational use, including use for fish and wildlife,

'(d) Industrial use,

'(e) Generation of hydroelectric power,

'(f) Such other uses as are recognized under the laws of the state involved.

'These uses are referred to in this compact as uses (a), (b), (c), (d), (e), (f), respectively. Except as to the superiority of rights to the use of water for use (a) or (b) over the rights to the use of water for use (c), (d), (e) or (f), as governed by subdivision C of this article, upon a permit being granted and a right becoming vested and perfected by use, priority in right to the use of water shall be governed by priority in time within the entire Upper Klamath River Basin regardless of state boundaries. . . .'

Article III, subdivision C, paragraph 1 provides in part that all rights acquired by appropriation to use waters originating within the Upper Klamath River Basin for use (a) or (b) are superior to the uses of (c), (d), (e) or (f). The superior rights under (b), irrigation use, are limited to the quantity of water necessary for irrigation of 100,000 acres in California and 200,000 acres in Oregon.

Article III, subdivision A of the compact recognizes vested rights to the use of waters originating in the Upper Klamath River Basin which were established and subsisting as of September 11, 1957. This subdivision subjects each state and persons using or claiming the right to use waters of the Klamath River Basin to the terms of the compact.

To summarize the above-referenced portions of the Klamath River Basin Compact as it applies to the use of water in the Upper Klamath River Basin, it is our opinion that:

(1) Rights which were established between February 24, 1909 and September 11,

1957 are not affected.

(2) Subsisting rights established before February 24, 1909, whether or not such rights have been established through an adjudication proceeding as provided in ORS ch 539, are not affected.

(3) Rights for (a) domestic use and (b) irrigation use acquired after September 11, 1957 are superior to (c) recreational use, including use for fish and wildlife, (d) industrial use, (e) generation for hydroelectric power and (f) other uses which may have been acquired any time after September 11, 1957.

(4) The superior right to (b) irrigation use is limited to 200,000 acres in Oregon.

(5) Oregon is subject to all the terms and conditions of the compact.

***3** The first question presented asks whether the Water Policy Review Board has authority under ORS 536.300, supra, to formulate an integrated, coordinated program for the use of water in the Upper Klamath River Basin. The answer is yes, but the program is subject to all terms and conditions of the Klamath River Basin Compact.

Under ORS 536.300, the board is required to make studies and formulate programs for the water resources of the state, including the Klamath River Basin. The board may by administrative rule establish minimum perennial stream flows. ORS 536.310(7); 536.550.

As noted above, Oregon is now subject to all the terms and conditions of the Klamath River Basin Compact. Article III of the Compact establishes priorities for the use of waters in that basin. It may be argued that, since the priorities established in Article III are priorities for 'granting permits to appropriate waters,' and since establishment of minimum stream flows by rule is not, strictly speaking, the granting of a permit for the appropriation of waters, the Article III priorities do not apply to such action.

We do not take such a literal view of the compact's provisions. Establishment of minimum stream flows is merely an entitlement, but in a very real sense represents an 'appropriation' of water by the state which affects water available for other uses. We believe such action is subject to the priority requirements of Article III.

Under ORS 536.310(7), minimum perennial stream flows are to be established by the board for the purpose of supporting aquatic life and minimizing pollution only 'if existing rights and priorities under existing laws will permit.' (Emphasis added). This provision was adopted in 1955; the compact was adopted two years later, in 1957. Again, under a literal interpretation of this statute, it could be argued that since the compact was not an 'existing law' when ORS 536.310(7) was adopted, the board need not consider the compact when it sets minimum stream flows.

We reject such an interpretation. 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. It is a well settled principal of statutory construction that where one statute deals with a subject in general and comprehensive terms and another statute deals with the same subject with more specificity, the two should be harmonized if possible but to the extent of any repugnancy, the specific statute controls over the general. Messmer v. Carter, 282 Or 323, 578 P2d 788 (1978); Thompson v. IDS Life Ins Co.,

274 Or 649, 549 P2d 229 (1968). This result is strengthened by the fact that in this case the specific provision (the compact) was adopted after the more general statute. See e.g., State ex rel. Medford Pear Co. v. Towler, 207 Or 182, 295 P2d 167 (1956); Smith v. Day, 39 Or 531, 65 Pac 1055 (1901).

Accordingly, we conclude that 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.

***4** In answer to the second question presented, it is clear that in those areas covered by the compact's regulation the compact represents the controlling law, and therefore any action taken by the board in conflict with provisions of the compact would have no legal effect.

James A. Redden
Attorney General

39 Or. Op. Atty. Gen. 748, 1979 WL 35672 (Or.A.G.)

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Office of the Attorney General
State of Oregon
***1** Opinion Request OP-5559
March 12, 1984

Dr. John R. Donaldson
Director
Department of Fish and Wildlife
506 S. W. Mill Street
Portland, Oregon 97208
Dear Dr. Donaldson:

You ask whether the establishment by the Water Policy Review Board of minimum stream flows in the Klamath Basin is consistent with the Klamath River Basin Compact (Compact) between the States of Oregon and California. **ORS 542.**620. We understand that this issue has arisen in connection with the adoption of Oregon Laws 1983, chapter 796, § 3. This section, codified to follow ORS 536.325, requires the Department of Fish and Wildlife and the Department of Environmental Quality ot submit to the Water Policy Review Board a list of the 'highest priority streams and recommended minimum perennial stream flows . . . sufficient to support aquatic life and minimize pollution . . ..'

In an earlier opinion, 39 Op Atty Gen 748 (1979), we concluded that the Water Policy Review Board had authority to adopt minimum stream flows, but that such stream flows would be without legal effect if their enforcement would be contrary to any provision of the Compact. We affirm the general conclusion of the earlier opinion but note that there are special circumstances under which the board retains authority to adopt and enforce minimum stream flows in the Klamath River Basin.

Generally, the provisions of the Compact do not directly address the states' authority to establish minimum stream flow. Article III, subsection B of the Compact provides in part:

'1. In granting permits to appropriate waters under this subdivision B, as among conflicting applications to appropriate when there is insufficient water to satisfy all such applications, each state shall give preference to applications for a higher use over applications for a lower use in accordance with the following order of uses:

'(a) Domestic use,
'(b) Irrigation use,
'(c) Recreational use, including use for fish and wildlife,
'(d) Industrial use,
'(e) Generation of hydroelectric power,
'(f) Such other uses as are recognized under the laws of the state involved.' **ORS 542.**620.

It is not entirely clear how this provision applies to the establishment of minimum stream flows since, as concluded in our earlier opinion, the establishment of a minimum stream flow technically is not an 'appropriation' and does not involve the issuance of a permit. Arguably, the establishment of a

minimum stream flow by the board would not be inconsistent with Article III since Article III is not applicable.

It is, however, 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. 3 Sutherland Statutory Construction, § 64.04 (Sands, 4th ed 1974). The legislative history, as well as the provisions of the Compact itself, make it very clear that the purpose of the Compact was to give:

***2** '. . . preferential rights to the use of water after the effective date of this compact for the anticipated ultimate requirements for domestic and irrigation purposes in the Upper Klamath River Basin in Oregon and California . . ..' (Emphasis added.) ORS 542.620, Article I, section B.

A joint report by the Oregon and California Klamath River Commissions concluded that:

'to insure an adequate supply of water for the future consumptive needs of domestic use and agriculture which are expected to develop in the Upper klamath River Basin it is necessary to take steps to establish a preference of use for such future consumptive requirements over future nonconsumptive requirements.' Report by Klamath River Commission of Oregon and California: 'Present and Probably Ultimate Utilization of Water Resources and Depletion of Stream Flow within the Klamath River Basin' p 4 (June 8, 1956).

