Report of the Committee on Power Marketing Agencies

The Committee on Power Marketing Agencies presents its summary of litigation, administrative, and legislative developments affecting the rates, practices and policies of the federal power marketing agencies: Southeastern Power Administration, Southwestern Power Administration, Western Area Power Administration, Bonneville Power Administration, and Alaska Power Administration. Litigation involving the Power Authority of the State New York is also reported because it markets hydroelectric power pursuant to a federal type preference statute.[1] This report additionally highlights the issue of competing uses for our nation's waterways.

I. LITIGATION UPDATE

During 1989, Power Marketing Agencies (PMAs) were involved in litigation concerning a variety of matters. Significant issues included the identity of preference customers under statute containing preference clauses for public bodies, the obligation to perform Environmental Impact Statements (EIS) when allocating preference power, and the contractual rights of private companies and preference customers. Also considered were the propriety of a settlement involving the mothballing of the Washington Public Power Supply System's Nuclear Project 3, the reasonableness of rates set by Bonneville Power Administration (BPA), and the authority of the Federal Energy Regulatory Commission (FERC or Commission) in setting BPA rates. The following cases represent major actions in PMA or Power Authority of the State New York (PASNY) litigation in 1989.

A. Municipal Electric Utilities Association v. Power Authority[2]

In *MEUA v. PASNY*,[3] the FERC affirmed a decision by an Administrative Law Judge (A.L.J.) which established criteria for identifying public bodies, as that term is used in the Niagara Redevelopment Act.[4] This opinion results in limiting the ultimate recipients of preference power from the Niagara Project.[5] This Commission Opinion required such public bodies, *inter*

1. Surplus power generated at federally owned reclamation and flood control projects and at the Niagara Redevelopment Project is marketed pursuant to a variety of statutes that grant a preference i.e., first purchase right, in the sale of power to public bodies and rural electric cooperatives. *See, e.g.*, Flood Control Act of 1944, 16 U.S.C. § 825f (1988); Bonneville Project Act of 1937, 16 U.S.C. § 832c (1988).

2. Municipal Elec. Utils. Ass'n v. Power Auth., 48 F.E.R.C. ¶ 61,124, *aff'd on rehearing* 49 F.E.R.C. ¶ 61,068 (1989), *appeal docketed sub nom.*, Vermont Dep't of Pub. Serv. v. FERC, No. 89-1644 (D.C. Cir.) [hereinafter MEUA v. PASNY].

3. *Id.*

4. Niagara Redevelopment Act, 16 U.S.C. § 836 (1988).

5. The term "public bodies" also appears in a number of Federal statutes which grant a preference to public bodies and rural electric cooperatives in the purchase of electric power from federally-owned hydroelectric projects. *See, e.g.*, Bonneville Project Act of 1937, 16 U.S.C. §§ 832b, 832c (1988); Fort Peck Project Act of 1938, 16 U.S.C. § 833b, 832c (1988); Fort Peck Project Act of 1938, 16 U.S.C. § 833b (1988); Flood Control Act of 1944, 16 U.S.C. § 825s (1988); Eklutna Project Act, Pub. L. No. 628, § 2, 64 Stat. 382

alia, to be in the business of direct retail electric distribution.[6] The Commission further determined that municipal distribution agencies (MDAs) formed in New York State and the Vermont Department of Public Service (VDPS) did not meet this criteria.[7]

The PASNY, owner and operator of the Niagara Project, had allocated preference power from the Niagara Project to MDAs and VDPS. Neither the MDAs nor the VDPS owned or operated distribution facilities. Rather, both had contracts to have investor-owned utilities use their facilities to transmit preference power to ultimate consumers. The Municipal Electric Utilities Association of New York State (MEUA), which represents the forty-seven municipally-owned electric utilities in New York State, challenged the decision of PASNY to sell preference power to the MDAs in *MEUA v. PASNY*.[8] The MEUA challenge was consolidated with a challenge brought by the Connecticut Municipal Electric Energy Cooperative (CMEEC) and the Massachusetts Municipal Wholesale Electric Company (MMWEC) to the PASNY allocation to VDPS.[9] On February 6, 1988, the presiding A.L.J. issued an Initial Decision finding that neither the MDAs nor VDPS qualified as public bodies or preference customers pursuant to the Niagara Redevelopment Act.[10]

