Report of the Committee on Power Marketing Agencies

This report focuses on litigation and legislation affecting the rates, practices and policies of the five federal power marketing agencies (PMAs) during 1987: Southeastern Power Administration (SEPA); Southwestern Power Administration (SWPA); Western Area Power Administration (WAPA); Bonneville Power Administration (BPA or Bonneville); and Alaska Power Administration (APA). Also included are FERC cases involving the New York Power Authority which markets hydroelectric power pursuant to a "preference" statute.[1]

I. Litigation Update

A. *Preference Customer Qualifications*

Litigation involving the PMA's has subsided somewhat in the past year, although two pending cases, one before a federal district court in Utah and one before the FERC, present a question of critical importance to future PMA allocation decisions. Both cases center on the issue of the qualifications that a public body must meet in order to be eligible for preference power.

1. *Salt Lake City v. Western Area Power Administration*[2]

This controversy stems from a 1983 application by Utah Power & Light Co. (UP&L), submitted in conjunction with WAPA's development of a marketing plan for its Salt Lake City Area projects, for authorization to act as an agent in the distribution of federal preference power for the cities and towns located in UP&L's service area that do not own retail electric distribution systems. WAPA rejected UP&L's application after examining the legislative history of the pertinent statutes, analyzing the constitutional issues raised by UP&L, and considering a variety of policy issues.[3]

UP&L filed suit against WAPA and the Department of Energy (DOE) on October 31, 1986.[4] Six separate causes of action were raised by UP&L in its complaint. In subsequent pleadings, the parties tended to group the causes of action into three principal areas: preference and constitutional issues; firming (or "brokering" of thermal generation); and environmental issues.

UP&L also sought rescission of any and all contracts WAPA has entered into that violate the declarations sought by UP&L, injunctive relief restraining WAPA and the DOE from continuing their allegedly wrongful acts, and an injunction requiring WAPA and the DOE to comply with the National Environmental Policy Act.

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1. Niagara Power Project Act, § 1, 16 U.S.C. § 836 (1982). Surplus power generated at federally-owned reclamation and flood control projects is marketed under a variety of federal statutes that grant a preference in the sale of the power to municipalities, other public bodies and rural electric cooperatives.

2. Salt Lake City v. Western Area Power Admin., No. 86-C-1000G (D. Utah Oct. 31, 1986).

3. *See Salt Lake City Area; Revised Proposed General Power Marketing Criteria and Allocation Criteria*, 49 Fed. Reg. 34,900 (1984).

4. Salt Lake City v. Western Area Power Admin., No. 86-C-1000G (D. Utah Oct. 31, 1986).

On December 31, 1986, UP&L filed an amended complaint narrowing the scope of relief sought for WAPA's Salt Lake City Area projects. However, UP&L continued to seek a declaration that all preference laws that "govern or are given effect" by WAPA be declared unconstitutional and null and void. Such laws include the Reclamation Project Act of 1939,[5] which governs much of WAPA's marketing power, and the Flood Control Act of 1944,[6] which governs the marketing of power by SEPA and SWPA.

Western's preference customers, represented by the Colorado River Energy Distributors Association (CREDA), intervened in the action. Interested preference customers from other regions of the country were denied intervention, but were permitted to participate as amici curiae. The amici curiae include numerous national, regional and local organizations representing the interests of nearly all PMA customers throughout the nation.

Motions for summary judgment were filed by the federal defendants and CREDA on March 6, 1987. The amici curiae filed their briefs on the same day. All argued for dismissal of the action, on the following grounds:

(i) The lawsuit is no different from the numerous other actions where dissatisfied preference customers have sought to overturn agency allocation decisions in which federal courts uniformly have refused to review such decisions.[7]

(ii) Alternatively, WAPA's decision to accord a lower priority to cities lacking retail electric distribution systems is rational since it is supported by the legislative history of the preference laws, promotes yardstick competition among utilities, and protects existing customers from severe dilution of the resource and disruption of their power supply programs.

(iii) Since WAPA's policies are rationally based, the plaintiff's equal protection rights have not been violated. The plaintiff also was accorded substantial procedural due process and has no substantive due process rights since it has no entitlement to preference power. The last of UP&L's constitutional arguments, pertaining to the Tenth Amendment, is equally unavailing since the sale of federal power does not interfere with any rights of the state.

(iv) WAPA's arrangements to firm its resources with purchases of thermal generation are within its statutory authority.

(v) WAPA was not required to prepare an Environmental Impact Statement before issuing its power marketing policy. UP&L's other environmental claims also cannot be sustained.

On September 21, 1987, UP&L filed its response to the summary judgment motions. Oral argument on the motions for summary judgment was held on October 19, 1987, and the judge took the matter under advisement. At the time of preparation of this report, the court had not ruled on the motions. The case has significant implications for the future power marketing programs of WAPA and the other PMAs.

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5. 43 U.S.C. § 485h(c) (1982).

6. 16 U.S.C. § 825s (1982).

7. *See, e.g.*, Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin., 819 F.2d 537 (5th Cir. 1987); City of South Sioux City v. Western Area Power Admin., No. 82-L-107 (D. Neb. May 20. 1985), *aff'd in part, rev'd in part*, 793 F.2d 181 (8th Cir. 1986); ElectriCities, Inc. v. Southeastern Power Admin., 774 F.2d 1262 (4th Cir. 1985); Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459 (11th Cir. 1985); City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

2. *Municipal Electric Utilities Association v. Power Authority*[8]

An administrative law judge at the FERC has under consideration the consolidated cases *Municipal Electric Utilities Association v. Power Authority*, and *Connecticut Municipal Electric Energy Cooperative v. Power Authority*,[9] (*MEUA v. PASNY*) which raise the question whether municipal distribution agencies (MDAs), formed in New York State for the purpose of purchasing preference power from the Niagara Project and the Vermont Department of Public Service (VDPS), a state agency, qualify as public bodies and thereby preference customers pursuant to the Niagara Redevelopment Act (NRA).[10] Hearings in the case were held from February 25, 1987, to March 23, 1987.