In view of the stated purpose of the Compact, as well as the legislative history, we believe that the Compact provisions must be read to limit the states' authority to enforce minimum stream flows that would be inconsistent with the priorities established in Article III of the Compact. This conclusion is also supported by the fact that at the time of the adoption of the Compact, the potential detrimental impact of the application of the provisions of the Compact on fish and wildlife resources was recognized.

In 1954, the California State Water Resources Board published a report on the Klamath River Basin. It found that nonconsumptive requirements for water such as those for power, flood control, conservation of fish and wildlife, and recreation were of varying significance and magnitude. It concluded that the water requirement for irrigated agriculture was predominant and all other requirements were relatively small. Even if other water requirements should increase in the future, the relative importance of water for irrigated agriculture would be maintained. California State Water Resources Board, Interim Report on Klamath River Basin Investigation 20 (March, 1954).

A report of the Oregon Klamath River Commission in 1954 stated that:

'[t]he streams and lakes of the Upper Klamath Basin support a valuable fishery and habitat for waterfowl and are of great recreational and economic value to Klamath County and the state of Oregon.' Oregon Klamath River Commission Report on Water Resources and Requirements of the Upper Klamath Basin 40 (December, 1954).

The report found that no specific quantities of water could then be determined as necessary to maintain those resources. However, it noted that the stream flows were then adequate for the fish.

The California Klamath River Basin investigation report recognized the recreational and economic value of the fishery to the Klamath River Basin and to

the state. It estimated that the minimum stream flows required to maintain the fishery at its then present level might be slightly higher than existed at that time. However, for improved fish habitat, it called for better spawning areas, reduction of rapid water level fluctuations, increased stream flows, and cooler temperatures during late summer and fall months.

***3** As is evident from both the Oregon and California reports, the two states were aware of the effect of fluctuations in stream flows on fish and wildlife. The issue of priority in connection with recreational use (including fish and wildlife) was discussed at a public hearing held in California. Apparently, one reason for recreational use being a higher preference than industrial and power use was to accommodate federal interests which were extensive in the area. Mr. Stearns, Secretary of the California Klamath River Commission, explained the reason behind the preferential order of uses. The main consideration was quality of water. Water use by industry would seriously affect the quality of water especially from the standpoint of recreation. The classification was also a necessary compromise to take into account the interests of Oregon and the federal Fish and Wildlife Service. Id. at 31-32.

At a joint hearing held by the Oregon and California Klamath River Commissions in Salem, Mr. Phil Schneider pointed to the low order of preference given water rights for recreation, which includes fish and wildlife. He expressed the Oregon State Game Commission's concern over the

'basic water flow in the reaches of the river in California and the relationship that that section of the river in Oregon might have to those flows. The commercial fishery participates in the utilization of runs up and down the Pacific Coast and for that reason they are concerned about that.' Minutes, Joint Hearing Oregon and California Klamath River Commissions, Salem, Oregon 9-10 (December 1-2, 1955).

It was explained to Mr. Schneider that the two state Klamath River Commissions were attempting to secure re-regulation of the fluctuating flows in the river caused by COPCO plants. Members of the two commissions explained the reason for subordinating nonconsumptive uses of water throughout the entire river system, not just the Upper Klamath River Basin. The Klamath River Compact Commission's action confirms the intent of the two state commissions to subordinate nonconsumptive uses (recreational, fish and wildlife) to consumptive uses (domestic, irrigation).

While we believe it clear that the states, through the Compact, intended to give priority to domestic and irrigation uses, there are some limitations to this preference. Subsection C.1 of Article III of the Compact provides:

C. 1. All rights, acquired by appropriation after the effective date of this compact, to use waters originating within the Upper Klamath River Basin for use (a) or (b) in the Uppper Klamath River Basin in either state shall be superior to any rights, acquired after the effective date of this compact, to use such waters (i) for any purpose outside the Klamath River Basin by diversion in California or (ii) for use (c), (d), (e) or (f) anywhere in the Klamath River Basin. Such superior rights shall exist regardless of their priority in time and may be exercised with respect to inferior rights without the payment of compensation. But such superior rights to use water for use (b) in California shall be limited to the quantity of water necessary to irrigate 100,000 acres of

land, and in Oregon shall be limited to the quantity of water necessary to irrigate 200,000 acres of land.' (Emphasis added.) **ORS 542**.620.

***4** Thus, in Oregon the priority for irrigation uses exists only up to a quantity of water necessary to irrigate 200,000 acres. Presumably, once that limit were reached, irrigation would no longer be a preferred use.

The states also retained some individual authority to regulate flows downstream from hydroelectric plants, including, in appropriate instances, minimum streamflows. Specifically, Article VIII, § B of the Compact provides:

'Each state shall exercise whatever administrative, judicial, legislative or police powers it had that are required to provide any necessary reregulation or other control over the flow of the Klamath River downstream from any hydroelectric power plant for protection of fish, human life or property from damage caused by fluctuations resulting from the operation of such plant.' **ORS 542**.620.

Therefore, the Water Policy Review Board and the Water Resources Director retain authority to adopt and enforce streamflows downstream of a hydroelectric power plant. Further, the states retain some authority to minimize pollution, which again could include minimum streamflows in appropriate cases. [FN1]

In summary, the State of Oregon retained limited authority to adopt minimum stream flows. It may enforce such minimum flows only where the establishment of such minimum flows is not inconsistent with the provisions of the Compact, under the limited circumstances discussed above.

Very truly yours,
Donald C. Arnold
Chief Counsel
General Counsel Division

[FN1] Article VII, section C of the Compact provides:

'C. Each state shall have the primary obligation to take appropriate action under its own laws to abate and control interstate pollution, which is defined as the deterioration of the quality of the waters of the Upper Klamath River Basin within the boundaries of such state which materially and adversely affects beneficial uses of waters of the Klamath River Basin in the other state . . ..' **ORS 542**.620.

The Klamath River Compact Commission itself has authority to aid in pollution abatement and control through cooperative efforts with other governmental agencies. ORS 542.620, Article I, section B(1).

Or. Op. Atty. Gen. OP-5559, 1984 WL 192108 (Or.A.G.)

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Office of the Attorney General
State of Oregon
***1** Opinion Request OP-6268-A (Supplement)
May 18, 1989

William H. Young
Director
Water Resources Department
3850 Portland Road NE
Salem, OR 97310

Dear Mr. Young:

You have asked a number of questions concerning the Klamath River Basin Compact (Klamath Compact). On September 21, 1988, we answered the first of those questions, which related to federal authority to designate a stretch of the Klamath River within Oregon as a wild and scenic river.

In this letter, we address the remaining questions.

1. Does the Klamath Compact limit the State of Oregon's authority to create and enforce in-stream water rights or minimum perennial stream flows on the Klamath River?

The answer is no. Any such flow protection, however, would be subordinate to later-granted water rights for irrigation and domestic use under Article III C(1) of the Compact.

2. Does the Klamath Compact prohibit designation of a portion of the Klamath River as a state scenic waterway?

The answer is no.

3. Does the Klamath Compact affect state or federal regulatory authority over proposed hydroelectric projects within the Klamath Basin?

The Compact does not alter state or federal regulatory authority, but does affect the terms of any permit or license granted. See discussion.

Discussion

The Klamath River Basin Compact, codified at ORS 542.610 and 542.620, became effective in 1957 upon ratification by Oregon and California and consent by the United States Congress. The purposes of the Compact are to provide for orderly development, use, conservation and control of the waters of the Klamath Basin for various purposes, including irrigation, domestic purposes, protection and enhancement of recreational, fish and wildlife resources, and hydroelectric and industrial purposes. See Art I(A).

