

COFCO V. GOVERNMENT

FOR and AGAINST

FEDERAL LEVEL - STATE LEVEL

**Water Resources
Center Archives**

F. L. Lathrop
December, 1954

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COPCO v. GOVERNMENT

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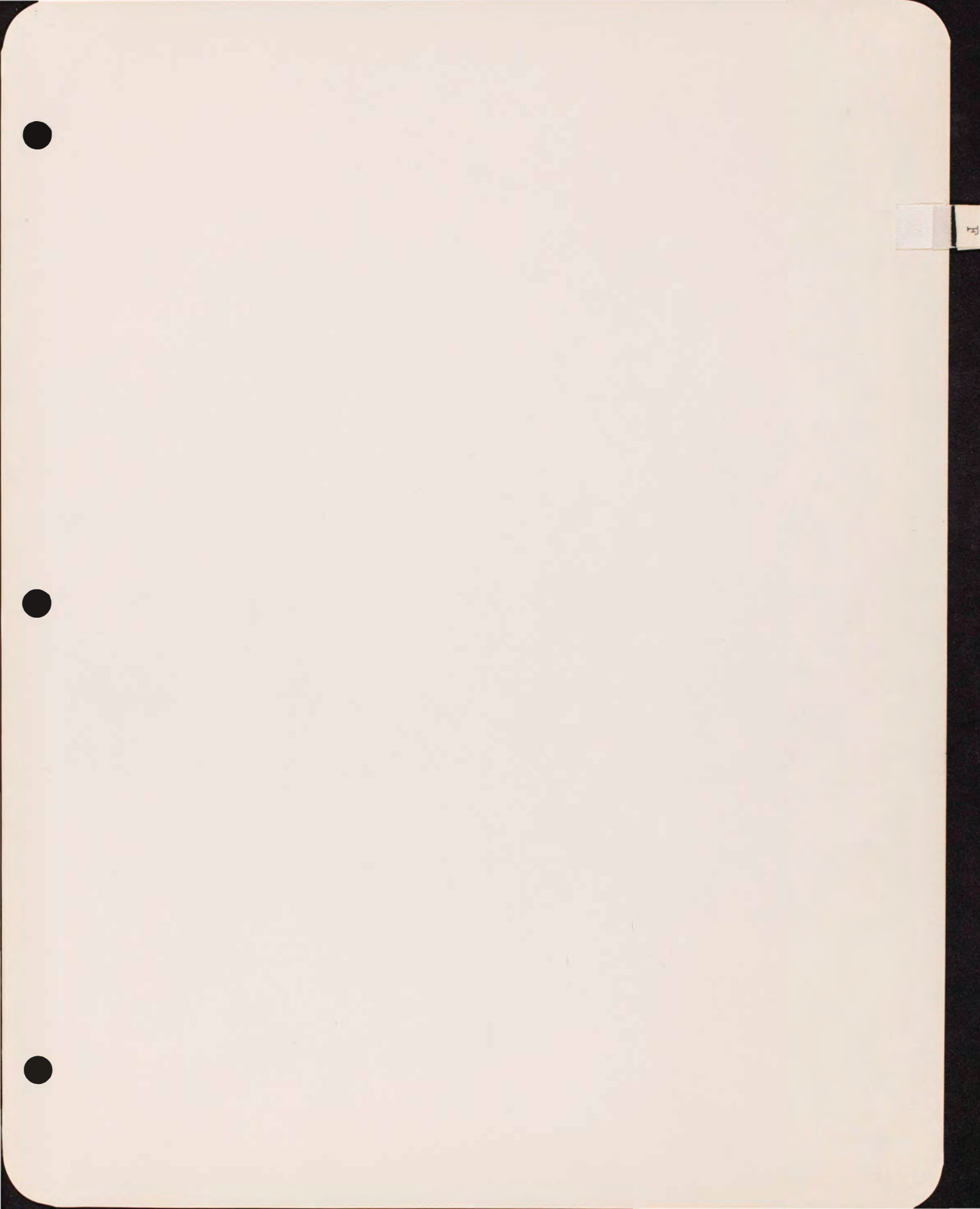
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COPCO v. GOVERNMENT

THE ISSUE

Water for power -

Renewal of the 1917 contract 13 years before expiration 1967

Copco's application to Oregon Hydroelectric Commission

April 16, 1951, for Project 180 - Big Bend Development.

Copco's application to Federal Power Commission for

Project No. 2082 - Big Bend #2

Hearing at Klamath Falls, June 30 - July 3, 1952

Federal Power Commission Opinion #266, Project 2082

January 28, 1954. Docket No. E-6390

License be issued to Copco for Big Bend Project #2 on condition that an agreement be reached between Secretary of Interior and Copco with regard to water supply, in the form of an extension or renegotiation of 1917 contract providing for the storage and release of water from Upper Klamath Lake.

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to

OFFICIAL POSITION TAKEN FOR AND AGAINST
ANY ACTION TAKEN AT THIS TIME (1954)

AGAINST

F. Federal Level

- (1) Bureau of Reclamation formal protest to F.P.C. dated October 17, 1952

"There is not sufficient unappropriated water in the Klamath River to supply the requirements of Project 2082."

"The Commission should deny a license to Copco under Sections 7(b) and 10(a) of the Federal Power Act."

"The Commission has no authority to issue a license to Copco for Project 2082 which includes rights and privileges relating to Link River Dam."