Currently, the Power Authority of the State of New York (PASNY) is selling preference power to some of the New York MDAs and to the VDPS. Both the MDAs and VDPS purport to distribute power to ultimate consumers through arrangements with investor-owned utilities. Complainants in *MEUA v. PASNY* claim that neither MDAs nor VDPS own or control electric distribution facilities, have utility responsibility or distribute power at retail to ultimate consumers.

The FERC had previously ruled that VDPS was not a public body or preference customer pursuant to the NRA because it did not meet the criteria essential for such a public body and preference customer: (1) ability to sell and distribute power directly to consumers at retail;[11] (2) utility responsibility for the needs of ultimate consumers;[12] (3) being capable of fostering yardstick competition;[13] and (4) not directly benefiting either investor-owned utilities or their customers.[14] At that time, VDPS openly purchased Niagara Project preference power at wholesale and resold it to investor-owned electric utilities, municipally-owned electric utilities, and rural electric cooperatives. Subsequently, Vermont passed legislation allowing VDPS to lease utility facilities.[15] The New York MDAs similarly claim either to lease utility facilities or have contractual rights to use such facilities.

Subsequent to the close of the record in the case, the Vermont legislature approved new legislation which expanded the authority of VDPS. The presid-

8. Municipal Elec. Utils. Ass'n v. Power Authority, 35 F.E.R.C. ¶ 61,333 (1986) [hereinafter MEUA v. PASNY].

9. *Id.*

10. 16 U.S.C. § 836 (1982).

11. *See* Massachusetts Mun. Wholesale Elec. Co. v. PASNY, 30 F.E.R.C. ¶ 61,323, at 61,651 (1985) [hereinafter Opinion No. 229], *aff'd*, 32 F.E.R.C. ¶ 61,194, at 61,445 (1985) [hereinafter Opinion No. 229-A], *aff'd*, 796 F.2d 584 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1286 (1987).

12. *See* Opinion No. 229-A, 32 F.E.R.C. ¶ 61,194, at 61,444.

13. *See* Opinion No. 229, 30 F.E.R.C. ¶ 61,323, at 61,650; Opinion No. 229-A, 32 F.E.R.C. ¶ 61,194, at 61,444, 61,450 n.6.

14. *See* Opinion No. 229-A, 32 F.E.R.C. ¶ 61,194, at 61,444.

15. The State of Rhode Island has passed legislation similar to the Vermont legislation under consideration in the hearing. For that reason, the State of Rhode Island and the Rhode Island Public Utilities Commission requested that the scope of their participation in the hearing, originally limited to a monitoring status, *see* MEUA v. PASNY, 35 F.E.R.C. ¶ 61,333 (FERC filed Dec. 1, 1986) (order granting intervention out of time in part and denying in part), be expanded to that of a full intervenor. The presiding administrative law judge denied the motion. *See* MEUA v. PASNY, 35 F.E.R.C. ¶ 61,333 (FERC filed Aug. 7, 1987) (order denying motion to enlarge scope of intervention).

ing administrative law judge (ALJ) refused to consider this new legislation in the context of *MEUA v. PASNY*.[16] Although the decision in this case will be binding only on PASNY, it is expected to affect the federal PMA programs.

B. *Central Montana Electric Power Cooperative, Inc. v. Bonneville Power Administration*[17]

As noted in last year's report, Central Montana Electric Power Cooperative, Inc. and Upper Missouri Generation and Transmission Cooperative, Inc. filed suit in both the U.S. District Court in Montana and the United States Court of Appeals for the Ninth Circuit to establish that Montana entities are entitled to a special preference in the sale of power and energy from Libby Dam.[18] The BPA has refused to serve the plaintiffs on the basis that a statutory preference for Montana does not exist in the Libby Dam legislation.

Responding to a motion to dismiss filed by Bonneville, the district court held that exclusive original jurisdiction over such actions against the Administrator is in the Court of Appeals for the Ninth Circuit under section 9(e) of the Pacific Northwest Electric Power Planning and Conservation Act.[19] Accordingly, the case was transferred to the Ninth Circuit where it was consolidated with the original action the cooperatives had pending there.[20] The consolidated cases were argued and submitted in Seattle on September 11, 1987, before a panel of the court. No decision had been issued at the time of this writing.

C. *Brazos Electric Power Cooperative, Inc. v. Southwestern Power Administration*[21]

In January 1986, Brazos Electric Power Cooperative, Inc. (Brazos) appealed a decision by the U.S. District Court for the Western District of Texas which upheld the allocation by SWPA of hydroelectric power generated at Denison Dam to two rural electric cooperatives. Brazos' primary argument was that the contractual arrangements between the cooperative and an investor-owned utility for the scheduling, transmission, and firming of Denison Dam power amounted to an unlawful sale of preference power to a non-preference entity. Brazos also argued that it was not properly notified of the availability of power and that SWPA failed to conduct an antitrust review pursuant to the allocation proceeding.

In June 1987, the U.S. Court of Appeals for the Fifth Circuit affirmed the

16. *See* MEUA v. PASNY, 35 F.E.R.C. ¶ 61,333 (F.E.R.C. filed July 9, 1987) (order denying motion to reopen record).

17. Central Mont. Elec. Power Coop., Inc. v. Bonneville Power Admin., 656 F. Supp. 781 (D. Mont. 1987).

18. *Report of the Committee on Power Marketing Agencies*, 8 ENERGY L.J. 159, 167-68 (1987) [hereinafter *Committee Report*].

19. 16 U.S.C. § 839f (1982).