Once a compact has been ratified by Congress, the compact becomes federal law. Cuyler v. Adams, 449 US 433, 438, 101 S Ct 703, 66 LEd2d 641, 647 (1981). The Klamath Compact, therefore, may supersede other state laws. Delaware River Joint Toll Bridge Com. v. Colburn, 310 US 419, 431, 60 SCt 1039, 84 LEd 1287, 1291 (1940). Federal law may supersede or preempt state law in one of two ways. The federal law may demonstrate the intent of the United States to occupy the field--that is, to regulate the area of concern so completely that there is no room for further state activity. Pacific Gas & Elec. v. Energy Resources Comm'n, 461 US 190, 203-04, 103 S Ct 1713, 75 LEd2d 752, 764-65 (1983).

Alternatively, state law is preempted to the extent that it actually conflicts with federal law: that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of Congress' objectives. California Coastal Comm'n v. Granite Rock, 480 US 572, 107 SCt 1419, 94 LEd2d 577 (1987). We turn to the preemption issue.

1. Occupation of the Field

A court will find that a federal law regulates the area completely only if the court concludes that Congress intended to occupy the field, ousting the state from any authority in the area. The text of the Klamath Compact shows that all the parties, including the federal government, intended that Oregon and California retain authority to determine the uses of water resources within their boundaries. The Compact provides that "rights to the use of unappropriated waters * * * may be acquired by any person * * * by appropriation under the laws of the state where the use is to be made * * * and may not be acquired in any other way." Art III(B) (emphasis added).

***2** In a comparable situation, the United States Supreme Court held that Forest Service regulations that provide for approval of operations "necessary for timely compliance with the requirements of Federal and State laws" (emphasis added) could not have been intended to preempt all state regulation of mining claims in national forests. California Coastal Commission v. Granite Rock Co., supra, 94 L Ed2d at 593. The Court observed, "It is impossible to divine from these regulations, which expressly contemplate coincident compliance with state law as well as with federal law, an intention to pre-empt all state regulation * * *." Id.

We reach the same conclusion here. By its terms, the Compact recognizes state authority to regulate water use. In light of that language, Congress could not have intended the Compact completely to occupy the field of water resource policy of the Klamath Basin. Absent a specific conflict between a proposed state action and the Compact, therefore, state law governing the Water Resources Commission's (WRC) authority would not be preempted.

2. Conflict

In order to determine whether exercise of any of the state powers at issue would conflict with the Klamath Compact, we must review those powers and the relevant Compact provisions.

a. In-stream Water Rights and Minimum Stream Flows

In 1987, the Oregon legislature expressly authorized the WRC to establish in-stream water rights. See ORS 537.332 to 537.360. An "in-stream water right" is a "water right held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain water in-stream for public use. An in-stream water right does not require a diversion or any other means of physical control over the water." ORS 537.332(2).

Either the Department of Fish and Wildlife, Department of Environmental Quality or the Parks and Recreation Division of the Department of Transportation may ask the WRC to issue an in-stream water right. ORS 537.336. Once issued, an in-stream water right has the same legal status as any other right for which a water right certificate has been issued. ORS 537.350(1).

For many years, the WRC has had authority to create minimum perennial stream flows under ORS 536.325. Once the WRC establishes a minimum stream flow,

future appropriations on the stream segment subject to the minimum stream flow may be exercised only when the minimum flow is met. Thus, establishment of a minimum perennial stream flow in effect creates a prior right to the in-stream use of the water along the affected stretch of the river, to which a later created appropriative right is subject. See 42 Op Atty Gen 312 (1982); see also ORS 536.325(3) (establishing priority date for minimum perennial stream flows). [FN1]

An in-stream water right or a minimum stream flow potentially might conflict with one provision of the Compact. [FN2] The potential conflict arises from Article III(C), which makes certain post-Compact appropriative rights for domestic uses and irrigation uses superior to all other post-Compact rights.

***3** Under the Compact, the priority of a water right is determined by its priority in time. The entire Upper Klamath River Basin is treated as a whole, and water rights issued by Oregon and by California are merged into one priority system. The Compact, however, creates one exception to this "first in time, first in right" principle. Article III(C) establishes superiority for certain rights regardless of priority in time:

"All rights, acquired by appropriation * * * to use waters * * * for use (a) or (b) in the Upper Klamath River Basin in either state shall be superior to any rights * * * to use such waters * * * for use (c), (d), (e) or (f) anywhere in the Klamath River Basin. Such superior rights shall exist regardless of their priority in time and may be exercised with respect to inferior rights without the payment of compensation."

That provision limits the superiority of irrigation rights to 200,000 additional acres in Oregon and 100,000 acres in California.

Uses (a) through (f) referred to in Article III(C) are listed in Article III(B)(1). The latter provision requires the states to give preference to designated uses in the event of conflicting applications to appropriate water. The uses, listed in order of preference, are:

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

Art III(B)(1). Thus, on its face Article III(C) appears to make domestic and irrigation uses superior to minimum flows or in-stream rights for recreational use, including use for fish and wildlife, or for other uses recognized under state law.

It could be argued that minimum perennial stream flows and in-stream water rights are not subject to the superiority provision in Article III(C). That argument proceeds along several steps. First, Article III(B)(1), which sets forth several uses in order of preference, refers only to rights for beneficial use "by direct diversion or by storage for later use." Art III(B). Neither in-stream rights nor minimum stream flows are rights for diversion or storage and, therefore, are not within the scope of Article III(B)(1). Accordingly, the argument concludes, when Article III(C) refers to use "(a)" through "(f),"

it is referring only to uses that do not include in-stream rights or minimum stream flows. For the reasons stated below, however, we reject that argument.

We previously have examined the relationship between minimum stream flows and the provisions of the Klamath Compact. In 39 Op Atty Gen 748 (1979), we concluded that the Water Policy Review Board (now WRC) had authority to adopt a basin program, including minimum stream flows, for the Klamath Basin. The opinion noted that program elements or minimum stream flows would have no legal effect "if contrary to the preferences of use described in Article III of the [Compact]," and that establishment of minimum stream flows "is subject to the priority requirements of Article III." 39 Op Atty Gen at 751.

***4** In a Letter of Advice dated March 12, 1984, to Dr. John Donaldson, Director of the Department of Fish and Wildlife (OP-5559), we examined in more detail whether there are any circumstances in which the minimum stream flows would be enforceable despite the Compact. That opinion did not distinguish clearly between the effects of subdivisions (B)(1) and (C) of Article III. [FN3] It appears to have concluded, however, that both subdivisions apply to minimum stream flows.

Finally, on September 21, 1988, we analyzed the effect of the Compact on designation of the Klamath River as a national wild and scenic river. Letter of Advice dated September 21, 1988, to William H. Young, Director, Water Resources Department (OP-6268). That opinion concluded that Congress had bound the federal government to honor the superiority of domestic and irrigation uses set out in Article XIII(B)(2) (set forth in footnote 7, infra), but that Article III(B) would not govern federal establishment of a wild and scenic river. [FN4] The opinion did not directly address state minimum stream flow issues.

Considering all of the above points, we conclude that minimum stream flows and in-stream water rights are subject to Article III(B)(1) and (C). If the commission has competing pending applications for a minimum stream flow or in-stream water right and an application for one of the other uses listed in Article III(B)(1), then so long as the applications otherwise would be approved under existing statutes and rules, the commission must give preference to the use higher on the list. For instance, among competing applications--one for irrigation, one for in-stream water rights for recreation--only one of which can be approved, the irrigation application must prevail, all other things being equal. Any recreational flow established will be subordinate to domestic use and to irrigation rights issued after the effective date of the Compact, for up to 200,000 acres of irrigation in Oregon and 100,000 acres in California. [FN5]

b. Oregon Scenic Waterways

Oregon's Scenic Waterways Act, ORS 390.805-390.925, establishes several scenic waterways in order to protect and preserve the natural setting and water quality of those rivers and to fulfill other conservation purposes. ORS 390.815 .