OPENING STATEMENT

Federal Power Commission Hearing on Project No. 2082

June 30, 1952

My name is E. K. Davis. I am Assistant Regional Counsel for Region 2 of the Bureau of Reclamation, Department of the Interior. Mr. Silverthorne and I are appearing for Oscar L. Chapman, Secretary of the Interior. Those Interior agencies having a particular interest in this case are the Fish and Wildlife Service, the Bureau of Indian Affairs, and the Bureau of Reclamation. Mr. Phil Dickinson, Assistant Regional Director for the Bureau of Reclamation, Region 2, Sacramento, California; Mr. Layton Stephens, Project Manager for the Klamath Project; and representatives of the Bureau of Indian Affairs and the Fish and Wildlife Service will testify for Interior.

As stated in our Petition for Intervention, in general, it is the position of the Secretary of the Interior that the application for license of The California Oregon Power Company should be denied or, alternatively, that action upon it should be suspended until the comprehensive investigations now being made by the Department of the Interior have been completed.

To support this position, we intend to show that the Federal Government through its various Interior agencies holds certain vested or inchoate rights to the waters of the Klamath River and Upper Klamath Lake under the laws of the United States and the States of Oregon and California. We will introduce evidence to show that after these rights have been satisfied there will not be a sufficient supply of unappropriated water from Klamath River below Upper Klamath Lake to meet the requirements of the applicant's proposed project. In fact, we believe the evidence will demonstrate that operation of the project planned by the applicant not only would interfere with any new irrigation or wildfowl but would impair the use of the water for the existing Klamath Project of the Bureau of Reclamation.

Essentially, our position on this phase of the matter will be the same as that presented in the protest of the United States to the application of The California Oregon Power Company to the Hydroelectric Commission of the State of Oregon for a license which would include the right to appropriate water for this same power project. As you undoubtedly know, the hearings in this matter were held June 11, 1951, here in Klamath Falls. A copy of this protest is attached to the letter of the Secretary of the Interior to the Federal Power Commission written in respect to the instant case. As of this date, the Oregon Hydroelectric Commission has not rendered a decision. Unless the request for license is granted, we believe The California Oregon Power Company will be unable to satisfy the provisions of Section 9(b) of the Federal Power Act requiring the applicant to show that it is

able to proceed under the laws of the State of Oregon with respect "to the appropriation, diversion, and use of water for power purposes." Further, it is our position that the Oregon Hydro-electric Commission legally cannot and will not grant to The California Oregon Power Company the license requested and required for this power project.

In addition to strictly water right considerations, we will show that the Bureau of Reclamation, the Bureau of Indian Affairs, and the Fish and Wildlife Service now have under way an extensive investigation program purposed to find the best plan for the comprehensive development of the water resources of the area. The study is designed to indicate the extent to which additional lands on the Klamath Indian Reservation may be brought under irrigation, the need for additional water for migratory waterfowl use, and to suggest possible extensions of the Klamath Project of the Bureau of Reclamation to serve additional areas in Oregon and California from the waters of the Klamath River and its tributaries. Also, the study will indicate the possibilities for economical development of power consistently with irrigation and other uses. Such power development would be proposed by the Bureau of Reclamation for irrigation pumping, for financial assistance to irrigation in the manner provided in the Reclamation Act of 1939, and for sale in the Upper Klamath Basin at the lowest possible cost.

It is the position of the Secretary of the Interior that waters in the Klamath Basin should be used for irrigation and for wildlife preservation to the maximum practicable extent. After plans for such usage have been solidified, additional power development should be planned as an integral part of a basin-wide multiple-purpose water resource development. Interior believes the investigations will show that the maximum amount of power and the maximum benefits to the area will derive through development of the remaining power sites on the Klamath River by the Federal Government. We will show that the Federal Government has spent and expects to spend substantial sums of money on these investigations, that they are now entering their final phase and will be completed within the next two years.

In connection with the intervention of the Department of the Interior in this case, there is a point I wish to make clear. We fully recognize that a power shortage exists in the Pacific Coast area, and we are aware that The California Oregon Power Company needs additional power in the immediate future. However, the construction of Big Bend No. 2 would not provide power for two or three years. We believe the evidence will show that other adequate sources of supply will be available to meet the company's needs in the immediate future. In view of this, there appears no justification for making provision now for the development of the Big Bend project, which gives promise of prejudicing the whole future economic development in the area.

In sum, it is the position of the Department of the Interior that the proposal of The California Oregon Power Company for

Project No. 2082 would impair valid existing water rights of the United States and that, in any event, no license should be granted until the extensive investigations now under way are complete, and not then except in light of a plan for the comprehensive development of the water resources of the Upper Klamath Basin for all beneficial public uses.

From Bureau of Reclamation report on the Upper Klamath River Basin (June, 1954) Pages 27 - 30.

Report of the Regional Director

Conclusions

51. The Upper Klamath River Basin contains large resources in water, land, timber, and wildlife and thus has great opportunity for expansion in agriculture, manufacturing, and recreation. However, decisions by local, State, and National officials and agencies, if made outside a framework for comprehensive resource development, may impair such comprehensive development. Policies basic to sound water and land use should be established by local and State agencies for their own guidance and for consideration of the Secretary in recommending or establishing Interior Department programs in the basin.

52. Water supply studies on which this report is based demonstrate clearly that in dry years as severe as those which have occurred heretofore, presently developed water supplies will be inadequate to meet present consumptive requirements, consumptive uses for probable new irrigation during the next 25 years, and uses proposed for power development below Keno. However, on the basis of reconnaissance studies, an engineeringly feasible plan of development of the basin is possible which will consider fully the relative needs of irrigation, waterfowl, hydroelectric power, industry, and fisheries, and will balance these needs in the interest of maximum over-all resource development. All indications thus far obtained are that the plan is economically sound. Monetary benefits to the Nation exceed costs in a ratio greater than three to one for those units on which economic analyses have been completed, including those most needed for early development. Although details of the plan may change as a result of further investigation, it is, as a whole, adapted to fitting in with longer term basin needs for agricultural, industrial, and recreational opportunity. Features of the plan can and might be built by local or State agencies without impairing the over-all efficiency of the plan.

