WH Sept
/55

1917 - 1955
COPCO CONTRACTS

COMPARATIVE ANALYSIS
by Lathrop Sept.1955

Together with
LEGAL POSITIONS OF (COPCO
(BUREAU

Lathrop

Water Resources
Center Archives

only other copy to Vice Chancellor
9/14/55 Phillips

Lathrop 21

9/13/65

COPCO CONTRACT

Index to This Special Subject

A. LICENSE

Federal Power Commission

Conditions

B. COPCO

1. Legal position statement October 19, 1954
   Harrison to Davis.
2. Legal position testimony April, 1926, of Herman Phleger, Chief Counsel before Congressional hearing.
3. Transcription of Boyle's testimony.

C. BUREAU

1. Position ~~offering~~ Opposing contract with Copco. Dec 19-1952
2. Report June, 1954, Regional Director Spencer on Upper Klamath River Basin.
3. Prepared statement before joint Klamath River Commissions October 26, 1954 (12 pages).

D. LATHROP

Comparative review proposed 1955 contract with 1917 and 1920 contracts.

F. L. LATHROP, *Consultant*
425 Yama St., Yreka, Calif.

A

F. P. C.
ORDER
CONDITION LICENSE

A

Appendix B

PROPOSED ORDER

The Commission orders that:

(A) A license be issued to the applicant under section 4(e) of the Federal Power Act for a period of 50 years from July 1, 1952 for the construction, operation and maintenance of major project No. 2082, subject to the usual conditions and provisions of the Act for licenses for such projects and the rules and regulations thereunder.

(b) The applicant be and is hereby authorized and directed to comply with the terms of paragraph 3 of the contract dated February 24, 1917 between the United States of America and California-Oregon Power Co., as amended January 28, 1919, April 27, 1920 and December 10, 1920 and as supplemented September 10, 1931 and April 22, 1941 and to maintain and operate Link River Dam as provided in said contract, until the expiration of the contract. (1967)

(C) The license incorporate the terms of paragraph (B) of this order and provide that upon the expiration of said contract of February 24, 1917, as amended and supplemented, the licensee continue to maintain and operate Link River Dam as provided in paragraph 3 of said contract, and comply with the terms of paragraph 3 of the contract, for the period of the license.

(Paragraph 3 provides for control between 4143.6 & 4137.0)

Typed Statement received from J. C. Boyle relative to position of his company and the Bureau at a meeting in Sacramento on October 15, 1954:

B 1

COPY

October 19, 1954

Dear Mr. Davis: (Bureau's attorney)

At the meeting held last Friday, October 15th, in the Reclamation Bureau's offices in Sacramento between representatives of the Reclamation Service and The California Oregon Power Company, Mr. C. H. Spencer, Regional Director, stated that he would not be willing to recommend to the Secretary of the Interior any negotiations looking to the extension of the Link River Dam contract of February 24, 1917 unless The California Oregon Power Company would make commitments in advance with respect to the water supply for irrigation of lands in the Klamath Basin, including Butte Valley and the Oklahoma District lands.

It was Mr. Boyle's understanding and mine that in substance the Bureau of Reclamation would insist as a condition to negotiations for contract extension that the company agree now that the contract subordinate the company's use of the waters of the Klamath River to the irrigation requirements for future irrigation of the Klamath Basin lands by the United States or its successors.

The company has always contended and still asserts that its rights to the waters of the Klamath River for generation of hydroelectric power stand ahead of all rights of the United States and other irrigators to the use of the waters of the River, except as otherwise provided in said Link River Dam contract and only during

not justified 1917 contract

See over

until 1967
F.P.C. order
Continued to 1967

its existence; and the company will continue to claim that all of its water rights have priority above and ahead of any future appropriations of the waters of the Klamath River or Upper Klamath Lake or their tributaries.

Nevertheless, in order that negotiations for contract modification and extension may be initiated and carried on The California Oregon Power Company hereby expresses through you and to Mr. Spencer its willingness that if the Secretary of Interior and his representatives and the California Oregon Power Company and its representatives can otherwise reach an agreement mutually satisfactory in all respects for the operation of Link River Dam and matters incident thereto, The California Oregon Power Company is willing that it contain provisions providing substantially as follows:

Subordinate
3 sources of
Water

1. That none of the waters of Upper Klamath Lake or its tributaries or those of the Klamath River shall be used by the company for any other purpose when the same may be needed or required by the United States for any irrigation or drainage district, person or association obtaining water from the United States for irrigation of lands lying within the Klamath Basin including the lands of Butte Valley and the Oklahoma lands, all of said lands being identified upon a map annexed to the agreement approved by the parties;

? what are they

2. That nothing in the contract shall interfere with the water rights acquired by the company prior to May 7, 1905;

3. That nothing in the contract shall be deemed to confer upon the United States or its successors any right to the use of

said waters for generation of electric energy, and that the United States shall during the term of the agreement refrain from utilizing said waters for the generation of electric energy without the consent or approval of the company;

4. That none of the said waters shall be transported beyond the Klamath Basin as herein defined and all return flow of water used for said purposes shall be in the Klamath River at a point upstream from Keno.

The sole purpose of this letter is to indicate certain of the conditions upon which The California Oregon Power Company is prepared to enter into an agreement with the United States respecting the operation of Link River Dam as provided in said contract of February 24, 1917 and unless such an agreement is made and entered into, The California Oregon Power Company reserves all of its rights with respect to the matters referred to herein.

Very truly yours,

(Signed by Copco's attorney Harrison)

1

CONGRESSIONAL HEARING

B 2

Source: Joint Hearing on S.3189 and H.R. 9493 - Klamath Irrigation District Suit Bill.

April, 1926. P. 27-28

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

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

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

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F. L. LATHROP, *Consultant*
425 Yama St., Yreka, Calif.

- - - - - - - -

Mr. Phleger. I am not prepared to go into that. I would not admit that. I think under the reclamation act the Secretary of the Interior has certain inherent powers which might be broad enough to permit of leasing power privileges. But the contract is not a lease. It is an adjustment of conflicting interests to water, whereby the United States secures priority, and in consideration of that priority and agreement the stream flow is maintained by regulating the lake.

As to any argument that might be made that this is a grant of water by the United States to the California Oregon Power Co., I would say this contract rather consists of a grant of water by the California Oregon Power Co. to the United States, because it waives its right to priority to save litigation. It says, "You can take all the water you want first." So I say that instead of its being a grant by the United States to the California Oregon Power Co. it is rather a grant of water by the California Oregon Power Co. to the United States.

Representative Leavitt. What happens at the end of the 50 years?

Mr. Phleger. At the end of the 50 years, according to the contract, the rights of possession of the company absolutely ceases. Now, we think the reason it was made 50 years was because it was thought some period should be put to it. We are confident that at the end of 50 years the wise policy which requires that water be not wasted but be put to economical use, as well as the right of California to have an equitable division of the waters of the stream, will result in the continued regulation of the waters of the lake, in much the same way as provided by the existing contract.

end 50 yr

2nd 50 yr. period

2

B3

Insert for Page 5:

Mr. Boyle stated that the primary purpose of his appearance was to ascertain if there is opportunity to reach an accord on certain controversial issues; and in order to facilitate such approach he thought his company would authorize or recognize the following conditions or stipulations:

(1) Prior right for all consumptive uses of water, present and potential, as set forth in the California Water Code

(2) The allocation of sufficient quantity of water from Upper Klamath Lake sources for all lands in Butte and Oklahoma Areas, as well as all land in the Upper Basin that could make beneficial use of water

(3) His company is convinced that there is ample supply of water for all beneficial uses including power, if spring run-off was stored and his company is prepared to develop such storage. He stated his company had been making preliminary studies for development of Round Lake, Aspen Lake and Long Lake Valley, at their own cost.