If a river stretch is designated as a scenic waterway, the free-flowing character of the waters must be maintained in quantities necessary for recreation, fish and wildlife uses. ORS 390.835(1). The WRC must carry out its functions under the Act in a manner that will maintain those values. ORS 390.835(1), (4). The WRC has several options for maintaining the necessary in-stream flows. These options include creation of in-stream rights (ORS 537.332

-537.360) or minimum stream flows (ORS 536.325), withdrawal of the stretch from further appropriations (ORS 536.410), or case-by-case review and conditioning of individual applications (ORS 537.170). See, e.g., Diack v. City of Portland, 306 Or 287, 759 P2d 1070 (1988).

***5** No dam, reservoir or other water impoundment facility may be constructed on waters within scenic waterways. ORS 390.835(1). No water diversion facility may be constructed either in the designated stretch or in waters that could affect that stretch unless the WRC makes specified findings. Id. First, it must be shown that the water is necessary for particular purposes. Second, the water must be used in a manner consistent with the policies of the Scenic Waterways Act. Id. See Diack v. City of Portland, supra, 306 Or at 298-99.

Establishment of a scenic waterway would not directly affect the Compact's grant of superior status to irrigation and domestic uses. Where the WRC engages in case-by-case review of new applications, it would be obliged to apply the policies of the Scenic Waterways Act, as expressed in ORS 390.835. The WRC, therefore, could not approve new appropriations that would be inconsistent with scenic waterway needs. Where, however, the WRC implements scenic waterway requirements by establishing minimum stream flows or in-stream rights, these flows would, as discussed above, be preempted by the Compact directive that subordinates other water uses to later domestic and irrigation rights if any are issued.

Thus, the WRC could not issue additional rights that would interfere with maintaining the free-flowing character of the waterway in quantities necessary for recreation, fish and wildlife uses. WRC's state statutory obligation to apply the scenic waterway standard does not conflict with the Compact. The Compact gives special status to domestic and irrigation rights once created, but does not mandate that the state approve any particular future applications for use of water.

c. State Authority to Permit Hydroelectric Development

Under state law, no one may construct or operate a hydroelectric facility without a permit from the WRC. ORS 543.120. [FN6] The Compact affects the WRC's permitting of hydroelectric development in two key ways. First, the state must evaluate hydroelectric facility applications in a manner that is consistent with the Compact. Second, the terms of the Compact, by operation of law, become conditions of any state permit relating to the waters of the Klamath Basin. Art XII(A), (D).

Under the Compact, if a hydroelectric permit application conflicts with a concurrently pending application to appropriate water, and there is insufficient water to satisfy both uses, the WRC must evaluate the applications in accordance with the preferences set out in Art III(B)(1). Additionally, if a hydroelectric permit is approved, the WRC must treat later acquired rights for all domestic uses, and for irrigation uses up to the quantity necessary to irrigate 200,000 acres in Oregon and 100,000 acres in California, as superior to hydroelectric permits. Art III(C).

Within these constraints, the WRC is free to process hydroelectric applications in the Klamath River Basin, just as it would applications for uses elsewhere in Oregon. For hydroelectric applications in the stretch of the Klamath River designated as a state scenic waterway, the constraints described

above in part 2(b) of this opinion also would apply.

d. Federal Authority to Permit Hydroelectric Development

***6** The Federal Power Act, 16 USC §§ 791-828c, vests federal authority over hydroelectric development in the Federal Energy Regulatory Commission (FERC). No hydroelectric facility to be located on a navigable river or built on federal lands, or that will generate electricity which will affect interstate commerce, may be constructed without a permit from FERC. 16 USC § 817.

The Compact does not directly alter the scope of FERC's licensing authority. The Compact does, however, constrain the agency's discretion, because FERC, like any other arm of the United States, is subject to the limitations the United States accepted in Article XIII. [FN7]

Further, even if a FERC license otherwise could be argued to empower the licensee to operate without a state issued water right, the Compact modifies the effect of a FERC license [FN8] and requires a FERC licensee to obtain rights to appropriate water under state law. That requirement stems from Article III(B) of the Compact. Article III(B) provides that, with certain exceptions not relevant here, "rights to the use of unappropriated waters originating within the Upper Klamath River Basin * * * may be acquired by any person * * * under the laws of the state where the use is to be made * * * and may not be acquired in any other way." (Emphasis added.) "Person" is defined in Article II(E) to mean "any individual or any other entity, public or private, including either state, but excluding the United States." [FN9] That definition plainly encompasses a licensee of a federal agency, such as FERC. [FN10] Therefore, like any other person, a FERC licensee must obtain rights to unappropriated water under state law. [FN11]

Conclusion

The Klamath River Basin Compact does not alter state authority to establish minimum stream flows, in-stream water rights, or state scenic waterways. Nor does the Compact impair state or federal regulatory authority over proposed hydroelectric projects within the Klamath Basin. The Compact does, however, subordinate use of water for these purposes to domestic and irrigation use, within the set limitations. Additionally, in some circumstances the Compact may circumscribe agency discretion or limit the effect of an agency action.

Sincerely,

Dave Frohnmayer

Attorney General

[FN1] ORS 537.346 calls for the conversion of minimum perennial stream flows established before September 27, 1987, to in-stream water rights.

[FN2] The Compact recognizes existing rights. Art III(A). Neither the scenic waterway law nor in-stream flow protections conflict with Article III(A). The WRC is statutorily prohibited from modifying or setting aside any existing rights. ORS 536.320(2). In addition, the Scenic Waterways Law allows persons with existing rights to continue to put them to use. ORS 390.835(1).

[FN3] OP-5559 seemingly equated the terms "preference" and "priority," using them interchangeably to describe the application of Article III(B)(1). Similarly, the opinion used the terms "superior[ity]" and "priority" to describe the effects of Article III(C)(1). Each of these terms has a specific meaning when used to describe characteristics of water rights. "Priority" refers to the

temporal relationship between an earlier established right and a later established right; the earlier established right has the better claim to water when supplies are insufficient for both. Article III(C) makes domestic and irrigation rights "superior" to others, despite the priority relationships. That is, that provision overrides the legal effect of priority established in Article III(B)(1). Finally, the Compact uses the term "preference" only to direct how the state must proceed when faced with competing pending applications for water. See id.

[FN4] The basis for the latter determination was that Article III(B) controls acquisition of water rights by "any person," and the United States is not included within the Compact definition of a "person." We also observed in a footnote:

"Moreover, this provision would not in any event apply to a wild and scenic designation. Article III(B) does not apply to instream water rights. By its terms, Article III(B) addresses only 'rights to the use of unappropriated waters * * * by direct diversion or by storage for later use.' "

OP-6268, supra, at 14 n 8 (emphasis omitted).

This ancillary footnote observation is inconsistent with what we here have determined to be the best reading of the Compact and of our previous advice on the relationship between minimum flows and the Compact. By this letter, we disavow that statement in footnote 8 of OP-6268.

[FN5] As we noted in OP-6268, supra, at 7, the Compact does not require Oregon or California to issue water rights for irrigation for the full acreage afforded superiority in Article III(C). The WRC retains the discretion to determine whether it is in the public interest to approve any particular application.

[FN6] If the facility is larger than 25 MW, a permit from the Energy Facility Siting Council is also required. ORS 469.320. A municipality proposing a facility must apply under ORS chapter 537. See ORS 536.007(6) (defining "person" to include municipal corporation); 537.130 (any "person" intending to appropriate water for beneficial use must obtain permit from WRC); 543.150.