53. Relatively minor extensions of the Klamath Project and settlement of a portion of the Klamath Straits Unit, for which detailed plans have heretofore been made, apparently can proceed without conflicts as to legal availability of water supply or plans proposed herein for preserving the Pacific Flyway wildfowl populations at their present levels. Plans for other water and land developments advanced herein may conflict with proposals of others. Reviews by local public and private agencies, and by State and other Federal agencies, will be required as to these conclusions and the following recommendations, to make certain that provision has been made for all local requirements and to secure appropriate guidance on desired policies. With the exception of the Klamath Project Extensions and Klamath Straits Unit, detailed studies for all units of the basin plan will be required before authorization is sought on any further facilities which might be built by the Federal Government.

Recommendations

54. It is recommended that:

1. The Secretary of the Interior take no action with respect to:
 - (a) The dedication of public lands for homesteading or use for wildlife preservation, or
 - (b) Additional Reclamation development, or
 - (c) Extension of the terms of the existing contract between the United States and The California Oregon Power Company

until the States of Oregon and California acting individually or in concert, and the local interests, after reviewing this report, have been afforded ample opportunity to identify their desires as to priorities of water and land use in the Upper Klamath River Basin.

2. The Secretary adopt a single long-range program, of perhaps ten years duration, for development of the public lands under his administration, which program will give full consideration to preserving the wildfowl potential of the Upper Klamath River Basin in its present state or will improve it, while at the same time will afford maximum opportunity for settlers and will place a maximum of such land on local tax rolls.

3. Further investigations be made:

- (a) By the Fish and Wildlife Service, in cooperation with wildlife agencies of the States of Oregon and California, to determine more closely the minimum flows required in the Klamath River below Keno for fishery preservation and the minimum land requirements in the basin for waterfowl.
- (b) By the Geological Survey, in cooperation with the State of California, of ground water conditions and potential in Shasta, Scott and Butte Valleys.
- (c) By the Geological Survey, in cooperation with the State of Oregon and the Bureau of Indian Affairs, of ground water conditions and potential in the Klamath Marsh Area and in Sprague River, Swan Lake, and Yonna Valleys.
- (d) By the Geological Survey, in cooperation with the State of Oregon, to secure adequate, standard topographic maps of the Oregon portion of the basin.
- (e) By the Bureau of Reclamation, consistent with recommendations 1 and 2 above of the Lost River, Miller and White Lake, and Butte Valley plans outlined in this report, in sufficient detail and accuracy to provide information on which the Congress may consider authorization of necessary structures.

4. That the report on the Klamath Project Extensions and the report on that part of the Klamath Straits Unit lying generally more than one-half mile north of the Oregon-California boundary, be processed to completion promptly.

1. Attorney General opinion July 1, 1925
I. H. Van Winkle to State Engineer.

The State Engineer was not authorized to issue a permit to the California-Oregon Power Company for the appropriation of water for power purposes; therefore he has power to cancel the same as having been issued inadvertently.

July 1, 1925.

Mr. Rhea Luper,
State Engineer.

Dear Sir: I have for consideration your oral request for an opinion as to whether you were authorized to issue to the California-Oregon Power Company a permit to appropriate one thousand cubic feet per second of water for power purposes, as specified in its application, filed in your office originally February 24, 1919, returned for correction June 10, 1923, and corrected application filed in your office June 23, 1923, which application was approved by you and permit thereon issued by you June 13, 1925. Said application shows the source of the proposed appropriation of water as Link river and is accompanied by a map showing the diversion dam described in the application located at the head of Link river, the same being the mouth of Upper Klamath lake, the position and description thereof showing that it is the same dam as that construed by said company under its contract with the secretary of the interior, dated February 24, 1917.

Reliable information is also at hand showing that said power company has been using said dam, so constructed by it, for the diversion of water into its canals leading to its power plants located on Link river, and that such dam is the same identical dam described in said contract. This dam is built across the mouth of Upper Klamath lake and said contract purports to authorize said company to raise the water level of Upper Klamath lake to the elevation of 4143.3 feet above sea level and to lower it not lower than 4137 feet above sea level. It requires the said company, upon its election to construct said dam, to construct the same so as to permit the raising of the elevation of the lake to a height of 4141.5 feet within two years and within ten years to the elevation of 4143.3 feet. The real source of the water supply for such appropriation is therefore, Upper Klamath lake, the same being taken therefrom at the storage dam across the mouth of such lake.

While the application does not furnish this information, I take it there is no question of its accuracy and that the application is defective in not showing the true source of the water to be appropriated thereunder.

Section 1 of chapter 5, found at page 63, General Laws of Oregon, 1905, reads as follows:

"That for the purpose of aiding in the operations of irrigation and reclamation, conducted by the reclamation service of the United States, established by the act of Congress, approved June 17, 1902 (32 stat. 388), known as the reclamation act, the United States is hereby authorized to lower the water level of Upper Klamath Lake, situate in Klamath county, Oregon, and to lower the water level of, or to drain any or all of the following lakes: Lower or Little Klamath lake, and the Tule or Rhett lake, situate in Klamath county, Oregon, and Goose lake, situate in Lake county, Oregon; and to use any part or all of the beds of said lakes for the storage of water in connection with such operations."

It is clear that said statute grants to the United States authority to use the bed of Upper Klamath lake for the storage of water for its operations of irrigation and reclamation, conducted by the Reclamation Service of the United States. This would preclude the use of said lake for the purpose of storing water by private individuals and corporations, especially without securing authority therefor from the State of Oregon, and no such authority is requested by the application of said company under consideration, nor granted by the permit issued by you thereon; nor does it seem that such permit could be granted by your office in view of the terms of said grant to the federal government.