(4) His company would be willing to agree on a schedule of low power rates for all power required for pumping and drainage by districts from all surface and underground sources, provided the regulatory commissions would approve such preferential rates.

Mr. Bowles posed the question on how and when his company would undertake construction of the iron gate to eliminate fluctuations of the river. Mr. Boyle's answer was that such development work would be undertaken at the same time, and as part of the construction of Big Bend No. 2, if and when authorized.

copy just in for pg 5 redraft typing
12/20/54

Jan 27 Klamath talk
Bruce transcription
from notes

Jan. 27, 1955
meeting

Compact
confidential
B 3'
c/c
file copy

At 2:00 P. M. Mr. John Boyle, representing the California Oregon Power Company appeared before the meeting.

Mr. Boyle: First, I wanted to clarify a certain condition that has arisen, or ask a question about it. It seems that from Morrison and Knudsen, Mr. Morton and O. G. Stanley called on Mr. Edmonston and some of the others in Sacramento, and those gentlemen called me on the phone and told me it was the desire of this Commission that I write a letter covering some five or six questions that I might have in mind. I told them I wasn't writing any letter; that if this Commission wanted any information from me they would write and ask for it. They said you would meet today and it would be well if I was in the vicinity, and here I am. I have not written any letter and I don't know what you have in mind for additional information. About pumping rates . . .

Mr. Edmonston: I did not initiate this. Mr. O. G. Stanley, retired U. S. Army Eng. Corps, and J. R. Morton initiated this situation.

Mr. Boyle: They did not say they were there at my request, did they?

Mr. Edmonston: No. Not to my knowledge. Mr. Jones told me Friday evening that Mr. Morton called him on the phone, and Mr. Jones can tell us the conversation. I want to make this clear. I did not initiate this.

Mr. Jones: Morton had been in two or three weeks before and wanted to get something on the physical picture which I gave him. I gave him a copy of our Interim report, March 1954. He said they were interested in it. It was stuff that had been published by our office. He called last Friday and said Morrison and Knudsen had seen Mr. Stanley and he wanted them to come up, and Mr. Wells. Mr. Wells had been requested by your company to do anything they could to facilitate the proposed work and that he and Stanley wanted to come up and talk to me about it. I told him it was no use. I am not a member of the Commission. I am assistant to State Engineer and even he could not speak for the whole Commission. As a result of that, I told Mr. Edmonston about it.

Mr. Edmonston: I did not call Mr. Stanley. Mr. Stanley called me at the office Saturday when I was working. I wasn't supposed to be. I said if they got there (to his office?) Tuesday morning by 8:00 o'clock I could talk to them. They did arrive at five to eight and I was there. I said, "What do you want to talk about? About the Klamath River __________? They said they were representing Morrison & Knudsen and not __________ Copco. They, Morrison & Knudsen, had prepared plans for a power plant on the Klamath River below Keno. I said I was just a member for the Commission and could not speak for them. If I were the Power Company I would suggest that if the Power Company wanted to, it could write a letter. But it was up to you to do that. A member of the Commission wasn't asking the Power Company for anything.

If the Power Company wanted to submit information in writing to the Commission, that was up to Copco.

Mr. Jones: They came into my office and got two phones and I walked out.

Mr. Boyle: They called me.

Mr. Jones: They implied that you were going to submit such a letter.

Mr. Boyle: I told them I would not write a letter unless the Commission requested it. The only reason I brought it out was to ask if there was some information you wanted me to indicate in a letter.

Mr. Edmonston: I told Mr. Stanley and Mr. Morton I did not know what the agenda was and it would be agreeable with Mr. Hagelstein for you to appear with or without a letter. I was not asking for any information for myself or the Commission.

Mr. Boyle: One of the things they mentioned was about our Program of re-regulation of the River. It wasn't clear to me in your Resolution wherein you state "Whereas, certain provisions in the Copco application included lack of proper provisions for control of fluctuations ________________________________ these areas. I assume that you meant we had made no provisions for re-regulating the River below these projects, but our license does show there is a regulating dam in it which is supposed to take care of re-regulation and fluctuations.

Regulation

Mr. Bowles: You wrote me and sent a copy of the application and you referred to provisions of re-regulating at Iron Gate, but there were no specifications. Our interest is that re-regulating be done at any time you do any other development.

Irongate

Mr. Boyle: The regulating dam was so labeled on the drawing I sent you.

Mr. Bowles: But it didn't give any idea of what it would be. That dam should be built at the same time as any other regulating on the River and not left to the last.

Mr. Stearns: Returning water to the River. Your Iron Gate was in your application?

Mr. Boyle: Yes.

Mr. Bowles: (Said something I didn't get)

Mr. Boyle: With increased irrigated areas included in Butte Valley and others this regulating dam will have to be so regulated that we are only releasing the amount of water that comes in at Keno.

Mr. Stearns: . . . only take care of fluctuation caused by you. Will spill by you . . .

8/30/55
Davis, Best & Bill read this from official copy & said who said that. Bernice will see notes & she can tell. RH

Mr. Bowles: (came in here) 24-hour period?

Mr. Boyle: Better than that. It will be a weekly cycle. In your Resolution, in the next to the last paragraph, "Commission request Secretary to withhold power contract . . ." Do I understand that the contract negotiations will have to come after the compact has been completed? We were going on this theory - we were trying to get the contract written up in ~~regular~~ Legal terms and submitted.

A Commission Member: We will be through in June. In the meantime, you can negotiate.

Mr. Boyle: You will be through by June? I made this statement several times. We can't get anywhere until we have some kind of contract. We can only negotiate with the Government. Let's get a contract drafted that covers everything we have agreed upon.

Mr. Bowles: Will that include definite rates?

Mr. Boyle: No. It will include pumping rates applied to the irrigated area which furnishes the water. We will make application to the State Commission setting up the same rate for pumping projects for the other areas included in the boundaries. The Butte Valley rate will be the same as the others.

A Commission Member: Does that include Shasta Valley?

Mr. Boyle: No, we did not include Shasta Valley.

Mr. Bowles: Would there be much difference in the rate?

Mr. Boyle: Yes. Between a third and a half.

Mr. Stearns: (He said something that ended with "to protect you.")

Mr. Boyle: At the end of the 50 years we will have the problem of getting some new licenses.

Mr. Stearns: (said something ending with "If the two are tied together so there will be no conflict, it will be to your advantage.")

Mr. Bowles: Could you give me the amount of water which your company is prepared to acknowledge should be allocated to Butte Valley? Some extra storage is going to be necessary.

Mr. Boyle: I don't know that we have any figure in mind to allocate to Butte Valley and the Oklahoma District. If we are making this stipulation that whatever is the required amount of water to economically irrigate this district, that water can be utilized prior to __________. A lot of Butte Valley can be irrigated by ground supply. You might take 30,000 to 50,000 acre feet. I the reservoir

will make our position clear. We can't say that Butte Valley is entitled to any water or an economic amount of water, whatever its needs; so long as this contract is in effect it has a priority for use. We do contemplate the storage in Aspen Lake. There are three steps to it:

storage

salvage waste

(1) to utilize 150,000 feet in Aspen Lake
(2) to be supplemented by another 150,000
(3) Round Lake - 150,000.

Same capacity as Upper Klamath Lake which allows twice the storage we have now for Upper Klamath irrigation, and utilizes the average yield __________. That is about 450,000 acre feet that runs down the River which could be saved by storage.

Mr. Stearns: This proposed reservoir for Butte Valley?

Mr. Boyle: No, I don't think so.

Commission Members asked him some questions I didn't get, here.

Mr. Boyle: How much volume?