In response to requests for clarification from PASNY and VDPS, the Commission ordered compliance with its order as of July 28, 1989, the date the Opinion was issued, rather than later dates requested by PASNY and VDPS.[11] Requests for a stay of the Opinion and requests for rehearing were denied by the Commission on October 19, 1989.[12] PASNY and VDPS then requested a stay from the Court of Appeals for the D.C. Circuit, which was granted on August 11, 1989, but was subsequently vacated on August 14, 1989.[13]

B. Salt Lake City v. Western Area Power Administration[14]

On April 14, 1988, Judge J. Thomas Greene of the U.S. District Court of Utah, Central Division, issued a decision in *Salt Lake City v. Western Area Power Admin.*,[15] (the *UP&L* lawsuit). This decision determined that the denial of preference power by Western Area Power Administration (WAPA) to cities lacking electric distribution systems was reasonable.[16] However,

(1950); Falcon Dam Act of 1954, Pub. L. No. 406, § 1, 68 Stat. 255, Pub. L. No. 88-237, 77 Stat. § 475; Flood Control Act of 1962, Pub. L. No. 87-874, § 204(b), 76 Stat. 1193(b).

6. MEUA v. PASNY, 49 F.E.R.C. ¶ 61,068 at 61,266 (1989).

7. *Id.* at 61,267 (1989).

8. *See supra* note 2.

9. MEUA v. PASNY 35 F.E.R.C. ¶ 61,333 (1986).

10. A discussion of the Initial Decision is included in the last report of this Committee. *See* 10 ENERGY L.J. 417, 419-20, (1989).

11. *See supra* note 2.

12. MEUA v. PASNY, 49 F.E.R.C. ¶ 61,068 (1989).

13. Vermont Dep't of Pub. Serv. v. FERC, No. 89-1493 (D.C. Cir. August 11, 1989 and August 16, 1989).

14. Salt Lake City v. Western Area Power Admin. (UP&L), No. C86-1000G (D. Utah April 14, 1988) (1988 WL 167244).

15. *Id.*

16. *Id.*, 1988 WL 167244 at 32-33. For a discussion of the case, see generally 10 ENERGY L.J. 417 at

Judge Greene's decision left unresolved the allegation of Utah Power & Light Company (UP&L) that WAPA should have prepared a full EIS instead of an Environmental Assessment (EA) on its post-1989 Salt Lake City Area Integrated Projects Marketing Criteria.[17] Judge Greene set a November 1988 trial date to hear the environmental portion of UP&L's complaint. However, as a result of settlement discussions, the trial was postponed.

In late December, 1988, while the *UP&L* suit was pending, the National Wildlife Federation (NWF) and several other environmental groups filed a lawsuit against WAPA[18] which raised environmental allegations virtually identical to those raised in the *UP&L* lawsuit. Accordingly, Judge Greene consolidated the *NWF* complaint with the *UP&L* environmental case, stating that NWF would be bound by the April 14, 1988, ruling as the "law of the case."

In early 1989, a tentative settlement[19] of the environmental issues was reached in the *UP&L* lawsuit. Based upon this tentative settlement, WAPA sought permission from Judge Greene to execute its post-1989 power contracts for the Salt Lake City Area Integrated Projects. While NWF opposed such contract execution, Judge Greene approved the execution of the contracts and permitted a "reopener" clause allowing WAPA to modify contract power allocations based on certain conditions.

In August 1989, WAPA and NWF filed cross-motions for summary judgment on the issue of whether WAPA was required to prepare an EIS. In September 1989, WAPA announced that it would prepare an EIS on the post-1989 marketing criteria. Judge Greene then vacated the planned hearing on whether WAPA should have prepared an EIS and scheduled a hearing on NWF's motion for a permanent injunction against the contracts and marketing criteria. Following that hearing, Judge Greene issued an order temporarily suspending the post-1989 contracts and marketing criteria until WAPA prepared an interim marketing plan. WAPA complied, and on November 6, 1989, the Court approved the post-1989 criteria and contracts which were effective December 1, 1989. A significant feature of the plan is that WAPA has the right to revise the post-1989 power contracts. The revisions can be based on decisions arising out of WAPA's EIS, or on decisions arising from the Department of Interior's EIS on Glen Canyon Dam operations,[20] or the Recovery Implementation Program for Endangered Species on the Colorado River.[21]

417-19. UP&L's appeal of this decision was scheduled to be argued before the Court Appeals for the Tenth Circuit on March 6, 1990.

17. *Id.* at 54-56.