[FN7] Article XIII(B) lists the requirements to which the United States will be bound, as follows:

"1. The United States shall recognize and be bound by the provisions of subdivision A of Article III.

"2. The United States shall not, without payment of just compensation, impair any rights to the use of water for use (a) or (b) within the Upper Klamath River Basin by the exercise of any powers or rights to use or control water (i) for any purpose whatsoever outside the Klamath River Basin by diversions in California or (ii) for any purpose whatsoever within the Klamath River Basin other than use (a) or (b). But the exercise of powers and rights by the United States shall be limited under this paragraph 2 only as against rights to the use of water for use (a) or (b) within the Upper Klamath River Basin which are acquired as provided in subdivision B of Article III after the effective date of this compact, but only to the extent that annual depletions in the flow of the Klamath River at Keno resulting from the exercise of such rights to use water for uses (a) and (b) do not exceed 340,000 acre-feet in any one calendar year.

"3. The United States shall be subject to the limitation on diversions of

waters from the basin of Jenny Creek as provided in subdivision A of Article VIII.

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

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

[FN8] We do not, by this statement, suggest agreement with the proposition that a FERC license obviates the licensee's need to obtain a state permit or license before using unappropriated waters of the state. To the contrary, see sections 9 and 23 of the Federal Power Act, 16 USC § 802 (requiring evidence of compliance with state laws respecting appropriation and use of water) and § 821 (disclaiming interference with state laws relating to control, appropriation or use of water); California v. United States, 438 US 645, 98 S Ct 2985, 57 L Ed2d 1018 (1978).

[FN9] The United States may be bound to obtain a state water right by virtue of other federal law. The Compact would not except the United States from such obligations.

[FN10] The definition of "United States" for purposes of Article XIII bolsters this reading. Article XIII(B) defines "United States," for purposes of that article, as "the United States or any agency thereof, and any entity acting under any license or other authority granted under" federal law. (Emphasis added.) The exclusive application of that definition to Article XIII indicates that, in the rest of the Compact, "United States" retains its ordinary meaning. That meaning does not include individuals acting pursuant to federal license or authorization. Therefore, by excluding the "United States" from the definition of "person" in Article II(E), the Compact did not exempt federal licensees from those entities that must obtain water rights under state law.

[FN11] One might conceivably argue that Article XIII(B) does not bind FERC or its licensees to Article III(B), but only to certain provisions of paragraphs "2" and "3" of Article III(B). That argument is unfounded. Paragraphs "2" and "3" of Article III(B) make no sense read in isolation; they refer to limitations on water use "under this subdivision B." FERC and its licensees, therefore, are bound by the requirement in Article III(B) that rights to appropriate water in the Klamath River Basin may be acquired only under state law.

Or. Op. Atty. Gen. OP-6268-A, 1989 WL 439823 (Or.A.G.)

END OF DOCUMENT

Citation
Or. Op. Atty. Gen. OP-6268
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(Cite as: 1988 WL 416275 (Or.A.G.))

KeyCite Citing Rank 1 of 1 Database OR-AG

Office of the Attorney General
State of Oregon
***1** Opinion Request OP-6268
September 21, 1988

William H. Young
Director
Water Resources Department
3850 Portland Road, NE
Salem, OR 97310

Dear Mr. Young:

You have asked several questions about the relationship between the Klamath River Basin Compact (Compact) and various possible state or federal management or designation actions. Because of the complexity of the issues involved, we address in this letter only your query as to what constraints, if any, the Compact places on the federal government's authority to designate that portion of the Klamath River governed by the Compact as a wild and scenic river. A letter addressing your remaining questions will follow shortly.

We conclude that the Klamath Compact does not affect congressional authority to designate the Klamath as a wild and scenic river. The Compact, however, may limit the potential effect of that designation.

Discussion

The Klamath River Basin Compact (the Compact), codified at ORS 542.610 and **542** .620, became effective in 1957 upon ratification by Oregon and California and consent by the United States Congress. [FN1] The purposes of the Compact are to provide for orderly development, use, conservation and control of the waters of the river for various purposes, including irrigation, domestic purposes, protection and enhancement of recreational, fish and wildlife resources, and hydroelectric and industrial purposes. See Art I(A).

The Wild and Scenic Rivers Act (Act), as amended, 16 USC §§ 1271-1287, initially was enacted in 1968. The Act provides for the management of wild and scenic rivers in a free-flowing condition. The original Act designated a number of river stretches as wild and scenic, see 16 USC § 1274, and provided a process for additional segments to be designated, see 16 USC §§ 1275, 1276. Congress is considering adding a portion of the upper Klamath River to the wild and scenic rivers system. See HR 4164.

Designation of a river under the Wild and Scenic Rivers Act affects both the federal government and the states. The Federal Energy Regulatory Commission (FERC) may not license a hydroelectric facility 'on or directly affecting' any designated river stretch. 16 USC § 1278(a). No other federal agency may 'assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect' on a designated stretch. Id. A state may continue to exercise its authority over the waters in the river only 'to the extent that such jurisdiction may be exercised without impairing the purposes of [the Wild and Scenic Rivers Act] or its administration.' 16 USC § 1284(d).

The effect of designation under the Act may be modified where the designated river stretch is covered by an interstate compact. Congress recognized that designation might interfere with rights and responsibilities established under an interstate compact. The Wild and Scenic Rivers Act provides:

***2** 'Nothing contained in this chapter shall be construed to alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by any States which contain any portion of the national wild and scenic rivers system.'

16 USC § 1284(e).

There is little doubt that Congress retains the right to override a compact if it so chooses. One session of Congress lacks power to impair the legislative power of a subsequent Congress. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 US 452, 486 n 10, 98 S Ct 799, 54 L Ed2d 682 (1978); Pennsylvania v. The Wheeling and Belmont Bridge Co., 59 US (18 How) 421, 423, 15 L Ed 435 (1855). In consenting to the Klamath Compact, Congress specifically reserved to itself such authority. See Pub L No. 85-222, § 6, 71 Stat 497, 508 (1957) ('The right to alter, amend, or repeal this Act is expressly reserved.') However, because your question arises in the context of HR 4164, which does not mention the Compact, we have analyzed your question assuming the applicability of 16 USC § 1284(e).

Under the terms of the Act, a conflict between wild and scenic designation and the Compact must be resolved in favor of the Compact. For instance, where a compact has allocated water between an upstream and a downstream state, nothing in a wild and scenic rivers designation would increase the upstream state's compact obligation. The Klamath Compact does not make such an allocation, but embodies a number of management principles to which the parties have agreed.

Our inquiry, therefore, turns to whether designating a portion of the Klamath as a wild and scenic river would modify or conflict [FN2] with the Compact. To answer that question, we first must determine the nature of the rights and obligations created by the Compact.

1. State and Federal Obligations Under the Compact

Several features of the Compact are important [FN3] to this discussion: 1) The Compact recognizes existing pre-Compact vested rights, [FN4] Art III(A); 2) As a general rule, no person may acquire any water right after the enactment of the Compact except through the state permit process, Art III(B); 3) Post-Compact appropriative rights for domestic uses, and irrigation uses up to the amount necessary to irrigate a total of 300,000 acres, [FN5] will have priority over post-Compact appropriative rights for other uses, Art III(C).

These substantive obligations bind the states; Article XII(A) provides that '[e]ach state and all persons using, claiming or in any manner asserting any right to the use of the waters * * * shall be subject to the terms of this compact.' By and large, the Compact is designed to be self-executing. The provisions of the Compact 'shall by operation of law be conditions of the various state permits, licenses or other authorizations relating to the waters of the Klamath River Basin.' Art XII(D).