20. Central Mont. Elec. Power Coop., Inc. v. Bonneville Power Admin., No. 86-7602 (9th Cir. filed Oct. 5, 1986).

21. Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin., 627 F. Supp. 350 (W.D. Tex. 1985).

decision of the district court and held that the allocation of power by SWPA is non-reviewable.[22] The Court of Appeals stated that it would "join our colleagues of the Fourth, Ninth, and Eleventh Circuits" in holding that the allocation of preference power pursuant to the Flood Control Act of 1944[23] is a "matter . . . referred to the sound discretion of the agency."[24]

The Fifth Circuit also held that SWPA had provided adequate notice to Brazos of the availability of power from which it might derive a benefit,[25] and that the transmission, firming, and scheduling operations performed by an investor-owned utility are proper and do not violate the preference clause of the Flood Control Act.[26] The compensation paid to the investor-owned utility as a quid pro quo must be "reasonable and consistent with the value of the services rendered the preference customer" and may not constitute an unlawful sham sale of power to non-preference customers.[27]

Brazos filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The Fifth Circuit Panel reaffirmed the initial decision and denied the petition.[28] The Panel rejected Brazos' argument that SWPA had sold power to an investor-owned utility in violation of the preference clause, relying on the fact that the investor-owned utility performing transmission, firming, and scheduling operations at Denison Dam "[owned] the only transmission lines available to handle Denison power for the two preference entities. . . ."[29] The Panel refused to find that an investor-owned utility may not receive any economic benefit from this type of arrangement.[30]

II. LEGISLATIVE DEVELOPMENTS

The federal power marketing program has faced various legislative challenges in 1987. Legislative efforts have been initiated to sell the PMAs to non-federal entities, alter the repayment practices of the PMAs, set or alter transmission policies, and alter the management of the multi-purpose projects that generate the federal hydroelectric power which is marketed by the PMAs.

A. Sale of the Power Marketing Agencies

1. Overview

For the past several years, the Administration has attempted to divest the federal government of its investment in the power marketing administrations. Congress has reacted strongly to efforts to sell these federal assets. Under the

22. Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin., 819 F.2d 537 (5th Cir.), *reh'g denied*, 828 F.2d 1083 (1987).

23. 16 U.S.C. § 825s (1985).

24. *Brazos*, 819 F.2d at 544 (citing ElectriCities, Inc. v. Southeastern Power Admin., 774 F.2d 1262 (4th Cir. 1985); City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978); Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459 (11th Cir. 1985)).

25. *Id.* at 542-43.

26. *Id.* at 544.

27. *Id.*

28. Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin., 828 F.2d 1083 (5th Cir. 1987).

29. *Id.* at 1084-85.

30. *Id.* at 1085.

Urgent Supplemental Appropriations Act of 1986,[31] Congress adopted a prohibition against the expenditure of any funds by the executive branch to study the sale of the PMAs without specific Congressional authorization. The congressional spending ban does not apply to the Alaska Power Administration.

2. Fiscal Year 1988 Budget Proposal

Despite a strong warning in late 1986 from the House, where seventy-seven House members joined Speaker Jim Wright,[32] and the Senate, where twenty-two Senators joined Senators Dale Bumpers and Don Nickles[33] in urging the Office of Management and Budget (OMB) not to include sale of PMAs in the fiscal year (FY) 1988 budget, the Administration once again proposed such a sale. The budget, issued January 5, 1987, by the Administration, contemplated the sale of all five PMAs, with an accelerated schedule for sale of the Southeastern and Alaska Power Administrations.[34] The Administration stated its intent to propose legislation in mid-1987 to lift the spending prohibition on studying the sale of SEPA, while the Alaska sale would proceed through the administrative process. The Administration anticipated that both sales would be completed by the end of 1989, and that the remaining PMAs would be sold by 1992.

3. SEPA Sale Legislation

Proposed legislation to authorize a study of the sale of SEPA was transmitted to the Congress by the Administration on June 10, 1987.[35] The legislation was introduced in the House by Representative Silvio Conte and three cosponsors.[36] In the Senate, Senator James McClure introduced the legislation[37] "by request," stating in his introductory remarks that "I have been and remain adamantly opposed to such transfers."[38] The proposal has received no further attention.

4. Alaska Power Administration

Since the Alaska Power Administration was not included in the congressional prohibition, efforts to sell this agency have continued through the Administrative process. In response to a Request for Proposals,[39] the agency

31. Pub. L. No. 99-349, 100 Stat. 710 (1986).

32. Letter to James Miller, Director, Office of Management and Budget, from Rep. James Wright (D-Tex.) (Nov. 18, 1986).

33. Letter to James Miller, Director, Office of Management and Budget, from Senators Dale Bumpers (D-Ark.) and Don Nickles (R-Okla.) (Dec. 12, 1986).

34. *See* EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1988, at 2-46 (1987).

35. Letter from Department of Energy General Counsel J. Michael Farrell to Honorable George Bush, President of the U.S. Senate transmitting proposed legislation to authorize a study of the sale of SEPA June 10, 1987, *reprinted in* 133 CONG. REC. S12,851 (daily ed. Sept. 25, 1987).

36. H.R. 2718, 100th Cong., 1st Sess. (1987).

37. S. 1719, 100th Cong., 1st Sess. (1987).

38. 133 CONG. REC. S12,851 (daily ed. Sept. 25, 1987) (statement of Sen. McClure).

39. ALASKA POWER ADMINISTRATION, U.S. DEPARTMENT OF ENERGY, DIVESTITURE STATUS REPORT: THE PURCHASE PROPOSAL PROCESS, Appendix D (July 10, 1987).

received one bid for each of its two facilities. The Alaska Power Authority, a state agency, offered to purchase the Snettisham project, which serves the Juneau area, and sell the output of the project to two existing customers.[40] Those customers, Alaska Electric Light and Power Co. and Glacier Highway Electric Association would merge into a single, investor-owned utility prior to consummation of the transaction. The successful consolidation of the two systems was identified as a necessary pre-condition to the sale.[41] The three customers of the Eklutna project, Anchorage Municipal Light and Power, Chugach Electric Association and Matanuska Electric Association, submitted a joint bid for the project.[42] Legislation authorizing the sale and transfer is expected to be submitted to Congress in April 1988.

B. Proposals to Modify Repayment Practices or Pricing Standards

1. Straight-line Amortization

In the Administration's FY 1988 budget, the Administration again proposed use of a straight-line amortization schedule for repayment of both power and irrigation assistance debt obligations by power customers.[43] Report language was included in the House passed version of the FY 1988 Energy and Water Development Appropriations bill to express Congress' disapproval of any move to impose straight-line amortization administratively without prior congressional approval.[44] The Administration did not submit draft legislation in 1987.