I would also call attention to section 2 of chapter 223, found at page 401, General Laws of Oregon, 1905, the same being section 5791, Oregon Laws. Said section authorizes the United States to appropriate and utilize waters of this state, by first filing notice of such appropriation in the office of the State Engineer. Said section further provides that upon such action being taken the waters described in such notice and unappropriated at the date of the filing thereof shall not be subject to further appropriation under the laws of this state but shall be deemed to be appropriated by the United States, and that no adverse claims to the use of such water shall be acquired under the laws of this state except as for such amount of said waters described in said notice as may be formally released in writing by an officer of the United States thereunto duly authorized, which release shall also be filed in the office of the State Engineer, and further provides the manner and conditions of making such appropriation by the United States.

You inform me that the United States, through its proper officers, has made such appropriation of the waters of Upper Klamath lake by filing the appropriate notice thereof in your office and that notice of such withdrawal was published by the State Engineer as provided in said section, and no relinquishment of said water has ever been made. It is clear, therefore, that the waters of Upper Klamath lake are thereby withdrawn in favor of the federal government and that no private person or corporation can acquire the right to the use of any thereof except such as may be hereafter specifically released by the federal government.

It is, therefore, my opinion that you were not authorized to issue such permit and that you are authorized to cancel the same as having been issued inadvertently, in view of the facts and law relating to the circumstances. I would, therefore, advise that the permit be canceled.

I. H. VAN WINKLE,
Attorney-General.

0. At State Level

- (2) Oregon Hydroelectric Commission December 20, 1954, letter
McClellan to Lathrop

"No action has been taken by the Hydroelectric Commission on this application since the hearing in Klamath Falls June 11, 1951. Nor is it likely that action will be taken until such time as the company has made arrangements with the Bureau of Reclamation which will assure it of a supply of water for operating its proposed plant."

C. CALIFORNIA -- Request to delay or suspend action

- (1) Department of Public Works - by State Engineer A. D. Edmonston, May 10, 1954.

"It is believed advisable that the proposed extension of that contract between the Secretary of the Interior and the California Oregon Power Company be delayed until the following events have transpired:

"1. Completion of the investigation by the U. S. Bureau of Reclamation of the available water supplies and needs of the Klamath River Basin and submission of the comments of the states of Oregon and California on the report of the Secretary of the Interior on that investigation.

"The State of California is making a similar investigation of the water supplies and needs for the entire Klamath River Basin including Butte Valley, and means and methods of supplying water to meet such needs.

"2. Appointment of members of the California-Klamath River Commission by the Governor of California."

"Further, your attention is called to the fact that the firm of Brobeck, Phleger and Harrison, attorneys for the California Oregon Power Company, are appealing from the Federal Power Commission decision.

"Attention is also called to the position taken by the Secretary of the Interior in this matter before the Federal Power Commission, that the license "should be denied, or, at the very least, should find that action upon it should be suspended until after the comprehensive investigation of the water resources of the Upper Klamath Basin is completed and the application can be evaluated in the light of the data developed as a result of such investigation." (Reply Brief of the Secretary of the Interior as Intervenor, October 17, 1952, page 65.)

"In view of the foregoing, it is respectfully requested that extension of the February 24, 1917 agreement between the Secretary of the Interior and California Oregon Power Company for storage in and release of water from Upper Klamath Lake in Oregon be deferred until the views of the States of Oregon and California thereon are submitted to you by the two State Commissions."

Secretary McKay's answer of July 1, 1954

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

July 1, 1954

My dear Mr. Edmonston:

Thank you for your letter of May 10, commenting on the possible extension of the contract between the United States and the California Oregon Power Company for regulation of the Upper Klamath Lake in connection with that company's proposed Big Bend No. 2 Development.

As you know, we in the Department of the Interior strongly approve of water resources development being accomplished in accordance with the desires of the people involved. For this reason the Department's ultimate position in connection with the renewal or revision of the existing contract with the California Oregon Power Company cannot be formulated until we have an adequate expression of the wishes of those interested in water resource development in the Klamath River Basin. We have now been advised by Chairman Hagelstein that organization of the California Klamath River Commission has been completed and we are, therefore, hopeful that the State of California, through the Commission, will be in a position to make a timely contribution toward a resolution of the problem.

As a further step toward early resolution of the matter, the Regional Director of the Bureau of Reclamation at Sacramento, Mr. Clyde H. Spencer, has been instructed to confer with all groups interested in this matter, including appropriate State agencies, water user organizations and the California Oregon Power Company with a view to ascertaining the position of these several groups in order that all points of view may be fully expressed and adequately considered as a predicate to a new Link River Dam agreement. The Commission may, therefore, expect to be contacted by Mr. Spencer. These consultations between Mr. Spencer and the interested groups will, we think, be mutually advantageous both to the Department and to the groups themselves, particularly in view of the relationship of the matter to the report on the land and water resources of the Klamath River Basin and related areas now nearing completion under Mr. Spencer's direction.

The resolution of this matter has already been held in abeyance for a considerable period of time. It is expected that Mr. Spencer's report and the consultation in which he is now engaged will be completed in the relatively near future, thus enabling a final solution without undue delay.

I would, if I may, suggest that the Commission and its members keep in close touch with Mr. Spencer with the understanding, of course, that following an opportunity for us in the Department to

consider the results of Mr. Spencer's consultations, opportunity will be afforded all interested parties to express their views upon the situation as it may then appear before the matter is concluded.

Sincerely yours,

signed Douglas McKay

Secretary of the Interior

Mr. A. D. Edmonston
State Engineer
State of California
Sacramento, California

Secretary McKay's answer of May 4, 1954 to Phil D. Swing
member California Water Resources Board.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

May 4, 1954

Mr dear Mr. Swing:

Thank you for your letter of April 10 in which you advise us of the interest of the State Water Resources Board of California in the division of the waters of the Klamath River as between the States of Oregon and California.