The federal government's obligations under the Compact are more limited than those of the states. Article XI limits the federal obligations to those specifically acknowledged in Article XIII. Article XI(A) provides that no

Compact provision other than Article XIII may be interpreted in a way that would 'impair or affect any rights, powers or jurisdiction of the United States, its agencies or those acting by or under its authority, in, over and to the waters of the Klamath River Basin.'

***3** Article XIII provides that the United States shall comply with: (a) the Article III(A) recognition of vested rights, see Art XIII(B)(1), and (b) a limited recognition of later-acquired rights for domestic and irrigation purposes. [FN6] Art XIII(B)(2). These requirements are binding on the United States, its agencies, and 'any entity acting under any license or other authority granted under the laws of the United States.' Art XIII(B).

2. Effect of Designation Under the Act

Were there no Klamath Compact, the designation of the Klamath as a wild and scenic river would have several significant effects. First, it would in effect create a federal reserved water right. See 16 USC § 1284(c). Second, it would preclude impoundments, at least on the designated stretch. Third, it would bar the federal government from authorizing hydroelectric facilities. 16 USC § 1278(a).

We next examine whether the existence of the Compact alters those effects.

a. Reserved Water Rights

The Act effectively reserves to the federal government that amount of unappropriated water necessary to accomplish the purposes of each designation. [FN7] As stated in a 1979 Interior Department Solicitor's Opinion:

'The Wild and Scenic Rivers Act contains an express, though negatively phrased, assertion of federal reserved water rights:

'Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes.'

'The legislative history of the Wild and Scenic Rivers Act emphasizes the congressional intent to reserve unappropriated waters necessary to fulfill the Act's purposes. In explaining the conference report on the Senate floor, Senator Gaylord Nelson, a principal sponsor and floor manager of the bill in the Senate, read the following sectional analysis:

'Enactment of the bill would reserve to the United States sufficient unappropriated water flowing through Federal lands involved to accomplish the purpose of the legislation. Specifically, only that amount of water will be reserved which is reasonably necessary for the preservation and protection of those features for which a particular river is designated in accordance with the bill.'

'Thus, the intent to reserve unappropriated waters at the time of river designation is clear and the remaining question is the scope of the reserved water right.'

86 I.D. 553, 607-08 (1979) (emphasis in original; footnote and citations omitted).

A recent Department of Interior Solicitor's Opinion reaffirms this view, stating that 'the reservation of waters was made, with limitations,' in 16 USC § 1284(C). (Slip opinion dated July 28, 1988, at 28.)

The creation of such a reserved water rights possibly would conflict with the

Compact. Of the provisions to which the federal government has bound itself in whole or in part, we believe that a federal reservation of water has the potential to create a conflict only with: Article III(A), which recognizes vested water rights that preexisted the Compact; Article III(B), which establishes the procedure for appropriating future rights; and with the special priorities established for domestic and irrigation uses.

***4** We conclude that designation under the Act would not conflict with the Compact's recognition of preexisting vested rights. In the 1968 Wild and Scenic Rivers Act, Congress recognized the validity of existing water rights. Congress' intent was to reserve only unappropriated water rights at the time a river is designated. See colloquy between Senators Church and Allott, S Res 119, 90th Cong, 1st Sess, 113 Cong Rec 21747 (daily ed Aug. 8, 1967) ('The reservation of unappropriated waters for a National Wild and Scenic River System is not intended to affect any prior valid water right under State law * * *.')

Regarding rights created after the effective date of the Compact, Article III(B) provides that 'rights to the use of unappropriated waters originating within the Upper Klamath River Basin for any beneficial use * * * by direct diversion or by storage for later use, may be acquired by any person after the effective date of this compact by appropriation under the laws of the state where the use is to be made * * * and may not be acquired in any other way.' This provision has no bearing on any reserved right created under the Act, because Article II(E) defines 'person' to exclude the United States. [FN8]

Finally, we must explore whether the creation of a reserved right under the Wild and Scenic Rivers Act would conflict with the priority system created by the Compact. Under the Compact, water rights are given a priority based on filing time. See Art III(B)(1). However, in an effort to protect irrigation and domestic uses, Article III(C) of the Compact grants those uses, up to a specific amount, special priority over other uses.

In consenting to the Compact, Congress did not bind the United States to comply with Article III(C). However, in Article XIII(B)(2), the federal government did agree not to impair, without payment of just compensation, water rights for domestic or irrigation use issued in the Upper Klamath River Basin, to the extent domestic and irrigation depletions above Keno, Oregon, do not exceed 340,000 acre-feet in any calendar year.

Therefore, the states may authorize additional domestic and irrigation uses up to the amount that would bring annual depletions at Keno to 340,000 acre-feet, even if those uses otherwise would conflict with the wild and scenic designation. Those rights, although granted later in time, would have priority over the federal reserved right.

b. Impoundment for Domestic and Irrigation Purposes

Designation under the Wild and Scenic Rivers Act appears to prohibit any further impoundments on the designated stretch of the river, for any purposes, including domestic or irrigation purposes. Upstream or downstream impoundments could be barred if they had an adverse effect on the designated stretch. [FN9]

One goal of the Compact is to meet the 'anticipated ultimate requirements for domestic and irrigation purposes.' Art I(B). Article III(C) contemplates the use of an amount of water sufficient to irrigate 100,000 acres in Oregon and 200,000 acres in California. To achieve that goal, the Compact established the

priority and preference provisions discussed above. It is possible that the amount of additional irrigation development could not be realized without further impoundments, which might be within or above the scenic stretch.

***5** Although the drafters of the Compact went to some lengths to assure that barriers to the full anticipated realization of irrigation and domestic uses would be removed, they did not obligate the states to grant all requests that would further such uses. [FN10] Therefore, even if compliance with the Act will impede development of the river's domestic and irrigation potential, this result does not modify or conflict with the terms of the Compact.

One may argue that 16 USC § 1284(e), quoted supra at 2, obligates the federal government not to take any actions that would interfere with a state's power under state law to manage a river covered by a compact. Under this interpretation, the federal government would be bound, by virtue of 16 USC § 1284(e), to honor the amounts of water that can be given a special priority by Article III(C).

That interpretation, however, would modify the terms of the Compact, because it would impair the powers specifically reserved to the United States in Article XI(A), which states:

'Nothing in this compact shall be deemed:

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

Further, a fourth preliminary draft of the Compact specified that state-awarded rights to use of water for domestic or irrigation purposes, established already or in the future, could not be limited by any federal assertion of a water right for power production, flood control, navigation or other non-consumptive uses anywhere in the Klamath River Basin. Under the proposed language, federal authority to designate the Klamath as a wild and scenic river would have been subordinated to state authority to appropriate water for domestic and irrigation uses. This provision was not adopted. We believe that the substitution of the more limited restriction of Article XIII shows that the federal government refused to be so restricted. See proposed Article III(D), Article X(A)(2), dated September 29, 1955.

The federal government's position on state authority over federal activities apparently was stated clearly during the negotiations. In a report on the Compact submitted to the California legislature, the issue was explained as follows:

'Both Commissions felt from the beginning that because of the great importance of federal activities in the Klamath River Basin, the Compact would be of little value unless the United States complied with its provisions the same as any other water user. Vigorous objections were raised, however, by certain federal agencies, particularly the Department of Justice and the Federal Power Commission. They made it plain that they would recommend opposition by the executive department of the federal government to Congressional approval of the Compact, if the Compact required full compliance with its terms by the

United States. Because such opposition, if it developed, would seriously endanger the chances of Congressional consent and, further, would probably lead to a Presidential veto of the consent bill even if it did pass, the Commissions adopted another approach to securing adequate federal compliance.