18. National Wildlife Federation v. Western Area Power Admin., No. 88-C-1175-J (D. Utah filed Dec. 20, 1988).

19. This settlement was never finally reached. On November 20, 1989, the Colorado River Energy Distributors Association, one of the original parties to the UP&L settlement agreement, voted to reject the settlement.

20. The EIS on Glen Canyon Dam operations is discussed in section II.D., *infra*.

21. The Fish and Wildlife Service of the United States Department of the Interior prepares recovery plans for listed endangered species where conservation of such species would be promoted by such a plan, pursuant to the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988). Such plans were prepared

C. *United States v. Pacific Gas & Electric Co.*[22]

This case involved a dispute between the parties over the authority of the WAPA to sell surplus Northwest energy to preference customers in Northern California and the obligation of Pacific Gas & Electric Co. (PG&E) to transmit the power. This action was brought by WAPA against PG&E and Northern California Power Agency (NCPA). Six city members of NCPA (Cities) brought the action to recover payment for energy sold by WAPA and used by the Cities, and to resolve disputes between WAPA and PG&E over capacity furnished by WAPA to PG&E. To resolve the dispute, the court reviewed WAPA's authority to sell surplus power to the NCPA and the Cities. The underlying contract between WAPA and PG&E was also analyzed to determine the parties' contractual rights relating to: (a) WAPA's obligation to sell the surplus energy directly to PG&E, rather than to the Cities, and (b) PG&E's obligation to transmit the power to the Cities.

There were several significant features of this decision. First, the court determined that one PMA may purchase power from and resell power to another PMA. Second, PG&E's contract with WAPA does not preclude WAPA from importing Northwest power to sell to entities other than PG&E. Third, PG&E's Nuclear Regulatory Commission (NRC) license conditions on its Stanislaus plant require PG&E to transmit surplus Northwest energy to NCPA.[23] Fourth, the NRC license conditions are enforceable as a contract, and that NCPA and the Cities qualify as third party beneficiaries to that contract. Fifth, when certain cities entered into or amended full requirements contracts with PG&E after PG&E entered into its Stanislaus Commitments, the cities could not terminate or modify those contracts based upon the Stanislaus Commitments. Sixth, PG&E was required to negotiate in good faith to accommodate partial requirements service where certain cities had a contract which allowed them to purchase power from other sources. Seventh, the filed rate doctrine would not preclude the court from ordering PG&E to provide transmission, capacity, and emergency reserve service. The court found these services to be required under the Stanislaus Commitments and the relevant contracts, even though, PG&E did not have a FERC filed tariff to provide such services.

D. *CP National v. Jura*[24]

The Court of Appeals for the Ninth Circuit held that inclusion of an availability charge in the Bonneville Power Administration's (BPA) 1983 rate schedules, PF-83 and NR-83, does note violate the power sales contracts

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for the Colorado Squawfish, Humpback, Chub and Bonytail Chub in draft form in 1989. *See* 54 Fed. Reg. 30,616 (1989).

22. United States v. Pacific Gas & Elec. Co., 714 F. Supp. 1039 (N.D. Cal. 1989).

23. This commitment was made a part of a prior contract between PG&E and the Department of Justice (DOJ) under which the DOJ dropped its antitrust investigation of PG&E in return for PG&E's agreement to include such a commitment as part of its license for a nuclear power plant. *See* 41 Fed. Reg. 20,225 (1976). They are generally known as Stanislaus Commitments.

24. CP Nat'l v. Jura, 876 F.2d 745 (9th Cir. 1989).

between BPA and publicly-owned and investor-owned utilities.[25] The availability charge in the rate schedule is a weighted average of three factors: (1) the purchaser's monthly computed energy maximum,[26] (2) the amount of power that BPA is obligated to supply on demand, and (3) the "measured energy" that BPA actually supplies.[27] The utility petitioners argued that certain contract language meant that the charge for power could be based only on the purchaser's Measured Demand and Measured Energy, contrary to the petitioner's argument the court pointed to contract language allowing other factors to be included among other factors.