2. The Senate Budget Committee Proposal

The Senate budget resolution[45] as originally approved by the Senate Budget Committee on April 8, 1987, called for two major changes in repayment policies for the five PMAs.[46] The proposal called for straight-line amortization for repayment of power and irrigation assistance debt obligations and sought to impose variable interest charges, tied to one-year Treasury notes, on all PMA debt. The Senate Budget Committee's proposal on PMA rate revision was eliminated from the final version of the resolution ultimately presented to and adopted by the Senate.[47]

When the House and Senate budget committees met in conference to resolve differences between their budget proposals, language was included in the conference committee report stating that no changes should be made in

40. THE SNETTISHAM TRANSFER REPORT OF THE AD HOC COMMITTEE TO THE ASSEMBLY, THE CITY AND BOROUGH OF JUNEAU (July 10, 1987).

41. *Id.* at 32.

42. Proposal to Purchase the Eklutna Hydroelectric Project (Nov. 19, 1987) (submitted to the Administrator, APA).

43. *See supra* note 34.

44. H.R. REP. No. 162, 100th Cong., 1st Sess. (1987), from the U.S. House of Representatives Committee on Appropriations to accompany H.R. 2700, 100th Cong., 1st Sess. (1987).

45. *Id.*

46. COMMITTEE ON THE BUDGET, REVISED CHAIRMAN'S MARK FOR THE 1988 BUDGET RESOLUTION, AT FUNCTION 270: ENERGY (1987).

47. *See* 133 CONG. REC. S5859-62 (daily ed. May 5, 1987).

PMA repayment policies.[48]

3. Federal Power User Fees

On August 6, 1987, Representative Don Pease (D-Ohio) introduced a bill that would impose a user fee on PMA power.[49] The tax, based on a Grace Commission recommendation, would impose a fee equivalent of fifty percent of the difference between existing rates for power and the average cost of other power in the region. No hearings were scheduled on the Pease bill.

III. CONGRESSIONAL ACTIONS PROPOSING REALLOCATION OF POWER AND/OR REVENUE

Several proposals to reallocate power and power revenues and change repayment methodology have been proposed in bills that authorize water development features to benefit irrigators and municipal water users and simultaneously resolve contentious Indian water rights claims.

A. San Luis Rey Indian Water Rights Settlement Act

Legislation to resolve water rights conflicts between five bands of Mission Indians in San Diego County, California and water users in and around the communities of Vista and Escondido proposes to use power generated at the Central Valley Project (CVP) to deliver water to the bands.[50] As introduced, the bills designate delivery of the water to the Indian bands as a new "project use," thus giving that function priority over power allocated to preference customers.

CVP power users negotiated an amendment to Senate Bill 795[51] that protects existing contractors against reductions in firm power allocations and rate increases due to the settlement. The bill was passed by the Senate. No action was taken by the House in 1987.

B. Colorado Ute Indian Water Rights Settlement Act of 1987

The Colorado Ute Settlement Act,[52] reauthorizes the Animas-LaPlata project originally authorized in 1968 as part of the Colorado River Storage Project (CRSP). The project will provide irrigation, municipal and industrial water to entities in Colorado and New Mexico and to two Colorado Indian tribes in settlement of water rights claims that have been pending for years.

The legislation incorporates a non-federal cost sharing agreement negotiated among the United States, the State of Colorado, the tribes and representa-

48. S. Con. Res. 49, 100th Cong., 1st Sess. (1987), 133 CONG. REC. S5960, 5986 (daily ed. May 6, 1987).

49. H.R. 3176, 100th Cong., 1st Sess. § 4 (1987).

50. H.R. 1699, 100th Cong., 1st Sess. (1987), S. 795, 100th Cong., 1st Sess., 133 CONG. REC. S18,496-500 (1987).

51. S. REP. NO. 254, 100th Cong., 2d Sess. (1987), to accompany S. 795, 100th Cong., 1st Sess., 133 CONG. REC. S18,496-500 (1987). The San Luis Rey Indian Water Rights Settlement Act passed the Senate with amendments recommended by the Senate Committee on Indian affairs by voice vote.

52. H.R. 2642, 100th Cong., 1st Sess (1987), S. 1415, 100th Cong., 1st Sess. (1987).

tives of local water districts. Included in the negotiated agreement and legislation is a requirement that irrigation assistance costs assigned to power users be repaid on an accelerated thirty-year, straight-line amortization schedule. The accelerated repayment provision was added at the insistence of the Administration and is consistent with repayment changes advocated by Office of Management and Budget for the PMAs.

Power users fear the change in repayment methodology will result in substantial CRSP rate increases and object to paying costs of a settlement to which they are not a party and for which they bear no legal responsibility.[53]

C. Standing Rock Sioux and Three Affiliated Tribes Compensation Plan.

Pick-Sloan Missouri Basin Program power users will be affected if legislative proposals to provide additional compensation to Indian tribes for lands acquired for Pick-Sloan project features are enacted. Although no legislation has yet been introduced, the Senate Indian Affairs committee held a hearing November 19, 1987, on a proposal advanced by Chairman Daniel Inouye (D-Haw.) relating to the Standing Rock Sioux tribe,[54] and a House plan authored by Representatives George Miller (D-Cal.) and Byron Dorgan (D-N.D.) regarding the Three Affiliated Tribes of the Fort Berthold Reservation.[55] The proposals resulted from recommendations of a Secretarial Commission established to assess the impacts of the Garrison and Oahe dams on the tribes.

The Inouye draft declares that the waters to which the Standing Rock Sioux have a prior and superior right were impounded by the Oahe Dam and are being used to generate hydropower at the Oahe, Ft. Randall Big Bend and Gavins Point Dams. The proposal states that the tribe is entitled to revenues produced by hydropower generated at those dams, and requires payment of compensation for land acquired for the Oahe Dam and reservoir from power revenues or in electric power equal in value to the dollar value of the compensation owed. In addition, the proposal also authorizes allocation of Pick-Sloan power "without reimbursement" to the tribe for irrigation pumping.

The House draft designates payment compensation to the Three Affiliated Tribes for land lost due to construction of the Garrison Dam and reservoir as a "specific feature" of the Pick-Sloan project and states that compensation shall be entirely repaid from power revenues, provided that allocation of those costs not, in and of itself, result in increased power rates. The proposal also provides for the development of irrigation, rural, municipal, and industrial water supplies for the tribes and for capital improvements to health, school, road and infrastructure facilities.