We in the Department of the Interior strongly approve of water resources development being accomplished in accordance with the desires of the people involved. For the reason the Department's ultimate position in connection with the renewal or revision of the existing contract with the California-Oregon Power Company cannot be formulated until we have an adequate expression of the wishes of those interested in water resources development in the Klamath River Basin.

As you probably are aware, an extensive survey of the land and water resources of the Klamath River Basin and related areas is now nearing completion by the Regional Director of the Bureau of Reclamation at Sacramento, California. We expect that a full report of the findings of this investigation will be released for review by State and local interests late this spring or early summer. This report should be an excellent focal point for the comments of both the California and Oregon Klamath River Commissions.

We are looking forward with interest to receiving such comments as the commissions of the two States may care to submit.

Sincerely yours,
/s/ Douglas McKay
Secretary of the Interior

- C. 2. California Klamath River Commission
June 9, 1954 - Resolution #2
June 14, 1954 - Chairman's letter of transmittal

C-2

June 9, 1954, Resolution #2

After discussion of the controversial issue--Project No. 2082 of the California Oregon Power Company--and related contracts now pending before the Secretary of Interior, the Federal Power Commission, the Oregon Klamath River Commission and the California Klamath River Commission, the following Resolution was drafted; and on motion by Nelson Bowles, seconded by James Stearns, and unanimously carried, the secretary was instructed to send it to the Honorable Secretary of Interior Douglas McKay.

To send a copy to the Oregon Klamath River Commission.

To send a copy to the California Water Resources Board.

"Resolved that the Honorable Secretary of Interior Douglas McKay be advised that the California Klamath River Commission has organized and the members are actively acquainting themselves with their duties and functions, as of June 9, 1954; and respectfully request that he withhold any decision or action on California Oregon Power Company's contract either as an extension or renewal and its proposed power development known as "Big Bend."

This Commission believes that such action would be premature and requests that no decision be made until this Commission has had time to study and to confer with the Oregon Klamath River Commission.

The members appreciate the official attitude of the Secretary in this matter, as reported in official press releases, and will wish to avail themselves of consultations with Mr. Spencer, your Regional Director."

California Klamath River Commission

By _____
Chairman

STATE OF CALIFORNIA
CALIFORNIA KLAMATH RIVER COMMISSION

COPY

June 14, 1954

The Honorable Douglas McKay
Secretary of the Interior
Washington, D. C.

Dear Mr. McKay:

I take the liberty of enclosing herewith documents listed below:

1. A resolution which was adopted at the first regular meeting of the California Klamath River Commission held on June 9, 1954, in Yreka, California
2. A list of the members of the California Klamath River Commission, appointed by the Honorable Goodwin J. Knight, Governor of the State of California.

Our Commission will greatly appreciate your favorable consideration of the enclosed Resolution.

It is our intention to hold a joint meeting with Governor Knight of the State of California, Governor Patterson of the State of Oregon and the Oregon Klamath River Commission some time during July, 1954. We would very much like to have the honor of your presence at this joint meeting if it is possible for you to attend. We will notify you as soon as the date and place of meeting has been decided upon.

With kindest personal regards, I am

Sincerely yours,

Wm. G. Hagelstein, Chairman
California Klamath River
Commission

WGH:lb

C. 2. July 1, 1954 - Secretary McKay's Answer

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington 25, D. C.

C-2

JUL - 1 1954

My dear Mr. Hagelstein:

Thank you for your letter of June 14, advising that the California Klamath River Commission has organized, and enclosing a resolution adopted by the Commission concerning the possible extension of the contract between the United States and the California Oregon Power Company in connection with the company's proposed Big Bend No. 2 Development.

As you know, we in the Department of the Interior strongly approve of water resources development being accomplished in accordance with the desires of the people involved. For this reason the Department's ultimate position in connection with the renewal or revision of the existing contract with the California Oregon Power Company cannot be formulated until we have an adequate expression of the wishes of those interested in water resource development in the Klamath River Basin. We are hopeful that with organization of your Commission having been completed, the State of California will now be in position to make a timely contribution toward a resolution of the problem.

As a further step toward early resolution of the matter, the Regional Director of the Bureau of Reclamation at Sacramento, Mr. Clyde H. Spencer, has been instructed to confer with all groups interested in this matter, including appropriate State agencies, water user organizations and the California Oregon Power Company with a view to ascertaining the position of these several groups in order that all points of view may be fully expressed and adequately considered as a predicate to a new Link River Dam agreement. The Commission may, therefore, expect to be contacted by Mr. Spencer. These consultations between Mr. Spencer and the interested groups will, we think, be mutually advantageous both to the Department and to the groups themselves, particularly in view of the relationship of the matter to the report on the land and water resources of the Klamath River Basin and related areas now nearing completion under Mr. Spencer's direction.

The resolution of this matter has already been held in abeyance for a considerable period of time. It is expected that Mr. Spencer's report and the consultation in which he is now engaged will be completed in the relatively near future, thus enabling a final solution without undue delay.

I appreciate your kindness in inviting me to attend the joint meeting you are planning in July. Unfortunately, in view of previous commitments during July, including an official visit to Alaska, it is quite doubtful whether my schedule can be arranged to permit attendance.

I would, if I may, suggest that the Commission and its members keep in close touch with Mr. Spencer with the understanding, of course, that following an opportunity for us in the Department to consider the results of Mr. Spencer's consultations, opportunity will be afforded all interested parties to express their views upon the situation as it may then appear before the matter is concluded.