Additionally the court also ruled that it, not the Claims Court, had jurisdiction to rule on the issue presented notwithstanding the petitioners' allegation that the 1983 rates constitute a breach of their power sales contracts with BPA.[28] This result was based on the court's determination that the case presented a challenge to BPA's ratemaking authority pursuant to Federal Statute. The Court of Appeals has sole jurisdiction over such a challenge under sections of the Pacific Northwest Electric Power Planning and Conservation Act.[29]

E. Utility Reform Project v. Bonneville Power Administration[30]

The Court of Appeals for the Ninth Circuit approved BPA's September 1985 settlement of claims by four investor-owned utilities (IOUs). The IOUs were challenging the decision of the Washington Public Power Supply System (Supply System) and BPA to mothball the Supply System's Nuclear Project 3 (WNP-3). The four utilities own thirty percent of the project. BPA stands behind the Supply System's seventy percent share through net billing contracts with 103 publicly-owned and cooperatively-owned participant utilities. The IOUs complained that the decision to stop construction of WNP-3 denied them the opportunity to obtain the power that would have been produced by their thirty percent share.

Under the settlement agreement, BPA agreed to provide the IOUs over a 30-year period with an amount of power they would have received if the plant had been completed. The IOUs will pay a rate for BPA's power which is based on the estimated operation and maintenance costs of the project. In exchange for the BPA power, the IOUs agreed to make an equal amount of energy available to BPA if BPA wanted it. BPA would pay the IOUs' costs to generate such power from their other resources. If the exchange were held to be invalid, BPA would pay the IOUs cash so they can purchase the power BPA would have provided.

In approving the settlement, the court noted that under section 2(f) of

25. *Id.* at 751.

26. *Id.* at 749.

27. *Id.*

28. *Id.*

29. Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839(e)(1)(G)(e)(5) (1988).

30. Utility Reform Project v. Bonneville Power Admin., 869 F.2d 437 (9th Cir. 1989).

the Bonneville Project Act of 1937,[31] the BPA Administrator has broad authority to settle claims, unless the settlement is contrary to a clear statutory directive. The court also noted that the BPA has broad authority to enter into exchanges of power pursuant to section 5(b) of the 1937 Act. The court found that the exchange was not a sale of power and that the potential payments to BPA were not rates. The court also found that the unexercised option to buy out the IOUs' thirty percent share of the project at some future time is not an acquisition of a power resource within the meaning of sections 5, 6, and 7 of the Pacific Northwest Electric Power Planning and Conservation Act.[32] In response to a claim that the exchange violates the preference provisions of the Bonneville Power Act,[33] the court found that where there were no competing or conflicting applications for the power, there would be no preference to satisfy. It refused to disturb the settlement based upon anticipated future needs of preference customers. Finally, the court held that the petitioners lacked standing to assert environmental claims because the "only interest advanced by petitioners is an economic one that lies outside the zone of interest protected by NEPA."[34]

F. Aluminum Co. of America v. Bonneville Power Administration[35]

The rates of the Bonneville Power Administration (BPA) are set pursuant to the Pacific Northwest Power Planning and Conservation Act[36] (Regional Power Act). *Aluminum* presented the first court review of rates for nonfirm energy sold outside of the Pacific Northwest.[37]

Under the Regional Power Act, BPA sets its rates pursuant to procedures which include an evidentiary hearing by the agency. Rates become effective upon confirmation and approval by the FERC. Rates for sale of nonfirm power outside the Pacific Northwest are subject to section 7(k) of the Regional Power Act.[38] Section 7(k) provides for "review by the Federal Energy Regulatory Commission for conformance with"[39] the Bonneville Project Act,[40] the Flood Control Act of 1944[41] and the Federal Columbia River Transmission System Act.[42]

In this case, various California entities argued that BPA's rates were too high because they were not based solely on the incremental cost of surplus energy. Various Northwest entities argued that the rates were too low because

31. Bonneville Project Act of 1937, 16 U.S.C. § 832a(f) (1988).

32. Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839c-839e (1988).

33. Bonneville Project Act of 1937, 16 U.S.C. § 832c(a) (1988). The court noted that the preference is reiterated in the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839c(a)-839g(c) (1988). *Utility Reform*, 869 F.2d at 445.

34. *Utility Reform*, 869 F.2d at 447.