The Department of Energy (DOE) told the Senate that the compensation

53. Testimony of Linda Lazzerino on H.R. 2642, 100th Cong., 1st Sess. (1987), presented to the House Committee on Interior and Insular Affairs on Sept. 16, 1987 and on S. 1415, 100th Cong., 1st Sess. (1987), presented to the Senate Committees on Energy and Natural Resources and Indian Affairs on Dec. 3, 1987.

54. Draft Senate legislation to implement certain recommendations of the Garrison Unit Joint Tribal Advisory Committee to finance Missouri River Basin Program and for other purposes.

55. Draft House outline of legislation to implement the recommendations of the Joint Tribal Advisory Committee.

plans would require rate increases of up to 10.41/mills per kWhr, a forty percent increase for Pick-Sloan customers.[56] The DOE challenged the vagueness of the House provision that attempts to prevent rate increases due to allocation of compensation costs, and opposed those provisions that authorize the Secretary of the Interior to dispose of Pick-Sloan power to the tribes "without compensation" as detrimental to Pick-Sloan ratepayers and in conflict with the existing authority of the Secretary of Energy.

D. O'Neill Unit

House Report No. 1858[57] modifies the original 1954 authorization of the O'Neill Unit of the Pick-Sloan Missouri Basin Program to irrigate 93,000 acres of land in Nebraska, and to demonstrate conventional and advanced artificial groundwater recharge technology. The legislation includes a forty-year straight-line amortization schedule for irrigation assistance costs paid by power users. The Senate companion bill[58] provides for repayment pursuant to existing federal reclamation law.

E. Lake Andes-Wagner/Marty II

The Lake Andes-Wagner/Marty II bills[59] authorize construction facilities to irrigate 45,000 acres in the Lake Andes unit and 3,000 acres on the Yankton Sioux Indian reservation in the Pick-Sloan Missouri River Basin Program. The legislation requires that construction costs for irrigation facilities be repaid by water and power users within forty years following the project development period—a change from the traditional fifty-year repayment period.

F. Bureau of Reclamation Reorganization

On October 1, 1987, Assistant Secretary of the Interior for Water and Science, James Ziglar, announced plans for a major reorganization of the Bureau of Reclamation. The agency[60] concluded that the Bureau had largely achieved its initial mission to reclaim the arid West and to provide municipal water supplies and hydroelectricity to that region. The report recommended that the Bureau's mission shift from construction of projects to management of existing resources, including management of groundwater, improvement of groundwater quality and toxic waste clean up.

Existing Bureau water and power programs were reviewed with an eye to cutting program costs, trimming Bureau personnel requirements and encouraging greater financial participation from non-federal interests. Recommendations for restructuring internal Bureau operations included moving the district

56. Statement of William H. Clagett, Administrator, Western Area Power Administration on Draft Garrison Unit legislation before the Senate Select Committee on Indian Affairs (Nov. 19, 1987).

57. H.R. 1858, 100th Cong., 1st Sess. (1987).

58. S. 1328, 100th Cong., 1st Sess. (1987).

59. H.R. 2671, 100th Cong., 1st Sess. (1987) and S. 1431, 100th Cong., 1st Sess. (1987).

60. U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, ASSESSMENT '87 . . . A NEW DIRECTION FOR THE BUREAU OF THE INTERIOR (1987).

headquarters to Denver, consolidating operations at existing regional offices, eliminating the Southwest Regional Office, and reducing Bureau personnel by fifty percent by 1988.[61]

The assessment also identified a number of power operation options designed to increase generating efficiencies, including:

- Upgrading generating equipment to add capacity to existing powerplants;
- Improving load management through modification of project operations and installment of new equipment, and;
- Transferring operation and maintenance (O & M) responsibilities at certain powerplants to non-federal operations.

The proposed transfer of O & M posed problems for power users because the Bureau report indicated an intent to turn generation of power facilities over to water conservancy districts, which might be more interested in maximizing water delivery than in power output. Power users were also concerned that the O & M transfer might be a backdoor effort to achieve the Administration's goal of defederalizing the PMAs.

Shortly after the announced reorganization, the Bureau initiated negotiations with the Northern Colorado Water Conservancy District to transfer O & M responsibilities for portions of the Colorado-Big Thompson Project in Colorado. Other potential candidates for transfer identified by the Bureau included the Anderson Ranch project in Idaho, the Rosa Diversion Dam in Washington, CVP in California and North Platte River projects in Nebraska, Wyoming and Colorado. The Bureau proposal has yet to be consummated.

IV. PMA RATE PROPOSALS AND ACTIVITIES

A. Southwestern Power Administration

1. SWPA Non-Federal Funding Policy

In response to a 1984 letter from President Reagan stating his Administration's policy to require private non-federal funding on new federal hydroelectric power projects, SWPA developed a policy for negotiating such funding for seventeen new projects identified by the U.S. Army Corps of Engineers as economically feasible and environmentally acceptable. On August 12, 1987, SWPA issued its final policy for the allocation of power and energy from these potential federal hydroelectric power projects.[62]

The manner of allocating power generated at federal projects will depend on the source of the funds used to construct the project. If federal funds have been used for construction, the output of a project first will be divided among the six states in SWPA's marketing area based on the ratio of the existing SWPA customer load in each state to the total SWPA load. Because some states currently do not get their "fair share" of SWPA power, ten percent of each available allocation of power produced with federal funds will be set aside for new customers and there will be an equalization adjustment applied to each state's allocation. In addition, the allocation of power within each

61. U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, IMPLEMENTATION PLAN . . . A NEW DIRECTION FOR THE BUREAU OF RECLAMATION (1987).

62. *Federal Hydroelectric Power; Power Allocation Policy*, 52 Fed. Reg. 29,881 (1987).

state will be based on the load share of each existing customer to the total SWPA customer load in that state with ten percent set aside for new customers.

If non-federal funds are used for construction, the allocation of the output of a project will depend on whether the source of the construction fund was a preference entity or a non-preference entity. Essentially, the allocation of power and energy produced at projects constructed with funds contributed by a preference entity will be marketed in various ways depending on whether the operation of the project will affect or be supported by other SWPA projects and whether it will increase SWPA system rates.