Mr. Jones: 250,000 acre feet of storage.

Commission Members asked more questions I didn't get. To the last one,

Mr. Boyle: said, "First two steps - yes. Would drop back into Klamath Lake (or River?) On the third step - no."

A Commission Member asked: Would the company be interested in a percentage participation?

Mr. Boyle: It hasn't come up. If there is any available under the 120 foot head, we would be very happy to consider it. Anything to conserve all the water in this Valley.

Mr. Stearns: It would be one more guarantee for a steady flow for Copco.

Commission Members asked more questions, and Mr. Bowles said: "Who determines the priority?

Mr. Boyle: Determine that by surface cost. If it isn't economically justified, settlers will lose their pants and someone will have to pay for it. You have got 15,000 acres to be irrigated by pumping and another 15,000 by supplemental water, then I would say you have to have 30,000 acre feet.

Butte economic feasibility

Mr. Bowles: Who is going to determine that so it won't be disputed?

Mr. Boyle: I have been over Butte Valley many times. You fellows who own the land can determine how much you can afford to pay for water. If you take 30,000 acre feet out of Klamath Lake and utilize Meiss Lake: ____________ it will be enough. If you farmers think you can make an adequate return on the land for $10.00 water, I think that should be the gauge. I am sorry I cannot answer.

Mr. Hagelstein: Your company would be willing to stand back and let them have water as they wanted it? You would not raise an objection?

Mr. Boyle: Not so long as the terms of the contract are lived up to. You might only develop 5,000 acres. We are gambling on a 50-year contract. All these areas have a right to use water. There is only one other limitation to the extension: it isn't going to be taken to any other watershed. Such as Pit River.

no expedition

Mr. Hagelstein: Would you tell us what your company's stand would be if something is written into a Compact in regard to Shasta Valley?

Mr. Boyle: If you take it out between Keno and the stretch where we have this proposed project . . . There, it would wash us out of the picture. .... make a separate deal on that one.

A Commission Member: You would be willing to let it be taken out below your plants?

Mr. Boyle: Yes. If possible to pumping Copco Lake or below Iron Gate, Shasta Valley has some wonderful storage possibilities. Why is not that water conserved?

A Commission Member: (asked a question)

Mr. Boyle: Certainly. We would be glad to have you work out a deal below Copco. Pumping should be reduced to a minimum. The use of reservoirs over a period of time. We are for the development of Shasta Valley if the water is not taken out between Keno and Copco. I thought ______________________ Ikes Mountain.

A Commission Member: We came to the conclusion that Ikes Mountain is not feasible.

Mr. Bowles: Write a letter to us on what you have agreed here today.

Mr. Boyle: Have we mutually agreed upon anything until this contract is made? It is already in your record. You got a letter covering the power situation and one covering the water situation. Ask the Secretary to write me a letter asking for specific information.

A Commission Member: A letter covering your three points.

Mr. Jones: One other thought on Shasta Valley. If it would be possible to divert from Copco Lake, that could save some 300 feet a lift.

When and if we get into planning. I don't know if feasible or not until we get into it, but if that could be diverted in 300 feet a lift during times of flood water and off peak power, and we could find some storage, would it be otherwise __________ possibilities?

Mr. Boyle: The solution to the whole thing is being able to pump off peak periods amounts. It is never possible to pump all the water at the time we need it. We would be glad to give you a letter if I knew more about it. If you will give me a letter giving load characteristic count and giving me the amount of power you want, we will stick our necks out at any time on that.

Mr. Edmonston: (He read from some report - Oregon Commission?) What is your claim right at Keno under present conditions as related to the license of the Federal Reclamation Project?

Mr. Boyle: Just exactly as shown except it only protects us on two rights; two on Link River, 205 and 150.
. . . as far as priority and filing. When we are negotiating the terms of the contract, power rights which are prior to the United States are to be recognized. .... you might store and pond water and get better use.

A Member: ______________________________

Mr. Boyle: I assume that the whole thing would blow up.

Mr. Edmonston: I assume that everything is approved.

Mr. Boyle: ____________________ I don't think your Compact can set up the rights. Or you could set up an agreement. If you are going to adjucate water rights of the situation ____________________.
We have been trying for a long time to settle differences by agreements and not by litigation.
We are not negotiating new water rights.
We are agreeing that whatever water rights we might have prior to the U. S. Any waters we may use from Klamath Basin have rights but we are not in favor of ______________ Butte Valley can take water right out of the Basin. Or Butte Valley.

Mr. Boyle: If we didn't think the U. S. owned all the water. I thought the water still belonged to the States. Should get rights to use water from the State. We expect to go to Oregon and California. But we are saying to Oregon that store __________________. We are willing to say that for 50 years Butte Valley or the Indians can use that water so long as they bring it back to Keno.

3

C 1

No. 2082

Before the

FEDERAL POWER COMMISSION

In the Matter of	)	
	)	Docket No. E-6390
THE CALIFORNIA OREGON POWER COMPANY	)	

REPLY BRIEF OF THE SECRETARY OF THE INTERIOR, AS INTERVENOR

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December 19, 1952

Hearing K Falk June 30 July - 52

2/24/53

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Cases Cited

Statutes Cited

Miscellaneous Material Cited

In the Matter of)
) Docket No. E-6390
THE CALIFORNIA OREGON POWER COMPANY)

REPLY BRIEF Nov 10 1952
OF THE SECRETARY OF THE INTERIOR,
AS INTERVENOR
Dated: Sacramento, Calif, this 19 day Dec 1952

STATEMENT OF THE CASE

Docket No. E-6390 is a proceeding commenced by the Federal Power Commission to require The California Oregon Power Company (herein sometimes referred to as "Copco") to show cause why it should not file application for licenses for five of its existing hydroelectric plants located on the Klamath River in Oregon and California. Docket No. E-6390 and Copco's application for license for a new hydroelectric project, also to be located on the Klamath River, designated as Project No. 2082, were consolidated for hearing by a Commission order dated May 1, 1952.

The Secretary of the Interior petitioned the Federal Power Commission for permission to intervene in both of the above proceedings on June 19, 1952. The petitions were granted by order of the Commission dated June 25, 1952.

On November 10 the Interior Department filed its brief in reply to the main brief of Copco relating to its application for license for

Project No. 2082. The previous reply brief contains a general statement of the evidence presented in the consolidated hearing and the position of the Interior Department. Inasmuch as the proposed Project No. 2082 is located on the Klamath River and would be operated in conjunction with Copco's five existing plants, the questions for consideration in the two proceedings are closely related. Moreover, the principal point of interest to the Interior Department in the Order to Show Cause proceeding — whether the Commission has authority to grant a license based on the utilization of surplus water from a Federal reclamation dam — was raised by Copco in its main brief in relation to Project No. 2082. Consequently, the general position of this Intervenor on this subject also was presented in its previous reply brief.

As stated, the Department of the Interior is directly concerned with the Order to Show Cause proceeding to the extent that jurisdiction by the Commission may be based on the use of surplus water from Link River Dam, which is owned by the United States and under the administrative jurisdiction and control of the Secretary of the Interior. Accordingly, this reply brief will be confined to a discussion of that general problem.

ISSUES

K Project is legally & physically different from most govt projects 2 states made possible under specific & limited purpose which after 50 yrs is breached in performance & violation of trust on use & disposal

I

DOES THE FEDERAL POWER COMMISSION HAVE THE AUTHORITY TO ISSUE A LICENSE TO UTILIZE SURPLUS WATER FROM A RECLAMATION DAM WHICH IS UNDER THE ADMINISTRATIVE JURISDICTION AND CONTROL OF THE SECRETARY OF THE INTERIOR?