35. Aluminum Co. of America v. Bonneville Power Admin., 891 F.2d 748 (9th Cir. 1989).

36. Pacific Northwest Power Planning and Conservation Act, 16 U.S.C. §§ 839- 839h (1988).

37. The energy in question was sold primarily to California utilities. Aluminum Co. at 957.

38. Pacific Northwest Power Planning and Conservation Act, 16 U.S.C. §§ 839e(k) (1988).

39. *Id.*

40. Bonneville Project Act of 1937, 16 U.S.C. §§ 832-832l (1988).

41. Flood Control Act of 1949, 33 U.S.C. §§ 701-709a (1988).

42. Federal Columbia River Transmission System Act, 16 U.S.C. §§ 838-838k (1988).

they were designed so they could never recover the cost of the energy produced. The court rejected both arguments and held that nonfirm energy purchasers benefit from BPA's entire system, which is operated to maximize production of useful energy and not capable of cost allocation between firm and nonfirm production. Therefore, it is appropriate that the nonfirm energy purchasers contribute to BPA's overall costs.

The court acknowledged that these rates did not recover the cost of services, but found that the rate design was lawful in this instance. The court noted that because BPA did not know "exactly what future market conditions would be when it designed the rates, BPA properly allowed for below-cost rates in conditions where energy might otherwise be wasted."[43]

Finally, the court found that the FERC abused its discretion by holding an evidentiary hearing to review the rates proposed by BPA rather than basing its decision on the BPA administrative record. The court concluded that the FERC may not hold an evidentiary hearing to supplement a record it thinks is inadequate. The court declined to reach the issue of whether there could ever be circumstances which permit a FERC evidentiary hearing to review BPA rates.

II. ADMINISTRATIVE AND LEGISLATIVE DEVELOPMENTS

A. Competing Uses of Water at Federal Water Resource Projects

A variety of methods other than litigation were utilized in 1989 to resolve claims of competing uses for the nation's waterways. Such competing uses include hydroelectric power, recreation, navigation, irrigation, flood control, and municipal and industrial water. The following summarizes some of the major administrative and legislative developments related to resolving competing water use issues that affect power users.

1. Bonneville Power Administration's Programs in Perspective Process

The Columbia River system plays a pivotal and multifaceted role in the Pacific Northwest supplying fish, wildlife, recreation, agriculture, transportation, flood control, and of course, hydroelectric generation. The BPA estimates that in the last ten years the federal hydroelectric system in the Pacific Northwest has lost about 650 average megawatts of firm energy to non-power uses. In that time, no generating facilities have been retired, but competing water uses have reduced the amount of power that existing facilities can produce.

BPA employs an extensive public involvement process which includes evaluation of the impact of competing water uses. The centerpiece of this process is the recently adopted Programs in Perspective (PIP). PIP operates in a two year cycle. In the first year, BPA examines its program levels and financial objectives (with focus on revenue requirements and revenues). In the second year, it focuses on strategic planning issues. BPA was in the second year

43. Aluminum Co. of America v. Bonneville Power Admin., 891 F.2d 748 (9th Cir. 1989).

of its PIP cycle in 1989, and competing water uses was one of the issues addressed. Participants in the PIP included the United States Army Corps of Engineers (Corps of Engineers) and the Bureau of Reclamation.

2. Competing Use Issues at Shasta Dam, a Bureau of Reclamation Project[44]

The Bureau of Reclamation, in concert with the Fish and Wildlife Service and analogous state agencies, decided to release cold water into the upper Sacramento River through an outlet near the bottom of Shasta Dam. The cold water releases are intended to improve salmon spawning temperatures during hot weather in the stretches of the Sacramento River below Shasta Dam.

The releases reduce power generation at Shasta, because water running through the low outlet bypasses Shasta's large generators. Consequently, WAPA must purchase replacement power to satisfy its contracts with its federal power customers.

A number of power users have not opposed the releases because they are the only feasible short-term means of maintaining spawning habitat during certain times of the year. However, these power users have argued that the replacement power purchase costs should be non-reimbursable for two reasons: (1) the cold water releases constitute a change in authorized purposes of the dam; and (2) they achieve an enhancement of the fishery.

3. Competing Use Issues at Corps of Engineers Projects

a. The Lake Texoma Advisory Committee

In accordance with Public Law 100-71,[45] Congress created the Lake Texoma Advisory Committee (LTAC). LTAC was created to advise and make recommendations to the Corps of Engineers concerning the operation and management of Lake Texoma and Denison Dam, a 70MW hydroelectric project located at the lake.