***6** 'Article XIII of the Compact states that the Compact shall not go into effect unless the Act of Congress consenting to it subjects federal agencies and licensees to specified Compact provisions. These specified provisions are those which the Commissions believe must be respected by all water users in order for the Compact to be meaningful. They include recognition of existing water rights established under state law, restrictions on out-of-basin diversions, and the superiority of future rights for domestic, municipal, and irrigation uses in the Upper Klamath River Basin over rights for other uses. This approach accomplishes the basic purposes of the Compact and is apparently more acceptable to the objecting federal agencies.'
Attachment B to letter from Bert A. Phillips, Chairman, California Klamath River Commission, to Joseph A. Beek, Secretary of the Senate and Arthur A. Ohnimus, Clerk of the Assembly, January 21, 1957, at 8-9.

In Article XIII, Congress carefully delineated the extent of the federal government's obligations under the Compact. Absent some clearer indication of congressional intent, [FN11] we decline to interpret the general language of 16 USC § 1284(e) to state Congress' intent to ignore those limitations. The better view of that statute is that Congress has reaffirmed whatever federal obligations have been agreed to in the Compact, and has declined to modify the rights and obligations of the states or the federal government under the Compact, but has not increased either federal or state obligations under the Compact.

c. Effect on Hydroelectric Projects

If Congress designates a portion of the Klamath River as a wild and scenic river, that designation will bar hydroelectric development on that stretch of the river. FERC may not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or any other project works under the Federal Power Act. 16 USC § 1278(a). The designation will allow only those other uses that are consistent with wild and scenic status. 16 USC § 1281.

The Compact addresses hydroelectric development in two sections. First, Article IV provides that it shall be the 'objective' of each state to provide for the most efficient use of available power head, in order to secure economic distribution of water, and low power rates for irrigation and drainage pumping. Second, Article III(B)(1) provides that each state shall give preference to certain uses over others in the event of conflict among applications for water use. The preferences, from highest to lowest are: a) domestic; b) irrigation; c) recreation use, including fish and wildlife; d) industrial use; e) generation of hydroelectric power; and f) other uses recognized under state law.

Article IV states a goal of the Compact, but creates neither a state nor a federal obligation to grant a hydroelectric permit, or a water right for hydroelectric generation. Nor does it create a preference for hydroelectric uses over other uses. Article III(B)(1) does establish a method for resolving conflicts if applications for different uses are pending at the same time. In such a circumstance, hydroelectric use has a lower preference than the

recreation, fisheries and wildlife uses protected by a wild and scenic designation. 16 USC § 1271. Therefore, we conclude that the Compact creates no rights or obligations regarding hydroelectric power that would conflict with the designation of the Klamath as a wild and scenic river.

3. Relevance of Compact Consent Act

***7** One other point bears mention. For different reasons, different parties to the current dispute over the question discussed in this opinion regard section 4(c) of the congressional Act consenting to the Compact as dispositive of the question. That provision states:

'Nothing in this Act or in the compact shall be construed as:

'* * * * *

'(c) Impairing or affecting any existing rights of the United States to waters of the Klamath River Basin now beneficially used by the United States; nor any power or capacity of the United States to acquire rights in and to the use of the said waters of said basin by purchase, donation, or eminent domain.' Pub L No. 85-222, § 4(c), 71 Stat 497, 508 (1957). Counsel for the City of Klamath Falls appears to argue that this provision sets forth the only ways in which the United States could acquire water rights after the effective date of the Compact. [FN12] That view is incorrect. The relevant question is what portion of the United States' authority Congress surrendered to the states by consenting to the Compact. The terms of the Compact itself, and specifically Articles XI and XIII, are the source of the answer to that question, as set forth in the preceding pages. The language quoted above does not bear on the issue. That provision is merely an interpretation clause that does not purport to limit federal power under the Compact, but rather to set forth expressly and in plain language that the Compact shall not be construed to impair certain specified, but nonexclusive, powers. Consequently, nothing in that provision affects the proper analysis of your inquiry.

Conclusion

The Klamath Compact does not forbid Congress from designating the Klamath River as a wild and scenic river. There is no necessary conflict between the Compact and designation, nor does the designation modify the Compact. However, water reserved by that designation is subordinate to the rights of irrigators and domestic users, to the limited extent set out in Article XIII(B)(2).

Very truly yours,

Dave Frohnmayer

Attorney General

[FN1] See Note following ORS 542.610. Congress consented to the Compact by Pub L No. 85-222, 71 Stat 497 (1957).

[FN2] 16 USC § 1284(e) disclaims any intent to 'alter, amend, repeal, interpret, modify, or be in conflict' with an interstate compact. First, the Wild and Scenic Rivers Act may not 'be in conflict' with the Compact, i.e., forbid what is required or require what is forbidden by the Compact. Second, the Wild and Scenic Rivers Act may not 'alter, amend, repeal or modify' the Compact, i.e., add to or subtract from the rights and obligations under the Compact. Finally, the Wild and Scenic Rivers Act may not be used to 'interpret' the Compact, i.e., be relied upon to construe language or clarify intent. For purposes of simplification, we will use the phrase 'modify or conflict' as a

shorthand for these restrictions.
[FN3] Other significant provisions include the following:
1) Priority of right will be governed by priority in time in the entire basin, Art III(B)(1);
2) In the event of conflicting applications for use of water, certain uses are given preference, Art III(B)(1);
3) With one exception, no out-of-basin diversions are permitted, Art III(B)(2)(a), (3)(a);
4) Diversions upstream from Keno, Oregon, for use in Oregon shall have return flows into the river upstream from Keno, Art III(B)(2)(a);
5) Substantially all return flows from diversion into California shall be returned above Keno, Art III(B)(3)(b);
6) Diversion out of the Jenny Creek Basin may be limited by the Klamath River Compact Commission.
[FN4] Article III(A) also recognizes inchoate rights then existing for the Klamath Project. Although project development had not yet been completed, all water rights that eventually might be put to beneficial use were recognized.
[FN5] Article III(C) refers to the amount of water necessary to irrigate 300,000 acres. In contrast, Article XIII(B)(2) refers to 340,000 acre-feet of water. These are not necessarily equal amounts.
[FN6] In addition, the federal government also agreed to comply with:
a) the limitations on diversions from the Jenny Creek basin, Art XIII(B)(3);
b) certain limitations on out-of-state diversions, Art XIII(B)(4); and
c) the provisions on return flows, Art XIII(B)(5).
[FN7] The reserved water rights doctrine had its genesis in Winters v. United States, 207 US 564, 28 S Ct 207, 52 L Ed 340 (1908) (in creating the Fort Belknap Reservation, Congress impliedly reserved enough unappropriated water to fulfill the purposes of that Indian reservation). The doctrine has been applied to reservations of federal land for purposes other than Indian reservations. E.g., Cappaert v. United States, 426 US 128, 96 S Ct 2062, 48 L Ed2d 523 (1976) (presidential proclamation designating Devil's Hole as part of National Monument implicitly reserved sufficient water to preserve the habitat of the rare Devil's Hole pupfish). We understand that a majority of the lands bordering the segment of the Klamath River proposed for designation are public lands managed by the Bureau of Land Management. It is, therefore, unnecessary to determine in this opinion the exact constitutional basis upon which a wild and scenic designation would 'reserve' water were the designated stretch wholly in private ownership at the time of designation.
[FN8] Moreover, this provision would not in any event apply to a wild and scenic designation. Article III(B) does not apply to instream water rights. By its terms, Article III(B) addresses only 'rights to the use of unappropriated waters * * * by direct diversion or by storage for later use.' (Emphasis added.)
[FN9] The Secretary of the Interior or the Secretary of Agriculture would determine whether a particular structure would have an adverse effect. See 16 USC § 1278(a). That determination would hinge on the overriding purpose of any designation under the Act: to preserve the stream in its free-flowing condition. See 16 USC § 1271. (In Diack v. City of Portland, 306 Or 287, 299,

759 P2d 1070 (1988), the Oregon Supreme Court, construing Oregon's Scenic Waterways Act, ORS 390.805 to 390.925, held that the term 'free-flowing' is self-explanatory, and is used in a 'purely descriptive sense.') No federal department or agency may 'recommend authorization of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration * * * .' 16 USC § 1278(a). Under the Wild and Scenic Rivers Act, the state also must exercise its jurisdiction in a manner which will not impair the purpose of the Act or its administration. 16 USC § 1284(d).