Sincerely yours,

/s/ DOUGLAS MCKAY

Secretary of the Interior

Mr. William G. Hagelstein, Chairman
California Klamath River Commission
c/o Butte Valley State Bank
Dorris, California

C. 2. December 9, 1954 - Resolution

CALIFORNIA KLAMATH RIVER COMMISSION

RESOLUTION NO. _____

Release
December 30, 1954

DECEMBER 9, 1954

WHEREAS, the California Klamath River Commission was created under Chapter 1473, of California Senate Bill No. 749, Section 8116 which reads: "It is the function of the Commission to cooperate with a similar commission representing the State of Oregon in formulating and submitting to the legislatures of both states for their approval an interstate compact relative to the distribution and use of the waters of the Klamath River." And,

WHEREAS, the Oregon and California Klamath River Commissions are engaged in studies with the objective of arriving at an interstate compact or agreement with regard to the distribution and use of the waters of the Klamath River that will provide protection for all interests in both states that will ultimately be concerned with the diversion of water for beneficial use. And,

WHEREAS, each joint meeting between the state commissions has resulted in unanimous agreement in problems presented for discussion. And,

WHEREAS, the joint efforts of the two commissions have reached a point of negotiation where the framework of a compact is beginning to take form. And,

WHEREAS, it is evident that any decision with regard to the development of additional hydroelectric power on the Klamath River between Keno and Copco Lake will be a key consideration in formulation of any such pact. And,

WHEREAS, numerous agencies, political subdivisions, irrigation districts and other interested groups are yet to be invited to present their view. And,

WHEREAS, it might be found desirable and mutually advantageous for the integration and joint use of proposed storage facilities in the Klamath River Basin for both irrigation and power. And,

WHEREAS, the two principal unknown quantities regarding future irrigation needs appear to be the Klamath Indian Reservation in Oregon and the Butte Valley and Oklahoma areas in California. And,

WHEREAS, certain provisions in the California Oregon Power Company application, including the lack of proper provision for control of flow both on the upper Klamath and lower Klamath River, might restrict or even preclude the economic feasibility of developing these areas. And,

WHEREAS, this Commission has begun studies to determine the extent and effect of these provisions on the established priority for irrigation use that promises an answer in the reasonably near future.

THEREFORE, BE IT RESOLVED That in view of the progress made in solving these many problems and in view of the fact that the proposed renewal or extension of The California Oregon Power Company contract will have such far reaching effect on all consumptive uses of water that would be covered by the interstate compact, this Commission respectfully requests the Secretary of the Interior to withhold approval of any power contract, including the renewal of the present California Oregon Power Company contract, on the Upper Klamath Lake until it can be formulated as an integral part of the draft of an interstate compact the articles of which are now being drafted.

I, the undersigned, Chairman of the California Klamath River Commission and custodian of the records thereof, do hereby certify that the foregoing is a full, true and correct copy of the resolution duly and regularly adopted by said Commission at a regular meeting held December 9, 1954.

DATED December 17, 1954

CALIFORNIA KLAMATH RIVER COMMISSION

By William G. Hagelstein, Chairman

C. 2. December 17, 1954 - Chairman's letter of Transmittal

Dorris, California
December 17, 1954

The Honorable Douglas McKay
Secretary of the Interior
Washington, D. C.

Dear Mr. McKay:

I take the liberty of enclosing herewith:

A Resolution which was adopted at the last regular meeting
of the California Klamath River Commission held on December 9, 1954,
in Klamath Falls, Oregon.

It is our intention to release this Resolution for publication ten days
from this date unless we hear from you to the contrary.

Since the receipt of your letter of July 1, our Commission, following
your suggestion, has taken advantage of Mr. Spencer's knowledge of the
Upper Klamath River Basin problems, and has continued its own hearings
with many of the organized interested groups in the Basin, as well as The
California Oregon Power Company. We have had several joint meetings with
the Oregon Klamath River Commission, one of which Mr. Spencer was invited
to but could not attend. Mr. Murray of his office carefully reviewed the
issues between the Bureau and Copco which were principally in connection
with legal matters and water rights. More recently we have met with the
Indian Agency and Tribal Council in an effort to get an adequate expression
of the wishes of those interested in water resource development of the
Upper Klamath River Basin.

We believe that the Klamath River Basin, both Upper and Lower, naturally
embraces all the elements for a wonderful multiple-purpose Basin develop-
ment. We therefore believe that to accomplish such, requires very careful
long-range planning.

The studies of our Commission thus far convince us that there is both
opportunity and necessity for broader planning than has ever before been
given adequate consideration. We believe that the time has arrived when
we must do some coordinated planning and establish sound policies relative
to the development and use of the vast natural resources of the Basin.

We have just recently learned from Mr. Tudor and others that we are soon
to have the benefit of a new national water policy by Congress and a
federal water resources policy by the President's Cabinet Committee.

The California legislature and the Governor are also about to formulate
a State water policy, create a new Water Department of cabinet status,
and introduce new legislation to clarify the County of Origin Act which,
of course, is most pertinent to these five Northern California counties
comprising the Klamath River Basin.

We therefore feel that there is opportunity now never before existing to create a comprehensive Basin plan that will make provisions for all basic needs of all the people in the Basin as well as the larger interests of the people throughout the states and the nation. To accomplish this end and formulate a master plan for the Basin, we believe that the states of Oregon and California, with the active participation of the Federal agencies working diligently together, can put such a comprehensive plan together during the Year 1955.

In the light of this statement, we believe we are fully justified in asking a postponement of any action relating to the power elements which have heretofore seemed urgent, and have your active participation in developing a master plan.

Since there is serious disagreement between State and Federal agencies concerning the application of state laws relative to use and development of water resources, and also between private power relating to the use of falling water in connection with reclamation projects, we firmly believe that there is both opportunity and necessity for the two States, the Federal Government, and private power to reach an early accord on this comprehensive plan for total Basin development. We are in hopes that by such method we can avoid recourse to courts and reach mutual agreements that will endure.