Whenever a non-preference entity provides the funds to construct a federal project and desires to purchase some or all of the output, the power and energy generated from that project will be allocated first to preference entities according to a load share formula. However, if preference entities are not "ready, willing, and able" to accept the power, the output will be allocated for five years based on the same formula utilized to allocate power and energy produced at projects constructed with funds provided by preference entities.

In the event that a non-preference sponsor of a federal project does not desire to purchase the output of a new project, that power will be allocated according to the load formula with ten percent set aside for new customers.

SWPA has not yet proposed a policy concerning the development of criteria for the selection of non-federal sponsors. However, a proposed policy regarding the feasibility criteria employed to measure the viability of a proposed project has been sent directly to customers of SWPA.

2. SWPA System Rate Increase

On November 4, 1987, SWPA filed notice of an average 4.3% increase in its system rates.[63] One feature of the proposal is SWPA's deferral of forty-eight percent of the investment in the Harry S. Truman project from plant-in-service based on the revenues lost from the Army Corps of Engineers operation of less than all six units at the plant. In addition, SWPA proposes to develop transmission rates on a rolled-in basis and reduce the purchase power adder account by means of a customer-specific credit against the proposed rate increase.

B. Bonneville Power Administration (BPA)

Last year's report contained a detailed discussion of the statutory background for BPA ratemaking as well as the FERC and court cases establishing specific ground rules to be employed by the BPA and the FERC.[64] This report provides an update on those cases which are still active.

63. *Proposed Power Rates*, 52 Fed. Reg. 44,217 (1987).

64. *See Committee Report*, *supra* note 18, at 177-86.

1. Developments in Procedures for BPA Ratemaking

a. FERC Procedures for BPA Rate Cases

Questions regarding the FERC procedures to be applied in the BPA rate cases were raised in *Southern California Edison v. FERC*.[65] On remand to the FERC, the Commission revised its procedure, amending part 300 of its regulations regarding approval of rates submitted to the Commission by the BPA.[66] The final rule deleted the exception for the BPA and other PMA's from ex parte communication restrictions, added a requirement that rates filed by the BPA under section 7(k) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act)[67] must comply with specified filing requirements, and made a technical correction to clarify the standard of review of the Commission for the BPA section 7(k) filings. On July 20, 1987, California parties challenged the Commission's final rule in *Public Utilities Commission v. FERC*.[68] This case is pending before the Ninth Circuit Court of Appeals.

2. BPA Rate Approvals

a. 1981 and 1982 Rates

A number of parties challenged the Commission's order granting final approval of the BPA's 1981 and 1982 nonfirm energy rates in *Aluminum Co. of America v. Bonneville Power Administration*,[69] *California Energy Commission v. Bonneville Power Administration*,[70] and *Public Utilities Commission v. Bonneville Power Administration*.[71] These cases were consolidated by the Ninth Circuit by order dated September 15, 1987.

b. 1983 Rates

On April 24, 1987, the Commission granted final approval of the BPA's NF-83 rate.[72] The Commission affirmed the presiding judge's decision on each issue except whether the NF-83 rate schedule should be approved as consistent with the statutory criteria applicable under section 7(k) of the Northwest Power Act. The presiding judge found that the NF-83 rate schedule could not be approved because the rates would not result in the recovery of the costs attributable to the production of nonfirm energy. The Commission reversed the presiding judge on this issue and approved the NF-83 rate schedule as reasonable.

65. Southern Cal. Edison v. FERC, 770 F.2d 779 (9th Cir. 1985).
66. Order No. 323-B, 52 Fed. Reg. 20,704 (1987) (amending 18 C.F.R. § 300).
67. 16 U.S.C. §§ 839-839h (1982).
68. Public Utils. Comm'n v. FERC, No. 87-7315 (9th Cir. filed July 20, 1987).
69. Aluminum Co. of Am. v. Bonneville Power Admin., No. 87-7303 (9th Cir. filed July 17, 1987).
70. California Energy Comm'n v. Bonneville Power Admin., No. 87-7308 (9th Cir. filed July 17 1987).
71. Public Utils. Comm'n v. Bonneville Power Admin., No. 87-7313 (9th Cir. filed July 20, 1987).
72. Bonneville Power Admin., 39 F.E.R.C. ¶ 61,069 (1987).

Challenges to the BPA's NF-83 rate have been filed in the United States Court of Appeals for the Ninth Circuit. The California Energy Commission challenged the rate prior to final approval in *California Energy Commission v. Bonneville Power Administration*.[73] The court dismissed the action for lack of jurisdiction by order dated November 24, 1987. Additional challenges are pending.[74]

Most parties seeking review of the BPA's 1983 regional rates stipulated to the dismissal of those cases.[75] The only cases not dismissed were those challenging the SP-83 surplus firm power rate and those involving the availability charge and the demand charge.[76]

In *City of Seattle v. Johnson*,[77] the court held that the BPA's rate determinations are subject to judicial review only after the rates are confirmed by the FERC on a final basis. The court rejected petitioner's argument that the availability charge was a charge for non-power, concluding that it is a mechanism for varying the average rate for energy depending on the amount used. The court also found that the power sales contracts indicate that the parties understood that the contracts were being entered into in light of the BPA's obligation to review and revise rates periodically.

The challenge to the customer charge in *Atlantic Richfield Co. v. Bonneville Power Administration*,[78] was dismissed on the merits. The court held that the customer charge was designed to recoup the BPA's costs associated with having to stand ready to deliver power and that the rate schedule was supported by substantial evidence. The court disagreed with petitioners' contention that the customer charge was in substance a curtailment charge forbidden by their agreement with the BPA. Finally, the court concluded that the decision to impose a customer charge was a reasonable decision in light of economic realities and did not amount to an arbitrary or capricious decision.

The challenge to the BPA's SP-83 surplus firm power rate is before the Ninth Circuit in *Public Utilities Commission v. Bonneville Power Administration*.[79]

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73. California Energy Comm'n v. Bonneville Power Admin., No. 87-7311 (9th Cir. filed July 20, 1987).