II

DOES THE SECRETARY OF THE INTERIOR HAVE EXCLUSIVE ADMINISTRATIVE AUTHORITY TO DETERMINE WHETHER THERE IS SURPLUS WATER AT A FEDERAL RECLAMATION DAM?

III

ASSUMING THAT THE COMMISSION HAS AUTHORITY TO ISSUE LICENSES BASED ON THE UTILIZATION OF SURPLUS WATER FROM LINK RIVER DAM, WOULD THE COMMISSION BE REQUIRED, UNDER SECTION 4(e) OF THE FEDERAL POWER ACT, TO DELAY THE ISSUANCE OF ANY LICENSES FOR TWO YEARS AFTER REPORTING THE MATTER TO CONGRESS?

need definition

IV

DOES THE AUTHORITY OF THE COMMISSION TO ISSUE LICENSES BASED ON UTILIZATION OF SURPLUS WATER FROM legal point well taken

A GOVERNMENT DAM EXIST ONLY WHERE THERE IS A DIRECT PHYSICAL CONNECTION BETWEEN THE POWER PLANT AND THE DAM?

V

ASSUMING THAT COPCO IS NOW USING SURPLUS WATER FROM LINK RIVER DAM, DOES THE 1917 CONTRACT BETWEEN THE COMPANY AND THE UNITED STATES CONSTITUTE A PERMIT WITHIN THE TERMS OF SECTION 23(b) OF THE FEDERAL POWER ACT, EXEMPTING COPCO FROM THE JURISDICTION OF THE COMMISSION BASED ON UTILIZATION OF SURPLUS WATER FROM A GOVERNMENT DAM?

ARGUMENT

I

THE FEDERAL POWER COMMISSION DOES NOT HAVE THE AUTHORITY TO ISSUE A LICENSE TO UTILIZE SURPLUS WATER FROM A RECLAMATION DAM WHICH IS UNDER THE ADMINISTRATIVE JURISDICTION AND CONTROL OF THE SECRETARY OF THE INTERIOR

Section 4(e) of the Federal Power Act grants to the Commission the authority and power:

> "To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission

lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: * * *" (Emphasis supplied.)

Section 23(b) of the Federal Power Act is closely related to section 4(e). Section 23(b) provides in part:

> "It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. * * *" (Emphasis supplied.)

The quoted provisions of the Federal Power Act are general in scope, ostensibly relating to all types and varieties of Government dams throughout the country. However, in contrast to this general authority, the Secretary of the Interior has been empowered specifically under reclamation law since 1906 to grant power privileges in connection with Government dams under his jurisdiction and control for reclamation purposes.

The Act of April 16, 1906, 1/ provides in part:

"Sec. 5. That whenever a development of power is necessary for the irrigation of lands under any project undertaken under the said reclamation Act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the moneys derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided*, That no lease shall be made of such surplus power or power privilege as will impair the efficiency of the irrigation project."

? did 1917 contract

The Reclamation Project Act of 1939, 2/ section 9(c), provides in part:

"* * * Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: * * * The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and

violation of specific & limited specific authority given by statute in enacting act.

1/ 34 Stat. 116. Get copy State library

2/ 53 Stat. 1187.

? any change or enlargement of provision of 1902 Rec act ?

> alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."

this should eliminate any right reserve before ascertain ultimate water needs of basin river Basin

It is a well accepted fundamental of statutory interpretation that a specific statute takes precedence over one of general applicability. [3] It is significant also that the Federal Power Act became law in 1920. The specific authority of the Secretary of the Interior to lease power privileges at Federal reclamation dams was reaffirmed and expanded in 1939. If the Federal Power Act were effective as to reclamation dams prior to 1939, certainly, by implication, those provisions of the 1920 act in conflict with the Reclamation Project Act of 1939 were repealed. The only reasonable conclusion to be drawn from these statutes is that the authority to grant power privileges at a Government dam under the administrative control and jurisdiction of the Secretary of the Interior, whether that grant of privileges be for the use of surplus water or otherwise, lies exclusively with the Secretary of the Interior.

We are not unaware that the language of the first proviso of section 10(e) of the Federal Power Act suggests that reclamation dams are within the contemplation of section 4(e). Section 10(e)

3/ 2 Sutherland, Statutory Construction (3rd ed. 1943) p. 542.

relates to the charges to be included in licenses involving the "use, occupancy, and enjoyment" of "lands or other property" of the United States. The proviso states:

> "Provided, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: * * *" (Emphasis supplied.)

However, as heretofore stated, the fact that the Congress, nineteen years after the Federal Power Act became law, approved a comprehensive reclamation act specifically authorizing the Secretary of the Interior to lease power privileges at reclamation dams, supports the conclusion that the Congress intended to repeal any provisions of the Federal Power Act in conflict with the Reclamation Act of 1939. The Reclamation Act of 1902 [4/] and the numerous acts amending and supplementing that original act, including in particular the Reclamation Project Act of 1939, [5/] clearly are intended to give to the

4/ 32 Stat. 388.

5/ Footnote 2, supra.

Secretary of the Interior the exclusive control and responsibility for Federal reclamation activities. There is nothing in the Federal Power Act itself, or in its legislative history, which would suggest any intent to authorize the Federal Power Commission to take any action which would in any way interfere with Federal reclamation activities.

Apart from the legal aspects of the question, policy considerations alone should cause the Commission to decide that it should not attempt to exercise jurisdiction over a Federal reclamation dam. Certainly, administrative chaos would result if two separate Federal agencies were to attempt to exercise separate control over the use of surplus water for the production of power at a given dam. The case of Green Bay and M. Canal Co. v. Patten Paper Co. 6/ was quoted at length in our reply brief on Project No. 2082. That case involved the right of a private corporation to water power incidentally created by the erection and maintenance of navigation structures in the Fox River in Wisconsin. In its decision, the Court stated at page 80:

> "* * * At what points in the dam and canal the water for power may be withdrawn, and the quantity which can be treated as surplus with due regard to navigation, must be determined by the authority which owns and

6/ 172 U.S. 58 (1898).

controls that navigation. <u>In such matters there can be no divided empire</u>." (Emphasis supplied.)

It is equally true in connection with the problem here presented that "there can be no divided empire" between the Interior Department and the Federal Power Commission with respect to the development of power from water available at a Federal reclamation dam. ok

only surplus - if so when

Moreover, in the instant case, so far as the United States is concerned, the Secretary of the Interior already has assumed jurisdiction of the relationship between Copco and the United States. Copco has been operating its existing plants under a long term contract with the Secretary since 1917. Would it not be most inappropriate for the Commission to inject itself into this relationship at this late date? yes

In this general connection, attention is invited to the fact that the quoted proviso of section 10(e) specifically states that the charges to be paid to the United States by a licensee utilizing a reclamation dam are subject to the approval of the Secretary of the Interior. If the Commission, contrary to the recommendation of the Secretary, should require the licensing of the Copco plants based on the utilization of surplus water from Link River Dam, the provisions of the licenses with respect to the charges would require the approval of the Secretary of the Interior.

of all (100%) run off can be controlled & regulated — no wasting of flood — there should be enough for firm power — when

II

THE SECRETARY OF THE INTERIOR HAS EXCLUSIVE ADMINISTRATIVE AUTHORITY TO DETERMINE WHETHER THERE IS SURPLUS WATER AT A FEDERAL RECLAMATION DAM

This argument is closely related to the discussion just concluded. As a matter of law, we believe that the Commission has no authority to grant licenses which in any way involve the use of a Federal reclamation dam. However, even if it were assumed that the Commission has coordinate jurisdiction with the Secretary of the Interior with respect to granting rights to utilize surplus water from such dams, certainly the determination of whether, in fact, there is any surplus water is within the sole jurisdiction of the Secretary of the Interior. To hold otherwise would be to permit the Federal Power Commission to encroach upon the statutory responsibilities of the Secretary. It would place the Commission in a position to prevent the use of reclamation facilities for the principal purpose for which they were constructed.