We have agreed on the definition of the boundaries of the Upper Klamath River Basin and on broad policies with the Oregon Klamath River Commission. We are just now beginning the formulation of articles to be included in an interstate compact.

The enclosed Resolution expresses our formal request to you.

With kindest personal regards, and the Season's Greetings, I am,

Sincerely yours,

Wm. G. Hagelstein, Chairman
California Klamath River
Commission

C 3. California Public Utilities Commission, Dec. 10, 1947
Report on Reduction of Klamath River Fluctuations

Pages 54 and 55

VIII. LEGAL LIMITATIONS ON RIVER REGULATION

Historical

Memo in my abstract, Copco - power
Refer pages 54 - 55, P. U. C., 1947 report

Page 54. Regulatory Power of State and Federal Governments

"Any new hydroelectric developments on the Klamath River will be subject to the control and authorization of the projects by the respective State or Federal regulatory agencies having jurisdiction to a much greater degree than those applicable to existing plants. Because of the conflicting and mutually exclusive interests of upstream irrigation and down river power development, it is inevitable that existing controls will be rigidly applied."

Page 55.

"The result is exemplified by the withdrawal of an application to the Federal Power Commission by the California Oregon Power Company for a license to develop 1065 feet of head on the river between Spencer Creek and Shovel Creek in 1925.

"The conditions under which the license was to be granted required, in the company's opinion, surrender of rights which made acceptance thereof impossible."

Oregon Attorney General Opinion I. H. Van Winkle of July 1, 1925

"The State Engineer was not authorized to issue a permit to the California Oregon Power Company for the appropriation of water for power purposes; therefore he has power to cancel the same as having been issued inadvertently."

Power Company Rights to Regulate River.

"More important, however, to the immediate study is the significance of the decision of the Supreme Court of the State of California in Moore vs. California Oregon Power Company (22 Cal. 2nd 725) dated August 27, 1943. In that decision the court outlined the prescriptive rights which have been acquired by the company to the use of the waters of the river in such a limited sense that it would appear impossible for the company to re-regulate or change downstream river operations at all. To do so might jeopardize its existing rights to the use of the waters of the river and might subject itself to action for damages by downstream riparian owners who might suffer from changes in present operations."

IN FAVOR OF

UNDER CERTAIN SPECIFIED CONDITIONS

STATE LEVEL

O. Oregon

- (1) Oregon Klamath River Commission
April 21, 1954, by Stanley in Herald News, Klamath Falls
May 12, 1954, by official action of Commission
recommends execution of contract

"It is believed that the power development scheme proposed by the California Oregon Power Company for development of the potential between Keno and Copco Lake in a series of plants of which Big Bend No. 2 is the first unit, will be in the best interest of the State of Oregon.

"This commission therefore recommends to you that you enter into a new contract extending to The California Oregon Power Company the privilege of regulating the water level in Upper Klamath Lake between elevations 4,137.0 and 4,143.3, under conditions substantially the same as the existing contract, but containing the following provisions:

"1. The right of the California Oregon Power Company to regulate the surface of Upper Klamath Lake between elevations 4,137.0 and 4,143.3, U.S.B.R. Datum, shall be subject to control by the Bureau of Reclamation to protect irrigation requirements for the existing Klamath Project plus any authorized additions thereto of lands from which the return flow will be tributary to Klamath River above Keno, Oregon, and further to protect any rights for water for irrigation of any lands which eventually look to Upper Klamath Lake or Klamath River above Keno for a supply for irrigation, including not to exceed 23,000 acres in Butte Valley, California, provided only that the return flow of irrigation water from such lands be tributary to the Klamath River above Keno.

"2. If it is considered and final determination of the Secretary of the Interior that the United States owns and controls all of the waters of the Klamath River and its tributaries in Oregon by virtue of the filings in 1905 and 1908, then the provisions as stated in Paragraph 1 preceding should be expanded to protect the water supply for future irrigation of all of the irrigable lands in the Klamath Basin in Oregon. (The State of Oregon does not agree to this concept and holds that the rights of the Bureau of Reclamation are limited to the beneficial use on the project as outlined in the 1905 filing.)

"3. That The California Oregon Power Company, at its option, may raise the dam at the outlet of Upper Klamath Lake and thereby create additional storage capacity in the lake, under conditions similar to those of the original contract covering construction of the existing dam, providing that all costs for damages, flowage, levees, etc. shall be borne by Copco and the dam, if constructed, shall become the property of the United States and providing further that all flowage rights, easements and other property acquired and owned by Copco incident to the Upper Klamath Lake Storage reservoir at the termination of the 50-year period shall be conveyed without cost to the United States.

"4. That the California Oregon Power Company may, at its option create additional storage capacity in a reservoir or reservoirs in basins such as Aspen Lake, Long Lake and Round Lake and fill and discharge such reservoirs with water pumped from and returned to Upper Klamath Lake at such times and in such manner as it deems necessary for power purposes, provided only that in such operations the company shall be subject to control by the Bureau of Reclamation to protect irrigation water supplies as set forth in Paragraph 1 hereof.

"During your negotiations with The California Oregon Power Company looking toward a new agreement, if it should appear to you that substantial departure from the basic provisions outlined above are necessary, you are requested to give this Commission an opportunity to be heard before taking final action."