In September 1989, the LTAC submitted its final report to the Corps of Engineers Tulsa District. It was recommended, *inter alia*, that the Corps of Engineers exercise flexibility in operating the project to meet the needs of all authorized beneficiaries and users. The LTAC recommended that the Corps of Engineers analyze the potential for incorporating a seasonal pool operating plan and conduct studies to improve timing and release rates from the dam. These studies would focus on minimizing adverse impacts on flood control capacity, down stream flooding, upstream/downstream bank erosion, navigation operations, water supply, recreation, and fish/wildlife. A study of the feasibility for developing three additional units at Denison Dam was also rec-

44. The Bureau of Reclamation constructs and operates federal dams and irrigation projects in the following seventeen states: Washington, Oregon, California, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, Montana, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma and Texas.

45. Pub. L. No. 100-71, 101 Stat. 422 (1987).

ommended. Finally, the Corps of Engineers was urged to reevaluate the project cost allocations to assure that the cost-benefit ratio was equitably assigned.

b. The Georgia-Alabama System

A controversy has recently arisen with respect to the Corps' of Engineers management of the Georgia-Alabama system. Lakes located at these projects have become popular recreation areas. In addition, rainfall levels in the region have been lower than normal, resulting in reduced water levels. The Corps of Engineers has adopted a drought management plan,[46] which severely restricts releases at the projects in order to maintain high lake levels, to the detriment of hydropower, navigation, and downstream water supply.

This restriction on releases has reduced flows at the projects, thus resulting in decreased power production, which in turn has caused SEPA to purchase significantly more expensive replacement power. Certain SEPA power customers have protested the Corps of Engineers restrictions, which they claim improperly favor recreation over power uses.[47] They have proposed to the Corps of Engineers that hydropower revenues not be used to support competing project uses. These revenues equal approximately eighty percent of the annual capital costs of the projects.

c. The Missouri River Basin Projects

During the recent drought, the Corps of Engineers continued to make releases at the normal levels for navigation in the Missouri River Basin, even though inflows were below normal. As a result, the levels of upper basin reservoirs decreased substantially. Recreational businesses claim that they were seriously harmed.

Senator Quentin Burdick (D-N.D.), Chairman of the Senate Environment and Public Works Committee, demanded that the Corps of Engineers stop making all navigation releases until an alternative management plan is developed. He has urged development of a method for assessing relative economic benefits from various management scenarios. Senator Conrad (D-N.D.), as Vice Chairman of the Senate Energy and Natural Resources Subcommittee on Water Development has introduced S. 1862 legislation to make recreation a purpose of the Garrison project.

d. GAO Study of the Corps of Engineers Drought Management

The General Accounting Office (GAO) is performing an investigation of the Corps' of Engineers drought management. Particular emphasis is being

46. For projects located on the Savannah River, the Corps continued its restrictions until recently, even though storage was within one-half foot of full pool.

47. Of the ten projects on the Georgia-Alabama System, only three (Russell, West Point, and Thurmond) were authorized to include recreation as a project purpose. In contrast, the Omaha District of the Corps of Engineers has stated that it cannot consider recreation in its management, because recreation is not an authorized purpose.

placed upon contrasting the management of the Georgia-Alabama system with that of the Missouri River Basin. The GAO is expected to develop recommendations on the principles which should guide the Corps in developing management plans. The GAO has indicated a willingness to address management issues with all interested parties.

e. Lake Lanier Project Uses Reassignment

Southeast power interests and the Atlanta Regional Commission (ARC), agreed in 1989 on a reallocation of storage capacity at Lake Lanier from power to water use.[48] This agreement provided that the water users would pay power customers a lump sum representing the present value of replacement power necessary as a result of the storage reallocation over the life of the project.

Senators Nunn (D-Ga.) and Fowler (D-Ga.) had indicated they would introduce legislation implementing this agreement early in 1990. However, downstream interests have raised questions regarding the effect of the reassignment in Alabama and Florida. Representative Bevill (D-Ala.) has stated that he will not act on the proposed reassignment until the Corps of Engineers provides information on the long-term impact of the reallocation on downstream users.

f. Libby Dam

Libby Dam, on the Kootenai River in northwestern Montana, is facing competing demands for the use of water stored in the Lake Koocanusa Reservoir. The reservoir extends north into Canada, with forty-eight of the reservoir's ninety miles providing waterfront recreation areas in the United States.

The recent drought resulted in a significant drawndown of Lake Koocanusa, which reduced water levels well below the reach of recreation boat ramps. In 1988, a provision was added to the Water Resources Development Act of 1988[49] authorizing the Corps of Engineers to improve low water access for recreation and provide additional recreation sites.[50] Early in 1989, Sen. Max Baucus (D-Mont.) announced that he may attempt to statutorily mandate a higher minimum reservoir level, which would substantially reduce power generation to enhance recreation and protect the lake's fishery.