no authority

U.S. states ceding all exclusive power over disposal of lands (not water)

a good point

The Government dam with which we are concerned is Link River Dam. This dam is located immediately below Upper Klamath Lake, near the mouth of the Link River, a short river which connects Upper Klamath Lake and Lake Ewauna, the point

? waste from UKL to Lost river ?

of origin of the Klamath River. Essentially, all of the water used or to be used by Copco in its five existing hydroelectric plants and the proposed Project No. 2082 must come from Upper Klamath Lake via Link River Dam. The dam is owned by the United States and is under the operational control of the Secretary of the Interior. At present, the dam is operated by Copco under the terms of a contract entered into in 1917 between that company and the United States (Ex. 1). The contract expires in 1967. Under the terms of the contract, Copco is allowed to make restricted releases of water from Upper Klamath Lake, provided that irrigation needs are first satisfied. As consideration for this privilege, Copco, among other things, purchased the dam site, built the dam, conveyed the dam to the United States, and gives favorable power rates to the Klamath Project of the Bureau of Reclamation. Under these circumstances, it is difficult to conclude that the water used by the Copco plants is surplus water, since in exchange for its use Copco is extending real and substantial benefits to the Federal reclamation project for which the dam was built.

irrigation priority

Sound reasoning 4 consideration

In any event, up to the present time, there has been no determination by the Secretary of the Interior as to whether there is or will be any surplus water from Link River Dam. No such determination can be made intelligently and conscientiously by the Secretary until after the completion of the Department's pending

June 1954 will be public

find report after basin only

comprehensive survey of the resources and requirements in the Klamath River Basin for irrigation, fish and wild life, power, and other beneficial uses. The Secretary's position is clearly necessary to a proper discharge of his duties and responsibilities under the reclamation laws with respect to making examinations and surveys for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands; with respect to constructing and operating reclamation projects and Indian irrigation projects, including structures for the production, use and sale of electric power and energy; and with respect to the administration of the existing Klamath Project.

III

ASSUMING THAT THE COMMISSION HAS AUTHORITY TO ISSUE LICENSES BASED ON THE UTILIZATION OF SURPLUS WATER FROM LINK RIVER DAM, THE COMMISSION WOULD BE REQUIRED, UNDER SECTION 4(e) OF THE FEDERAL POWER ACT, TO DELAY ISSUANCE OF ANY LICENSES FOR TWO YEARS AFTER REPORTING THE MATTER TO CONGRESS

not yet been done 1954

The third proviso, section 4(e), of the Federal Power Act states:

> "*Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the

> facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: * * *" (Emphasis supplied.)

The meaning of this language is without ambiguity. Should the Commission determine that the Klamath River is navigable, it would necessarily have to find that Link River Dam is being, and will be, used advantageously by the United States for <u>public purposes</u>, in addition to navigation, since it has been used, and is now being used, for reclamation purposes. Assuming that the Commission has authority to license the use of surplus water from Link River Dam, and the further authority to determine whether there is such surplus water, then clearly the quoted proviso requires the Commission to report the facts and conditions to the Congress and to wait for two years before issuing any licenses relating thereto.

IV

THE AUTHORITY OF THE COMMISSION TO ISSUE LICENSES BASED ON UTILIZATION OF SURPLUS WATER FROM A GOVERNMENT DAM EXISTS ONLY WHERE THERE IS A DIRECT PHYSICAL CONNECTION BETWEEN THE POWER PLANT AND THE DAM

This Intervenor suggests that the authority of the Commission under sections 4(e) and 23(b) of the Federal Power Act to license the use of surplus water or water power from a Government dam is limited to situations in which there is a physical connection between the Government dam or appurtenant facilities and the works of the applicant, e. g., the use of penstocks in the dam. We find nothing in the Federal Power Act or its legislative history to suggest that these sections have reference to the situation pertaining with respect to Copco's five existing plants, or the proposed Project No. 2082, in which there is involved only a water regulation for plants lying many miles downstream from a Government dam.

This interpretation of sections 4(e) and 23(b) is fortified by section 10(f) which provides:

> "That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.
>
> "Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 17 hereof.

> "Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement." (Emphasis supplied.)

Link River Dam, at the headwater of the Klamath River, is a Government improvement which increases the storage capacity of Upper Klamath Lake and makes feasible the production of power at plants many miles downstream. This is precisely the situation contemplated by section 10(f). If the Congress by the use of the phrase relating to the utilization of surplus water from a Government dam in sections 4(e) and 23(b) had intended to cover "headwater improvement", no purpose would have been served by including the first two paragraphs of section 10(f). If the Commission has initial jurisdiction under 4(e) and 23(b), it has ample authority to impose proper charges for the use of Government property -- including surplus water -- under 10(e). Moreover, 10(f) specifically authorizes the imposition of charges for headwater improvements when a license is being, or has been, issued based on one or more of the jurisdictional grounds set forth in 4(e) and 23(b) or, under the last paragraph of 10(f), even where a project is not under license. It must be presumed that section 10(f) was designed to give the

Commission authority it would not otherwise have had.

It is to be concluded, therefore, that sections 4(e) and 23(b) were not intended to cover a case where there is no direct physical connection between the Government dam and downstream power plants. This physical situation, existing in the present case, was intended to be covered under the terms of section 10(f) relating to payment for the use of headwater improvements or storage reservoirs of the United States.

V

ASSUMING THAT COPCO IS NOW USING SURPLUS WATER FROM LINK RIVER DAM, THE 1917 CONTRACT BETWEEN THE COMPANY AND THE UNITED STATES CONSTITUTES A PERMIT WITHIN THE TERMS OF SECTION 23(b) OF THE FEDERAL POWER ACT, EXEMPTING COPCO FROM THE JURISDICTION OF THE COMMISSION BASED ON UTILIZATION OF SURPLUS WATER FROM A GOVERNMENT DAM

Section 23(b) of the Federal Power Act reads in part:

> "It shall be unlawful for any person * * * to * * * utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. * * *" (Emphasis added.)

Essentially all of the water used by Copco in its existing hydroelectric plants is made available pursuant to the terms of a valid permit, i. e., the 1917 contract between Copco and the

1917 contract is permit

not sufficient storage to control all water

Secretary of the Interior relating to Link River Dam. This permit was granted prior to June 10, 1920. It is still in effect. It will not expire until 1967.

will not expire 1967

As was pointed out in the intervenor's reply brief on Project No. 2082, the Secretary of the Interior controls the use of virtually all of the waters of the Upper Klamath Lake. The 1917 contract was made in recognition of his authority. No question has ever been raised with respect to the validity of the 1917 contract. Consequently, it must be concluded that this contract constitutes a permit within the requirements of section 23(b) of the Federal Power Act, exempting Copco from the jurisdiction of the Commission based on the utilization of surplus water from a Government dam.

1917 contract permit order

utilization of surplus water Govt stored

CONCLUSION AND PROPOSED FINDING

The Federal Power Commission has no authority to issue licenses for the five existing power plants of Copco located on the Klamath River or for the proposed Project No. 2082 on the ground that these plants use or will use surplus water from Link River Dam. It is recommended that the

Commission so find.

Respectfully submitted,

Oscar L. Chapman
Secretary of the Interior

By

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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

In the Matter of)
) Docket No. E-6390
THE CALIFORNIA OREGON POWER COMPANY)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Reply Brief of the Secretary of the Interior, as Intervenor, upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each of the following persons, to wit:

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Dated: Sacramento, California, this 19th day of December 1952.