74. Southern Cal. Edison Co. v. Bonneville Power Admin., No. 87-7477 (9th Cir. filed Oct. 21, 1987); Public Utils. Comm'n v. Bonneville Power Admin., No. 87-7486 (9th Cir. filed Oct. 21, 1987); Public Utils. Comm'n v. Bonneville Power Admin., No. 87-7486 (9th Cir. filed Nov. 4, 1987); California Energy Comm'n v. Bonneville Power Admin., No. 87-7499 (9th Cir. filed Nov. 13, 1987).

75. *See* Association of Pub. Agency Customers v. Bonneville Power Admin., No. 87-7511 (9th Cir. filed Nov. 20, 1987).

76. For current challenges to the availability charge, see C.P. Nat'l Corp. v. Jura, No. 85-7536 (9th Cir. filed Sept. 27, 1985) and Public Generating Pool v. Jura, No. 85-7545 (9th Cir. filed Sept. 30, 1985). The original challenges in City of Seattle v. Johnson, No. 83-7947 (9th Cir. filed Dec. 15, 1983) and Puget Sound Power & Light Co. v. Johnson, No. 84-7591 (9th Cir. filed Sept. 12, 1984) were dismissed for lack of jurisdiction in City of Seattle v. Johnson, 813 F.2d 1364 (9th Cir. 1987).

77. City of Seattle v. Johnson, 813 F.2d 1364 (9th Cir. 1987).

78. Atlantic Richfield Co. v. Bonneville Power Admin., 818 F.2d 701 (9th Cir. 1987).

79. Public Utils. Comm'n v. Bonneville Power Admin., No. 85-7541 (9th Cir. filed Sept. 30, 1985).

c. 1985 Rates

The FERC granted interim approval to the BPA's modification of the 1985 nonfirm energy rate schedule. The BPA had proposed the modification in response to falling gas and oil prices. In *Public Utilities Commission v. FERC*,[80] several California parties challenged the interim rate, seeking reversal of interim approval or, alternatively, a writ of mandamus ordering the BPA to cease implementation of the rate schedule until a hearing had been held. The court dismissed the action for lack of jurisdiction, noting that the court has jurisdiction to review only final actions, concluding that a BPA rate determination is not a final action until approved on a final basis by the FERC. The court also found that mandamus was inappropriate and that petitioners had an adequate means of challenging the BPA's procedures during review following the FERC approval of the rates.

The Commission granted interim approval of the availability provisions of the BPA's surplus firm rate schedule on March 9, 1987.[81] The Commission granted final approval to the BPA's 1985 rates on April 29, 1987.[82]

d. Variable Industrial Power Rate

The Commission granted final approval to the VI-86 rate in its order approving the BPA's 1985 rates.[83]

e. Long-Term Sale to Southern California Edison Company

While the SC-86 contract rates were approved by the Commission, the BPA and Southern California Edison Company have been unable to finalize a contract.

f. Firm Displacement Sales

The Commission granted final approval of the FD-85 rate for a five-year period in its order approving the BPA's 1985 rates.[84]

g. 1987 Rates

The BPA's 1987 rates were filed with the Commission for confirmation and approval on July 31, 1987. The Commission granted interim approval to the BPA's 1987 rates on September 29, 1987.[85] The BPA filed its proposed long-term surplus firm power rate schedule (SL-87) in a simultaneous but separate filing and requested expedited final approval effective October 1, 1987.

80. Public Utils. Comm'n v. FERC, 814 F.2d 560 (9th Cir. 1987).

81. BPA, 38 F.E.R.C. ¶ 62,229 (1987) (order granting interim approval of proposed rate schedule modification).

82. BPA, 39 F.E.R.C. ¶ 61,078 (1987) (order confirming and approving rates on a final basis and terminating dockets).

83. *Id.*

84. *Id.*

85. BPA, 40 F.E.R.C. ¶ 61,350 (1987) (order granting interim approval of rates).

The Commission denied the request for expedited final approval but granted interim approval effective October 1, 1987, and requested additional information to supplement the record regarding the SL-87 rate.[86] The Commission has not yet taken final action on any of the BPA's 1987 rates.

3. Challenge to Near Term Intertie Access Policy (NTIAP)

On November 6, 1987, the United States Court of Appeals for the Ninth Circuit denied California Energy Commission's petition challenging the NTIAP.[87] The Ninth Circuit affirmed previous holdings in *Department of Water & Power v. Bonneville Power Administration*.[88] In addition, the Ninth Circuit ruled that the NTIAP (1) did not constitute ratemaking, and (2) did not unlawfully deny transmission access to new generating resources.

On November 19 and 20, 1987, the California Energy Commission and California Public Utilities Commission requested rehearing en banc of the Ninth Circuit's decision. On December 2, 1987, the Ninth Circuit requested that the BPA respond to the rehearing requests on December 16, 1987.

At the Commission, an order was issued on April 24, 1987, denying requests for a rehearing of the Commission's November 15, 1985 Order Denying Petition for Declaratory Order that the NTIAP constituted a change of rates.[89]

C. Western Area Power Administration (Western)

1. Boulder Canyon Project

Notice of a proposed power rate adjustment for the Boulder Canyon Project was published on January 21, 1987.[90] On May 20, 1987, the Under Secretary confirmed and approved the rate on an interim basis, pending the FERC review and approval. Notice of the Under Secretary's action was published on June 5, 1987.[91]

2. Central Valley Project

On August 15, 1986, the Bureau of Reclamation and Western invited proposals for non-Federal financing of a 600-kW addition to the Bureau of Reclamation's Lewiston Dam.[92] On June 9, 1987, Reclamation and Western announced the selection of the Trinity Power Authority as the non-Federal financing entity for the development.[93]

Notice of proposed power and transmission rate adjustments for the CVP

86. *Id.*

87. California Energy Resources Conservation & Dev. Comm'n v. Bonneville Power Admin., 831 F.2d 1467 (9th Cir. 1987).

88. Department of Water & Power v. Bonneville Power Admin., 759 F.2d 684 (9th Cir. 1985).

89. Public Utils. Comm'n v. Bonneville Power Admin., 39 F.E.R.C. ¶ 61,088 (1987).

90. *Boulder Canyon Project; Proposed Power Rate*, 52 Fed. Reg. 2280 (1987).