[FN10] Under the Compact, each state grants to the other the right to construct facilities for storage and conveyance of water from one state to the other, 'insofar as the exercise of such right may be necessary to effectuate and comply with the terms of this compact.' Art V(A). We do not read this provision to create an absolute right to build an impoundment for storage. If State A authorizes the use of the water, State B will not object if the impoundment is located in State B so long as the location is approved by the Compact commission.

[FN11] The legislative history of the Wild and Scenic Rivers Act sheds no light on this issue. The only reference to the Compact in the legislative history is a colloquy between Representatives Flood and Aspinall concerning the impact of the Act on a proposed compact between New York, Pennsylvania and Delaware dealing with the Susquehanna River. See HR 18260, 90th Cong, 2d Sess, 114 Cong Rec 26590 (daily ed Sept. 12, 1968). We do not find this language particularly illuminating, other than to reconfirm the already apparent meaning of 16 USC § 1284(e), which by its terms pledges not to interfere with specified compacts.

[FN12] See letter dated July 25, 1988, from Richard M. Glick to George Flitcraft, Mayor of City of Klamath Falls.

Or. Op. Atty. Gen. OP-6268, 1988 WL 416275 (Or.A.G.)

END OF DOCUMENT

KWUA Data Request 1.10

With respect to any meeting between PacifiCorp and the OPUC Staff or Commissioners at which the 1956 Agreement or the Compact was discussed, provide the dates of all such meetings and the names of all persons present at such meetings.

Response to KWUA Data Request 1.10

PacifiCorp objects to the request on the grounds that it is overly broad, unduly burdensome and seeks information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, PacifiCorp responds as follows

- On July 11, 2002 the 1956 Agreement was discussed at the Socioeconomic Workgroup Meeting. Individuals in attendance were:

  - Mary Cheyne (Klamath Drainage Dist.)
  - Bob Davis (People for the USA)
  - Jim DePree (Siskiyou Co.)
  - Jon Goldstein (DOI)*
  - Jan Houck (OR Parks & Recreation)
  - Christine Kennelly (Kearns & West)
  - R. Craig Kohanek (OR Water Resources Dept.)
  - Bill McNamee (Oregon PUC)
  - John O'Connor (CH2M Hill)
  - Todd Olson (PacifiCorp)
  - Wes Silverthorne (NMFS)

  *Participated via conference call

- On June 8, 2002 the 1956 Agreement was discussed at the Plenary Meeting. Individuals in attendance were:

  - Brian Barr (World Wildlife Fund)
  - Mike Belchik (Yurok Tribe)
  - Mel Berg (BLM)
  - Leo T. Bergeron (California State Grange)
  - William Bettenberg (US Dept. of the Interior)
  - Chuck Bonham (Trout Unlimited)
  - Donna Boyd (Friends of the River)
  - Jim Bryant (USBR-Klamath)
  - Jim Carpenter (UKBWG)
  - Mary Cheyne (Klamath Drainage Dist.)*

- Bob Davis (USBR-Klamath)
- Jim DePree (Siskiyou County)
- Paul DeVito (ODEQ)
- Larry Dunsmoor (Klamath Tribes)
- Steve Edmonson (NOAA Fisheries)
- Toby Freeman (PacifiCorp)
- Gary Frey (Argonne National Lab)
- Dan Fritz (Bureau of Reclamation)
- Dave Gravenkamp (Siskiyou Co. Public Works)
- Keri Green ("TANGO" Facilitator)
- Jan Houck (Oregon Parks & Recreation Dept.)
- Christine Kennelly (Kearns & West)
- Curtis Knight (California Trout)
- R. Craig Kohanek (Oregon Water Resources)
- Barbara Machado (BLM)
- Bill McNamee (Oregon PUC)
- Tam Moore (Capital Press)
- Todd Olson (PacifiCorp)
- Linda Prendergast (PacifiCorp)
- Teri Raml (BLM)
- Don Reck (BIA)
- Susan Rosebrough (National Park Service)
- Steve Rothert (American Rivers)
- Amy Stuart (ODFW)
- Roberta VandeWater (US Forest Service)
- Anna West (Kearns & West)
- David White (NOAA Fisheries)
- Murrel Wigington (Copco Lake Sportsman Club)

* Participated via conference call

– On September 27, 2001 the 1956 Agreement was discussed at the Instream Flow Workshop meeting. Individuals in attendance were:

- Brian Barr (World Wildlife Fund)
- Mike Belchik (Yurok Tribe)
- Randy Brown (USFWS)
- Bernard Burnham (BIA/N.W. REG.)
- Ken Carlson (CH2M HILL – Portland)
- Mary Cheyne (Klamath Drainage District)
- Jim DePree (Siskiyou County)
- Paul DeVito (ODEQ)
- Larry Dunsmoor (Klamath Tribes)
- Jerr Garvey (OWRD)

- Russ Kanz (SWRCB)
- Curtis Knight (California Trout)
- Rick Kruger (ODFW)
- Jennie Land (USBR)
- David Leland (North Coast RWQCB)
- Ann Manji (CDFG)
- Tim McKay (Northcoast Environmental Center)
- Bill McNamee (OPUC)
- Mark Mullins (CH2M HILL)
- Forrest Olson (CH2M HILL)
- Gretchen Oosterhout (Decision Matrix)
- Tom Payne (TRPA)
- Ronnie Pierce (Karuk Tribe)
- Linda Prendergast (PacifiCorp)
- Mike Rode (CDFG)
- Dennis Smith (USFS RHAT)
- Amy Stuart (ODFW)
- Mike Turaski (BLM)
- Roberta VandeWater (USFS)
- Anita Ward (UKBWG)

– On April 14, 2004 Robin Furness and Paul Wrigley met with Lee Sparling to discuss Klamath related issues. The 1956 Agreement was discussed at these meetings.

– In fall of 2004, Christy Omohundro and Judi Johansen met individually with Ray Baum, Lee Beyer, and John Savage to discuss Klamath related issues. The 1956 Agreement was discussed at these meetings. OPUC Staff may have been present at one or more of the meetings with the Commissioners, but the names of these individuals were not recorded.

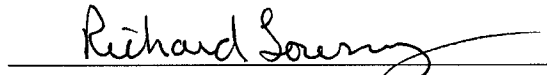
CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **KLAMATH WATER USERS ASSOCIATION'S REPLY BRIEF** on the attached Service List obtained on May 12, 2005 from the Oregon Public Utility Commission's Website:

[X] by **MAILING** a full, true and correct copy thereof in a sealed, postage-paid envelope, addressed as shown on the attached Service List, and deposited with the U.S. Postal Service at Portland, Oregon, on the date set forth below; AND

[X] by **ELECTRONIC MAIL** ("e-mail") to those parties on the Oregon Public Utility Commission's Website Service List who listed an e-mail address.

DATED Thursday, May 12, 2005.



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