E. K. Davis
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Of Counsel
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Harris 8/29/55 Spencer

refer Spencer to the report of June-54 paragraph 51 why did he be first one to step out of the framework he set for comprehensive development.

Opening Statement June 30 1952
Bureau legal - to Fed Power Com
on Project # 2082

take copy my binder & index on each approach & those previous to & this last one
new copy for vice chairman & the official record
& on separate sheet make abstract of Spencer's and Bureau ~~action~~

F. L. LATHROP, *Consultant*
425 Yama St., Yreka, Calif.

F, 3. From Bureau of Reclamation report on the Upper Klamath River Basin (June, 1954)
Pages 27 - 30.

C2

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

Co/co (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 pl ce 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 mimimum 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.

ground water completed mch-53

(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.

Congress

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.

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copies for all members both com handed before Murray started reading.

C 35

Ref minutes 19-8 joint meeting Oct 26-54

10/26

Statement of A. N. Murray, Regional Planning Engineer,
Region 2, Bureau of Reclamation, Sacramento

I am A. N. Murray, Regional Planning Engineer of Region 2, Bureau of Reclamation. I appear here today in response to the invitation contained in Mr. Hagelstein's letter of October 13 to Mr. Clyde H. Spencer, Regional Director of the Bureau. I am authorized by Mr. Spencer to represent him and to present this statement to the California and Oregon Klamath River Commissions. At its conclusion, I and my associates, Mr. Donald A. Gray and Mr. Clifford Lawrence, also Elmore will be pleased to answer in so far as possible any questions of the Commissions' members.

The statement which I will make has necessarily been assembled somewhat hastily because of the limited time available for its preparation. The statement has been prepared against a background of Mr. Spencer's recently completed draft of report on the Upper Klamath River Basin, the informal comments thus far received by us on that draft of report, and statements which have appeared in various newspapers and in letters to others.

I wish it were appropriate to display all of the letters Mr. Spencer has received since he released his draft of report. I am sure the native sense of humor with which the average American is blessed would be tickled a little to note the widespread views expressed. However, we regard these comments as completely informal, and offered solely for Mr. Spencer's consideration as he directs the revision of his draft report. Our senses of humor were tickled--but I must confess somewhat wryly--

for we have the task of revising a report on which the concerned local interests have expressed just about every conceivable point of view. These comments have two principal characteristics--they all have an opening paragraph which praises our report in general terms, followed by a series of paragraphs which thump us and our sister Bureau in the Interior Department about the ears for one reason or another. I am sure you will appreciate my hope that the deliberations of these Commissions will furnish a beacon as we begin to walk down what now appears a foggy path.

The subject matter is of grave importance to the present and future economy of the great interstate area defined in our report as the Upper Klamath Basin. It is a complicated subject, as witness the volumes heretofore written about it. In the interest of brevity, I expect to do only two things in this statement: first, to draw on history to show the atmosphere in which our investigation was carried on and completed. Second, to explain the nature of the report itself.

In 1900 practically none of the land in the Klamath Project area was irrigated. The small settlements which then existed did not consume any noticeable part of the Basin's water supplies. However, beginning at about that time, and progressing ever upward, the acreage of land under irrigation has climbed. At the same time, its population has grown, as have its industries. The result has been growth in consumptive use of water. In 1907, about 7,000 acres of land were irrigated on the new Klamath

Reclamation Project. By 1931, 117,000 acres of land were irrigated on the Klamath Project, and irrigation outside the Project boundary also 2 had grown. Today, nearly 200,000 acres of land are irrigated on the Project, and further growth has been experienced in irrigation outside its boundaries. Irrigated agriculture has grown to the place where it is now a major inudstry of the whole interstate area.

This growth in irrigated agriculture, with its attendant increase in the consumptive use of the basin's water supplies, has not been achieved without periodic conflict among the many agencies which have wished to use water for various purposes. It was clear to us, however, 7 years ago, and was clear to informed people generally, that the time had come to look at the remaining land and water resources of the basin broadly. This seemed necessary so future plans for development of those resources might be coordinated and thus aid the maximum economic development of the basin. With this in mind, we initiated the investigations which have led to our recently completed draft of report.

During the course of the investigation, events occurred and facts were developed which have influenced markedly the report itself. This is not surprising since the basin, the Region, and the entire west have undergone radical changes during the past 7 years. Some of these events and some of the facts uncovered have made it clear that there is not agreement on the part of many local groups and official agencies as to the way in which these water resources should be developed and the

?

1954
1947

policies which should govern their utilization. Also, conflicting legal positions have been advanced during this 7-year period. As a result, our report recommends no projects for construction, aside from the small projects which would develop part of the Klamath Straits area and minor extensions of the Klamath Project. Neither does our report recommend that detailed investigations be made at this time of the many alternative ways of developing the basin's water resources. On the contrary, the primary recommendation in our report is that responsible local and state agencies establish a few policies to guide all agencies working in the basin in the future. If this is done, each of us can do that part of the total job appropriate to our responsibilities and authorizations.

One facet of Klamath Basin development has received a substantial amount of attention by Secretary McKay, whose interest in the basin is well-known to all. This facet concerns a contract executed in 1917 by the United States and the California Oregon Power Company. The term of the contract expires in about 13 years. It has been requested that the term of this contract be extended or that a new contract be prepared on substantially the same basis. However, Secretary McKay recognizes the influence which the existing contract and any extension or modification of it might have on the uses of water in the Upper Klamath Basin. He therefore has stated that he does not wish to extend the contract or to modify it until he has before him the views of all local interests thereon. The draft of Klamath Basin Report which we recently completed was prepared, among other things, with the thought that it could present a body of fact which would aid the local people and the Secretary in identifying their wishes in this regard.

My attention has been invited to a recent newspaper article quoting a responsible local official as stating: Who ?

> "The pressing issue now, of course, is the negotiation between COPCO and the Bureau for development of power on the river. The question to be resolved is whether the Bureau pumps water into Butte Valley and then drops it into the river again above Copco Lake, generating power at one plant at that point, or whether COPCO develops power in a series of plants down the 1310 foot fall of the canyon between Keno and the California line."

The first sentence of this quotation bears repetition: "The pressing issue now, of course, is the negotiation between COPCO and the Bureau for development of power on the river."

We disagree with this statement. We view the question identified by the author as non-existent, for at no point in our report do we propose that the Bureau of Reclamation construct a powerplant in the Klamath River Basin. More serious, however, is an opinion we hold and have expressed as to the only real issue. This issue is the priority of use of water in the Klamath River Basin as between consumptive uses for irrigation and other purposes, and the production of hydroelectric energy. A brief review of the history of the past four years will, I believe, explain the difficult situation which has faced our office in this connection.