91. *Boulder Canyon Project; Rate Order; Confirmation and Approval*, 52 Fed. Reg. 21,351 (1987).

92. *Trinity River Division, Central Valley Project*, 51 Fed. Reg. 29,330 (1986).

93. *Non-Federal Proposal for Financing Study, Development and Marketing*, 52 Fed. Reg. 21,770 (1987).

was published on August 4, 1987.[94] Western proposed to utilize a revenue adjustment clause as part of the new CVP rate and published notice of an evidentiary hearing on the clause on October 7, 1987.[95]

3. Colorado River Storage, Collbran, and Rio Grande Projects (Salt Lake City Area Integrated Projects)

The notice of the final allocations of the Salt Lake City Area Integrated Projects energy and capacity for the post-1989 period was published on April 2, 1987.[96] A correction notice was published on May 20, 1987.[97]

Western withdrew its proposal to market capacity and energy from the Salt Lake City Area Integrated Projects for the pre-1989 period by notice on March 13, 1987.[98]

Notice of a proposal to establish additional designated federal points of delivery from the Colorado River Storage Projects was published on July 6, 1987.[99]

On August 3, 1987, the Under Secretary placed the Salt Lake City Area Integrated Projects rate into effect on an interim basis, pending the FERC's review and approval. Notice of this action was published on August 13, 1987.[100]

4. Pick-Sloan Missouri Basin Program (P-SMBP), Eastern Division

Notice of a proposed rate for economy energy sales from the P-SMBP Eastern Division was published on June 9, 1987.[101] The Administrator placed the rate into effect on a final basis by notice of August 26, 1987.[102]

5. Pick-Sloan Missouri Basin Program (P-SMBP), Western Division and Fryingpan-Arkansas Project

Notice of the final allocations of power for the post-1989 period from the P-SMBP-Western Division and the Fryingpan-Arkansas Project were published on January 23, 1987.[103] A correction notice was issued on April 3, 1987.[104]

On May 20, 1987, the Under Secretary confirmed and approved the rate

94. *Central-Valley Project-Proposed Power and Transmission Rates Adjustments*, 52 Fed. Reg. 28,864 (1987).

95. *Central Valley Project Power and Transmission Rates Adjustments, Revenue Adjustment Clause Evidentiary Hearing*, 52 Fed. Reg. 37,509 (1987).

96. *Final Post-1989 Allocation of Power*, 52 Fed. Reg. 10,620 (1987).

97. Correction Notice, 52 Fed. Reg. 18,945 (1987).

98. *Withdrawal of Pre-1989 Firm Power Offer*, 52 Fed. Reg. 7928 (1987).

99. *Proposal to Establish Additional Designated Federal Points of Delivery for Power*, 52 Fed. Reg. 25,300 (1987).

100. Rate Order, 52 Fed. Reg. 30,245 (1987).

101. *Pick-Sloan Missouri Basin Program-Eastern Division; Proposed Rate for Economy Energy*, 52 Fed. Reg. 21,732 (1987).

102. *Power Rate for the Pick-Sloan Missouri Basin Program-Eastern Division*, 52 Fed. Reg. 32,166 (1987).

103. *Final Post-1989 Allocation of Power*, 52 Fed. Reg. 2597 (1987).

104. Correction Notice, 52 Fed. Reg. 10,798 (1987).

for the Fryingpan-Arkansas project, placing it into effect on an interim basis pending the FERC's review and approval. Notice of this action was published on June 5, 1987.[105]

Western proposed extension of the existing rate schedule for the Resource Coordination Program on October 30, 1987.[106] The Under Secretary approved the extension on an interim basis on December 1, 1987, subject to review and approval by the FERC. Notice of the action was published on December 10, 1987.[107]

6. Navajo Generating Station

Notice of a revised proposed rate and ratemaking methodology for the sale of Navajo power was published on June 24, 1987.[108] On the same date, Western published a notice of proposed allocation criteria for the sale of Navajo surplus power.[109]

Western published notice of the proposed Navajo Power Marketing Plan on September 4, 1987.[110] Reclamation adopted the final plan, with the concurrence of Western, the State of Arizona, and the Central Arizona Water Conservancy District, by notice of December 21, 1987.[111]

7. Parker-Davis Project

Notice of proposed allocation criteria and allocations of capacity and associated energy from the Parker-Davis project were published on March 6, 1987.[112] The final allocation criteria and allocations of capacity and associated energy were noticed on July 29, 1987.[113]

8. Rio Grande Project

On March 27, 1987, the Under Secretary placed an increased power rate for the Rio Grande project in effect on an interim basis, pending review and approval by the FERC. Notice of the action was published on April 10, 1987.[114] The FERC approved the rate on a final basis on August 6, 1987.

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105. *Order Confirming, Approving, and Placing in Effect on an Interim Basis the Power Rate Adjustment for Fryingpan-Arkansas Project*, 52 Fed. Reg. 21,360 (1987).

106. *Proposed Extension of Power Rate Schedule RCP-1 on an Interim Basis*, 52 Fed. Reg. 41,770 (1987).

107. *Order Confirming and Approving an Extension of Power Rate Schedule RCP-1 on an Interim Basis*, 52 Fed. Reg. 46,833 (1987).

108. *Proposed Interim Navajo Power Rate; Navajo Generating Station, Arizona*, 52 Fed. Reg. 23,770 (1987).

109. *Proposed Allocation Criteria and Extension of Time*, 52 Fed. Reg. 23,764 (1987).

110. *Proposed Navajo Power Marketing Plan*, 52 Fed. Reg. 33,627 (1987).

111. *Adoption of Navajo Power Marketing Plan*, 52 Fed. Reg. 48,328 (1987).

112. *Proposed Allocation Criteria and Allocations of Capacity and Associated Energy from the Parker-Davis Project, Nevada*, 52 Fed. Reg. 7014 (1987).

113. *Final Allocation Criteria and Allocations of Capacity and Associated Energy from the Parker-Davis Project*, 52 Fed. Reg. 28,333 (1987).

114. Notice of Rate Order, *Rio Grande Project*, 52 Fed. Reg. 11,744 (1987).

9. Washoe Project

The FERC approved the rate for the sale of power from Stampede Powerplant of the Washoe Project on February 10, 1987.