B. Proposed Sale of the PMAs

The Administration's FY91 budget, released in late January 1990, includes a proposal to sell certain exclusive marketing rights of SEPA to existing customers. Such initiatives have been repeatedly rejected by Congress.

48. ARC is the agency charged with procuring municipal and industrial water for the Atlanta region.
49. Water Resources Development Act, 33 U.S.C. § 2201 (1988).
50. *Id.*

The Administration's FY90 budget also assumed sale of the Alaska Power Administration for $85 million and sale of selected sub-systems of other PMAs over the next several years. However, the FY90 congressional budget plan[51] did not include sale of any PMA assets.

The Alaska Power Administration was not included in the congressional asset divestiture prohibition in 1987, and efforts to sell that agency have progressed. Purchase agreements have been reached between the Alaska Power Administration and the relevant customers of their two projects. Draft legislation has been written to implement the Alaska sale and currently is undergoing an extensive interagency review.

C. Proposals to Modify PMA Repayment Practices

The Bush Administration's FY 1991 budget proposes acceleration of the repayments of federal investments in hydropower facilities. The budget provision requires repayment of outstanding federal power customer obligations at current market interest rates on a straight-line amortization basis.

D. The Central Utah Project Authorization Ceiling

The Colorado River Storage Project (CRSP) is a multipurpose project for the upper Colorado River Basin States of Colorado, New Mexico, Utah and Wyoming. CRSP includes four major storage units[52] and ten participating projects for irrigation, municipal and industrial water supply, and other purposes. The Central Utah Project (CUP), when completed, will provide municipal and industrial and irrigation water to residents of Utah.

The current debate in Congress regarding the CUP involves raising the authorization ceiling for the CRSP to complete the CUP. In 1987, the Utah delegation attempted to introduce legislation acceptable to all CUP water users but was unsuccessful due to provisions offered by Rep. Wayne Owens (D-UT). Representative Owen's suggested provisions included: (1) levying a $15 million annual surcharge on CRSP power rates to fund fish and wildlife measures; (2) granting a perpetual license to the local irrigation district to develop and sell the power from the Diamond Fork powerplant, without regard for preference in marketing or cost-based rates; and (3) authorizing a National Academy of Sciences study of changing the operation of the dams on the Colorado River to provide increased recreational and environmental benefits.[53]

In the 100th Congress, Rep. Owens substituted the perpetual license provision for a provision that provided financing of the CUP irrigation features and the fish and wildlife programs by allowing the irrigation district to issue bonds backed by CRSP power revenues.[54] The new proposal would have shortened the repayment period and required the payment of interest on irri-

51. H.R. Con. Res. 106, 100th Cong., 2d Sess.

52. Colorado River Storage Project Act, 43 U.S.C. §§ 620-620o (1982 & Supp. V 1987).

53. H.R. Con. Res. 3408, 100th Cong., 1st Sess. (1987).

54. *Id.*

gation assistance by power users.[55]

The House Interior Committee (Committee) passed an interim funding increase to permit construction of the CUP to proceed.[56] The Committee further directed water, power and environmental groups to meet and try to negotiate a settlement of the outstanding funding questions.[57] However, efforts to reach a satisfactory compromise were unsuccessful in 1989.[58] As of early 1990, the Utah delegation urged the passage of a proposal that included the following provisions: (1) local, non-power customer cost-sharing of the total project cost; (2) dedication of federal power funds to fish and wildlife mitigation and enhancement efforts; and (3) establishment of a board to oversee CUP-related environmental expenditures.[59]

Glen Canyon Dam is one of four storage units which comprise the Colorado River Storage Project. Revenues obtained from the sale of power produced at the Glen Canyon Dam power plant repay the costs of the power installations and assist in repayment of the costs of the participating projects such as the CUP.

The Secretary of the Interior recently directed the Bureau of Reclamation to prepare an EIS on the effects of the Bureau's current operations at Glen Canyon Dam. Several groups have asked the Secretary of Interior to implement new minimum flow conditions for the Glen Canyon operations during the EIS process.

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55. H.R. 3408, 100th Cong., 2d Sess. (1988).
56. H.R. Rep. No. 915, 100th Cong., 2d Sess. 3 (1988).
57. *Id.*
58. H.R. 3408, 100th Cong., 2d Sess. (1988).
59. *Id.*