Until November 10, 1950, it had been our understanding, that by its filings made pursuant to the 1905 Act[1], the Reclamation Service--

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1/ Ore. Laws, C. 228; Ore. Comp. L. Ann. Secs. 116-438, repealed by Ore. Laws, Sec. 2, C. 328

on behalf of both existing and future landowners of the Klamath Reclamation Project--had acquired rights to the use of all the then-unappropriated water of the Klamath River in Oregon. This understanding had been reinforced by a 1930 opinion of the Attorney General of Oregon. On November 10, 1950, the then-Attorney General of Oregon ruled that the Reclamation Service, by its filings under the 1905 Act, had acquired rights to the use of only such water as had ~~at that time~~ in 1950 been applied to beneficial use. Although we disagreed with the 1950 opinion as a matter of law, as a precautionary measure we filed another Notice of Intention to Utilize Water under the 1905 Act. In this latest filing, made in January 1951, we outlined service areas in all portions of the Basin which we then contemplated might be served through a reclamation project and which were then under study at the time.

legal water filing

Later in 1951, the California Oregon Power Company made application to the Oregon Hydroelectric Commission for a permit to construct the Big Bend No. 2 plant in the Klamath Canyon. Also in 1951, the Company made application to the Federal Power Commission for a license to operate the same plant. In both its applications, the Company presented evidence which purported to show that it had or could obtain rights to the use of certain quantities of water for operation of its proposed plant. At our recommendation, the Secretary of the Interior intervened in these proceedings and objected to the COPCO applications on the ground that the Company did not in fact possess the claimed water rights. It was Interior's position that the 1950 opinion of the Oregon Attorney General was in error as a matter of law. More important ~~that~~ than this was our position, based upon what we then believed and believe now to be sound water supply studies, that if COPCO's claims as to

what kind?

its water rights were upheld and water were used under them for power production in the Klamath River Canyon, there would not be adequate water available in the Basin above Keno to meet the requirements of substantial areas of land in Oregon and California which were not then under irrigation and which have no other source than the Klamath River for full or supplemental water supplies.

It is against this factual situation that we have prepared a draft of report outlining the potential uses of the water resources of the Upper Klamath Basin. As of this date, no official agency having jurisdiction in these matters has taken authoritative action to establish whether or not the consumptive uses of water above Keno, Oregon, shall have priority over the uses of water for producing hydroelectric energy in the Klamath River Canyon. Neither has the California Oregon Power Company committed itself formally to recognize such a priority. On the contrary, the Company has consistently taken and is maintaining today in the United States Circuit Court of Appeals, a position which, if upheld, makes it impossible for the Bureau of Reclamation to certify that the quantities of water are legally available for development of irrigated land beyond that now under irrigation in the Klamath Project. In stating this I do not wish to leave any inference that I am criticizing the Company for holding to a position which it believes to be legally sound. It is the Company's business to defend its property rights as it conceives them to be. This statement of the present situation does, however, pin-point the principal difficulty we have faced in projecting possible plans for Basin development.

Recently there have been indications that the Company is willing to concede additional consumptive uses of water within the Basin under as-yet-undefined conditions. Also, while our report was being printed, we were informed that the Oregon and California Klamath River Commissions, acting in concert, had expressed themselves as favoring a policy under which consumptive uses of water would take priority over its use for power. However, these expressions were advanced after our investigation was completed, and have not yet been adopted formally by the Company or by any agency having jurisdiction over the matter. Perhaps a little patience on the part of everyone will clarify the picture yet.

no action taken officially

As engineers, therefore, we have had to make estimates of water supply and water requirements, to project operating criteria, to advance potential plans for basin development, and to appraise the economic justification of these plans - all in an uncertain legal and policy atmosphere. Engineers frequently are faced with uncertainties. We have a tool we employ in such cases. The tool is called an assumption. If the assumption is incorrect, then all the calculations based on it may be incorrect. In the present case we assumed that all power uses of water would be secondary to consumptive uses.

What? revised procedure 6 1

Even if this basic assumption as to water policy is correct, it does not necessarily follow that the potential plans of development we have identified are also correct. Except for our studies of available water supplies under historical and present-day conditions of development, all of our investigations are of reconnaissance accuracy. Detailed investigations of the many alternative plans must be made before we can recommend to the Commissioner and the Secretary that any construction be undertaken by the Bureau of Reclamation.

7 construction

Our basic assumption as to water policy has led us to estimate the rate of growth of future irrigation and domestic requirements in the basin. Experts can have a field day with these estimates. The rate of growth of irrigation, municipal, and industrial demands depend upon local, regional, and National factors difficult to predict. Also - and very important - they depend upon the desires of very individualistic American farmers.

agree on [illegible] (7)

From all I have heard, qualified reviewers of our report agree with our estimates of available water supplies under both historical and present-day conditions of consumptive use. All such reviewers agree with us that existing storage capacity must be increased if tomorrow's water requirements are to be met. However, we have had to estimate the amounts of water which will be available in the future and under conditions of gradually-increasing consumptive use. Also, we have had to estimate a date when the available supply during periods of drouth would be less than the demand; we did this to establish a possible date when the new storage would have to be constructed and costs incurred.

7a [illegible] storage

time of storage

overall plan

The result of this pyramid of assumptions and estimates, and I use the term advisedly, is a potential plan of basin development. It is nothing more. And it must be viewed in proper perspective. We believe it is consistent within itself. That is, all the alternatives examined are based on the same pyramid. The alternatives, therefore, can be compared with one another, but not with some other plan based on other assumptions and estimates. To do so is to attempt the old trick of comparing apples and oranges.

9

An example of the impossibility of comparing alternate plans which have been based on dissimilar assumptions and estimates can be seen in connection with the potential power development plan advanced by The California-Oregon Power Company. The first phase of the plan is the Big Bend No. 2 project. COPCO, too, has made certain assumptions and estimates as to the streamflows which will be available in the future for its potential development. These flows are much larger than those we used in planning the development of the power head between Keno and Copco Lake. The disparity in water supplies estimated by the two agencies results in widely different installed capacities and energy outputs and is due to differences in three assumptions: first, we make allowance for our estimates of growth in consumptive use; second, we assume that more than twice as much water must bypass any diversions to powerplants for fish; and third, we apparently have been more conservative than COPCO in choosing the runoff years on which to base estimates of capacities and energy outputs. Furthermore, COPCO properly assumes that its plants will be operated as a part of its entire system and therefore would operate them to a great extent as peaking plants. We did not consider it appropriate in a reconnaissance investigation to assume that the hydroelectric plants we studied would be operated as peaking plants on any system. This widened still more the differences in installed capacities. Our two power schemes are both oranges - neither can be compared with the COPCO apple. To me, this doesn't mean that the situation is hopeless; perhaps if everyone works together, we can call the final product a peach.

Big Bend

Stream flow

4

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The assumption as to operating criteria also is important in regard

7a)

to any new major storage above Link River Dam. In order to have water available in critically dry years for the estimated growth in irrigation demand and for power, new storage must be created and water stored there must be carried over from wet years to dry years. Our studies to date show that the most economical and efficient way to secure the necessary water is by dredging certain shoal areas in Upper Klamath Lake. This scheme has not seemed unacceptable to us because the new capacity would have to be held full for use in dry years. Our operation studies are based upon criteria which would require lowering the lake below its present minimum level during only 7 of the past 77 years. In only one month out of the entire period would the lake level be drawn to Elevation 4130.5. The lake level would fall below Elevation 4135.0 for a total of nineteen months and below Elevation 4134.0 for a total of fourteen months out of the 77 years.

1st thing 1

All these are, however, details in the broad picture. All alternatives should be explored at a time appropriate to the needs of the Basin's economy. Most of all, policies as to priorities of use of water should first be established to guide all agencies - local, State, and Federal - public and private - in their plans for utilizing the Basin's water resources.