Klamath Basin Water Users Protective Association
June 25, 1954, sending to Secretary of Interior McKay approved redraft of renewal contract between Copco and Government which contains a price tag of favorable power rate schedule

"8. In consideration of the rights and benefits accruing to the Company by reason of the control and operation of the dam, the Company hereby agrees to furnish electric power during the 50-year period of its control of the dam for all pumping requirements for the irrigation or drainage of lands deriving their water supply from or in connection with the works of the Klamath Project, or otherwise made a part of the Project by the Secretary of the Interior, or any of the lands, including those pumping from wells, described in Paragraph 4 hereof at the rates as follows:

"In the case of power for removal of water from Tululake Sump and Lower Klamath Lake Sump and the drains leading thereto or therefrom, the charge for power shall be:

"(a) 4 Mills per kilowatt hour throughout the year during peak period; namely, eight (8:00) A.M. to eight (8:00) P.M. of each day, except Saturdays, Sundays and legal holidays.

"(b) 2 Mills per kilowatt hour throughout the year during off peak period; namely, eight (8:00) P.M. to eight (8:00) A.M. of each day and during the 24-hour period of Saturdays, Sundays and legal holidays.

"(c) The rates for energy in (a) and (b) shall apply only to requirements for pumping plants owned and operated by the United States for removal of water from said sumps as shown on attached map marked Exhibit "A", and said drains and shall not apply to energy used in pumping of water which is used for irrigation outside of the following areas: (1) The area lying within the boundaries of Tulelake and (2) the area in the State of California lying within the boundaries of Lower Klamath Lake as delineated on the attached map of Klamath Project - Oregon - California - Modoc Unit, dated December 20, 1939 (K-2-8-1) and marked Exhibit "A".

"For all other pumping requirements of less than 50 horsepower, the charge for power shall be 5 mills per kilowatt hour. For all other pumping requirements of 50 horsepower or more, the charge for power shall be:

"(a) 5 Mills per kilowatt hour throughout the year during peak period; namely, eight (8:00) A.M. to eight (8:00) P.M. of each day, except Saturdays, Sundays and legal holidays.

"(b) 3 Mills per kilowatt hour throughout the year during off peak period; namely, eight (8:00) P.M. to eight (8:00) A.M. of each day and during the 24-hour period of Saturdays, Sundays and legal holidays.

"All such power shall be delivered by the Company at its own expense whenever there is an installation for such pumping purposes of 100 horsepower or more for at least two years business at an average seasonal load factor of at least 50 per cent. The season in all cases shall be taken as five (5) months. All such power shall be delivered by the Company at its own expense whenever there is an installation of such pumping purposes of less than 100 horsepower but greater than $7\frac{1}{2}$ horsepower for at least five years' business at an average seasonal load factor of at least 25 per cent, and for over five years' business at an average seasonal load factor of at least $12\frac{1}{2}$ per cent, or at the option of the customer the Company shall supply energy at 5 mills per kilowatt hour with no delivery (minimum) charge where such installations for less than 100 horsepower are made at the customer's expense. For installations of $7\frac{1}{2}$ horsepower or less the

customer's will be required to participate in the cost of the lines to serve, in accordance with the Company's established extension policies.

"The electric current supplied shall be in such form as to be available for the pumping requirements of the area. In case the commercial rates for power at any time are lower than the said rates for a like service, the commercial rates during such time shall supersede those herein stated.

"9. As a further consideration for the rights and benefits accruing to the Company by reason of the control and operation of the dam and the storage of water in Upper Klamath Lake, the Company hereby agrees to pay to the United States, by Douglas McKay, Secretary of the Interior, the sum of Three Hundred Thousand Dollars (\$300,000.00) per annum in lawful money of the United States, payable annually on the _____ day of _____ 1954, and annually thereafter. Which money shall be held by the said Secretary for the use and benefit of the land owners within the Klamath Project and shall be applied by the Secretary to the Operation and Maintenance charged to the various Districts and individual water users within said Project, to the end that all of the irrigable land within said Project shall benefit to that extent from the funds paid by said Company.

"10. As further consideration of the rights and benefits accruing to the Company by reason of the control and operation of the Link River Dam and of the benefits to be derived by the Company from the construction of a storage dam at the Boundary Site on Lost River, the Company hereby agrees to participate in the cost of construction of such dam. Subject to Congressional authorization, the United States, through the Bureau of Reclamation, will construct said storage dam and reservoir at the Boundary Site on Lost River according to plans and specifications to be approved by the Company and by the Secretary of the Interior. Cost of the above dam and reservoir is to be apportioned as follows:

"A. One quarter of the total cost is to be paid by the Company in consideration of the storage benefits that have and will accrue for power development.

"B. One eighth of the total cost is to be paid by the U. S. Fish & Wildlife Service out of Duck stamp revenues, in consideration of the wildfowl benefits which will accrue in the Clear Lake Basin and said Boundary Reservoir.

"C. The remaining five-eighths of the cost is to be paid by the Bureau of Reclamation out of agricultural and grazing lease revenues to be derived by reclaiming and leasing approximately 20,000 acres of the bed of

Clear Lake, all of which will be made possible by construction of said Boundary Dam and Reservoir.

"The United States, through the authorized representative of the Bureau of Reclamation, shall at all times control and operate the outlets of said dam for the best interest of the Project.

"11. The failure of the Company to comply in their true intent and meaning with any of the provisions of this contract, shall render this contract subject to cancellation by the Secretary of the Interior upon 60 days' written notice to the Company stating the cause of such proposed cancellation, and in case of failure or refusal of the Company to comply with the provisions of this contract within the period allowed by the Secretary of the Interior, he may cancel this contract. After such cancellation, the Company shall have no further rights in regard to the use of the said dam and its appurtenances, including dykes, levees, flowage, easements and additional storage if any, the operation and control of which shall immediately pass to the United States.

"12. This contract shall bind and inure to the benefit of, as the circumstances may require, the successors and assigns of the parties hereto, including without limitation any Water Users' Association or similar group which may succeed either by assignment or by operation of law to the rights held in trust by the United States hereunder.