The Federal Government, principally the Department of the Interior, has a long record of participation in Klamath River Basin development. We in the Bureau of Reclamation are proud of the part we have had in that record. It is the policy of the Administration to cooperate with local and State groups in the development of the water and land resources of the Basin. It is not the policy of the Administration to tell you how your water resources are to be developed. We therefore suggest only one thing today to the

minutes oct 25 show refer to contents this entire statement as pertinent & require further study in relation to all other correlative facts as developed by KR com jurisdiction

all uses

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what does he mean

clarify

members of the Klamath River Commissions of California and Oregon. That is, that the Commissions take whatever action they can to insure that clear-cut priorities for the use of water are adopted by agencies having jurisdiction over the subject matter. We believe that in considering this question the Commissions should not confine their deliberations solely to the matter of water for irrigation versus water for hydroelectric power. To do so is to look too narrowly at the Basin's future economy and the welfare of its future residents. We think the Commissions should consider the needs of the fishery along the Klamath River above Lake Copco. We think the Commissions should consider the needs of the millions of wildfowl who funnel through the Klamath River Basin in their annual migrations to the north and south. We think the Commissions should look, not solely at the natural watershed of the Klamath River Basin, but at a slightly larger area which forms a natural hydrologic and economic unit divided by the California-Oregon boundary. Once appropriate recommendations have been made and decisions reached by those agencies having jurisdiction, we in our local office stand ready to serve in any way we can consistent with the decisions. The many letters which the Secretary of the Interior has written to California and Oregon residents and agencies on this subject state clearly that he, too, is prepared to assist once such decisions are reached.

read by [illegible]

Klamath Falls, Oregon
October 26, 1954

STANDARD B & P "NOTEAR"

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State of California

CALIFORNIA KLAMATH RIVER COMMISSION

CHAPTER 1473, STATS. 1953

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August 16, 1955

MR. WILLIAM G. HAGELSTEIN, CHAIRMAN:

LATHROP'S REVIEW OF
FIRST DRAFT (AUGUST 9, 1955) PROPOSED CONTRACT BETWEEN GOVERNMENT AND COPCO

Mr. Spencer's letter of transmittal bearing date of August 5, 1955 says, and I quote: "If you have any suggestions with respect to this draft of contract, please send them to me not later than September 1, 1955, (so that our negotiations with Copco may be concluded expeditiously.")

To facilitate a better understanding of the terms and conditions contained in this proposed contract, I have made an abstract comparing the provisions in this contract, item by item, with the former contract of 1917, and the amendments and supplements of 1919 and 1920, thereto.

This does not appear to be a renewal or an extension of the former contract, but an entirely new contract, the effective date of which is immediately after execution and sanction or approval by the following:

1. The Federal Power Commission
2. The Oregon Hydroelectric Commission
3. The Oregon Public Utilities Commission
4. The California Public Utilities Commission

{a formality and limited to certain aspects of regulation}

As I read this contract, both States seem to be ignored, especially with relation to the State Engineers and the State Water Resources Boards having jurisdiction over water rights and water uses. There is no recognition that there exists either the Oregon or California Klamath River Commission or the administrative set up proposed in the Compact for an Interstate

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Commission to administer the water and power which are the subject matter of this contract. There is no mention as to how the Government acquired these water rights to surface, ground water, and storage reservoirs - or that the water laws of both States will be respected. For be it remembered that in 1905 the Government was brought into the picture because neither State had jurisdiction over interstate and navigable waters, and the two States had accrued to their credit some 3½ million dollars from the sale of public lands dedicated to reclamation purposes.

There are only two contracting parties - the Government and Copco - without respect or consideration to either State or the people of the Basin, even though the basic rights and privileges all stem from grants of the two sovereign States in 1905. This contract recognizes water use and rights beyond the old contract or the original grant and the purposes for which the grants were made, and now validates them beyond the right of either State to stop. This contract attempts to validate water rights prior to 1905 Government rights, but does not define their nature, extent, source or place of diversion or kind of use.

The authority in both contracts - of 1917 and 1955 - is derived from: Same Source "in pursuance of Act of Cong. June 17, 1902"(32 Stat. 388) (Reclamation Act). It was under the provisions of this same Act that Congress authorized the

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Secretary of Interior to create the "Klamath Project" and accept the grants, in trust, of sovereign lands and waters ceded in 1905 by the two States for developing for Homestead - and again limited to this same Act of 1902.

Again the record shows that the Government by negotiated purchase (see Lathrop Report #7-C, copy attached) had removed all adverse claims to water and power except Moore Bros. 205 c.f.s.; and for the total sum of $494,844.65 had purchased rights to 4,370 c.f.s.; had appropriated 15,000 c.f.s.; and had control of water and power and reservoir sites for 10,000 H.P. of hydro power.

This contract makes no provision for the maintenance, control and operation of the waters of the Klamath River - the navigability of waters in Lake Ewauna, the Straits, the control works at Keno, McCormick Power Site, and the gates at Ady - all of which play an important part in California's proposed plan for Butte Valley's source of water, point of diversion, and return water via Ady pumps to the Klamath River.

This new contract is unlike the 1917 contract with respect to a complete statement of what takes place at the termination of the 50-year period (refer to Article 8, and also to Phleger testimony, Page 27). In the former one all rights and privileges which Copco derives from the 1917 contract and amendments cease and determine, as of 1967. The present contract termination clause at the end of the 50 years has no mention of what happens to the

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respective rights of parties.

(POWER) Reference to Gov Chamberlain 1905 attached

In the new contract there are no power revenues accruing to anyone that might be used to lessen the cost of water users such as Butte Valley. The Government agrees never to go into the power business. Article 8 reads, "Nothing in this agreement shall be deemed to confer on the United States or upon any of its successors any right to the use of Klamath water for the purpose of generating electric power." (The State of California or the Butte Valley Irrigation District, as assigns or successors to the Bureau, is forever ~~shifted~~ stilled from developing power.)

might be district K Com state of Calif

Another method of measuring the values that will enure to private power is by asking this question: If Copco were divested of all of its rights to water in the Upper Basin and the value therefor fixed by the parties, what then would Copco or other private power be willing to pay for a 50-year franchise for the exclusive right to a definite amount of falling water which no doubt has a value of a million dollars or more, annually?

There are no rights involved that the Government alone or with the help of either or both States does not now have the right to extinguish for a relatively small amount of dollars as compared with the value of the 50-year right to falling water and validation of rights long in dispute.

There is no adequate consideration given in this new contract; in fact,

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the consideration as I read it, is very much less than was given in the original contract, and for the most part a consideration is given by the United States to Copco by continuing rights, privileges, and properties to which Copco would have no right whatever after 1967. The real consideration seems to be lost sight of. The Government is agreeing in this new contract never to create any power from the waters of the Klamath River. That exclusive right is handed over without consideration to Copco, and no revenues from Government power will ever accrue to reduce the cost of water for Butte Valley and other places. Nor are there any franchise payments for the privileges of using falling water which, under the least consideration, should be worth a million dollars a year. Certainly the consideration in the 1917 contract under which Copco expended a million and a half, or so, for construction of the dam and regulatory works, the building of levees, and the purchase of flowage rights cannot be a continuing consideration because all such rights cease as of 1967.

If this contract is to be defeated legally, one of the most pertinent bases of attack would be a lack of adequate consideration, and not in the public interest. There are no benefits and no urgencies that are not completely covered in the existing contract, which has yet twelve years to run.

Let us look at it for a moment from the standpoint of each of the two Klamath River Commissions. If separate reviews and reports are made to the Bureau on this new contract they will undoubtedly nullify each other. If

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they are to have any weight whatever, in my opinion, the two Commissions must act jointly and find out whether the two States through the Interstate Compact and the Commission which is set up to administer are to be parties to this new contract, and if so, the contract must be rewritten to give effect to these so that the two sovereign States and the people of the Basin will forever be in a position so that there will be no repetition of enlargements of rights and breaches of contracts such as the two States have suffered during the last fifty years under Government sole responsibility. State Engineer Edmonston's letter to the Chairman dated July 18, states that Mr. Hagelstein's Article III "would not adequately protect the preference rights of future designees to the uses of water for domestic and irrigation purposes in either State."

Consideration of this new contract by our Commission and the Oregon Commission, separately and jointly, of course, now takes precedence over any consideration of articles to a Compact which now may never be completed because this contract divests both Commissions of most of their respective powers and jurisdiction.

F. L. Lathrop, Consultant

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